



Center for Jewish Ethics

Jewish Ethics of Employee Treatment and Communal Responsibility

Dani Passow

Yeshivat Chovevei Torah

Introduction

There is ample evidence that the current system implementing labor laws is flawed. Consider the following facts from a recent study entitled, “Broken Laws, Unprotected Workers” that presents findings about surveyed restaurant workers in New York, Chicago, and Los Angeles.

76 percent of restaurant employees surveyed who worked more than 40 hours a week did not receive overtime as required by federal law.

26 percent received below minimum wage.

86 percent of workers did not receive full meal breaks when working a minimum number of consecutive hours.

A full 69 percent received no breaks whatsoever or had their breaks shortened by their employers.

30 percent of tipped employees, whose minimum wage is significantly less than non-tipped employees, failed to receive even that reduced minimum wage. 12 percent had some tips stolen by their employers.¹

20 percent of those surveyed spoke up and complained to their employers. Of these, nearly half, 43 percent, were the victims of illegal retaliatory measures: their employers fired or suspended them, cut their wages, or threatened to call immigration authorities. As a result of fear created by such measures, 20 percent of those polled failed to complain even though they worked in dangerous conditions or did not receive minimum wage.²

Such flagrant abuses of law and justice demand that we question to what extent our own tradition requires communal responsibility, outside of the current enforcement structure, to ensure that the eating establishments we patronize adhere to legal standards of employee treatment. This is the issue my essay will address.

¹ Bernhardt et al, *Broken Laws, Unprotected Workers*
http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf Last Accessed 2/27/2010

² *ibid.*

I. Employee Rights

In the book of Deuteronomy, we find a broad warning against oppressing a worker:

You shall not oppress a hired servant who is poor and needy, whether he is of your brothers, or of your strangers who are in your land inside your gates; At his day you shall give him his hire, nor shall the sun go down upon it; for he is poor, and sets his heart upon it; lest he cry against you to the Lord, and it should be sin to you. (Deut. 24:14-15)

Commenting on this verse, Nachmanides writes, “For if you will not immediately pay as he leaves from his task, he will go to his home, and his wage will be with you until the morning, and he will die from hunger during the night.” On the one hand, it seems like the economic world on which Nachmanides is commenting contains a system where employees, beyond having no savings, are living in such destitute conditions that one night without food could be lethal. This is puzzling because people who are so close to death rarely make good laborers. Rather, Nachmanides implies two important ethical concepts. First, if the employer is permitted to withhold wages this one evening, he may be more inclined to do so again in the future. While a single evening of withheld wages is unlikely to cause the death of the worker, a pattern of such behavior may. Furthermore, Nachmanides implies that the worker’s very existence is dependent on his wages. What would the case be if the employer indeed paid the wages on time, but the wages were so low that it would be impossible for the worker to sustain herself for any prolonged period of time? Nachmanides’ comments suggest that wages should be great enough that a worker could live off them.

One of the first minimum wage laws in the United States seemed to adopt this approach. Passed in Washington DC in 1918, the law was designed to protect women and

children "from conditions detrimental to their health and morals, resulting from wages which are inadequate to *maintain decent standards of living*."³ (emphasis added) Nevertheless, it is one thing for an owner to be forbidden from *forcing* an employee to receive less than a living wage and quite another if the employees themselves willingly accept such work.

This very question was raised by the Supreme Court when the aforementioned bill was challenged in *Atkins vs. Children's Hospital* in 1923. The Supreme Court struck down the law in a 5-3 decision citing "due process" as contained in the Fifth Amendment. According to a previous case in 1905, the due process clause was meant to ensure the right of employees and employers "to obtain from each other the best terms they can as the result of private bargaining."⁴ In the *Atkins vs. Children's Hospital* decision, Justice George Sutherland wrote that the D.C. law was "an arbitrary interference with the liberty of contract which no government can legally justify in a free land."⁵

While seemingly supporting a minimum wage, Jewish tradition also recognizes the importance of not being overly restrictive on economic dealings. For instance, the concept "in order not to shut the door in the borrower's face" appears numerous times in the Talmud.⁶ It generally refers either to granting certain rights to a creditor or to restricting the rights of a borrower, both of which encourage a creditor to lend, *ultimately helping the borrower* by providing the opportunity to receive a loan. One could replace borrower with employee in this principle and come to the same conclusion: Too much clamping down on the economy can be stifling, and it is ultimately helpful to no one.

