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AN EMPLOYER'S VICARIOUS LIABILITY FOR AN EMPLOYEE'S SEXUAL MISCONDUCT

In recent years, some of the rabbis, teachers, administrators and health care professionals who were employed by *yeshivot*, synagogues, and youth organizations of the Orthodox Jewish community have been convicted of child abuse.

How ought Halakha deal today with a yeshiva in New York City which employs a Jewish administrator, principal, or teacher who abuses one of its Jewish students? Though in our presentation we will be addressing sexual abuse, our conclusions are not limited to sexual abuse but encompass other forms of harassment, including assault, bullying, hazing, and sexual harassment. In the event that a victim files *nezikin* (*damage*) claims against the abuser's employer in *beit din*,¹ the question arises whether the yeshiva is responsible to pay the victim of abuse.² Are there grounds for a victim of abuse to file a claim against the employer of the abuser that he suffered

¹ For an earlier discussion regarding the types of claims a victim of abuse may advance against his abuser in *beit din*, see this writer's "Harnessing the Authority of *Beit Din* to Deal with Cases of Domestic Violence," *Tradition* 45:1 (2012), 37-59 (hereafter: "Harnessing the Authority of *Beit Din*"), which can be accessed at www.yutorah.org.

The assumption of our presentation is that either the perpetrator has been criminally convicted by a court, or that the *beit din* will assess whether in fact he/she is an abuser. See "Harnessing the Authority of *Beit Din*," 45-50. Once this determination has been rendered by a civil court or a *beit din*, the *beit din* would proceed to address the issue of the employer's monetary liability for the employee's sexual misbehavior.

² For earlier treatments of the issue of employer liability relating to *nezikin* (injury), see Shillem Warhaftig, *Jewish Labor Law* [in Hebrew], (Jerusalem: Moreshet, 1969), 929-951; Haim Hefetz, "Vicarious Liability in Jewish Law," [in Hebrew], *Dinei Yisrael* 6 (1975), 49-92; *Iyyunim be-Mishpat*, H.M. 44; Michael Wygoda, *Agency Law: Section 11*, (Jerusalem: Ministry of Justice). Many of the sources for sections 1-2 of this presentation have been culled from the aforementioned studies.

Even if the yeshiva has been incorporated, the corporate entity and its employees may be respectively institutionally and personally liable for any *nezikin* claims. See this writer's *Rabbinic Authority: The Vision and the Reality*, (hereafter: *Rabbinic Authority*), (Urim, 2013), 65-110.

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diminished educational opportunities and educational accomplishments, diminished wages and salaries, as well as a non-economic claim for pain and suffering?³ Should in fact the institution be held responsible, we would in effect be invoking the notion of vicarious liability (or *respondeat superior*, lit. the superior must answer) which means that halakha would hold an individual responsible for the misconduct of another, even though the individual is free from recklessness, personal blame, or fault and is, in that sense, “innocent” of any wrongdoing. The modern justification for *respondeat superior* within the context of labor relations is that the employer chooses the worker, controls the work and profits from it, and is in better position to absorb losses than his employee, and therefore will be financially able to compensate for such injuries.⁴ Secondly, should a yeshiva or, for that matter, any Jewish institution which services the needs of our children be halakhically treated in the same fashion in terms of responsibility as an employer who is concerned about a third party’s entrance into the workplace? Finally, is the yeshiva liable for acts of an employee’s abuse even when the yeshiva has exercised reasonable care to correct and prevent any such misconduct? At the conclusion of our presentation, we will raise the practical significance of our *limmud* (study) for our community.

I. An Employer’s Responsibility for Bodily Injury Caused to his Employee

In the absence of an employer’s negligent behavior which caused the injury, the threshold question is whether the employer is responsible for any bodily injury caused to his employee. If, in fact, the employer is not liable, then there would be no grounds even to consider whether an employer ought to be responsible for injury caused to a third party, such as a student abused by an administrator or teacher in a school setting.

Addressing the mitsva of erecting a *ma’akeh*, a parapet on one’s roof, and the prohibition against standing by idly by someone’s death, *Sefer ha-Hinnukh* writes:⁵

³ Whether all of these *nezikin* claims are valid grounds for monetary damages in halakha is beyond the scope of our presentation. Alternatively, parties may choose to opt for resolving their matters in accordance with secular law. For the halakhic underpinnings for such an arrangement, see *Rabbinic Authority*, supra n. 2 at 197-199.

⁴ Rochelle R. Weber, “Scope of Employment Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees,” *Minnesota Law Rev.* 76 (1992), 1519-1520.

⁵ *Sefer ha-Hinnukh*, mitsva 538.

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We realize that the Almighty, in his divine providence, knows exactly what will happen to every man, whether good or bad, decreeing according to his merits... Nevertheless, man must take all necessary precautions in every circumstance, for God created a world which follows the laws of nature: Fire burns and water extinguishes a flame... Likewise, someone falling off a high rooftop will die... Since by divine wisdom our bodies... are subject to the laws of nature, He has commanded us to take all necessary precautions...

As Rambam states:⁶

We have been commanded to remove all obstacles and danger from our homes and therefore we have to construct a wall to encircle the roof and around our pits... in order that no one may fall into them.

Strikingly, the mitzva of *ma'akeh* extends beyond the duty to construct a fence upon one's roof. As *Sefer ha-Hinnukh* aptly notes,⁷

The fact that Torah mentions 'your roof'— the Torah is speaking in the usual case.

In other words, the mitzva of *ma'akeh* is to serve as a paradigm for dealing with multifarious life situations beyond the actual building of a fence around a roof to avoid risk and danger to human life.

Sensitive to this understanding of the mitzva of *ma'akeh*, already R. Natan in the Talmud exhorts us:⁸

One who raises a wild dog or uses a rickety ladder in one's home transgresses the verse "one should not place blood in one's home."

The commandment to provide a safe environment for both occupants of one's home and third parties is not limited to one's rooftop but extends to raising a wild animal or using a rickety ladder in one's residence. The violation of "one should not place blood in one's home" (Deut. 22:8) extends beyond the failure to place a fence around one's roof and encompasses the failure to monitor one's pets as well as being derelict in maintaining the utility and safety of objects found in one's home such as a ladder.

⁶ *Sefer ha-Mitsvot, mitzvat aseh* 184.

⁷ *Sefer ha-Hinnukh*, supra n. 5.

⁸ *Bava Kamma* 15b.

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Noncompliance with the duty of constructing a *ma'akeh* entails the nullification of a positive commandment to construct a fence as well as the negative commandment of "one should not place blood in one's home."⁹ As such, the mitsva of *ma'akeh* is a halakhic-moral obligation which is usually unenforceable by a *beit din*.¹⁰

Following in the footsteps of R. Natan and the *Sefer ha-Hinnukh* and realizing that the mitsva of *ma'akeh* is a halakhic-moral obligation which encompasses multifarious situations, R. Epstein and R. Uziel contend that hazardous materials found in the workplace are to be regulated based upon the mitsva of *ma'akeh*. In other words, the mitsva of *ma'akeh* is not limited to protecting an individual in one's home but equally extends to one's place of employment. Moreover, as we noted, it is mitsva with no halakhic-legal consequences. Therefore, in order to be able to hold an employer halakhically-legally accountable for bodily injuries caused to one's employees by hazardous materials found in the workplace, R. Epstein and R. Uziel suggest that one must invoke the *nezikin* (injury) claim of *bor*, a pit.¹¹ The claim of *bor* covers scenarios where an obstacle is created by an individual's negligence and another person is injured. The classic example is that of a person who digs a pit in a public thoroughfare, leaves it uncovered and an animal falls into it.¹² Adopting the *halakhot* of *bor* as the avenue for addressing an employer's liability for the injury caused by potentially hazardous material in the workplace will depend on whether the employer's permission to allow the worker to enter the workplace ipso facto means that he assumes responsibility for an employer's claim of *nezikin*. This issue is a matter of halakhic debate.¹³ For those *posekim* who argue that the employee's entry into the workplace means that his employer assumes responsibility for any injury caused to the employee, then based upon *hilkhot bor*, the employer may be mandated by a *beit din* to pay for the injury. On the other hand, for those *posekim* who contend that a worker's entry into the work place does not assume an employer's willingness to compensate the employee for potential injury, a *beit din* may not obligate him to pay damages. In short, whether an employer is responsible vis-à-vis the employee for exposure to hazardous materials in the workplace is subject to debate.

However, is an employer liable for directing an employee to engage in actual work which entails a danger to him? For example, knowing that

⁹ *Sefer ha-Mitsvot* of Rambam, *mitsvat aseh* 184; *mitsvat lo-ta'aseh* 298.

¹⁰ *Arukh ha-Shulhan*, H.M., 410:4; *Mishpetei Uzziel*, H.M. 44.

¹¹ *Arukh ha-Shulhan* and *Mishpetei Uzziel*, supra n. 10.

¹² Exodus 21:33-34.

¹³ SA and Rema, H.M. 398:5; S.A., H.M. 389:10.

an employee worked for their enemy, an employer's creditors attacked the employee, injured him and stole the merchandise. In this case, R. Yosef Trani obligates the employer to compensate his employee for his losses which were caused by the employer's negligence.¹⁴ Said conclusion was drawn by R. Trani's inference from Rashba's posture,¹⁵ a view which was subsequently endorsed by R. Moshe Isserles.¹⁶ And, in fact, a few other *posekim* concur that in cases of an employer's negligence, he is responsible to pay for the bodily injury incurred by the employee.¹⁷ However, given that the employer did not assume responsibility to protect his employee's bodily integrity and given that many decisors reject the notion that an individual may be a *shomer* of the bodily integrity of another individual, many *posekim* demur and contend therefore that he is exempt from liability.¹⁸ In short, in the event that there is no negligence on the part of the employer in the employee's bodily injury or the injury to the laborer failed to transpire during the time of employment, many *posekim* argue that the employer is exempt from responsibility.

Implicit in this conclusion is that liability for one's behavior rests with the one who causes the injury rather than a third party (even when it is in a position of authority). Dating back to the time of the Second *Beit ha-Mikdash* (Temple), we encounter that the *Perushim* (the Pharisees), those who accepted the teachings of our Oral Law, and the *Tsedukim* (the Sadducees), those who rejected their rulings, already debated whether in fact Judaism accepts the notion of an employer's vicarious liability for his employee's actions. Recounting this controversy, the Mishna in *Yadayim* informs us:¹⁹

¹⁴ *Teshuvot ha-Mabbai* 2:156.

