

# Building at What Cost?

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***This teshuvah was passed on October 17, 2018, with a vote of nineteen in favor, two in opposition, and two abstained. Voting in favor: Rabbis Aaron Alexander, Pamela Barmash, Elliot Dorff, Baruch Frydman-Kohl, Susan Grossman, Reuven Hammer, David Hoffman, Jeremy Kalmanofsky, Jane Kanarek, Steven Kane, Jan Kaufman, Gail Labovitz, Amy Levin, Jonathan Lubliner, Daniel Nevins, Micah Peltz, Avram Reisner, Iscah Waldman, and Ellen Wolintz-Fields. Voting against: Rabbis David Booth and Joshua Heller. Abstaining: Rabbis Robert Scheinberg and Deborah Silver.***

**Question:**

May a Jewish institution that has hired a non-Jewish contractor allow the contractors and their non-Jewish laborers to work on Shabbat or Yom Tov?

This question was asked by the Senior administration of JTS at the beginning of their 21<sup>st</sup> Century building project in 2016.

**Answer:**

We should first establish that activities connected to both building (בונה) and demolishing in order to build (סותר) constitute primary categories of forbidden labor on Shabbat.<sup>1</sup> Indeed, the main source in the Torah used to generate these 39 primary categories of prohibited activity is the physical construction of the *Mishkan*. These essential activities associated with the building of the *Mishkan* became the paradigmatic acts of constructive labor and, thus, were prohibited by the Rabbis on Shabbat.

So, it is clear that a Jew is prohibited מן התורה from building on Shabbat.

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

<sup>1</sup> Throughout the course of this paper - “work” or “labor” refer broadly to any activity that the *halakhah* categorizes as a מלאכה. These terms are inexact stand-ins for the types of intentional activities the Rabbis understand as prohibited. (מלאכת מחשבת אסרה תורה) - see BT Sanhedrin 62b).

For a listing of these primary categories, see Mishnah Shabbat 7:2. Also see, BT Shabbat 102b; MT *Hilkhot Shabbat* 10:12-15; 22:25-33. From these sources, building may be understood as any act of construction, repairing, or physical improvement of a structure. Demolishing includes activities involved in the intentional preparation of space for building by means of destruction and clearing. An act simply for the sake of destruction, without the intention of construction is rabbinically forbidden but does not constitute an infraction of the biblical prohibition of סותר. See BT Shabbat 106a.

Consequently, if a Jew were to ask another Jew to build for him on Shabbat, this would constitute an explicit violation of the Biblical principle: "Not to place a stumbling block in front of the blind."<sup>2</sup>

We may now focus on our question: May a Jew ask a non-Jewish person to build or to hire non-Jewish workers in order to construct a building on Shabbat?

On the one hand, a non-Jew is not obligated to observe the Sabbath; for a person outside of the Covenant, building on Shabbat is not a transgression of any kind.<sup>3</sup> Consequently, asking a non-Jew to work on Shabbat is not a violation of the biblical law of "putting a stumbling block in front of the blind."<sup>4</sup> Yet, on the other hand, beginning with some of the earliest strata of Rabbinic thinking, there were rabbis who resisted this possibility. Their concern focused on how such a request might affect a Jewish person's relationship to the institution of Shabbat if he or she were allowed to ask a non-Jewish person to perform work on their behalf.

### **Naming the Violation:**

While the concerns and issues around the possibility of a non-Jew doing work for the benefit of a Jew on Shabbat are raised in other rabbinic compilations, as we will soon discuss in detail, it is

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<sup>2</sup> Leviticus 19:14; See also BT Shabbat 150a; BT Pesachim 22b; Rambam, *Sefer Ha-Mitzvot*, Negative 299 and MT *Hilkhot Roseakh* 12:14. See also, the commentary of the Ramban on Leviticus 12:16. Simply asking another Jew to perform a מלאכה on Shabbat would violate the principle of לפני עור. And this would be true whether or not the Jew who did the asking derived benefit from the work done by the other Jew.

In a fascinating responsum which considers whether a Jew who lives in the Land of Israel and visits a community outside of Israel may be asked to do work on the *second day of Yom Tov* for other Jews, the *Radbaz* concludes that such a request should be no better than asking a non-Jew to do work on Yom Tov which is forbidden. As we will soon see, asking a non-Jew to work on a Jew's behalf is prohibited under the halakhic category of אמירה לכרי. The *Radbaz* creates the category of אמירה לישראל and writes: לא גרע אמירה לישראל מאמירה לעכו"ם. See שו"ת רדב"ז חלק ד סימן רנח. Affirming this principle, Rabbi Ovadiah Yosef argues that the reason animating the prohibition is "lest he (the Jew) come to do this work himself":

"ולא גרע אמירה לישראל מאמירה לגוי שהטעם הוא משום שמא יבא לעשות מלאכה בעצמו. ראה שו"ת יביע אומר חלק ט - אורח חיים סימן מט.

To be clear, while asking a Jew who is not celebrating the second of Yom Tov is conceived here as a rabbinic prohibition, asking a Jew to do a מלאכה on Shabbat is אסור מדין תורה.

<sup>3</sup> The mitzvot of Shabbat relate exclusively to Jews. See Exodus 31:13- לְדַעַת כִּי אֲנִי ה' מְקַדְשֵׁיכֶם "כי אות הוא ביני וביניכם לדרתיכם

<sup>4</sup> Importantly, if a Jew were to ask a non-Jew to violate one of the seven Noachide commandments, he would be in violation of the principle of לפני עור. For a clear articulation of this principle, consider the language of the Or Zarua, Bava Metzia 286:

"דכל מצוה שאין הגוי מוזהר עליה מותר לו לישראל לומר לגוי לעשותה. אבל מצוה שהגוי מוזהר עליה אסור לו לישראל לומר לגוי לעשותה."

the Bavli that succinctly names this prohibition: אמירה לנכרי – “asking a non-Jew.”<sup>5</sup> With this articulation of the prohibition the Bavli has not only formulated for us a new *halakhic* category but it has also classified it as *Rabbinic violation* (שבירת).<sup>6</sup> Unfortunately, the Bavli does not clearly explain why אמירה לנכרי is prohibited. As we will shortly see, this silence will allow for disagreement amongst the *Rishonim* as to the application of this prohibition in our question.

The plan of this paper is to trace the development of the salient ideas and concerns behind the prohibition of asking a non-Jew to perform work for the benefit of a Jew on Shabbat in order to better understand what is religiously at stake as we approach this issue as it relates to building on Shabbat.

And although the subject of this paper includes issues of אמירה לנכרי broadly, the argument and conclusion of this paper focus solely on building. Other issues of אמירה לנכרי should be considered on a case-to-case basis.

### **A Categorical Prohibition:**

One of the early rabbinic compilations that considers the possibility of a non-Jewish person doing work for a Jew on Shabbat is the *Mekhilta De-Rabbi Yishmael*. An anonymous *tanna* draws attention to the passive language the Torah uses to articulate the prohibition of performing *melakhah* on Yom Tov. The verse from Exodus 12:16 reads:

You shall celebrate a sacred occasion on the first day, and a sacred occasion on the seventh day; <u>no work at all shall be done on them</u> ; only what every person is to eat, that alone may be prepared for you.	וּבַיּוֹם הָרִאשׁוֹן מִקְרָא־קֹדֶשׁ וּבַיּוֹם הַשְּׂבִיעִי מִקְרָא־קֹדֶשׁ יִהְיֶה לָכֶם כָּל־מְלָאכָה לֹא־יַעֲשֶׂה בָהֶם אֶדְ אֲשֶׁר יֵאָכֵל לְכַלְנֶפֶשׁ הוּא לְבַדּוֹ יַעֲשֶׂה לָכֶם :
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The verse could have read- “You should not do work (לא תעשה) on them.” The *Mekhilta* derives the following limitations from the Torah’s choice of passive language:

<sup>5</sup> שבת קנ עמוד א ומקבילות.

<sup>6</sup> On the meaning of שבירת see Albeck’s comments on Betsah 5:2.

