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OPPORTUNITY COST AS TREATED IN TALMUDIC LITERATURE

INTRODUCTION

The alternative or opportunity cost doctrine has provided modern economic investigations with an invaluable tool of analysis. This doctrine advances the conceptualization of cost beyond its superficial identification with explicit outlays or payments. Cost is viewed as reflecting the value of *opportunities foregone*. The cost of obtaining anything is the value placed on whatever must be sacrificed in order to obtain it. Implicit in this formulation is the rejection of the idea that cost must in some way be associated with disutility. As long as time spent on a particular activity precludes the simultaneous pursuit of another activity, an opportunity cost is incurred.

Talmudic literature recognizes the phenomenon of opportunity cost and discussions abound regarding its legal ramifications in a variety of circumstances. Four examples (three of which will be discussed) of the impact of Halakhah on opportunity cost are in the following settings:

1. loss of earnings incurred by individuals in the process of performing *mitzvot*;[1] 2. loss of earnings suffered by assault victims during their convalescence;[2] 3. loss of earnings occasioned by the breaking of contracts;[3] and 4. usury violations arising out of business transactions that call for one party to desist from his usual earning activities as a precondition to receive working capital.[4]

I

Chancing upon the lost property of his neighbor, the Jew is duty bound to salvage and return the lost object to its right-

ful owner[5] and may not demand or accept compensation for so doing.[6] Exegetical interpretation of the verse "Save that there shall be no poor among you"[7] has, however, limited this obligation only where its discharge would not impose a financial loss on the retriever.[8] Consequently, if one found a lost object and was at that moment engaged, he need not stop his activities to return his neighbor's property. If the retriever had incurred an opportunity cost in returning his neighbor's property, he might have a legal claim on the owner for his loss depending on the circumstances.

There are three possibilities for recovery: Firstly, where both parties (the owner and the retriever) stipulate a fee for undertaking to find the lost property, the Smah rules that the agreed upon fee is binding only to the extent that it covers the *feasible* foregone earnings of the retriever. Any excess amount cannot be exacted, as the proprietor may claim that *that part of his stipulation* was made in jest (*meshata ani boch*).[9] The Ktzot disputes the reasoning of the Smah and states that as long as an opportunity cost was in fact incurred, the retriever has a valid legal claim to *any* amount agreed upon by the owner, even if it is in excess of his feasible loss.[10] Both the Smah and Ktzot agree they would rule the same irrespective of which party initiated the agreement.

Should the retriever undertake to find the lost property without stipulating a fee with the owner then he cannot claim his lost earnings since the proprietor could have found the lost object himself. The rescuer can nevertheless, recoup a fraction of his foregone income. The owner is obliged to compensate him with a fee equal to the minimum remuneration an unemployed worker would demand for performing work of the nature at hand, or the minimum compensation a typical worker in the restorer's line of employment would demand if asked to abandon his work in favor of idleness, whichever is lower in value. The principle of *anan sahadi* is invoked, as we are certain, the owner would incur, at the very least, the smaller of the above expenses in order to secure the restoration of his property.[11] In the absence of the owner, however, three individuals constituting a *Bet Din* can act in the interest of the owner and offer a bystander compensation

for the successful recovery of the lost property. Their offer may extend as high as the value of the lost article itself, as we are certain that the owner would be pleased with this arrangement since the restoration spares them the nuisance involved in replacing it. This applies also when an animal is found and the rescue fee is as high as the animal's market value, for the *subjective* value of the animal to the owner exceeds its market value by virtue of the fondness and attachment he feels for it.[12]

Does one have the option of refusing the compensation offer, claiming a preference to engage in his own work? Or does one have the obligation to accept the offer and discharge the *mitzvah* of *hashavat avedah?* The Bach holds that if the opportunity cost consists merely of his foregone earnings, he is duty bound to accept the offer. However, if at the time he was confronted with the offer he was engaged in restoring his own property, whether or not it is incumbent upon him to accept the offer is a subject of dispute between the Rosh and Rif.[13]

In the third situation neither the owner nor a *Bet Din* of three are present when the rescue operation is in progress. In this instance, the amount of compensation the restorer is entitled to is disputed by the *Rishonim.*

The Rambam[14] and Bet Yosef[15] state that the restorer is only entitled to a fee equal to the minimum amount he would have demanded if asked to abandon his work in favor of idleness. The variability of this measure is explicitly recognized by the Rambam. He points out that the eagerness on the part of the worker to trade part of his wages for leisure is directly related to the irksomeness of his work experience. Hence, we would expect the blacksmith and metal worker, engaged, as they are, in arduous and unpleasant work, to express a relatively stronger preference for leisure than one performing pleasant and light work, i.e., a money changer. The disparate work-leisure preference scales of the money changer and blacksmith would be reflected in the amount of reduction in wages each would willingly absorb given the opportunity to abandon their work in favor of leisure.[16] In addition, long periods of idleness could very well be perceived by the worker as adversely affecting his health[17] and exerting a corrupting influence on his moral char-

acter.[18] Another consideration is the time of day the offer of exchanging work for leisure is made. And finally, the spending habits of the worker would doubtless play a role. The greater his need for money, i.e., large family, large debts, expensive tastes, etc., the less willing he would be to trade work for leisure even at the margin.

