# THE RETURN OF LOST PROPERTY ACCORDING TO JEWISH & COMMON LAW: A COMPARISON

*Michael J. Broyde and Michael Hecht**

## I. Introduction

In every legal system a gap exists between the law as it is actually enforced by the courts and the ethical categorical imperative.[1]

* Michael Broyde is a Senior Lecturer in Law at Emory University School of Law and Director of the Law and Religion Program's Project on Law, Religion and the Family; Michael Hecht is the Associate Dean of Yeshiva University and a Professor in the Department of Political Science at Yeshiva University. The research assistance of Paul Malek of Emory University and Tzvi Shiloni of Yeshiva University is truly appreciated.

One area of lost property law is not discussed: Jewish law's ruling concerning the role of *makom* (place) and the obligation to return the lost property of a Gentile are omitted from this article and will be addressed in a forthcoming article by these authors entitled "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity," in the Jewish Law Annual.

1. See, for example, Isaac Herzog, *Moral Rights and Duties in Jewish Law*, I *The Main Institutions of Jewish Law* 381-86 (The Soncino Press, 1936), for an excellent general analysis of moral claims in Jewish law as compared with those in English common law.

An introduction to Jewish law might be needed for some readers. The *Pentateuch* (the five books of Moses, the *Torah*) is the historical touchstone document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 before the common era ("BCE"). The period from the close of the canon until 250 of the common era ("CE") is referred to as the era of the *Tannaim*, the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries were the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (1) the era of the *Geonim*, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Ahronim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which lead to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh,* as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even Ha-Ezer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matters. Many significant scholars—themselves as important as Rabbi Karo in status and authority—wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent

Although it was rejected by Justice Holmes in his "bad man rule,"[2] a strong claim can be made that the measure of an enlightened and advanced legal system and society is its success in bridging this gap. Within a religious legal system[3] which rejects the clear separation of law and ethics, the severity of this problem is ameliorated. As illustrated by Jewish law, even such a system's purely civil law must be influenced by ethical duties to a far greater degree than in secular legal systems.[4]

This article compares the legal rules and jurisprudence of the American common law and Jewish law in the area of finding and returning lost or abandoned property, illustrating the interplay between the purely legal and ethical components of the respective legal systems. Surprisingly enough, the differences between the two systems are not usually significant; they follow the same basic legal principles, and typically lead to the same results.[5] There are, however, two major exceptions: Jewish law imposes a duty to rescue the lost property of one's neighbor, while the common law does not require that one initiate the process by retrieving the article. Thus according to Jewish law, when one happens to stumble across lost property, one must intervene to retrieve it; according to the common law one need not. Second, Jewish law imposes ethical duties as part of its legal mandate, a practice the common law does not follow.[6]

complete edition of the *Shulhan Arukh* (Vilna, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last 1200 years Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in question and answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but also to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

2. Justice Holmes subscribed to the view, extremely popular in its day, that the law should only attempt to provide guidance for acceptable "legal" rather than proper conduct; thus Justice Holmes was of the opinion that:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, and not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457, 459 (1897).

3. A system in which law is but one component of a religious system. For two recent Hebrew works that are nearly restatements of the Jewish law and ethics in the area of lost property, see Ezra Bassri, 3 *Dinnai Mammonut,* 42-82 (Jerusalem, 2d ed, 1990) and Jacob Blau, *Pithei Hoshen* (*Laws of Loans and Lost Property*) (Jerusalem, 1983). Translations of these works cited herein are those of the authors. In addition, a review article on this topic can be found in 11 *Encyclopedia Talmudic*, *Returning Lost Property* at 54.

4. This area of the law was chosen for a number of other reasons also. First, it is an area of the law far distant from any apparent religious significance, thus making it an excellent paradigm for comparing the civil law of a religious system with the civil law of a secular system. Second, from the perspective of the common law, the field of lost property is devoid of constitutional or federal interests, thus allowing the common law to develop in its historical manner.

5. In the Chart at the end of this article, we summarize these distinctions in tabular form. In order to demonstrate that this overlap is not an inevitable result that any legal system would have reached, this article—and the chart—also include the legal results that would be reached in New York State, which in 1958 recodified its laws of lost property and moved them away from the common (and Jewish) law rules.



This article approaches the issues raised in returning lost property in the order they are encountered as property is lost or found. The first two sections discuss the issue of defining "lost property"; the next four sections discuss the obligations of the finder; the subsequent two sections discuss the legal relationship between the finder and the original owner; and the last section discusses miscellaneous issues related to lost property.

## II. When is Property "Lost"?

Jewish law recognizes that property may become ownerless by one of two means: (1) abandonment, which is an express renunciation by the former owner of his ownership; or (2) express or implied "forsaking hope" of reclaiming an object to which one has legal title, but not possession by the owner of that item. Abandonment is effective only for property in one's own possession at the time of abandonment. By contrast, forsaking hope is applicable to both lost and stolen property; it is a relinquishment of the right to have the property returned. It results from external, involuntary circumstances which have placed the property beyond the possession of the owner, and the owner's realization that he is unlikely to ever recover his property. These juridical concepts in Jewish law find nearly perfect analogy in the common law doctrines of relinquishment and abandonment. For example, after abandonment in Jewish law and abandonment in common law, the finder of lost

6. Neither author is well trained in legal history, and thus will not claim that the common law was in fact influenced by Jewish law in its analysis of this area, rather than merely co-evolving in the same way as a matter of coincidence. However, given the significant overlap in the substantive legal rules used (and the fact that these rules are not the only ones possible, as demonstrated by New York's complete, but different, statutory structure), it would not come as a surprise if such an influence were shown, nor would this be the first time such an influence has been shown. See Judith A. Shapiro, *Shetar's Effect on English Law - A Law of the Jews Became the Law of the Land*, 71 Georgetown L J 1179 (1982), and Issac Bruz, *The Privilege Against Self-incrimination in Anglo-American Law: The Influence of Jewish Law* in Nahum Rakover, ed, *Jewish Law and Current Legal Problems* 161 (Library of Jewish Law, 1984).

property can properly exercise dominion over the object, thereby vesting title and absolute ownership in himself.