Though it is not consequential to the question at hand, the prohibition of אמירה לנכרי applies not only to Shabbat prohibitions. It is forbidden for a Jew to ask a non-Jew to perform – on his behalf – any action that is forbidden for the Jew to do. See Bava Metzia 90a; Rama, Y. D. 297:4; Shach, ad loc; Magen Avraham to O. H. 307:21.

Our discussion will focus on the particular case of building on Shabbat by means of non-Jewish labor and not on אמירה לנכרי in general.

"No work at all shall be done on them" - You should not do, your fellow [Jew] should not do, nor should a non-Jew do any of your work.	כל מלאכה לא יעשה בהם. - לא תעשה אתה, ולא יעשה חברך, ולא יעשה גוי מלאכתך <sup>7</sup>
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Just as a Jew is prohibited from doing work, so too work cannot be done for the Jew by anyone else. **In the *Mekhilta's* formulation, such behavior is not simply an evasion of the prohibition of מלאכה, it seems to constitute a conceptual extension of the prohibition against work itself.**<sup>8</sup> The *Mekhilta* creates a straightforward and blanket prohibition that leaves no wiggle room to allow for exceptions. Simply put – part of the very prohibition against a Jew performing work on Shabbat is having *any work done on her behalf* – period.

I would describe the *Mekhilta's* articulation of the prohibition of אמירה לנכרי as an inherent or an intrinsic prohibition. That is to say, it does not depend on where the work is performed (e.g. in the Jew's hometown or outside of his city) or on the possibility of onlookers drawing a problematic conclusion or on the type of activity. **Categorically, the act of a non-Jew doing work for the benefit of a Jew on Shabbat is prohibited, seemingly as an extension of the prohibition of work itself. We will call this approach Paradigm I.**

Now it should be said that this exegetical move completely coheres with the larger narrative of Shabbat. Restricting creative labor is not only imitating God's rest on the Seventh Day of Creation; we intentionally pull back from mastering our environments to make the theological point that God is the Ultimate Master of the World.<sup>9</sup> This *Mekhilta* expresses the idea that trying to circumvent this theological commitment subverts the religious meaning of the cessation of creativity.

As coherent as this exegetical reading is to the institution of Shabbat, this position will become attenuated. The rabbinic texts we will see support parts of the argument presented in the *Mekhilta* while also trying to allow for the possibility that work might be performed for the benefit of the Jew over Shabbat. It will be essential to understand the criteria that the rabbis develop to allow for such possibilities.

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<sup>7</sup> מכילתא דרבי ישמעאל בא - מסכתא דפסחא פרשה ט.

<sup>8</sup> While it is true that this verse discusses Yom Tov, there is a קל וחומר (*a fortiori*) argument to be made for Shabbat. עיין שולחן ערוך הרב אורח חיים סימן רמג סעיף א and ספר מצוות גדול לאוין סימן עה.

The substance of the prohibition is defined by what the Jew is forbidden to do on Shabbat. See O.H 307:2. The Mishnah Berurah straightforwardly describes the parameters of the prohibition:

"כל דבר שאסור לישראל לעשות מצד הדין אסור לומר לא"י לעשותו." ראה משנה ברורה סימן שז ס"ק ח.

<sup>9</sup> See also Rabbi Shimshon Raphael's definition of מלאכה in his commentary to Exodus 20:10 in *The Pentateuch, Translated and Explained by Samson Raphael Hirsch*, vol. 2, rendered into English by Isaac Levy, Judaica Press: Gateshead, England, 1982.

To conclude our discussion of the *Mekhilta* (Paradigm I), we should note that despite the fact that this law seems to have a Biblical source, the majority of *poskim* follow the Bavli and categorize the prohibition of אמירה לנכרי as a Rabbinic violation. Commenting on Exodus 12:16, the Ramban characterizes the utilization of this verse as the source of the prohibition of אמירה לנכרי as an אסמכתא בעלמא (i.e. not truly a biblical source but merely support) and the Rambam writes: "דבר זה אסור מדברי סופרים"<sup>10</sup>

### Direct Agency

The Mishnah, too, considers the possibility of a non-Jew performing work on Shabbat for the benefit of a Jew. It pursues this question – as is often its method – through the investigation of a specific case. We are presented with a disagreement between Beit Shammai and Beit Hillel on whether a Jew may give leather hides to a non-Jewish tanner or clothing to a non-Jewish launderer *before Shabbat begins*<sup>11</sup>:

The House of Shammai say: We may not give skins to a [non-Jewish] tanner, nor clothing to a non-Jewish launderer unless there is sufficient time for them to be completed while it is still day. And in all of these cases, the House of Hillel permit while the sun is up.	בית שמאי אומרים : אין נותנין עורות לעבדן, ולא כלים לכובס נכרי אלא כדי שיעשו מבעוד יום, ובכולן (ממשנה ה עד ח.) בית הלל מתירין עם השמש.
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Let us begin with observing a point of agreement between Beit Hillel and Beit Shammai that contrasts with the *Mekhilta*. Both Beit Hillel and Beit Shammai fundamentally agree that work **may be done** for the benefit of the Jew on Shabbat. This represents a completely different assumption than the *Mekhilta*. For both Beit Hillel and Beit Shammai, this work is allowed provided that the request to the non-Jewish laborer is made **before** Shabbat begins. But it is important to emphasize that for both Beit Hillel and Beit Shammai the Jew may not specify that the work be performed on Shabbat.

<sup>10</sup> רמב"ם הלכות שבת פרק ו הלכה א. וע"ע ב"י סוס"י רמד בשם הסמ"ג שיש רמז לאיסור זה בשבת ויו"ט מן התורה.

<sup>11</sup> משנה שבת א: ח

Additionally, for both Beit Shammai and Beit Hillel, asking a non-Jewish person **on Shabbat** itself to perform work is forbidden. Beit Shammai and Beit Hillel disagree only about how much time **before Shabbat** begins a Jew may ask a non-Jew to perform work.

This Mishnah also introduces a new framework for considering the prohibition of אמירה לנכרי. Beit Shammai permit asking a non-Jewish laborer to perform work that benefits the Jew only in a situation where it is possible for the non-Jew to have **completed the task before Shabbat begins** – כדי שיעשו מבעוד יום. There has to be a cushion of time before Shabbat in order to allow the laborer to complete the task if he so wished. The reasoning seems to be: If the non-Jew decides to postpone working on the job Friday afternoon and instead work on Saturday, well, that was **his decision**. The Jewish owner of the clothes did not specifically request that the non-Jew work on Shabbat. Such benefit is permitted in the language of the *Rishonim* and later *poskim* משום דנכרי אדעתיה דנפשיה קעביד.<sup>12</sup> Beit Shammai's mandated cushion of time distances a sense of direct agency such that the non-Jew is no longer understood as acting as a surrogate of the Jew for work performed on Shabbat. Rather, he is working for himself, deciding on his own accord to work on Shabbat. We will call this framework, attempting to mitigate such a notion of שליחות (Direct Agency) Paradigm II.

Beit Hillel, in contrast, simply demand that **the request be made before Shabbat begins**. Seemingly, for Beit Hillel, the prohibition of אמירה לנכרי is limited to making a request for the non-Jew to perform a מלאכה **on Shabbat itself**.<sup>13</sup>

The *Rishonim* offer different understandings of Beit Hillel's statement. For now, I will focus our attention on Rashi's reading of Beit Hillel in our mishnah. Rashi seems to understand the entire mishnah – not just Beit Shammai's position, as described above – as being concerned with שליחות (Direct agency), and an attempt to further distance the Jewish employer from the work of the non-Jew on Shabbat.