It is Rambam's view that most people, given the chance, would substitute wage units for leisure at the margin.[19] This assumption illuminates the underlying logic for the discount element called for by the Rambam earlier.[20] The retriever cannot claim title to his foregone earnings in full, as he did not experience the disutility of his usual work in the time spent on the recovery. At the same time, no increase is allowed to compensate him for his time as no remuneration may be demanded or accepted for the performance of a *mitzvah.*

Rashi, however, offers a different formula of compensation for the above loss. According to Rashi, the remuneration of the retriever is *equal* to the minimum fee he would demand if asked to abandon his work in favor of restoring the last article in question.[21] This calculation, assuming the original work was more irksome than the effort involved in restoring the lost object, will result in a higher compensation than would occur under the Rambam's formula. Rashi's formula allows compensation for the efforts involved. Evidently, it is Rashi's view that compensation for the performance of a *mitzvah* under these circumstances is permitted.[22]

The P'nai Y'hoshua, interpreting Rashi's view, limits the formula to instances where it would work to the advantage of the owner. Hence, in the event the original work was less burdensome than that of restoring the lost object, the restorer has a legal claim only to an amount equal to his foregone earnings.[23]

A third formula of compensation is devised by Tosafot R'yad which states that the retriever's fee is set equal to the minimum payment required to induce an *unemployed worker* to perform the restoration work at hand.[24]

R. Chananel devises still another formula. No discount is admitted on account of the work-leisure trade-off. The formulation does, however, introduce a new element by explicitly

recognizing the variability of a worker's earnings during the course of the year in response to fluctuations in the demand for his services. Hence, in close proximity to *Yom Tov,* the services of the tailor are in heavy demand and accordingly he earns a relatively high compensation for his work. At other times of the year, demand for his work tapers off considerably and is reflected in his relatively depressed earnings. Time lost from work to retrieve a lost object is, according to this view, compensated not by his actual foregone earnings but only by the estimated earnings he could have commanded for his work during slack periods.[25] Only in the event the recovery coincided with a slack period of employment for the retriever would the restorer recoup his foregone earnings in full.

Although R. Chananel's view enjoys wide acceptance among the *Rishonim,*[26] its underlying logic is, paradoxically, quite elusive. Commenting on R. Chananel's view, Tosphot, in *Bekhorot* 29b, regards it as being inexplicable.

The Ran explains that R. Chananel's formulation is based on the presumption that when an individual abandons his own work in favor of restoring his neighbor's property—performs the *mitzvah* of *hashavat avedah* in spite of an explicit exemption—the restorer does so with the implicit intent of sustaining some loss for the sake of attaining the *mitzvah of hashavat avedah.* While this presumption disallows a subsequent claim on the part of the retriever for *full* compensation of his foregone earnings, he, may, nevertheless, claim as his reward the remuneration he could have earned during slack periods.[27]

The *Orukh Hashulchan* views R. Chananel's formulation as providing a restrictive interpretation of the exemption proceedings from the verse "Save that there shall be no poor among you."[28] The verse is interpreted as merely establishing the principle that should the restoration act impose a loss of such magnitude that it would lead to the retriever's impoverishment, he is exempt from performing the *mitzvah* of *hashavat avedah.* Losses of a lesser magnitude, should circumstances require it, are, however, expected to be incurred by the retriever. Foregoing the remuneration one could earn during slack periods of employment is regarded by R. Chananel as a loss that

could lead to impoverishment. Therefore he is always entitled to be compensated by this amount for his *interrupted labor.* Opportunity cost losses in excess of this amount cannot, however, be recouped as foregoing the *differentia*l between current wages and slack period wages is not regarded as a *dire* financial sacrifice.

A corollary of the above interpretation of R. Chananel's view is that in the event an individual abondons the salvage of his own property in favor of rescuing the more valuable property of his neighbor, the restorer can recover his loss in full. This follows from the fact that discarding one's own property can properly be regarded as an act that could lead to impoverishment.[29]

The *Orukh Hashulchan* attaches critical importance to slack period wages as a measure of dire financial sacrifice. This, however, is apparently valid only under the restrictive assumption that the restorer does not have to rely on his accumulated savings to maintain a subsistence standard of living during slack periods of employment. Should the slack period wages fall below a subsistence wage, it is, however, difficult to see why foregoing the differential between current and slack period wages would not constitute a dire financial sacrifice as this differential must be *drawn upon* to maintain subsistence during slack periods of employment.

