ASPECTS OF FAIRNESS AND FRAUD IN THE RABBINIC LAW ON HIRE OF LABORERS

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Suzanne Singer

Chapter One: INTRODUCTION

I. THE THESIS

A. Purpose and Scope

This thesis proposes a close examination of a portion of the laws regarding employer-employee relations as they are formulated in two medieval Jewish sources: 1) The *Arba'a Turim, Hoshen Mishpat* (*Tur H.M.*), compiled in the 14th century by Rabbi Jacob ben Asher (1270-1340), son of the *tosafist* and *halakhic* giant, Rabbi Asher ben Yehiel, known as the *Rosh* (1250-1327) and, 2) The *Beit Yosef*, Rabbi Joseph Caro's (1488-1575)[1] massive commentary on the *Tur*, written between 1522 and 1542. Caro provides both an analysis of the laws in the *Tur* and a presentation of their *halakhic* sources. The resulting compilation of discussions and opinions spans the time from the *Mishnah*, edited around 200 CE, to responsa from the 15th century; and spans geography, from Jerusalem through Europe (France, Germany, Italy and Spain), and from Northern Africa through Egypt. It is from this exhaustive work that Caro will develop a summary of the laws in the form of the *Shulhan Arukh* (1564),[2] the legal code accepted as authoritative by the

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[1] Caro was born in Spain in 1488. His family was forced to leave following the expulsion of the Jews in 1492. They settled in Turkey where Caro lived for thirty years before emigrating to Israel. He died in Safed in 1575.

[2] Caro, a product of Sephardic culture, wrote the *Shulhan Arukh* in Safed.

Jewish community.[3]

The focus here will be on the first three chapters of The Laws of Hiring in the *Tur, H. M.*, chapters 331-333 and the concomitant commentary in the *Beit Yosef.* It should be noted that the abstracts from responsa literature found in the *Beit Yosef* commentary demonstrate how broadly the concept of hire was taken. It might include anyone who does anything for another for money. Although this also includes the paid bailee who is hired to watch over someone else's property, and who is paid for that task, the laws of bailees form a different area of the law and do not figure as such in the laws of hire.

The basic elements of the rabbinic law regarding the hiring of workmen derive from the Tannaitic and Amoraic strata of the *Talmudim.* The medieval post-Talmudic rabbinical expansions of these ancient provisions examine the implications of the earlier material and attempt to develop them into a more or less harmonious system. In focusing on the medieval restatements of the talmudic law, this thesis presents both the statement of the law on the subject and a significant delineation of the questions and problems that the Rabbis, both ancient and medieval, raised in connection with them and, where evident, the resolutions thereto.

We therefore present a portion of the classic "labor law" of Jewish tradition that developed in a pre-industrial environment. The rules and regulations from this pre-

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industrial society may have a degree of relevance to the modern world with respect to various ethical issues, such as paying the employee in a timely fashion, limiting the hours of employment, or permitting the employee to withdraw from the job. Indeed, various modern phenomena in the field of labor have from time to time been examined in more rules and regulations recent rabbinical essays using the *halakhah* as a point of comparison, e.g., the propriety and legal standing of unions.[4] The focus here, however, is on the law itself and its view of "labor and management" in the pre-industrial world, and what that law suggests about the worker, the hirer, and their interactions. This approach is neither pro-labor nor pro-management. It tends only toward an identification of the classic law itself and the process by which that law was derived. The relevance of the law to the modern period is of secondary importance, except with regard to determining applicable ethical principles.

B. The Plan of This Work

The balance of this chapter will undertake: 1) a review of the more important secondary literature on the subject, 2) a brief overview and background of labor legislation in the Jewish tradition and, 3) background on the social and economic milieu in which the Rabbis lived. Chapters Two, Three and Four are an original, annotated translation of the *Tur H.M.* chapters in question, including the commentary of the *Beit Yosef*. Footnotes offer background on the Sages quoted, explanations of key legal terminology, and sources for the material presented. Chapter Five is an analysis of the intergenerational discussions and decisions presented in the *Tur H.M.*'s Laws of Hiring, chapters 331-33,

[4] See, for example, Tamari's *With All Your Possessions.*

along with the relevant *Beit Yosef.*

The concluding Chapter Six attempts to compare this material with modern-day labor legislation. The difficulties in comparing medieval formulations of Jewish law with contemporary law are manifold. The *halakhah* clearly reckons without the familiar elements of modern labor law: the significance of the corporate hirer, the labor union, collective bargaining, governmental regulation, and the like, which matters vary from nation to nation. Still, there are general principles in both systems for which parallels can be drawn.

Appendix A consists of two charts that summarize the arguments in the *Tur H.M.*'s chapters 332 and 333; the charts are designed to help readers follow the arguments in the text. Appendix B is an original translation of the corresponding chapters on the Laws of Hiring in the *Shulhan Arukh,* Caro's final redaction of the laws drawn from his commentary on the *Tur H.M.*

C. Critical Bibliography of Major Secondary Sources Cited

Although there is a great deal of material on Jewish labor legislation, the most useful works for our present purpose are:

1. Meir Tamari, *The Challenge of Wealth: A Jewish Perspective on Earning and Spending Money* (Northvale, New Jersey: Jason Aronson, Inc., 1995). "[T]his book attempts, using traditional Jewish sources, to provide guidelines for modern Jews to manage the ethical issues raised in the marketplace and by possession of

wealth."[5] Tamari argues that Judaism, though possessing characteristics of both, is neither in line with socialism nor with capitalism, but is an "ism" all its own. "After all, Judaism is not an economic system, but a spiritual and moral value structure, within which economic activity takes place and is formed into a pattern of holiness."[6] Tamari finds modern relevance in traditional Jewish labor law in that it provides a brake on "the power of economic lust"[7] and guidelines for creating "greater economic morality."[8]

2. _____. *With All Your Possessions: Jewish Ethics and Economic Life* (New York: The Free Press, A Division of Macmillan, Inc., 1987). This book is written "to show that there does indeed exist, as a result of the Jewish value system, a separate and distinct 'Jewish economic man,' molded by religious law and communal practice."[9] Tamari contends, for example, that though Judaism legitimated "the profit motive and entrepreneurial activity ... intervention and distortion of the [free market] mechanism was insisted upon" where the welfare of the community was at stake.[10] This book covers a wide range of economic activities including: "competition, prices and profits ... the wages, rights and obligations of workers ... the development of Jewish banking ... the system of taxation ... charity and social welfare."[11] With regard to the issue of labor, Tamari maintains that, "Ethical and human issues assert themselves in such a way that what starts

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[5] Tamari, *The Challenge of Wealth*, xiii.
[6] *Ibid.*, xiv.
[7] *Ibid.*, 9.
[8] *Ibid.*, 15.
[9] Tamari, *With All Your Possessions*, 1.
[10] *Ibid.*, 124.
[11] *Ibid.*, 3-4.

out as an exercise in costs, supply and demand, and profits becomes an inseparable compound of morality and economics."[12]

3. Aaron Levine, *Economics and Jewish Law* (Hoboken: Ktav Publishing House, Inc., Yeshiva University Press, 1987). Levine offers an analysis of "contemporary economic issues from the standpoint of Jewish law."[13] Of particular interest here are Chapter One in which Levine contends that, "The halakhic ideal for the marketplace, we will contend, is to require market participants to deliberately expose themselves to objectively verifiable standards of conduct,"[14] and Chapter Six in which Levine argues that, "Halakhah mandates the achievement of efficiency as a *religious* duty."[15]

4. _____, "Jewish Business Ethics in Contemporary Society," in Leo Jung's *Business Ethics In Jewish Law* (New York: Hebrew Publishing Company, 1987). Here, Levine argues that, "Jewish law rejects the notion that the competitive marketplace serves as an automatic check against fraud and deceit."[16] Against the argument that economic self-interest will lead to ethical conduct, Levine offers the Torah's injunction to fear God and to behave in such a manner that one's integrity is "objectively evident." What Judaism aims at is conduct that will sanctify the mundane, i.e., behavior that will contribute positively to the moral climate of society."[17]

5. Moses L. Pava *Business Ethics: A Jewish Perspective* (New York: Ktav Publishing

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[12] *Ibid.*, 126.
[13] Levine, xix.
[14] *Ibid.*
[15] *Ibid.*, xxii.
[16] In Jung, 198.
[17] *Ibid.*, 200.

House, Inc., Yeshiva University Press, 1997). Pava's goal is to "explore and interpret Jewish religious writings in light of contemporary business ideology and practice."[18] Pava argues that, "Jewish business ethics ... differs from secular approaches in three specific ways. Jewish ethics (1) recognizes God as the ultimate source of value, (2) acknowledges the centrality of community, and (3) holds out the promise that men and women (living in community) can transform themselves."[19]

6. Joseph H. Heinemann, "The Status of the Laborer in Jewish Law and Society in the Tannaitic Period," *Hebrew Union College Annual* 25 (1954). Heinemann reviews the economic and social conditions in Palestine during the Tannaitic period, as well as workers' rights and obligations. Topics covered include: categories of employees, wages, retraction and dismissal, and time of work. His presentation balances workers' rights with those of the employer. Additional details appear below in this chapter.[20]
7. Jacob Neusner, *The Economics of the Mishnah* (Chicago and London: The University of Chicago Press, 1990). Neusner outlines the economic conditions and assumptions of the Rabbis in the Mishnah. Details are given below in this chapter.[21]

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[18] Pava, 3.
[19] *Ibid.*, 7.
[20] Section II, subsection E, "Employers' Rights."
[21] Section II, subsection B, "The Economics of the Rabbis."

8. *The Principles of Jewish Law*, ed. Menachem Elon (Jerusalem: Keter Publishing House Ltd., 1975). This work offers important insights into specific concepts of labor legislation such as "unjust enrichment."

9. Michael S. Perry, "Labor Rights in Jewish Tradition," pamphlet published by the Jewish Labor Committee, New York. Perry served as executive director of the Jewish Labor Committee, so he writes from a decidedly pro-labor stance in this paper published by the organization. Details are given below in this chapter.[22]

10. Israel H. Weisfeld, *Labor Legislation in the Bible and Talmud* (New York: Yeshiva University Press, 1974). Weisfeld presents a summary of labor laws in the Talmud pertaining to "forced and free labor." He underlines Judaism's concern for, and protection of, labor while also noting the law's protection of employer's rights; but his emphasis is on the "special prerogative" of labor.[23] Judaism's respect for manual labor and the contracted worker is traced back to the biblical story of Creation, and contrasted with the Greco-Roman disdain for labor.

11. Ch. W. Reines, "Labor in Rabbinical Responsa," in *Israel of Tomorrow*, ed. Leo Jung (New York: Herald Square Press, 1946). Reines asserts that, "Generally ... medieval rabbinical responsa are as emphatic in protection of labor as the Talmud."[24] Reines contends that, with regard to labor, "the rabbinical authorities did not content themselves with a strictly legal point of view alone, but advocated a settlement in accordance with the dictates of righteousness."[25]

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[22] Section II, subsection C, "Workers' Rights."
[23] Weisfeld, 64.
[24] Reines, 140.
[25] *Ibid.*, 146.

12. Gayle Pomerantz and David Stern, "Employee Rights in a Situation of Dismissal: A Liberal Jewish Perspective," in *Reform Jewish Ethics and the Halakhahh: An Experiment in Decision Making*, ed. Eugene B. Borowitz (New Jersey: Behrman House, 1994). Though their focus is on the *halakhah* relating to the dismissal of an employee, the authors also address the larger question of the relationship between economics and ethics in capitalism and in Jewish law. They conclude that "Judaism insists upon the recognition of the transcendent divinity of every human being no matter what the market conditions, no matter what the effect on profit or productivity."[26]

Additional literature on the subject is listed in the Bibliography.

II. THE MILIEU OF THE RABBIS

A. Different Realities

1. Community. In order to approach the legislation in the *Tur H.M.*, it is important to understand the context and assumptions underlying the Rabbis' legal decision-making. In contrast to modern-day Western society, the Rabbis of the Talmud and the medieval period lived in a tightly-knit Jewish community that was, generally speaking, semi-autonomous within a larger host society. "The Jewish court (*bet din*), alongside the various institutions of Jewish autonomy (the exilarch, the community, inter-communal

[26] Pomerantz and Stern, 297.

organizations), provided the mainstay of Jewish internal autonomy from the destruction of the Temple until the period of emancipation."[27]

The Talmud, and the medieval restatements of the law in the various Codes, formed the basis of the community's legislation. In addition, drawing on the principles contained in these sources, both the Rabbis and the community leaders issued *takhanot* (ordinances) and *gezerot* (legal decisions) to address problems of communal concern.[28] Through rabbinic courts, Rabbis were also the ultimate arbiters and enforcers of Jewish law.[29] The rabbinic courts regulated "prices, profits and competition."[30] They were able to enforce the laws through a variety of sanctions including "attachment of property, monetary fines, and corporal punishment."[31] In today's Western world, neither the labor legislation of the *Tur H.M.* and the *Shulhan Arukh*, nor the Rabbis regulate the relationship between employee and employer who are, rather, under the jurisdiction of the civil state.

2. ***Morality.*** Furthermore, the ethical and the economic are not separate arenas in the *halakhah*, as they are in today's secular society. Moses L. Pava explains the difference as one between a traditional society and a pluralistic one:

> ...a pluralistic order is radically different from all traditional conceptions of society, including those conceptions assumed by traditional Jewish sources. A fundamental distinction between a pluralistic society and traditional societies is the formal divorce between moral-cultural institutions (e.g., press, universities, religious institutions)

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[27] *Encyclopedia Judaica*, 16 volumes (Jerusalem: Keter Publishing House, Ltd., 1972), 124.
[28] Eliav Shochetman, "Jewish Law in Spain and the Halakhic Activity of Its Scholars Before 1300," in *An Introduction to the History and Sources of Jewish Law*, eds., N.S. Hecht, B.S. Jackson, S.M. Passamaneck, D. Piattelli, and A.M. Rabello (New York: Oxford University Press, 1996), 284.
[29] Tamari, *With All Your Possessions*, 3.
[30] *Ibid.*, 86.
[31] *Encyclopedia Judaica*, 125.

> from the apparatus of the state. Further, a pluralistic society separates its economic institutions ... from both the state and the moral-cultural institutions.[32]

Meir Tamari discusses the effect this conflation of law and morality had on rabbinic legislation: "The Bible and the homiletical literature established an ethical and moral framework within which the Jewish community operated ... The result was a specifically Jewish economic system."[33] Judith Romney Wegner characterizes this as a "theocratic system."[34] A secular system "as such does not concern itself with conduct judged to be outside the purview of law. It relegates to the domain of ethics, morality, or religion any question of retribution for such conduct."[35] A theocratic system, on the other hand, considers that "all rules of human conduct ... emanate from God."[36] Where a modern legal system classifies human action into three groups, i.e., required conduct, forbidden conduct, and conduct that is considered neutral, a theocratic system adds two additional categories: "*commended* (though not legally required) and conduct that is *condemned* (though not legally forbidden)."[37]

3. ***The place of labor in the Rabbis' world.*** The fact that the Rabbis' society was pre-industrial cannot be overstated. "Until the Industrial Revolution, most of the world's population was rural,"[38] and agriculture was the primary economic activity. This agricultural economy would be replaced by a capitalist and urban one, entailing a major population shift to the cities. Home based or small workshop production would yield to

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[32] Pava, 179-80.
[33] Tamari, *With All Your Possessions*, 3-4.
[34] Judith Romney Wegner, "Halakhah and ShaRi'a: Roots of Law and Norms of Conduct in Theocratic Systems," *CCAR Journal* (Fall 2000): 85.
[35] *Ibid.*, 91.
[36] *Ibid.*, 92.
[37] *Ibid.*, 86.
[38] encarta.msn.com, "Industrial Revolution," Microsoft R, Encarta R , Online Encyclopedia 2002.

goods manufactured in factories. Skilled labor, which was valued in a pre-industrial setting, would later be threatened by the machine and by the assembly-line system. Workers would have to adapt to new conditions in the workplace. E.J. Hobsbawm, in *The Age of Revolution*, asserts that:

> ... *all* labour had to learn how to work in a manner suited to industry, i.e., in a rhythm of regular unbroken daily work which is entirely different from the seasonal ups and downs on the farm, or the self-controlled patchiness of the independent craftsman. It also had to learn to be responsive to monetary incentives.[39]

Following the Industrial Revolution, capital would be needed to invest in machinery. What resulted was, "The exploitation of labour which kept its income at substandard level, thus enabling the rich to accumulate the profits which financed industrialization..."[40]

Prior to the Industrial Revolution, there was no sense of a "working-class consciousness."[41] This consciousness would ultimately lead to the formation of trade unions, in response to the gross abuses of the industrial revolution. (It would take the better part of one hundred years before labor's right to organize would be formally recognized.) This modern notion of a trade union was unknown to the Rabbis. True, guilds or trade associations existed from Talmudic times, setting quality standards and prices. These guilds, however, did not have nearly the power of the modern labor union. As Meir Tamari explains, restrictions were placed on them:

> The main halakhic protection [from these professional associations acting against the public interest] is to be found in the concept of an *adam chashuv* - important personage ... whose function it is to mediate ... [A]lmost all the codes and the

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[39] E.J. Hobsbawm, *The Age of Revolution: Europe 1789-1848* (New York: Praeger Publishers, 1962), 49.
[40] *Ibid.*, 39.
[41] *Ibid.*, 209.

responsa make their restrictive policies dependent on the approval of the *adam chashuv*.[42]

Ch. W. Reines asserts that, "labor strikes in the modern sense were not known in the middle ages."[43] The right to strike, which "represents the use of the power of a union to withhold the supply of labor from the market and thereby influence wages and the terms of employment,"[44] has been quite limited in Jewish tradition. Modern Israel's first chief rabbi, Rabbi Avraham Yitzchak Ha-Kohen Kook, saw the issue of unionization as follows:

> ...irrespective of whether a strike is aimed at preserving working conditions or improving wages ... it is not permissible ... [In claiming their rights] the union workers are not different from the parties to any form of monetary conflict. It is possible, however, to use the strike as a weapon to force the employer to appear before a rabbinical court.[45]

B. The Economics of the Rabbis

It is also important to keep the Rabbis' economic framework in mind when attempting to understand the medieval Jewish laws. According to Jacob Neusner, the concept of market economics was not unknown to the framers of the *Mishnah*. However, "in numerous ways, the framers of the system subverted the workings of the market in favor of a distributive system, which they imagined."[46] By distributive economics Neusner means the "... intervention of authority other than the market in controlling both production and distribution of scarce resources" through, for example, the

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[42] Tamari, *The Challenge of Wealth*, 81
[43] Reines, 140.
[44] Tamari, *With All Your Possessions*, 156.
[45] As quoted in Tamari, *The Challenge of Wealth*, 81.
[46] Neusner, 74.

imposition of tithes for the Levites and provisions made for the poor.[47] Indeed, the Sages of the *Mishnah* did not view the market as setting value through supply and demand. Rather, they saw the market as a place where commodities of fixed values could be exchanged for other commodities of equal value:

> In a market economy, the framers of the *Mishnah* invoked the conception of true or inherent value, and that is an anti-market conception ... Since [they] maintain that there is true value, as distinct from a market value, of an object, we may understand the acute interest of our authors in questions of fraud, through overcharge and not only through misrepresentation.[48]

Though Neusner points out that the *Mishnah*'s "distributive economics" apply specifically to the land of Israel, we can see the influence of this concept in the framing of legal discussions beyond the *Mishnah* and outside of the land of Israel. We note, for example, the very limited role the market plays in the Rabbis' deliberations, and their clear concern with the issue of fraud. Furthermore, though the *Tur H.M.* and the responsa on which it draws are written in the medieval period, the decisions therein are ultimately based on the *Mishnah*'s formulation of the problems.

Indeed, the principles underlying modern capitalism are hardly relevant to *halakhah*. As Gayle Pomerantz and David Stern explain, "[t]he utilitarian approach remains dominant" in capitalism.[49] They use the theories of Milton Friedman to illustrate "the classic theory of the corporation":

> Friedman's definition of business responsibility ... : "There is one and only one social responsibility of business: to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud" ... Freedom is

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[47] *Ibid.*, 9.
[48] *Ibid.*, 76-8.
[49] Pomerantz and Stern, 287.

> Friedman's predominant value ... [and] competitive capitalism provides greatest freedom to the individual, and thereby reflects and furthers values of a democratic society.[50]

Pomerantz and Stern compare this utilitarian stance to that of the *halakhah*. "Unlike classical free-market capitalism, Judaism does not enshrine freedom as an absolute value."[51] The Jewish notion of freedom, they maintain:

> ... entails responsibility ... The existence of *halakhah* is evidence that Judaism, while valuing liberty, considers human freedom neither sufficient expression nor sufficient guarantee of human dignity. *Mitzvot* constitute an explicit, rigorous, and visible hand of guidance towards individual and collective well-being.[52]

It is in the framework of this non-utilitarian economic system as it intersects with *halakhah* that the Rabbis' approach to labor law must be understood.

C. Categories of Work

Modern labor law in the United States assumes many categories of employee. Typical employee classifications according to one source[53] are:

1. Casual: Ordinarily employment may be casual if it is temporary in nature and limited in purpose, or if it is incidental, accidental or irregular.
2. Agricultural employees.
3. Domestic employees.
4. Loaned employees.
5. State and municipal employees.
6. Federal employees.
7. Employees who participate in an enterprise, e.g., executives, partners, corporate officers.
8. Volunteers.
9. Aliens.
10. Minors.
11. Illegal employees.
12. Independent contractors.

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[50] *Ibid.*, 287-8.
[51] *Ibid.*, 297.
[52] *Ibid.*, 298.
[53] Jack B. Hood, Benjamin A. Hardy, Jr., Harold S. Lewis, Jr., *Workers' Compensation and Employee Protection Law*, Nutshell Series (St. Paul, Minn.: West Publishing Co., 1999), 42-51.

13. Professional employees.

In addition, workers in the United States are categorized according to their condition of employment: hourly, salaried, or *per diem*; commissioned or non-commissioned; hired through contract or "at will"; unionized or non-unionized; with benefits or without; full-time or part-time. For the Rabbis, on the other hand, only two primary categories of workers exist: the day laborer (*ha-poel*) and the contracted worker (*ha-kabalan*).[54] What differentiates the day laborer, *ha-poel*, from the contracted worker, *ha-kabbalan* is the issue of time. The day laborer is hired to work for a specific amount of time while the contracted worker is hired to do a specific job within a limited amount of time during which "he is a free agent, working or idling at will."[55] The latter category includes the physician and the teacher, alongside the dyer of wool and the man hired to dig a ditch.

It should also be noted that, though in modern parlance we use the term "contract" to designate the agreement between employer and employee, there is no generic term in *halakhah* that parallels that of "contract" in Roman or Anglo-Saxon law.[56] (It should be noted that modern Israeli law, patterned after both English and German law, does have a specific term for "contract.") In this translation and discussion, therefore, rather than the term "contract," the term "agreement" or "engagement" will be used with regard to medieval and Talmudic hiring laws, except when referring to secondary literature that employs the term "contract."

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[54] Also translated as "pieceworker" or "contract worker" by some.
[55] Weisfeld, 81.
[56] *Encyclopedia Judaica*, 924.

D. Workers' Rights

As we shall see, those writers who have argued that labor legislation in the Jewish tradition is pro-labor have rich sources from which to draw. Indeed, the basis for the laws governing legal relations between employer and employee are the Bible and the *Mishnah*, which articulate a respect for work and an ideal of safeguarding the worker against abuse. Many of the subsequent laws reflect this spirit. Secondary literature on labor law emphasizes this point. "[T]he Bible and the Talmud are replete with the loftiest sentiments and teachings exalting and glorifying the ideal of labor ... They [i.e., the Rabbis] tried to be fair, as jurists must; and yet they could not withhold their partiality towards the laboring man."[57] "Generally ... medieval rabbinical responsa are as emphatic in protection of labor as the Talmud."[58] More specifically, in "Labor Rights in the Jewish Tradition," Michael S. Perry outlines workers' rights by surveying traditional Jewish sources, i.e., the Bible, Talmud, Codes, and Responsa.

Perry begins by contrasting the Talmudic perspective on work with that of the ancient Greeks and Romans. While the latter held that "freedom from work was ... a right of rank and privilege," for our Sages, "labor is an ethical commandment."[59] *Mishnah Avot* 1:10[60] counsels, "Love labor and hate mastery and seek not acquaintance with the ruling power." In considering the Talmud's decisions with regard to labor contracts, Perry

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[57] Israel Herbert Levinthal, *Judaism: An Analysis and Interpretation* (New York: Funk & Wagnalis Company, 1935), 238.
[58] Reines, 140.
[59] Perry, 1.
[60] Perry cites Herbert Danby's translation of the Mishnah, *The Mishnah*, (London: Oxford University Press, 1954).

finds that, "the Talmud makes it clear that workers are entitled to special protection beyond their rights as a party to an agreement ... 'the Rabbis hold that the workers [always] have the advantage' in their relationship to the employer."[61] (This assertion will be examined as to its veracity. While the first part of this statement is borne out by the material we will be examining, the second part is not.) Perry notes that, "many interpreters of Jewish religious traditions who codified the Jewish Oral Law supported themselves through manual labor."[62] Following is a partial list of workers' rights as outlined by Perry:

1) *Right to Prompt Payment.* Two verses from the Torah forbid the employer from withholding wages overnight, i.e., Lev. 19:13 and Deut. 24:14,15. "This principle was considered so sacrosanct that Talmudic sages reversed the burden of proof under contract law in cases involving disputes over the payment of wages." Indeed, generally, if someone is accused of owing money, he can take an oath that he owes no money. "If, however, a worker accuses an employer of owing wages, the *worker* is entitled to take the oath, and the accused – the employer, must pay."[63] Though the Bible prohibits a creditor from taking a pledge from a debtor by entering their home, "workers ... are granted the right to enter their employer's home and select a pledge that would secure the equivalent of their

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[61] Perry, 2.
[62] *Ibid.*
[63] In a footnote page 3, Perry cites, Shevuot 7:1: "All they that take the oaths which are enjoined in the Law take oaths that they need not make restitution; but ... if a hireling said to a householder, 'Give me my hire which is in thine hand', and he said, 'I have given it', and he said, 'I have not had it', the hireling shall take an oath and satisfy his claim."

wages."[64] Wages must also be paid in currency, not in-kind.[65] (These provisions regarding taking an oath and selecting a pledge are indeed granted by Talmudic law. However, the Torah's injunctions are not enacted as forcefully in the Talmud as the author suggests.)

2) *Right to Stop Work.* Relying on the principle that workers are not slaves,[66] if a worker quits in the middle of a job, he is entitled to pro-rated pay. "The employer, on the other hand, is not permitted to break the labor contract ... If [workers] are laid off while their labor contract is in effect ... if they cannot find any job of comparable difficulty at the same pay, they can demand an 'idle wage' of at least fifty percent of their normal wage."[67] (As we shall see below in Chapter Four's translation of the *Tur H.M.*'s chapter 333, these provisions hold in cases where the employer suffers no irretrievable loss.)