³ <http://supreme.justia.com/us/261/525/case.html> Last retrieved 2/26/10

⁴ *Ibid.*

⁵ *Ibid.*

⁶ See Sanhedrin 3a and 32a; Gittin 50a; Bava Kama 8a; Bava Metzia 68a; Bava Batra 175b

This situation seems to set up a conflict between the basic human rights of employees and a free market. Yet, these two values don't really contrast since the rights of workers are subsumed in the value of a free market. The whole purpose of limiting economic restrictions, as stated by the Talmud, is for the benefit of the weaker economic party: the borrower, or by extension, a laborer. Nevertheless, "in order not to shut the door in the borrower's face" cannot override a biblical law (such as the prohibition of *ashek* — oppression), which suggests that the value of *immediate* action in aid of the economically weak trumps long-term economic modeling even where such models seem to be in the ultimate best interest of the economically vulnerable.⁷

Nevertheless, "liberty of contract" is a Jewishly recognized right. The Mishna states, "A contractual stipulation contrary to what is written in the Bible is null."⁸ However, in the Talmud, R' Yehuda states that this isn't the case when it comes to monetary laws. In such instances, the contractual stipulation is valid.⁹ This means that if two parties sign a monetary contract that contradicts a biblical monetary enactment, the contract is valid. R' Yehuda's opinion is considered the accepted and binding approach according to the authors of the codes.¹⁰ This being the case, it seems that while the Torah establishes basic employee rights, the rabbis recognized a more fundamental right to contract. The implication seems to be that employees have a right to waive their right of freedom from oppression.

⁷ While the Talmud has the initial assumption that *Prozbul* may violate the biblical law found in Deut. 15:2 "This is the matter of *Shmita*: every creditor shall remit his authority over what he has lent his fellow; he shall not press his fellow or his brother," the Talmud concludes that this law was only operable in the times of the Temple. Subsequent to the destruction of the Temple, the rabbis instituted a rabbinic law equivalent to that found in Deut. 15:2. Thus, Hillel's innovation of *Prozbul* only violates a rabbinic and not a biblical law. (See Bavli Gittin 36a)

⁸ Mishna Bava Metzia 7:11 (cited in Bavli 94a)

⁹ Babil, Bava Metzia 94a

While the American legal system maintained this approach for quite some time, in the landmark case of *West Coast Hotel vs. Parish* in 1937, the Supreme Court overruled *Atkins vs. Children’s Hospital*, stating

[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.¹¹

The case ostensibly turned on the term “arbitrary.” While in 1923 minimum wage was considered an arbitrary restriction of the freedom of contract, in 1937 this was no longer the case. It should be kept in mind that *Atkins vs. Children’s Hospital* took place at the beginning of the economic boom that occurred during Calvin Coolidge’s presidency. By contrast, *West Coast Hotel vs. Parish* occurred after the Great Depression and during the New Deal. What seems clear is that a careful balance needed to be struck among three values: imposing restrictions that look after the well-being of the economically vulnerable; acknowledging and preserving the right to contract; and cultivating market freedom that strengthens the economy as a whole.

Applying this intersecting web of values to the Jewish approaches we have seen, we might say that the Torah sets up an ideal standard of a living wage. The rabbis, in turn, recognize that restrictions shouldn’t be overburdening and stifling to the economy but, nevertheless, basic standards cannot be overridden. At the same time, there is a fundamental human right to contract freely. Significantly, the value of the free market, according to the

¹⁰ See, for instance, the *Biur HaGra* in *Even HaEzer*, who states repeatedly (28, 66, 92) “Even with respect to a biblical law, regarding a monetary contractual stipulation (that contradicts the law), the stipulation is valid.”

rabbis, doesn't outweigh basic human rights. However, the basic human right of "liberty to contract" does outweigh other human rights.

Nevertheless, in today's society, when individuals waive their right to minimum wage, perhaps because a sub-minimum wage offer is the only job they can find, their decision affects others by driving down the value of their services. Consequently, other people who don't want to waive their right to minimum wage may be forced into doing so. According to free market economics, the wage will settle on the service's intrinsic worth. But free market economics doesn't outweigh one's right to a minimum standard, the rabbis tell us. As such, a person should be able to accept a job below minimum wage only if that decision can remain in a bubble and not affect others. In our society, such a situation is quite rare. Therefore, accepting a position below minimum wage, and by extension hiring someone for such a wage, is ultimately an unacceptable violation of the ethos of Torah's prohibition of *oshek*.

Beyond Nachmanides' reading, what exactly constitutes the prohibition against oppression, *oshek*? Interestingly, in his code Mishneh Torah, Maimonides places *Oshek* under the rubric of *g'zeila*, thievery. By doing so, Maimonides suggests an underlying similarity between the two offenses. Oppression is akin to taking, by force, something that is not one's own.¹² Maimonides writes,

Who is one who violates the law of *Oshek*? One who comes into possession of another's money fairly, but then coercively claims the money and refuses to return it. For instance, cases where one is owed repayment of a loan or deposit, or if his wages

¹¹ <http://supreme.justia.com/us/300/379/case.html> Last accessed 2/28/2010

¹²Theft is divided into two categories: *Gneva* and *Gzeila*. Maimonides even lists these two acts under separate categories in the *Mishna Torah*. *Gneva* is defined as stealing secretly where the victim doesn't know they are being stolen from (*Hilchot Gneva* 1:3). *Gzeila* is taking by force where the victims are fully aware they are being robbed (*Hilchot Gzeila v'Aveda* 1:3).

are being withheld and he cannot extract them because the one withholding the money is strong and tough.¹³

Oshek, Maimonides states, is coercively appropriating money through *threat*. No physical force need be used; rather one uses one's strength to prevent another from making a legitimate claim for their property or money. It now seems clear why Maimonides places *oshek* and theft in the same chapter. If we equate harm and the threat of harm, *oshek* is virtually no different from stealing.