Another interpretation of R. Chananel's view is offered by the Even Haazel. This approach views R. Chananel's formulation as providing a measure of the value that must be attached to *work expended in restoring lost property.* Such work is assessed, for the purpose of compensating the restorer, at a price equal to the reward the latter would *invariably earn for performing his usual work.* What the restorer could invariably earn for his usual work is, in turn, determined by his slack period remuneration.

The above analysis of R. Chananel's view leads to the conclusion that losses *other* than foregone earnings, i.e., losses in property, cannot be recouped. The restorer is only entitled to a reward for his work in restoring the lost poperty. Inasmuch as his slack period earnings is the only consideration in setting a value to the work of restoration, other losses cannot be recouped.[30] This

view is not, as discussed above, in agreement with the *Orukh Hashulchan's* interpretation of R. Chananel.

The *mitzvah* of *hashavat avedah* extends to other areas as well. Exegetical interpretation of the verse "and shou shalt restore it to him"[31] has been expanded to include the obligation to restore an individual *to himself*.[32] Extricating an individual from life threatening circumstances[33] and restoring one's health by providing him with medicinal services are examples of this obligation.[34] The *mitzvah* of *hashavat avedah* also includes the obligation of directing and assisting an individual who has lost his bearings to the nearest road or town.[35]

Losses in earnings incurred as a result of performing the above *mitzvot* can apparently be recovered in the same manner as the restorer of lost property recoups his foregone earnings.

II

The Torah adjures the presiding judge in a law suit against demanding or accepting fees from the litigants involved. Payments regarded as even remotely affecting the objectivity of the judge in his deliberations of the case fall under the explicit Biblical prohibition against bribery.[36] Fees offered by the litigants for the purpose of compensating the judge for his work (*s'khar dina*) in adjudicating the case are also prohibited. The latter prohibition is exegetically derived from the verse

> Behold I have taught you statutes and judgments, even as the Lord my God commanded me[37]—just as I taught you gratuitously, so you must teach gratuitously.[38]

Acceptance on the part of the judge of payments regarded as either bribery or fees for pronouncing judgment carry the penalty[39] of voiding the judge's decision.[40] In the event the judge was engaged in his own work at the moment he was approached by the litigants to adjudicate their case, the judge may, however, condition his acceptance of the case to the requirement that the litigants share[41] in compensating him for his foregone earnings. The opportunity cost claim of the judge may not extend to feasible foregone earnings occasioned by the

law suit, but may only cover losses in earnings he can actually validate (*s'khar b'tellah d'mukhach*).[42]

While compensation for losses in earnings that cannot be verified is strictly prohibited, acceptance of such fees on the part of the judge does not carry with it the penalty of invalidating his ruling.[43] The relevant criterion to be used in classifying judicial payments as either falling into the category of fees for pronouncing judgment or into the less severe category of opportunity cost payments is a matter of dispute between the Rosh and the Bach.

In the Bach's view the relevant consideration in categorizing judicial fees is the manner in which such fees are solicited or accepted rather than their absolute magnitude. Any fee, regardless of its size, demanded by the judge as a *pre-condition* to accepting a case is to be regarded as a fee for pronouncing judgment. Receipt of such a fee will invalidate the decision. Should the litigants, acting on their own accord, initiate an offer of compensation to the judge prior to his acceptance of the case; or, alternatively, should the judge demand a fee only *after* rendering his verdict in the case, the fee is regarded as an opportunity cost payment. It is only at this point that the magnitude of the payment becomes relevant.[44]

In the Rosh's view, the amount is the relevant consideration. Should the fee exceed the judge's feasible losses in earnings occasioned by the law suit, the fee is classified as a fee given for pronouncing judgment. The stringency of the law regarding this type of fee is accordingly applied. Receipt of fees covering feasible but not verifiable losses in earning is regarded as a contemptible act, but the decision is not invalidated. Finally, judicial fees corresponding exactly to the verifiable foregone earnings of the judge are, in the first instance, permitted.[45]

The criterion devised by the Rosh is apparently the accepted one as evidenced by the following dispute regarding the status of an opportunity cost claim put forward by the judge only after he had rendered his ruling in the case. The Smah[46] and the Sh'vut Yaacov[47] state that under these circumstances the shared responsibility of the litigants is reduced to a payment equal to the minimum compensation that the

judge would demand if asked to abandon his usual work for an interval equal to the time he spent on the case in favor of idleness. This view parallels the case involving *hashavat avedah,* discussed above. Torei Zahav[48] and N'tivot Hamishpat[49] dispute the above view and argue that the delayed action on the part of the judge obliterates entirely the validity of his claim.