¹⁵ *Teshuvot ha-Rashba ha-Meyuhasot la-Ramban* 20.

¹⁶ *Rema*, H.M. 176:48.

¹⁷ *Mishpat Shalom*, H.M. 176; *Teshuvot Benei Binyamin* (Navon), H.M. 35.

¹⁸ *Teshuvot ha-Rosh* 89:4; *Teshuvot Maharshal* 96; *Taz*, H.M. 176:48; *Netivot ha-Mishpat* 176:60; *Teshuvot Maharik*, *Shoresh* 131; *Teshuvot Maharashdam*, H.M. 435; *Teshuvot Noda be-Yehuda*, *Mahadura Kamma*, *Orah Hayyim* (O.H.) 34; *Teshuvot Tsemach Tsedek* 6; *Teshuvot Gur Aryeh Yehuda*, H.M. 18; *Hazon Ish*, *Bava Kamma*, 11:21.

However, some decisors argue that an employer is liable according to *dinei shamayim*, the laws of heaven, or *middat hasidut*, the standard of saintliness. See *Noda be-Yehuda*, op. cit.; *Gur Aryeh Yehuda*, op. cit.; *Maharashdam*, op. cit.

Alternatively, R. Schwadron contends that a *peshara*, a compromise, should be brokered regarding the matter. See *Mishpat Shalom*, supra n. 17.

Regarding authorities who reject the idea that an individual can be a *shomer* of someone else's body, see *Teshuvot ha-Rashba ha-Meyuhasot la-Ramban*, 20; *Teshuvot ha-Rosh* 89:4; *Teshuvot Maharashdam*, H.M. 435; *Taz*, H.M. 176:48; *Netivot ha-Mishpat* 176:60.

¹⁹ *Mishna Yadayim* 4:7.

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The *Tsedukim* said: We are protesting against you *Perushim*. If you argue that my ox and donkey who are exempt from mitsvot, that I am liable for the injury it caused, likewise my bondsman and bondswoman that are obligated in mitsvot, isn't it clear that I would be obligated to pay for the injury they caused? They replied to them: No – If you say (this) regarding my ox and donkey who are bereft of intelligence, should we likewise say the same regarding my bondsman and bondswoman who possess intelligence? For if I anger them, they may go out and set on fire someone's stack and I shall be liable to pay.

In other words, according to the *Perushim*, the servant's master is not liable for the damage caused by the servant.

Subscribing to the *Perushim's* view, post-talmudic authorities such as *Tosafot* and *Meiri* conclude that even if the slave intended to harm another individual, his master is not responsible for any ensuing damage.²⁰ Similarly, if a servant steals, his master is not duty-bound to pay for the theft.²¹ The concept of individual responsibility is not limited to a master-servant relationship but extends equally to halakhic marital ties. As the Mishna instructs us, though during her marriage a wife who injures somebody is exempt to pay for the injury caused,²² nonetheless upon divorce she is obligated to pay from her assets.²³ Or should the wife own assets during the marriage which are not under the husband's control, she must remit compensation during the marriage.²⁴ In short, a wife is responsible for the damage she caused to others.

The responsibility of a wife as well as a slave for damages is a reflection of the general rule that if Levi instructs Yehuda to violate Halakhah and Yehuda does so, Yehuda is liable and Levi is not. For example, if Levi tells Yehuda to dig a pit, which Yehuda does, and Moshe falls into the pit and is injured, Yehuda is liable.²⁵ Or, to give another example: An owner of hops entrusted his hops to a *shomer* (bailee) who has his own hops, and the *shomer* instructed his servant to put some hops into the beer, pointing to his own hops. However, the servant inadvertently placed the bailor's hops into the beer instead. Subsequently, the bailor sued to recover the value of his hops. *Shulhan Arukh* rules that the *shomer* is exempt from responsibility. The servant is also not

²⁰ *Tosafot*, *Bava Kamma* 4a, s.v. *lav*; *Beit ha-Behirah*, *Bava Kamma* 4a.

²¹ *Tur*, *H.M.* 349.

²² Her nonpayment relates to a wife's matrimonial property rights, which is a matter beyond the scope of our presentation.

²³ *Bava Kamma* 87a.

²⁴ *Arukh ha-Shulhan*, *H.M.* 424:14.

²⁵ *SA*, *H.M.* 410:8.

obligated to pay since his master, the *shomer*, did not specifically instruct him to put these hops in and not the others. Since the bailee's instructions to place "some hops into the beer" were unclear in regard to whose hops, the servant is not liable to pay.²⁶ Obviously, had the *shomer's* instructions been clear and had the servant failed to comply with them, the servant would have been obligated to pay for the value of the hops. Here, again, Halakhah recognizes the notion of individual responsibility for one's behavior. The one exception to the rule of individual responsibility is that a minor who engages in *nezikin* is exempt from responsibility when he attains majority age.²⁷ But here again, this exception is understandable and reflects the halakhic affirmation of individual responsibility. Since the act of *nezikin* was committed during a period when a minor is exempt from mitzvot and responsibility only commences for actions done when one reaches majority age, a minor is exempt from liability even upon attaining the age of majority.

In short, the mitzva of *ma'akeh* instructs us that an individual Jew must provide a safe environment which will minimize the exposure to risk. Secondly, the concept of individual responsibility undergirds the interaction between individuals including but not limited to master-servant ties, spousal relationships, bailment matters, and relationships with minors. In sum, in responding to the question whether another individual is responsible for the damage caused by someone else, the Talmudic reply is "an individual is obligated to protect his own body."²⁸

II. An Employer's Responsibility for Injury Caused by his Employee

A similar conclusion that we found regarding injury caused to the employee may be found in the context of an employer's responsibility for injury caused *by his worker*. For example, in a *baraita* we encounter the following teaching,²⁹

Our Rabbis taught: Once the quarryman has delivered [the stones for building] to the chiseler [for polishing and smoothing], the latter is responsible [for any damage caused by them]; the chiseler having delivered

²⁶ SA, H.M. 291:25.

²⁷ However, should the minor benefit from the injury caused, then he must compensate. See *Teshuvot Shevut Ya'akov*, volume 1, 177.

Even though a minor is exempt from payment, nevertheless for educational reasons, a *beit din* is authorized to monetarily penalize a minor who is a *mazik*. See *Shevut Ya'akov*, *ibid.*; *Teshuvot ha-Radvaz*, vol. 1, 432.

²⁸ *Bava Kamma* 4a.

²⁹ *Bava Metzia* 118b.

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them to the hauler, the latter is responsible; the hauler having delivered to the porter, the latter is responsible; the porter delivers the stones to the bricklayer, the latter is responsible; the bricklayer delivers them to the foreman (to set the stones in place), the latter is responsible. But if after he had placed the stone properly in place, it caused damage, all are responsible. But has it not been taught: only the last is responsible, while the others are exempt? There is no difficulty: the second case refers to a laborer, the first case to an independent contractor.

Addressing the situation of injury caused to the employer or a third party by a laborer, the *baraita* directs its attention to whether the other workers who are employed on the same project are responsible to pay for the damages caused. Does it make a difference whether we are dealing with a group of contractors who are being compensated for a project or a group of wage earners who are paid by the hour?³⁰ The tannaitic reply is that if the damage was directly caused by a worker, regardless of whether we are dealing with workers who earn an hourly wage or contractors who are compensated based upon the completion of a project, liability resides solely with the *mazzik*, the tortfeasor. As the aforementioned *baraita* states,³¹

Once the quarryman has delivered [the stones for building] to the chiseller [for polishing and smoothing], the latter is responsible [for any damage caused to a third party].

Such a conclusion is seen as authoritative amongst the authorities.³² Accordingly, if the actual damage transpired after the worker completed his job, then one must distinguish between a group of laborers and a group of contractors. Concerning the contractors, given that they all were partners in this enterprise, they all are jointly responsible to pay for the damages. However, a wage earner is hired to perform a particular job, and therefore only the last one will be liable.³³

On the other hand, in addressing a scenario of a contractor causing damage, the mishnah in *Bava Metsia* instructs us,³⁴

³⁰ For this distinction between a laborer and contractor, see *Rashi B.M.* 112b, s.v. *kablanut*; *Maggid Mishneh*, *Hilkhot Sekhirut* 9:4; *Rema*, *H.M.* 333:5. For additional analysis towards defining the relationship between an employer and a laborer, see Be-rachyahu Lifshitz, *Employee and Independent Contractor: Acquisitions and Obligations in Contract*, [in Hebrew], Jerusalem 1993.

³¹ *Bava Metsia*, supra, n. 29.

³² *Rashi*, *Bava Metsia* 118b; *Ra'avad*, *Shita Mekubbetset* 118b.

³³ *Ra'avad*, *Shita Mekubbetset* 118b; *S.A.*, *H.M.* 384:4.

³⁴ *Bava Kamma* 98b.

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If a builder undertook to remove a wall and broke the stones or damaged someone,³⁵ he would be liable to pay.

Accordingly, if a builder contracted to demolish the wall and broke the stones or injured a passerby during the dismantling, the builder is liable. The inference drawn from this Mishnaic ruling is that if we are dealing with a builder who has been hired on a per diem basis, if he causes property damage or he himself injures a third party from the dismantling of the stones, the employer as well as the employee would be jointly responsible in paying damages.³⁶ The rationale is that an employer will supervise his wage earner's job and therefore he is responsible for any *nezek* (damage) which was done by his laborer during his employment while working with his employer's property. On the other hand, an employer has neither control nor the capacity to supervise a contractor's work; therefore he is exempt for any *nezek* committed by his employee. Clearly, should an employer of a group of contractors undertake to accept joint responsibility for damages incurred in the *baraita* case, he would share in the liability.³⁷ However, should the pain continue to persist after the actual injury, the laborer is solely responsible for the damages.³⁸

As is aptly noted by R. Sha'anani, a *dayyan* who serves on Tel Aviv's Rabbinical Court,³⁹ the aforementioned *mishnah* and subsequent halakhic discussions are silent regarding an employer's liability for other types of *nezek* such as the case of an employee who during the performance of work tramples on another person's property located at the work site. Moreover, there is silence regarding whether employer liability extends to an employee who assaults or sexually abuses a coworker or a third party while on the job. It seems that in these instances sole responsibility for such misconduct resides with the laborer. Consequently, it would seem, a principal or teacher who abuses his student is solely liable for his own misbehavior. In fact, assuming a particular state permits corporal punishment of students by teachers, if a teacher utilizes excessive force in attempting to educate a student

³⁵ See textual variant found in *Dikdukei Sofetim*, *Bava Kamma* 98b; *Piskei ha-Rosh*, *Bava Kamma* 9:14; *Rashash*, *Bava Kamma* 98b.