Maimonides' understanding is relevant to employee treatment in both explicit and more subtle ways. Explicitly, Maimonides states that withholding wages is a violation of *oshek*. When owners refuse to pay wages, they are clearly violating this principle. Moreover, the underlying problem, according to Maimonides' description of *oshek*, is using one's position of power to manipulate another into financial loss. Thus, for instance, in the statistics mentioned in the introduction, we saw that nearly one out of every three workers surveyed was either the victim of illegal retaliatory measures or was too afraid to voice legitimate complaints regarding having his or her rights violated due to potential employer retaliation. These workers feel threatened into silence, and become incapable of claiming what is rightfully theirs; they are victims of *oshek*.

On a more subtle level, Maimonides' equating of *oshek* with theft has significant ramifications. For instance, one of the central methods for placing someone outside the boundaries of the Jewish community is by actively removing the power to be a witness from one who normally has such a right.¹⁴ The Shulchan Aruch is quite explicit on the subject of

¹³*Mishna Torah Hilchot Gzeila V'Aveda* 1:4

¹⁴ I have chosen my language very carefully here. I by no means suggest that those who aren't valid witnesses are considered outside the community. This is the case only for those who by virtue of their actions have their right to witness stripped.

thieves and their right to testify: “Thieves are invalid for testifying from the moment they steal, even if they have returned the stolen goods, until they do *teshuva*.”¹⁵ Significantly, it is not sufficient for the thief to simply rectify the financial imbalance caused by stealing. Rather, the very act of stealing is considered a breach of a value so central to Judaism, that spiritual repentance is the only means for re-admittance into the community. Thus, following Maimonides, violating the laws of *asbek* places one outside of the Jewish community. How ironic that many of the most publicly Jewish contemporary institutions -- kosher eating establishments -- violate standards of behavior that, according to the Shulchan Aruch, define what it means to be part of the Jewish community.

Any nuanced conversation on employee rights must recognize the complex relationship between the employee and the employer. Not all rights afforded to the employee should be viewed as legal protection solely for the employee. Because employees’ health and attitude affect their production, ensuring their wellbeing is in the interest of the employer. Accordingly, when talking about limits to how much one can work, the Mishna takes an angle that is protective of the employer:

A worker is not permitted to work at night then hire himself out during the day; and he is not allowed to starve or deprive himself in order to give his food to his children, because this undermines the work done for his employer, since he will be too weak to work energetically and diligently.¹⁶

Nevertheless, these laws also are about respecting the dignity of the employee. The Mishna states, “One who engages laborers and demands that they commence early or work late: where local custom is not to commence early or to work late, he may not compel

¹⁵ Shulchan Aruch, Choshen Mishpat; *Hilchot Edut* 34:7

¹⁶ Shulchan Aruch Choshen Mishpat 337:19

them.”¹⁷ The Mishna’s emphasis on local custom suggests that the issue here is not the physical wellbeing of the employee vis-a-vis how productive he will be for the employer. Nor is there a concern for the employee’s physical suffering. Rather, the local custom establishes a norm of what is considered a fair workday. By forcing an employee to violate that norm, one sets that employee apart from the community. For example, if the norm is for a person not to work late, this means those late evening hours are the worker’s free time. Those free hours are often used to participate in activities that create a common bond among community members. Today that might take the form of watching a particular television program, or following a sports team; it might also be reading a book or newspaper, studying a given subject to later discuss with friends, or even something more explicitly communal like attending a concert or joining a choir. In a locality where most people work late evenings, one’s social acceptance won’t be impeded by not having the opportunity to participate in these activities because no one has such an opportunity.

Additionally, if one has a family, working late or rising early means spending less time with family. Expectations of family roles are certainly influenced by communal norms, and feelings of abandonment on the part of a spouse or children may result from a parent not meeting those expectations. Thus, in a community where children expect their parents to take care of them in the morning, or to be home for dinner, forcing parents to come to work early or stay late can have drastic effects on their families.

The role of communal expectations in today’s restaurant industry is interesting. On the one hand, as the statistics cited previously indicate, widespread practice often doesn’t agree with the laws. And yet, the laws of minimum wage and overtime represent the overall

¹⁷Bava Metzia 83a

will of the public about what those norms should be. Which one should be considered local custom? The argument outlined in the previous paragraph suggests that what matters most is what takes place in practice since, seemingly, it is such practice that determines one's expectations. Nevertheless, while the Mishna speaks in terms of "locality" or geography, perhaps the additional category of occupation is also relevant in determining one's expectations.