While this legal rule is quite clear in both legal systems, its applications are underdeveloped in common law compared to Jewish law. The critical question is: what factual circumstances warrant a finder to conclude that abandonment by the initial owner has occurred? A noted writer on the common law of personal property indicates that the common law is hazy and undeveloped on this question:

> No cases have been discovered dealing with the question of the circumstances that would justify a finder in assuming dominion over lost goods on the assumption that the owner had abandoned them, or could not be discovered.[7]

Jewish law, on the other hand, provides a detailed set of rules which regulate when abandonment has occurred or may be presumed. The finder may gain title to the lost property if abandonment has expressly occurred, or if it may be reasonably presumed. One illustration of express abandonment is presented by the Talmudic scholar, Rabbi Zvid, "The general principle in regard to a loss (of property) is if (the loser) has said 'Woe! I have sustained a monetary loss,' he has abandoned his object."[8] No prior communication of the declaration of abandonment to the finder is necessary.

The circumstances in Jewish law in which abandonment may be presumed has generated far more discussion. The *Mishnah,*[9] discussing which type of property cannot be presumed to be aban-

7. Ray Brown, *The Law of Personal Property*, 32 n 4 (Callaghan & Co, 3rd ed, 1975) [hereinafter Brown, *Personal Property*]. Common law operates under the general assumption that property is lost and abandonment has not yet occurred; see *Paset v Old Orchard Bank & Trust Co.*, 19 Ill Dec 389, Ill App 3d 534, 378 NE2d 1264 (Ill App 1978); *Martha's Vineyard Scuba Headquarters, Inc., v Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F2d 1059 (1st Cir 1987).

A claim could be made that the absence of development in this area of common law results from common law being driven by the case method. One suspects that frequently people simply take possession of lost property without a clear legal determination of their right to do so. Common law only allowed for development of this law in the rare circumstance where all of the following six events occurred: (1) property was lost in a context where abandonment might, but need not, have occurred; (2) the property was found by another; (3) the original owner discovered who found his property; (4) the finder refused to return the object; (5) the original owner sued to recover the object; (6) there was a legal dispute (rather than a factual dispute) that resulted in an appellate decision. Jewish law, since it is driven by legal scholarship, developed definitions of abandonment even in the absence of a case.

8. *Bava Meziah* 23a; Moses Maimonides, *Mishnah Torah, Theft and Abandonment* 14:3.

9. *Bava Meziah* 27a.



doned,[10] explains that the finder's duty of the public proclamation applies if two conditions are satisfied: the object must have (1) claimants; and (2) identifying marks or signs which would allow the original owner to identify the object as his. An owner of a lost article, the *Mishnah* posits, cannot be expected to have abandoned hope for its return if he has means of identifying the object, and he knows that the law requires that one return objects to its rightful owner. However, once he is aware of the loss, the owner can be expected to abandon hope of recovery if the lost item has no unique identifying marks which would allow him to reclaim his object.[11]

Jewish law added one further element to determine whether one can presume abandonment of a lost object or is obligated to seek out the owner and return the find. This is the concept of *ye'ush shelo medat*, literally abandonment without knowledge, which is the subject of an involved and famous Talmudic dispute.[12] The concept is applied to lost property not identifiable by unique marks—situations where Jewish law would normally assume abandonment. If the finder takes possession of lost property prior to the owner's awareness of his loss, the latter's *subsequent abandonment* is ineffective and the property must be returned to the owner once his identity is satisfactorily established. In his analysis of this rule, Rabbi Isaac Herzog states that through the application of this principle, "the scope of abandonment is considerably reduced."[13] Indeed, he comments, "The reader may well wonder under what conditions abandonment is effective."[14] Although there undoubtedly is some truth to this assertion, it unnecessarily overestimates the practical consequences entailed by the application of this principle. The Talmud provides detailed guidelines which aid the finder to reasonably conclude that the owner became aware of the loss shortly after its occurrence, or in any event, before it was found, permitting the finder to properly assume title. For example, the loss of money is presumed to be discovered virtually immediately by the loser since "a person usually touches his wallet at frequent intervals."[15] Likewise, the Talmud places in this category particularly precious items, and those which are heavy, since peo-

10. See Section III below for a further discussion of this issue.

11. Joseph Karo, *Shulhan Arukh, Hoshen Mishpat* 262:6; Blau, *Pithei Hoshen* at 2:5-7 (cited in note 3).

12. *Bava Meziah* 21b-22b.

13. Herzog, *Main Institutions of Jewish Law* at 1:307 (cited in note 1).

14. Id.

15. *Bava Meziah* 21b; *Shulhan Arukh, Hoshen Mishpat* 262:3.

ple quickly notice the loss of such items.[16] So, too, an object which has been lost for a long time (even if it has a unique identifying mark) is presumed to be abandoned, since Jewish law assumes that people eventually discover losses of property.[17]

However, the legal principle of *unintentional abandonment*—that in order for abandonment to be effective, it must precede the finder's taking possession—presents analytic and jurisprudential problems within Jewish law. The Talmud appears to indicate that the finder took the article *in violation of the law*, without right, since an unknowing owner is not capable of abandonment which would entitle the finder to claim ownership, and any subsequent abandonment is not given retroactive effect for the benefit of the finder. This seems to be the explanation of the Tosafists.[18] Yet, this argument contains an inherent difficulty, for it is appropriate to apply the improper conduct concept only to a case of theft and not to one of lost property.[19] Nahmanides, obviously aware of the difficulty implicit in this approach, offers an entirely different rationale[20] to explain the ineffectiveness of unknowing abandonment, based on the premise that abandonment is possible only if the object is not in fact within the possession of the one abandoning the object. He argues that since the finder took possession of the lost article prior to abandonment and thereby became a bailee of the owner, the owner's subsequent abandoning hope of recovery is not effective since one cannot abandon hope of recovering property which is legally considered within his own posses-

16. *Bava Meziah* 21b; *Shulhan Arukh, Hoshen Mishpat* 262:3.

17. After a reasonably long time, it is presumed that they abandon hope of ever having their property returned, even if it is clearly marked. *Shulhan Arukh, Hoshen Mishpat* 262:5. For a discussion of what happens to such property, see Section VI.

18. See Jacob Lorberbaum, *Netivot Hamishpat* 259, citing Tosafot, *Bava Meziah* 26a *s.v. v'nezel.* See also Tosafot, *Bava Kama* where Tosafot, carrying this point to its logical conclusion, states that one who picks up an object before abandonment occurs, no longer holds the item as a bailment for the original owner after abandonment, but rather takes ownership of the item and owes the value of the item to the original owner as a debt. Tosafot's assertion becomes crucial for determining what happens to these items after abandonment; see also Section IV for a further discussion of this issue.