³⁶ *Mishneh Torah*, *Hilkhot Nizkei Mamon* 13:18; *SA H.M.* 384:4.

³⁷ *Nimmukei Yosef*, *Bava Metsia* 118b; *Ra'avad Bava Metsia* 118b.

³⁸ *Teshuvot Nofet Tsufim* (Burdugo), vol. 1, *H.M.* 395.

³⁹ *Iyyunim be-Mishpat*, *Hoshen Mishpat* 44 (463).

he rather than the employer is responsible to pay for damages.⁴⁰ But is a student in a yeshiva setting to be treated halakhically like a third party in the conventional workplace?

III. The Halakhic Mandate for a Safe Workplace

If, in fact, the yeshiva as the employer is exempt from responsibility for any monetary claims advanced by the victim of abuse against one of the yeshiva's employees, does that mean the yeshiva is absolved from introducing policies of hiring, supervision, and training in dealing with sexual misconduct which will hopefully create a safe environment for students? Firstly, Halakha is concerned for the victim of abuse, and ensuring that abuse does not take place must be of primary concern. In addition, the establishment and employment of such policies serves as a concrete articulation of our covenanted-responsibility of *arevut*, guaranteeing that our fellow Jew observes Halakha.⁴¹ Obviously, engaging in child abuse in any shape or form such as improper touching or fondling is a halakhic violation.⁴² Hence, an employer, similar to every individual Jew, is duty-bound to ensure that his employees are engaging in proper conduct, and thus must introduce policies with the aim of preventing employees and third parties from functioning in a sexually hostile environment.

Moreover, our duty to promote a safe work site is underscored by our mandated love of our fellow man, as *Sefer ha-Hinnukh* observes,⁴³

One should act with his friend as he is accustomed to behave for himself, to protect his property and to prevent that injuries befall him...If he injures his property or pains him, he has transgressed this positive commandment.

Consequently, the *weltanschauung* of Halakha based upon the notion of love of our fellow man and *arevut* would entail that the employer properly screen its potential employees by interviewing them and contacting their references. And once employed, the employee ought to be supervised and receive training in proper sexual behavior.

⁴⁰ *Ketubbot* 50a; *Gittin* 31a; *SA, Yoreh De'ah* (Y.D.) 245:9. For further discussion regarding this issue, see this writer's "Corporal Punishment in School: A Study in the Interaction of Halakha and American Law with Social Morality," *Tradition* 37:3 (Fall 2003), 57-75.

⁴¹ Deuteronomy 9:9-14. *Teshuvot Hatam Sofer*, Y.D. 19.

⁴² *SA, Even ha-Ezer* (E.H.) 20:1; *Beit Shemuel* and *Biur ha-Gra*, ad locum.

⁴³ *Sefer ha-Hinnukh*, mitsva 219.

Furthermore, Halakha is not merely concerned with the prevention of improper sexual misconduct in the workplace. Failure for a yeshiva or for that matter any Jewish institution to deal with actual abusive behavior occurring under their watch entails a violation of “And thou shall restore it to him.” Summarizing the interplay between mitsva of *lo ta’amod al dam re’ekha*, the obligation to assist somebody in peril, and “And thou shall restore it to him,” the duty to restore a lost object to its owner, R. J. David Bleich writes,

The obligation to save the life of an endangered person is derived... from the verse “Nor shall you stand idly by the blood of your fellow...The Talmud and the various codes of Jewish law offer specific examples of situations in which a moral obligation exists with regard to rendering aid. These include the rescue of a person drowning in a river, assistance to one being mauled by wild beasts, and aid to a person under attack by bandits... This obligation is predicated upon the scriptural exhortation with regard to the restoration of lost property, ”And you shall restore it to him”...On the basis of a pleonasm in the Hebrew text, the Talmud declares that this verse includes an obligation to restore a fellow-man’s body as well as his property...

A latter day authority, R. Yehudah Leib Zirelson, in his *Teshuvot Atzei ha-Levanon*, no. 61 argues cogently that the obligations posited by the Gemara... apply under non-life threatening circumstances no less than in life-threatening situations. The verse “And you shall restore it to him”... mandates not only the return of lost property, but a fortiori, preservation of life as well... Accordingly, declares *Atzei ha-Levanon*, restoration of health to a person suffering from an illness is assuredly included in the commandment “And you shall restore it to him.”⁴⁴

In short, the divine imperative of “And thou shall restore it to him” is not limited to the recovery of lost objects but equally encompasses the restoration of psychological well-being as well as physical health of a fellow-Jew.

This obligation is not enforceable in *beit din*, as is evident from the immunity granted to the rescuer for any injury committed during the saving of the rescued party. Additionally, despite the fact that the rescuer has the right to sue the rescued party for any financial expenses incurred

⁴⁴ J.D. Bleich, *Judaism and Healing* (N.Y.: Ktav, 1981) 1,3-4.

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during the rescue operation,⁴⁵ nonetheless, the failure to restore health does not result in any halakhic-legal consequences.⁴⁶ The duty is a halakhic-moral obligation which a Jew must comply with in order to fulfill the requirements of Heaven, i.e. *hayyav be-dinei shamayim*.⁴⁷

To state it differently, a Jewish institution is not only obligated based upon the norms of love of one's fellow man and *arevut* to professionally create and implement policies regarding hiring, supervising, and training of employees regarding sexual misconduct. Implicit in such a mandate is that the yeshiva as an employer is duty-bound to serve as a *shomer* over the bodily integrity of its students.⁴⁸ Any suspicion of sexual abuse should be recorded and investigated and the individual should be monitored. As we have seen, whereas the halakhot of labor relations preempt an employer's responsibility for bodily injured caused by his employee to a third party, here, when dealing with an institution who is servicing children and therefore acting in a custodial, caretaker capacity mandates that certain administrative policies be established and implemented.

Moreover, should an actual act of abuse occur, prompt action ought to be taken against the employee by his discharge based upon the halakhic imperative of "and you shall restore it to him," i.e. insuring the psychological health of the victim of abuse. Finally, assuming there is a credible allegation of abuse and there are reasonable grounds ("*raglayim la-davar*") of suspicion that the abuse transpired or actual knowledge of an act of abuse, the employer must comply with the mandated reporting laws of the state where the abuse occurred, and if required by law, ought to notify the civil authorities regarding the incident.⁴⁹ The aforementioned

⁴⁵ *Tur*, H.M. 264; *Beit Yosef*, H.M. 265, *SA*, H.M. 267:26, 380:4.

⁴⁶ *Mishnah Torah*, *Hilkhot Rotseah u-Shemirat ha-Nefesh* 1:14,16.

⁴⁷ This *din shamayim* which generally cannot be dealt with by an earthly Jewish court may be addressed in a *beit din* under certain prescribed conditions. See Y. Ariel, *Dinei Borerut*, 174, 188-190.

⁴⁸ *Mordekhai*, B.M. 359, 461; *Rema*, H.M. 176:48; *Teshuvot Maharik*, *shoresh* 131; *Maggid Mishneh*, *Hilkhot Toen ve-Nit'an* 5:2. One of the primary objections to this view is that *hilkhot shomerim* conventionally is understood as limited to the guarding of movable objects rather than human beings. See *Shemot* 22:6.9; *Shakh*, H.M. 227:19; *Mishpat Shalom* 176:48. For an employer's liability as a *shomer*, see *infra*, nn. 105-107.

Whether the institution and the employee serve as an "*apotropus*," a guardian vis-à-vis the children, is beyond the scope of our presentation.

⁴⁹ *Shita Mekubbetset*, *Bava Metsia* 83b in the name of Ritva ; R. Sinai Adler, *Devar Sinai*, 45-46 (Jerusalem: 5760) (R. Elyashiv's opinion); *idem.*, "A Treatise Regarding Your Friend's Blood," [in Hebrew] *Yeshurun* 15 (5765), 634-665, at 641 (R. Elyashiv's opinion); *Nishmat Avraham*, Vol. 4, 207, 208. However, if the alleged abuse is

policies represent what may be best described as a yeshiva's zero tolerance policy vis-a-vis employees who may be or who are child predators. These administrative guidelines concretize how to fulfill our obligations of love of one's fellow man, *arevut*, rebuke, and active intervention to assist a fellow human being in peril.

Moreover, failure to employ a policy of dismissal entails a violation of *afrushei me-issura* which minimally is a violation of a rabbinic prohibition⁵⁰ or maximally a transgression of a Biblical interdict.⁵¹ As a member of our covenant-faith community, a Jewish employer, like every Jew, has a duty to prevent the commission of a transgression (*leafrushei me-issura*).⁵² The interdict of *afrushei me-issura* is grounded either in our covenanted-responsibility of *arevut*, the obligation to guarantee that our fellow Jew observes Halakha,⁵³ or based upon in the mitzva of admonishing a neighbor who is straying from the dictates of the Torah.⁵⁴ To allow an employee who is under suspicion of being an abuser or actually is engaging in pedophilia to roam the workplace without supervision and accountability is a travesty.

based upon flimsy evidence such as a suspicion or rumor, there would be no grounds for contacting the civil authorities. See also *Nishmat Avraham*, Vol. 4, 207, 208 (R. Waldenburg's opinion).