3) *Limits on the Hours of Work.* Perry states that, because the Sabbath is such a fundamental part of Judaism's architecture, "workers must be granted a day of rest."[68] (Note that this is a Biblical injunction, from Ex. 20, not a formulated law in the Talmud.)

4) *The Right to Eat.* An "important fringe benefit" by which "[w]orkers are entitled

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[64] In a footnote page 3, Perry cites b. Baba Metzia [hereafter b. B. M.] 115a: "His house thou mayest not enter, but thou mayest enter [to distrain] for porterage fees, payment for hiring asses, the hotel bill, or artists' fees."

[65] In a footnote page 3, Perry cites b. B. M.: "If a man engages a laborer to work for him on straw or strubble, and when he demands his wages, says to him 'take the results of your labor for your wage,' he is not heeded."

[66] Based on the verse from Torah: "For unto Me the children of Israel are servants" (Lev. 25:55) to which the Talmud, in b. Baba Kama [hereafter b. B. K.] 116b, adds "but not servants to servants."

[67] In a footnotes pages 4-5, Perry cites Tosefta Baba Metzia [hereafter t. B. M.] 7:6, and b. B. M. 76b.

[68] In a footnote page 5, Perry cites Ex. 20:9,10: "Six days shalt thou labor, and do all thy work; but the seventh day is a sabbath unto the Lord thy God: in it thou shalt not do any manner of work."

to eat as much as they like, provided that the food comes from the field in which they are actually working."[69] This benefit is clearly meant to apply to agricultural workers, although it was later understood to include, as Tamari explains, "all workers engaged in the production of food, both in agriculture and in the food industries, provided the process has not been completed, for example grapes before turned into wine ..."[70]

5) *Sick and Disability Pay.* "[L]ong-term workers are ... free from the obligation of making up work if they fall ill during the contracted period. Additional protection is offered to workers who are injured on the job."[71]

6) *The Crucial Role of Local Custom.* "Talmudic principles of labor rights are considered a 'floor'; local custom can add a range of fringe benefits and prevent employers from making agreements less favorable than prevailing wages and benefits."[72] (Chapter Two's translation of the *Tur H.M.*, chapter 331 provides further details on this matter.)

7) *Trade Unions.* "... the Talmud explicitly recognized the right of worker organizations to regulate wages and to make binding rules and regulations on members of the association."[73] Perry warns, however, that, "While the right to engage in collective bargaining and to strike is consistent with Jewish religious law, it should be noted that there is a strong preference – some would argue a mandate – for binding arbitration over strikes in Jewish *responsa*." (In contrast to

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[69] b. B. M. 87a-b, based on Deut. 23:25.
[70] Tamari, *The Challenge of Wealth*, 112. Once the food is "finished," the tithing laws apply and the food cannot be eaten until they are fulfilled.
[71] In a footnote page 6, Perry cites Rabbi Simeon ben Zemach Duran's *Responsa*, Vol. 1, #64.
[72] In a footnote page 7, Perry cites p. B. M. 7:1.
[73] In a footnote page 8, Perry cites b. B. B. 8b and *Teshuvot HaRashba*, part 4, section 185, and part 5, section 125.

Perry's positive spin on the issue of trade unions, see restrictions on trade associations above,[74] particularly Rabbi Avraham Ha-Kohen Kook's statement on the question.)

Perry observes that the employee has obligations as well: "Day laborers are required to work faithfully, with all of their strength and to refrain from going hungry or working both days and nights."[75]

Meir Tamari's analysis in *With All Your Possessions* focuses more attention on the rights of the employer than does Perry. Still, one gets a rather positive outlook on the legislation as it relates to employees. Tamari offers a conceptual framework through which he analyzes the subject:

> The basic framework of Judaism's treatment of the array of questions arising out of the employer-employee relationship would seem to be defined on [three] factors ...
>
> 1. The employer-employee relationship is a specific instance of contractual rights and obligations binding free agents ...
> 2. The worker is entitled to special protection regarding his wages and working conditions over and above the normal legalisms regarding contracts ... At the same time, Judaism's symmetry in justice is reflected in its insistence that the worker has obligations as well – primarily, to render honest value for wages received ...
> 3. A major form of protection is that granted by custom ... custom usually provides the worker with fringe benefits over and above the wages agreed upon.[76]

Tamari summarizes the rights and obligations of the worker as follows:

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[74] In this chapter, section II, subsection A. 3, "The place of labor in the Rabbis' world."
[75] In a footnote page 7, Perry cites t. B. M. 8:2: "A worker has no right to do his own work by night and to hire himself out by day ... Nor may he deprive himself of food and starve himself in order to give his food to his children, on account of the robbery of his labor, which belongs to the householder [who hires him]."
[76] Tamari, *With All Your Possessions*, 129.

Contractual Rights. According to Tamari, Jewish tradition does not distinguish between employer and employee in terms of class. An employee is obligated to his employer for fulfilling the terms of the contract only. "He is not obligated to be servile."[77] Either side is entitled to retract from the contract "under certain circumstances." However, under no circumstances can the breaking of a contract be at the expense of the other party."[78] While the worker is in no way enslaved to the employer, "he can be made to perform according to the most rigorous standards, if these are agreed upon in the contract or are part of normal working conditions." He cannot be made to perform work that would be injurious to his health, however.[79]

Local Custom. Tamari underlines the crucial role of local custom with regard to hours of work and wages. "The *Shulhan Arukh* ruled that deviations from local customs, in exchange for additional payment, depended upon mutual prior agreement."[80] Tamari cites local custom as providing a number of nonfinancial benefits to the worker as well, in particular the provision of food. "Perhaps the greatest example of a nonfinancial benefit to which a worker is entitled is the right to eat of the fruits with which he is working."[81] (Clearly, as noted above, this benefit applied to agricultural workers.) Limitations were placed on these rights, however. According to Maimonides, a worker is not allowed to "idle away his time by eating" nor may he eat like a glutton. "And realizing that defrauding the employer could even take the form of piety, the rabbis instituted a shortened form of grace after meals."[82]

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[77] *Ibid.*, 130.
[78] *Ibid.*, 131.
[79] *Ibid.*, 132.
[80] *Ibid.*, 133.
[81] *Ibid.*
[82] *Ibid.*, 134.

Wages. Tamari reiterates the injunction to pay workers promptly and in currency, not in kind.

Health. "The general halakhic principle seems to be that work, just like any other human activity, has its normal element of risk, which has been considered and accepted by the worker ... In other words, the employer does not have any automatic obligations to shoulder the social costs arising from such a risk." However, if the injury was caused by defective equipment, the employer is liable for what Tamari cites as the traditional five categories of damages: "loss of income, loss of limb, medical expenses, pain incurred, and the shame resulting from the injury."[83] On the other hand, custom "as distinct from legal opinions, seems to have acknowledged the liability of an employer even in those cases where an injury occurs during the normal, everyday activities of the worker."[84]

Provision of Assistance. "In the absence ... of a contrary clause in a contract an aged employee can demand assistance, the cost of which is to be borne by the employer ... there is also a provision in the halakhic sources for enabling a worker to perform easier tasks as his strength or ability wanes."[85]

Professional Associations. "Generally speaking, associations of workers, whether hired employees or operating as independent contractors, were already permitted in Talmudic times."[86]

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[83] *Ibid.*, 140.
[84] *Ibid.*, 141.
[85] *Ibid.*, 148.
[86] *Ibid.*, 149.

E. Employers' Rights

The workers' rights outlined in the preceding section notwithstanding, one must consider from whose perspective the labor laws are written. Since the Talmud and subsequent Codes and Responsa base themselves on the *Mishnah*, it is helpful to examine the *Mishnah*'s worldview as it pertains to employer-employee relations. Here, theology comes into play and it is the employer's rights and responsibilities that are the focus. Jacob Neusner explains that the Sages wanted to create an orderly society that would mirror the order in heaven. "The Mishnah's world view ... speaks of transcendent things ... Danger means instability, disorder, irregularity, uncertainty, and betrayal."[87] Particularly troubling to the Sages was change. "[L]aws governing relations of employer to employee hold that each party must abide by its commitment and that the party which changes the terms of an agreement bears liability to the other."[88]

Therefore, the Rabbis' decisions tend to support the status quo: "They proposed to effect the vision of a steady-state economy, engaged in always equal exchanges of fixed wealth and intrinsic value ... The task of the Israelite economy, as they saw it, is to maintain perfect stasis, to preserve the prevailing situation ..."[89] In other words, the Rabbis were no revolutionaries, according to Neusner. They worked very clearly within the established political and economic system. There is an unmistakable acceptance of the right to private property, and it is the property owner, the *ba'al ha-bayit*, who is recognized as the only legitimate player in the marketplace. "The householder's will

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[87] Neusner, 16.
[88] *Ibid.*, 56.
[89] *Ibid.*, 72.

reigned supreme, and his decisions governed ... craftsmen and day laborers or other workers ... enter the world of social and economic transactions only in relationship to the householder."[90] Indeed, in the material we will be examining, the laws are framed from the perspective of the employer, the *ba'al ha-bayit*. The legal categories by which workers' and employers' rights and obligations are constructed assume a hierarchical structure of society. Workers are protected from abuse but the power relationship between employer and employee is maintained.

In *The Challenge of Wealth*, Tamari notes some ways in which the laws are less favorable to the worker and more protective of the employer:

> The halakhic detached view of the employer-employee relationship may not always be seen as being to the worker's benefit ... Maimonides writes: '... a Jewish free man may be used even as a slave [to perform all manner of work, excepting that which is harmful to his health] since he only works of his own free will and with his full consent.' All that can be offered in return for these disadvantages is freedom.[91]

Further restrictions on workers' rights involve eating and praying:

> ... the *Rambam* wrote that one who stops working in order to eat during working hours or ate before the completion of the work day, transgresses a negative *mitzvah* [and is guilty of theft] ... The Tur then goes on to limit the activities of the employee outside the place of work, where these may detract from his ability to do the job he had undertaken to the best of his ability. 'He may not work [elsewhere] at night and then hire himself out in the daytime, he may not fast or mortify his flesh as these weaken him and then he is unable to do the work of the employer properly. In the same way the employer is not allowed to steal the wage of his employees ... so too the worker is not allowed to idle away his time ... After all, the sages freed him from the collective grace after meals, and the fourth blessing of that grace [in order to protect the interest of the employer ...[92]

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[90] *Ibid.*, 65.
[91] Tamari, *The Challenge of Wealth*, 108.
[92] *Ibid.*, 112-3.

Joseph H. Heinemann elaborates on this subject in "The Status of the Laborer in Jewish Law and Society in the Tannaitic Period."[93] He begins by describing the living conditions of the masses in Palestine during the first century C.E., the period when the *Mishnah* was achieving its final form: "A large proportion of the population had to find their livelihood as hired laborers, often on a day-by-day basis; they could never be certain of finding employment for each day ... The masses were ... subject to great poverty, though not, as a rule, to actual starvation."[94] Though the Rabbis of this period held "work and worker ... in high esteem,"[95] it is important to remember that:

> Hebrew law ... makes no fundamental distinction between the hiring of objects and of services. Employment appears as but one instance of the law of hiring (cf. the order of cases in Mishnah Baba Metzi'a, especially in chapter 6, where employment is dealt with as but one of many cases of hiring, e.g. of asses, cattle etc.)[96]

Furthermore, while various Biblical injunctions protecting the worker form the basis of Mishnaic and later laws, they are sometimes modified in the laws in favor of the employer. Two of Heinemann's examples illustrate this point. In the first case:

> [Though] one of the main concerns of Biblical labour-legislation [is] to prevent delay in payment of the hired worker ... [I]n tannaitic law ... [it] is not upheld in its original simplicity and severity. It is modified considerably, with the effect that it becomes applicable only under special conditions, and that it loses its emphatic and uncompromising character.[97]

Some of the exceptions to the basic rule are: 1) according to a *baraita* in b. B.M. 112a, "the employer only transgresses when he has got the money in hand to pay the wages; but not, if he has no money" [98]; 2) in t. B.M. 10:5, "where the employer instructed an agent to

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[93] *Hebrew Union College Annual* 25 (1954): 263-325.
[94] Heinemann, 264.
[95] *Ibid.*, 265.
[96] *Ibid.*, 270-1.
[97] *Ibid.*, 287.
[98] *Ibid.*

hire workers, neither the employer nor the agent transgresses this injunction if he delays payment" [99]; 3) b. B.M. 110b interprets Lev. 19:13 as meaning "once payment has been delayed until morning, no further transgression is committed by further delay."[100] Heinemann notes, however, that most day laborers in Tannaitic times were paid in a timely fashion.[101]

The second case of modification cited by Heinemann involves workers reciting various required prayers, as indicated by Tamari above. Workers were allowed to interrupt their work to recite the *Shema* and the *Tefillah*. However, a worker "occupied on the top of a tree and the like, need not descend for the former, but must do so for the latter."[102] Presumably, descending and ascending the tree would take up too much of the employer's time. *Beth Hillel* contends that, in Heinemann's words, "hired workers were not even permitted to interrupt their work while reciting the *shema*."[103] With regard to the *birkat ha-mazon*, one *baraita* rules that "workers must not say any benediction before meals and only a shortened version of the grace after meals; this form of grace became known as 'workman's grace' (b. Ber. 46a)."[104] According to Heinemann, the principle underlying this relaxation of "religious duties" is "that the *sakhir's* [i.e., the employee's] time is not his own but belongs to the employer." The legislation is fashioned "so as to prevent [the hired workers] from wasting the employer's time unduly."[105]

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[99] *Ibid.*, 288.
[100] *Ibid.*
[101] *Ibid.*, 294.
[102] b. Berachot [hereafter b. Ber.] 16a.
[103] Heinemann, 323.
[104] *Ibid.*, 323-4.
[105] *Ibid.*, 323.

F. A Balance

As we can see from the many provisions and exceptions cited above, the Rabbis, in their effort to maintain the status quo (to use Neusner's theory), are also unquestionably concerned with protecting workers. According to Aaron Levine, this is because:

> Labor belongs to the groups that sociologists once defined as the weaker vessel ... In accordance with the principles of Jewish law governing all social relations, the underdog should receive the benefit of the doubt in borderline cases, as well as every possible encouragement to redress this imbalance and achieve equality of economic opportunity ... If Jewish law favors the laborer in borderline cases, that is due to the principle of giving the benefit of the doubt to whatever party is socially, financially, or legally at an undeserved disadvantage.[106]

A close examination of the material in the *Tur H.M.*, however, demonstrates that, while the principle of favoring the party with the "undeserved disadvantage" is clearly operational, sometimes the disadvantaged party is the employer. We find, above all, that the Rabbis's process of adjudication strives towards fairness to both parties in their consideration of a range of labor issues. As Leo Jung has said in response to the question, "What does Judaism teach concerning capitalism and socialism?":

> The Torah stands neither for capitalist extremism with its near-exclusive stress on the employer's profit, nor for socialist extremism, with its single-minded emphasis on workers' advantages. Judaism knows only one 'ism': tzedekism (righteousness), which insists on and assures a satisfactory harvest for both.[107]

What concerns us here is the Rabbis' effort to achieve a balance, to give each party its due. Examining all sides of an issue is, indeed, the Rabbis' forte. Menachem Fisch describes talmudic literature as follows:

> The overall impression conveyed by their writings is that the rabbis seem to have been unwilling to decide an issue except when absolutely necessary, and in their view absolute necessity in this respect is never exegetical, moral, or theological – only

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[106] Levine, "Jewish Business Ethics in Contemporary Society," 177-81.
[107] In Levine, *ibid.*, 194.

> halakhic! The only binding aspect of the rabbis' theological and exegetical deliberations, keen and fierce as they may be, is the very process of deliberation itself. Their countless debates and disputes concerning these matters seem not to have been conducted with a view to arriving at a final and obligating conclusion. They are invitations to join in the pondering and not attempts to somehow put an end to it.[108]

Although Fisch's position is stated somewhat broadly, it is useful to think of the Talmud as engaging us in the deliberative process of its Sages.

The *Beit Yosef*, in its presentation of Talmudic discussions and post-Talmudic commentary and Responsa, also invites us "to join in the pondering." The great *halakhists* cited by Caro endeavor to consider all aspects and possibilities of a situation, but they are always mindful of their sacred obligation to uphold the principles of righteousness. We might even trace this interest in process back to biblical times. Indeed, as Moses L. Pava asserts regarding the daughters of Zelophehad in Numbers 27:3-7: "The Bible chooses to report not only the legal rule but also the circumstances surrounding its promulgation. To understand this narrative is to understand that what counts in the biblical vision is not only the final status of the law, but also the process by which the rulings are reached."[109]

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[108] Menachem Fisch, *Rational Rabbis: Science and Talmudic Culture* (Bloomington: Indiana University Press, 1997), 53.
[109] Pava, 79.

CHAPTER TWO:
Translation
Hilkhot Poalim 331

Chapter Two: TRANSLATION

Tur H.M./Beit Yosef: Hilkhot Poalim 331

(Note: The text of the *Tur H.M.* is in *italics*; the *Beit Yosef* is in regular type. Parentheses mark words that are implied, but not mentioned explicitly, by the text.)

331. *1. The one who hires workers without a formal engagement in a place where there is a known custom, cannot change the custom of the locale; in everything, whether with regard to food, (the employer) must give to them according to local custom.*

1. "The one who hires the workers in a place where there is a known custom cannot change with regard to them the custom of the locality; in everything, whether with regard to food, he must give to them according to the custom," the ***Mishnah***, top of chapter "HaPoalim" (b. Baba Metzia [hereafter b. B. M.] 83a).[110]

2. And if there is a custom whereby they (the workers) are fed, if nevertheless they make an engagement with him with the explicit understanding that he (the employer) would give it to them, as the first Tanna says, he must add to what the custom (provides), because thus is how

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[110] Translations of the relevant passages from the Mishnah and Talmud in b. B. M. chapter six (75b-78b) are largely based on *The Talmud Bavli, The Steinsaltz Edition*, Vo. V, Tractate Bava Metzia, Part V (Jerusalem: Israel Institute for Talmudic Publications, 1992) [hereafter referred to as "Steinsaltz Talmud"]. Translations of passages from b. B. M. chapter seven (83a-87a) are largely from *Talmud Bavli*, The Artscroll Series/Schottenstein Edition, gen. ed. Hersh Goldwurm, Tractate Bava Metzia, Vol. III. (Brooklyn, NY: Mesorah Publications, Ltd., 1994) [hereafter referred to as "Schottenstein"].

(the Sages) decided. And the ***Rashbag***[111] *says that it is not necessary to say this, and it appears that the law is like the first Tanna, but the Rama*[112] *decided like* ***Rashbag***.

2. And as to what he wrote, "And if the custom is to give them food, if nevertheless, they make an engagement with him explicitly to give it to them, as the first ***Tanna*** says, he has to add to what the custom (provides); and ***Rashbag*** says that it is not necessary (to state)," *ibid.* in the ***Mishnah,***[113] "The one who hires the workers etc. in a place where the custom is to feed, he must feed; if (it is the custom) to provide relish, he must provide. Everything is according to the custom of the locality. And a story of Rabbi **Yohanan ben Matya** who said to his son, 'Go and hire for us workers'; he went and made an engagement with them to feed them; and when he came back to his father, his father said to him, 'Even if you prepare for them a meal like Solomon's in his time, you would not have discharged your duty towards them because they are children of Abraham, Isaac, and Jacob; rather, before they start the work, go and say to them, 'On the condition that you have no claim upon me other than bread and beans only.' ***Rashbag*** says it is not necessary to say so; rather, everything is according to the custom of the locality." And in the ***Gemara,*** the story is a precedent that disproves the rule. "The text is defective and should read, 'And if he makes an agreement with them regarding food, he must give them more.' And also it once happened that **Rabbi Yohanan ben Matya** said to his son, 'Go and hire for us workers,' etc."[114] And ***Rashi*** explains that he provides them with more: "He adds to the customary amount because, since he does not need to stipulate but he does stipulate, it is additional food that he is speaking about."

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[111] Rabbi Shimon ben Gamliel, *Tanna* in the *Mishnah.*
[112] Rabbi Meir Abulafia, 1170?-1244. Talmudic commentator; most renowned Spanish rabbi of the first half of the 13th century (*Encyclopedia Judaica,* 184).
[113] b. B. M. 83a.
[114] *Ibid.*, 86a-87b.

And as for what ***Rabbenu***[115] says that: "The ***Rama*** decided according to ***Rashbag,***" thus it appears to be the understanding of the ***Rif***[116] and the ***Rosh,***[117] that they wrote the ***Mishnah*** according to its form, and did not write the way it was said in the ***Gemara,*** and thus appears to be the understanding of the ***Rambam***[118] who, without giving details, wrote in the ninth chapter of ***The Laws of Hiring*** that, "Everything is according to the custom of the locality."

3. And thus with regard to the subject of work, they do it according to the custom, and if they are not accustomed to rise early and to stay until dark, he cannot compel them to rise early and to stay until dark, even if he adds to their wages since he did not make this stipulation at the time he hired them.

3. And as to what he wrote, "And thus with regard to the subject of work, they do it according to the custom, and if they are not accustomed to rise early and to stay until dark, he cannot compel them to rise early or to stay until dark, even if he adds to their wages etc.," *ibid.* in "HaSokher Et HaPoalim."[119] "If he says to them to rise early and to stay until dark in a place where they are not accustomed to rise early or to stay until dark, he is not permitted to compel them." And in the ***Gemara,*** (examining the first statement of the ***Mishnah*** quoted above in #2,) "This is obvious! No, it is necessary. Where he added to their wages, you might have said (that the employer could say), 'I

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[115] Rabbi Jacob ben Asher.
[116] Rabbi Isaac of Fez (Alfasi). Northern Africa (1013-1103); author of "[t]he earliest major code, the *Halachot of R. Isaac of Fez* ... an abridgement or epitome of the Talmud itself." Stephen M. Passamaneck, *A Handbook of Post Talmudic Halakhic Literature* (Los Angeles, CA: Hebrew Union College-Jewish Institute of Religion, 1965), 8-9.
[117] Rabbi Asher ben Jehiel, also known as *Asheri.* Germany and Spain, 1250-1327.
[118] Rabbi Moses ben Maimon, also known as Maimonides; author of the law code the *Mishneh Torah.* Spain and Egypt, 1135-1204.
[119] b. B. M. 83a.

added to your wages with the understanding that that you would rise early and stay until dark with me.' (The ***Mishnah***) comes to inform us that they can reply to him, 'That which you added for us was with the understanding that we would do good work for you.'" The ***Tosafot***[120] wrote, "He says to them to rise early and stay late." According to the ***Ri,***[121] "(That is) when he hired them without stipulation and said to them after he had already hired them, to rise early and to stay until dark. But if he made the stipulation from the beginning (i.e., when he hired them), everything is according to the stipulation."

4. In what circumstances does this apply? When there is a known custom, but if there is not in the city a known custom, or even if there is a custom not to rise early and to stay until dark, and he says to them, "I am hiring you according to the law of the Torah," they are obligated to leave their homes when the sun rises and to do their work until the stars come out.

4. As to what he wrote, "In what circumstances does this apply? When there is a known custom but if there is not in the city a known custom, or even if there is a custom not to rise early and to stay until dark, and he says, 'I am hiring you according to the law of the Torah,' they are obligated to leave their homes when the sun rises etc.," *ibid.*[122] **Reish Lakish**[123] said: "A worker on his way (to the city), is on his own time; on his way (i.e., going home), is on the employer's time, as it is said: '(You make darkness and it is night,

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[120] Commentaries on the Talmud by the Franco-German authorities of the 12th-13th centuries.
[121] Rabbi Isaac ben Shmuel of Dampierre, *Tosafist*, 12th century. France. (Unless otherwise indicated, this and most subsequent biographical information are taken from the "List of Sources" in *The Talmud Bavli, The Steinsaltz Edition*, Vo. V, Tractate Bava Metzia, Part V, 275-77).
[122] b. B. M. 83b.
[123] Rabbi Simeon ben Lakish, commonly known as Reish Lakish. Third century CE Amora from Eretz Israel.

in it every forest beast stirs.) The sun shines, they are gathered in, etc. (and in their dens they crouch). Man goes forth to his work, etc. (and to his labor until evening).'"[124] (The *Gemara* then asks, "When would **Reish Lakish's** ruling apply?") "Let us see what is customary in a new city? And let us see from where the emigrants come. If you like, I can say that (**Reish Lakish's** ruling applies in a situation) where the employer said to them, 'You are being hired by me as a worker according to the Torah.'" And ***Rashi*** explains: "In his entering: i.e., into town (after work). From his own time: i.e., he must yield from his own time to the employer, and he must stay with him (i.e., work until dark). And in his going out: i.e., to his work in the morning. From the employer's time: i.e., he does not have to go earlier than when the sun rises. They are gathered in: i.e., 'the beasts' from the above text (as) it is written, 'You make darkness night, and in it every forest beast stirs. The sun shines, etc. Man goes to his work, and to his labor until evening until it gets dark.' And let us see what is the custom: i.e., in a city where everything is according to local custom; according to **Reish Lakish**, what is it (the new city)? Emigrants, i.e., they are gathered from many places and there is a place where they rise early and there is a place where they stay late and they can rely only on the Torah."

And the ***Rif*** and the ***Rambam*** omit all this; it seems to me that the reason is that they

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[124] Psalms 104:20, 22-23. *"When the sun rises* at dawn *man* first *goes forth to his work.* He must labor there *until evening*, i.e. until it grows dark [and the stars appear] (*Rashi*, according to Schottenstein on 83b). According to *Tosafot*, "Since the laborer's commute from his home to the workplace is for his employer's needs, he may make the trip on his employer's time. At the end of the day, however, he must actually remain at work until the stars appear, since his commute home is not for his employer's benefit but rather his own." This is opposite to Reish Lakish's and Rashi's positions (*ibid.*).

explain that of **Reish Lakish** like **Rabbi Hananiel**,[125] that this is what he said: "When he enters to his work he yields from his own time to the employer, and he hurries to go out before dawn because this is his own time to go out, and he goes out from the first light; therefore, in his going out from his work is from the employer's time, because he goes out before the stars come out so that he would approach his house at the time the stars come out, and this is from the employer's time for, behold, the law is that he has to stay until the stars come out as was brought out from the verse." The implication is that **Reish Lakish** has changed the world of their custom from the rule of the verse that he brings to affirm this, since we read, 'A man should always enter (the city) at Ki Tov.'[126] Because, according to this, **Reish Lakish** only lets us know the practice of workers at his specific time. And this is not needed according to the interpreters, because all rules fall under the general rule of what they wrote, "Everything according to local custom." Or alternatively, even if they explained it according to how ***Rashi*** explains, they would not need it because it is established that **Reish Lakish**'s words refer only to a new city of emigrants. Or alternatively when he says, "You are being hired by me as a worker according to the Torah law," it is an unusual thing, and therefore they do not bother to write it.