19. See *Bava Kama* 66a, where the "in violation" rule is applied to theft and specifically indicates that it does not apply to lost property. That discussion can be understood to apply only if abandonment preceded the finding. Rabbi Yom Tov Ashbealli (*Ritva*), quoted by *Shita Mekubezet* on *Bava Meziah* 26a, compounds the problem by pointing out that the finder is under an affirmative obligation to take lost property into his possession and attempt to find the owner. He, therefore, understands that the Talmudic statement "possession acquired in a prohibited manner" merely indicates that no abandonment has been made, thus entitling the finder to acquire title.

20. Nahmanides, *Milhamot Hashem* on *Alfasi, Bava Meziah* 26a. Whether Nahmanides' or Tosafot's rationale is deemed correct is of critical importance in determining what happens to these items; see also Section IV.



sion, and the possession of the bailee is considered that of his bailor.[21] Whichever approach one takes, it is clear that abandonment is only effective prior to finding the object.[22] Such a result stands in contrast to the law in New York State, which, in its recodification of the lost property laws, rejects all of the common law (and Jewish law) formalism and defines "lost property" as follows:

> Lost or mislaid property. Abandoned property, waifs and treasure trove, and other property which is found, shall be presumed to be lost property and such presumption shall be conclusive unless it is established in an action or proceeding commenced within six months after the date of the finding that the property is not lost property.[23]

In New York, property is lost when the owner does not know where it is.

## III. When Is Property "Mislaid" Rather Than "Lost"?

Jewish law recognizes a fundamental distinction between lost property and mislaid property. While Jewish law compels a person to affirmatively act when he encounters lost property,[24] no such obligation is present for mislaid property. One who encounters mislaid property not only need not pick it up, indeed one is prohibited from picking up the property, whether to find its original owner or to claim it as lost.[25] The rationale for this is obvious: if the property is placed in a particular place (that is relatively se-

21. Emanuel Rackman has cited unknowing abandonment as an illustration of Jewish law's attempt to improve the ethical values of the Jewish people, since clearly this principle of law could hardly ever become the subject of litigation. Since the rule is applied to property not identifiable by unique marks, the practicality of the situation virtually insures that the true owner will never recover what he once possessed. Yet the finder is precluded from asserting ownership over the object, and is subject to the same duties, to be discussed below, that are applied to the finder who can reasonably expect that he will eventually be required to deliver the property back to the original owner. As Rackman concludes, "Through such a rule the mores of the people with regard to lost property were improved for the rule was an essential part of the eduction of Jews throughout the ages." *Masmid, Yearbook of Yeshiva College 1948* 12-13 (1948).

22. Nahmanides' rationale would be accepted by the common law as correct. According to the common law, abandonment cannot be valid unless one both abandons claim to an item and also abandons actual physical ownership of the item; one who announces intent to abandon an item without actually relinquishing control has not abandoned the property as a matter of law according to common law. See *Abandoned, Lost and Unclaimed Property*, 1 Am Jur 2d § 15 [hereinafter *Abandoned Property*].

23. *McKinney's Consolidated Laws of New York Annotated, Personal Property Law*, ch 41, Art 7-B, § 251 [hereinafter *Laws of New York*].

24. See Section IV below.

25. *Shulhan Arukh, Hoshen Mishpat* 260:9-10 and 262:7.

cure), the easiest way to ensure that the object is returned to its owner is to do nothing: the owner will return to retrieve his possession.[26] If one picks up the mislaid property in violation of Jewish law, one must attempt to return the property to its owner; even if the owner is never found, the finder never takes valid title, since the initial act of picking up the object was not lawful.[27]

The identical distinction is found in the common law. As one well known treatise on personal property states:

> To intentionally place an article down and then go away, forgetting it, has often been held not a losing of it; thus the discoverer of the article is not a "finder" and does not have a finder's rights.[28]

According to common law, one who places an item down deliberately has created some form of a bailment with the one on whose property the item is left.[29] The "finder" of the item is not the finder according to common law, but must leave it as a bailment with the person on whose property it was found, since the one who mislaid the property is most likely to remember where the item was placed, and return to that spot to retrieve his item.

On a practical level, both Jewish and common law found it difficult to distinguish between mislaid and lost property in "hard" cases. Jewish law resolved these issues by creating a presumption in favor of mislaid property. If doubt exists whether the article was deposited or lost, the finder should not assume possession.[30] Rabbi Moses Isserless adds a number of additional factors. He distinguishes three situations:

26. It seems clear that even Jewish law, which requires that one take possession of lost property and return it to its owner, does not require that one guard deliberately placed properties to prevent their theft; Blau, *Pithei Hoshen* at 4:n 3 (cited in note 3).

27. Moses Isserless (*Rama*), commenting on *Shulhan Arukh, Hoshen Mishpat* 260:9. This is in accordance with the general Jewish law rule that abandonment does not grant the possessor valid title if the possessor himself acquired the item improperly.

28. Brown, *Personal Property* at 29 (cited in note 7). The statement in the second edition of *Personal Property*, written more closely conforming to the common law rule, states:

> To intentionally place an article down and then go away, forgetting it, is not in the eyes of the law a losing of it, nor is the subsequent discoverer of such an article the finder thereof.

Ray Brown, *Personal Property* 28 (Callaghan & Co, 2d ed, 1955).

29. See, for example, *Kincaid v Eaton*, 98 Mass 139, 93 Am Dec 142 (1867); *McAvoy v Medina*, 93 Mass 548, 87 Am Dec 733 (1866). What exactly happens to these items will be discussed in Section IV.

30. For example, if an animal is found roaming in the fields during the day, or an object buried in the sand, or a garment or spade is found by the side of a field fence, the finder should conclude that the owner will return and retrieve their items. See *Shulhan Arukh, Hoshen Mishpat* 261:1-2.



(1) The object is located in a reasonably safe location.
Here, the law is, as stated above, that the finder should not touch the object whether identifiable by identifying marks or not, as long as reasonable doubt exists that it was intentionally deposited rather than dropped;

(2) The article is located in a place where its safety is doubtful. In this case, if doubt exists whether it is deposited or dropped, the finder is obligated to take and proclaim the find if identifying marks are present. If there are no identifying marks, the object should not be touched, as moving it would decrease the likelihood of locating the original owner.