Implicit in the permissibility in contacting the civil authorities is that there exists no prohibition of *mesirah*, of informing to a government which conducts itself by the rule of law such as a democracy. See *Arub ha-Shulhan*, H.M. 388:7; *Teshuvot Tsits Eliezer*, 19:52. However, some *posekim* contend that the interdict against *mesirah* applies when one causes a Jew to be incarcerated and the punishment for the particular offense is more severe than the Halakhah prescribes. See *Iggerot Moshe*, H.M. 1:8, 5:9; *Teshuvot Helkat Ya'akov*, H.M. 5 (new edition). Nonetheless, the prohibition is inapplicable to an individual who is a danger to society such as a pedophile. See *SA*, H.M. 388:12, *Shakh*, *SA*, H.M. 388:59.

⁵⁰ *Tosafot*, *Hiddushei ha-Ran*, *Hiddushei ha-Rashba*, *Shabbat* 3a.

⁵¹ *Mishnah Berurah*, *Sha'ar ha-Tsiyyun* 347:8.

⁵² *Sedei Hemed*, *Ma'arekhet ha-Vav*, *Kelal* 26(3).

There is a dispute whether *afrushei me-issura* is limited to an *issur* (prohibition) being committed in one's home and one's *reshut* (domain) or whether the obligation to prevent another individual's transgression extends to a situation where the *issur* potentially could be transgressed outside of one's home and domain. See *Imrei Binah*, *Hilkhot Dayyanim* 9; *Ketsot ha-Hoshen* 3:1; *Netivot ha-Mishpat* 3:1. Given that the potential for transgression of *issur* here deals with an employee who is working in an employer's facility, it would seem that even *Imrei Binah*, who generally limits invoking the *issur* beyond one's home, would argue that such a situation is equivalent to having the potential *issur* violated in one's home and would concur with *Ketsot ha-Hoshen* and *Netivot ha-Mishpat* that it is incumbent upon the employer to prevent the occurrence of such *issurim*.

⁵³ *Teshuvot Hatam Sofer*, *Y.D.* 19.

⁵⁴ *Teshuvot Ketav Sofer*, *Y.D.* 83.

In sum, based upon the foregoing presentation, the yeshiva as an employer is halakhically obligated to implement certain administrative policies to ensure a safe environment for their students. Yet, should abusive behavior be perpetrated by one of their employees, the yeshiva who implemented such policies, similar to an employer would not be liable for his worker's sexual misconduct.

IV. “*Dina de-Malkhuta Dina*” – An Avenue towards the Recognition of an Employer’s Vicarious Liability

The remaining question is whether there are any halakhic grounds to hold an employer who implemented these policies liable for an employee’s sexual misconduct? Clearly, should a labor agreement or an insurance policy deal with an employee’s liability for injury caused by the employee, the agreement dictates the conditions and scope of institutional responsibility for such *hezek* perpetrated by the employee. However, in the absence of an agreement addressing this issue, is an employer responsible? Will an employer always be responsible for employee sexual misconduct or will he be exempt from responsibility should he demonstrate that hiring, supervisory, and retention policies were in place at the time of the alleged act of abuse?

Given that the abuse transpired in New York City, seemingly the doctrine of “*dina de-malkhuta dina*,” lit. the law of the kingdom is the law,⁵⁵ may serve as an avenue for a the victim to file suit in *beit din* against his abuser. In accordance with *Rema*, which is the accepted view amongst the majority of *posekim*,⁵⁶ “*dina de-malkhuta dina*” is applicable to all matters that fall under the rubric of “*le-takkanat benei ha-medina*,” for the benefit of the citizenry.⁵⁷ As understood by *Rema* elsewhere,⁵⁸ any legislation relating to social interaction is to be subsumed in the category of “*le-takkanat benei ha-medina*,” and therefore requires Jewish compliance. In contemporary times, legislation governing labor relations is one of the many examples of a law which is “*le-takanat benei ha-medina*.”⁵⁹ Numerous Israeli *dayyanim* including Rabbis Izirer, Sherman, and

⁵⁵ *Nedarim* 28a; *Gittin* 10b; *Bava Kamma* 113a-b; *Bava Batra* 54b-55a.

⁵⁶ *Teshuvot Dovev Mesharim* 1:76.

⁵⁷ *Rema*, *H.M.* 73:14, 369:11.

⁵⁸ *Darkhei Moshe*, *H.M.* 369. And, in fact, scattered throughout his *Hoshen Mishpat* rulings, *Rema* offers concrete examples of applying civil law to instances involving social interaction. See *Rema*, *H.M.* 73:14,154:18, 356:7, 369:11.

⁵⁹ File no. 106/5756, Tel Aviv Regional Rabbinical Court, *Plonit v. Va'ad ha-Hinnukh shel Agudat Yisrael* (unpublished decision); File no. 5513-35-1, Haifa Regional Rabbinical Court, *Plonit v. Ploni*, August 11, 2005; File no. 1323-35-1, Ashdod Regional Rabbinical Court, *Ploni v. Menahel Mosad Almoni*, July 13, 2008.

Tsadok⁶⁰ invoke *Rema's* approach in halakhically recognizing civil labor law. It is clear in these cases that our desire to foster a sexually safe working environment facilitates proper social interaction. As such, the doctrine of “*dina de-malkhuta dina*” may appear to serve as a vehicle for addressing whether Halakha ought to recognize an employer’s vicarious liability in cases of an employee’s sexual misconduct.

Let us briefly present how New York courts have dealt with employer’s vicarious liability as it relates to sexual harassment and abuse. A review of the law in New York City will demonstrate how our matter has been resolved differently in the late 1990s in comparison to more recent years. Sexual harassment claims, including but not limited to sexual abuse, have been resolved in NY in pursuance to the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (“Title VII”) and the NY City Human Rights Law (“NYCHRL”), which is codified in part in the New York City Administrative Code.⁶¹ Various NY courts have noted that claims brought under NYHRL are to be resolved in the same fashion as claims advanced under Federal Title VII and have been rendered in accordance with two US Supreme Ct. decisions.⁶² In 1998, the United States Supreme Court in two separate decisions, *Faragher v. Boca Raton*⁶³ and *Burlington Industries, Inc. v. Ellerth*,⁶⁴ furnishes the guidelines which shield the employer from federal sexual harassment claims. Assuming the plaintiff has proven sexual harassment by an employee who exercised managerial or supervisory responsibility, the employer must prove that (1) he exercised reasonable care to prevent and correct any harassment; (2) action was taken against the offending employee (e.g., discharge, demotion or undesirable reassignment) and, (3) made use of any preventive and corrective mechanisms to avoid the harm. Upon demonstrating compliance with these safeguards, the employer was exempt from responsibility for his employee’s misbehavior. These guidelines were endorsed by NY courts.⁶⁵

⁶⁰ File no. 1323-35-1, supra n.59; File no. 8085481, Supreme Rabbinical Court, *Mosedot Plonim v. Plonit*, September 16, 2009.

⁶¹ New York City Administrative Code, Section 8-107.

⁶² *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481, 487 (S.D. N.Y. 1998); *Moore v. Sam’s Club et al.*, 55 F. Supp. 2d 177 (1999); *Wahlstrom v. Metro-North Commuter Railroad Co.*, 89 F. Supp. 2d 506, 523 (S.D. N.Y. 2000); *Duviella v. Counseling Service of Eastern Dist. Of N.Y.*, 52 Fed. Appx. 152, 153 (2d Cir. 2002); *Kercado-Clymer v. City of Amsterdam, et al.* 608 F. Supp. 203 (2009).

⁶³ 524 U.S. 775 (1998).

⁶⁴ 524 U.S. 742 (1998).

⁶⁵ *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (1998); *Ehrens v. Lutheran Church*, 385 F. 3d 232 (2d Cir. 2004); *Vione v. Tewell*, 12 Misc. 3d 973, 820 N.Y.S.2d 682 (N.Y. Sup. Ct. 2006).

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In effect, these secular legal guidelines are a concretization of the notions of *arevut*, love of one's fellow man, *afrushei me-issura*, and "and you shall restore it to him," which, if implemented, serve to promote a work environment which is free of sexual harassment and abuse.⁶⁶

Applying the *Farager-Ellerth* guidelines to our scenario, should student abuse have occurred in 2008 at the hands of a NY City yeshiva principal or teacher⁶⁷ and the school had established and implemented hiring, supervision, and retention policies concerning abuse, the yeshiva would have been exempt from liability. However, if the yeshiva was negligent regarding any one of these policies, in light of NY court decisions, a *beit din* invoking the doctrine of "*dina de-malkhuta dina*" may have imputed responsibility to the yeshiva and the school would be required to pay civil damages. Placing an employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee, serves as grounds for imputing employer liability.

Subsequently, in 2009-2010, some NY courts abandoned applying the *Farager-Ellerth* guidelines for addressing lawsuits brought under NYCHRL. In *Zakrzewska v. The New School*, a federal court in the Southern District of New York concluded that the *Farager-Ellerth* guidelines for harassment liability do not apply to claims under NYHRL. Additionally, the court concluded that NYHRL creates vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any such harassment.⁶⁸

Answering a question certified to it by the United States Court of Appeals for the Second Circuit, the New York Court of Appeals, in *Zakrzewska v. The New School*, acknowledges that state and local civil rights law must be interpreted in light of federal law. Moreover, the language of New York City Administrative Code imputes vicarious liability for the employer, even if he complies with the *Farager-Ellerth* guidelines

⁶⁶ See *infra*, n. 75.

⁶⁷ An individual qualifies as a supervisor if he or she is authorized to hire, fire, promote, demote, and reassign the employee or if his recommendation is given substantial weight by the final decision maker(s). See *Ellerth*, 118 S. Ct. at 2269.

Furthermore, even if that individual is not empowered to change a person's employment status such as hiring and firing, if he is authorized to direct another employee's day-to-day work activities, he or she qualifies as a supervisor. See *Faragher*, 118 S. Ct. at 2280. As such a teacher would qualify as a supervisor.

⁶⁸ *Zakrzewska v. The New School*, 598 F. Supp. 2d 426 (2009).

and creates a safe workplace.⁶⁹ And, numerous New York courts have endorsed the *Zakrzewska v. The New School* ruling mandating an employer's liability even where the employer implemented hiring, supervision and retention policies and took immediate and appropriate corrective action.⁷⁰ In effect, the courts have precluded the use of the Farager-Ellerth guidelines as an avenue for an exemption of an employer's vicarious liability rather than rejecting them.⁷¹ As such, in accordance with New York law, a New York City yeshiva would be liable for child abuse even if it had established and implemented policies which promoted a safe work place, such as producing records relating to retention, supervision, discipline, termination, and complaints or investigations regarding an employee accused of sexually abusing a student. To state it differently, concerning abuse, a New York City employer is strictly liable.