Judicial fees are restricted to verifiable losses in earnings only when the source of such fees is the litigants themselves or some other private source. When the public treasury is, however, the source of judicial compensation, this requirement does not apply. The community can hence engage an individual to perform judicial duties and fix his salary in excess of what he could command in his next best market alternative.[50] Maintaining the honor and dignity of the judicial institution is a matter of communal concern. Included in this responsibility is the obligation of providing the judge with a salary sufficient to allow him to maintain a decent standard of living. Should an increase in the judge's family render his current salary inadequate, the community must provide him with a salary supplement, even if the judge himself objects to this increment.[51]

The opportunity cost restriction does not apply in some instances even when the source of judicial fees is private in nature. These instances include the following cases:

1. An individual expert, accepted by the litigants to serve as the *sole* judge in their civil law suit, is not adjured against demanding or accepting fees for pronouncing judgment. Since Biblical law qualifies a single expert to serve as judge in civil law suits, Rabbinical decree has expanded the necessary quorum of judges in such cases to a panel of three. Whether or not acceptance on the part of the litigants of a single expert waives the Rabbinical requirement of a panel of three is disputed by the *Poskim.* Nonetheless, the single expert has the prerogative of refusing to serve as the *sole* judge in civil cases as the Torah only requires him to render his judicial duties as *a member* of a panel of three. Since the single expert may refuse he may condition his acceptance of such cases to the requirement that the litigants compensate him for his work in pronouncing judgment.[52]

2. If the litigants of a civil suit accept a relative or otherwise unqualified person as a member of a panel of three judges, the unqualified judge is not constrained in regard to demanding fees for

pronouncing judgment. The reasoning here exactly parallels the logic underlying the previous case. Since the Torah does not require an unqualified person to accept the judicial role, he need not render his services gratuitously.[53]

3. Should the complexity of a civil law suit cast doubt in the minds of the expert panel in regard to their ability to render a decision in accordance with the law of the Torah, they need not render their judicial services gratuitously. This follows from the fact that under such circumstances the Torah *requires* the panel of experts to condition their acceptance of the case to the willingness on the part of the litigants to abide by their decision whether or not it is in accordance with the law of the Torah. Since the panel may not accept the civil suit without the above stipulation, they may also require the litigants to compensate them for pronouncing judgment. Here again, since the Torah does not require a panel of experts to participate in a law suit unless they are capable of rendering a decision according to the law of the Torah, then inability to do so frees them from any obligation in the case. They may therefore demand fees for their services.[54]

Exegetical interpretation of the verse "Behold I have taught you statutes and judgments, even as the Lord my God commanded me"[55] also establishes a prohibition against demanding or accepting fees for providing instruction in the Written and Oral Law.[56]

Inasmuch as teaching the Written Law to children may entail the subsidiary tasks of providing instruction in the proper accentuation of Biblical texts (*pisuk taamim*) as well as a custodial service (*shimur*), Amoraic opinion allows compensation for these secondary functions. While no dispute exists regarding the propriety of custodial fees, Rav prohibits payment for the inculcation of textual accents while R. Yochanan permits it.[57]

When the teaching assignment does not entail the above secondary functions, the teacher may, nevertheless, condition his engagement to the requirement that his employer compensate him for his verifiable losses in earnings.[58]

Lacking any other means of support, an individual may demand or accept fees for the teaching of Torah. The compensation he receives under these circumstances does not have to correspond with the salary he could command in his next best market alternative.[59] Compensation may be taken for teaching Rabbinical innovations and decrees.[60]

III

To the extent which the Torah requires a child to incur financial sacrifice in connection with his duty to bestow honor upon his parents is a matter of Amoraic dispute in *Kiddushin* 32a. R. Yehudah holds that the *mitzvah* of *kibud av va'eim* requires the child to provide for his parents' needs, i.e., food, drink and clothing, at his *own* expense. This is derived on the basis of a *hekkish* that compares the honor due parents with the honor due the Almighty. In reference to the latter obligation it is written "Honor the Lord with thy substance."[61] R. Natan Bar Oshea, however, interprets the *hekkish* to limit the financial obligation of the child to the requirement that he *interrupt* his labor should a parental request necessitate such action. Both views are thus in agreement that parental requests must be obeyed even when compliance with them occasions an opportunity cost to the child.