5. The Yerushalmi (asks): "In what circumstances does this apply? During non-holy days. But on Sabbath eve, whether regarding rising early or staying until dark, it is from the employer's time because he (the worker) does not have to stay late like on non-holy days; (he needs time)

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[125] 10th-11th c. N. Africa.

[126] *Ki tov*, i.e., in the daytime. See Rav's statement in b. B. K. 60b.

until he (is able to make) preparations, in order to fill for himself a bucket of water and to roast for himself a fish and to light the candle after he comes to his house.[127]

5. And as to what our Rabbis of the ***Yerushalmi*** asked, "In what circumstances does this apply? During non-holy days. But on Sabbath eve, whether regarding rising early or staying until dark, it is from the employer's time, etc. until he (is able to make) preparations, in order to fill for himself a bucket of water, etc. " In the *Yerushalmi*, it is written according to the notes of ***Asheri*** in the chapter aforementioned.[128] We studied in the *Yerushalmi*, in the chapter aforementioned that, "The residents of Tiberias do not rise early and do not stay until dark; the residents of Maon rise early and stay until dark. The residents of Tiberias who went up to be hired by the residents of Beit Maon, they are hired like the residents of Beit Maon. And the residents of Beit Maon who went up[129] from Tiberias to be hired, they are hired like the residents of Tiberias. But a man who went up from Tiberias to hire workers from Beit Maon (to work in Tiberias) can say thus, 'You might think that we have not found rental workers to hire from Tiberias; but because I heard about you, that you rise early and stay until dark, because of this I have come here.'" And ***Nimmukei Yosef***[130] wrote this *ibid.* And see the responsum of the ***Ribash***[131] that is written at the end of chapter 332.

6. And if he says to them, "I am paying you like one or two from the city," we estimate an average between them. And Rashi explains, "They pay them what middling workers are paid."

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[127] p. B. M. 7:1.
[128] *Ibid.*
[129] This appears to be misquoted as, in the *Yersushalmi* it is written, "who went down," which makes more sense.
[130] Commentary on the *Rif* by Rabbi Joseph ibn Habiba. Spain, early 15th century.
[131] Rabbi Isaac Barsheshet, leading Sephardic respondent, 1326-1408. Spain and Algeria, translated by Hirschman.

But the Rama, zal, explained that we estimate the highest wage, and the lowest wage, and what the average is between them, and one pays the average, for example, if the high wage is six, and the low wage is four, one pays them five.

6. "And if he says to them, I am paying you like one or like two," we understand it according to the explanation in the aforementioned chapter (87a). It has been taught in a *baraita*, "The one who hires the worker and says to him, 'Like one or like two of the residents of the city,' he pays them no more than the lowest wage. This is the opinion of **Rabbi Yehoshua**. But the Sages say, 'We estimate an average between them,'" and it is known that the *halakhah* is according to the Sages. And in the opinion of the ***Rambam***, in chapter eight[132] of the ***Laws of Hiring***, he explains "we estimate" according to the opinion of the ***Rama***; and it appears from the ***Maggid Mishnah***'s[133] opinion that thus is also the understanding of the ***Ramban***[134] and the ***Rashba***.[135] The ***Ribash*** wrote in responsum 476, "Everything that a man vows with regard to hiring even orally and without a formalizing act (*kinyan*),[136] he must pay in full as long as the one who was hired has done his work."

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[132] It is in chapter nine in my edition, *The Code of Maimonides, Book Thirteen: The Book of Civil Laws*, Yale Judaica Series, trans. Jacob J. Rabinowitz (New Haven: Yale University Press, 1954).
[133] *Maggid Mishnah*, commentary on Maimonides' *Mishneh Torah* by Rabbi Vidal of Tolosa. Spain, 14th century (also referred to as HaRav HaMaggid).
[134] Rabbi Moses ben Nahman, commentator on the Bible and the Talmud; also known as Nahmanides. Spain and *Eretz Yisrael*, 1194-1270.
[135] Rabbi Solomon ben Abraham Adret, 1235-c. 1314. Spain, contemporary of the Rosh.
[136] "*Acquisition, mode of acquisition.* A formal procedure to render an agreement legally binding" in *The Talmud, The Steinsaltz Edition: A Reference Guide*, trans. Israel V. Berman (Jerusalem: Israel Institute for Talmudic Publications and Milta Books, 1989), 254.

Maharik[137] wrote in responsum 173,[138] "The one who seeks from his neighbor to save him from danger and he did so, and said that he gave a bribe of thus and such, he is believed according to his oath as to how much he spent; and it is not necessary that he reveal to whom he gave the bribe because of the danger. Reuven persuaded Simon to strive on his behalf in some deal gratis; and when the deal got near to being concluded, Reuven retracted and said, 'I will not finish the endeavor unless you give me thus and such'; and with this Simon paid him and appeased him, and afterwards the money given to Reuven wound up in the hand of Simon, and he said, 'You took what is mine unlawfully because I was under pressure when I appeased you with the money that you wanted from me.'

The *Maharik* wrote in responsum 133 that the law is with Reuven. "Reuven hired a person who should go on his behalf to such-and-such locale; and Reuven went outside the city, and the agent said to two (people), 'I want him to pay me also my expenses because thus is the custom.' And when he returned from his commission, Reuven did not want to give him the money because he said, 'Because of thus I hired you for ten; but were it not so, it would not have been appropriate to pay you (more than) seven,'" see *Terumat HaDeshen*,[139] number 323. (As to) when one is obligated to pay the matchmaking fee to a matchmaker, if (the parties) are satisfied with a match and

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[137] Morenu HaRav Yoseph Kolon. No. Italy responsa, late 15th century, 1420-1480; studied in Germany.
[138] Though this is the number cited by Caro, it does not appear as such in the edition I consulted.
[139] *Gift of the Ashes*, responsa of Rabbi Israel ben Pethahiah, HaRav Isserlein. Very popular collection; latest work cited by Caro; first edition published in 1519; first responsa with an actual title (Passamaneck, in conversation).

afterwards retract, as found in the writings of ***Morenu HaRav Isserlein,***[140] number 65. (As to) one who troubled himself with his friend's note of indebtedness (i.e., to get the debtor to pay), until he succeeded in getting it paid, and he (the friend) vowed that he would give him a quarter (of the proceeds) by performing an act of acquisition (*kinyan*)[141] to formalize (the vow), (as to whether or not) the "employer" is able to retract, see the writings aforementioned, number 330. (As to) Reuven who vowed to (pay) Simon his son-in-law two pounds in order that he would teach his own son, Reuven's grandson, and now Reuven retracts and he does not want to pay because there was no formal engagement (*kinyan*), see the responsa on the Maimonidean restatement **(Maimon),**[142] *Sefer Mishpatim,* number 64.

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[140] 1390-1460. "The foremost rabbi of Germany in the 15th century ... mainly known as the author of *Terumat HaDeshen*" (*Encyclopedia Judaica,* 1080).
[141] Making this an enforceable contract.
[142] Responsa at the end of each of the 14 books of the *Mishneh Torah.* The one in question here is from Rabbi Meir of Rothenburg.

CHAPTER THREE:
Translation
Hilkhot Poalim 332

Chapter Three: TRANSLATION

Tur H.M./Beit Yosef: Hilkhot Poalim 332*

332. *1. One who says to his agent, "Go and hire some workers for me for four (dinarim)," and he hires them for three, he only pays them three. It does not make any difference if he says, "Your wages are upon me,"*[143] *it does not make any difference if he says, "Your wages are upon the employer." And even if they did work worth four: They (only) have resentment (taromet)*[144] *against the agent. And if the employer says to him, "For three," and he hires them for four, if he says to them, "Your wages are upon me," he pays them four, and he goes and collects from the employer what he benefited him. And the Rama wrote, "Precisely up to four, but he does not receive more from the employer, even if the work is worth more, lest 'he do business with his neighbor's cow.'"*[145] *And if he says to them, "Your wages are upon the employer," he pays them according to what the workers are hired for in the city, if four, then four, if three, then three, and even if the workers are landowners who have work of their own. And they cannot say, "We only hired ourselves out with the understanding that we would get four." They only get three. And even if there are those who are hired for three, and there are those who are hired for four, they only*

* See Chart #1 in Appendix A as an aid to following the arguments in this chapter.

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[143] I.e., my responsibility.

[144] In Hebrew, the word is *taromet*, which is translated here as "resentment" and, elsewhere, as "grievance." The concept of *taromet* is explained by Menachem Elon: " ... from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction ..." *Taromet*, resentment, is just such a "moral imperative." It is a recognition, on the Rabbis' part that a moral wrong has been caused, though no legal claim or financial redress obtains. Elon, *The Principles of Jewish Law* (Jerusalem: Keter Publishing House Jerusalem Ltd., 1975), 8.

[145] b. B. M. 35a.

get three and they have resentment against the agent. In what circumstances does this apply? When their work is not worth four. But if it is worth four, he pays them four, even if workers are hired for three, provided that it is clear that their work is worth four. If it is not possible to ascertain how much the work is worth, they only get three and they have resentment against the agent. And the Rama, of blessed memory, wrote that, "Even if the employer said, 'I don't know if it is worth four or not,' (he only gets three) because wherever it is not "thrown upon him to know" (i.e., he is under no duty to have or ascertain this information), even if he says, 'I do not know,' he is not obligated, and he is not to be put under an oath (on this matter)."

1. "The one who says to his agent, 'Go and hire some workers for me for four,' and he hires them for three, he only pays three. It does not make any difference if he says, 'Your wages are upon me,' etc. And even if they did work that is worth four or five. And if the employer says to him, 'For three,' and he hires them for four or five, they have resentment against the agent," at the beginning of the chapter "HaUmanim" (76b).[146] "The one who hires the contracted workers[147] and they deceive one another they have against each other resentment," in the ***Gemara*** (76a). "The ***Mishnah*** does not teach, 'They retracted one from the other,' but rather, 'They deceived each other.' The workers deceived each other. How do we visualize this case? If the employer says to him, 'Go and hire workers for me,' and he went and misled (the other workers). How do we visualize the case? If the employer says to him, 'For four', and he went and said to them, 'For three,' what basis do they have for resentment? They understood and accepted. If the employer says to him, 'For three,' and he went and said to them, 'For

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[146] b. B. M. Ch. 6.

[147] The term *kabalan* is translated as "artisan" or "contract worker" in various places. According to Rashi, the difference between a *poel* and a *kabalan* is that the *poel* is hired for a specific period of time whereas the *kabalan* is hired for a specific job.

four,' if he said to them, 'Your wages are upon me,' let him pay them from his own (pocket) for it has been taught in a *baraita*, 'The one who hires workers to do work for him, and shows him that of his neighbor, he must pay him his full wage. He can then return and collect from the employer what he benefited him.' No, it is necessary (to understand the *Mishnah* as referring to a situation) where he says to them, 'Your wages are upon the employer.' But let us see how workers are paid. No, it is necessary (to understand the *Mishnah* as referring to a situation) in places where some workers are paid four and others are paid three. For they can say to him, 'If you had not told us for four, we would have troubled ourselves and gotten hired for four (elsewhere).' If you like I could say, 'These (workers) are landowners[148] that we are dealing with.' They can say to him (the employer), 'If you had not told us for four, it would have been beneath our dignity to hire ourselves out.' If you like I can say, 'We are still dealing with workers. ' Because they can say, 'Since you told us for four, we took the trouble to do especially good work for you.' But let us examine their work. (The ***Mishnah*** is referring to a case) where it is full of water (i.e., a ditch dug by the workers) and (the value of the work) cannot be determined. If you like I can say, (the ***Mishnah***) is in fact (referring to a case where) the employer says to him, 'For four,' and he (the agent) went and said to them, 'For three.' And as for what you said, 'They understood and accepted,' they can say to him, 'Do you not (know the Biblical teaching), Do not withhold good from those to whom it is due?'"[149]

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[148] "Who would only work for other people if he was offered more than the standard wage," in the Steinsaltz Talmud.
[149] Proverbs 3:27.

And the ***Rif*** and the ***Rosh***, have written, "The general idea we hold from this is that you understand where the employer said to his agent, 'Go and hire workers for me for four *zuzim*,' and the agent went and said to them, 'For three *zuzim*,' they can say to him, 'Very well, we did understand and accept,' and even though their work is worth four, they are paid only three because they made cheap terms with him. But they have resentment against him because they can say to him, 'Since the employer said to you for four, why did you diminish our wages, and don't you accept, "Do not withhold good from those to whom it is due."' And where the employer says to him, 'For three,' and he (the agent) says, 'For four,' if he (the agent) says to them, 'Your wages are upon me,' he pays the workers four from his own pocket and he collects three from the employer, as it has been taught in a *baraita*, 'The one who hires the worker to do work for him, and then shows him that of his neighbor etc.' And if he says to them, 'Your wages are upon the employer,' let us see how the workers are hired in that place. If it is for four, the employer gives them four; and if for three, he gives them three. Since the agent changed his commission, his commission is invalidated. He has become like one whom they worked for without a contract. Because the law for paying is according to the custom of the locale, and if even if there is someone who hires for three and someone who hires for four, he pays them only three. The mind of a person could be reconciled with the low price, and it is their (i.e., the workers') responsibility to reveal to the employer that they would only hire themselves out to him for four.

And it applies only in a case where their work is not worth to four, but where their work is worth four, for example where they take the trouble and do work for him that is worth four, they are paid four from the employer because they can say to him, 'If your

agent had not said to us four, we would not have troubled ourselves and done work for you that is worth four.' And if it cannot be known what their work is worth, for example, if they dig a ditch that is full of water and we cannot say how much their work is worth, and they say their work is worth four, he pays only three according to the custom, however they have resentment against him, the agent, because they can say to him, 'If you had not told us four, we would not have troubled ourselves at all.' And it is manifest in their words that where the employer says to him, 'Hire for me for three,' and he goes and hires for four, and he says to them, 'Your wages are upon me,' he pays them four, and he receives from the employer only three." And thus it was evident from the words of the ***Rambam***, in chapter nine, in the ***Laws of Hiring***. And understand (from this) that even if workers (there) are not hired for less than four, he (the agent) only receives three from the employer because the employer only said to him for three. He should not have hired for more saying, 'Your wages are upon me' and, since he changed his commission and took the hiring upon himself, he brought the loss upon himself. And because of this, the text brought in (the case) where "the one who hires the worker, etc. and he goes and receives from the employer what he benefited him." What does this mean? The employer says to hire for him, that is what is deemed here "the benefit."

And in the version of a book that is before me, according to the words of ***Rabbenu*** **(Jacob b. Asher)**, it is written: "And he goes and receives from the employer what he agreed to,"[150] as if to say, What he (the employer) stipulated with the agent, that is three

[150] In Hebrew, the difference between "benefited," i.e., הנהנה and "agreed to," i.e., התודעה is the second letter: a *hey* in one and a *tav*, in the other. The *tav* and the *hey* look similar and the difference might very well be due to scribal error.

and from what ***Rabbenu*** wrote, in the name of the ***Rama***, "precisely up to four, but he does not receive more from the employer," etc. The implication of that statement is that he takes from the employer what he benefited him, that is that if the workers are not hired at less than three and a half he receives three and a half from the employer, and he brings the loss of half upon himself; and if they are not hired at less than four, he pays them four for all of it from the employer because he did not find (those to be) hired for less than this (and this is) what is called, "what he benefited him." And this is the implication from ***Rashi*** 's explanation.

Or alternatively, even though there are those who are hired at three, if they did work equal to four, he receives four from the employer since the work is equal to four, that is deemed "what he benefited him." And as the ***Rama*** says, "Provided that he did not go beyond the employer's instructions more than 25%, that he takes from the employer what he benefited him. But if he adds more he does not get (more than 25%) from the employer." And the ***Mishnah*** uses the expression "That he not do business with his neighbor's cow," (i.e.,) he should not make a profit from this, according to the chapter "HaMafkid" (B. M. 35a). Because this language is used in the ***Mishnah***, that "the one who hires a cow from his neighbor and lends it to another and it dies in a natural fashion, the one who hired (the cow) must swear that it died a natural death, and the borrower shall pay in full to the hirer," and it fits well to say thus that the hirer takes legal possession for the value of his neighbor's ox. But here this agent has not taken possession of anything so he does not get from the employer more than he paid the workers.

And it is necessary to say, without further explanation, that the workers are grateful to him (the agent) even though the employer only told him to hire them at three, he hired them for four or for five. And that favorable treatment is called "business practice." And he reasoned that since the Talmud takes up the matter when he says to him, 'Hire for three,' and this one went and said for four, we can say that only up to that limit could he take from the employer, but no more, on the basis that "he should not do business with someone else's cow." In any case, one should be quite surprised at ***Rabbenu*** if the version in ***Rabbenu***'s text is, "He takes from the employer what he had stipulated," which is three, as I explained above. How will this language apply (i.e., how would the following idea be a continuation of that concept), "And the ***Rama*** wrote up to four, but more he does not take from the employer, etc." because that language implies that in any case he takes four from the employer, and from what has just gone before, he only takes three.

And if we say that the correct version is, "He takes what he benefited him," the implication is that this is according to ***Rashi***, and the ***Rama.*** And this also appears to be the case from what is written later on, "If the employer says to him for three, and he says to them for four, etc." "and if he says, 'Your wages are on me,' he gives it to them and returns and takes from the employer." One is amazed as to why he omitted the explanation of the ***Rif*** and the ***Rosh*** and the ***Rambam***, because they are the great pillars of learning. And regarding what was written in the name of the ***Rama***, "Even if the employer says he does not know if it was worth four, etc." this is quite simple. The students of the ***Rashba*** wrote that, "If he had hired them for three, or without a contract, or if they did especially good work that was worth four, he only gives three because

they hired out for the low price of three for good work, and similarly this is clear from the words of the ***Rif***."

2. And if the employer said to him, "For three," and he said to them, "For four," and they said, "As stated by the employer," surely they did not have in mind to go lower than what he said to them; rather what they intended to say was, "We trust you that the employer said thus." And, if he said to them, "Your wages are upon me," he pays them four, and he goes and takes from the employer what he benefited him. If he says to them, "Your wages are upon the employer," he pays them four if there are those who are hired for three and there are those who are hired for four, or if their work is worth four even if everyone is hired for three.

2. "And if the employer said to him, 'For three,' and he said to them, 'For four,' and they said, 'As stated by the employer,' surely they did not have in mind to go lower than what he said to them," etc. "And if the employer said, 'For four,' and he said to them, 'For three,' and they say, 'As stated by the employer,' they are entitled only to three," etc. *ibid.* "It is obvious. If the employer said to him, 'For three,' and this one (the agent) went and said to them, 'For four,' and they said to him, 'As stated by the employer,' they had in mind the higher offer. But if the employer said to him, 'For four,' and this one went and said to them, 'For three,' and they said, 'As stated by the employer,' what is the law? They relied on the (agent's) statement, (as if) saying to him, 'We trust you that thus the employer said.' Or perhaps they were relying on the employer's statement." And it was not resolved. And the *posekim*[151] decided leniently (for the employer) that they are only entitled to three.

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[151] Codifiers.

And as to what he wrote, "And if he said to them, 'Your wages are upon me,' he gives them four," etc. "And if he said, 'Your wages are upon the employer,' he gives them four if there are those who hire out for three and those who hire out for four or if their work is worth four," etc., *ibid.* The ***Rif*** wrote in this language: "It is obvious. The employer said to him, 'For three,' and this one (the agent) went and said to them, 'For four,' and they said to him, 'As stated by the employer,' their mind is on the higher amount, and if their work is worth four, they are paid four from the employer. But if the employer said to him, 'For four,' and this one went and said to them, 'For three,' and they said to him, 'As stated by the employer,' what is the law," etc. And the ***Rosh*** wrote on this what ***Rav Alfasi*** taught: "They had in mind the higher offer" (i.e., in the case where the employer said three and the agent said four) and if their work is worth four, they are paid four.

This is not clear to me because, even if they only do work like the other workers, they are paid four as the agent said to him (the worker), because they (the workers) had in mind the higher amount if the employer said to him (the agent), 'More than four.' One would not go lower than what the agent said, even if the employer said less. Therefore even if they worked like the rest of the workers, they are paid four, because we do not require (especially) good work except where there are those who are hired for three and there are those who are hired for four, in the case where the employer said to him, 'For three,' and he said to them, 'For four,' and he said to them, 'Your wages are upon the employer.' But it seems that what he wrote is appropriate, because necessarily this situation teaches that, where he said to them, 'Your wages are upon the employer,' and there are those who hire out for four, his commission is nullified because he changed

(the terms). And it might occur to you since he said, 'As stated by the employer,' it is as though they were hired by the employer for three, and even if they did especially good work, they would only be given three. It (Alfasi's teaching) tells us that they had in mind the higher wage and it is as though he had not said, 'As the employer stated' (and thus they are paid four)."

(*Bedek HaBayit*)[152] And as to what ***Rabbenu*** wrote: "And if he said to them, 'Your wages are on the employer,' he gives them four if there are those who hire out for three and those who hire out for four." It is amazing for we said above that, "The employer said, 'For three,' and he said to them, 'For four,' that even if there are those who hire out for four and there are those who hire out for three, if he said to them, 'Your wages are upon the employer,' he only gives them three." And thus ***Rabbenu*** wrote (above). How did he (then) write here that he gives him four. Therefore, it appears that one should amend the text and write, "And he gives them three, even if there are those who hire out for three and those who hire out for four; but if all hire out for four, or if their work is worth four, he gives them four, even if all hire out for three."

And one must still examine this further. "But if their work is worth four, he gives them four even if all hire out for three" because, indeed, the ***Rosh*** has not written that he gives four in the case of especially good work but rather, where there are those who hire out for four. Understand from his words that where all hire out for three, even though they do especially good work, he only gives three. And it is possible to say that ***Rabbenu***

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[152] Literally, "Repair of the Temple," Caro's addition to his *Beit Yosef* text.

understands that when we say, "If you wish we can say," etc., the implication is that they did especially good work in any situation, even though all of them hire out for three, and similarly it is clear from the flow of the ***Gemara's*** argument, and even necessary to set aside the words of the ***Rosh,*** and explain it thus.

And this is the language of the ***Rambam*** in chapter nine of the ***Laws of Hiring***. "The employer said to him, 'For three,' and the agent went and said to them, 'For four', and they said to him, 'Behold, as the employer said,' their only understanding is that the employer will give them more than four, therefore, their work is evaluated; if it is worth four, they are paid four from the employer, and if (the worth) cannot be determined or if it is not worth (four), they are only entitled to three. (If) the employer said to him, 'For four,' and the agent went and said to them, 'For three,' and they said to him, 'As stipulated by the employer,' even though their work is worth four, they only get three because, indeed, they heard three and accepted, and this is the law as written. Therefore we evaluate what they did, if it is worth four, they are paid four from the employer," etc. This is according to the *Halakhot* of **Alfasi** that, "It is necessary according to the rule that is clarified above when he says to his agent, 'Hire for me for three,' and he hired for four, and he said to them, 'Your wages are upon the employer,' because any time there is in a locale those who hire out for three, we see how much the work is worth, as was made clear. And certainly it is that, even where there was not in the locale someone who hires out for less than four, they are given four, and if he said to them that, 'Your wages are upon me,' he gives from his own (pocket), and thus explains ***Rashi.***"

And as for what ***Rabbenu*** wrote, "And if he said to them, 'Your wages are upon me,' he pays them four, and he returns and takes from the employer," this was made clear above in this very chapter. The students of the ***Rashba*** wrote thus that, "If he, the employer, said to them, 'Come (work) with me for four in the same way as your neighbors,' and they said to him, 'As they were paid,' and it is found that the employer gave them five,[153] their mind was on the higher amount and this is clear," and see in *Nimmukei Yosef* and the ***Ri***, in *Netiv*, 29, number 1. He wrote in the name of the ***Rashba*** that, "The employer deceived them, for example he said, 'Come with me as they are hired,' and they said, 'For how much?' and he said to them, 'For five,' and the going rate was ten. Thus, if the workers deceive the employer, and they said to him that the majority are hired for ten, and it is found that the majority are hired for five, it was written in the ***Yerushalmi*** that they have against each other only resentment.

And it is not true because, when the employer deceives them, their contract is voided, and he has workers without terms of work, and they take the lower amount that the workers (are hired for). And when the workers deceive the employer, the hiring is through deception, and they are only entitled to five." And (***Ri***) wrote further in number 2 there that, "One who makes a contract with a worker, that he will give him such and such an object for his wage, after he did the work, he can give him the object or its value, whatever the employer wishes, because since the worker did not perform a lawful act of acquisition it never became his."

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[153] These figures according to the annotation of *Siftei Cohen*.

4. If the employer hired them on his own for a selah[154] *and the work became cheaper (i.e., wages fell) and the employer seemed angry to them (because he paid so much), and they persuaded him (to finish the job at the agreed-upon rate), he cannot say, "I was only persuaded by you with the understanding that you would lower your wage according to the low price," because they can answer, "We only persuaded you with the understanding that we would do especially good work and thus we did."*

4. "If the employer hired them on his own for a *selah*, and the work became cheaper and he seemed angry to them, and they persuaded him (to pay the agreed-upon rate), he cannot say, 'I was only persuaded with the understanding you would lower your wage according to the low price,'" etc.

5. And by the same token, if the work went up (in price), and they appeared angry to him, and he persuaded them (to finish the job at the agreed-upon rate), they are not able to say, "We were only persuaded by you with the understanding that you would add to our wages according to the appreciation," because he can say to them, "I only persuaded you with the understanding that I would add to your food (i.e., fringe benefits) and thus I did."

5. "And by the same token, if the work went up (in price), and they appeared angry to him , and he persuaded them, they are not able to say, 'We only persuaded you with the understanding that you would add to our wages according to the appreciation,'" etc. *ibid.*, in the *Gemara,*[155] in explanation of the *baraita,* and see what is written by ***Nimmukei***

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[154] Coin equivalent to four dinarim. Marcus Jastrow, *A Dictionary of the Targumim, Talmud Babli, Yerushalmi and Midrashic Literature* (New York: The Judaica Press, Inc., 1996), 996.
[155] b. B. M. 77a.

Yosef in the name of the ***Aharonim***.[156]

6. And if the work is worth five dinarim and they were hired for four (one selah=four dinar) and it became cheaper and stood at four, he cannot say, 'As I hired you for one dinar less than the standard, also now that it is cheaper, I will lower your (wages) by one dinar than what it is now worth,' and thus if their wages are for an additional dinar from the standard and the work appreciates (in value), they are not able to say, 'Also now you must add an additional dinar from the standard for us according to the current appreciation.'