However, most *posekim* contend that the rule of *dina de-malkhuta dina* is inapplicable when dealing with judge-made law such as US Supreme Ct. and NY court decisions, because generally the law as interpreted by the courts evolves and is ever-changing.⁷² In fact, as we have shown, New York law has evolved from initially absolving an employer from liability in situations where hiring and supervision policies were operative and subsequently mandating responsibility even when said policies were implemented. In the minds of these *posekim*, "*dina de-malkhuta*

⁶⁹ Section 8-107(1) (a); *Zakrzewska v. The New School*, 620 F. 3d 168 (2010).

⁷⁰ *Edrisse v. Marriot International*, 757 F. Supp. 2d 381 (2010); *Alexander v. Westbury Union Free School*, 829 F. Supp. 2d 89 (2011); *Cajamarca v. Regal Entertainment Group*, 863 F. Supp. 2d 237 (2012); *Mc Redmond et al. v. Sutton Place Restaurant and Bar et al.*, 95 A.D. 3d 671 (2012); *Gandarilla v. Albert Sanchez, et al.*, No. 07 Civ. 6909 (LTS) (S.D. New York- August 15, 2012); *Joyner v. The City of NY et al.*, No. 11 Civ. 4958 (DLC) (S.D., NY, October 10, 2012).

⁷¹ In this fashion, the New York courts interpreted the cases in a way that did not contradict the established precedent of the US Supreme Ct. decisions.

⁷² *Teshuvot ha-Rashba* 3:109, 6:254; *Teshuvot ha-Rivash* 495; *Beit Yosef, Tur H.M.* 26 (end); *Rema, Darkhei Moshe H.M.* 369:3, *Sma*, ad. loc.. 21,28; *Teshuvot Mahariz Enzel* 4; *Teshuvot Shevut Ya'akov* 2:176; *Teshuvot Maharsham* 5:41; *Teshuvot Penei Moshe*, 1:39, 2:116; *Teshuvot Shemesh u-Tzedaka* 33:1; *Teshuvot ve-Hanhagot* 3:455; Avraham Sherman, "National Custom in Labor Relations," [in Hebrew], 18 *Tehumin* 245-247 (5758); File no. 335906/3, *Ploni v. Plonit*, Tel Aviv-Yaffo Regional Rabbinical Court, May 26, 2010. Cf. *Teshuvot Minhat Yitzchak* 2:86, who argues that judge-made law regarding matters unrelated to taxes ought to mandate compliance based upon *dina de-malkhuta dina*; Shlomo Dichovsky, "Partnership Doctrine – Is it *Dina de-Malkhuta Dina*?" [in Hebrew] 18 *Tehumin* 18, 27-29 (5758); PDR 16, 296, 301; File no. 3369-21-2, *Plonit v. Ploni*, Supreme Rabbinical Court, January 23, 2007; File no. 292687/1, *Ploni v. Plonit*, Netanya Regional Rabbinical Court, October 10, 2010; File no. 830099/5, Haifa Regional *Beit Din*, *Ploni v. Plonit*, June 11, 2012; File no. 824780/2, Netanya Regional *Beit Din*, *Ploni v. Plonit*, June 27, 2012.

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dina” is to be invoked only with regard to a determinate body of law, i.e. statutory law.⁷³ And, therefore, New York law, which is judge-made law, would not be recognized based upon “*dina de-malkhuta dina*.”⁷⁴ Consequently, secular law memorialized in judge-made law will not provide the grounds for addressing whether an employer ought to be responsible for the abuse committed by his employee. Hence, should a victim of child abuse lodge a monetary claim against the New York City yeshiva in *beit din*, arguing that *dina de-malkhuta dina* should serve as the grounds for justifying his claim, it may be rejected.⁷⁵

⁷³ Even though, historically speaking, the law of the monarchy required the king’s interpretation, the rule of *dina de-malkhuta dina* would remain applicable. See *Teshuvot Kerem Shlomo* 31 (R. Netanel’s opinion). Cf. R. Shimshon Morfogu’s posture who argues that any law which requires interpretation, even monarchial interpretation need not be followed. See *Kerem Shlomo*, op. cit.; Shmuel Shilo, *Dina de-Malkhuta Dina* [in Hebrew], (Jerusalem, 1974), 188-189.

⁷⁴ Secondly, there are *posekim* who subscribe to *Shakhb*’s posture who contend that should secular law contradict Halakha, the latter trumps civil law. See *Shakhb*, *H.M.* 73:39; *Teshuvot Avkat Rokhel* 81; *Teshuvot Maharsham* 3:69. Consequently, since Halakha rejects the notion that an employer assumes vicarious liability in cases of an employee’s abuse, therefore civil law fails to be binding by dint of *dina de-malkhuta dina*.

⁷⁵ On the other hand, New York City law which mandates that an employer establish and implement policies regarding hiring, supervision, and retention would be recognized by many *posekim* based upon *dina de-malkhuta dina*. This conclusion is based upon R. Moshe Sofer’s teaching,

“If the matter would be submitted to us, we would have legislated it!” See *Teshuvot Hatam Sofer*, *H.M.* 44.

The background for *Hatam Sofer*’s ruling relates to the nineteenth century Eastern European regulation that only licensed wine brokers may sell wine and liquor. Concerned with the monopolistic ramifications of this civil law and its attendant economic harm foisted upon non-licensed wine brokerages, members of the Jewish community asked *Hatam Sofer* to express his opinion regarding this regulation. In reply, *Hatam Sofer* argues that it is desirable to regulate economic competition and, in fact, there is precedent in Jewish legal history which demonstrates that earlier decisors as well as communities protected the right of people to earn a living, and therefore this civil legislation makes sense. He therefore concluded that if the Jewish community would have been empowered in his time to pass such legislation, it would have been done without hesitation. As such, the civil legislation ought to be affirmed. This notion, “if the matter would be submitted to us, we would have legislated it!” reverberates in subsequent nineteenth century and twentieth century rulings regarding various commercial matters. See *Ketsot ha-Hoshen* 259:3; *Teshuvot Beit Yitshak* 75,77; *Teshuvot Hitorerut Teshuva* 232; *Teshuvot Shoel u-Meshiv*, *Mahadura Kamma* 44; *Teshuvot Minhat Shlomo* 1:87; *Teshuvot Tsits Eliezer* 12:83; *Teshuvot Shevet ha-Levi* 10:201; PDR 6:382 (R. Zolty, R. Elyashiv, and R. Nissim’s opinions). Similarly, in our scenario, in contemporary times if *posekim* would have been empowered to pass legislation, policies regarding hiring, supervision, and retention would have been promulgated in order to promote a safe working environment as a vehicle for engendering love of one’s fellow man and preventing the commission of transgression. As such, *dina*

V. “*Minbag*” – An Avenue towards the Recognition of an Employer’s Vicarious Liability

Though the doctrine of *dina de-malkhuta dina* may not serve to address our situation, nonetheless *minbag ba-medina*, national or local practice, may be a more halakhically promising approach for dealing with our issue at hand.

Halakha establishes the guidelines for setting up various types of commercial relationships including but not limited to *shutafut* (partnership), *arevut* (surety), and labor relations. At the same time, Halakha recognizes the ability of parties to enter into agreements which may be at variance with the guidelines set down by Halakha.⁷⁶ As such, any issues between the parties would be resolved in accordance with the provisions of their mutually-agreed upon arrangement.

If there is a *minbag* dealing with a certain matter in monetary affairs, even though the *minbag* does not have the endorsement of a rabbinic authority or communal leadership and the origin of the *minbag* is non-Jewish,⁷⁷ we presume that whoever signs off on a commercial agreement or obligates himself to an individual intends to obligate himself in accordance with the *minbag*. So for example, if a business agreement fails to be finalized in accordance with a *shtar* (recognized halakhic-legal document), nevertheless, should the *minbag* validate the transaction based upon commercially accepted modes of undertaking an obligation, the

de-malkhuta dina is applicable. Alternatively, it ought to be validated based upon *Rema*’s view that matters that are legislated relating to social interaction are to be recognized based upon *dina de-malkhuta dina*. See supra text accompanying nn. 56-60.

Whether an employer is accountable in a *beit din* for failure to implement hiring, supervision, and retention policies or liable for negligent hiring, supervision, and retention of an employee who engages in pedophilia is beyond the scope of this presentation.

The implicit assumption of this notion “if the matter would be submitted to us, we would have legislated it!” is that the legislation does not stand in contradiction to any Halakha. See *Teshuvot Beit Reuven*, vol. 2, *Siman* 23 (5).

⁷⁶ Parties may determine their own business relationship, provided that the arrangement complies with a proper form, i.e. *kinyan* and, is not violative of any *is-surim*, prohibitions such as theft or the interdict against taking *ribbit*. See *Kiddushin* 19b; *Beit Yosef*, H.M. 305:4; SA E.H. 38:5, H.M. 291:17, 305:4; *Rema*, H.M. 344:1.

⁷⁷ Though there is a long-standing halakhic dispute whether a monetary custom practiced by the community on their own is effective without rabbinic or communal endorsement, the classical restatements have either explicitly or implicitly ruled that a monetary custom has an independent status. See SA, H.M. 176:10, 218:19, 229:2, 230:10, 232:6, 330:5, 331:12; *Rema*, SA, H.M. 72:5.

Concerning the validity of a monetary *minbag* which is grounded in non-Jewish practices, see *Teshuvot Nediv Lev* 12; *Teshuvot Mahari Levi* (Ettinger) 2:111; *Teshuvot Devar Avraham* 1:1; *Teshuvot Beit Yisrael* 172; *Teshuvot Torat Hayim* 1:10; *Teshuvot Aholei Tam* 202; *Teshuvot Divrei Yosef* 21; *Teshuvot Iggerot Moshe*, H.M. 1:72.