Rashi reads Beit Hillel's statement in conjunction with the following *baraita*:

One may not send a letter in the hand of a non-	תנו רבנן : אין משלחין איגרת ביד נכרי ערב שבת, <b>אלא אם כן קוצץ לו דמים</b> ... <sup>14</sup>
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<sup>12</sup> הר"ן על הרי"ף מסכת שבת דף מו עמוד ב, שו"ת אגרות משה א"ח חלק ג סימן לה, שו"ת אג"מ א"ח חלק ד סימן נב, קרבן העדה מסכת שבת פרק א הלכה ח ד"ה בקיבולת, משנה ברורה סימן רמד ס"ק ב, שו"ת יביע אומר חלק ח - אורח חיים סימן כח: א

<sup>13</sup> One other possible explanation behind Beit Hillel's position which will not be developed in the body of this work is the prohibition of "ממצוא חפצך" - the prohibition of pursuing business matters on Shabbat. See Isaiah 58:13 and רש"י מסכת עבודה זרה דף טו עמוד א, ד"ה כיון דזבנה קנייה. We could explain Beit Hillel's opinion by presuming they hold that requesting work **on Shabbat itself** would be a violation of "ממצוא חפצך" – and **before** Shabbat there is no issue.

Such an explanation would attribute different reasoning behind B"H and B"S approaches.

<p>Jew before Shabbat [for delivery] <u>unless he stipulated an amount of money.</u></p>	
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מיישם establishes a relationship where the Jewish employer stipulates a set fee to be paid upon the completion of a **discrete task or project**. The employer does not indicate when the non-Jew should work, nor does he even show a preference. One hired to complete a specific project is entirely independent of the employer regarding the hours he works. His time is his own and when he works, he may be understood as working for himself. The employer has arranged to pay him in full upon the completion of the project.

This type of employer and employee relationship stands in contrast to a work agreement where the employer hires an employee by the hour or day (שכיר יום / day laborer). A person hired for a **discrete amount of time** is considered to be working directly for the employer. His time is not his own; he does not work at his own discretion. The employer actively directs when the work is done and pays the worker specifically for the hours he has worked.<sup>15</sup>

Rashi overlays this *baraita* onto the position of Beit Hillel in the Mishnah. On this statement in the *baraita* Rashi comments:

<p>“Unless he stipulated an amount of money” – Because he stipulated an amount of money – <u>he works on his own accord.</u> And Beit Shammai does not agree with [the implications of] stipulating [a fee for the project]. For even [in the situation where he] stipulates [a fee], he [Beit Shammai] disagrees... Rather this statement is taught for the position of Beit Hillel- that without one stipulating a fee [for the non-Jew to complete this project <u>even Beit Hillel</u>] <u>would not disagree that this is forbidden.</u></p>	<p>”אלא אם כן קצץ לו דמים” - דכיון דקוצץ לו דמים - <b>בדידיה טרח</b>, ובית שמאי לא מודו בקצץ, דאפילו בקצץ פליגי... אלא מילתא דבית הלל אשמעינן, <b>דבדלא קוצץ לא פליגי דאסור.</b><sup>16</sup></p>
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Rashi reads Beit Hillel’s opinion in the Mishnah as presupposing a קוצץ לו דמים arrangement. Only if the employer **sets a fee for the completed project** (קוצץ לו דמים) may he then turn over

<sup>14</sup> שבת דף יט עמוד א.

<sup>15</sup> ראה קרבן העדה פני משה מסכת שבת פרק א הלכה ח.

<sup>16</sup> שבת דף יט עמוד א, רשי ד”ה אלא אם כן.

According to the *shitah* of Rashi- Beit Shammai requires the cushion of time before Shabbat to complete the work even when there is קוצץ לו דמים.

his hides or laundry to the non-Jewish laborers.<sup>17</sup> Without this, one **may not** ask a non-Jewish laborer to process his hides immediately before Shabbat.

If the non-Jew works on Shabbat and benefits his Jewish employer by means of this work, as long as there was a contract for a discrete project – “בדידיה טרח” – he works on his own accord. If the non-Jew works on Shabbat he is doing so because of his own self-interest to complete the job more quickly: the sooner he finishes the project, the sooner he gets paid.<sup>18</sup> קוצץ לו דמים loosens up the causality between the request and when the work is performed.

However, where no set fee is stipulated for the project, **even Beit Hillel would agree that one may not give work to a non-Jewish laborer on Friday afternoon** because of the concern he will do work on Shabbat.

To review: If the compensation structure is such that the laborer is paid at the conclusion of the entire project, the laborer then sets his own hours. He can work seven days a week or he can work four. Of course, the faster he completes the project, the sooner he gets paid. Understood within this framework, if the non-Jewish laborer works on Shabbat, this is his choice to do so. His Jewish employer had nothing to do with it and, consequently, the employer may benefit from this work.

On the other hand, if the laborer is paid by the hour, the Jewish employer intentionally designates such and such number of hours on such and such a day. With this compensation structure, if the non-Jew works on Shabbat, he was specifically directed to work on Shabbat by the employer.

Again, I would understand Rashi’s reading of Beit Hillel’s statement in the mishnah as an attempt to tease apart the direct causality between the request of the Jewish employer and the actions of the non-Jewish laborer. To conceptualize this within a halakhic construct, Rashi attempts to mitigate the ways in which the non-Jew may be understood to be the direct agent (שליח) of the Jew when he works on Shabbat. Indeed, fundamentally, Rashi understands the prohibition of אמירה לנכרי as an issue of שליחות.<sup>19</sup>

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<sup>17</sup> לפי התוספות צ"ל דמתניתין נמי איירי בקוצץ לו שכר. עיין תוס' מסכת שבת דף יט עמוד א ד"ה אלא אם כן קוצץ לו דמים.

<sup>18</sup> See Ran to BT Shabbat 19b.

The Ramabam codifies this idea:

”פוסק אדם עם הגוי על המלאכה וקוצץ דמים והגוי עושה לעצמו ואף על פי שהוא עושה בשבת מותר.”  
ראה הרמב"ם הלכות שבת פרק ו הלכה יב.

<sup>19</sup> ראה רש"י מסכת שבת דף קנג עמוד א, ד"ה מאי טעמא שרי ליה למיתב לנכר; עבודה זרה דף כא עמוד א, ד"ה מפני שנקראת על שמו; שם כב עמוד א, ד"ה לא יאמר ישראל; שם ד"ה שרא להו; מסכת מסכת מועד דף יב עמוד א ד"ה מקבלי קיבולת בתוך התחום אסור. וגם הגהות מיימוניות הלכות שבת פרק ו הלכה א אות ב; ש"ך יורה דעה סימן רצד סעיף קטן כח.



We have seen two attempts to construct the relationship between the Jewish employer and the non-Jewish laborer in such a way that the work performed by the laborer on Shabbat would be understood as the non-Jew's independent choice and initiative. Both Beit Shammai's concept of *יום שיעשו מבעוד יום* and the *baraita's* requirement of *קוצץ לו דמים* attempt to disconnect the Jewish employer's request for work from the performance of work on Shabbat. Both of these efforts conceptualize the prohibition of *אמירה לנכרי* as a concern for having the non-Jew serve as a Jew's surrogate for the violation of Shabbat in pursuit of benefit and each provides an attempt to deconstruct such agency.

**Location, Location, Location: Appearances (מראית העין)**

A *baraita* in the Yerushalmi introduces a new framework (Paradigm III) for conceptualizing the concerns involved with *אמירה לנכרי*:

<p><i>Baraita</i>: Non-Jewish artisans who were doing [work] for a Jew [on the Sabbath]— in the house of the Jew [it is] prohibited. But in their own homes-- [it is] permitted.</p> <p>Rabbi Shimon Ben Lazar said- When is this applicable? [In the case of a non-Jew who has accepted] a <b>contract</b>. However in [the case of a non-Jew] hired for the day- [this is] forbidden.</p> <p>When is this applicable? When [he works on items that are] unattached to the ground. However, [when he works on items that are attached to the ground] it is prohibited. [If the non Jew is working for the Jew] in another city-- in all cases it is permissible. What is the meaning of "in all cases?"- whether unattached or attached, whether with a contract or hired for a day? Rabbi I'la [responded] whether unattached or attached provided there is a contract. Rabbi Shimon ben Karsnah said in the name of Rabbi Aha: In relation to Shabbat and mourning and idolatry the law is according to Rabbi Shimon ben Elazar.</p>	<p>תני אומנין עכו"ם שהיו עושין עם ישראל בתוך ביתו של ישראל אסור ובתוך בתייהן מותר.</p> <p>א"ר שמעון בן לעזר במה דברים אמורים? <b>בקיבולת</b>. אבל בשכר יום אסור.</p> <p>במה דברים אמורים? בתלוש מן הקרקע. אבל במחובר לקרקע אסור. ובעיר אחרת בין כך ובין כך מותר.</p> <p>מהו בין כך ובין כך מותר בין בתלוש ובין במחובר. בין בשכיר בין בקיבולת.</p> <p>א"ר אילא בין בתלוש בין במחובר ובלבד בקיבולת. ר"ש בר כרסנה בשם ר' אחא בשבת ובאבל ובע"ז הלכה כר"ש בן אלעזר.<sup>20</sup></p>
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<sup>20</sup> ירושלמי מסכת שבת פרק א הלכה ח.