(3) The object is situated in a place where it definitely is not safe, e.g., a public highway.
Here, if no identifying marks are present, the finder may take possession and title of the object even though reasonable doubt exists that it was deposited there, provided it is an object whose loss would be already noted by its owner, thus allowing for the presumption of prior abandonment. If identifying marks are present, the finder must seek out the owner and return his lost property to him.[31]

Common law, like Jewish law, looked to the place where the object was found as the crucial factor in determining whether an item was lost or misplaced. Thus:

> If the owner laid the property down in a public place, in a place of business as in a private compartment of a safe deposit company or other place . . . it is not lost, but mislaid, property.[32] But where the articles are accidentally dropped in any public place, public thoroughfare or street they are lost in the legal sense.[33]

New York State, on the other hand, abolished the distinction between lost and misplaced property for the purposes of the laws of lost property. It does not matter how or why property is without an owner; all such property is lost.[34]

## IV. When Does One Become a "Finder"?

The crucial distinction between Jewish and common law arises in determining when one becomes a finder. Common law is generally reluctant to impose any affirmative duties on a stranger to protect either the life or property of another; hence, no involvement or

31. *Shulhan Arukh, Hoshen Mishpat* 260:10.
32. *Abandoned Property*, 1 Am Jur 2d at § 10 (cited in note 22).
33. Id at § 6.
34. See text accompanying note 23.

obligation is imposed on one who merely sees the lost property of another. It is entirely at the option of the finder to decide whether he will or will not take possession of the object.[35] According to common law, once the finder chooses to volunteer and take possession, only then will the common law impose affirmative duties of any kind. Thus, according to common law one who sees the lost property of another, just like one who sees another drowning, is under no obligation to rescue the property (or the person).[36] New York, accepting the common law rule, states that the "finder" means the person who first takes possession of lost property.[37]

Of course, according to common law and New York statute, one may not take the property as one's own merely because one is not obligated to return it.

> Found or discovered property may be the subject of larceny if the finder at the time the article is found . . . knows or has the means of ascertaining the owner, or believes the owner can be found but nevertheless intends at that time to appropriate the article for his own use.[38]

Thus, according to the common law, one can walk away from lost property and not be involved; however, if one is involved, one must follow the rules.

By contrast, Jewish law, a system which imposes duties even in the absence of special relationships, requires that one who sees lost property must involve himself in that property and assist in its return. The origin of this lost property doctrine is in the Bible. Three verses in the Bible provide the basis for the obligation to involve oneself in the lost property of another:

> (1) When you see your brother's ox or sheep going astray do not ignore them; you must return them to him.

35. Brown, *Personal Property* at 30 (cited in note 7). Compare *Murgoo v Cogswell*, 15 D Smith 359. It, of course, is sometimes an extra-legal obligation to become involved in returning lost property. See Frank Childs, *Principles of the Law of Personal Property* 443 (Callaghan Co, 1914) ("A person seeing lost property is not under any legal obligation to take it into his possession, however great this moral obligation to do so may be . . . ").

36. This is also consistent with the general common law rule which requires a special legal relationship to be present before the common law imposes a duty. This special legal relationship can be contractual, such as employer-employee, biological, (for example, parent-child) or involuntary such as a tort-feasor's relationship with the victim.

37. *Laws of New York* at § 251 (cited in note 23). Thus in a case where two boys discovered an envelope containing $12,300 in cash, and sought the assistance from a 15-year-old girl who—with the two boys—took the money to her house, all three are finders for the purpose of the law. *Edmonds v Ronella*, 73 Misc2d 598, 342 NYS2d 408 (NY Supp 1973).

38. Childs, *Personal Property* at § 337 (cited in note 35).



> (2) But if your brother does not live near you, or you do not know who he is, you should bring it home to your house, and it shall remain with you until your brother claims it; then you shall give it back to him.
> (3) You should do the same with his donkey; you should do the same with his garment; so you should do with anything that your brother loses and you find; you have no right to withdraw [from returning it].[39]

Jewish law accepts, based on these verses, that there is a legal imperative to intervene and return the lost property of another. Furthermore, this is in harmony with Jewish law generally, which imposes a duty upon all members of the community to intervene to aid another member of the community.[40]

The exact parameters of the obligation to assist in property return is of some dispute within Jewish law. Most authorities[41] are of the opinion that one who sees lost property and then declines to pick it up has transgressed both the negative prohibition of "you have no right to withdraw [from returning it]" and the positive commandment of "you shall give it back to him."[42] A number of authorities adopt a different understanding, which is closer (albeit by no means identical) to the common law rule. These authorities rule that if one is aware that visible property is lost, but never takes physical possession of the lost object, he is only guilty of transgressing the negative prohibition of "you have no right to withdraw [from returning it];" the positive commandment of "you shall give it back to him" does not apply unless the finder takes actual possession and does not return the object.[43]

39. *Deut* 22:1-3.

40. The approach of Jewish law to aiding members of the community is based on the verse "[d]o not stand [by idly] and let your brother's blood be spilled." *Lev* 19:16. Based on this and other textual imperatives, Jewish law generally imposes a duty to intervene so as to protect others from injury.

41. See, for example, Rabbi Solomon Yitzhaki (*Rashi*), commenting on *Bava Meziah* 30a; Yosef Habib, *Nimukei Yosef, Bava Meziah* 30a; Moses Maimonides, *Mishnah Torah, Theft and Abandonment* 11:1; David Halevy, *Turai Zahav (Taz), Shulhan Arukh, Hoshen Mishpat* 259.

42. For a lengthy discussion of this, see Blau, *Pithei Hoshen* at 1:1 (cited in note 3) and notes accompanying that section. Jewish law draws jurisprudential distinctions between positive and negative commandments which are beyond the scope of this article. For an explanation of these differences, see Menachem Elon, *Hamishpat Haivri* 185-199 (Jerusalem, 3rd ed, 1988).

43. See Yosef Habib, *Nimukei Yosef*, commenting on Alfasi, *Bava Metzia* 30a, and Joshua Falk-Cohen, *Sefer Meirat Einayim, Shulhan Arukh, Hoshen Mishpat* 259:1. This clause is based on the statement in *Bava Metzia* 26b that if the finder waits until the owner abandons hope of recovery by expressing abandonment and then takes the article, he has transgressed only the "you have no right to withdraw [from returning it]." See Nahmanides, *Commentary on Bava Meztia* 30a and Falk-Cohen, *Sefer Meirat Einayim* cited above.