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agreement would be halakhically valid.⁷⁸ Or if there is a *minhag* that a partnership undertakes responsibility for a *hezek* caused by one of its partners, the partnership is liable even though such responsibility was not articulated in the agreement.⁷⁹

This rule that when one enters into a transaction one is bound by local custom even if the parties fail to mention the practice in their agreement extends equally to labor relations. In the absence of a labor agreement specifying the daily hours of employment, the Mishnah for example communicates to us that one follows the prevailing practice, which is to begin work later in the morning and return completed work prior to the evening hours. And upon employment, should the employer insist in pursuance to the *din* that the laborer begin work early and end late, given that the original agreement does not address this subject, the *minhag* of beginning work late and finishing early becomes one of the mutually agreed upon terms of the agreement.⁸⁰ However, should the parties have mutually agreed prior to the onset of employment that the hours of work would begin early and end late, such an agreement would trump the *minhag*.⁸¹

To understand the effectiveness of *minhag* in general and in regard to our scenario in particular, let us briefly present the building blocks for establishing the authority of *minhag*. For a *minhag* to be binding, three conditions must obtain: Firstly, the custom must be clear.⁸² Secondly, it must be practiced throughout the country or the locale which is practicing the behavior.⁸³ Moreover, the presumption that the parties intended *minhag* to be determinative when entering into the agreement is predicated upon the fact that the custom is “*pashut*” (widespread), otherwise one cannot assume that this is the parties’ intent. The criteria for ascertaining if a *minhag* is “*pashut*” are subject to debate.⁸⁴ One approach is

⁷⁸ *Teshuvot ha-Rashba* 4:125; *Teshuvot Maharashdam H.M.* 380; *Teshuvot Maharshah* 2:229; *Teshuvot Hatam Sofer Y.D.* 314.

⁷⁹ *Rema*, *H.M.* 176:48. For additional examples, see *Teshuvot ha-Rashba* 2:268, 4:125, 6:254; *Teshuvot ha-Ran* 54; *Teshuvot ha-Rivash* 413.

⁸⁰ *Mishnah Bava Metsia*, 7:1; *Rema*, *H.M.* 331:1.

⁸¹ *Tosafot Bava Metsia*, 83a s.v. *ha-sokher*; *Hiddushei ha-Ritva*, *Bava Metsia* 83a, s.v. *ha-sokher*; *Tur H.M.* 331:3.

⁸² *Teshuvot Maharashdam H.M.* 33; *Teshuvot Teshurat Shai* 413.

⁸³ *Mishnah Torah, Hilkhot Ishut* 23:12, *Hilkhot Sekhirut* 9:1, *Hilkhot Mehira* 7:8; *Beit Yosef, Tur H.M.* 42:2; *Teshuvot Maharik he-Hadashot* 65.

⁸⁴ Many of the sources cited infra in nn. 84-101 have been culled from R. Kleinman, “National Laws – Is there an expectation that people contract in accordance with them even if they possess no actual knowledge of them?” [in Hebrew] *Tehumin* 33 (5773), 82-93, at 90-91, nn. 31-36.

that the *dayyan* is the arbiter who will determine the frequency of the *minhag*.⁸⁵ Some argue that the *minhag* must be prevalent on a daily basis.⁸⁶ Others contend that it must have been practiced at least three times.⁸⁷ Furthermore, according to many *posekim* the parties to a business agreement including but not limited to a labor agreement need not possess knowledge of the actual existence of the *minhag*.⁸⁸

The autonomy of *minhag* and its effectiveness to define commercial ties is not limited to practices which transpire in the business community. According to most *posekim*, one can grant halakhic validity to civil legislation by virtue of *minhag*.⁸⁹ In other words, as contemporary *posekim* such as R. Zolty, R. Feinstein, R. Elyashiv, R. Y. Weiss and R. Lavi note, a *minhag* may emerge from civil legislation.⁹⁰ The concept of *minhag* is not limited to a practice in a locale which is frequent, widespread, and clear but equally extends to any law which is widespread, clear, and exists in statutory form and/or frequently interpreted by the courts. To state it differently, the existence of civil laws regulating labor relations does not mean that *ipso facto* it is to be recognized as a “*minhag*” that *ought* to govern an employment agreement. For *minhag* to be determinative, according to certain opinions, it has to have transpired at least three times, which must be attested by two witnesses. However, if the definition of a *minhag* being “*pashut*” is that it is a daily occurrence, then the testimony of two witnesses is insufficient. In our scenario, unless the prevailing practice is clear, its existence must be demonstrated by inquiring from many people whether *yeshivot* utilize employment contracts prepared by attorneys which provide that disputes be resolved in accordance with secu-

⁸⁵ Y. Rosner, *Mishpat ha-Poalim*, 87, n. 43.

⁸⁶ *Teshuvot Hakham Tsevi* 61; *Kenesset ha-Gedolah*, H.M. 201:81; *Pithei Hoshen*, *Hilkhot Sekhirut*, 149, n. 17.

⁸⁷ *Teshuvot Terumat ha-Deshen* 342; *Rema* H.M. 331:1; PDR 4:128.

⁸⁸ *Teshuvot ha-Rashba* 4:125, 6:254; *Teshuvot Maharashdam* H.M. 380; *Teshuvot Maharashah* 2:229; *Sma* H.M. 338:2; *Teshuvot Hatam Sofer* Y.D. 314; *Teshuvot Teshu'ot Hain* 55 cited in *Pithei Teshuva*, E.H. 53:12.

Cf. *Erech Shai* who argues that *Shakh* H.M. 42:36, 61:9, 71:33 disagrees and *aharonim* endorse his view. See *Erech Shai*, E.H. 50:7. See also *Beit Shemu'el*, E.H. 53:20.

⁸⁹ R. Kleinman, “Civil Law as Custom: Jewish law and Secular Law - Do they Diverge or Converge?” 14 *The Review of Rabbinic Judaism* 11 (2011).

⁹⁰ *Teshuvot Minhat Yitzchak* 2:86 (9), 7:126; *Ateret Devora*, 2: H.M. 44; PDR 8:162, 12:176, 179, 16:296, 310, 312; *Iggerot Moshe* H.M. 2:55; *Pithei Hoshen*, *Hilkhot Sekhirut* 4:3; *Teshuvot Tzitz Eliezer* 5:30.

Obviously, some *posekim* may restrict the power of a monetary custom and thus refuse to legitimate a piece of civil legislation. For example, even if there is a *minhag* to accept a civil will, many decisors have rejected this *minhag*. See this writer’s “The Propriety of a Civil Will,” *Hakirah* 15 (2013), 165-205.

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lar law.⁹¹ Then and only then one may contend that *minhag* as reflected in secular law is “*pashut*” and therefore determinative, serving to resolve contentious issues.⁹²

Just as any *minhag* may serve to define the terms of a business agreement even though the parties are actually unaware of its existence, so too *minhag* will establish the choice of law which will govern the commercial arrangement. In other words, even if the yeshiva and the employee in their agreement did not specifically mention that civil law ought to govern any contentious issues, by dint of the existence of a *minhag*, their intent is to enter into the agreement on the basis of local law. Furthermore, the *umdena* (assessed expectation) which we encounter regarding *minhag* is that the law is applicable even in its details, independent of the fact that the parties are ignorant regarding the details of the applicable law and/or that the law is subject to change.⁹³ The assumption is that the parties may avail themselves of the services of an attorney in order to ascertain the state of the law. Therefore, ignorance of the details of the law is no excuse. Moreover, when invoking *minhag*, we assume that people who accept the authoritative nature of *minhag* not only assume that the details may be unfamiliar to them but that the content may vary from time to time. Nevertheless, they are ready to manage their commercial ties in accordance with the *minhag*, namely the law. As such, even if the *minhag* is “*pashut*” that labor relations in the network of New York City *yeshivot* is being governed by New York City labor law, the fact that there is no awareness regarding a specific labor law or that the New York City law regarding a particular labor law has changed since the date of their agreement was consummated is immaterial.

In a series of *teshuvot* dealing with bankruptcy law, tenancy law, and labor law, Rabbi Moshe Feinstein endorses the notion that *minhag* reflects civil legislation and may be invoked as determining a matter even if the parties expressly fail to mention the norm emerging

⁹¹ *Teshuvot ha-Rosh* 13:21; *Teshuvot Admat Kodesh* 1:31; *Teshuvot Hikrei Lev E.H.* 45:4.

If Torah-observant Jews have their contracts prepared by an attorney then it is clear that their intention is to have any differences resolved in accordance with Halakha. See File no. 1/35/8935, *Mosedot Plonim v. Kuf & Vov*, Jerusalem Regional Beit Din.

⁹² *Teshuvot Mishpetei Shemuel* 103; *Admat Kodesh*, supra n. 91; *Dinei Mammonot*, vol. 2, 14.

⁹³ *Dinei Mammonot*, vol. 1, 314-315; *Mishpat ha-Poalim*, supra n. 85, at 92; Kleinman, supra n. 84, at n. 58. For a discussion of this view, see *Teshuvot Beit Reuven*, vol. 2, H.M., 172-173.

from the *minhag* in their commercial agreement. As *Hazon Ish* observes,⁹⁴

The law of the kingdom determines the expectation of the people. Since we customarily abide by the law of the kingdom under certain prescribed conditions, the law influences people, who then decide to rely on civil law.

Moreover, in accordance with R. Feinstein's view, even if the local custom differs from Halakha, the custom will prevail due to the fact that it was the parties' intent to have their matters resolved in accordance with custom, namely secular law, even in a case of a specific law which generally may be unknown by the populace.⁹⁵

Addressing the question whether an employer can dismiss a worker without cause, R. Feinstein writes,⁹⁶ "Any custom that they may stipulate is in actuality Torah law." Adopting such a perspective is not limited to the issue of dismissing a worker without cause. As noted hundreds of years earlier by Rashba,⁹⁷ even though generally Halakha exempts an employer from liability for bodily injury caused to his worker, nevertheless *minhag* may serve as the grounds for workman's compensation. Similarly, though generally Halakha exempts an employer from liability for an employee's act of abuse, *minhag*, namely the governing law, ought to serve as a basis for obligating a yeshiva to compensate for an employee's sexual misconduct.

⁹⁴ *Hazon Ish, Sanhedrin: Likkutim* 16:1. For further discussion, Rabbinic Authority, supra n. 2 at 189-190.