The opening statement of the *baraita* introduces location as a salient factor for thinking about whether a non-Jewish person can perform work for a Jew on Shabbat. If the non-Jewish laborer works in the home of the Jewish employer— seemingly, even if the non-Jew has a **contract** to complete the project – such work is prohibited. If the work is performed in the home of the non-Jew – seemingly, even if the non-Jew is a **day laborer** – such work is permitted.

The issue here seems to be a concern about perception, rather than a concern about the business arrangement itself.

When work occurs within a homeowner's domain, the worker may be *perceived* as the direct agent of the homeowner. A passer-by, witnessing work occur on the property of a Jew, might conclude that the homeowner – on Shabbat – asked the non-Jew to work for his benefit.

When the work occurs in the non-Jewish laborer's home, there is no concern regarding what people might think (מראית העין). A passer-by will not think that the non-Jew is working on behalf of a Jewish employer and suspect him of hiring the laborer on Shabbat, even if he is a day laborer being paid directly for the hours he is working.

Rabbi Shimon ben Lazar quickly qualifies this opening statement of the Yerushalmi and understands it to apply only when the non-Jewish laborer works under a contract (קיבולת) to complete a specific project. קוצץ לו דמים is another term for the requirement of קיבולת.<sup>21</sup> Again, with such an arrangement, the non-Jew works of his own accord, on his own time schedule. As important, this business arrangement of קיבולת assumes that the Jewish employer receives no benefit from the non-Jew if he decides to work on Shabbat.<sup>22</sup> And to be clear, even with this business structure Rabbi Shimon ben Lazar concurs that the work cannot occur in the home of the Jew. Rabbi Shimon ben Lazar has added to the *baraita's* first statement which expressed a concern for the **appearance of agency** (מראית העין), a desire to tease apart **actual agency**.

With the Yerushalmi's introduction of a concern about appearances and what people might be led to suspect, we thus have a third conceptual framework (Paradigm III), different than both the *Mekhilta* and the tannaitic sources discussed in the last section.

Rabbi Shimon Ben Lazar concludes that under no circumstance may a Jew benefit from the work of a non-Jewish laborer hired by the hour or the day (שכיר יום). Someone hired for a set amount of time is considered to be the שליח of the Jew.<sup>23</sup> This prohibition is operative irrespective of where the work occurs. While the concern for the שכיר יום was implicit in the

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<sup>21</sup> ראה משנה ברורה סימן רמד ס"ק א. וגם ראה פני משה מסכת שבת פרק א הלכה ח ד"ה בד"א.

<sup>22</sup> קרבן העדה מסכת שבת פרק א הלכה ח ד"ה בקיבולת. "שקצץ עמו בשכר כל מלאכתו דאין פסידא לישראל אם לא יעשה היום ועכו"ם אדעתיה דנפשיה קעביד":

<sup>23</sup> קרבן העדה מסכת שבת פרק א הלכה ח ד"ה אבל בשכיר יום

*baraita* in the Bavli, the *baraita* in the Yerushalmi explicitly prohibits a non-Jewish day laborer from working on behalf of a Jew.

Rabbi Shimon layers a third requirement unto the opening statement of the *baraita*. Not only must working on Shabbat have been the independent choice of the non-Jew and not only must the work occur in the non-Jew's home, but the type of work must involve things that will not be set into the ground.<sup>24</sup> That is to say, work that is unrelated to construction. **Work that involves objects that are מחובר לקרקע (objects to be set into the ground) – even if performed under contract and performed on the property of a non-Jew – is prohibited**. For example, if a door was constructed by a non-Jew on Shabbat – even on his own property, if the door was then placed on the home of a Jew, people might connect the work with the Jewish homeowner and suspect that the Jew had asked the non-Jew to build him the door on Shabbat. In order to eliminate this suspicion, work can be done for the Jew only when it is unlikely that one would connect the work to the Jewish employer. Only work performed on objects that will not be placed in a public space (בתלוש), where it will not be possible to connect the Jewish employer to the performance of the work on Shabbat, is permitted provided this work is done in the home of the non-Jew.

The *baraita* concludes that “in all cases” if the work is done in a city other than the city in which the Jew lives, where there is no concern of linking up the work with the Jew, then it is permissible for the non-Jew to perform even work that will be placed in a public space. The concern מראית העין can be addressed by having the work done in another city, but the inherent prohibition of a non-Jew serving as the surrogate of a Jew to perform creative labor on Shabbat must be mitigated by קבלנות. Only with the קבלנות arrangement is the direct causality between the request of the Jewish employer and the actions of the non-Jewish laborer sufficiently disconnected. Thus, the full sugya of the Yerushalmi brings together two paradigms and demonstrates a halakhic concern for both שליוחות (Paradigm II) and מראית העין (Paradigm III).

Finally, the Bavli shares this concern of מראית העין first raised in the Yerushalmi. In a statement made by Shmuel, he affirms that קבלנות is the base requirement for a permit to benefit from the work of a non-Jew on Shabbat. Shmuel then requires that the work be performed outside of the Shabbat limit:

<p>Shmuel said: <u>Those under contract (to complete a discrete project)- within the Sabbath limits – forbidden; outside of the Sabbath limits- permitted.</u> Rav Papa said: And even outside the Sabbath limits we did not say (that it was permitted) except</p>	<p>אמר שמואל: מקבלי קיבולת, בתוך התחום אסור, חוץ לתחום - מותר.  אמר רב פפא: ואפילו חוץ לתחום לא אמרן אלא דליכא מתא דמקרבא להתם, אבל איכא מתא דמקרבא להתם - אסור.<sup>25</sup></p>
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<sup>24</sup> פני משה מסכת שבת פרק א הלכה ח ד"ה בד"א. דבקבולת מותר בבית העכו"ם בתלוש מן הקרקע אבל במחובר לקרקע כלומר אם הוא לצורך מחובר לקרקע כגון שמשנת אבנים לשוקען בבנין אפילו בביתו של עכו"ם אסור:

<sup>25</sup> מועד קטן דף יב עמוד א.

where there is no other (Jewish) city close to there. But if there is a (Jewish) city close to there it is forbidden.	
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The concern here, as in the Yerushalmi, is that ***even though there is a contract relationship*** where the employer indicates no preference as to when work is done for the project, passers-by will not know that the non-Jew is working independently of his employer and will erroneously assume that the Jew directed the non-Jew to work on Shabbat.<sup>26</sup> Rav Papa is even concerned for the possibility of מראית העין in another city with Jewish residents beyond the Sabbath limits!<sup>27</sup>

Both the Yerushalmi and Bavli place מראית העין – the concern that people might come to the conclusion that the Jew hired and directly instructed these laborers to work on Shabbat – as a central factor for determining whether a Jew may benefit from work on Shabbat.

With the conclusion of our analysis of sources from the classical rabbinic period, I would like to make the following observations:

1. Even once the requirement of קבלנות has been met, both the Bavli and Yerushalmi prohibit such construction from occurring on the property of a Jew. Indeed, the Bavli prohibits such work from occurring within the Shabbat limits of the city.
2. The interpretive direction of both the Bavli and Yerushalmi is to further limit the conceptual permits created by Beit Shammai and Beit Hillel. In other words, Beit Shammai and Beit Hillel allow for work to be done on Shabbat by a non Jewish laborer provided the request is made prior to the start of Shabbat. The Bavli and Yerushalmi both create an additional requirement, namely that the work occur outside of the Shabbat limit.