However, according to both opinions, there is a clear legal obligation to retrieve the lost property of another. Jewish law allows no option to one who comes upon such property as to whether one should become involved.[44] Nevertheless, virtually all authorities maintain that one who violates this obligation and deliberately passes over the lost object of another and the item is subsequently never returned incurs no legally enforceable duty of compensation to the person whose object was lost, although it is right and proper to do so.[45] Essentially, the obligation to stop and involve oneself in the lost property of another is an ethical duty whose violation is without financial penalty. Of course, one who picks up a lost, unabandoned, item with the intent of taking actual possession of the item and not returning it to its original owner has committed an act of theft for which compensation is required. In addition, such a person has violated both the positive and the two negative commandments to return lost property.[46]

Yet, it is interesting to note that according to both Jewish and common law one who picks up lost property intending to return it, and upon examining it determines that there are no marks on it which will enable the finder to identify who the owner is, is not guilty of theft, even if by due diligence the owner could have been found (and the owner is still looking for the object). According to Jewish law, such conduct typically violates the obligation to return lost property (but is not theft) and according to the common law, such conduct is conversion, but not theft.[47]

However, most authorities disagree. They distinguish *Bava Metzia* 26b on the grounds that one cannot be said to have negated the command "you shall give it back to him" without some positive act which would indicate a refusal to return the article, and in *Bava Metzia* 26b no such act occurred prior to abandonment by the one who lost the object. However, in the ordinary case of withdrawal, the act of withdrawal itself is sufficient to negate the positive command of "you shall give it back to him."

44. There are only two situations where one need not retrieve the lost property of another. The first is where even if it were the finder's property, the finder himself would not retrieve it. For example, if one were an elderly person and the object was of the type that this person would not normally carry in public, one is not under an obligation to treat another's property better than one's own; *Shulhan Arukh, Hoshen Mishpat* 263:1. Even in that situation, Jewish law encourages one to retrieve the object or pay the person whose object one did not salvage. Id. The second case is when one lost an object of one's own, and in the process of search, one finds one's own lost object and the lost object of another, and one cannot take both objects, one may retrieve one's own object first. See Bassri, *Dinnai Mammonut* at 8:3 (cited in note 3).

45. Blau, *Pithei Hoshen* at 1:3, n 8 (cited in note 3); Israel Meir Kagan, *Mishnah Berurah* at 443:12; Elijah of Vilna, *Biur HaGra Hoshen Mishpat* 348:22.

46. *Shulhan Arukh, Hoshen Mishpat* 259:1; Blau, *Pithei Hoshen* at 1:5 (cited in note 3).

47. Blau, *Pithei Hoshen* at 2:11-14 (cited in note 3); Childs, *Personal Property* at § 337 pp 452-53 (cited in note 35).



The religious duty of aiding a stranger with whom one has no prior (legal) relationship has become the cornerstone of Jewish law. This is but one example of many where the Jewish law imposes an ethical obligation to come to the aid of a stranger to protect either his physical or spiritual well-being or his property.[48]

## V. Duties of the Bailee-Finder

The basic duty of the finder according to both Jewish and common law is to restore the lost object to its owner. When the loser's identity is known or can be simply determined, (for example when the object contains his name) the Talmud, based on a scriptural inference,[49] rules that the return may be made either to the owner personally or to his possessory domain. When one returns an object to the owner's domain, it is not even necessary to inform the owner that his object has been returned.[50] So, too, according to the common law, "a finder is under a duty to ascertain the owner of the article found" and to return it.[51]

What are the legal duties in a situation where the object's owner is not known, but the object contains clear markings that would allow one to return the object should the owner realize who has found it? Here, Jewish law imposed a heavier burden. Jewish law imposes on the bailee-finder a duty of public proclamation designed to alert the original owner that his property has been found. Much Talmudic and post-Talmudic discussion revolves around the most effective manner in which the public notice of the find can be conveyed to the owner (without also conveying too much information so as to allow a non-owner to claim the property).[52] Jewish law does not, however, require that the finder suffer any actual financial loss (or even loss of profit) while seeking to

48. Bassri, *Dinnai Mammonut* at 1:9 (cited in note 3). One of the most interesting applications of the rules of returning lost property can be found in Joseph Babad, *Minhat Hinuch*, Commandment 339, who seems to maintain that the rules of returning lost property provide guidance about when one is obligated to save a person's spiritual well being. He maintains that this is an *a forcia* situation as compared to returning lost property.

49. *Bava Meziah* 31a.

50. Id. *Shulhan Arukh, Hoshen Mishpat* 267:1. Moses Maimonides, stating the rule allowing return without informing the owner, makes the following comment: "[h]e also has fulfilled the mitzvah;" Maimonides, *Mishnah Torah, Theft and Abandonment* 11:16; David Halevy, *Turei Zahav (Taz), Shulhan Arukh, Hoshen Mishpat* 267:1 argues that Maimonides' choice of language indicates that return without informing the owner, although technically acceptable, is not preferred.

51. Childs, *Personal Property* at § 333 (cited in note 35).

52. See, for example, *Bava Meziah* 28a-b; Maimonides, *Mishnah Torah, Theft and Abandonment* 13:1-9; *Shulhan Arukh, Hoshen Mishpat* 267:3; and commentaries; Blau, *Pithei Hoshen* at 7:5-6 (cited in note 3).

return the object.[53] Jewish law requires that one expend free time, but not one's money, in search for the object's owner.

Common law did not extend the obligation to find the owner even to the expending of one's free time.

> While a finder is under a duty to ascertain the owner of the article found, there is no obligation to expend time or money in searching for him if the finder does not have any means of knowing who the owner is.[54]

The finder only has to engage in a minimal searching that involves the expenditure of only very small amounts of time or effort.[55] New York law has shifted the burden of searching from the person who finds the object to the police. The law requires:

> [A]ny person who finds lost property of the value of twenty dollars or more or comes into possession of property of the value of twenty dollars or more with knowledge that it is lost property or found property shall, within ten days after the finding or acquisition of possession thereof, either return it to the owner or report such finding or acquisition of possession and deposit such property in a police station or police headquarters . . .[56]

Indeed, one who keeps the property for more than ten days—even with the intent to search for and find the true owner—is "guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or imprisonment not

It seems logical that the precise procedure which one follows to notify members of society that one has found a lost object depends to a great extent on each particular society and its methods of communication. See Bassri, *Dinnai Mammonut* at 3:1 n 1 (cited in note 3); *Shulhan Arukh, Hoshen Mishpat* 267:3 recounts that one announces in the synagogues. See Bassri, *Dinnai Mammonut* at 3:1 n 1 (cited in note 3) and Blau, *Pithei Hoshen* at 7:n 10 (cited in note 3) for a discussion of what to do in a society where many do not attend synagogue for worship; see also Moshe Schreiber, *Responsa Hatam Sofer, Hoshen Mishpat* 122 for a discussion of whether it is appropriate to advertise in a newspaper. In a society which the government has established a working process to return lost objects to their genuine owner, it would appear that it is appropriate to use that process, as that too is a form of announcement. So, too, Moses Isserless states (*Shulhan Arukh, Hoshen Mishpat* 259:7) that Jewish law accepts a secular determination that one must return a lost object to its owner, even if according to Jewish law it would be permissible to keep the object (such as after abandonment). It is unclear, however, if secular law can abrogate the obligation according to Jewish law in a situation where the secular law is more lenient than the Jewish law; Blau, *Pithei Hoshen* at 2:53 (cited in note 3).