Obviously there is a distinction between *Hazon Ish* who is utilizing *dina de-malkhuta dina* as a yardstick for determining the content of the *umdena* and R. Feinstein's posture, which invokes *minhag* as the guideline for defining the parties' expectations. The differing results in whether one adopts the rule of *dina de-malkhuta dina* or *minhag* is beyond the scope of our presentation. Suffice it to say that the problems that we encountered attempting to resolve our case via the avenue of *dina de-malkhuta dina* we will not necessarily confront when we employ the notion of *minhag* to resolve our case. For example, whereas, there are numerous authorities who would limit the invoking of *dina de-malkhuta dina* to matters of statutory law (see supra text accompanying n. 72), concerning the scope of *minhag* it may encompass case law.

⁹⁵ *Teshuvot Iggerot Moshe H.M.* 1:72, 75, 2:55.

The rationale is that *minhag mevattel halakha*, custom overrides the law. See *Yerushalmi Yevamot* 12:1; *Bava Metsia* 7:1.

⁹⁶ *Iggerot Moshe* 1: H.M. 75.

⁹⁷ *Supra* n. 15.

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Invoking Rashba's and R. Feinstein's approach,⁹⁸ we can now address our scenario. A child was abused by his principal or teacher in 2012 at a yeshiva located in New York City. In the absence of an insurance policy or an employment agreement which addresses whether a yeshiva is liable for abuses caused by one of its employees, we may invoke that *minhag* ought to serve to determine the parameters of the yeshiva's liability.⁹⁹ As such, though the applicable *halakhot* of *Hoshen Mishpat* which deal with labor relations do not obligate a yeshiva to compensate monetarily a victim of abuse, nonetheless, *minhag* as reflected in New York City law may serve as grounds for such monetary relief.

Said conclusion is premised upon three propositions. Firstly, regardless of whether the yeshiva and employee mutually agreed in their labor contract that any disputes that may arise be resolved according to Halakha by a *beit din*, the *umdena* is that even God-fearing Jews intend that *minhag*, namely that governing civil law ought to be factored into arriving at a decision. Secondly, New York City statutory law as well as the courts' interpretation of the law is reflective of *minhag*. In other words, the *minhag* factors into considering the fact that details of the law may change due to the varying opinions of court justices even after a yeshiva's labor

⁹⁸ Whether Rashba and R. Feinstein would invoke their approach regarding our issue and arrive at this conclusion, we leave as an open question for now.

Rashba's ruling is predicated upon a Tosefta's discussion of a ship which was sailing at sea and encountered a storm which threatened to sink it and some of the freight was thrown overboard in order to lighten the ship. Relying upon maritime custom, the Tosefta's ruling is that the loss be divided according to the weight of the cargo rather than the property owners' wealth. See Tosefta, *Bava Metsia* 7:7, which was accepted as normative Halakha. See SA, H.M. 272:15, 17.

On the basis of this ruling, Rashba concludes that *minhag* will be determinative regarding an employer's responsibility for bodily injury caused to his employee while on the job. In other words, despite the fact that Tosefta deals with the halakhic-legal strength of *minhag* concerning property loss and Rashba is focusing upon an employee's loss due to bodily injury; nonetheless, in Rashba's mind the two cases are to be treated alike, i.e. governed by *minhag*. And therefore, we can argue that though Rashba's position regarding the effectiveness of *minhag* deals with an employer's responsibility for a worker's bodily injury, his perspective may extend to an employer's requirement to compensate a victim of abuse which is perpetrated by one of his employees.

⁹⁹ Should the labor agreement explicitly state that the yeshiva is absolved from any monetary claims in the event of student abuse, it is a subject of debate whether the parties' agreement trumps a *minhag* which mandates liability. See Y. Yifrach, "A Labor Agreement in Variance with the National Custom," [in Hebrew] *Shurat ha-Din* 3 (5755), 276-281, at 276; A. Sherman, "National Custom in Labor Relations," [in Hebrew] *Tehumin* 18 (5758), 236-247, at 245; Y. Eliazrov, "An Employer who deviates from the National Custom," [in Hebrew] *Tehumin* 20 (5760), 71-77, at 72.

agreement has been signed and/or the abuse transpired.¹⁰⁰ Moreover, *minhag* is authoritative even if the law¹⁰¹ or the details of the law such as an employer's vicariously liability is unknown to the parties.¹⁰² As such, the content of the *minhag* is determinative. Finally, even though NY City law as interpreted by the courts differs substantially from Halakha regarding the issue of a yeshiva's vicarious liability, nonetheless the law as articulated by the courts trumps the *halakhot* of employment relations. To state it differently, even though the norms of *Hoshen Mishpat* concerning labor relations would exempt the yeshiva from liability for the teacher's sexual misconduct, nonetheless *minhag*, namely NY City law in 2012, would impose liability upon the yeshiva regardless of whether it had proper hiring, supervision, and retention policies in place prior and during the time of incident of abuse. And therefore, should a monetary claim by a victim of abuse be advanced against the yeshiva in 2012, the school ought to be held halakhically responsible based upon the import of *minhag*.

Finally, a reply to the contention that this *minhag* is to be a labeled "*a minhag garua*," a practice devoid of logic and purpose:¹⁰³ If one endorses the minority view that one individual can be a *shomer* for another person's bodily integrity,¹⁰⁴ then an employer such as a yeshiva may be viewed as a *shomer* who is protecting his students, and should negligence occur 'under his watch' ought to be monetarily responsible, like a parent who is construed as a *shomer vis à vis* his/her minor children.¹⁰⁵ To state

¹⁰⁰ *Hut Shani, Hilkhhot Ribbit*, 186-187; R. Tzvi ben Ya'akov (oral communication); Kleinman, *supra* n. 84 at 89, n. 39, at 93, n. 60. For a discussion of this view, see *Beit Reuven*, *supra* n. 93.

¹⁰¹ For the validity of *minhag*, even if an individual is unaware of the *minhag*, see *Teshuvot ha-Rashba* 1:1068, 3:17; *Hiddushei ha-Rashba, Bava Batra* 144b, s.v. ho; *Teshuvot ha-Ritva* 53; *Teshuvot ha-Ran* 54; *Teshuvot ha-Rivash* 413; *Teshuvot ha-Tashbetz* 1:133; *Teshuvot Maharashdam* H.M. 380; *Teshuvot Hatam Sofer* Y.D. 314; *Iggerot Moshe* H.M. 1: 72,75.

¹⁰² *Mishpat ha-Poalim*, *supra* n. 85 at 92.

¹⁰³ *Beit Reuven*, *supra* n. 93, at 100-104 in the name of Ramban and Rabbeinu Tam.

¹⁰⁴ See *supra* text accompanying n. 48. The implication of viewing the yeshiva and its employees as *shomerim* regarding other matters is beyond the scope of our presentation.

¹⁰⁵ *Iggerot Moshe, E.H.* 1:106 and Z. N. Goldberg, "Guarding an Object which does not Belong to the Bailor," [in Hebrew], *Tebumin* 14 (5754), 200-206, 205 seem to limit *shemira* to young school children. Whether said conclusion is applicable to children of majority age we leave as an open question. Suffice it to say that if somebody guards an asset and he is hired to perform other work, he becomes a *shomer* over the asset if the guarding is related to the other work. See *Teshuvot ha-Radvaz* 638; *Teshuvot Shai le-Moreh* 15. Assuming as we stated that *hilkhot shemira* are applicable to human beings, therefore if a teacher is hired for teaching, he becomes a *shomer* because the *shemira* is related to the other job, namely teaching.

it differently, a yeshiva as a *shomer* must oversee its employees and ultimately its students “*ke-derekh ha-shomerim*,” lit. in accordance with the standard amongst bailees.¹⁰⁶ “*Ke-derekh ha-shomerim*” will vary from locale to locale.¹⁰⁷ Its scope and parameters may be defined by *minhag*, namely the governing law. Consequently, even though the yeshiva may have established and implemented a policy of supervising its employees, nevertheless, should an employee engage in abuse, NY City law may find the yeshiva monetarily responsible for such misconduct even though the yeshiva did not act negligently. In short, *minhag* trumps the laws of *Hoshen Mishpat*, which would have exempted the employer from responsibility.

Various objections may be leveled against implementing *minhag* as an avenue to resolve whether the yeshiva ought to be vicariously liable for one of its employees’ misconduct. First, as we have seen, given that the application of *minhag* may vary depending upon the posture of NY law regarding our issue of an employer’s liability, it means that the *minhag* is unclear and therefore fails to serve as a vehicle for addressing our matter.¹⁰⁸ If the *minhag* is unclear, how can one presume that the parties intended that it ought to govern their relationship? To state it differently, the applicability of *minhag*, similar to the invoking of *dina de-malbhuta dina*, requires that the governing law be statutory rather than judge-made law which may be ever-changing.¹⁰⁹

Second, unless it is crystal clear that the parties desire that contentious matters be resolved in accordance with *minhag*, namely civil law rather than *Hoshen Mishpat*, there are no grounds available for invoking the *umdena* that *minhag* ought to prevail.¹¹⁰ Since American law allows arbitration courts including *battei din* to resolve matters of labor relations according to Halakha,¹¹¹ one cannot assume that parties who appear at a *beit din* implicitly intend to have their differences resolved in conformity

¹⁰⁶ B.M. 42a.

¹⁰⁷ *Piskei ha-Rosh*, B.M. 3:21; *Hiddushei ha-Ramban*, B.M. 42a; *Teshuvot Terumat ha-Deshen* 333; *Rema*, H.M. 291:18.

¹⁰⁸ Kleinman, supra n. 84, at 90, at text accompanying n. 48, n. 61 (R. Bareli’s opinion).

¹⁰⁹ File no. 344858/3, *Plonit v. Ploni*, Tel Aviv Regional Rabbinical Court, June 1, 2011.

¹¹⁰ Kleinman, supra n. 84, at 89, text accompanying n. 39 (R. Ben Ya’akov’s opinion).