There is at least one realm of Jewish law where one's occupation determines one's legal responsibility: frequency of the obligation for a husband to sleep with his wife. A Mishna in Ketubot reads,

The times for conjugal duty prescribed in the Torah are: for wanderers (those who are wealthy enough not to have to work): every day; for laborers: twice a week; for ass-drivers: once a week; camel drivers: once in thirty days; sailors: once in six months. These are the words of Rabbi Eliezer¹⁸

There are several reasons why there is a difference in obligation among men of different occupations: the husband's sexual strength, desire, how often he is around and thus how often he needs to sleep with his wife to demonstrate affection.¹⁹ While it is difficult to know whether or not these differences in law reflect differences in norms, they do demonstrate that the rabbis of the Mishna considered occupation a taxonomic category. Moreover, the rabbis recognized that occupation certainly affects family life; the expectations of the wife of a camel driver were considered to be different from those of the wife of a sailor. Clearly, the rabbis regarded expectations, at least in certain areas, as occupation-dependent. Accordingly, even if the average worker in America works forty hours a week, if most restaurant

¹⁸Ketubot 5:6

¹⁹See Feinstein, Moshe: *Iggrot Moshe, Even ha-Ezer*, 3:28

employees work more, this isn't morally problematic since the occupational norm, and hence the social expectation of restaurant workers, is to work long days.

Nevertheless, because employee rights laws are meant to be universal, there is a public expectation for all workers to be treated according to a minimum standard. By refusing to grant those rights to an employee, one is essentially setting up a class distinction between people to whom the law does and does not apply. Such a distinction clearly offends the human dignity of those who aren't, in practice, granted their legal rights. We have seen that meeting standards within one's occupation is important because of relative social expectations. Here, however, by placing someone in a category where the law doesn't apply to them, we set up a social expectation that violates a universal and *fundamental* human right to be protected by the law.²⁰ Violating this right should be considered so egregious that it should transcend normal tolerance for occupation-dependent expectational differences.

United States labor law does not restrict the number of hours an employer can require an employee to work a week.²¹ This implies that the norm in America is, in the language of the Mishna, to work early and late. Nevertheless, the law does require most employees to be paid time-and-a-half for every hour over forty worked in a week.²² Representing the will of the public, this law suggests that there is, in fact, a social value in allowing workers time in their day to do as they please. While this value begins to establish some of the expectations we saw previously, such as parental involvement and time to be involved in communal activities, ultimately the law states that the value of free time is a weak value. Therefore, one may forego this right, but only if compensated.

²⁰For evidence of a Jewish value of universal equality, see Jerusalem Talmud Sanhedrin 4:22

²¹<http://www.dol.gov/compliance/guide/minwage.htm> Last accessed 2/28/10

²²Ibid.

We can view the time-and-a-half provision as essentially saying that people are paid their normal wage in exchange for labor, and another fifty percent of that wage as compensation for forfeiting their right to free time. It could be argued, however, that the time-and-a-half provision is irrelevant when it comes to establishing social expectations since once enough employees have sold their right to free time and aren't home with their children in the evening, or don't have the time to read the latest novel or go to the movies, the societal expectation for such activities may be lost. Nevertheless, time-and-a-half serves the additional role of being a reminder to those who work overtime that there does exist an expectation of free time, even if they've chosen to sell that right.

There are many instances in Jewish tradition where one performs an extra act, not required by law, which serves to cultivate an awareness of a specific value. For instance, when one performs certain acts of heating on Shabbat, one technically does not violate the prohibition against cooking. However, since that act might be experienced as an act of cooking, the *Halacha* requires that the act be performed with some modification. This modification functions as a reminder, or *heker*, that there is a value in refraining from cooking on Shabbat. Overtime pay can be viewed similarly: as a *heker* that there is a value and expectation of free time. Thus, refusing to pay overtime violates two moral principles: it is stealing one's right to free time that society has evaluated as being worth fifty percent more than normal wages; and it is destroying both the employer's and employee's awareness that workers are *entitled* to free time.

II. Models for Patron Responsibility

The conclusions from the preceding discussion apply to an individual hiring an employee. We now turn our attention to the responsibilities of the community in ensuring that employee rights are upheld.

Shelichut-Agency

In many realms in Jewish society, one can appoint an agent to carry out some task. For instance, one can select an agent to purchase land on one's behalf, to propose marriage, or to give charity. One can even be considered an agent for another without being appointed as long as the purpose for which the person is acting as agent is something that is beneficial to the principal and to which the principal would have agreed had it been offered.²³ Nevertheless, the sages of the Talmud place sole responsibility with the agent when the assignment involves violating a religious prohibition. This understanding, summarized in the phrase *ein shaliach lidvar aveira* -- there is no agent for a sinful act -- is quite reasonable on two accounts.²⁴ First, the agent, being an aware and autonomous person, is ultimately the one who decides whether or not a crime will be committed. Having a contract is not an excuse for shirking this responsibility. At the very least, the agent should share responsibility. That mental awareness is integral to holding the agent accountable is demonstrated by the fact that if one appoints a child or someone with mental disabilities, culpability lies entirely with the principal.²⁵