### **"The Bathhouse is Called by His Name!" - A Complicating Consideration**

In the 12<sup>th</sup> century Rabbenu Tam was asked whether it was permissible for a Jew to use non-Jewish labor in order to build his home on Shabbat. In a breathtaking interpretive move, Rabbenu Tam created an argument to allow such work under certain conditions. In putting forth his argument Rabbenu Tam made use of a seemingly unrelated sugya and rejected the

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<sup>26</sup> רש"י מסכת מועד קטן דף יב עמוד א. ד"ה מקבלי קיבולת בתוך התחום אסור - ליתן מלאכה לנכרי בקיבולת כי עבדי ליה בשבתא, דידעי כולי עלמא ואמרי: היום בשבת יהב ליה, Rashi reconciles this ruling of Shmuel with Beit Hillel's position in the Mishnah that allows giving a non-jewish launderer clothing immediately before Shabbat, even though it is clear that the laborer will launder them within the *techum* on Shabbat:

והא דשרי בית הלל בפרק קמא דשבת (יז, ב) ליתן כלים לכובס בערב שבת עם חשיכה, ואפילו בתוך התחום, משום דכביסה בנכרי מידי דלא מינכר, וליכא חשדא, אבל מידי דמינכר - בתוך התחום אסור, משום חשדא

<sup>27</sup> ראה טור סימן תקמג

salient sugyot we have just discussed. Perhaps for these reasons, Rabbenu Tam told us that when he built his own home he rejected the conclusions of his own responsum.<sup>28</sup>

In a *baraita* in the Tractate of Avodah Zarah, Rabban Shimon ben Gamliel states that a Jew may not rent his bathhouse to a non-Jew because even after it is rented, it is still "called by the name of the Jew." That is to say, a bathhouse is not a type of business that is commonly rented out; therefore if it is owned by a Jewish family, it will always be assumed to be operated by this family. The explicit concern raised in this *baraita* is that a long term non-Jewish renter will perform מלאכה in the bathhouse on Shabbat. Such a situation is problematic because an observer will assume that the Jewish owner of the bathhouse directed the non-Jew to perform מלאכה for him on Shabbat.<sup>29</sup> The *baraita* reads:

Rabban Shimon ben Gamliel says: One should not rent his bathhouse to an idolater, <u>because it is called by his name</u> and this idolater will do work in it on the Sabbath and Holidays.	תניא, רבן שמעון בן גמליאל אומר: לא ישכור אדם מרחצו לעובד כוכבים, מפני שנקרא על שמו, ועובד כוכבים זה עושה בו מלאכה בשבתות ובימים טובים. <sup>30</sup>
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To be clear, there is nothing מן הדין that prohibits renting a non-Jew a bathhouse.<sup>31</sup> The concern here is solely appearances and what people might think if they saw work taking place on Shabbat.

The *gemara* teases out an inference from the *baraita* and the fact that it specified a bathhouse. While the business of a bathhouse seemingly will always implicate its Jewish owner, the *gemara* asks- "What about another type of business? May a Jewish landowner rent out part of his field to a non-Jew?" In other words, need one have the concern that passers-by, seeing people working in a Jewish owned field on Shabbat, will come to the conclusion that a Jewish landowner hired non-Jews on Shabbat to do work?

The *gemara* answers that renting a field is different from a bathhouse and, in fact, it is **permitted** to rent one's field to a non-Jew. Why? Because there existed a plausible and common situation during the Talmudic period that could dispel any concerns that the Jewish

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עיינו תוספות מסכת עבודה זרה דף כא עמוד ב ד"ה אריסא אריסותיה קא עביד וע"ע ספר הישר שו"ת סי' ו

ראה רש"י עבודה זרה דף כא עמוד א ד"ה מפני שנקראת על שמו: <sup>29</sup> "והרואה שמחממין בשבת אומר שהבלנים שלוחין של ישראל הן." ובחידושי הריטב"א מסכת עבודה זרה דף כא עמוד ב--"ואיכא משום מראית העין שסבורין העם שהגוי עושה שליחותו."

<sup>30</sup> עבודה זרה דף כא עמוד ב

<sup>31</sup> חידושי הריטב"א הנ"ל.

owner hired non-Jewish workers on Shabbat to work the land. This economic reality would remove any suspicions that the Jewish landowners had violated Shabbat.<sup>32</sup>

To explain: It was common practice for landlords to establish a sharecropping relationship with workers. In such an arrangement, a sharecropper receives a set portion of the crop; the more he works, the more he receives, as he is entitled to a percentage of his total output. Moreover, he controls when and how much he will work. When the employee-employer relationship is formulated in these terms, although the Jew benefits from work that the non-Jew performs on Shabbat, ***the non-Jew is considered as working on his own behalf, because he will benefit from his efforts by earning a portion of the crop.*** Someone observing people working in a field owned by a Jew on Shabbat would simply assume - אריסא אריסותיה קא עביד – “a sharecropper performing his sharecropping work.”<sup>33</sup> The sharecropper works on his own initiative.

Of course, this conclusion is mistaken in the situation under discussion in the Talmud. The non-Jew is in fact ***a renter***, not a sharecropper! But what is critical here is appearances. Renting a field to a non-Jew even though he will do מלאכה on Shabbat is permitted because someone witnessing this situation will ***think*** the non-Jew is a sharecropper working on his own accord.

According to this sugya, the ***possibility of sharecropping*** serves the purpose of keeping suspicion of wrongdoing from falling on the lessor of the land. ***The plausibility and probability that this worker was a sharecropper shields the Jewish landowner from false accusations of Shabbat violation.***<sup>34</sup>

Rabbenu Tam ingeniously adopts this argument of - אריסא אריסותיה קא עביד - the presumption of “a sharecropper performing his sharecropping work” and fashions it into a permit to allow a non-Jew to build on behalf of a Jew on Shabbat. Rabbenu Tam similarly argues in regard to the building contractor relationship – it is presumed: קבלנא קבלנותיה קעביד.<sup>35</sup>

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<sup>32</sup> חידושי הריטב"א הנ"ל:

”אלא שאסרו כל מקום שיש בו משום חשד שהרואה סובר שהיום השכירו לעשות מלאכתו, וכל היכא דליכא משום חשדא מותר, לפיכך אסרו במרחץ דלא הוה אורחייהו למיתן לאריסות וקבלנות ושכירות כלל, והתירו בשדה דהוה אורחייהו למיתן לאריס וליכא חשדא.”

וכן מבואר ברמב"ם הלכות שבת פרק ו הלכה טו שכתב שמותר להשכיר כרמו לנכרי מפני שהרואה יודע ששכורים הם<sup>33</sup> או שבאריסות נתן להם אבל דבר שאין דרך רוב אנשי אותו המקום להשכירו או ליתנו באריסות-אסור.

<sup>34</sup> Incidentally, the *gemara* pivots and asks if the possibility of this model of shared profit arrangement (sharecropper) can provide cover for the renting of a bathhouse. The *gemara* rejects this possibility because this model of profit sharing does not apply to the business model of a bathhouse. It is not the custom to lease a bathhouse for a share of the profits. Since this business model was not common vis a vis bathhouses, an observer seeing a non-Jew work in a bathhouse (owned by Jews) will assume that the Jew violated the Sabbath by engaging non-Jews to perform melacha on his behalf.

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The most salient characteristic of a sharecropper for this analogy is that the אריס works on his own behalf. He is *not* hired at a fixed wage to work for a day or a season. He is not instructed when he should work. He is self-directed and he himself benefits from choosing to work on Shabbat.

Rabbenu Tam argues that the sharecropper and a building contractor (קבלן) share these important characteristics.<sup>36</sup> The קבלן does not receive a wage in exchange for a set amount of time. He is hired to finish a specified project. In both these frameworks, if the non-Jewish laborer works on Shabbat, he acts אדעתיה דנפשיה קעביד. And an essential assumption of Rabbenu Tam's argument – aside from the assumption that the קבלן in this case is not Jewish – is that the Jewish employer receives no benefit from the industriousness of the non-Jewish worker and his decision to work on Shabbat.<sup>37</sup> The faster the laborer works, the faster he receives his fee for the project; thus the laborer is the only person understood to benefit from the speedy completion of the project.