7.[157] And as to what he wrote, "If the work is worth five *dinarim* and they were hired for four, and it (the work) became cheaper and stood at four, he cannot say, 'As I hired you for one *dinar* less than the standard also now that it is cheaper, I will lower your (wages) by one *dinar* than what it is now worth.' And thus if their wages were for an additional *dinar* from the standard, and the work appreciated (in value), they are not able to say, 'Also now you must add an additional *dinar* from the standard for us according to the current higher rate.'" This also is in the ***Gemara*** in the explanation of the *baraita*.

The ***Ribash*** wrote in responsum 475 with regard to the *hazzan* who wanted to be exempt from taxes that if the custom of the city was to exempt the *hazzanim*, this is also permitted because in matters of the engagement of workers we certainly follow the custom of the locale. And in any case, it seems that in this example, it is necessary that the custom was clearly to exempt. For this is not similar to the ordinary custom of workers because any number of workers are hired every day. A person can see what the

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[156] Literally, "the last," i.e., the rabbinic authorities from the time of the publication of Caro's *Shulhan Arukh* in 1555 (Steinsaltz Talmud, 275).
[157] This is undoubtedly a misprint; the number should be "6."

custom is, but with respect to exempting the *hazzan*, since there is in the city only one *hazzan*, how does one call it a custom where they exempt from taxes only one *hazzan* or two, unless it is known and publicized in the city. On the basis that the recognized custom of the city is to exempt the *hazzan*, they exempted them. And as to the custom of the places from which the *hazzan* came, you do not look at that at all, from what we read at the beginning of the chapter "HaPoalim,"[158] "Let us see from where they came." This implies that one is in a new city that does not have in it a custom (which is not so in the case of the *hazzan*). They follow the custom of the place from which they came. That is to say that, if all the residents of the new city came from one place, all follow the custom of the place from which they came. Since this is a new city and there is still not in it a known custom (of its own), their mindset is to carry on the custom according to their place of origin. And thus is resolved the question in the ***Gemara*** with regard to collections of emigrants, that is to say that, in a city that gathers these from the north, and these from the west, and there is no set custom here that can be followed, we should follow (the custom of) the place from whence came the worker since he came to be hired here (in this town).

And as to what they wrote in the ***Yerushalmi***, "The people of Tiberias do not rise early and do not stay until dark, and the people of Maon rise early and stay until dark, the people from Maon who went to hire from amongst (the people of) Tiberias, they are hired like the people of Tiberias, but a person from Tiberias," etc. "This is the case when the one who hires goes to the location of the worker to hire him, the worker can say,

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[158] b. B. M. 83b.

'With the understanding that I am being hired (according to the custom) of my place,' but when the worker goes to be hired in another place, (it is) with the understanding that it is according to the custom of the workers of the place where he was hired that he does the work." One who hired a teacher for his son and for the son of his neighbor for a period of time, and during this time his neighbor went ahead and hired another teacher for his son, as to whether or not he is liable to pay the wage of the first teacher, (see) the Responsa of the ***Rashba***, number 643. The one who hired a teacher for his son for a year, and the year is intercalated, for whom is it intercalated, (see) the aforementioned Responsa, number 645.

Three men contracted to farm and advanced wages to one man to collect rents. (Some months later two of the men) sold their interests in the undertaking to the third man, the ***Rosh*** wrote at the end of section 66 (of his responsa, i.e., 66:6) that the collector does not have to return what they advanced him, and also the one who bought them out does not have to repay them that money. And this responsum is also written at the end of section 22. If a hired man finds something, to whom does it belong, see the chapter "Shenayim Ohozim" (12b),[159] and the ***Tosafot*** on the chapter "Almanah Nizonat Alah," 98a.[160] The one who hired his neighbor for a specific amount of time to conduct business with his (the hirer's) property, and made a condition that all found items or profit that there might be from them would belong to this hirer: there were among these items notes of debt, and he was quit with the owner of the notes, in the Responsa of the ***Rashba***, number 1014.

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[159] b. B. M. Ch. 1.
[160] b. Ket. Ch. 11.

The ***Ran***[161] wrote in the last chapter of tractate ***Avodah Zara*** as to the one who hires the worker and made an arrangement with him to give him this *kor*[162] of wheat or this item of clothing, if he wanted to retract he can retract; he may give him something else of his because, there is no *kinyan*[163] and this is made plain. (As to) the one who buys garments for his servant, if the servant takes them when he leaves him, (see) the rulings of the ***Rosh*** at the end of the chapter "HaNaarah SheNitpatetah."[164] In the chapter "Mi SheAhazo" (73a),[165] we conclude that the one who hires a worker to do something as contracted work, and he received upon himself (i.e., took responsibility for) any future accident (arising from that work), and an unusual accident (indeed) occurred, he is not liable, because he did not make the condition with this understanding (of coverage for the unusual). In chapter "HaNizakin" 54b,[166] we read that the one who wrote a *Sefer Torah* for his neighbor and afterwards said he did not write the divine names for their own sake or that he did not make his parchments for their own sake, is believed (so as) to deprive him of his wages, etc. ***Rabbenu Jeroham***[167] (said), And precisely in this fashion that the worker himself renders the *sefer* unfit on his own, but the worker whose work is rendered ritually unfit without his knowledge, for example if an idolater came and poured the wine on it and he was not able to stop him, he does not forfeit his wages.

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[161] Rabbi Nissim ben Reuben Gerondi, 14th c. Spain, commentary on *Alfasi*.
[162] Measure of capacity.
[163] "*Acquisition, mode of acquisition.* A formal procedure to render an agreement legally binding." See note 136.
[164] b. Ket. Ch. 4.
[165] b. Git. Ch. 7.
[166] b. Git. Ch. 5.
[167] Jeroham ben Meshullan, Spanish talmudist. Born in Provence, France, c. 1290-1350, expelled with the Jews of France in 1306. Student of the *Rosh* (*Encyclopedia Judaica*, 1402).

CHAPTER FOUR:
Translation
Hilkhot Poalim 333

Chapter Four: TRANSLATION

Tur H.M./Beit Yosef: Hilkhot Poalim 333*

333. 1. *One hires a worker: whichever of them comes to retract, the worker or the employer, is at liberty to do so, because the employer can say to the worker, "Hire yourself out somewhere else," and the worker can also say to the employer, "Go and hire for yourself another worker." Yet, there is against the retractor resentment (taromet)*[168] *for the sake of the trouble (he has to go through to find another worker or job). However,* **Rabbenu Tam**[169] *wrote if the employer took possession of the artisan's tools with which he does the work, the acquisitional element (the kinyan) of the hiring engagement is formalized, and the employer cannot retract and neither can the worker if he is a contracted worker. In what circumstances does this apply that they are able to retract? As long as he has not performed a possessory act (kinyan) with the artisans' tools, and similarly, in the case where a possessory act is not relevant, when they have not (yet) gone (to work). But if the donkey drivers went to bring hay, and they did not find (any), or if the workers went to work the land, and they found a water-logged field, (employers) give them their wages like an idle worker. They estimate with respect to the one who hires himself out to do this work, and similarly the donkey-driver who hires out his donkey to bring a load, how much he would have wished to reduce his wage and stand idle or to come empty-handed, and thus he would deduct from his wage. And if he said to him, "Go and hire yourself out for as much as you can and I will pay you the difference according to the amount that I agreed to with you," he must do it. And milord father, the* **Rosh,** *of blessed memory, wrote, "This is not strictly limited to (the*

* See Chart #2 in Appendix A as an aid to following the arguments in this chapter.

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[168] See note number 144 above.
[169] *Tosafist*, commentator on the Talmud. France, 1100-1171.

matter of) whether they went or they did not go, rather the same rule applies also if they went and did not stay so long, and (now) they can still hire themselves out, (in which case) they only have resentment against him. And similarly, if they did not go, and he delayed them until they were no longer able to be hired, he has to give them their wages like an idle worker since he caused them to suffer a loss. However, he (the Tanna in the Talmud)[170] *takes up the ordinary situation, without further elucidation, where they had not gone and they could find employment, and once they went, they were unable to find employment. However at times there is an expense in that they went: if it was in such a way that he could not find anyone to hire him and, even if he did not go, he might not have found that he could be hired in another place. And, if he went, his situation is as if he had begun work, and the employer cannot retract, and if he retracts, he must give him his wage like an idle worker. And if he did not go, he can retract, and he is not even entitled to have resentment against him. If this is so, then, for example, where the other workers are hired for three, and he hires them for four, since they went, it is for him as if they had begun, and he cannot retract, and he cannot say, "Hire yourselves like the other workers," rather he must pay them like an idle worker according to the more costly contract he agreed to with them, or they could hire themselves out like other workers, and he pays them (the balance) according to the condition he agreed to with them.*

333. 1. "The one who hires the worker, whichever one comes to retract, the worker or the employer, is at liberty to do so, because the employer can say to the worker, 'Hire yourself out somewhere else,' and the worker can also say to the employer, 'Go and hire yourself another worker.' Rather there is against the retractor resentment for the sake of

[170] b. B. M. 76b.

the trouble," at the beginning of the chapter "HaUmanim" (76b).[171] It has been taught in a *baraita*, "The one who hires the artisans[172] and they mislead the employer, or the employer misleads them, they have against each other only resentment," and ***Rashi*** explains that, "They have against each other only resentment," etc. "because he can say to them, 'Hire yourselves out to others,' and they can also say to him, when they retract, 'Go and hire others.' However, there is resentment because this one will have to find other workers, and that one will have to find other employment, but there is no claim for money, for they are only (dealing) in words (i.e., nothing of pecuniary value is yet at stake).

And ***HaRav HaMaggid,*** wrote in chapter nine of the ***Laws of Hiring,*** in the name of the ***Ramban*** and the ***Rashba,*** that they have against him only resentment, precisely when and as they were not able to hire themselves out the night before when he hired them. But if they were (able to be) hired the night before, and now they cannot be hired at all, behold, this is like an irretrievable loss to them and he gives them their wages like an idle worker and thus, if they are hired for less, he pays them the difference. And as to what he wrote (in the portion regarding), "However, **Rabbenu Tam** wrote, 'If the employer took possession of the artisan's tools with which he does the work he completes *kinyan* on the hiring,'" etc., (is found) at the beginning of chapter "HaZahav" (48a).[173]

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[171] b. B. M. Ch. 6.
[172] Here, *umanim* is used in the sense of artisans. *Uman* and *kabalan* are also used interchangeably to refer to contracted workers.
[173] b. B. M. Ch. 4.

On this that ***Rava*** said, both Scripture and the *Mishnah* support **Reish Lakish** who said taking possession (*meshikhah*)[174] is made explicit in Torah. It is taught in a *baraita*, "He gave it to a heathen barber, and does this hairdresser need *meshikhah* of the shears?" The *Tosafot* wrote from here, "**Rabbenu Tam** said the scribe who has hired himself out, if one has taken possession from him of his writing pen or his sheath, then, no one can retract. And if you should say, what is the difference with the (day) worker who can retract, one has to respond that it is precisely with regard to the day laborer that it is written in the Torah, 'They are my servants and not servants to servants.' He can retract but not the contracted worker." And the ***Rosh***, wrote (about this) in the abridgement of his rules, and see in ***Mordecai***,[175] chapter "HaUmanim." The students of the ***Rashba*** wrote that, "Anyone to whose hands the bundle of work tools comes, can hire against them (other workers should one attempt to retract) from the money (raised by selling) the bundle of work tools, even if there is no irretrievable loss, and even if he had not begun the work yet, because once the bundle is in his hand, the employer has assumed legal possession of his employ (and all that goes with it – including the tools), as it indicates in (chapter) "HaZahav" with regard to having given to the *sappar*, etc. And there is no difference between an irretrievable loss and where there is no irretrievable loss, according to the one who explains the ruling that the "*havilah*" means "the workmen's tools." Rather (the difference is that) in the case of an irretrievable loss, he can hire (other) workers from the money (raised) from the entire load, even if it is worth

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[174] Literally, "drawing or pulling." "One of the modes of acquisition [or kinyan] of movable property" (Steinsaltz, *Reference Guide*, 224). Here *meshikhah* is one mode of acquistion (*kinyan*) and formalizes the hiring agreement.

[175] Compendium of *halakhic* decisions by Rabbi Mordecai ben Hillel HaCohen. Germany (1240?-1298).

a great deal, if he cannot find (workers) for less than the cost (of the tools), in order that he (the employer) not suffer a loss. But when there is no irretrievable loss, he must wait until he finds workers for a cheaper rate, and he hires against them (the retracting workers) from the money (raised) from the tools. And afterwards, they explained that this cheap rate we are talking about is the usual course of events, and they did not come to restrict the matter, only that he (the employer) not increase for them (the newly hired workers) more than the proper wage."[176]

And as to what he wrote, "In what circumstances does this apply that they are able to retract? As long as he has not performed a possessory act (*meshikhah*) of the artisans' tools, and similarly where a possessory act is not relevant, as when they did not go (to the job). But if the donkey drivers went to bring hay and they did not find (any) or the workers went to work the land and found a water-logged field, they pay them their wage like an idle worker," etc. A *baraita* at the beginning of the chapter "HaUmanim," "The one who hires artisans and they deceived the employer or the employer deceived them, they only have against one another resentment. In what circumstances does this apply? That they had not gone. But if the donkey drivers went and did not find hay, or the workers found a field that was water-logged he pays them their full wage. However, coming full is not the same as coming empty, to do work (is not the same as) to sit and be idle." And as to what he wrote, "If he said to him, 'Go and hire yourself for as much as you can and I will pay you the difference according to the amount that I agreed to with you,'" he must do it, this is simple. And the **students of the *Rashba***

[176] I.e., that he not pay the new workers more than he has to, thereby costing the retracting workers more money.

wrote, "If he is unable to be hired out, except for (some sort of) heavier work, if he wishes, he need not perform that (heavier work), and they pay him his wage like an idle worker."

And as to what he wrote in the name of the ***Rosh***, "Not precisely that they went or that they did not go" etc. until "and he pays them according to the stipulation he agreed to," *ibid.* in the ***Pesakim***,[177] also the ***Tosafot*** wrote concerning this, as it was taught in a *baraita* that, "They have against one another only resentment." This is a difficulty for the ***Ri*** because the rule is established for us according to **Rabbi Meir**[178] that we do assess this as "a case of indirect damage."[179] If so, why does he not pay him like an idle worker since it is because of him that they are out of work? One must say that (the *baraita*) assumes (the following context): That when he retracts they will still be able to hire themselves out. And in any case, there is resentment against him (the employer) because now he (the employee) will have to take the trouble to find (work). And when he makes these distinctions right next to this, between the donkey-drivers who did not go and those who went and found a water-logged field, he was able to make a distinction even when they did not go at all: between whether they are still able to be hired out, and whether he retracts after they could no longer be hired out. But he (the *Tanna* in the *baraita*) seized upon the usual course of events. This is the language of the

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[177] *Piskei HaRosh*, i.e., the Decisions of the *Rosh*.
[178] *Tanna* of the 2nd century CE. "In a Mishnah cited later ([b. B. M.] 78b), R'Meir and R'Yehudah dispute the amount of compensation an employer must give his worker who dyed wool the wrong color." Schottenstein, on 77b.
[179] "An action which causes only minimal direct damage, but indirectly brings about a greater loss ... Though the matter is a subject of debate between the Sages, the Halakhah generally obligates the person who caused the initial damage for the total loss suffered by the other person" (Steinsaltz, *Reference Guide*, 178).

Maggid Mishnah, in chapter nine of the ***Laws of Hiring*** in the name of the ***Ramban*** and the ***Rashba*** that, "Precisely they themselves (the workers) went because then the agreement of hire is established between them, for the hiring of the workers is formalized at the beginning of the act. If the agent went there (instead of the workers), they only have resentment. And when they say that they only have resentment, it is only when they did not go, precisely when they are not able to hire themselves out the night before when this employer hired them.

However, if they were hired the night before and now they cannot be hired at all, then this is like an irretrievable loss for them and he pays them their wage like an idle worker. And similarly if they are hired at less, he makes up the difference. And if they went, even though they did were not able to hire themselves out the night before, he gives them their wage like an idle worker, provided that they now cannot be hired at all. But if they were hired, they only have resentment against him, for behold, he can say to them, 'Go and hire yourselves out,' and thus if they are hired for less, he makes up the difference, and he is quit of the whole thing. And these are rules when the employer did not visit his work site the night before because of his negligence. But if the employer was not negligent in the matter at all, behold (it is considered to be) *force majeure* (that no work can be done) and he is under no obligation, as ***Rabbenu*** (the *Rambam*) wrote and this is necessarily the case through clear proofs." The ***Ritba***[180] wrote in a *Teshuvah* in the name of his teachers, that the only time a worker can retract is when he hires himself out verbally, but anyone who obligates himself through *kinyan* to reinforce the matter, he is

[180] Rabbi Yom Tov ben Abraham Ishbili, commentator on the Talmud. Spain (c. 1250-1330).

not able to retract.

2. In what circumstances does this apply? When they had not begun work, therefore the employer can retract any time he does not cause them to suffer a loss. But if they began work, the employer cannot retract and if he retracts, he pays them their wages like an idle worker. And the worker, if he is a day laborer, he can retract even if it is in the middle of the day because he has the upper hand, and we estimate how much what he did is worth, and he (the employer) gives it, even if the work should become more expensive, so that he cannot finish it for half the wage that is left in his (the employer's) hand (i.e., balance of what was paid the retracting worker). "For example, if they hired for eight dinarim per day, and he worked with him for half a day, even if it happens that he must give to another for the half-day that remains six dinarim, even so he has to give to the first one four dinarim for the half-day he worked. We do not say that he gives him only two dinarim in order that the day's work be finished for eight dinarim, according to what he stipulated. And this is the rule also if the work becomes cheaper, so that he can finish the half-day that remains for two dinarim, he must pay him six dinarim, and he can only withhold from him two dinarim in order that the work of the day be completed according to what he stipulated. However, the **Ri** *says that precisely where he just quits, but if he retracts because the price goes up, we do not listen to him (i.e., he does not get paid more). And if he is a contracted worker who accepts the work for such and such (an amount), he is not able to retract either, and if he retracted he is at a disadvantage because we estimate for him what there is to do in the future (i.e., what is left to do) according to what is necessary to finish the work. So if he accepted to do the work for eight dinarim, and he did half and retracted, and the work should become more costly, so that it is only possible to complete the work for six, he pays him only two in order that his work be completed for eight, according to what he agreed to, and if he is not able to finish for less than*

eight dinarim, he does not give him anything. However, if (the work) should become much more costly, so that he is obliged to pay more for it than what he agreed to with him, he (the employee) is not obligated to pay him anything from his pocket. Therefore if he had begun the work and he retracts, even if he (only) went (to the job site), it is just like he had begun the work, and if the cost (of doing the job) rises, he only suffers a loss for the effort of his going since he (the employer) does not seize anything of his, and he does not have to give him anything from his pocket. (If the work) cheapens so that he can finish the work for two dinarim, he (the employer) still only pays him four dinarim. And thus the rule is that the employer who retracts, he is at a disadvantage because if the cost (of the work) cheapens, and he can finish it for two dinarim, he must give him (the day laborer) six dinarim for what he did, and he only has two dinarim left in order to finish his work according to his stipulation, and if the cost rises, he must give him four dinarim.

2. "In what circumstances does this apply? When they have not begun the work, therefore the employer can retract any time that he has not caused them a loss," etc. "And the worker, if he is a day laborer, can retract even if it is in the middle of the day and he has the upper hand" etc., in the beginning of the chapter "HaUmanim."[181] Concerning what is taught in a *baraita*, "If he hires the artisans and they deceived the employer or the employer deceived them, they have against each other only resentment," he concludes with, "In what circumstances does this apply? When they have not begun the work. But if they have begun the work, we estimate for them what they did. How? If they undertook to reap (a field) for two *selaim* (i.e., eight *dinarim*), and they reaped half of it and left half, or if they undertook to weave a garment for two *selaim*, and they wove half of it and left half, we assess what they have done. If (labor costs increased meantime so that) the work they have done is (now) worth six *dinarim*,

[181] b. B. M. 76b.

(the employer) pays them a *selah* (i.e., four *dinarim*), or they can finish their work and receive two selaim. **Rabbi Dosa** says, 'We estimate what is left to be done, if it is worth six *dinarim*, we give them a shekel (i.e., two *dinarim*) or they can finish the work and receive two *selaim*.'"

And in the ***Gemara***, our **Sages** reason that they (the workers) have the upper hand but **Rabbi Dosa** reasons that the employer has the upper hand. "**Rav** said that the law is according to **Rabbi Dosa**. But did **Rav** rule this way? Surely **Rav** said, 'A worker can retract even in the middle of the day.' And if you say that **Rabbi Dosa** differentiates between day work and contracted work (this would be unsatisfactory). It was taught (differently) in a *baraita*, 'If someone hires the worker and in the middle of the day he (the worker) hears that a close relative died or if a fever seized him, if he is a day worker he (the employer) must pay him his wage, if he is a contracted worker, he must pay him his contract.' Whose opinion (does this ruling reflect)? If we say that it is the **Sages**, (they say) that even in a case where the worker was not subject to *force majeure*, the **Sages** maintain that the worker has the upper hand. Rather, is it not **Rabbi Dosa**? Infer from here that **Rabbi Dosa** does not differentiate between day work and contracted work. In fact, **Rabbi Dosa** is referring to two things. And **Rav** agreed about one, but he disagreed about the other."[182] And according to ***Rashi***, he distinguishes between day work and contracted work. And with regard to hiring, there is this reason, that "they (day laborers) are servants but not servants to servants." But in the case of contracted work, he is not like a servant, but he (is responsible to) himself. And **Rabbi Dosa**

[182] b. B. M. 77a-77b.

teaches that the *baraita* is referring to contracted work, as it says, "They accepted to reap," and **Rav** is referring to the day laborer.

And as to what ***Rabbenu*** wrote, "And thus if (the cost of the work) cheapens," etc. This is simple. From (what we know about) the price going up, we can deduce (what happens when) the price goes down. ***Mordecai*** wrote in the name of **Rabbi Meir** that, "Even if they had begun the work, the employer can retract where the worker finds he can be hired and he (the worker) has against him (the employer) only resentment. And he brought proof for the matter. And in light of this, this that we say, 'In what circumstances does this apply? When they had not yet begun the work, etc.' He did not teach this with regard to day work but with regard to contracted work, as per ***Rashi***." And as to what he wrote, "And however the ***Ri*** said, 'Precisely when he (the day laborer) retracts verbally, but if he retracts in consequence of the rise in price, we do not listen to him.'" ***Maharik***[183] wrote in paragraph 182, "The worker can retract even if he already accepted the money for his hire, and he no longer has the money[184] in his hand to pay the employer back. Even so he can retract and the money becomes a debt."

And as to what he wrote, "And if he is a contracted worker who accepted upon himself the work for such and such, he cannot retract either, and if he retracts he is at a disadvantage," etc. This has already been made clear, and see ***Nimmukei Yosef*** in the ***Mishnah*** of "The one who hires the artisans and retracts on them."[185] And as to what he

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[183] Joseph ben Solomon Colon. Italy, 1420-1480.
[184] Literally "coins."
[185] b. B. M. 75b.

wrote, "And however, if (the work) should become much more costly, so that he is obliged to pay more for it than what he agreed to with him (i.e., the original retracting worker), he (that employee) is not obligated to pay him anything from his pocket." Thus wrote the ***Ramban ibid.***, and this is plain. And as to what he wrote, "Therefore if he began the work and he retracts, even if he (only) went, it is as if they had begun the work, and if the cost goes up, the only loss he incurs is the trouble (he took) in his going, since he (the employer) does not seize anything of his, and he does not have to give him anything from his pocket. That is to say, there is no question, if he actually began the work, and (the wages) rose, and he retracts, he does not pay him from his pocket. It is enough for him that he loses what he began to do, but even if he went to bring hay and the like, as was made clear above, because it is as though he had begun the work, if he retracts he only loses the trouble (he went to) in his going and he does not have to pay him anything from his pocket.

And as to what he wrote, "Since he did not seize of anything of his," this implies that if he did take hold of something of his, he had to pay the employer for everything he caused him to lose, according to what the ***Maggid Mishnah*** wrote in chapter nine of the ***Laws of Hiring***. Concerning that which the ***Gemara*** said with regard to workers who retract in the matter of an irretrievable loss that, "If the bundle (of tools) of the workers came to the employer's hand and they retracted, he can hire against them even for 40 or 50 *zuzim*. Because there is an opinion in this regard that, with the artisans' tools in his hand, even in a matter that is not an irretrievable loss, he can hire against them up to whatever wage he will have to pay (to complete) the work, if the cost has gone up in the meantime. And this seems to be the opinion of the ***Rashba***, and this seems to be the

opinion of the ***Ramban.***" And as to what he wrote, "If (the cost of the work) declines so that he can finish it for two *dinarim*, even so, he only pays him four *dinarim*," this is clear since in the case of the contracted worker who retracts, the employer has the upper hand when the cost of the work rises, this is the rule when the cost declines. And as to what he wrote, "And thus the law of the employer who retracts is that he is at a disadvantage so that if the price of the work cheapens, and he can complete it for two *dinarim*, he must give him six *dinarim* for everything that," etc. and if the cost rises, he must give him four *dinarim*," *ibid.* (see) the ***Mishnah,*** "The one who hires the contracted worker and he retracts, he is at a disadvantage," *ibid.* The employer who retracts is at a disadvantage.