²³ Bavli Bava Metzia 12a

²⁴ See Bavli, Bava Metzia 10a

²⁵ Rambam, Mishneh Torah, *Hilchot Shluchin V'Shutafin* 2:2

Another reason that *ein shaliach lidvar aveira* is that one's conscience can often cause one to rethink action at the last moment, particularly when it comes to an interpersonal crime. When confronted with the humanity of another person, one may be inclined to reevaluate the initial decision to harm or to take advantage of that person. Emmanuel Levinas suggests that "The dimension of the divine opens forth from the human face."²⁶ In seeing the divine in the other's face, one is confronted with the depth of what it means to be human and can be struck with awe. Certainly such an encounter could dissuade someone from causing harm.

We see a similar notion when Moshe warns Pharaoh of the final plague, the killing of all first-born Egyptian males. Immediately before receiving the divine message regarding the tenth plague, Moshe states to Pharaoh: "I shall never see your face again."²⁷ It is as if by seeing Pharaoh's face, Moshe would be incapable of causing such human suffering, no matter how justified or necessary that suffering might be.

Furthermore, particularly in a system where God is understood as Law Giver, seeing the divine in the Other can strike one with a fear of sin. Levinas writes, "I have always described the face of the neighbor as the bearer of an order, imposing upon me, with respect to the other, a gratuitous and non-transferable responsibility."²⁸ Such order inevitably forces one to become aware of a system beyond one's immediate, often petty, desires, an awareness that would discourage proceeding with the original nefarious plans.

One who delegates a crime never has to come face to face with the victim; a delegator never encounters the divine within that person that could lead to a state of awe or

²⁶ Levinas, Emmanuel. *Totality and Infinity*. Kluwer Academic Publishers Inc. Norwell, MA, 1991 p 78

²⁷ Exodus, 10:29

recognition of an order beyond their current circumstances. According to Jewish law, in order for a person to be held fully accountable for a crime, the person must be warned--receive *hatra'a*-- immediately prior to committing the prohibited act.²⁹ One way to view this requirement is as a last-minute reminder to the criminal of the weight of criminal actions. If we understand the feelings of awe and recognition of order that result from physically encountering the victim as a *natural* warning, a principal never receives this warning, and therefore cannot be held accountable for the misconduct of the agent.

While this might be true in a technical legal sense, using an agent to commit a crime does not excuse one from moral culpability as is evident in the biblical narrative of David, Batsheva and Uria. David has committed adultery with Batsheva, Uria's wife. He plots to kill Uria and wed Batsheva, sending a letter to Yoav, a military commander in charge of Uria: "Place Uria directly in front of the fierce fighting, then withdraw from behind him so that he be struck and die."³⁰ Here, David is committing the act of murder through an agent, Yoav. In fact, he is even more removed, since Yoav doesn't actively kill Uria, but puts him in harm's way. Though the rabbis find different reasons to exonerate David on a legal level,³¹ there is no disagreeing with God's scathing reprimand as conveyed to David through the prophet Natan: "Why have you scorned the word of God, doing that which is evil in My eyes? You have struck Uria the Hittite with the sword."³²

This narrative suggests that if we view restaurateurs as agents of their customers, then the customers should be held morally responsible for any malfeasance on the owner's

²⁸ Levinas, Emmanuel. *Alterity and Transcendence*. Columbia University Press: New York, NY, 1999, p 170

²⁹ See Rambam, Mishna Torah *Hilchot Sanhedrin 12:2*

³⁰ Samuel II 11:15

³¹ See Bavli, Shabbat 56a

part. Yet, it is specious to think that the owner can be viewed as the customer's agent. First, as opposed to David and Yoav, the owner acts prior to ever having come in contact with the customer, and the customer has never had the opportunity to appoint the owner as an agent. Second, we have seen that when agency is not explicitly delegated, it is valid only when we can assume the agent is acting in the best interest of the principal. Since violating employee rights is illegal, and legality in a democracy expresses the voice of the community, it cannot be in the customer's best interest to violate employee rights. Thus, using agency as a model for customer-owner relationship, we cannot hold the customer morally responsible for the owner's misconduct.

***Arevut*- Guarantorship**

Just as one can appoint an agent in the economic world, one can do so as well for *mitzvot*. For example, if one has already recited the *kiddush* for Shabbat, one can do so again on behalf of another person who hasn't yet heard the *kiddush*. The general prohibition against reciting a *Beracha she'eno tzricha*, "a superfluous blessing," which would normally apply when one wants to repeat a blessing, is overridden.³³ The principle of *kol Yisra'el arevim zeh bazeh*, "All of Israel are guarantors for each other," is what makes this possible. A beautiful articulation of this idea is recorded by the Maharsha, Rabbi Samuel Eidels: "With regard to...God's *mitzvot*, all of Israel are guarantors for each other, which is not the case with regard to eating and drinking, where when one person eats or drinks, that person alone is

³² Samuel II 12: 9

³³ Shulchan Aruch Harav, Orach Chayyim, Hilchot Betziat HaPat: 167

satisfied.”³⁴ By setting up a dichotomy between physical and spiritual sustenance, the Maharsha suggests that concrete distinctions between self and other that exist in the physical world are shattered in the realm of *mitzvot*, where all of Israel seem to be considered a single, unified being.