Foundational to Rabbenu Tam's argument is the assumption that most building occurs within a קבלנות relationship and not by means of having to hire laborers on a daily basis (שכיר יום).<sup>38</sup> In this way, the presumption of קבלנות in the construction industry shields the employer from accusations of Shabbat violation. A passer-by seeing building occurring on a Jew's property will necessarily conclude that these workers are קבלנים – simply by virtue of being building contractors. Anyone witnessing such building will understand that these workers independently decide when to work and are personally motivated to finish the project.

By creating an analogy here to the sharecropper, Rabbenu Tam is able to bypass the Yerushalmi and Bavli's concerns regarding location and מראית העין. Both the Bavli and Yerushalmi allow for work on Shabbat to benefit a Jew by means of קבלנות but both sources stipulate that the work must occur *outside* of the תחום. Rabbenu Tam's innovation allows for this work to take place *within* the תחום.

In the course of his argument, Rabbenu Tam ignores the Yerushalmi that prohibits work on objects that will be placed into the ground (במחובר לקרקע אסור) even if performed by

תוספות הנ"ל.

See the position of Rabbi Meir who attacks the meaningfulness of a comparison between an אריס and קבלן.

"שאיין בו שבח לישראל כלל במה שממהר נכרי לעשות קבלנותו."<sup>37</sup>  
תוספות מסכת עבודה זרה דף כא עמוד ב ד"ה אריסא אריסותיה קא עביד

וגם ראה לשון התוספות במועד קטן יב עמוד א ד"ה אמר שמואל מקבלי קיבולת בתוך התחום

בית יוסף אורח חיים סימן רמד

א (א) ישראל ששכר לו גויים לבנות לו בית בקבלנות היה מתיר רבינו תם (ספר הישר שו"ת סי' ו). התוספות (כא: ד"ה אריסא) והרא"ש (סי' כג) כתבו בספ"ק דעבודה זרה שלמד כן מאריסות שדה שחלק הישראל משביח במלאכה ואפילו הכי שרי כל שכן קבלנות שאין שבח לישראל כלל במה שממהר לבנות לו בשבת

ראה שיטת הר"י <sup>38</sup>

contracted laborer, if the work occurs *inside* the תחום.<sup>39</sup> He marginalizes Shmuel's explicit statement in the Bavli that says:

מקבלי קיבולת, בתוך התחום **אסור**, חוץ לתחום - מותר.

Rabbenu Tam rejects the straightforward reading of this sugya and argues that this entire passage does not refer to Shabbat but rather treats the permissibility of a *mourner* hiring employees during his *mourning period* when he is prohibited from work.

Perhaps it was because he jettisoned the Bavli and the Yerushalmi that – as many Rishonim attest – “even though Rabbenu Tam was lenient regarding קיבולת [when building on Shabbat] he was stringent with himself when he built *his* home and did not allow the non-Jewish builders to work on Shabbat even though they were employed through a contract.”<sup>40</sup>

Now I want to emphasize the centrality of the concept of מראית העין to Rabbenu Tam's argument and the extent to which his argument is deeply embedded in the historical conditions of his time. Because builders work by contract in his locale, in his lifetime, all concerns of suspicion are removed from the בעל הבית. Rabbenu Tam has no concern that people will suspect the בעל הבית of any wrong doing. He assumes people of his historical moment will understand the permissibility of such behavior when performed under contract. Rabbenu Tam's permit is framed within the time and context in which he lived.<sup>41</sup> What allows him to formulate his *heter* is his belief that all Jews of his time and place understand the halakhot governing construction on shabbat.

***Said differently, it's not the fact that קבלנות is used in construction that saves the day and allows Rabbenu Tam to issue his heter. It is Rabbeinu Tam's belief that the Jewish community understands the halakhic significance of קבלנות arrangement, namely that once there is קבלנות, there is no infraction of Shabbat.***

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<sup>39</sup> עיין הרא"ש מסכת עבודה זרה פרק א, וזה לשונו: וכיון שפוסק בתלמוד ירושלמי כר' שמעון בן אלעזר ולא מצינו בתלמוד שלנו שחולק עליו מנין לנו להתיר. הלכך כל קבולת במחובר כבנין בית אסור.

<sup>40</sup> תוספות מסכת עבודה זרה הנ"ל. וע"ע בית יוסף אורח חיים סימן רמד "ונראה לי דמשום הכי לא כתב רבינו רבינו תם מתיר ור"י אסור אלא כתב היה מתיר רבינו תם כלומר מתחלה היה מתיר רבינו תם אבל אחר כך כשבא מעשה לידו לא התיר"

<sup>41</sup> Both Rav Moshe Feinstein and Rav Ovadiah Yosef consider the question of whether – after the fact – a synagogue built by non-Jews within a *kablanut* business arrangement may be used by the Jewish community. In both instances, both poskim base themselves on the *heter* of Rabbenu Tam and allow the synagogues to be used.

שו"ת אגרות משה אורח חיים חלק ד סימן נב  
שו"ת אגרות משה אורח חיים חלק ג סימן לה  
שו"ת יביע אומר חלק ח - אורח חיים סימן כח



Consequently, with *kablanut*, at his historical moment, there is no concern of מראית העין. The question we must ask if we are to consider Rabeinu Tam's *heter* relevant to our question is- "Are Rabbenu Tam's assumptions still operative in our day?"

**The Shulhan Arukh:**

The relevant סימן reads:

<p>Where a person concludes with a non-Jew regarding work and stipulates a fee for the entire project and consequently the non-Jew works of his own accord – even though he works on Shabbat – this is permitted.</p>	<p>פוסק (=מתנה) עם האיני יהודי על המלאכה, וקוצץ דמים, והאיני יהודי עושה לעצמו, ואף על פי שהוא עושה בשבת, מותר ;</p>
<p>In what situations? In private where the public does not know that this work which is performed on Shabbat is being done on behalf of a Jew.</p>	<p>במה דברים אמורים? בצנעה, שאין מכירים הכל שזו המלאכה הנעשית בשבת של ישראל היא,</p>
<p>However, if it is widely known, it is forbidden, since someone seeing the non-Jew work will not know that there was a contract and will say, "so and so hired the non Jew to perform work for him on Shabbat."</p>	<p>אבל אם היתה ידועה ומפורסמת, אסור שהרואה את האיני יהודי עוסק אינו יודע שקצץ, ואומר שפלוגי שכר האיני יהודי לעשות מלאכה בשבת.</p>
<p>Therefore, if a person makes a contract with a non-Jew [so that the non-Jew] will build for him a courtyard or wall or harvest his field- if this work is within the city of the Shabbat limit – [the Jew] may not permit him to do work for him on Shabbat <u>because of the observers who do not know that he was contracted.</u></p>	<p>לפיכך הפוסק עם האיני יהודי לבנות לו חצירו או כותלו, או לקצור לו שדהו, אם היתה המלאכה במדינה או בתוך התחום, אסור לו להניחה לעשות לו מלאכה בשבת, מפני הרואים שאינם יודעים שפוסק.<sup>42</sup></p>

Not surprisingly, the *Shulhan Arukh* seems to follow the Yerushalmi and Bavli. Both actual agency (שליחות) and the appearance of impropriety (מראית העין) seem to be considered in this discussion of the parameters of אמירה לנכרי.

The *Shulkhan Arukh* also engages the specific case of construction where the Bavli did not. Building is permitted on Shabbat only within the context of a קבלנות relationship and, even in this case – because building is so public ("ידועה ומפורסמת") – the halakhic permit to build is **limited to areas beyond the city limits**. Within the תחום observers might erroneously conclude that the Jewish homeowner contracted the workers for the day. However, beyond the תחום – since this is a distance Jews may not traverse on Shabbat, there will be no one (that is to say, no Jews) there to observe the non-Jews working on the Jew's behalf. By definition, concerns about מראית העין do not exist beyond the תחום!