3. *In what circumstances does it apply that the day laborer has broader permission to quit than the contracted worker? When it is not a question of an irretrievable loss, that he (the employer) can postpone (the work) until he can appoint a worker to finish his work. But in the case of an irretrievable loss, for example, (if he was hired) to remove flax (i.e., raw material of linen) from the vat in which it was steeping, and it would be ruined if he did not remove it, and other cases like this, there is no difference between a day laborer and a contracted worker. If they are subject to force majeure, for example, if he was ill or a near one died, they are able to retract and they have the upper hand (and the employer must) pay for everything they did. However, he (the employer) does not have to give them their full wage, and milord father, the* **Rosh,** *of blessed memory, wrote, here are his words, "He does not give them their full wage precisely when the force majeure comes to them during the second half of the day, but if it comes during the first half of the day, and after the incident has passed the employer accepted them (to do) their work without conditions, he gives them their full wage and he cannot subtract from them for the time they were idle because of the force majeure." But if they are not unavoidably prevented and they*

retract, they are at a disadvantage since it is a case of an irretrievable loss, and he can deceive them even if they have not yet begun their work. How does he deceive them? He says to them: I agreed to (pay you) a selah (i.e., four dinarim), go and receive two (selahs), in order that they complete their work, and he only gives them what he agreed to, and the **Rambam** *wrote, Even if he gave them two, they are obligated to return to him the additional amount. In what circumstances does this apply? In a situation where he cannot find other workers to hire. But if he could find other workers to hire and he deceived these, milord father wrote, he must pay them according to what he agreed to in the last arrangement. And if the hirer cannot deceive them, he hires other workers; everything that he added to these over what he agreed to with the first, he takes from the first even up to double the wage of the first ones, and if he had in hand something of theirs, he can distrain on it to hire the workers to finish his work so that it won't be lost, even up to 40 or 50 dinarim. And in all of this, there is no difference between the day laborer and the contracted worker. In what circumstances does this apply? When he cannot find other workers to hire now. But if he finds other workers to hire, and they say to him, Go and hire for yourself other workers from these who are standing before you to finish your work so that (the work) not be an irretrievable loss,*[186] *both (in the case of) the day laborer and (the case of) the contracted worker he (the employer) has against them only resentment. And we calculate for the day laborer according to what he has finished since he has the advantage; and for the contracted worker, because he is at a disadvantage, (we calculate) how much there is left to do. And the* **Rashba** *teaches as well that if he had found other workers to hire at the time he (originally) hired these, and now he cannot find any, it turns out that they have caused him a loss, but if he was not able to find other (workers), they are not liable for, imdeed, they did not cause him to suffer any loss at all.*

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[186] Correction based on the *Hidushei.*

3. In what circumstances does it apply that, "The day laborer has broader permission to retract than the contracted worker? When it is not a question of an irretrievable loss," etc. "But in the case of an irretrievable loss," etc. "between a day laborer and a contracted worker, if they are subject to *force majeure*," etc. "they are able to retract and they have the upper hand," etc. *ibid.* in a *baraita* that the text wrote next to it (77b), "The one who hires the worker and in the middle of the day he (the worker) hears that a near relative died or if he a fever seized him, if he is a day laborer he (the employer) gives him his wage, if he is a contracted worker he gives him his contract. ***Rav Nahman bar Yitzhak***[187] applies this idea in reference to an irretrievable loss, and this is the general consensus." And ***Rashi*** explains, "'He gives him his wage': Since it is a case of *force majeure*, we do not penalize him and put him at a disadvantage, and he (the employer) gives him half his wage." And as to what he wrote, "However, he does not have to give them their full wage," this is obvious, and he only wrote it to bring it near to the words of the ***Rosh***, which he wrote next to it. And as to what he wrote in the name of the ***Rosh***, here are his words, "He does not give them their full wage, precisely when the *force majeure* comes to them during latter half of the day, but if the *force majeure* comes to them during the first half of the day, and after the incident has passed, the employer accepted them (to do) his work without conditions, he gives them their full wage and he cannot subtract from them for the time they were idle because of the *force majeure*."

And as to what he wrote, "But if they are not subject to *force majeure* and they retract, they are at a disadvantage since it is a case of an irretrievable loss, and he can deceive

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[187] Fourth century CE *Amora* from Babylonia.

them," in the ***Mishnah*** at the beginning of chapter "HaUmanim" (we find), "He hired the donkey driver or the wagon driver to bring poles for a litter or flutes for a bride or a dead person, or workers to bring up his flax from the steeping vat, or any work (that would cause the employer) an irretrievable loss in a place where there is no one else, he hires against them (i.e., at their expense), or he may deceive them." And ***Rashi*** explains: "'A place where there is no one else,' i.e., where he cannot find workers to hire, and the flax is ruined, and he relied on them. 'He hires against them,' i.e., he may hire others for a higher wage, and it is their responsibility to make good the additional cost. 'Or he can deceive them,' the ***Gemara*** explains how he deceives them." And as to what ***Rabbenu*** wrote, " He deceives them even if they had still not begun the work," the ***Rosh*** wrote, *ibid.*, that thus the ***Ravad***[188] made careful notice of the ***Mishnah,*** and so too the ***Ramban.*** And as to what he wrote, "How does he deceive them? He says to them: 'I agreed to (pay you) a *selah* (i.e., four *dinarim*), come and receive two (*selahs*),' in order that they complete their work, and he only gives them what he agreed to," *ibid.*, in a *baraita* (76b). And as to what he wrote in the name of the ***Rambam,*** "Even if he gave them two, they are obligated to return to him the additional amount," at the beginning of the chapter, ***The Laws of Hiring***. And as to what he wrote, "But if he could find other workers to hire and he nevertheless deceived these, milord father, the ***Rosh***, wrote, "He must pay them according to what he agreed to in the last stipulation," *ibid.*, in a *baraita.* With respect to what was taught, "He hires against them or he deceives them," (the *baraita*) concludes, "In what circumstances does this apply? When there are not workers there to hire, but if there are workers to hire, and he (the worker) said, 'Go and hire from these,'

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[188] Rabbi Avraham ben David, commentator and *halakhic* authority, wrote comments on the *Mishneh Torah.* Provence, c. 1125-1198?

he (the employer) has against them only resentment." And ***Rashi*** explains: "'In what circumstances does this apply?' i.e., that he hires against them (i.e., for more money) when he cannot find (other workers) to hire (i.e., for the same wage)." And the ***Rosh*** wrote on this, "Meaning when there is no additional cost. But if there are workers there to hire at the same rate (as the original workers), they say to him, 'Go and hire," and this is easy to understand. It is obvious! Since he is able to find (workers) to hire without additional cost, why would he make a forfeiture of his money by paying more to hire (others)? And it seems to me that it refers to the case of deceiving them, because if he finds others to hire, and they say to him, 'Go and hire,' and if he deceives them, he must give them the increase." And thus the ***Maggid Mishnah*** wrote in the name of the ***Rashba.***

And as to what he wrote, "And if he cannot deceive them, he hires other workers, and all that he adds (in wages) to these, more than what he agreed to with the first ones, he takes from the first ones (i.e., from their stipulated wages), even up to double," etc. "And if he had in his hand something of theirs, he can distrain on it to hire the workers," etc. "even up to 40 or 50 *dinarim," ibid.,* in the ***Gemara.*** Here they teach that, "He hires up to their wages against them. **Rabbi Nahman** said, 'Up to their wages.' **Rava** raised an objection, 'Up to 40 or 50 *zuzim.*' He said to him that this *baraita* taught where the (workers') bundle reached his hand." And ***Rashi*** explains: "'Up to their wages,' i.e., if they did for him a little bit of the work, and they had received nothing. 'He hires against them,' i.e., all that he was obligated (to pay) them (the retractors), he adds to the others (i.e., new workers) and they finish (i.e., he applies the wage of the original workers to the new workers). 'Where the bundle has reached his hand,' i.e., if he has in his hand a

substantial amount (of valuable property) of theirs, as is the way of the artisans who undertake a job, bringing their work tools to the employer's house." The clarification of his words that, "all that he was obligated (to pay) them (the retracting workers), he adds to the wages of the others," that is, double the wage (he was going to give to) the first, and this additional amount he deducts from the first workers, and thus wrote the ***Ramban***, and thus was made clear from the words of the ***Rambam***, in chapter nine of the ***Laws of Hiring***. "All that he adds to these other workers over what he agreed to with the first ones, he takes from the first. Up to how much? Up to the wages of the first, and if he (the employer) has property (of the workers) in his possession, he hires them (the others) to finish the work at a wage of up to 40 or 50 *zuzim*, for each day and for each worker, even though he hired the (first) worker for three or four."

And the ***Maggid Mishnah*** wrote, "The language of the *baraita* is, 'Up to 40 or 50 *zuzim*,' and the explanation of ***Rabbenu*** (i.e., ***Rambam***) is that the intention is for each worker for each day, and (he chose) it (the 40-50) as a figure of speech, but it is correct." And the ***Ramban*** wrote, "And if the bundle came into his possession, he hires against them from the value of the bundle, even up to 40 or 50 *zuzim*, because there was an implicit *kinyan* here for the purpose of paying from it (for other workers) for his hiring. However, if he hired them (the other workers) for 100 *zuzim*, he cannot (use the property he has in hand to) pay them, because this is not hiring (i.e., the 100 would be much more than is reasonable), but up to 40 or 50. It is the way of employers to hire thus in a matter of an irretrievable loss." And this (view of the ***Maggid Mishnah***) does not appear to be the implication of the ***Rambam*** text that I have written in this context: since 40 or 50 is a figure of speech, what difference does it make if it is 40 or 50 or 100? And the ***Ramban***

wrote concerning that, "He hires against them or he deceives them even though when the bundle is not in his possession, there are only words here. They (the retracting workers) are only obligated to pay up to the amount of their wage, and not more, because that is the amount they had in mind, and there is no *kinyan* here. However, if he did not hire against them but suffered a loss because of his postponement, they do not pay because, behold, they never agreed to pay (him for his loss), and any time they have not been made bailees,[189] even though they were negligent, they are exempt."

It is written in ***Nimmukei Yosef***, "Why is it that we obligate the retracting workers in a case of an irretrievable loss? The ***Rashba*** wrote, 'Precisely (in a case) when there would have been other workers to hire at the time these (the first) were hired, and now he cannot find (any workers). But if he had not found others (when he hired the first workers), they are exempt.'" [190] And in the approach of the students of the ***Rashba***, written in the name of the ***Ramban***, "In the case of an irretrievable loss, the workers are liable even if the employer had not found other workers at the beginning, because no man sees his wealth become an irretrievable loss and remain silent. Under ordinary circumstances he would have put some effort into finding (other) workers, and if he extended himself and added a little to their wages, he certainly would find (them). However, where the workers were not able to find work, he is not obligated to pay them their wage because one does not picture workers saying, 'We really tried and we were hired,' because it is possible that he spent the whole day trying and he is not able to be

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[189] A *bailee* is a person who has received an item from its owner, and has accepted the obligation to look after it, whether gratuitously or for money (Steinsaltz, *Reference Guide*, 263).
[190] See analysis below in Chapter Five, section I.

hired.[191] These provisions that have just been enunciated in a case where they had not yet begun the work. But if they had begun the work and the employer retracts, he pays them their full wage if they cannot hire themselves out in another place, because by beginning the work, he the hiring engagement is formalized and binding."

This is what is taught in the ***Mishnah***. "In what circumstances does this apply? When the donkey drivers had not yet gone," etc. because in the travel of the donkey drivers, this is the beginning of the work, even though they did not find at the beginning to hire themselves out. He pays them their full wage. But there are those who say that even though these workers could not find someone else to whom they could hire out in the beginning, since they cannot be hired now, the employer is obligated even though they had not begun the work, because they can say to him, "If you had not hired us, we would have taken the trouble and gotten hired elsewhere." Similarly, we said with regard to the employer's irretrievable loss, that even if the employer did not find (other) workers, if they retracted they are obligated because he can say to them, "I would have gone to the trouble and hired (others)." And as to what ***Rabbenu*** wrote, "There is no difference between a day laborer and a contracted worker," thus wrote the ***Rambam*** in chapter nine of ***The Laws of Hiring***. And thus is the implication of the ***Gemara***, that there is no difference between the day laborer and the contracted worker except in a case where there is no irretrievable loss, but in the case of an irretrievable loss, there is no difference between them.

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[191] *Ibid.*

As to what he wrote, "In what circumstances does this apply? When he cannot now find other workers to hire. But if he finds other workers to hire," etc. "whether in the case of a day laborer or a contracted worker, he has against them only resentment" in a *baraita, ibid.*, this it is made clear above. And as to what he wrote, "We calculate in order to hire for a day laborer what he did," etc. "and for the contracted worker that he is at a disadvantage, (therefore) we calculate what must still be done," and thus wrote the ***Rambam*** in chapter nine of ***The Laws of Hiring***, and this is obvious according to what is made clear in this chapter, according to the Law of Hire of a contracted worker who retracts.

And as to what he wrote, in the name of the ***Rashbam***, that this applies also when, "If he could find other workers to hire at the time he hired these," etc. "but if he was not able to find others, they are exempt because, behold, they did not agree to this at all (i.e., to put up their possessions as a guarantee)," it seems that this is a scribal error and, instead of "the ***Rashbam***," one must read "the ***Rashba***," because ***HaRav HaMaggid*** wrote these words in his name in chapter nine of ***The Laws of Hiring***, and thus I found in the corrected version.[192]

4. A question was posed to milord father, the **Rosh**, *of blessed memory: Reuven was contracted by Simon*[193] *to weave a garment of five cubits for a dinar, and when he began to weave he said that the yarn was inferior and threatened to stop his work if he would not add (to his wage) and, because of this apprehension, he (Simon) vowed to him to add to his wages (by paying for) four*

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[192] This change has been made in the printed texts of the *Tur H.M.* and the *Beit Yosef.*
[193] This translation is based on the original text of the *Rosh* as the *Tur* seems to have misquoted him here.

cubits the dinar. And now let our Rabbi teach, if Simon is obligated to give him the additional amount because we consider it a matter of irretrievable loss. It is established for us that he can hire someone else or deceive them, it does not make any difference if it is a day laborer or a contracted worker, for if he dismissed him, he would not have found another artisan who would work in his fellow artisan's trade, and for the employer, this would be an irretrievable loss. The answer: since the contracted worker is not able to retract but if he retracted he is at a disadvantage, he can deceive him and even if it relates to something that is not an irretrievable loss if he cannot find another worker to hire.

4. "A question to milord father: Reuven contracted with Simon to weave a garment of five cubits for a *dinar*," etc. section #104, paragraph 2. (*Bedek HaBayit*:) (This is) the language of the responsum: "But if he found another worker and if it is not an irretrievable loss, it is acceptable for him to deceive him according to what is implied by ***Rashi*** on this. For it was taught in a *baraita*, 'In what circumstances does this apply? When there are not there workers to hire, it is established that he can hire against them, and this is the implication from what is taught. Or that he can deceive, even though he finds workers to hire,'" and ***Rabbenu*** wrote the words of the responsum on the subject that he agrees with what the ***Rosh*** wrote in his rulings: That it is established that he can deceive him.

5. A question: Reuven says to an artisan, Make for me such and such a thing and I will buy it from you and the artisan makes it, and says to Reuven to take the work and if he would not take it immediately, it would be an irretrievable loss. And Reuven says, 'I am not obligated to.' The answer: Reuven is obligated to pay the artisan because of the law of indirect damage, on the basis of a direct comparison with the donkey drivers who did not find hay and the workers who found a

water-logged field, he gives them their wage since they suffered a loss of a day's work because of him. Here too on he basis of what he said (the worker has suffered) a loss.

5. "A question: Reuven said to a contracted worker, Make for me such and such thing, and I will buy it from you," etc. at the end of the rule aforementioned. The ***Ribash*** wrote, in number 475, about the *sheliah tzibbur* who raised a complaint: He stipulated with the selectmen of the city.[194] Certainly if he made this condition with the first selectmen and there are witnesses to the matter, or that they admit (to it), behold the condition stands. And even though this condition is not written in the engagement of hire, he does not lose money because they gave him assurances thus verbally, and upon this basis he hired himself out. And the other selectmen who hired him did so also afterwards, according to the original condition did they hire him, unless they explain otherwise.

The ***Rashba*** wrote that he was asked about the members of a group who hired a rabbi to expound for them on every Shabbat, and now the members of the group retract. And he answered that they are not permitted (to do this) and they are obligated to pay his full wage, and the following does not apply here that, "It is not the same to come full as to come empty," etc. For, on the contrary, the mind that expounds is happier expounding for the congregation to inform them of the commandments, "The upright visitations of God bring joy to the heart."[195] Furthermore, those who are (constantly) occupied in the

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[194] The Hebrew word here is *berurim*. According to Isidore Epstein, in *The Responsa of Rabbi Solomon Ben Adreth of Barcelona (1235-1310)* (New York Graphic Society, 1971), 33, "The administration [of the Jewish communities in Spain] was in the hands of secretaries known as *Mukdamin* or *Berurim* or *Neemanim*, duly elected by the members, for a certain period, usually that of one year ..."

[195] Psalms 19:9.

study of Torah are at ease, and if they are not occupied in their work, they become weary and debilitated. And they are like the porters[196] of Mehoza[197] who, if they do not work, wither.

And thus also the Responsa of the ***Ramban***, number 1, who was asked regarding ten students who hired one teacher for ten *litra*[198] and they arranged amongst themselves that anyone who withdrew from the contract to study would have to pay his portion of the (teacher's) fee for the whole year, and each one gave a pledge to the hand of a third party. And during the year, students were added until the wage of the teacher rose to 11 *litra*, and one of the students left and did not want to pay the fee except for the length of time he had studied, because he said that without it, the teacher would have over ten *litra* for his pay. And the ***Ramban*** answered that the law is with the teacher[199] because what emerges from the language of the question is that he had the right to add additional students in order to increase his pay; for if it were not thus, how did they add an additional pupil for that teacher, and if so, he loses money through the retracting of this one. And he (the student) is obligated to pay and besides, the teaching of religious studies is not like other types of work where one can say to him, "Go and hire yourself out to others," because there is one bright student who is easy to teach, and another student who is difficult to teach. And the students of Torah do not benefit when they

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[196] b. B. M. 77a. The Hebrew *uchlos* is from the Greek and is translated as "crowd, population" in the *Compendious Hebrew-English Dictionary* (Tel Aviv: The Dvir Publishing Co., 1938.) However, in the Steinsaltz Talmud, Baba Metzia, the word, in the plural, is translated as "porters." This seems to be the better translation for the context.

[197] Mehoza is "a district in Palestine." The word can also mean "harbor, trading place" (Jastrow, 757). Mehoza was the hometown of Rava.

[198] *Litra* is the Roman *Libra*, a pound (Jastrow, 706).

[199] According to a version of the responsum on the *Responsa Project of Bar Ilan University* CD-ROM, the *Ramban* decided in favor of the student.

are idle, rather, they are distressed, and it is similar to the porters of Mehoza. And furthermore, since he made a stipulation from the beginning that if he would retract, he would have pay the fee in full, it seems to me that he is obligated to pay according to the stipulation. That if you say that he only made this stipulation if he retracted and the teacher could not find anyone to hire him, that if this were the case, that stipulation was not necessary, because even if he did not stipulate thus, that is the law. Since he does not have to (and he stipulated anyway), he came with the intention to add something, as we found in the chapter "Yesh Nohalin,"[200] but this is not from the perspective of the pledge given to a third party (i.e., the pledge itself does not cause liability). According to the understanding of ***Rambam,*** a pledge of a third party is not like giving it to the teacher, and even the ***Rambam*** agrees with this. And see the printed version of the *Teshuvot,* number 1,042.[201]

It is written in the Responsa of the ***Ramban,*** number 105 who was asked regarding Reuven who placed his son in an apprenticeship with Simon for an agreed upon sum for a year, and he worked with him two months or so, and afterwards he refused and did not want to uphold the condition of his father. And he (*Ramban*) answered that if the father provides for him (i.e., supports him), the father is (considered) the employer and the father can make any stipulation for his hiring that he wants. But if he does not provide for him, it is possible to say that there is nothing in what the father arranged for his hiring at all, because he is like an uninvolved third party. And if he refuses now, the

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[200] b. B. B. 108a ff.
[201] It is unusual to find a reference to a printed book in a mid-16th century text (Passamaneck, in conversation).

son gets paid for what he did like a hired worker, this is similar to (what we had at) the beginning of the chapter "HaPoalim." But in any case, whether the father provides for him or whether he does not provide for him, he is able to nullify the stipulation of the father, provided that he would say that he does not want to take anything from the father. And it is possible that even if he is being supported at the father's home, (and) everything is done according to the arrangement of the father, he cannot contest the legality of what the father arranged on his behalf for his hire (i.e., he cannot be a recalcitrant worker), until the time that he (the son) would renege entirely. Because we assume that, since he knew the stipulation that the father fixed, and entered into the work, he is agreeable to what the father did since he did not protest. And this, it seems to me, makes more sense, and therefore he takes all that he did according to what the father fixed, and he retracts any time he wants, and he is a day laborer and not a contracted worker."

A laborer whose wife takes ill, and during this (illness) he does not complete his work, this is considered *force majeure*. In this kind of situation, see in *Terumat HaDeshen*, number 39, and there you will find many of the laws of hiring (and who can retract). See there (regarding one who) hired him to make so many barrels of wine, even though the scope of the days of vintage is known, he is called (i.e., considered) a contracted worker.[202] (See there also) as to what he said concerning the employer who hires a

[202] I.e., in the case of a contracted worker, the time is his own since he is hired to do a specific job. In the case of a day laborer, the time is the employer's, since he is hired for a specific amount of time. One would therefore assume that someone hired to make barrels of wine would be considered a day laborer, given that the time to do such a task is limited by the grape harvesting season.

servant who wants to retract in the middle of the day: It is called an irretrievable loss. I have found (a decision) written about a *shokhet* and *bodek* (a kosher butcher) that they hired. The other butchers do not allow him to examine (the animals), because it takes him too much time for his examination, because it is the way of the gentile butchers to be strict (in this situation). It seems that is not worse than "theft and loss"[203] because, even though theft has aspects of *force majeure*, in any case he loses his remuneration. But if (the butchers) are strict in a case where the gentile butchers are not strict, and no one has ever heard that they were strict in this matter, this is much more like *force majeure*, thus he does not lose his compensation (where the meat is unavoidably delayed). And if it is not the way for the gentile butchers of the *bodek*'s place to be strict, but it is the way of the (gentile) butchers who are in your cities to be strict, and it is known to the community that they are strict in this way, it would be necessary for the community to stipulate explicitly (that they want the *bodek* not to follow the *minhag* of the gentile butchers). And if they did not stipulate, it is their loss and they must pay him like an idle worker, as we said in the chapter "HaUmanim." Here, "the one who earns his compensation by hoeing and filling the earth with water," etc. "and the one who earns his wage by irrigating and the river dries up, in the dispute of *Yoma*," etc. from the Responsa of the ***Ran***.

A gentile who tells his messenger to call a tailor for him, and he calls Reuven, and as Reuven begins to cut, Simon also comes in, and he cuts and he repairs it like the first

[203] I.e., the *bodek* causes the butchers to suffer a loss because, during the length of the examination, they cannot sell any meat. This is also like theft because it is as though the *bodek*, through the delay, has taken the butchers' income.

man and, at the time of the payment, the first one receives the wage for both of them, and Reuven says that he only wants to pay Simon as a trainee, and Simon demands that he pay him like an artisan because he is also an artisan like him, the ***Rosh*** wrote according to section #74, number 3, that the law is with Simon. (In the case of) one who hires a teacher for his son to teach him for a year and in the middle of the year, he finds a better teacher, and he wants to remove him from the first's tutelage to hire (the second teacher), the ***Rosh*** wrote according to the section aforementioned, number 4, since he hired him for a definite period of time and he began his work, he cannot dismiss him from his hire during his (appointed time) if he is not negligent in his work.

The one who gives yarn to weave and he complains that he (the weaver) switched it, and the weaver admits that it was switched but without his knowledge, and he does not know how much (of a loss is involved), he would be legally required to take an oath, (see) the section aforementioned, number 5. The one who hires herself out as a wet nurse for the son of the employer, if she can quit, (see) section 17, number 7, and in the ***Tur, Even HaEzer***, chapter 70. And see the Responsa of the ***Rashba*** that I noted at the end of chapter 334, and at the end of chapter 332. Reuven was angry with Simon who had hired him for a year to teach his children, and he taught until Pesach. And after Pesach, Simon got up and hired another teacher. And Simon asserts that he wants (the new teacher, presumably) to teach until the end of his year, in the responsa, number 1,197. Some of the rules about one who hires another one, (see) this ***Tur (i.e., H.M.)***, section 264.

As to the one who gives money to his friend to write for him a *Sefer Torah* in which a mistake is found so that he has to hire someone who can correct it: The ***Rashba*** wrote in number 1,056, "If there are mistakes that scribes ordinarily make (lit. which is the way that scribes err thus), the (original) scribe is liable for nothing, but if he errs in such a way that is not the way of scribes to err, he is liable. In any event, anything along these lines depends on the custom of the place (i.e., local practice). If the custom of the place is that those who write *sefarim* (holy books) correct them, this one also accepted (this task) without condition. Ordinarily in places where it is not the responsibility of the *soferim* to make corrections, if he undertook to correct it himself, the employers are obligated to pay him."

CHAPTER FIVE:
Analysis

Chapter Five: ANALYSIS.

I. CHAPTER 331

Based on the *Mishnah*, chapter 331 establishes the principle that the law follows the custom of a given locale. Levine comments:

> One of the most interesting institutions of pre-Talmudic times was the *Minhag ha-Medinah* (literally, the custom of the land or province). It resembled a local labor relations board ... It functioned to effect compromise between the claims of the employer and employee, less formally than a Jewish court (bet din) or single judge. Locally these enactments had the authority of the Bible. Thus the Minhag ha-Medinah served to prevent quarrels between employer and employee by settling major points of potential disagreement.[204]

The *Tur H.M.* and the *Beit Yosef*, basing themselves on the Talmud and the *Tosafot*, examine how this principle operates. Local custom prevails unless an explicit stipulation to change what is customary is made and *agreed to* by the worker (*ha-poel*) before the work begins (331:1 and 3). Otherwise, the employer is not at liberty to deviate from the local custom, the latter providing a floor with regard to wages, food, and hours of employment. The underlying assumption is that the worker enters into a "contractual" relationship with the employer (the *ba'al ha-bayit)* as a "free agent."[205] The concept of "freedom of contract" that exists in civil laws clearly applies here as well.

Based on the *Mishnah*, any promise the employer makes regarding food is considered to be over and above what the local custom provides (331:2). This is also the case if the employer adds to the employees' wages with the expectation that they will work longer hours than what the custom requires. The additional wages are considered a bonus to

[204] In Jung, *Business Ethics in Jewish Law*, 180.
[205] Tamari, *The Challenge of Wealth*, 130.

entice the workers to do better work, but the workers cannot be compelled to work additional hours (331:3). Local custom thus provides a level playing field, as it were. Everyone knows the terms of employment, thereby minimizing the extent to which advantage can be taken on either side, particularly the worker's side.

The Rabbis also take up the situation where there is *no* known custom, for example in a new city of immigrants. The first issue at hand is hours of employment. In such a case, or even if there is a known custom, if the employer states it explicitly, hiring may be done according to the law of the Torah (331:4, based on the Talmud). To wit, workers must begin work at sunrise and remain until the stars appear. An exception is noted for Sabbath eve when workers are released early in order to make preparations (331:5).[206] Here, once again, the terms must be known to, and accepted by, the workers. Furthermore, though it may mean a longer workday, the hours are set according to the Torah's terms, not the employer's or the worker's potentially exploitative terms. The laws in the Torah thus become the absolute floor for workers' agreements.

The second issue the Rabbis debate with regard to a city with no known custom is whether the employer should pay for the time it takes the worker to get to work in the morning, or for the time it takes the worker to get home at night (331:4). One notes that neither the employer nor the employee is held to account for *both* the worker's coming and going. The employer *is* required to pay for one way, however. According to the *Beit Yosef*, the majority ruling holds that, since going to work in the morning is for the

[206] Based on the *Yerushalmi*, B. M. 7:1.

benefit of the employer, the employer must pay for *this* time. On the other hand, since the worker's leaving for home in the evening is for the worker's benefit, this time should be on the worker.[207] The benefits of both parties are weighed in this decision and a compromise is reached taking both into account. It is germane to note that in 1947, a federal law, "The Portal-to-Portal Act," was passed in the United States requiring the employer to pay for employees' time getting to and from work in some situations.