This conception of the relationship among all Jews suggests that one should refrain from patronizing a restaurant that does not meet ethical standards of employee treatment. If the employer is ethically bound to pay minimum wage and overtime and to treat the employees fairly, then, as *arevim*, guarantors, at the very least we shouldn't actively support the employer's violation of these rights. Perhaps we should even take measures, such as boycotts or protests, to stop the employer. The Sefer Chassidim elucidates this principle: ““Were it not for *arevut*... one would only examine another's actions to the extent necessary to set up precautions against influencing them to sin, but wouldn't attempt to help others root out their own evil actions.”³⁵ *Arevut* thus means that all Jews are responsible for each other's morality. If this is the case for strangers, how much more should it apply to the managers and owners of restaurants we patronize.

***Lifnei Iver*-Stumbling Block Before the Blind; and *Mesayeia Lidei Ovrei Avera*—Assisting Misconduct**

The Torah records a broad prohibition against helping others do wrong according to the traditional rabbinic reading of “Do not place a stumbling block before the blind.” (Lev

³⁴ Chiddushai Agadot: Bava Metzia 107:b

³⁵ Sefer Chassidim, Siman 93

19:14)³⁶ Commenting on a Mishnaic law prohibiting business interactions with idolaters three days prior to their holidays, the Talmud asks about the basis of this law:

The question was asked: Is it [forbidden] because of profit, or perhaps because of “Do not place a stumbling block before the blind?” A practical difference would exist in a case where an idolater already owns an animal. If you say [one must not sell to him] because of profit, here, too (where the idolater already has an animal), profit is derived (and the prohibition makes sense); if however you say it is because of placing a stumbling block before the blind, here, then, he has [an animal for sacrifice] of his own (and the prohibition does not make sense).³⁷

The Talmud understands the Mishna's fear that the object one sells to an idolater might be used for immoral religious practices, in which case the selling would be a violation of “Do not place a stumbling block...” Yet, if the idolater already had all the religious objects he needed for worship, this prohibition wouldn't apply. The Talmud thus limits the liability for aiding one in sin to a case where the crime could not have been committed without that aid. According to this reading, the problem with helping another to sin is not, to use American legal terminology, “aiding and abetting a crime.” As developed in our discussion regarding agency, ultimate culpability lies with the one who performs the proscribed action. One is held accountable for such help only if one actually *enables* the sin to occur. Involvement in misconduct isn't legally problematic, as long as that behavior could have occurred anyway. According to this view, I could escape violating *Lifnei Iver*— the Stumbling Block law—by relying on the fact that others would provide the idolater with religious items. Yet, reciprocally, those very others aren't in violation of *Lifnei Iver* because of me. It's a vicious cycle. Even though society as a whole helps this idol worshiper, society as a whole is exonerated. Applying this reasoning to restaurants, if there are other potential customers for

³⁶The traditional reading is summed up by the *Meshech Chochma* commenting on this verse: “This prohibition also includes causing others to stumble in a manner in which they are ‘blind’ in terms of awareness, or because of temptation or malice within their hearts.”

a restaurant that violates employee rights, one might still be ethically permitted to patronize that restaurant.

Rabbi Judah Rosenas, an early 18th century Turkish commentator on Maimonides, indirectly critiques this approach using an economic example: the case of borrowing with interest. While it is biblically forbidden to *lend* with interest, there is an additional prohibition against *borrowing* with interest because of *Lifnei Iver* even in the case where there are other potential borrowers. Rosenas writes, “It’s possible that the other borrowers will retract their offers, and it will be that [you are the] one who causes the lender to [lend with interest].”³⁸ It seems rather far-fetched to assume there’s a reasonable chance that all potential borrowers will disappear. Rather, Rosenas’ approach supports the notion that it is problematic to be *involved* in illicit behavior regardless of whether or not that behavior would take place without one’s involvement. Here, involvement, rather than enabling, is the issue. Thus, patronizing a restaurant that doesn’t uphold moral standards would be unethical.

The difference in values between involvement and enabling is significant. When one enables another to violate a moral ethic, one is, in a sense, committing a crime vicariously through another. Though their hands may be clean, they have used another instrumentally, itself a problem, to cause harm. The problem with being connected to or involved in illicit behavior is not about committing an egregious act vicariously, but about desensitizing oneself to the moral error of the act committed. The strength of any law resides not primarily in its being recorded in some legal code, but in society’s willingness to follow the law. When it comes to morality, taboo is crucial in establishing and maintaining boundaries that are considered unbreachable. As legal theorist William Ian Miller has written,

³⁷Bavli, Avodah Zara 6b

Disgust is more than just the motivator of good taste; it marks out moral matters for which we can have no compromise. Disgust signals our being appalled, signals the fact that we are paying more than lip service; its presence lets us know we are truly in the grip of the norm whose violation we are witnessing or imagining.³⁹

If one is involved, even tangentially, in immoral behavior, even when there are many others who are prepared to take part in the behavior, one's sense of disgust with such activity is eroded. Accordingly, Rosenas interprets *Lifnei Iver* as being fundamentally about maintaining taboos, the visceral reaction of recoiling from a morally reprehensible act. Maintaining those taboos is crucial to both sustaining the law on a societal level, and in cultivating a character that recoils from immorality.