IV

Rashi[62] and the Ramban[63] interpret the verse "Behold I have taught you statutes and judgments, even as the Lord my God commanded me"[64] to establish the principle that *all mitzvot,* not only the discharge of judicial duties and the instruction of the Torah, must be rendered gratuitously. Many discussions of latter day commentaries[65] implicitly accept the above thesis. This leads the Chikrei Lev to question the prevailing communal practice of engaging cantors for *Shabatot* and *Yomim Tovim* and *Shofar* blowers for *Rosh Hashanah.* Inasmuch as work on these days is strictly prohibited, payments to these individuals can in no way be viewed as opportunity cost payments.[66]

The S'dei Chemed resolves the above difficulty by theorizing that the prohibition against fees for the performance of *mitzvot* applies only to those *mitzvot* that inescapably devolve upon the individual. *Mitzvot* that do not fit the above description, such as performing the duties of cantor or *Shofar* blower do not fall within the prohibition.[67] This difficulty can, in our view, also be resolved with the premise that fees for the performance of

mitzvot are not prohibited when the source of such fees is communal rather than private.[68]

According to the Ramban fees for rendering medical services are strictly prohibited. The physician may, nevertheless, require compensation for the physical exertion the rendering of his services entails.[69] The Ritvah disagrees and states that medical fee claims may only properly extend to the verifiable losses in earnings suffered by the physician as a result of attending to his patient.[70]

It is apparently difficult to reconcile the Ramban's statement with his view that *all mitzvot* must be performed gratuitously. The Even Haazel explains the apparent contradiction by suggesting that the Ramban is in agreement with Rashi's statement in *Kiddushin* 58b. Here Rashi asserts that though the verse "Behold I have taught you statutes and judgment . . ."[71] establishes the principle that all *mitzvot* must be performed gratuitously, the constraint applies only to instances where the *mitzvot* can be accomplished with minimal effort. Should the *mitzvah* entail significant effort, the prohibition does not, however, apply.[72]

Other commentators have also viewed the expenditure of more than minimal effort as a basis for releasing an individual from the prohibition against demanding fees for the performance of *mitzvot*. The Mordechai[73] points out that pupils do not usually understand the import of their lessons until it is repeated to them many times. Teachers may therefore, in his view, receive compensation for the work involved in *reviewing* their lessons to their pupils. The *Orech Mishpat* views the Mordechai's statement as providing another basis for releasing judges from the prohibition against demanding fees for their services as considerable energy must be expended in explaining judicial procedures and the import of the verdict to the litigants involved.[74]

V

In cases regarded halakhically as criminal assault, the Torah directs the offender to compensate the injured party in all the dimensions his injury could have extended. These areas include

nezek, tzaar, reepoiy, shevet, and *boshet.*

Shevet is an indemnity to the injured party for the loss of earnings during the convalescence period. A panel of experts establishes the *shevet* liability. After estimating the probable length of the convalescent period, an assessment in regard to the type of work the injured party would be capable of performing subsequent to his confinement is made. His earning capacity in this period serves as the *base* period for the purpose of setting a value to his foregone earnings during his period of enforced idleness. In consideration of the fact that the injured party does not experience the disutility of work during his confinement the *shevet* liability is reduced to a payment equal to the minimum compensation the victim would demand if asked to abandon his *base* period employment for a length of time equal to his confinement in favor of idleness.[75]

The *shevet* indemnity is a lump sum levy. Its value is fixed at the outset of the injury, and remains immutable regardless of the *actual* time it takes the victim to recuperate. This arrangement was established to benefit the offender, as it is not uncommon for the actual convalescence to exceed the expert estimate on account of the injured party's laxity. Unanticipated speedy recoveries are statistically rare.[76]

Culpability in regard to *shevet* can only be incurred in cases involving *adam hamazik.* When damage is, however, inflicted by an individual's animal or property, the sole indemnity prescribed by the Torah is *nezek.*[77] Moreover, the indemnity of *shevet* can only be incurred in instances where damage was inflicted directly on the person of an individual. Consequently, if one detained an animal that is usually available for hire, though its owner sustains thereby a loss in foregone earnings, *shevet* liability is not incurred as no direct damage or injury was inflicted to the *person* of the owner.

The Ktzot states that the cases classified as *garmee* incur liability only in respect to *nezek,* but not in connection with the four other punitive payments.[78]

VI

Labor contracts are regarded halakhically as being consummated when the parties reach a verbal agreement. Nevertheless, as long as the work stipulated by the agreement has not actually begun, either party has the *legal* prerogative to retract, provided such retraction does not occasion a financial loss on the other party. When retraction does impose a financial loss, the reneging party is forced to honor his part of the oral commitment only when the aggrieved party, in addition to sustaining a financial loss in consequence of the retraction, incurred an opportunity cost as a result of entering into the oral agreement. Hence, a reneging employer would not be required to honor his part of the verbal labor contract unless alternative employment opportunities presented themselves to the worker at the moment the oral commitment was enterd into. Similarly, a reneging worker does not incur liability unless alternative sources of labor supply were available to the employer at the time the verbal agreement was made.