Finally, the Rabbis examine circumstances in which local custom includes a range of wages (331:6). For example, if an employer says he will hire according to what others in the city are paid, and if the going rate constitutes a range, what does the worker get paid? The Rabbis debate whether the employee should be paid: the lowest amount (R. Yehoshua in the Talmud); the middling amount, i.e., what the average worker gets paid (Rashi); or an average between the highest and the lowest wage (the Sages in the Talmud, the *Rama*, the *Rambam* and the *Rashba*). The law accords with the third opinion.

This discussion, involving an employer making a verbal engagement with an employee, leads the *Beit Yosef* to cite the *Ribash* (331:6). The *Ribash* maintains that, as long as the employee has done the work, the employer is obligated to pay according to the employee's oath. For this to hold, the *Ribash* says in his responsum, *kinyan* is not necessary because the way in which laborers are generally hired does not involve *kinyan*. One vow leads to another and Caro now cites the *Maharik* in a case where someone has agreed to pay a bribe to save his neighbor from danger. The man who paid the bribe is

[207] Schottenstein, B. M. on 83b, citing *Tosafot*.

believed according to his oath and is paid on this basis. The underlying question here seems to be one of determining the nature of the relationship between the two parties. Is it really one of employer-employee? Indeed, the next *Maharik* case, cited in the responsum text, asks that very question. Here, the issue at hand is: Can a person who agrees to work for nothing change his mind and demand payment *in media res*? Simon has persuaded Reuven to work for him for free. In the middle of the job, Reuven refuses to continue working unless he is paid. Simon pays him, but claims that Reuven forced him to do so. Now he wants his money back. The *Maharik* finds for Reuven. The *Maharik*'s reasoning, though not cited by Caro, is that, as a volunteer, Reuven is not an employee and Simon is not his employer. Not until a wage is agreed upon does an employer-employee relationship, with its concomitant rules, obtain. Therefore, Reuven is not considered to be retracting or reneging, as there never was a labor contract between them in the first place.

At first blush, this decision in favor of Reuven seems unfair: One could argue that, in essence, Reuven blackmailed Simon. Upon further reflection, however, the ruling appears to protect Reuven against potential exploitation by Simon. Perhaps Simon wanted Reuven to work for free for many more hours than Reuven had anticipated. Furthermore, Simon has at least two other options. He can hire someone else; or he can persuade someone else to work for free in order to complete the job.

In these last few cases cited, i.e., those of the *Ribash* and the *Maharik*, the Rabbis seem concerned with protecting the parties who have agreed to perform an act on someone else's behalf from undue danger and exploitation.

II. CHAPTER 332

Chapter 332 deals with the issue of fraud.[208] In the cases presented here, the fraud involves the employer's "agent" (*sheliah*) deceiving other workers regarding wages. As we shall see, local custom plays an important role here too because prevailing wages in a locale are factored into determining what the worker gets paid. Two deceptions are explored. The first involves the agent being sent by the employer to hire workers for four *zuzim*; instead, the agent hires them for three. The second reverses the situation: The employer sends the agent to hire workers for three, but the agent hires them for four.

In paragraph 1, the *Tur H.M.* and the material brought in by the *Beit Yosef* are categorical about the first situation. If the employer says to hire at four, and the agent hires at three, the workers get paid three. It makes no difference whether their work is worth more, whether the agent claims responsibility for paying the wage, or whether he claims that the employer is responsible. What is interesting here is that the Rabbis take into account the mindset of the workers. Though the agent cheated them out of the possibility of a higher wage, the Talmud maintains that, as free and lucid agents, they accepted the terms offered them; therefore, that is what they are paid. The *Rif* and the *Rosh* explain further that, not only have they made "cheap terms" but, also, the onus is on them to prove that they should be paid more. The Rabbis, however, do allow for the workers to have resentment (*taromet*) against the agent because they can rightfully ask why the

[208] See Chart #1 in Appendix A for a schematic summary of the law.

agent deprived them of the additional *zuz*. To support this position, they can cite the Biblical verse, "Do not withhold good from those to whom it was due" (Proverbs 3:27).

The concept of *Taromet* deserves some comment. As we saw above (in footnote 144), Menachem Elon states that, "from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction ..."[209] *Taromet*, resentment, is just such a "moral imperative." It is a recognition, on the Rabbis' part, that a moral wrong has been caused, though no legal claim or financial redress obtains. In a different context, Tamari explains that, where "human courts are not able to prosecute or even enforce a pattern of behavior ... the person is liable before the Heavenly Court. In such cases, people are supposed to act in such a way as to clear themselves before God."[210] With regard to *taromet*, Tamari argues that,

> This public sanction of resentment, normally regarded as an evil trait, is Judaism's weapon against the creation of an ideological and spiritual atmosphere in which obligations can be ignored, or discharged merely by a financial penalty. Intangible though it may be, it would seem that such peer pressure and public disapproval would be a powerful factor in achieving honest business conditions in general, and honest labor relations in particular.[211]

Interestingly, the Rabbis seem to apply no legal sanction against the agent who,

> ... may be hoping to collect the larger sum from the employer ... keeping the remainder for himself. Or he may hope that his employer, who has benefited because he misled the other workers, will pay him a profit he has earned by hiring workers for lower wages than he anticipated paying.[212]

Presumably, *taromet* would damage his reputation sufficiently that he would not be

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[209]Elon, *The Principles of Jewish Law*, 8.
[210] Tamari, *The Challenge of Wealth*, 38.
[211] *Ibid.*, 131.
[212] Steinsaltz on b. B. M. 76a.

tempted to deal fraudulently with other workers in this way. Still, the fact that he is not punished by the court for "stealing" from the workers and from the employer is disconcerting.

The second case of deception, whereby the employer tells the agent to hire for three, and the agent hires for four, is more complicated. Here, depending on the specific circumstances of the hiring, the workers receive three *or* four. If the agent claims responsibility for paying the wage, then he is obligated to pay the full four *zuzim* to the workers and get reimbursed by the employer, though not necessarily for the full amount. The *Beit Yosef* presents us with a problem concerning two texts of Jacob ben Asher's work whereby, one says the agent gets reimbursed according to "what he (the employer) agreed to" and the other, according to "what he (the agent) benefited him." Caro concludes that the only reading that makes sense is "what he benefited him," a number that cannot go above four, or 25% more than what was the originally stipulated by the employer, according to the *Rama.*

On the other hand, if the agent claims that the employer is responsible for the wages, then if the work is worth four *zuzim,* that is what the workers get paid. The *Beit Yosef* wrestles with the *Rosh*'s perspective on this because it seems to contradict statements by the *Tur H.M.* and the *Gemara.* According to the *Rosh*'s understanding, if all hire for three in a locale, even if the work is worth four, the worker only gets paid three. Caro rejects this interpretation as not being in keeping with the logic of the *Tur* and the *Gemara.* Therefore, if the agent claims that the employer is responsible for the wages, and all are

paid three, if the work is worth four, the worker is paid four.

However, if the worth of the work cannot be determined, then the going rate determines the payment because, by changing the terms of the contract, the agent has invalidated his commission. Therefore, local custom takes over. One of three possibilities exists: 1) The going rate is four so the workers get four; 2) The going rate is three, so the workers get three. In this case, the workers are entitled to resentment against the agent; 3) The going rate is three or four, in which case the workers get three. Here again, they are entitled to resentment. The principle underlying the rule that, if the value of the work is unknown, the worker is entitled only to the standard wage is: "*ha-motzi me-havero 'alav ha'rayiah,*" i.e., the burden of proof is on the one who seeks to exact [payment] from his fellow."[213]

Why is the case of the employer wanting to hire for three while the agent hires for four more complicated than the reverse? It appears that the Rabbis are making a few assumptions about the mindset of the workers. One is that the workers are aware of the going rate for the task they are hired to do: either three or four *zuzim*. If they accept three *zuzim* as their wage, from the perspective of the Rabbis, the workers have made "cheap" terms and are reconciled to the lower wage. The workers would be under the impression that the employer is cheap, unwilling to offer the higher rate.

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[213] Schottenstein on 76a. And see b. B. K. 46b. As Tamari writes in *With All Your Possessions*: "There exists in the Jewish legal system a principle that the onus of proof is always on the one who claims money from his neighbor ... This principle is waived in the case of a worker claiming that he never received his wages" (137-8) and in a number of other cases. Elon explains: "The fundamental rule that the plaintiff has the burden of proving his claim (*ha-motzi mi-havero alav ha-re'ayah*) is based on the presumption (*hazakah*) of the rightful possession by the defendant of the chose in action - i.e., the thing or the money claimed ..." (*The Principles of Jewish Law*, 600-601).

If the workers are offered four *zuzim*, however, the workers are operating under the assumption that the boss is generous and is willing to pay the higher wage. Therefore, as in the scenario in the Talmud that the *Beit Yosef* recounts, the workers can tell the agent that they did "especially good work" because they were offered the extra *zuz*. Because of the workers' heightened expectations, the Rabbis look for justifiable situations where they are entitled to the higher wage: if the agent claimed responsibility for payment, or if the agent claimed that the employer was responsible, then if the work is worth four, or if the going rate is four where the worth cannot be determined, the worker is paid four.

In the first case, the agent is penalized for misleading the workers. In the second case, the employer will be out of pocket an extra *zuz* per worker, but this seems reasonable given the quality of the work that is produced, or the adherence to the going rate in that locale. What counts here seems to be the inherent value of the work, not an assessment of whatever the market will bear. Where there is no way to determine the worth of the work, however, the going rate prevails, and the employer is not penalized for his agent's lie. Though the workers have been deceived and have thus agreed to work for the higher wage, because the value of their work cannot be determined, they are paid at least according to the going rate.

Clearly intention plays a decisive role in the Rabbis' adjudication process. This is even more evident in the scenario in which the workers, wary of the agent's potential shenanigans, claim that they will work according to the employer's stipulation. In

paragraph 2, the *Tur H.M.*, basing itself on the Talmud, declares that, when the agent offers four, and the workers state: "As stated by the employer, they had in mind the higher wage," i.e., they agree to work for the wage of four *zuzim*. Therefore, even if the employer had only said three, if the agent said four and claimed responsibility for the wages, the workers are paid four. If, on the other hand, the agent claims that the wages are the employer's responsibility, they are paid four if their work is worth four, even if everyone else if hired for three; or if the prevailing wage is three or four, and their work is worth four; or if everyone is hired for four. This follows the logic in the previous paragraph.

Now, how do the Rabbis justify the fact that the employer, intending to hire for three, is nonetheless liable to pay the workers four? The operative principle here is the concept of "unjust enrichment," which concerns "a person's liability aris[ing] neither from his undertaking nor delictual act, but from the fact that he has derived a benefit to which he is not entitled, at the expense of another."[214] In the Rabbis' language, "one should not do business with one's neighbor's cow."[215] Therefore, if a worker is directed by his employer to work on a third party's field (here, the agent is considered the employer, the third party is the *ba'al ha-bayit*), "the owner of the field will have to pay for the benefit derived, even though he did not request the work, for otherwise he will be in a position of having been enriched without right at another's expense."[216]

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[214] Elon, *The Principles of Jewish Law*, 335.
[215] b. B. M. 35a.
[216] *Ibid.*, 338. See also t. B. M. 7:7, and b. B. M. 76a.

The *Beit Yosef* also elaborates on the opposite scenario, which is left unresolved in the Talmud: The employer said four, the agent said three, and the workers declare they will work according to the employer's stipulation. The *posekim* resolve this by finding that the workers get paid three, undoubtedly for the same reason stated above: They made and accepted cheap terms. In fact, this is precisely the reason Caro gives in the *Shulhan Arukh* for the workers only getting three: "They heard three and accepted it."[217]

Interestingly, Caro cites two cases decided by the students of the *Rashba*, one in which the employer deceives the workers directly, i.e., without the medium of an agent, the other in which the workers deceive the employer directly. In both cases, the lower wage is paid and the only recourse is resentment. In the first case, the employer hires workers and tells them their wage will be like the others in town; it turns out, in fact, that the others are paid more than what the employer offered. In the second case, the workers say they want to be paid like the others in town; in fact, the others are paid less than what the workers claimed.

The rulings by the *Rashba*'s students are based on the following reasoning. In the case of the employees' deception, because they lied, they are paid the lesser amount. This certainly seems fair. In the case of the employer's deception, his contract with the workers is voided by his lie; the workers are therefore working without terms. The rule for workers without a contract is that they are paid the prevailing lower wage.[218] This

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[217] See Appendix B, *Shulhan Arukh H. M.* 332:4.
[218] See above, Chapter Three, *Tur H.M.* 332, Caro's citing of the *posekim* in the case where the employer wants to hire for three while the agent hires for four.

ruling certainly favors the deceptive employer. How can this be explained? The *Rashba*'s students seem to hold that the workers are responsible for knowing the prevailing wages. In other words, they should know what the majority of the others in town are getting paid. If they do not make it their business to know, they are penalized when they believe the words of the employer. *Caveat emptor*!

Another instance of direct deception between employer and employee occurs when the going wage rises above or falls lower than the originally stipulated wage (332:4,5). Here, the originally agreed to wage is what is paid. In the case of wages rising, the employees will be unhappy and, perhaps, do a bad job or quit. The employer may therefore persuade them to finish the job with a vague promise of better conditions and the possible implication of higher wages, but he is liable only for the originally agreed to wage. In the case of wages falling, the employer will be unhappy and, presumably, may wish to dismiss the employees. The employees can persuade the employer to let them finish the work for less money, but he is liable to pay them the originally agreed to wage. The operative principle here seems to be that both employees and employers are held to their original word: If they agree to do a job for a specific wage, that is what the employer should pay and what the employees should be paid. Both are protected against price fluctuations.

The same principle holds true if the employer promises to pay an extra *dinar* over the prevailing wage (332:7). If after the work commences, the prevailing wage rises, the employees cannot claim that they are entitled to the higher prevailing wage plus a *dinar*. By the same token, if the workers were hired for a *dinar* less than the prevailing wage,

and the prevailing wage falls, the employer cannot claim that he will pay the lower wage minus a *dinar*. The integrity of the original engagement is thus preserved in these cases; neither side can change the meaning of the original stipulation.

This principle is demonstrated in several cases cited by the *Beit Yosef*. In a responsum of the *Rashba*, the question is: If someone hires a teacher for his own son and that of his neighbor, and his neighbor then hires another teacher, is the neighbor liable for paying his portion of the original teacher's wage? Though not included in Caro's citation, the *Rashba* rules that the neighbor is, indeed, obligated. He bases his reasoning on the Talmud's principle that, if someone shows a worker another's field, the owner of the field must pay for what he benefited from this work.[219] Therefore, the neighbor, though not explicitly involved in the hiring of the first teacher for his son, is nonetheless bound by the Talmudic principle and is not allowed to renege. It is as though he had an engagement with the teacher because of the benefit he received from him.

In a responsum of the *Rosh*, the issue is: Three men have leased some land for a year, and hired a collector to manage the rentals. At the end of nine months, two of the lessees sell out the rental to the third. Now they want their money back from the collector for the remaining three months of the lease. The *Rosh* rules that neither the collector, nor the third lessee is obligated to return the money to them. Clearly, these examples underline the sanctity of an engagement and raise the question of retracting from one. That is the subject of the next chapter.

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[219] b. B. M. 76a.

III. CHAPTER 333

Chapter 333 focuses on the issue of retraction, a form of deception, fraud or negligence in the view of the Talmud.[220] The questions posed here are: Do employers and employees have the right to retract? Should one of them retract, what is the retracting party's financial liability or moral sanction? Based on the Talmud, the general rule is that either party is at liberty to retract as long as: 1) The hiring engagement has not yet been formalized or; 2) If the employer retracts, workers can find other work for the same wage; in the case of the employee's (viz. a day laborer) retracting, the employer can find other workers. In other words, if there is no actual or indirect damage, either in terms of ruined property or loss of work opportunity, the two parties are free agents and can change their mind. The principle here seems to be: "No harm, no foul." However, in either case, there is cause for *taromet*, resentment, against the retracting party because of the trouble the employer must incur to find other workers, and the trouble the employee must incur to find other work. Though there is no financial liability here, the retracting party has not lived up to their end of the verbal engagement and has thus behaved unethically.

Once a loss has been sustained, however, financial liability comes into play. The Rabbis examine a variety of circumstances in which the retracting party causes a loss. The first circumstance involves a loss before the engagement has even been formalized. The *Beit Yosef* cites the *Maggid Mishnah*, the *Rambam* and the *Rashba* who rule that, if the workers could have found other work when the employer initially hired them, but cannot find

[220] See Chart #2 in Appendix A for a schematic summary of the law.

work (for the same wage) now that the employer has retracted, the workers are considered to have suffered an irretrievable loss. The employer is thus responsible for paying wages "like an idle worker" - *ke-poel batel* - i.e., the amount a worker would demand in order to remain idle (333:1). In the case of a worker who would suffer from remaining idle, however, e.g., a teacher or a hard-laborer, the employer is obligated to pay the full wage (333:5). Alternatively, the employer may pay the difference between what the worker can now earn and the amount the employer agreed to in the first place (333:1).

The formalizing of the engagement obligates the parties further (333:1). For the contracted worker, *meshikhah*[221] is effected when the employer takes possession of the artisan's tools. For a day laborer, the equivalent of *meshikhah* is the start of the work, for example, if donkey-drivers leave to collect hay. Differing liabilities apply for the employer, the contracted worker and the day laborer.

The employer. The specific instance of deceit discussed here involves the workers going to a job and discovering that the work is no longer needed (333:1), for example, if donkey-drivers went to collect hay and did not find any, or if workers went to work the land but the land was water-logged. This is considered a case of the employer retracting if he has been negligent and has not checked the night before to see if work was still required. Therefore, if the workers have set out for the job, and the employer retracts in this way, the employer is liable for paying the workers the wage of an idle worker or the

[221] See footnote number 174.

difference between what the workers can now earn and what the employer had agreed to with them in the first place. The compensation is based on the law of "indirect damage," *dina d'garmei*[222].

> However, the compensation does not depend on the mere fact that the employment contract has been canceled, but rather, on the actual damage caused by the cancellation of the contract. For this reason the workers do not receive their full wages, for the benefit they derived from not actually working must be balanced against the wages they were prevented from earning.[223]

If the employer was not negligent, on the other hand, and had checked out the field the night before, he incurs no financial liability. (This is stated explicitly in the Talmud but not cited in the *Beit Yosef*.)

The *Rosh* adds a nuance to this situation. He says the question is not so much whether or not the workers had already left to work, but whether or not they were able to find other work. So, if they had gone but could find other work, the employer is off the hook. Alternatively, if they had not left yet but, being delayed by the employer, could not find other work, the employer is liable. In other words, what is operative here is the issue of loss. Therefore, the employer is protected in two ways. He has no liability if: 1) he has been responsible and checked the site out the night before or, failing that, 2) the workers can find other work.

The day laborer. The biblical verse, "For it is to Me that the children of Israel are servants" (Lev. 25:55), is interpreted by the Rabbis to mean that human beings are servants of God

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[222] "An action which causes only minimal direct damage, but indirectly brings about a greater loss" (Steinsaltz, *Reference Guide*, 178).
[223] Steinsaltz, *ibid.*, 14.

but *not* servants (or slaves) to other human beings.[224] Since the day laborer is tied to his work for a fixed amount of time, so as not to be a slave to his employer, he is afforded the privilege of quitting in the middle of the day, providing this does not cause the employer an irretrievable loss. If it is not a case of an irretrievable loss, the assumption here is that the *employer* can always find other workers, thus is at no disadvantage if the original workers quit (333:1). The worker is paid for the work he has done, and the employer hires other workers to complete the job (333:2). So if the worker was hired for eight *dinarim* and quits in the middle of the day, he is paid four for the work he has done.

The worker is given the "upper hand," i.e., the advantage, in this situation. If prices go up, and it will now cost ten *dinarim* to get the job done, so that the new worker will get paid six, the original worker still gets the four he originally agreed to, and the employer must absorb the loss of the extra two *dinarim* he will need to pay the new worker. Conversely, if prices go down, so that it will now cost six *dinarim* to get the job done, and the new worker will get paid two, the original employee is paid six *dinarim*, i.e., his originally stipulated wage minus what it will cost to get the job done. The employer thus puts out the eight he had originally intended to pay.[225] This provision would presumably be a disincentive to the employer to fire workers when the price goes down so that he can get the job done more cheaply.[226] And, if the price goes up so much that it

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[224] b. B. M. 10a.
[225] However, given that this "formulation allows the worker to parlay his retraction into a profit, R. Shabbetai b. Meir entitles [the worker] only to the prorated share of the original stipulation. Following this formula entitles the worker to 4 in [this] example" (Levine, *Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics*, 46).
[226] Heinemann, 300.

will cost much more than eight to complete the job, the worker is not obligated to pay the employer anything more than four *dinarim*, i.e., half of his originally agreed to wage for completing the work. Here the worker is given a clear advantage over the employer, presumably because he is the more vulnerable party. A *caveat* is issued, however, as a protection for the employer: If the worker quits because wages have gone up, he does not get paid more (333:2).

The contracted worker. The contracted worker is not allowed to retract. The presumption here is that, hired for a specific task, he is "master of his own time" and "responsible only to himself."[227] Thus the issue of being a potential slave to the employer does not apply. If he does retract, he has the "lower hand," i.e., he is at a disadvantage. He is paid, not for the work he has done, but according to how much it will take to finish the job (333:2). So, if he was originally hired for eight *dinarim*, and he quits in the middle of the day and the prices have gone up, so that now it costs ten *dinarim* to get the job done, and the new worker gets paid six, the original worker is only paid two so that the completed job costs eight as originally stipulated. If the cost to complete the job is eight, then original worker receives nothing. This is the case whether or not there is an irretrievable loss to the employer.

Irretrievable loss. If there is an irretrievable loss involved in the situation, the day laborer and the contracted worker are treated equally (333:3). Neither is allowed to retract and, if one does, the employer has the "upper hand," i.e., the advantage. If there are no other

[227] *Rashi* on b. B. M. 77a.

workers to hire, the employer is allowed to deceive the retracting worker by promising higher wages but paying only the originally agreed to wage; or he can hire other workers at the retracting workers' expense, i.e., from the wages they were promised and, if he has in his hand something valuable belonging to the worker, e.g., his work tools, he can sell the tools and use the money to hire other workers, if the cost exceeds the wage originally stipulated.

The question of how much the employer can pay other workers from the value of the original worker's tools is explored in the *Beit Yosef* (333:2). 1) R. Nahman states that the employer can hire only "up to their wages"; 2) *Rava* states up to 40-50 *zuzim*; 3) Caro's understanding of *Rashi* is up to double; 4) *Rambam* holds that 40 or 50 is a figure of speech representing any amount; therefore there is no limit to how much the new workers can be paid from the value of the workers' tools; additionally, he claims that the amount in question is for each worker for each day; 5) *Ramban*, on the other hand, sets a limit; he rules that 40-50 *zuzim* is the maximum that can be paid. This difference of opinion is not settled in the *Beit Yosef*.

Caro includes *Rashba*'s opinion that, even before the engagement has been formalized, the retracting workers are responsible for the employer's loss where the employer could have hired others the night before (when the retracting workers were hired), but now cannot find other workers (333:3). The *Rashba*'s reasoning seems to be that, since the employer had the possibility of an alternative to the retracting workers, he is now deprived, not only of the retracting workers' labor, but also of the other workers' potential labor. On the other hand, if no workers were available when the retracting

workers were hired, the employer had no alternative in the first place, and losing the retracting workers leaves the employer in no worse a situation than he was before when he could find no other workers. In such a case, the workers are not held liable for the employer's loss.

The students of the *Rashba,* however, are stricter about the employees' liability. They contend that the employer would never be in a situation where other workers were not available because, given the right offer, someone would always be willing to work. Thus the retracting workers cause the employer the loss of this alternative labor (which was available when the retracting workers were hired but is no longer so), and are liable. In the case of *a retracting employer,* however, the workers cannot claim similarly that they could have found other work at the time they were hired, because one can put a lot of effort into finding work and not find any. Therefore, the retracting employer has not caused them the loss of this potential alternative income (since there is not necessarily any to begin with) and, as long as the work has not yet begun, he does not have to pay them their wages.

If, however, in the case of an irretrievable loss, a worker was unavoidably prevented from working because of *force majeure* (333:3), he is not penalized. He is paid for the work he did before the *force majeure* struck if he is a day laborer, and according to his agreement if he is a contracted worker. The *Rosh* adds a proviso for the day laborer whereby, if the *force majeure* occurs during the first half of the day, and the employer accepts the worker with no special stipulations after the *force majeure* has passed, the worker is paid his full wage and nothing is deducted for idle time. If the *force majeure*

hits during the second half of the day, however, the employee is paid for the first half of the day only. It is not clear why the Rosh makes this distinction. In the first case, since the worker is paid for the work he has already done, we can only assume that he is rewarded for returning to work after the *force majeure* has passed.

A decision by the *Ribash* is used by Caro to illustrate the employer's position in the case of an irretrievable loss (333:4). Simon makes an engagement with Reuven to weave a garment. In the middle of the job, Reuven threatens to stop working unless Simon pays him a higher wage. Simon agrees but reneges on paying the higher amount once the job is completed. The law is decided in Simon's favor since this is considered a case of an irretrievable loss. As we have seen, in such a case, the employer is allowed to deceive the worker if he cannot find another worker to hire. Apparently, Simon could not hire another worker because of guild practices restricting one artisan from working on another's project.[228]

The reverse situation is also considered by the *Ribash* and cited by Caro (333:5). Here, Reuven asks a contracted worker to make something for him but then refuses to accept and pay for it. The law finds in favor of the contracted worker because what he made for Reuven is presumably one-of-a-kind or perishable, and cannot be sold to someone else. The contracted worker is deemed to suffer an irretrievable loss if Reuven does not pay him, and Reuven is thus obligated to do so. In these two cases, we see that the law

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[228] Salo W. Baron, Arcadius Kahan and others attest to the existence and power of guilds in medieval European Jewish communities in *Economic History of the Jews* (Jerusalem: Keter Publishing House Jerusalem Ltd., 1975). See in particular chapter two.

favors whoever is considered to suffer the loss, the employer or the employee. Neither is favored over the other *a priori*.

Two categories of worker, the teacher and the hard laborer, are always considered to suffer an irretrievable loss if the employer retracts. As the *Rashba* and the *Ramban* explain in the *Beit Yosef*, both teacher and hard laborer become weakened if they are deprived of work, the former intellectually, the latter physically. Furthermore, the teacher is happier studying Torah than remaining idle, the hard laborer, working rather than remaining idle. Therefore, rather than paying them a wage like an idle worker as we saw above in 333:1, they are paid their full wage (333:5). Thus, the *Rosh* rules that, if someone hires a teacher for a year but, mid-year, finds a better one, he cannot fire the original teacher unless he has been negligent in his duty.