Even according to the enabling approach, there is still a problem in being involved with illicit behavior: *mesayeia lidei ovrei avera*—aiding misconduct. As the Tosfot write, “Even in [the case where] one didn't violate *Lifnei Iver*...nevertheless, there still exists a rabbinic prohibition since we are required to distance ourselves from illicitness.”⁴⁰ Tosafot's view bifurcates the biblical and rabbinic moral teloi. The same distinctions that we made before between the Talmud in *Avoda Zara* and Rosenas can be made here. Ultimately, the rabbinic perspective agrees with Rosenas' understanding of Torah, although by virtue of being a rabbinic law, it carries less legal weight. Nevertheless, whether the prohibition is biblical or rabbinic, all opinions agree that aiding misconduct is morally reprehensible. In order to avoid violating this principle, one would need to refrain from purchasing items that one knew were produced through moral misconduct.

***Mitzva Haba'a B'avera*-Religious Duty Enabled By Sin**

³⁸Mishna LaMelech, *Hilchot Loveh Vmalveh*, 4:2

³⁹Miller, William Ian. *The Anatomy of Disgust*. Harvard University Press, Cambridge Mass. 1998 p.194

The importance of taboo is so great that it is even extended to an *object* that was obtained improperly. The Mishna in tractate Sukkah discusses the permissibility of using a stolen lulav to fulfil the Mitzvah of taking *Arba'a Minim* -- four species of plants -- on the festival of Sukkot. The Mishna quite clearly states,

A stolen lulav, or one which is dried, is *pasul* (invalid and cannot be used for the *mitzvah*). One which comes from a grove (devoted to idolatry) or from a town condemned as idolatrous is *pasul*; if the point has been broken off, or the leaves torn off, it is *pasul*; if they are only dis severed, it is Kosher. R. Jehudah says: It must be tied together at the top. A lulav from the Iron Mount is Kosher. A lulav that is three spans long, sufficient to shake it by, is Kosher.⁴¹

It is striking that the Mishna includes as forbidden a stolen lulav and one that comes from idolatrous sources in a list of physical requirements for a kosher lulav (such as unbroken, unsevered, proper length). The effects of idolatry and theft are so strong that they are seen as equivalent to physical defects. On the one hand, this fact can be viewed as an extension of the taboo discussed previously. If the lulav's status of *pasul* is seen as similar to a physical defect, this will deter people from purchasing such a lulav and help prevent them from being in proximity to illicit behavior. But the Mishna goes even further. The actual metaphysical reality is that this lulav *is* broken. The Mishna thus teaches us that moral actions related to an object become embedded within the object. The metaphysical is on par with the physical. Applying this to restaurants, it would seem that food produced under immoral circumstances may be blemished and should thus be viewed as *asur behana'a*-prohibited from providing pleasure.

⁴⁰Bavli, Shabbat 3a s.v. *Bava D'Reisha Patur U'Mutar*

⁴¹ Sukkah 3:1

The ensuing conversation in the Talmud commenting on this Mishna takes a different route. The Talmud asks if the prohibition for using a lulav applies equally on all days of Sukkot, concludes it does, and then asks,

“but a stolen lulav is prohibited only because it must be [one’s] own (in order for that person to fulfill the mitzvah, as stated previously--but on the second day, which is wholly rabbinic, why should it be invalid? Said R. Johanan in the name of R. Shimon Bar Yochai: Because it is a religious duty that is enabled by sin.”⁴²

This discussion is based on a specific understanding of the biblical verse, “You should take for yourselves, on the first day (of Sukkot), the fruit of a beautiful tree, branches of palm trees, boughs of thick trees, and brook willows.” (Lev, 13:40) There are two key points in this verse. First, the Torah states the *mitzvah* regarding only the first day of Sukkot. Secondly, the words “take for yourselves” are interpreted by the Rabbis to mean that the plants being taken must be owned by the individual taking them. The *mitzvah* was later extended, rabbinically, to the other six days of Sukkot, but without the qualification that the four species must be owned by the person performing the *mitzvah*. Accordingly, only on the first day is there a problem using a lulav owned by someone else. So why is a stolen lulav prohibited on other days? Rabbi Shimon Bar Yochai states: because it is a *mitzvah* that is enabled by a sin. The Talmud reinterprets the Mishna: the problem is not an intrinsic blemish inherited by the lulav through its being stolen. Rather, a *mitzvah* brought about through sin is hypocritical and borderline blasphemous. You cannot serve God by breaking one of God’s commandments.