<sup>42</sup> שולחן ערוך אורח חיים הלכות שבת סימן רמד סעיף א

But let's be clear: according to the *Shulkhan Arukh* even with the structure of קבלנות construction cannot occur on the land of a Jew within the Shabbat limits. ***In other words, the reality of קבלנות does not do away with the concerns of מראית העין!***

However, given Rabbenu Tam's argument it's possible to tease out an inference from the end of this *seif*. The *Shulkhan Arukh* provides the reasoning that animates this prohibition: "because of the observers who do not know that he was contracted" for this work.

But what would the law be if everyone ***knew*** that the Jewish homeowner ***had arranged*** a contract for this work and that the non-Jewish person worked of his own choice? What if we lived during a historical moment where all major building projects were constructed by means of companies that were contracted to complete an entire project? Seemingly, if all observers ***knew*** that the workers were contracted, the *Shulkhan Arukh* would permit construction by means of non-Jewish laborers would be permitted. This is in fact Rabbenu Tam's argument.<sup>43</sup>

And again, I want to emphasize, this reading places concerns for what people may erroneously conclude (מראית העין) at the center of a discussion for determining what is permitted or forbidden regarding אמירה לנכרי in relation to building on Shabbat.

### **Moving Towards a פסק: Salient Factors Compelling a Decision.**

- 1) The permission offered by the Yerushalmi and the Bavli which allow for a Jew to benefit from the work of a non-Jew on Shabbat is limited to a situation where the work occurs ***outside the תחום***.

Even with a contract arrangement (קבלנות) between the Jew and the contractor construction cannot occur within the city limits.

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<sup>43</sup> כך כתב הג"ר רב משה פיינשטיין: "ולשון המחבר שכתב שהאיסור הוא מפני שהרואין אין יודעין שקצץ ויאמרו שפלוני שכר הנכרי לעשות בו מלאכה בשבת משמע שהוא כהר"י (ור"תם) בתוספות והרא"ש שבמקום שכולם ואולי גם רובם בונים ע"י קבלן מותר וכיון שהרמ"א לא הגיה כלום משמע שגם הוא פסק כן והטעם פשוט." שו"ת אגרות משה אורח חיים חלק ג סימן לה

- 2) The leniency created by Rabbenu Tam that allows for building *within the תחום* works only because it assumes two important steps:
- a) All construction projects occur within a framework of קבלנות.
  - b) All members of the Jewish community have an appreciation of the halakhic *meaningfulness* of the distinctions of קבלנות and שכיר יום in relation to the laws of Shabbat. Consequently, any random passers-by would understand the halakhic permissibility of work occurring on Shabbat.

Rabbenu Tam's leniency is predicated on a communal reality in which members of the Jewish community *understand* that because the non-Jew was hired within a framework of קבלנות, this work performed by a non-Jew to benefit a Jew is permitted due to the principle of דנכרי אדעתיה דנפשיה קעביד. Another way of saying this same idea is that members of the Jewish community are aware that – if the non-Jew were to perform work as a שכיר יום employee – this act would be אסור מדרבנן.

In our day, we can accept the first piece of Rabbenu Tam's argument. Most construction today occurs within a framework of קבלנות.

However, the second critical piece of Rabbenu Tam's argument cannot be said to be true in our Jewish communities.

***Today, members of our Jewish communities do not know about, let alone understand the meaningfulness of the distinction between קבלנות and שכיר יום that Rabbenu Tam's heter requires.***<sup>44</sup>

To make this point, it is worth recounting an actual event that occurred at the beginning of our campus building project. Before we had come to a decision as to whether JTS would allow building to occur on the premises on Shabbat, we received a delivery of material on Shabbat. The trucks unloaded on Saturday afternoon. On Monday morning we received a phone call from a random person in the neighborhood questioning our commitment to Shabbat observance. In this Jewish lay person's eyes, "work" should not be done on Shabbat – so how was it possible that a religious institution allow this?

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<sup>44</sup> Indeed, no less than the Rambam, discusses a historical reality where:  
"שאין הכל יודעין הפרש שיש בין השכיר ובין הקבלן". **The Rambam concludes in such a historical context – even though there is קבלנות and the work will even occur outside of the תחום – asking a non-Jew to perform this work is nonetheless forbidden.** Compare with Hilkhhot Shabbat 6:1 and see (סימן סו) for an attempted resolution of this contradiction.

In our communities where Shabbat observance is weak and where we – at times – are seen to have made concessions or compromises to adapt Jewish law to fit the exigencies of people's lives, we need to thoughtfully consider how a permit to allow building and the operation of heavy machinery on Shabbat in a very public way will be received by our communities and how it will further impact the institution of Shabbat.<sup>45</sup>

If Jews of all different levels of knowledge and legal sophistication were to witness building occurring on Shabbat on a Jewish landowner's property, many would conclude that Shabbat was not being taken seriously.

**Therefore, for our Jewish communities today, the leniency of Rabbenu Tam is not available. His argument simply breaks down when applied to our current reality.**

- 3) The Rambam pushes us to think about the impact of אמירה לנכרי on the institution of Shabbat itself.

Consider how the Rambam framed the prohibition of אמירה לנכרי:

<p>It is forbidden to ask a non-Jew to do work on Shabbat for us, even though the non-Jew is not obligated by the laws of Shabbat, even though one asks him before Shabbat begins, and even though one does not need the work until after Shabbat. This is a rabbinic prohibition- <b><i>So that Shabbat would not be taken lightly in their eyes and they would perform the work themselves.</i></b></p>	<p>אסור לומר לגוי לעשות לנו מלאכה בשבת אף על פי שאינו מצווה על השבת ואף על פי שאמר לו מקודם השבת ואף על פי שאינו צריך לאותה מלאכה אלא לאחר השבת, ודבר זה אסור מדברי סופרים כדי שלא תהיה שבת קלה בעיניו ויבואו לעשות בעצמן.<sup>46</sup></p>
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The Rambam here suggests that what stands at the foundation of the prohibition of אמירה לנכרי is a concern that the prohibition of מלאכה on Shabbat would have been weakened (שבת קלה בעיניהן). If one could reason, "If I can have a non-Jew do מלאכה for me, why can't I simply do it myself?!", then the prohibition against work on Shabbat and the theological commitment behind it would have been undermined.

Along these lines, we should remind ourselves of another reason given for the general concern of מראית העין in *halakhah*. It is not only that we need to be mindful of appearances lest people suspect us of a transgression. We must also be concerned

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זה דומה לדברי ה"ג ר"י משה פיינשטיין<sup>45</sup> - "אבל ודאי דלכתחלה יש להחמיר במדיניותנו שבעוה"ר מזלזלין באיסורי שבת שלא לבנות אף ע"י קבלן עכו"ם כשיטת הר"ן ודעימיה." ע"ש שו"ת אגרות משה אורח חיים חלק ג סימן לה.

<sup>46</sup> רמב"ם הלכות שבת פרק ו הלכה א

about people drawing erroneous conclusions about what is permitted.<sup>47</sup> In our situation, Jews may see certain actions taken by non-Jewish workers under the auspices of a religious institution and believe that these acts are permitted on Shabbat.

In my mind, one cannot help but conclude that both from the vantage point of the בעל הבית and the passer-by witnessing building on Shabbat, the claim of Shabbat on these parties will be diminished.

- 4) Up until now, we have discussed whether a private individual may contract non-Jewish builders to work on Shabbat. However, does the argument change if the party hiring the laborers is not an individual but a synagogue or Jewish organization? In our specific case, we are considering whether JTS – a central and publicly recognized leadership training institution of the Conservative Movement – may engage in such practice. There is a Talmudic concept that the principles that guide an אדם חשוב must reflect a higher standard than the principles that guide a regular individual's behavior.<sup>48</sup> People distinguished by their learning, piety and commitment to the Jewish people serve as models for other Jews in their relationship to God and Judaism and, therefore, must be particularly cognizant about the example they set.