53. *Shulhan Arukh, Hoshen Mishpat* 265:1; and Zalman of Lydia, *Shulhan Arukh Harav, Hoshen Mishpat* 265:33; and Blau, *Pithei Hoshen* at 8:1-2 (cited in note 3).

54. Childs, *Personal Property* at § 333 (cited in note 35).

55. *Finding Lost Goods*, 36A CJS § 7 [hereinafter *Goods*, 36A CJS]; *Zech v Accola*, 253 Wis 80, 33 NW2d 232 (Wis 1948); *Manufacturers Safe Deposit Co. v Cohen*, 193 Misc 900, 85 NYS2d 650 (NY Sup 1948) reversed on other grounds, *In re Cohen's Estate*, 98 NYS2d 197 (NYAD 1950).

56. *Laws of New York* at § 252 (cited in note 23).



exceeding six months or both."[57] It is the police who are charged with the duty to find the "true" owner in New York; the finder has no legal obligations to search.[58]

## VI. What Happens to Lost Property Whose Owner is Never Found?

According to both Jewish and common law, upon taking possession of a lost article, the finder becomes a bailee and remains one until the owner recovers the object. If a reasonable period for publicizing the find has passed, and no one has come forward with a claim, the finder remains a bailee. For how long does the finder remain a bailee? According to Jewish law, he remains a bailee until the owner claims the object, or as Maimonides put it, "until Elijah comes" [and reveals the owner's identity].[59] Common law states that after reasonable efforts to find the true owner,

> [t]he finder of lost goods does not gain title thereto as against the [true] owner . . . . The finder of lost goods is a bailee of them for the true owner with certain rights and obligations . . . . As to all others, however the finder's rights are tantamount to ownership, giving him the right to possess and hold the found goods.[60]

*Thus, neither in Jewish nor common law can one acquire title to lost property through one's inability—even after good faith efforts—to find the original owner.*[61]

However, both Jewish and common law accept that although one does not acquire title to the object, one is not completely precluded from using it. There are two schools of thought on this topic within Jewish law. Most authorities, following the rule of

57. Id.

58. *Laws of New York* at § 253 (cited in note 23) describes in great detail the obligations of the police, which include "the police . . . shall accept and retain custody of the property" and "the police . . . shall give to the person depositing it a receipt" and "If at any time the police have reason to believe that a person has an interest in found property or in a found instrument in their possession and reason to know his whereabouts, they shall give notice of the finding and deposit and the location of the office to which the property or instrument is transmitted to such person."

59. Moses Maimonides, *Mishnah Torah, Stolen or Abandoned Property* 13:10.

60. Brown, *Personal Property* at 24 (cited in note 7).

61. Some authorities have stated that there is one mechanism to acquire such title. Jacob Lorberbaum, *Netivot Hamishpat* 256:1 (cited in note 18) notes that according to Jewish law, property whose ownership cannot be factually determined does not transfer either through an intestacy inheritance or through a will; thus one could claim that after a period of time has elapsed such that the original owner who lost the property is certainly deceased, the possessor at that time would acquire the property; see also Blau, *Pithei Hoshen* at 7 n 10 (cited in note 3) for a similar idea. It is interesting to note that a similar distinction has been advanced by American courts; see *Burdick v Chesebrough*, 94 AD 352, 88 NYS 13 (NYAD 1904).

Rabbi Shabtai Meir HaCohen, state that in situations where Jewish law precludes the finder from taking title, Jewish law states that "the object should reside until Elijah comes." That phrase is properly understood to mean "the object should reside *in the finder's pocket* until Elijah comes"—while the user has no ownership rights to the object, it is his to use and derive benefit.[62] Should the finder break it or wear it out, he owes the true owner the value of the object, if the owner comes forward to claim it.[63] This seems to be the approach of most decisors.[64] Other Jewish law authorities disagree, and rule that in situations where the owner does not come forward, the object resides in peace, without anyone authorized to use it for his own benefit.[65] According to neither of these schools of thought may the possessor (who is not the true owner) legally transmit valid title to another.

As explained above, the common law held that "[t]he mere fact of finding is not sufficient to vest in the finder any right to title to the thing found;"[66] furthermore, "the finder is only the apparent general owner of the thing found, under an uncertain or contingent title which may be defeated by the discovery of the true owner."[67] According to the common law rule, the finder, after reasonable efforts to locate the true owner, becomes the possessory owner, with

62. Shabtai ben Meir HaCohen (*Shakh*), commenting on *Shulhan Arukh, Hoshen Mishpat* at 222:5; 267:17; 300:10; Lorberbaum, *Netivot Hamishpat* 76:5 (cited in note 18); Moshe Schreiber, *Hatam Sofer, Hoshen Mishpat* 122. See also the discussion of this topic by Blau, *Pithei Hoshen* at *Laws of Loans* 7:n 32, 36 and *Laws of Lost Property*, 7:n 10 (cited in note 3). See also text accompanying notes 18 to 22.

63. This understanding of the "let the object reside" rule is limited to those situations where the possessor acquired possession properly; all agree that in situations where he did not acquire possession properly, he has no rights to use the object at all, and the object remains unowned.

64. The term "decisors" is the conventional translation used to denote those who decide Jewish law, in Hebrew *poskim*, literally "those who decide." Moses Feinstein, *Iggerot Moshe Hoshen Mishpat* 2:45(4); Eliezer Waldenburg, *Tzitz Eliezer* 12:88. This has also been phrased in a slightly different manner. Based on *Tosafot, Bava Kama* 66a, some wish to assert that the finder of the item owes an inchoate debt to the original owner, but that the item itself belongs to the finder after abandonment occurs. According to this approach, the finder would "purchase" the item from the original owner, and would be required to pay its value to the original owner should he come forward. See Hayyim Auerbach, *Divrai Mishpat* 260:1 who discusses this issue; see also comments of Abraham Isaiah Karlitz, *Hazon Ish, Bava Kama* 18:1 who notes that this approach cannot be harmonized with Jewish law's obligation to pick the lost item up as a bailment for its original owner.