Blasphemy is precisely how “*mitzvah* that is enabled by a sin” is understood in tractate Bava Kama, where we read:

⁴² Sukkah 30a

Rabbi Eliezer Bar Yaakov says: One who steals a *seab* of wheat, grinds it, kneads it, and bakes it, and then takes *Challah* (the commandment to set aside dough for the priests), what blessing should he make? He wouldn't be blessing! He would be blaspheming!⁴³

Why does Eliezer Bar Yaakov include in his question taking *Challah*? Assuming the blessing under discussion is grace after meals, one says grace to acknowledge God's role in the making of bread.⁴⁴ Yet, the very fact that one has stolen and violated a God-given command undermines the possibility that such an acknowledgement can be genuine. In contrast to the previous approach we encountered, here the sin doesn't cause a metaphysical change in the object; rather it taints the foundation of one's religious mindset. According to this approach, using an object that was obtained through immoral actions such as stealing or *osbek* undermines one's religious character. From that point on, no matter the lofty spiritual goals one imagines using the object for, one's lack of religious integrity taints any further religious action.

⁴³ Bava Kama 94a

⁴⁴I'm following the interpretation of the Asheri on Berachot 45 that the blessing referred to here is grace after meals.

III. Being Proactive

Responding to the conclusions reached using the models of *Arevut, Mesayeia Lidei Ovrei Avera, Mitzva Haba'a B'avera* and some opinions of *Lifnei Iver*, The Tav HaYosher – “ethical seal”-- was launched in May of 2009. The founders of the Tav understood that given the fact that government oversight has proven insufficient in ensuring that employee rights are upheld, it is incumbent upon the Jewish community to take responsibility for the treatment of workers in restaurants it patronizes. Thus, the Tav HaYosher certifies kosher restaurants that meet three standards: the right to fair pay: minimum wage; the right to fair time: adequate breaks and overtime wages when appropriate; and the right to an abuse-free working environment. These standards are ensured by looking through restaurants’ financial records and by interviewing employees. These compliance visits occur every four to twelve weeks. The certification is free of charge, as all Compliance Monitors are volunteers.

The Tav’s positive campaign partners with restaurant owners, offering free publicity to restaurants with the seal. A number of Jewish organizations, along with a growing community of individuals, have committed to buying from restaurants with the Tav HaYosher.

The goals of the Tav HaYosher are to cultivate an awareness of the important Jewish values discussed in this paper, that Jewish consumers need to consider when patronizing an eating establishment; to effect real change in the lives of employees in kosher restaurants whose rights are currently violated; and to publicly declare that Judaism stands for ethics.

In under a year since first launching with seven restaurants in New York City, the Tav HaYosher has expanded to five states: Maryland, Pennsylvania, New York, New Jersey, and Illinois. As of April, 2010, 38 kosher restaurants have signed onto the Tav HaYosher.

Postscript

In our previous discussion on agency, we concluded that one reason why principals might not be culpable for a harmful act carried out by an agent is that they don't have the opportunity to confront the face of the victim. This failure to see victims of one's actions may be one of the key reasons why employee exploitation in restaurants is so prevalent. The average customer enters a restaurant, encounters only a few of what might be many employees, pays for and receives services. The restaurant may look quite reputable, and the employees with whom the customer comes in contact may in fact be paid adequately. Given the fact that federal law allows for tipped employees to receive far below minimum wage, many more tipped employees are paid fairly. Furthermore, because the employees one interacts with are hoping for a good tip from the customer, they are likely to present themselves in a manner that will evoke good feelings in the customer. When customers leave a tip at the end of a meal, their experience is one of a fair system. And yet, the cooks and dishwashers that work behind closed doors may be severely exploited.

While reading about mistreatment may cause consternation among restaurant goers, the visceral experience of the face-to-face encounter is lost. Moreover, one might read such an article only once or twice a year, not every time one goes to a restaurant. Yet each and every time we patronize a restaurant, we contribute to exploitation. If we had to stare the victims in the face every time we made such a purchase, we most likely would be disinclined to support establishments that violate employee rights.

The problems with restaurants serve as an important example of a larger problem that exists in a globalizing society. As more and more jobs are outsourced overseas and produce is shipped around the world, we generally have no contact with the people who are producing the goods we consume. In order to uphold the dignity of those laborers who produce our consumer items, we need to be extra vigilant on both the technical and emotional levels. Technically, we need to support organizations that monitor employee treatment. Emotionally, because some of the natural mechanisms of repulsion from suffering are lost, we need to replace these with conscious reminders to exercise our imaginations to consider the suffering that might be caused by our consumer choices. In order to cultivate such a *midah*, religious leaders and teachers need to constantly speak on the subject. Additionally, the traditional *mussar va'ad*, a group dedicated to processing and improving moral attributes, would do well to focus on this *midah* as one central to living a complete life, guided by Torah's principles, in the 21st century.

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