I would suggest that this concern is part of what animated Rabbenu Tam's decision not to avail himself of his own leniency when he built his home. The Rambam warns us that there are ways that an אדם גדול might behave that do not constitute a transgression yet will cause "people to talk" and in doing so, will bring about a desecration of the name of God.<sup>49</sup>

If the expectations of individuals who possess deep learning relative to their community are higher, one can fairly suggest that an institution of scholars, training tomorrow's religious leadership should be particularly thoughtful and careful about the example it sets.

What JTS permits, forbids or encourages has ramifications well beyond 122nd St. JTS sets an example for undergraduates, rabbinical students, rabbis in the field and lay Jewish communities.

JTS has been instrumental in setting an aspiration for what Shabbat observance should look like by means of its graduates who go out and work in diverse Jewish communities. One needs to consider very carefully how building on Shabbat by means of non-Jewish labor – even within a halakhic permit<sup>50</sup> – will affect the institution of Shabbat in our

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<sup>47</sup> עיין ר"ן ריש חולין "שמא יחשבו הרואים" וכן המהרש"ל (הובא בש"ך יו"ד ס" פ"ז ס"ק ו' "שלא ידמו לומר. י")  
<sup>48</sup> שבת דף קמב עמוד ב.

<sup>49</sup>

רמב"ם הלכות יסודי התורה פרק ה הלכה יא

constituencies, both lay and professional. All that our constituents will see and hear is "work" on Shabbat. Fine distinctions will not be understood and the institution of Shabbat will be desecrated. Shabbat will simply take on the appearance of a regular weekday and, in the noise and bustle of building, the category of יום שבתון will have been publicly eroded.

As importantly, our students will feel that Shabbat can be *compromised* for reasons of monetary benefit. I use the words "compromised" because I believe that is the way such a permission to build on Shabbat will be perceived. This is the lesson they will take from our gates and will bring to their Jewish communities.

While this point is formulated with our particular case in mind, I would argue this point is equally applicable for synagogues and other Jewish institutions.

- 5) A word should be said about "the noise and bustle of building" just referenced. In the case of the 21<sup>st</sup> Century Building Project there will be students who live at JTS in the dorms throughout construction. Any Jewish institution that contemplates allowing construction on Shabbat by means of non-Jewish workers needs to consider the effects of the noise on the entire community.

There is a *baraita* in the Tractate of Shabbat that states clearly: "We may not put wheat into the water mill (Friday just before Shabbat even if it operates by itself) unless there is sufficient time that they may be ground while it is still day."<sup>51</sup> Rabbah explains this statement with the sentence: "Because it makes noise." And Rashi understands the noise as a "denigration of Shabbat (זילותא)." Construction on a synagogue's campus while congregants are present in another part of the building might very well impact "oneg Shabbat" and constitute זילותא.<sup>52</sup>

- 6) To return to the substance of the arrangement of קבלנות, the Jew may not receive any benefit from the non-Jew working on Shabbat. If the Jew were to have any direct

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ויש דברים אחרים שהן בכלל חילול השם, והוא שיעשה אותם אדם גדול בתורה ומפורסם בחסידות דברים שהבריות מרננים אחריו בשבילם, ואף על פי שאינן עבירות הרי זה חילול את השם

On this exact point, consider this incident that the gemara relates:

מר זוטרא בריה דרב נחמן בנו ליה אפדנא (palace) מקבלי קיבולת חוץ לתחום.  
אי קלע רב ספרא ורב הונא בר חיננא, ולא עלו לגביה.  
ואיכא דאמרי: הוא נמי לא על בגווייה.  
- והאמר שמואל: מקבלי קיבולת, בתוך התחום - אסור, חוץ לתחום - מותר!  
- **אדם חשוב שאני!**  
עיין י מסכת מועד קטן דף יב עמוד א.

<sup>50</sup> To be clear, we hope this paper has demonstrated that a halakhic leniency **does not** exist for our communities. This section is meant to argue for a prohibition of building even if one does not accept the argument presented thus far.

<sup>51</sup> שבת יח, ב

עיין אגרות משה א"ח ד: פד. <sup>52</sup>

benefit from the non-Jew working on Shabbat this would constitute a violation of the prohibition of *אמירה לנכרי*.

If, for instance, a Jew were to say "I need my house built in three months" and the only way the non-Jewish contractor could meet this deadline would be by working seven days a week, then this request is *אסור* because the Jew is **compelling** the non-Jew to work on Shabbat. The Jew will benefit from the non-Jew's labor on Shabbat.

If, however, that three month deadline meant that the non-Jew would have to work six days a week, then the non-Jewish workers have a choice. They can work either on Saturday or Sunday. If they decide to take off on Sunday and work on Saturday- that will be their choice. The Jewish employer would have been just as happy to have the non-Jews work on Sunday and take off on Saturday. He gained nothing if they decided to work on Saturday.

However, if one has contracted a firm for a building project and the workers are part of a union, the pay scale is different for Sundays than it is for Saturdays. This is true in New York and other parts of the country. Workers receive 2x pay an hour on Sundays and 1 ½x pay an hour for work on Saturdays. That is to say, it is less expensive to build on Saturday than it is on Sunday. So, if one uses workers that have this pay scale arrangement for overtime, the Jewish employer **does benefit** by having the workers build on Saturday, as opposed to Sunday.

***This is simply אסור לכל הדעות.***

- 7) Concern for financial cost has always been a salient factor within halakhic calculus. In fact, there is an opinion amongst the *rishonim* that in a situation where there is *שבות הפסד מרובה* involving financial loss, concerns for financial loss are privileged.<sup>53</sup> Like many areas of life one needs to engage the delicate calculus of positive and negative outcomes. In our case which involves a leading educational institution in Jewish life, one that hopes to set standards for Jewish practice, there simply will be too much damage inflicted on the institution of Shabbat in the eyes of our students and community to permit building on Shabbat for financial reasons. I would submit that this conclusion should be the same for a synagogue.

With every building project, people have to make hard decisions that will reflect their values. How much is a community willing to pay for beautiful tiles and finishings? All monetary calculations are a zero sum game. If you spend money on fancy wood finishes, you have less money to use for programming. Sometime there are good reasons to go with the fancy finishings (or if not "fancy," something more than the most spartan of building plans) and the needed money for the critical programming will simply have to be raised elsewhere.

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<sup>53</sup> ראב"ד בהשגות שבת פ"ו ה"ט, הובא במ"מ שם, וכן אמרו במקום הפסד כגון צינור כ"ו, ולפנינו ברמב"ם הנדפסים אין השגה זו וישנה ברמב"ם כת"י אדלר ניו - יורק.

In the case at hand, the values of Shabbat and its place within our covenantal relationship with God define who we are. If we erode our relationship with a particular understanding of the institution of Shabbat – where we are asked to intentionally distance ourselves from weekday ways of being – then we have lost the values that underlie who we are and why our version of religious education matters.

Any institution that engages in a building project and ceases all construction on Shabbat and Yom Tov should inform the larger community about this choice. This is an important opportunity for a communal conversation about the way in which communities live out value commitments, particularly around issues of Jewish observance. (e.g. spending more money on kosher meat/food; making sure our buildings are environmentally friendly.) The Reichmann family famously made a tremendous *kiddush ha-shem* by mandating all work on Shabbat and Yom Tov cease on all their international construction projects. With this act, Paul Reichmann announced to the world the importance of Shabbat and how there are values that are more important than money.<sup>54</sup> Such messages should be embraced as a wonderful educational opportunity.

#### פסק דין

It is forbidden for a Jewish institution to contract a building company and allow it to build on Shabbat or Yom Tov by means of non-Jewish laborers.<sup>55</sup>

And for the historical record, JTS adopted this counsel as it moved forward with its building project.

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<sup>54</sup> <https://www.google.com/amp/s/www.theglobeandmail.com/amp/report-on-business/legendary-canadian-real-estate-developer-paul-reichmann-dies/article15084013/>

<sup>55</sup> Louis Ginzberg gave the same ruling in 1921. He offers no argumentation and states that “legally it could be done” but that “the public would not know of this ‘legal fiction.’” See page 108, The Responsa of Professor Louis Ginzberg, ed. David Golinkin, JTS, 1996. Of course, this paper has argued that a leniency is *not* legally possible in our day.