Insofar as the breaking of the contract affords the worker the consolation of spending his day in leisure, the reneging employer is not required to compensate the aggrieved worker by the full amount of wages he originally stipulated. His liability is reduced to a payment equal to the minimum amount a typical worker in the same line of employment as the aggrieved worker would demand if asked to abandon his work in favor of leisure (*k'poeil bateil*).[79]

If the breaking of the contract affords the worker not only a respite from his physical exertion but the more inviting consolation of leisure—freedom of movement—the value of the latter alternative rather than the former, as it appears to us, should be incorporated into the discount element. This calculation will measure the *actual* loss the breaking of the contract occasioned the worker. In instances where we are certain that the worker would have preferred work to leisure, the above discount element is not applied. Agricultural and iron workers fall within this category as even short lay-offs exert a debilitating effect on their health. Consequently, a reneging employer

would be obligated to compensate these workers by the full amount of wages he originally stipulated. Application of the discount element would in this case *understate* the actual loss the workers sustained as a result of the retraction.[80]

Similarly, an employer seeking release from his contractual responsibility to a religious teacher, must compensate him by the full amount of the wages he originally stipulated. This is so because we are certain that religious teachers prefer to devote their time to instructing rather than spend their time in leisure or idleness. Compensating the religious teacher with the wages of a *poeil bateil* would understate the loss the teacher actually suffers as a result of the retraction.[81]

In the event the worker could only secure employment offering a lower wage rate than the one called for by the broken verbal contract, the employer may exercise either of the following options:

> 1. he may require the worker to accept the lower paying job, compensating him for his loss in the wage differential called for by the higher paying job of the broken contract; or 2. he may require the worker to accept the amount of money he would demand if asked to abandon the *work called for by the broken contract* in favor of leisure.[82]

Should only work more irksome (although higher paying) than the kind stipulated by the broken contract be available at the time of the retraction, the options the employer enjoys in this instance is disputed by the *Rishonim*. The Talmedei Harashba rules that under these circumstances the worker can not be coerced into accepting the more irksome work. Refusal on the part of the worker to accept the more irksome work would force the employer to compensate him *k'poeil bateil*.[83] The Mordechai, however, holds that either of the above two options can be exercised by the employer. He may either require the worker to accept the more irksome, higher paying job, or, alternatively, compensate him *k'poeil bateil*.

Once the laborer has completed part of the work stipulated by the verbal agreement, or has just performed work *preparatory* to the fulfillment of the terms of the contract itself, the

employer and employee cease to enjoy equal rights with regard to retraction.

Retraction at this stage on the part of the employer obligates him to honor his part of the agreement, subject to the discount element discussed above, whether or not the worker incurred an opportunity cost as a result of entering into the verbal agreement. In this instance, the sole requirement for liability is the occasioning of a financial loss to the worker as a result of retraction. Similarly, if the worker, upon arriving at the work scene, finds that the stipulated work was either already performed or impossible to discharge, he has a legal claim to the wages of a *poeil bateil.* Examples of this case occur when a worker is hired to plow or irrigate a field, but finds when arriving that the soil is very moist and hence cannot be plowed or, alternatively, finds that the previous night's rainfall has already irrigated the field.

The worker's claim to the wages of a *poeil bateil* is valid only when the employer did not inspect the work scene the previous night. Moreover, even if the employer neglected to do so, in the event the worker knew, prior to the time he was slated to begin his work, that circumstances obviated the discharge of the stipulated work, no compensation can be claimed by the worker.[85]

In contradistinction, the day laborer or the *poeil,*[86] has the legal right to terminate an engagement at any time. This right is viewed by the Torah as a necessary safeguard to his personal freedom. Denying him this right would have the effect of relegating him to the status of chattel, bound to his employer against his own inclination. This right is exegetically derived from the verse "For unto me the children of Israel are servants"[87]—they are My servants but not servants to servants.[88]

The preferred status of the *poeil* with regard to retraction is not, however, absolute. He may not, for instance, release himself from his present contractural responsibilities in order to secure higher paying employment elsewhere.[89] In addition, when the labor agreement is consummated by a *written* contract or *kinyan,* the Ritvah is of the opinion that the *poeil* cannot retract with impunity.[90] The Rivash disagrees, however,

holding that a labor agreement consummated by a written contract is on par with a verbal agreement.[91] A third limitation occurs when the *poeil* deposits his work tools with his employer The Rashba and the Ran are of the view that the employer may threaten to withhold release of these articles unless the stipulated work is completed. Failure of this tactic allows the employer to sell these articles for the purpose of securing workers to complete the unfinished work.[92] Finally, in the event the *poeil* was contracted to perform work that requires immediate attention, postponement of which would result in irretrievable loss, he may not retract without incurring penalty.[93]