¹¹¹ The norms of civil law are applicable only if the secular government insists that their laws be followed. See *Aliyyot de-Rabbeinu Yona* B.B. 54a; *Hiddushei ha-Rashba*, *Gittin* 10b; *Teshuvot ha-Rashba* 1:895, 6:149; *Teshuvot ha-Rivash* 228, 495; *Beit Yosef*, H.M. 369(4) in the name of R. Ya’akov Yisrael, *Darkhei Moshe*, H.M. 369; *Teshuvot Maharik*, *Shoresh* 188.

with civil law. As *Maharashdam* observes,¹¹² “If we have even a slight doubt, we should not follow a *minhag*... and therefore when you want to uproot the *din torah* from its place, you must produce a proof...” In other words, the existence of the *minhag* must be widespread and clear, namely people must be aware that secular labor law is governing their commercial affairs. Absent such awareness, we invoke Halakha, which would mean that an employer would be exempt from responsibility for his worker’s misbehavior.

Moreover, admittedly, individuals may have the intention to resolve their matters in pursuance of *minhag*, namely the governing New York City law, but details of the law may be unfamiliar to them. Consequently, *minhag* may not be determinative.¹¹³ However, should the practice of legally imposing vicarious liability upon an employer even in the context of a safe workplace have been known to have occurred in one jobsite three times, or once in at least three different places, or that many people are aware that the law mandates employer’s vicarious liability, then and only then may we invoke *minhag*.¹¹⁴

Furthermore, given that NYC law has changed since the consummation of the labor agreement between the yeshiva and the employee, the *minhag* at the time of the execution of labor agreement (namely New York law prior to *Zakrzewska v. The New School*) ought to prevail and therefore the yeshiva ought to be exempt from responsibility.¹¹⁵ Consequently, for all or any of the foregoing reasons, imposing an employer’s vicarious liability in cases of an employee’s abuse lacks halakhic foundation.

In conclusion, *Hoshen Mishpat*, including but not limited to labor relations, mandates that a pedophile, regardless of whether he sexually misbehaves during the time of employment or after hours, is personally monetarily liable for his own behavior and his employer is not. Nonetheless, according to Rashba’s and Rabbi Feinstein’s approach,¹¹⁶ one may conclude that, should the parties’ expectations be that *minhag*, namely secular law, obligates them in their commercial relations and should the law mandate an employer’s liability for his employee’s sexual misconduct, the employer rather than the employee would be monetarily liable. Said

¹¹² *Teshuvot Maharashdam* H.M. 327. See also *Teshuvot ha-Rosh* 79:4.

¹¹³ *Hut Shani, Hilkhos Ribbit*, supra n. 100.

¹¹⁴ A. Bareli, “The Details of the Law: Are they to be Subsumed under *Dina de-Malkhuta Dina?*” [in Hebrew], 26 *Tehumin* 353 (5766);

¹¹⁵ *Hut Shani*, supra n. 100.

¹¹⁶ See supra n. 96.

conclusion is predicated upon the fact that the parties did not mutually agree in their labor contract that the employer would be exempt from responsibility for any sexual misbehavior which may be perpetrated by his employee in the future.¹¹⁷ Others, as we noted, have explicitly or implicitly dissented from this position and contend that *minhag and/or dina de-malkhuta dina* fail to serve as an avenue for mandating an employer's liability.

Unlike New York law, in Halakha, there generally is no statute of limitations in advancing such claims for employer liability.¹¹⁸ Even if the alleged act of abuse was perpetrated twenty or forty years ago, a *beit din* is empowered today to hear claims against an employer such as a loss of educational opportunities, diminishment of salaries, reimbursement of health care expenses, and noneconomic claims such as pain and suffering.¹¹⁹ Nevertheless, such a *beit din* decision would be unenforceable in New York.¹²⁰

¹¹⁷ In other words, should the labor agreement exempt the employer from liability for his employee's sexual misconduct, the contract is binding, and, should a *minhag* mandate liability, the terms of the contract trumps the *minhag*. See *Shulhan Arukh, H.M. 331:1, 332:2; Teshuvot Zera Emet, 2, Y.D. 97; PDR 8:78, 81; File no. 6186601, Ploni v. Mosadot Plonim, Tzfat Regional Rabbinical Court, February 25, 2008. Cf. R. David Korfo, Shitah Mekubetzet, Bava Kamma 83a, s.v. ha-sokber, Teshuvot Melamed le-Ho'il O.H. 40; Sherman, supra n. 99.*

However, should the *minhag*, namely the law, impute an employer's liability and prohibit parties from agreeing that an employer would be exempt from liability for his employee's misconduct, then the *minhag* trumps a labor contract which exempts the employer from responsibility. See *Bah, Tur H.M. 61:8; SA, H.M. 61:4, 103:7. Cf. Sma, H.M. 61:8.*

¹¹⁸ *SA, H.M. 98:1. Harnessing the Authority of Beit Din, supra n. 2, at n. 117.*

¹¹⁹ For a contemporary *beit din's* authority to render a decision regarding *nezikin* claims, see *Rabbinic Authority, supra n. 2 at chapter 3, pp. 111-175.*

Concerning legal enforceability of a *beit din's* decision regarding this matter, see *infra n. 120.*

¹²⁰ In certain states such as New York, given that there is a statute which expressly provides that such a claim is time-barred in court, it would be equally time-barred in arbitration such as a *beit din* proceeding. See NY CPLR Section 7502. In short, though halakhically there is a basis for a victim of abuse filing a claim against his employer in *beit din*, nevertheless, in New York a statute of limitations will apply which will result in the claim being time-barred and thus a *beit din's* decision imposing employer liability would be legally unenforceable.

Many states such as California, Connecticut, Florida, Indiana, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Ohio, and Washington rule that statutes of limitations are inapplicable to arbitration proceedings. See *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal. App. 4th 1040,1051 (Cal. App. 2d Dist. 2009); *Owings and Merrill, v. Connecticut General Life Insurance Co.*, 197 A.2d 83 (1963); *Raymond James Financial Services, Inc. v. Phillips* (2D10-2144); *Lewiston*

Deciding between the competing arguments regarding an employer's vicarious liability for sexual misconduct will be the sole prerogative of the *posek*. The relative strength of each argument applicable in each situation, its effectiveness, and plausibility will hopefully be tested within the framework and constraints of future halakhic decisions.

FINAL THOUGHTS: A Practical Step Forward

How should our yeshivot, synagogues, and youth organizations located throughout the United States proceed regarding these matters? It behooves these institutions to establish a safe workplace by drafting and implementing policies regarding hiring, supervising, and training employees concerning sexual misconduct and retention of child predators.¹²¹ Though these administrative policies are not to be found explicitly in the *Shulhan Arukh* and *posekim*, nevertheless if *posekim* would have empowered to pass such legislation today, they would have done it.¹²²

Yet, though Halakha recognizes the importance of such policies promulgated by civil law, at the same time the halakhot of *Hoshen Mishpat* do not recognize the notion of institutional liability should abuse transpire where an institution had accepted and implemented such policies. Nonetheless, as we have shown, Halakha would recognize an employer's vicarious liability for abuse based upon *minhag* or *dina de-malkhuta dina*, namely New York City law.¹²³

Firefighters Assn. v. City of Lewiston, 354 A. 2d 154, 167 (Maine 1976); *Carpenter v. Pomerantz*, 634 N.E. 2d 587, 590 (Mass. App. 1994); *Ward v. Thomas*, 2003 Mich. App. LEXIS 2080 (Mich. Ct. App. 2003); *Har-Mar Inc. v. Thorsen and Thorsen, Inc.*, 218 N.W. 2d 751 (MN 1974); *Price v. New Jersey Manufacturers Insurance Co.*, 82 NJ 519, 526 (2005); *In the Matter of the Arbitration between Cameron and Griffith*, 370 S.E. 2d 704 (N.C. Ct. App. 1988); *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St. 3d 93, 97, 573 N.E. 2d 77, 80-81; *Broom v. Morgan Stanley DW, Inc.*, No. 82311-1 (7/22/10).

Therefore, in the aforementioned states even though there is a statute which expressly provides that the claim is time-barred in court, it would not be time-barred in a *beit din*.

¹²¹ See text accompanying nn. 41-54.

¹²² See n. 75.

¹²³ We have refrained in this article from examining our issue via the lens of *hilkhot shemira* and *shelihut*, bailment and agency Halakhah. One may very well contend that the abuser in the institutional setting is in effect the agent/bailee of the employer. The care and safekeeping of children in a yeshiva or youth organization as well as adults in various institutional settings have been entrusted to the employer and he in turn has entrusted their care with the rabbi, administrator, teacher, or health care professional. He/she was employed to discharge the institution's mission and responsibility.

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We feel that in the absence of an institution's culpability, allowing a *beit din* to hand down awards based upon *minhag* or *dina de-malkhuta dina* is counterproductive. Execution of a *pesak din* against their assets would impede, if not destroy, the ability of these institutions to serve the needs of our community. Indeed, the mere threat of liability might do so. In turn, the impact of such liability, or even the risk of such liability, inevitably redounds against the institution. If our community believes that donations to our institutions which are used primarily for the religious and educational benefit of its constituents are being siphoned off to pay an institution's claims and *beit din* fees relating to institutional behavior, their attitude toward supporting the yeshiva, synagogue, or youth organization will inevitably sour. In turn, this is likely to impact the morale and effectiveness of the administrator, teacher, or health care professional, whose resolve and spirit may already be compromised due to the threat to their health care and retirement benefits.

We have discussed above the possibility that our institutions may be sued in civil court by victims of abuse due to the fact that they are employers of these abusers. Given this possible liability, they ought to prepare agreements with the parents of those children who choose to avail themselves of their services which state that any monetary disputes and differences arising from any alleged acts of abuse shall be resolved in a *beit din* in accordance with the halakhot of *Hoshen Mishpat* and that neither *dina de-malkhuta dina* nor *minhag* shall serve as the basis for a *beit din's* decision.¹²⁴ Such agreements should be drafted with the assistance of a rabbi who has expertise in *Hoshen Mishpat* and be reviewed by an attorney.

He/she abused that special position in which the institution has placed him to enable it to discharge its responsibilities.

The question is, assuming the employer establishes and implements the policies against sexual harassment, does Halakhah maintain that he remains responsible if abuse transpires "under his watch" as a *shomer*, a bailee and/or deviates from his mandate as a *mesballeah*, a principal?

¹²⁴ Based upon executing such an agreement, the *beit din* may address whether the institution is responsible in accordance with *hilkhot shemira* and/or *hilkhot shelibut*. See supra, n. 123.