This principle is applied in a case of the *Ramban*'s. Ten students get together to pay a teacher ten *litra* for a year. They make an agreement that each of them is responsible for their share of the wage for the entire year, regardless of whether a student decides to retract or not. Other students are subsequently added so that the teacher's wage rises to eleven *litra*. At some point, one of the original students retracts and insists on paying only for the time he was taught. He reasons that, because of the new students, the teacher will be paid the originally stipulated amount of ten *litra;* therefore, his share for the rest of the year is not necessary.

The *Ramban* finds in favor of the teacher for a number of reasons. He argues that: 1) The teacher has a right to add more students to increase his wage; 2) If the retracting student

reneges on his payment, the teacher loses part of this wage; 3) The principle that a retractor can say, "Go hire yourself out to others," does not apply to a teacher. This is because some students are harder to teach than others, thus one student/employer is not like another. By retracting, the student is essentially saying, "Let these new students be your new employers," and that does not hold water for the *Ramban;* 4) Since the student made the engagement in the first place, he is bound to it; 5) The student can potentially argue that he made the deal to pay for the whole year in the first place to cover the case where, by students retracting, the teacher might not find other employment. This is rejected out of hand by the *Ramban* because, by law, the students would have to pay the teacher his full wage in such a case anyway, no stipulation to this effect being needed; 6) Since no stipulation was needed, but one was made, it must be meant to cover the present case whereby the teacher is entitled to more than the originally agreed-upon amount with the ten original students. Ultimately, just as in the case of wages rising or falling when the employer has agreed to pay an extra *dinar* or the employee has agreed to work for a *dinar* less than the prevailing wage (332:7), the original terms of an engagement cannot be reinterpreted to suit new circumstances.

Clearly a mutual engagement reached by two parties, employer and employee, with full knowledge and understanding of what that engagement means, is binding on both. Another example from the *Ramban* brings home this point. Reuven places his son in apprenticeship with Simon. Who is deemed the employer here? The *Ramban* considers the possibility that, if the father provides for his son, he, Reuven, would be the actual employer; therefore, the son would have to work according to the father's stipulations. If, on the other hand, Reuven does not provide for his son, or if the son declares he does

not want his father's support, the son would then not be bound by Reuven's stipulations. The *Ramban*, however, finds another, more plausible possibility; to wit that, whether or not the father feeds him, the son is still obligated by his father's engagement. The *Ramban* reasons that, since the son entered into the deal knowing the stipulations his father made for his hiring, he must honor them during the time he works as an apprentice for Simon. The son may retract at any time, however, as he is considered a day laborer.

Knowledge of the circumstances in which the hiring is done is again relevant in one of the last examples cited by Caro in this chapter. In this case, a *bodek* is hired by a community to inspect the meat of gentile butchers - presumably so that the gentile butchers can sell kosher meat to Jews. The community is entitled to withhold the *bodek*'s wages - a form of retraction - if the *bodek* takes too much time and the gentile butchers are prevented from selling their meat during this delay. This is because the *bodek* is expected to know and follow the *minhag ha-makom*, the custom of the place and, in this case apparently, the gentile butchers have a habit of being impatient with meat inspection. The *bodek* is paid only if the butchers have never been known to be impatient in this way, in which case the situation is likened to *force majeure*.

This intersection of *minhag ha-makom* with withholding of wages also appears in the final example in the *Beit Yosef*. In a responsum, the *Rashba* rules that, as long as a scribe makes mistakes common to all scribes, he cannot be held liable for his mistakes - at least as long as the *minhag* is to exempt him. The same principle holds true for scribes who make corrections to their *sefarim*. If the *minhag* is for scribes to make these corrections,

the scribe is not paid an additional amount for making them. However, if it is not the *minhag*, the scribe is paid for doing so.

Interestingly for the structure of this three-chapter unit of the *Tur*, the issue of *minhag ha-makom* is what concerned us at the very beginning of the first chapter. Ending on that theme brings us, in a sense, full circle, suggesting a kind of coherence to this section of *halakhah*.

CHAPTER SIX:
Conclusion

Chapter Six: CONCLUSION

I. SUMMARY

A. Neither Pro Nor Con

The labor laws we have examined suggest no obvious bias either towards the employer or towards the employee. The workers are certainly considered a "protected" class, to use modern legal terminology, because the system ensures a floor for wages and fringe benefits according to the principle of *minhag ha-makom*, custom of the place. (It should be noted that "floor" might only be a bare minimum.) Workers are considered free agents who may enter into or withdraw from a contract though, with regard to retracting, there are greater restrictions on the worker contracted for a job rather than for the day. On the other hand, these laws also ensure the *status quo* for the employer, the *baal ha-bayit*, in the sense that the hierarchy of employer to employee is not challenged. Indeed the laws, as Neusner explains, are enunciated from the point of view of the employer.[229]

Furthermore, we have seen throughout that the Rabbis take great pains to balance the powers and responsibilities of both parties. This is evidenced in each case they discuss. For example, if an agent offers a group of workers three *dinarim*, even though the employer was willing to pay four, they get paid three. Here, the workers lose out on making the extra *dinar* to which they would have been entitled, because the onus is on

[229] Neusner, 65.

them to accept or reject the terms offered. They heard three, accepted three, so that is what they get.

If the agent offers four, when the employer wanted to hire for three, however, the workers will be paid four if their work is worth four, or if that is the going rate in town. In other words, though the worker expects to be paid four, he does not actually get paid that amount unless he deserves it. In that case, the employer would have to pay the extra *dinar*, under the Talmudic principle, that "one should not do business with one's neighbor's cow" (i.e., the modern principle of "unjust enrichment.") Whether he wanted the work done for four or not, the employer must pay according to what he benefited from the transaction. At the same time, if the worker's work is not worth four, despite his expectation, he will be paid three. Clearly, the Rabbis are trying to balance the mindset of the worker, and the worth of his work, with the employer's benefit.

Protection from loss is a guiding principle in this material. For example, if the employer retracts once the workers have set off for the job, they must be paid like idle workers. However, this provision holds only if the workers are not able to find comparable work for comparable pay. Thus, while the worker is protected from losing out on his wage, the employer is protected from having to pay out unnecessarily for work that is not done. If the worker can make the same wage elsewhere, the employer is off the hook.

If the worker retracts, on the other hand, so long as he does not cause the employer an irretrievable loss, he is entitled to retract before the work has begun; or, if he retracts

midday, he is entitled to be paid for the work he has performed. This preserves the freedom of the worker. The assumption is that the employer can find another equally qualified worker. If this other worker should cost the employer more than the original worker (because wages have gone up), the employer incurs the extra cost if the worker is a day laborer. The worker incurs the loss if he is a contracted worker. In the case of an irretrievable loss, however, the employer is protected if he is in possession of the worker's tools because, if need be, he can sell those tools and hire new workers, at a higher wage, from the proceeds of those tools. The employer is required, though, to make every effort to hire other workers at the same wage.

B. The Moral Imperative

As noted above in Chapter One, morality and law are intricately intertwined in *halakahah*:

> ... the halakhic system carefully distinguishes between normative rules that involve sanctions imposed by a court, and precepts not enforced by such sanctions. However, the fact that legal norms and moral imperatives both have a common source and background in the halakhic system has an important consequence: the legal system itself, functioning as such, from time to time invokes, even though it does not enforce, the moral imperative.[230]

This intertwining is evidenced in the concept of *taromet*, resentment, which the Rabbis offer as an acceptable frame of mind in certain cases. Moses Maimonides, in the *Mishneh Torah*, makes it clear that Jewish law frowns on anger, whether displayed outwardly or harbored inwardly. "[A] person should be neither hot-tempered and easily provoked to anger nor like a corpse that has no feeling ... The prophets described God by all kinds of

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[230] Menachem Elon, *Jewish Law: History, Sources, Principles, Ha-Mishpat Ha-Ivri*, Vol. I, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: The Jewish Publication Society, 1994), 144.

attributes, 'slow to anger' ... to inform us that these traits are good and right ..."[231] However, where the Rabbis see an injustice that does not fit into the category of the legally actionable, they provide a moral right to experience anger and resentment. For example, if an agent hired workers for three *dinarim* when the employer told him to hire for four, though the workers only get paid three, they are entitled to feel resentment against the agent.[232]

C. Principles

From our analysis in Chapter Five, we can extract seven principles or concepts that appear to have significance in the Jewish laws on hiring as they are formulated in the *Tur H. M.*, chapters 331-333, and the corresponding *Beit Yosef* commentary:

1) Primacy of the custom of the place

2) Agreement entered into with full knowledge and understanding

3) Workers' permission to retract from their engagement

4) *Taromet*, resentment, a Jewish ethical notion

5) Protection from loss

6) Unjust enrichment

7) Indirect damage

In examining provisions of medieval Jewish labor laws, it is worth considering whether and how these principles might be relevant to laws on hiring workers in the modern world.

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[231] Moses Maimonides, *Mishneh Torah (Yad Hazakah)*, "*Hilkhot Deot*, Ethical Ideas," ed. Philip Birnbaum (New York: Hebrew Publishing Co., 1944), 11-12.
[232] See Chapter Five, section II, "Chapter 332."

II. Modern Applications?

A. "A Specifically Jewish Economic System."[233]

Comparisons between *halakhah* and modern economic theories have been made by various thinkers. For example, W. Sombart, a proponent of the free enterprise system, argues in *Jews and Modern Capitalism*[234] that, as paraphrased by Meir Tamari, the Jew is "a positive force in the emergence of modern capitalism ... the Jew [is] one of the prime creators of modern market economies ... [due to] his need for political freedom, his ability to transcend national boundaries, and Judaism's legitimization of the profit mode in the accumulation of capital."[235] One might add the Jew's exclusion from other aspects of societal intercourse to Sombart's list. Others have considered socialism to be the natural outcome of the Mosaic code and the moral teachings of the biblical prophets. Thus, A.S. Lieberman, one of the fathers of Jewish socialism, wrote: "For us, socialism is not strange. The community is our existence, the revolution our tradition, the commune the basis of the Torah, which has been made concrete in the laws that land is not to be sold in perpetuity ... a system of equality and tranquility."[236]

Meir Tamari argues that neither theory is in keeping with Jewish sources. The claim that Judaism is connected to the development of capitalism neglects the fact that *halakhah* "imposes important restraints on the free market model." Proponents of Judaism's consonance with socialism ignore Judaism's recognition of "the legitimacy of private

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[233] Quote from Tamari, *With All Your Possessions*, 4.
[234] (New Brunswick, N.J.: Transaction Books, 1982).
[235] Tamari, *With All Your Possessions*, 2.
[236] *Ibid.*

property, the profit motive, and market mechanism."[237] Further, with regard to labor, "There does not seem to be any trace of a Marxist labor theory of value in the Jewish concept of wages. The worker is not seen as the sole contributor to the value of goods and services but as one of the factors of production whose price (wage) is to be determined by a market mechanism."[238]

For Tamari, direct comparisons are problematic because *halakhah* views economic activity as taking place within a "distinctly *Jewish* framework ... [that] seeks to sanctify man's everyday actions in this field ... Attitudes and behavior with respect to poverty, money, finance, trade, and welfare are determined by Jewish conceptions of man's partnership with God ... and overriding understandings of the demands of justice, mercy, and righteousness" (emphasis added).[239]

Just such a difference in outlook is demonstrated by the case of fringe benefits. In many modern economies, the employer is responsible for providing the employee with health care, unemployment, and retirement benefits. Tamari observes that, in effect, this "transfer[s] some of society's welfare obligations to the firm ... When we examine Judaism's attitude to these social costs, the primary issue is not whether sick and elderly workers have to be looked after but rather whether this is the responsibility of the employer or of society."[240] As explained by Rabbi Uzziel, the late Chief Rabbi of Israel, with regard to injuries suffered on the job:

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[237] *Ibid.*
[238] *Ibid.*, 129.
[239] *Ibid.*, 4.
[240] *Ibid.*, 138-9.

> Both employer and employee require each other. The worker labors more for his own self-interest than for the benefit of his employer. The law, therefore, does not place any special responsibility on the latter for the worker's welfare or make him liable for injuries suffered ... At the same time, however, the Torah obligates him to make every effort to protect his workers from injury ... [241]

Often, in *halakhah*, the community funds share the responsibility with the employer for providing sick pay and the like.

B. Different Categories

To Tamari's caveat, we may add some others. We have already noted in Chapter One some of the differing socio-economic realities that underlie this legislation in the two periods. These include: 1) The medieval *halakhah* was written in a pre-industrial society by the Rabbis who also adjudicated legal matters that came before them in a tightly-knit, semi-autonomous community and, 2) The economic system of the Rabbis was more "distributive," to use Neusner's term,[242] than market-driven. Perhaps most importantly, the modern notion of unions and collective bargaining was unknown to the Rabbis (despite the implications from the Rabbis' rulings that some have suggested).

To complicate matters, the medieval *halakhah* applied to Jewish communities around the world, while modern secular labor legislation differs by country, and even by state and region in the United States. Since it is beyond the scope of this thesis to examine modern international or national law in great detail, the focus here will be on comparing the medieval Jewish laws to modern American laws in general.

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[241] As quoted in Tamari, 142.

[242] See above, Chapter One, section II, subsection B, "The Economics of the Rabbis."

Within this context it should be noted that, whereas the medieval Jewish laws are categorized under the larger rubric of "The Laws of Hiring" (which include persons, animals, and inanimate objects such as ships), United States labor legislation is split into two areas: "Employment law is a broad area encompassing all areas of the employer/employee relationship except the negotiation process covered by labor law and collective bargaining."[243] In general, contract law governs any private agreement between two parties for services rendered. Thus:

> Contract law governs the employment contract between the president of General Motors and the company, but a specialized body of law, known as labor law, governs the collective bargaining agreement between GM and the United Auto Workers ... The rules and principles of contract law underlie labor law ... but they have been adapted to meet the needs of the specialized subject matter.[244]

The area of collective bargaining is regulated by the National Labor Relations Act, the main provisions of which define *protected* activity. Stripped to its essentials, it reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection ...
>
> In addition to organizing, [section 7] protects employees who take part in grievances, on-the-job protests, picketing, and strikes. Section 8 defines employer unfair labor practices. Five types of conduct are made illegal [for example]: Employer interference, restraint, or coercion directed against union ... Employer discrimination against employees who take part in union or collective activities ... Employer refusal to bargain in good faith with union representatives ... [245]

Another key difference is that, whereas one set of laws governs the area of hiring in the medieval Jewish community, in the United States:

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[243] From the web page of the Legal Information Institute at Cornell Law School (law.cornell.edu).
[244] Jay M. Feinman, *Law 101: Everything You Need to Know About the American Legal System*, New York: Oxford University Press, Inc. 2000.
[245] From law.cornell.edu

> Employment law consists of thousands of Federal and state statutes, administrative regulations, and judicial decisions ... The area of labor law is governed by both federal law, state law and judicial decisions. It is also governed by regulations and decisions of administrative agencies. States are preempted from interfering with federal statutory law or with the guidelines promulgated by agencies established under federal law or by the U.S. Constitution. [246]

Even an employment contract between two private parties is superseded by statutory laws set forth to protect employees. Medieval Jewish employers were not subject to taxes like those in the United States that support a nationwide system of entitlements, such as Social Security and Medicare. Unknown to the Rabbis of the period would be anti-discrimination legislation, such as the Americans With Disabilities Act (1990) or the Civil Rights Act (1964) prohibiting discrimination on the basis of gender, religion or race.[247] Finally, where modern American labor legislation, such as wage regulations, is often part of a larger government plan to stabilize the economy or to promote growth,[248] Jewish law does not conceive of labor issues in terms of broader economic policy.

C. Common Principles?

Though the circumstances vary significantly from medieval to modern times, it is possible to draw some parallels between medieval Jewish and modern labor legislation.

1) *Primacy of the custom of the place (minhag ha-makom).* As noted in Chapter Five, this principle was established in Jewish law as a minimum protection for workers with regard to wages and fringe benefits. If workers are generally paid a certain wage in a

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[246] *Ibid.*

[247] Information on this and other matters related to modern American labor law was provided by Marta M. Fernandez, Esq., an attorney specializing in labor and employment law and representing management, in a conversation.

[248] www.brittanica.com, 2002 Encyclopaedia Brittanica Inc., On-Line.

locale, for example, that is what any worker employed in that locale must be paid. If workers are used to being fed bread and beans, that is the minimum a worker hired in that locale must be fed. In the United States today, floors have been established on a national basis, regulated by law, not custom. Protection for the employee is afforded by such provisions as minimum wage laws, unemployment compensation, health and safety legislation, and civil rights protections against discrimination in hiring.[249]

In the collective bargaining arena, aside from federal laws, there are even area and city-wide agreements on standard wages in some industries. In Los Angeles, California, for example, the hotel industry has negotiated a city-wide wage agreement with the Hotel Employees and Restaurant Employees union.[250] Though collective bargaining agreements are unknown to the medieval Rabbis, these local arrangements seem to echo the principle of *minhag ha-makom*.

Two caveats must be advanced, however. First, though fringe benefits were important to Talmudic and medieval *halakhah*:

> ... such benefits would seem to be of greater importance today. In societies providing only a minimal standard of living, ordinary wages are the essential and dominant factor. In the modern world, however, such considerations such as vacation, sick leave, and health insurance have become as important as, if not more important than wages.[251]

Second, though it seems apt to draw parallels between the medieval Jewish provision for a minimum local rate and the minimum wage laws of the United States, were the

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[249] As mentioned in this section, subsection B, "Different Categories," above. This insight and others were provided by David Schulman, Esq., a Los Angeles deputy city attorney specializing in discrimination and other workplace issues, in a conversation.
[250] Fernandez (see footnote number 247).
[251] Tamari, *With All Your Possessions*, 132.

Rabbis to live today, it is not at all clear that they would have supported this American guarantee. As Aaron Levine states:

> Since the *raison d'être* of the minimum wage is its antipoverty objective, Halakhah would apparently call for this measure to be financed by the same equity benchmark it invokes for all social welfare legislation. This benchmark consists of a broad-based proportional wealth tax. Far from mandating the practice of "invisible charity" in a broad-based fashion proportional to wealth, the minimum wage imposes the obligation only on employers.[252]

Additionally, given the reality of multinational corporations, a phenomenon that would be totally foreign to the medieval codes, it is unfortunately the case that "the custom of the place" where the work is done can operate to the detriment of the worker. This is evident in a global economy where multinationals hire workers in developing countries for minimal wages, according to the local custom, in conditions that meet local environmental standards, but which are often dangerous and harmful to workers' health and welfare.[253]

2) *Agreement entered into with full knowledge and understanding.* The Rabbis clearly assume that the workers enter into their hiring agreement as free and rational agents. As noted in Chapter Five,[254] for example, it is their responsibility to be aware of the prevailing wage and to accept or reject terms of employment. So too, does American contract law assume understanding on the part of both parties:

> Contract law is based on several Latin legal principles, the most important of which is *consensus ad idem*, which means a meeting of the minds between the parties or, in other words, a clear understanding, offering and acceptance of each person's

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[252] Aaron Levine, *Economic Public Policy and Jewish Law* (New York: Yeshiva University Press, 1993), 27.
[253] Insight provided by Dr. Rachel R. Adler, Associate Professor of Jewish Religious Thought and Feminist Studies at Hebrew Union College-Jewish Institute of Religion, Los Angeles, in a conversation.
[254] Section II, "Chapter 332."

> contribution. Lawyers say that it is from the moment of *"consensus ad idem"* that a contract is formed and may be enforced by the courts.[255]

The freedom to enter into a contract is underlined as well in the following analysis:

> Contract law demonstrates the law's respect for these values [i.e., freedom and autonomy] by enforcing the agreements people make and by imposing obligations on people only when and to the extent that they consent to assume obligations. This is what is meant by *freedom of contract*. Freedom of contract encompasses freedom to contract and freedom from contract.[256]

In collective bargaining agreements, though freedom to enter into the agreement with full understanding is assumed, it is an agent appointed by the union and representing the workers, who engages in the negotiations with the employer. Therefore, while the agent must fully understand the terms of the agreement, the same is not necessarily the case with those for whom the agent is negotiating.[257] Interestingly, though Jewish law has extensive provisions regarding agency,[258] they are never mentioned in the labor context.

3) *Taromet*. As we saw above,[259] *taromet* is a moral sanction in *halakhah* that is not legally actionable and has no equivalent in American law. For example, if the employer tells his agent to hire workers for four *dinarim*, and the agent hires them for three, they are paid three, since this is what they heard and accepted. They are entitled, however, to *taromet*, resentment, against the agent. In Chapter One,[260] we reviewed Judith Romney Wegner's analysis that, since law and morality are not separated in Jewish law, two legal

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[255] www.duhaime.org, Lloyd Duhaime, Duhaime & Co., Victoria, BC.
[256] Feinman, 175.
[257] Fernandez (see note number 247).
[258] See, for example, *Hilkhot Shaluhim* in the *Shulhan Arukh H. M.* 177-182.
[259] Section I, subsection B, "The Moral Imperative," of this chapter.
[260] Section II, subsection A.2, "Morality."

categories exist that address ethical questions. There are no such moral categories in the American legal system, which is secular. The closest one might come to such a concept is the redress based on "emotional distress." The difference is that "emotional distress" *is* actionable.

If, however, we broaden the context beyond the courts, the corporate boardroom and the union hall, to encompass the larger society, we can see that moral sanction does exist in the realm of the church, the mosque and the synagogue, as well as in the secular realm through civic activism such as boycotts and letter writing campaigns, for example.[261] Unfortunately, such measures are not often successful in bringing about the changes their advocates desire. In an effort to bring the secular and the religious closer together, Rabbi Michael Lerner, founder and editor of *Tikkun* magazine, has suggested that just as corporations are required to file Environmental Impact Reports, they be also required to file an "Ethical Impact Report." The measure of their success would be "dependent on their ability to prove a history of social responsibility."[262] This would be part of a "New Bottom Line in our Economic and Social Institutions, writes Lerner, " whereby values of love and caring would be included as criteria throughout the public life of society:

> Productivity and efficiency must no longer be judged solely by the degree to which any corporation or institution maximizes profits or power, but also by the degree to which a corporation, school, government institution, or social practice tends to support ethical, spiritual, and ecological sensitivity ... [263]

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[261] Schulman (see note 249).
[262] In a statement of the Tikkun Community's "Core Vision," on the *Tikkun* magazine website, www.tikkun.org
[263] *Ibid.*

Unfortunately, Rabbi Lerner has not been successful in getting this idea implemented.[264]

4) *Worker's permission to retract.* Chapter 333 of the *Tur H.M.* clearly underlines the principle that a worker may retract because, while people are considered servants to God, they are not "servants to servants," i.e., they are not slaves to other human beings. American law recognizes this right as well, in that an employer cannot compel someone to work. An exception, that is rarely invoked, is a contractual arrangement where it can be proven that the employee's service is unique, and therefore cannot be made up through monetary compensation. This "specific performance" provision has no parallel in *halakhah.*

An example of when "specific performance" might be sought is the situation of a well-known and popular actress, hired to star in a movie, who quit in mid-production. It might be argued that the movie cannot be made without her completing the contract. The employer could go to court and seek to have her ordered back on the set. He or she has a very high standard to meet in such circumstances, however, and it would only be in exceptional cases that the employer could succeed.[265] This is because two types of remedies for damages are possible: monetary and injunctive relief (i.e., behavior enjoined by a court), and there has been a great reluctance on the part of judges to impose the latter. The employer would be more likely to sue, and more likely to win, for time lost and the cost of hiring a replacement. This reluctance to impose injunctive relief

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[264] In an e-mail response dated December 10, 2002, Rabbi Lerner writes: "Sorry to say, no one has yet run with this. I developed it when I was an advisor to the Clintons, but they never bought into it."

[265] Fernandez (see note 247).

reflects a desire to protect individual liberty. It also follows from a belief that contract law should not be punitive or coercive, but should result in making the damaged party whole again.[266]

With regard to collective bargaining agreements, the provision of the National Labor Relations Act reads as follows:

> Sec. 143: Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.[267]

With regard to the employer, we saw in the *Tur H.M.* that he also has the right to retract *as long as the agreement has not yet been perfected* through the commencement of work or the employer's taking possession of the workman's tools. If he does retract after this point, he is considered by the Rabbis to be at a disadvantage. In the United States, the employer seems to have the greater advantage in what is known as "at will" employment. Many workers are hired "at will," meaning that an employee may quit and "an employer may dismiss at any time an employee who was hired for an indefinite period, for any reason or no reason, without incurring any liability to the employee."[268] Technically, this is a reciprocal provision; however, the inequality of economic power

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[266] This insight and others were provided by Nomi M. Stolzenberg, Professor of Law at the University of Southern California, specializing in property law; and co-Director of the USC Center for Law, History, and Culture, in a conversation.
[267] law.cornell.edu
[268] www.smartagreements.com, the Smart Text Corporation.

between employer and employee vitiates the legal power provided. Therefore, many exceptions have been recognized:

> Federal and state laws now protect particular groups of people from arbitrary dismissal or expressly prohibit discharge for particular reasons. For example, the Americans With Disabilities Act prohibits discharge of an employee because the employee is disabled. Federal and state laws also protect various classes of employees from termination due to race, sex, age, national origin and other factors. The courts have also recognized two basic exceptions to the employment at will rule. These exceptions are:
>
> 1. An employer may not terminate an employee at will if the termination would violate public policy.
>
> 2. An employer may not terminate an employee at will where there is an implied contract between the employer and employee.[269]

5) *Protection from loss.* We saw in the *Tur H. M.*, chapter 333, that the Rabbis are concerned with ensuring that the upper hand be given to the party at risk of losing the most. For example, in the case of an irretrievable loss to the employer, if no other workers can be found for the same wage, the employer is entitled to use the proceeds from the sale of the worker's tools, should he have these in hand, in order to hire workers for a higher wage. In American contract law, a provision protecting a plaintiff from loss also obtains:

> When a contract has been breached, the primary function of the law of damages is to place the injured party in as good a position as he would have been in had the contract been fully performed. Damages which are awarded for this purpose are called either "expectation" or "loss of bargain damages" ... [270]

The concept of damages is not applicable in the area of collective bargaining, however.[271] On the subject of the employer's being entitled to sell the workers' tools, this appears to

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[269] *Ibid.*

[270] Jane M. Friedman, *Contract Remedies,* Nutshell Series (St. Paul, Minn.: West Publishing Co., 1981), 2.