NOTES

1. V. *Choshen Hamishpat* 9:5, 34:18, 264, 265; *Yoreh Deah* 240:5, 252:12, 312, 336:2.
2. V. *Choshen Hamishpat* 420.
3. V. *Choshen Hamishpat* 333, 334.
4. *Yoreh Deah* 177:2.
5. Deuteronomy 22:1-4.
6. V. Ramban in *Torat Haadam Shaar Hasakanoh B'hashavat Gufo; Chidushei Chatam Sofer Baba Metzia* 68a; and Even Haazel, *Gzeilah Va-avedah* XII, 3.
7. Deuteronomy 15:4.
8. V. *B.M.* 33a.
9. Smah, *Choshen Hamishpat* 265:ot 7.
10. Ktzot, *Choshen Hamishpat* 265:ot 2.
11. V. Smah, *Choshen Hamishpat* 265:ot 4.
12. V. Tosophot, *B.M.* 31b.
13. V. Bach, *Tur Choshen Hamishpat* 265.
14. V. Rambam, *Gzeilah Vaavedah*, XII, 4.
15. V. Bet Yosef, *Tur Choshen Hamishpat* 265.
16. V. Commentary of Rambam on *Mishnah Bkhorot* 29b.
17. V. Ramban, *Deiot* IV, 2, 4, 15.
18. V. *Ktuvot* 59b.
19. V. Commentary of Rambam on *Mishnah Bkhorot* 29b. For two exceptions of this generalization V. *B.M.* 77a and Rama, *Choshen Hamishpat* 334:4.
20. See note 14.
21. Rashi, *B.M.* 31b. This view is also held by *Tosphot, B.M.* 68a, Rosh, *B.M.*, II, 24, 28, M'eiri *B.M.* 31b, *Shetah M'kubetzet B.M.* 31b, *Nimukei Yoşef B.M.* 31b, S'mag essen 82, *Choshen Hamishpat* 265, Rama, *Choshen Hamishpat* 265:1.

22. *Tosphot B.M.* 31b.

23. V. *Pnai Y'hoshua B.M.* 68a; v. however, comment of Ritvah quoted in *Shitah M'kubetzet B.M.* 31b.

24. Tosafot R'yad *B.M.* 31b.

25. R. Chananel *B.M.* 31b.

26. R. Chananel's view is subscribed to by Rif, Ramban, Rashba, Ritva and Raivod.

27. V. *Chidushei Haran B.M.* 31a.

28. Deuteronomy 15:4.

29. *Orukh Hashulchan, Choshen Hamishpat* 265:3. This interpretation of R. Chananel's view places him in accord with Rosh's ruling (*B.M.* II, 28) for this variation of case III. Rambam does not explicitly deal with this case at all. This leads Even Haazel (*Gzelah Vaavedah,* XII, 3) to conclude that in Rambam's view this case is treated in the same manner as case II described above.

30. Even Haazel, *Gzelah Vaavedah,* XII, 3.

31. Deuteronomy 22:2.

32. V. *Sanhedrin* 73a, *Baba Kama* 81b.

33. *Ibid.*

34. V. Commentary of Rambam on *Mishnah Nedarim* 38a.

35. V. *Tosefta* B.M., II, 12, *Baba Kama* 81b. For other corollary obligations proceeding from the mitzvah of hashavat avedah v. *Responsa Maharam Lublin* 12; Shakh, *Yoreh Deah* 349, ot 4; *Tur Choshen Hamishpat* 293:3. *Responsa Rosh K'lal* 99:6; *N'tivot Hamishpat* 28, ot 1; *Responsa Mishkinot Yaacov, Choshen Hamishpat* 68, *Haaimek Sh'ailoh L'Sh'eilot Lev* 69 ot 3; *Shaar Hamishpat, Choshen Hamishpat* 28 sief katan 2.

36. V. *Choshen Hamishpat* 9.

37. Deuteronomy 4:5, 14.

38. V. *Bkhorot* 29b, *Nedarim* 37a.

39. The Rama (34:18) posits that *s'khar dina* does not irrevocably invalidate the decision of the judge, but merely suspends its authoritative force while the illicit fee remains in the judge's possession. Return of the illicit fee reinstates the judge and restores his rulings. The leniency of the law here follows from the fact that *s'khar dina,* though contemptible, does not disbar the judge but merely imposes a Rabbinical *k'nas* on him. The *k'nas* is operative only so long as the judge retains the *s'khar dina* in his possession. Should the offense carry with it the penalty of disbarment, i.e., acceptance of bribes, the offender is not reinstated until he undergoes repentance. *Shoel Umaisheev* (4th ed., vol. 3, no. 129) disagrees with the ruling of the Rama. *S'khar dina,* in his view, irrevocably invalidates the decision of the judge. The leniency of the Rama's ruling applies only to a witness who accepts fees for offering testimony. Return of the fee allows the witness to retestify as denying him this privilege could create an undue hardship to third parties. No such similar hardship is generated by irrevocably invalidating the ruling of a judge who accepts *s'khar dina* as the litigants can present their dispute to another judge.