65. This seems to be the opinion of Karo and Isserless, both of whom indicate that this property is held by the court, and not by a person. See *Shulhan Arukh* 300:1 and comments of Isser Zalmal Meltzer, *Even Haazel, Laws of Claims and Claimants,* appendix to section 76; Hayyim Halberstam, *Divrai Hayyim, Claim and Claimants,* § 21.

66. *Goods*, 36A CJS at § 2 (cited in note 55).

67. Id.



a right to usage.[68] However, as in Jewish law, the possessory owner may not transfer valid title to another.[69] New York State, on the other hand, has rejected this legal analysis and ruled that "[t]he title to lost property . . . shall vest in the finder."[70] New York law essentially directs that in situations where the true owner cannot be found, after a reasonable period of time and compliance with the details of the statute,[71] *title* vests in the finder.

In sum, both Jewish and common law (but not New York law) adopted the same rule: one who picks up a lost article prior to abandonment never takes complete title to the object. The original owner always has superior title to the object as compared to the finder.

## VII. What Type of Bailment is Created Between the Finder and the Owner?

Jewish law recognizes essentially three categories of bailment, each with varying degrees of responsibility: 1) The gratuitous bailee, who is liable only for negligence; 2) The bailee-for-hire, who is also liable for theft or loss; and 3) The borrower, who is virtually an insurer, and liable for almost all mishaps which may befall the article.[72]

The Talmud cites two opinions concerning the category of bailment created when one finds lost property. "A bailee of lost property: Rabbah ruled that he is a gratuitous bailee; Rabbi Joseph maintained that he was a bailee-for-hire."[73] It is unclear which of these two opinions Jewish law accepts as normative. Many early authorities including Maimonides and Joseph Karo, the author of *Shulhan Arukh,*[74] rule in accordance with the opinion of

68. Id at § 3.

69. *New York v Haws*, 56 NY 175 (1874); *Goods,* 36A CJS at § 3 (cited in note 55).

70. *Laws of New York* at § 257 (cited in note 23).

71. Essentially the law requires that the police notify people who they reasonably think might own the property and that they notify the public of the loss so that the true finder can reclaim the property. After a period of time, which varies depending on the value of the object (less than $100, three months; less than $500, six months; less than $5,000, one year; more than $5,000, three years) the finder can claim title. *Laws of New York* at § 252 (cited in note 23).

72. *Bava Meziah* 93a; Moses Maimonides, *Mishnah Torah, Hiring [of Workers]* 1:1-2.

73. *Bava Meziah* 29a; compare *Bava Kama* 56b.

74. A note on the titles of books in the Jewish legal tradition is needed, if for no other reason than to explain why the single most significant work of Jewish law written in the last 500 years, the *Shulhan Arukh*, should have a name which translates into English as "The Set Table." Unlike the tradition of most Western law, in which the titles to scholarly publications reflect the topics of the works, the tradition in Jewish legal literature is that a title rarely names the relevant subject. Instead, the title usually consists either of a pun based

Rabbi Joseph and therefore hold the finder responsible not only for negligence, but also theft or loss not attributable to negligence.[75] Many other authorities, including Rabbi Moses Isserless, accept the opinion of Rabbah, and rule that the finder only has the status of a gratuitous bailee, and is liable only for his negligence.[76]

on the title of an earlier work on which the current writing comments or of a literary phrase into which the authors' names have been worked (sometimes in reliance on literary license).

A few examples demonstrate such phenomenon. Rabbi Jacob ben Asher's classical treatise on Jewish law was entitled "The Four Pillars" (*Arba Turim*), because it classified all of Jewish law into one of four areas (see note 1 for more on this). A major commentary on this work that, to a great extent, supersedes the work itself is called "The House of Joseph" (*Beit Yosef*), since it was written by Rabbi Joseph Karo. Once Karo's commentary was completed, one could hardly see "The Four Pillars" it was built on. A reply commentary by Rabbi Joel Sirkes, designed to defend "The Four Pillars" from Karo's criticisms is called "The New House" (*Bayit Hadash*). Sirkes proposed his work (for example, the new house) as a replacement for Karo's prior house.

When Rabbi Karo wrote his own treatise on Jewish law, he called it "The Set Table" (*Shulhan Arukh*) which was based on (located in) "*The House of Joseph.*" Rabbi Isserless' glosses on "The Set Table"—which were really intended vastly to expand "The Set Table"—are called "The Tablecloth" because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table. Rabbi David Halevi's commentary on the *Shulhan Arukh* was named the "Golden Pillars" (*Turai Zahav*) denoting an embellishment on the "legs" of the "Set Table." This type of humorous interaction continues to this day in terms of titles of commentaries on the classical Jewish law work, the *Shulhan Arukh*.

Additionally, there are book titles that are mixed literary puns and biblical verses. For example, Rabbi Shabtai ben Meir HaCohen wrote a very sharp critique on the above-mentioned *Turai Zahav* ("Golden Pillars"), which he entitled *Nekudat Hakesef*, "Spots of Silver," which is a veiled misquote of the verse in *Song of Songs* 1:11, which states, "we will add bands of gold to your spots of silver" (*turai zahav al nekudat hakesef*, with the word *turia* "misspelled.") Thus, HaCohen's work is really "The Silver Spots on the Golden Pillars," with the understanding that it is the silver that appears majestic when placed against an all gold background.

Other works follow the model of incorporating the name of the scholar into the work. For example, the above mentioned Rabbi Shabtai ben Meir HaCohen's commentary on the *Shulhan Arukh* itself is entitled *Seftai Kohen* "the words of the Kohen," (a literary embellishment of "Shabtai HaCohen," the author's name). Rabbi Moses Feinstein's collection of responsa are called *Iggerot Moshe, "Letters from Moses."* To make life even more complex, the rabbinic tradition frequently shortened names to acronyms, making their true origins even more obscure. Thus, the work named *Seftai Cohen* is actually referred to in the Jewish law literature by its acronym, *Shakh*, confusing its origins even further. Indeed, most acronyms begin with the same letter—R—as most authorities were known by their titled name, which began with the word "rabbi."

Of course, a few leading works of Jewish law are entitled in a manner that informs the reader of their content. Thus, the Fourteenth Century Spanish sage, Nahmanides (*Ramban*) wrote a work on issues in causation entitled "Indirect Causation in [Jewish] Tort Law: (*Dina Degarmei*)" and the modern Jewish law scholar Eliav Schochatman's classical work on civil procedure in Jewish law is named *Seder Hadin*, ("Arranging the Case,") a modern Hebrew synonym for civil procedure.