[271] Fernandez (see note 247).

be an area where *halakhah* differs from American law. The American employer is not allowed to keep the employee's property. In fact, even if the employer has loaned money to the employee, and the employee quits, the employer is required to pay the employee's wage without deducting for the loan.[272]

6) *Unjust enrichment.* According to the *Talmud* and subsequent Jewish law, the employer who had planned to pay his workers three *dinarim* a day may in fact have to pay four if his agent offered four, under certain conditions: if the work is valued at four or other workers in the locale are paid four. This is based on the Talmudic principle that "one should not do business with his neighbor's cow."[273] An example of "doing business with his neighbor's cow" is as follows. Reuven shows Simon Levi's field, and has Simon work on it, increasing its value thereby. Levi is then required to pay Simon for the improvement he made to his land, even though he never asked for the work to be done. If he were not to pay, in modern terminology, this would be called "unjust enrichment." One definition of unjust enrichment in the area of contract law follows:

> The term "unjust enrichment" ... means that if the plaintiff were to recover any sum in excess of the *value* of the promised performance, he would probably pocket the recovery rather than use it to secure a similar performance from another person. The result would be that the "aggrieved" party would be left with a sum of money in excess of any objective harm done to him.[274]

This concept does not apply in the modern employment setting, however. The employee is expected to perform whatever he or she is asked to do, and whatever the employee does with the employer's property continues to be the employer's property.[275]

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[272] *Ibid.*
[273] b. B. M. 35a.
[274] *Ibid.*, 13.
[275] Fernandez (see note 247).

7) *Indirect damages.* We saw above[276] that indirect damage, *dina d'garmei,* is defined as:

> An action which causes only minimal direct damage, but indirectly brings about a greater loss ... Though the matter is a subject of debate between the Sages, the Halakhah generally obligates the person who caused the initial damage for the total loss suffered by the other person."[277]

American law makes a similar provision in that, if an employee is wrongfully terminated, the employee can recover the wages he or she would have earned had he or she stayed with the employer, as well as damages for emotional distress, and possibly other losses. For example, if an employer sponsors an immigrant on a visa, but wrongfully terminates the employee while his or her immigration status is still pending, that person might be deported and the employer would have still to make restitution. With regard to an employer, indirect damages can only be sought where a special contractual relationship exists between employer and employee. In that case, the employer has a duty to seek a replacement. If he or she does not find one, and a loss is caused as a result of an employee's promise, then a remedy for indirect but non-speculative damages may be sought. Most employees are hired "at will," however, and no recovery for indirect damages is provided by American law in this circumstance.[278]

D. Concluding Thoughts

In a recently published book, *The Edges of the Field* (Boston: Beacon Press, 2000), Joseph William Singer recounts the story of the Malden Mills textile factory in Lawrence, Massachusetts. The factory suffered a devastating fire before Christmas of 1995. Instead of closing the plant, laying off its 3,000 employees, and collecting insurance, owner

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[276] In Chapter Five, section III, "Chapter 333."
[277] Steinsaltz, *Reference Guide,* 178.
[278] Fernandez (see note 247).

Mordecai Feuerstein, who was 70 years old and close to retirement, announced he would rebuild the plant and pay workers their wages for the next month, including their $275 Christmas bonus. Singer tells us that Feuerstein "made good on his promise. He continued to pay his workers' salaries for several months ... As of 1998, almost all the workers had been rehired."[279]

In explaining why, "in an age of downsizing, Feuerstein stood out,"[280] Singer credits his Jewish background. "As an Orthodox Jew, Feuerstein relied on traditional Jewish teachings about the moral obligations of property owners. Feuerstein answered questions about his action by quoting a Talmudic saying of the great Jewish teacher Hillel. 'Where there are no men, be a man.'"[281] Singer contrasts Feuerstein's fusing of marketplace and religious values with the corporate need to ensure profits for shareholders. Our discussion has included the idea that *halakhah* is a theocratic system whereby law and morality are intertwined, in contrast to American secular law. Therefore, an important question to explore might be: Is there a difference in the way the two systems would approach a case like Feuerstein's? In other words, Would *halakhah*, as a religious system, mandate Feuerstein's actions?

The brief comparison between the medieval *halakhah* and American laws on the hiring of workers that we have undertaken suggests that both strive for similar goals, that is, justice and rectitude as each system perceives them. Though the methods for achieving

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[279] Singer, 8.
[280] *Ibid.* 9.
[281] *Ibid.*, 8.

these goals may differ, the two systems are not so far apart as one might imagine. It is clear that both systems value individual freedom. It is also clear that both systems attempt to protect the interests of the parties involved, particularly the less powerful party which is, often, the worker. American law relies on the employer to provide this protection. In a case like Feurstein's, the worker would be compensated for his job loss through unemployment insurance to which the employer has contributed. This compensation would be for a set period of time, generally six months. Under certain circumstances, the worker might also be offered various services such as help finding another job.

Halakhah also protects the worker when a job loss occurs, but the formula is different, with a greater reliance being placed on the community rather than on the employer to fulfill this obligation. From the material we have examined in the medieval "Laws of Hire," the worker is compensated for loss of work if the employer has been negligent, for example, by not inspecting a field the night before to ensure that it is workable. In that case the worker is paid like a *poel batel*, an idle worker, for the time he was hired to work. If, however, the loss was due to *force majeure*, like in Feuerstein's case, the employer would not be held liable. What is more, the employer's responsibility for ensuring the welfare of the worker beyond the term of his engagement is never mentioned.

We might conclude, then, that both the medieval *halakhah* and the American legal system try to balance freedom and protection. Both systems operate from an ethical

perspective, though *halakhah* is theocratic while American law is secular. Moral sanction occurs within the framework of the law in *halakhah*, while occurring outside of it in American legislation. Morality and ethics notwithstanding, it seems as though neither system would mandate the generous behavior of a Mordecai Feuerstein. He relied on an aphorism from *Avot*, not the provisions of *halakhah* and a Conservative or a Reform Jew might have done the same. Feuerstein may have based his actions on his personal sense of Judaism's ethical mandates, but neither *halakhah* nor American legislation would understand his responsibility towards his employees to guarantee their future employment in this way. What both systems do seem to guarantee, however, in theory at least, is that both employer and employee will be given due consideration in the formulation as well as in the adjudication of the laws.

APPENDIX A:
Charts 1 & 2

TUR CHAPTER 332 CHART: DECEIT
CHART #1

Tur:

Employer says 4 — Agent says 3 — He gives 3 and resentment

No difference if: wages on agent or employer, or work is worth 4
because mind reconciled to lower rate

Employer says 3 — Agent says 4

- If claims responsibility for wage: — Agent gives 4 and collects from employer benefit
  Rama: Only up to 4
- If claims employer is responsible:
- -- If worth 4: — Pays 4
  -- If not worth 4: — Pays going rate:
  - If 4, pays 4
  - If 3, pays 3
  - If 3 or 4, pays 3 and resentment

❖ If workers say, "As stipulated by employer" — Their mind was on the higher rate

- If agent claims responsibility for wage: — Pays 4 and collects from employer benefit
- If agent claims employer responsible: — Pays 4 if rate is 3 & 4
  Or pays 4 if work worth 4 even if rate is 3

Talmud:

Employer says 4 — Agent says 3 — He gives 3

Why resentment? They understood and accepted
But they can say: "Do not withhold good from those to whom it is due"

❖ If workers say, "As stipulated by employer" — Undecided
Posekim: He gives 3

Employer says 3 Agent says 4

- If: "Wages are on me": Agent pays 4. Collects what benefited employer
- If: "Wages are on employer"
  - -- If work worth 4: Pays 4
  - -- If work cannot be examined: Pays going rate as above
  - ❖ If workers say, "As stipulated by employer" Their mind was on higher rate
  - -- If: "Wages are on me": Pays 4. Collects what benefited employer.
  - -- If: "Wages are on employer": Pays 4 if work worth 4 or rate is 3 or 4

The Rif and the Rambam:

Employer says 4 Agent says 3 Workers accept 3 but resentment

Employer says 3 Agent says 4

- ❖ If: "Wages are on me" Agent pays 4, collects 3 from employer
- ❖ If: "Wages are on employer" How workers hired?
  - If 4, they get 4
  - If 3, they get 3
  - If 3 and 4, they get 3
  - If work is worth 4, they get 4
  - If worth undetermined, they get 3 and have resentment

The Rosh (Rejected by Beit Yosef):

Employer says 3 Agent says 4

- ❖ And "Wages on employer": How workers paid?
  - ✓ If going rate 4, they get 4
  - ✓ If rate 3 or 4:
  - Get 4 if work worth 4
  - Otherwise, get 3
  - ✓ If going rate 3, they get 3 regardless of work's worth

TUR CHAPTER 333 CHART: RETRACTING
CHART #2

Principle	Condition	Consequence
Employer/employee can retract Can say: Go hire yourself out/hire other workers	Before the contract has been perfected	Resentment (for trouble of finding other job/other workers)
	Precisely if he could not be hired out the night before when employer hired him and now can't find work (Maggid):	Resentment only
Employer cannot retract	But if worker can find other work:	Worker has resentment only
	If employer takes possession of tools (Tam) Or if workers have gone [Not strictly whether or not they went, but whether they could find other work or were delayed so could not find work (Rosh)]. And if cannot find other work:	Pays wages like an idle worker or pays the difference
	If they were hired the night before, and could have gotten other work then and now not (Maggid):	Ditto
	If employer gives heavier work (Rashba):	Worker does not have to accept
	Additional condition: If employer checked out the site the night before: If did not check out site:	 Not liable Liable

Artisan cannot retract	If employer has taken possession of tools and if dead loss:	Employer can sell the bundle and hire other workers for more (if he cannot hire for less) (Rashba)
	If not dead loss:	Must wait until he can find cheaper labor (Rashba)
Day laborer can retract	If he just quits (Ri) and if there is no dead loss:	Calculate how much he did is worth (even if cost goes up, or down in which case he gets more)
	If because price went up:	We don't listen to him
	If money no longer in his hands:	Money becomes a debt (Maharik)
	If dead loss and force majeure and if second half of the day:	Does not get full wage (Rosh)
	and if first half of the day:	Gets full wage (Rosh)
Contract worker cannot retract	Dead loss or not:	Paid according to what it will cost in the future to finish the work (dispute in the gemara – check)

Day laborer cannot retract	If dead loss and no other workers to hire:	Employer can deceive them (even if they had not yet begun the work) Or hire other workers against them Employee must return money for unfinished work to employer (Rambam)
	If other workers to hire:	Cannot deceive them; must pay new workers according to last agreement
	If employer has tools and if dead loss:	Additional amount taken from first: can distrain on their property - up to 40-50 zuzim (dispute over meaning)
	and if no dead loss:	Must wait for cheaper labor
	If no bundle:	Pays only up to wage of first Pays original worker for what he did If worker just went to job site, he loses his time and his wage
	But if employer does not look for other workers: Or if he could not hire others at the time he hired the first:	Workers are exempt (Ramban)
		Workers are exempt (Rashba) not exempt (Ramban)

APPENDIX B:
Shulhan Arukh

APPENDIX B

SHULHAN ARUKH: Hilkhot Sakirut Poalim

Chapter 331: The employer of workers must conduct himself with them according to the custom of the locality, and in it three paragraphs

1. **The one who hires the workers and tells them to rise early or to stay late, in a place where it is not the custom to rise early or to stay late, cannot compel them, even if he adds to their wages, since he did not stipulate thus at the time of their hiring.**

Gloss: It was not the custom in the city, or that he said to them: "I am hiring you according to the law of the Torah, you are obligated to leave your houses at the time the sun begins to shine and to do the work until the stars come out" (*Tur*, chapter four). And on the eve of Shabbat, he himself is the first to go to his house, so that he is able to fill for himself a bucket of water, and to roast for himself a small fish and to light the candle (ibid., chapter five in the name of the *Yerushalmi*). If there was no custom in the city, however the majority of the people of the city came from a place where there is a custom there, we follow the custom of the city from which they came. He went from a place where the custom was to rise early and to stay late, to a place where it was not the custom to rise early and not to stay late, or the reverse, we follow (the custom) of the place where he hired the workers (*Nimmukei Yosef*, beginning of the chapter, "HaPoalim," in the name of the *Yerushalmi*). And only a thing that is found and done the majority of the time is called a custom, but a thing that is done only one or two times is not called a custom (*Ribash*, number 475).

2. **In a place where the custom is to feed (the workers), one must feed; (where it is the custom to) supply dry figs, dates or the like, he must supply; everything is according to the custom of the locality.**

3. **The one who hires workers, and they said to him: (Pay us) Like one or two of the inhabitants of the city, one calculates the highest wage and the lowest wage and one gives the average between them, for example if the highest is six and the lowest is four, one gives five.**

Chapter 332: The law re. the one who says to his agent: go and hire me workers, and he hired them for more than what he (the employer) said to him (the agent), and in it six paragraphs

1. **He said to his agent: Go and hire me workers for three (zuz), and he went and hired them for four, if the agent said to them: Your wages are upon me, he must pay them four, and he receives from the employer (only) three, and he suffers a loss of one from his (own) pocket.** (And there are those who say if all the workers are hired only for four, the employer pays the agent according to

what he benefited him – *Tur* chapter one[282] and see *Beit Yosef*.) **And if he says to them: Your wages are upon the employer, he pays them according to the custom of the locality. If there was in the locality someone who was hired for three and someone who was hired for four, he (is obligated to) pay them only three, and they have resentment against the agent. And in what case does this apply? When their work cannot be measured; however, if their work can be measured, and behold, it is worth four, the employer must pay them four, for if his agent had not said four to them, they would not have troubled themselves and made something worth four.**

2. **The employer said to him: Hire me (workers) for four, and the agent went and hired for three, even if their work is worth four, they are entitled only to three because, behold, they took (the work on) themselves (i.e., voluntarily), and they have resentment against the agent.** (And it makes no difference if he said: Your wages are upon me, or he said: Your wages are upon the employer – *Tur*, chapter one.)[283]

3. **The employer said to him: For three, and the agent went and said to them: For four, and they said: We accept as the employer stated, they could only assume that the employer would pay more than four; therefore, we evaluate what they have done, if it is worth four, they receive four from the employer, and if it is not worth (four) or if (the value) is not known, they are entitled only to three.**

Gloss: And if the agent said: Your wages are upon me, in any case he pays them four; and similarly if workers were generally hired only for four (*Tur*, chapter two).

4. **The employer said to him: For four, and the agent went and said to them: for three, and they say to him: As the employer has said, even if their work is worth four, they are only entitled to three, for behold, they heard three and they accepted it upon themselves.**

Gloss: The employer who said to the workers: Do work with me for four just as your fellows did, and they said: Just as our fellows did, and it is found that he paid them more, he must pay these as (he paid) their fellows (*Beit Yosef* in the name of the students of *Rashba*). The employer who deceived the workers and said to them: Work with me for four like the rest of the hired workers, and they found that they were hired for more; or if the workers deceived the employer in a similar way, behold it is as if they had not hired one another at all, and he pays them the lesser amount that is (paid to) the workers (i.e., in that locality) (*Rabbenu Jeroham*, chapter 29,[284] section 1, in the name of *Rashba*). An employer who hired a worker and he told him to take an object for his wage, afterwards he can give him its monetary

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[282] In my version of the text, this is in chapter two of the *Tur*.

[283] *Ibid.*.

[284] In R. Jeroham's work, *Toledot Adam V'Hava*, the chapter divisions are literally referred to as *Netiv*, "Pathway."

value (instead), since he (the worker) did not draw the object, he did not perform *kinyan* on it (and the Responsa of *Maharam*,[285] Prague edition, chapter 165).

5. **If the employer himself hires for a sela, and the work becomes cheaper (i.e., the cost fell) and it seems to them that the employer is angry, and they persuade him with words, he is not able to say: I was only persuaded with the understanding that you would lower your wage according to the low price, because they can say: We only persuaded you with the understanding that we would do good work and thus we did.**

Gloss: And there are those who disagree that if the employer said explicitly: I am only going to pay you thus, he was able to retract without (grounds for) resentment, even if they retracted and persuaded him, he is only obligated to pay them according to what he said (*Nimmukei Yosef*, chapter "HaUmanim"). **And thus if the work has risen in cost and it seems to him that they are angry, and he persuaded them with words, they are not able to say: You only persuaded with the understanding that you would add to our wages according to the appreciation (in the cost of the work), because he can respond: I only persuaded you with the understanding that I would add to your food and drink and thus I did.**

6. **If the work is worth five, and he hired them for four, and the cost went down and stayed at four, he gives them four.** (And he is not able to say to them: Also now take a *dinar* less than what it (the work) is worth – *Tur*, chapter five).[286] **And thus if he hired them for a *dinar* more than what is proper (i.e., the going wage), and the cost of the work goes up, they are not able to say: Now also add a *dinar* more than the going rate according to the current appreciation.**

Chapter 333: The one who hires the worker and the worker retracts before he has begun or afterwards, and in it eight paragraphs

1. **The one who hires the workers and they deceive the employer, or the employer deceives them, they have against each other only resentment (i.e., no legal recourse).**

Gloss: And there are those who say that if an employer took possession of the artisan's tools that he uses for his work, the employer is not able to retract, neither the worker if he is a contract worker (*Tur*, in the name of *Rabbenu Tam*); however, if he is a day laborer, he is able to retract as it has been made clear (Tosafot and *Rosh* at the beginning of the chapter "HaZahav"). However, he is able to withhold the artisan's tools and to hire others (*Mordecai*, chapter "HaUmanim," and *Nimmukei Yosef*, in the name of the students of *Rashba*, and *HaMaggid* (Maggid Mishneh), chapter nine). **In what circumstances does this apply? If they had not gone (i.e, they had not begun work). But if the donkey-drivers had gone and found no hay; or the workers, and they found the field waterlogged; or if they were hired to**

[285] Rabbi Meir Lublin. Eastern Europe, 1558-1616.

[286] In my version of the text, this is in chapter two.

irrigate the field and they found it filled with water, if the employer had examined his work the evening before and found that it required workers, the workers are entitled to nothing, for what was he supposed to do? And if he had not examined (the field), he must give them their wages as an idle worker (Explanation: we evaluate who would hire himself out for this work, and thus the donkey-driver who hired out a donkey to bring a load, how much he is willing to reduce his wage and sit idle and come empty), **for it is not the same to come full as to come empty, nor is the one doing work like the one who is idle.**

2. **In what circumstances does this apply that they have against him only resentment? If they had not gone (to work), specifically if they were not able to hire themselves the day before when this employer had hired them; however, if they were (able to be) hired the day before, and now are not able to be hired at all, behold this is like a dead loss to them, and he pays them their wages like an idle worker; and if they were hired for a lesser (amount), he pays them the difference. And if they had gone** (and specifically that they had gone themselves, but not their agent) (*HaMaggid*, chapter nine, in their name), **even if they did not find (the opportunity) to get themselves hired the day before, he pays them their wages like an idle worker, provided that now they cannot be hired at all. But if they find someone who would hire them for his hire, they have against him only resentment.** (And there are those who say that even if he only found work that is harder than this (i.e., the original job), unless they want to add to their wages, they must get themselves hired elsewhere (*Mordecai*, chapter "HaUmanim"); and there are those who disagree (*Beit Yosef* in the name of the students of *Rashba*). **And if they find they can hire themselves out only for less (money), he pays them the difference. And all of these laws are in the case where the employer did not examine his work the night before, since he is negligent; but if the employer was not negligent at all, behold this is a *force majeure* (i.e., he was prevented from carrying out his responsibilities because of unavoidable circumstances), and he is exempt as has been made clear.**

Gloss: And see below, chapter 334, paragraph 2. A teacher who hired himself for two years and he began the first year, the term "beginning" also applies for the second year, and this is the rule for all workers (The glosses of *Mordecai*, chapter "HaUmanim").

3. **The worker began his work, and retracted from it in the middle of the day, he (can) retract, and even if he had already received the wages of his hire, and he is not obligated to pay the employer, he is able to retract and the money is a debt upon him, as it is said: "Because the children of Israel are my servants" (Lev. 25:55), and not servants to servants.**

Gloss: From this reasoning the worker is forbidden, even he is a teacher or a scribe, to hire himself out to be in the house of the employer for a fixed period of three years (the glosses of *Mordecai*, chapter "HaUmanin").

4. **What is the law for the worker who retracted after he had begun (work)? We evaluate what he has done, and he takes (it)** (between the high cost of the work

and the low cost; and specifically when he retracts without a reason, but if he retracts because (wages) went up, we don't listen to him) (*Tur*). **And if he is a contract worker, we evaluate what remains to be done** (see above, chapter 176, paragraph 23), **whether the cost (of the work) falls at the time he was hired or whether it does not fall, whether the cost of the work falls afterwards or does not fall, we evaluate what remains to be done. How? If he accepted to reap for two *selaim*** (or if he accepted upon himself to make so many barrels of wine) (*Terumat HaDeshen*, number 329), **if he reaped half and left half; (if he accepted) to weave a garment for two *selaim*, (and) he wove half and left half; we evaluate what remains to be done, if it was worth six *dinarim*, we pay him a shekel or they can complete their work; and if what was left is worth two *dinarim*, we pay only a *sela* for behold they only did half the work. Gloss:** And the employer who retracts, his law is like the contracted laborer, in that he is at a disadvantage) (*Tur*).

5. **In what circumstances does this apply? In a case where there is not a dead loss; but, in the case of a dead loss, for example (if he was hired) to remove flax from (the vat in which it was) steeping, or he hired a donkey to bring flutes for a death (i.e., funeral) or for a bride (i.e., bridal procession), or the like, neither a day laborer nor a contracted worker is able to retract.** ((In the case of) a maidservant or a male servant of the employer, it is called a dead loss, when the employer cannot do the work himself, and because of this it is a loss to him) (*Terumat HaDeshen*, number 329); **unless he is prevented, for example if he is ill** (he or his wife or his children) (section 5, number 329) **or he heard that (a near relative) of his had died** (in the language of the *Tur*). (However, he is not obligated to pay them their full wage, only what they did, and they have the advantage (*Tur* ibid. and the *Rosh* and *Rashi* and the other *Posekim*, see chapter 100, 25). And if the employer retracted, and the contracted workers, after the *force majeure* has passed, returned without condition and did their work, he must pay them for all their work and he cannot deduct from them at all (*Tur* in the name of his father the *Rosh* and this in his *Piskei*). But if such is not the case, he deducts from him all the days of his illness or *force majeure*, even though the worker did not return to it (*Tosafot*, and *Rashbatz*, and the Responsa of *Maimon* (number 60, "*Kinyan*," paragraph 31). And this is also the rule for the teacher who was ill that the money is deducted for his illness. However, if the worker or the teacher had already received his wage, there are those who say that he is not obligated to give it back (*ibid.*, in the Responsa of *Maimon*, and in *Mordecai* see number 100, 25). And the teacher who retracts, it is called a dead loss.

   And thus a scribe who has accepted to write a *sefer* and retracts, it is called a dead loss (Responsa of *Maimon* mentioned above, and *Mordecai* chapter "HaUmanim"). For teachers, their law is like that of workers who are obligated to do as the local custom, to rise early or stay late, as was made clear in chapter 331, and he is forbidden to do his work with the lesson or the youth in the evening for more (time) than is proper, or to indulge in gluttony, and anyone who would alter is at a disadvantage, and we are to remove him (*Mordecai*, chapter "HaUmanim," in the name of the *Yerushalmi*, and the glosses of *Maimon*

at the end of the laws of hiring). (If) he hires himself out for a time, he is under the law of the day laborer; but if he hires himself out to teach a book or half a book, he is under the law of the contracted worker (the glosses of *Maimon*, chapter nine). And see chapter 334 and 335 on the laws of a teacher. **And if he was not prevented by a *force majeure*, and he retracted, if he could find other workers to hire as he hired these (i.e., for the same wage), he can hire against them or deceive them.**

Gloss: And if he found other workers (to hire), and he deceives these, he is obligated to pay them according to what he agreed to in the last case (*Tur*, chapter three in the name of the *Rosh*). **How does he deceive them? He says to them: "A *sela* is what I stipulated with you, come and receive two," until they finish their work, and he only has to give them what he stipulated in the beginning; and even if he gives them the two, he can recover from them the additional amount. Gloss:** A worker who worked *gratis* with the employer, he is able to retract even if it is (with regard to) a dead loss (*Maharik*, paragraph 133).

6. **How? He can hire (other) workers against them and they finish their work without (his suffering) a dead loss, and the entire additional amount he has to pay these last laborers in excess of what he agreed to with the first he takes from the first. Up to what (amount)? Up to as much as the wages of the first ones (that he owed them). And if they have money in his (the employer's) hand, he can hire (other workers) to finish the work up to forty or fifty *zuz* for each day, for each worker, even if he hired the (first) worker for three or four.**

Gloss: And if he did not hire other workers against them, the workers are not obligated to compensate him for his damage (*Nimmukei Yosef*, chapter *HaUmanim*). And there are those who say that this hiring against them up to forty or fifty *zuz*, that is, precisely (in the case) where he seized the artisan's tools, but (as for) the rest of the cases, no (Mordecai, the chapter mentioned above). And precisely in the case of a dead loss where there is no money, for example a teacher or similar cases, but in the case of a dead loss in which money is involved, he must pay him for all of his damage (*Terumat HaDeshen*, chapter 329, the glosses of *Asheri*).

7. **In what case does this apply? Where there are not there workers to hire to finish the work. But if there are workers to hire for their wages (i.e., the original), he says to him: "Go and hire from these and complete your work," whether (in the case of) a day laborer or a contract worker, he has against them only resentment, and we evaluate for the day laborer what he did, and for the contracted worker what there is left to do.**

8. **He said to the artisan: "Make for me such-and-such thing and I will take it from you," and the artisan made it, and afterwards he does not want to take it, and this is a thing that if he will not take it immediately, he (the artisan) will suffer a loss, he (the buyer) is obligated (for the loss).**

Gloss: A prayer leader who hired himself out with the leaders of the city for a year according to such and such a condition, and afterwards hired himself out to the

citizens of this town with a second set of leaders, and did not stipulate conditions, he certainly hired himself out according to the first condition. And specifically, if he returned and hired himself out for a second year; but if he remained silent with them, we do not say that he remains according to his first condition (*Ribash*, number 475, and *Maharik*, paragraph 118). The father who hired out his son for work, even if he did not provide food for him, and he certainly is comfortable with what the father does, and he receives (a wage) according to what the father determined, until the time that he retracts (Respons a of *Ramban*, number 105). A teacher (working for) an employer, where the employer said to him: "Go from me," and the teacher consented, the employer is able to retract and detain him, for he cannot forego his obligation (to educate) the young lad (*Mordecai*, beginning of chapter, "HaUmanim," and Responsa of *Rashba*, number 873 and *Rabbi Jeroham*, number 29, section 3). However, with regard to the rest of the workers, if he says to him before two (witnesses): "Go from me," he is exempt from any relinquishment. And there are those who say, if he spoke to him in an angry manner, that he is not exempt (*Rabbi Jeroham*, in the chapter aforementioned, 2, "HaDaot").

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