40. V. *Choshen Hamishpat* 9:5.

41. The requirement that the litigants share in the *s'khar b'teilah* expense

holds, according to *Erekh Shy* (*Choshen Hamishpat* 9), only when it is impossible to secure the services of a qualified judge gratuitously. Should this not be the case, a request by litigant A for a fee demanding judge does not have to be adhered to by litigant B unless A agrees to shoulder the entire *s'khar b'teilah* expense himself.

42. V. *Choshen Hamishpat* 9:5.
43. V. Smah, *Choshen Hamishpat* 9 ot 16.
44. V. Bach, *Choshen Hamishpat* 9.
45. *Responsa Rosh k'lal* 56:5.
46. Smah, *Choshen Hamishpat* 9 ot 14.
47. *Responsa Sh'vut Yaacov* vol. I, no. 142.
48. V. *Turei Zahav, Choshen Hamishpat* 9 ot 14.
49. V. *N'tivot Hamishpat, Choshen Hamishpat* 9 ot 8.
50. V. *Tosphot Ktuvot* 105a, *Responsa Chatam Sofer, Choshen Hamishpat* no. 164, 165.
51. V. *Ktuvot* 105a.
52. V. *Erekh Shy* V. *Ein Mishpat.*
53. V. *Minchat Chinukh* 83 ot 2.
54. V. *Ein Mishpat.*
55. Deuteronomy IV, 5, 14.
56. V. *Nedarim* 37a.
57. *Ibid.*
58. V. *Tosphot Bkhorot* 29a.
59. *Ibid.* V. *Responsa Chatam Sofer, Choshen Hamishpat* no. 164, 165; V. however, commentary of Rambam on *Mishnah Aboth* IV, 6, 7; *Talmud Torah* III, 10.
60. V. *Ran Nedarim* 37a; Rama *Yoreh Deah* 246:5. *Orach Mishpat* views Ran's statement as providing a basis for permitting a *Bet Din* to demand fees for executing judicial functions required only by Rabbinical, as opposed to Biblical, law, such as validating the signatures of witnesses.
61. *Proverbs* III, 9.
62. V. Rashi, *Kiddushin* 58b.
63. V. Ramban in *Torat Haadam Shaar Hasakanah B'hashavat Gufo.*
64. Deuteronomy 4:5, 144.
65. V. *S'dei Chemed* vol. 4, *Maarekhet Hashin Klal* 23.
66. V. *Maarocay Lev.*
67. V. *S'dei Chemed, op. cit.*
68. V. R. Tam, *Tosphot Ktuvot* 105a.
69. V. *Tur Yoreh Deah* 336.
70. V. Nimukei Yosef *Y'bamoth* 106b.
71. Deuteronomy 4:5, 14.
72. Even Haazel *Gzeilah Va-avedah* XII, 3.
73. V. *Responsa Maharam Padua* no. 40.
74. V *Orech Mishpat.*
75. V. *Choshen Hamishpat* 420.
76. *Ibid.*, see however, comment of *Yam Shel Shlomo Baba Kama* 88a.

77. V. *Choshen Hamishpat* 420.
78. V. Ktzot, *Choshen Hamishpat* 333 ot 2.
79. V. *Choshen Hamishpat* 333.
80. V. *Baba Kama* 88a.
81. V. Rama, *Choshen Hamishpat* 334:4.
82. V. Shakh, *Choshen Hamishpat* 333 ot 9. The Bach,however, expresses the view that it is the *poel,* and not the employer, that is given the prerogative of exercising either of the above options.
83. V. Bet Yosef, *Choshen Hamishpat* 333.
84. V. Mordechai *B.M.* VI:346 quoting Maharam.
85. V. *Choshen Hamishpat* 333, 334.
86. This privilege is not, however, extended to the *kablan* or piece worker.
87. Leviticus 25:55.
88. V. *B.M.* 10a.
89. V. Rama, *Choshen Hamishpat* 333:4.
90. V. Bet Yosef, *Choshen Hamishpat* 333.
91. *Responsa Rivosh* 476.
92. V. Nimukei Yosef *B.M.* IV.
93. V. *Choshen Hamishpat* 333:5; V. *Magid Mishnah, S'keenoot* IX:4.