75. Moses Maimonides, *Mishnah Torah, Theft and Abandonment* 13:10; *Shulhan Arukh, Hoshen Mishpat* 267:16.

76. *Shulhan Arukh, Hoshen Mishpat* 267:16.



This dispute remains unresolved in Jewish law,[77] and whoever is the possessor is given the benefit of the doubt, and has applied to him the legal standard that would be most beneficial.[78] In a situation where there is no possessor, most authorities rule that the law is in accordance with those authorities who state that the person is a bailee-for-hire.[79]

The opinion classifying the finder as a bailee-for-hire requires explanation. Why should a person who is involuntarily returning lost property assume the status of a paid bailee? Rabbi Joseph[80] renders his opinion based on an overtly religious doctrine of *esek bemitzva*, the rule that while one is engaged in the actual performance of a legally compulsory religious duty, one is excused from other legal obligations, including financial obligations. Thus, Rabbi Joseph recounts that if per chance while the bailee was attending to the lost article for the owner's benefit[81]—a legally compulsory duty—a poor man came for a donation, one would be excused from giving him charity, and such charity is otherwise mandatory.[82] His involvement in attending to a lost object exempts the bailee from attending to the poor man (which would otherwise be obligatory), thereby allowing the returner of lost property to derive a clear financial benefit from his action; such a benefit qualifies as a payment. This financial benefit, according to Rabbi Joseph, is sufficient, without more, to classify the finder of lost property as a bailee-for-hire, since he can derive financial benefit from his bailment.[83] This outcome is unlikely, however, and that is why some authorities accept the opinion of Rabbah and rule that since the financial gain is sufficiently remote, a finder should better be classified as a gratuitous bailee.

77. Both Joshua Falk-Cohen and Shabtai ben Meir HaCohen label this dispute as a case of legal doubt; see their comments on id.

78. For a detailed discussion of how and why Jewish law resolves certain financial disputes in this manner, see Oded Lipa Levfar, *Mishpetei ha-Migo* (Benei Brak, 2d ed, 1993).

79. Bassri, *Dinnai Mammonut* 4:1 (cited in note 3).

80. *Bava Kama* 56b.

81. Obviously the mere fact that the object is in the finder's possession does not constitute involvement in a mitzvah (*esek bemitzvah*). The bailee must actually be involved in preserving the object. See Tosafot, *Bava Kama* 56b.

82. Providing charity for a person's daily food needs is mandatory in Jewish law; see *Shulhan Arukh, Yoreh Deah* 250:1.

83. This distant definition of benefit is not foreign to American law. Frequently, the law defines even a very tangential theoretical benefit as sufficient to be classified as a benefit as a matter of law. See, for example, *Donovan v Bierwirth*, 680 F2d 263 (2nd Cir 1982). (For the purposes of ERISA law, a benefit encompasses even situations where there is no apparent real financial benefit).

The precise dispute as to the status of the finder occurs in the common law. As one authority states:

> The finder of lost property who takes possession of it assumes the duties of a *bailee without compensation* although some authorities hold the finder to be a *bailee for hire.*[84]

However, in common law, the majority opinion is that the finder is a gratuitous bailee, with only a minority of authorities accepting the bailee for hire rule.[85] Both opinions can be logically understood within the framework of the common law. One need only be a gratuitous bailee, since one's actions are completely voluntary; according to common law, one need not even pick up the lost object. To burden the volunteer by imposing upon him obligations of a paid bailee would only further discourage one from rescuing lost property. On the other hand, there is a reasonable chance that the finder will derive a monetary benefit from his actions, since if the true owner does not come forward, the finder stands to gain use of the property rent free. Thus one could classify him as a bailee for hire, since he is seeking to rescue the property with the hope of using it.[86]

## VIII. Is the Finder Entitled to Compensation?

According to both Jewish law[87] and the common law[88] the finder of lost property is not entitled to a reward, unless one is explicitly offered.[89] However, each legal system enables the finder to recover reasonable out-of-pocket expenses incurred in the successful recovery and preservation of the goods.[90] According to the common law, the finder is entitled to recover any loss caused by his involvement in recovery and return of the object, as long as the expenses are reasonable.[91] Jewish law ruled that such a level of compensation is too high. A statement of the *Mishnah* is the basis for an involved discussion among the early commentaries concerning the remuneration that the finder may claim if he is a worker and his involvement with the lost article has caused him to abandon his own work.[92] The *Mishnah* states: "[i]f his lost time is worth a *sela* [a talmudic coin], he cannot demand a *sela*, but is paid as a laborer."[93] The Talmud explains that he is paid as an "unemployed laborer" in his particular occupation.[94] Two different measures of compensation are advanced to explain what an "unemployed laborer" is paid:

> (1) Many authorities, including Maimonides[95] and Karo,[96] explain that the amount an unemployed laborer is paid is arrived at by estimating how much *less than full pay* would an individual in the finder's profession accept *to remain idle rather than to work.*
>
> (2) Other authorities ask how much *less than his full pay* would this worker accept to avoid his regular work and instead *spend his time returning lost objects.*[97]

By definition, both awards are less than the full value of lost time to which he would be entitled under the common law. In other words, Jewish law agrees with the common law and grants a full recovery for out of pocket expenses. For loss of time, which is not an out of pocket expense, but rather the loss of an anticipated profit, Jewish law refuses to concur with the common law and does not allow the full measure of recovery; since the finder is obligated

84. *Goods*, 36A CJS at § 7(b) (cited in note 55) (and particularly notes 79, 80, 80.5).

85. See, for example, Brown, *Personal Property* at 30-31 (cited in note 7); *Goods*, 36A CJS at § 7(b) (cited in note 55).

86. The New York State recodification of the law made this issue moot, as the finder does not hold the item at all; that duty now falls on the police. The police may not use the property and have no ownership interest in it although it is unclear what type of bailment (if any) is created; see 24 Op State Compt 445 (1968) (a town may not use valuable lost and found property in its recreation program) and *Fuentes v Wendt*, 106 Misc 1030, 436 NYS2d 801 (NY Sup 1981) (finder of bonds was entitled to award of $75,000, which was value of bonds, and entitled to interest commencing from date the police department had improperly refused to deliver bonds to finder).

87. Tosafot, *Bava Meziah* 31b; *Shulhan Arukh, Hoshen Mishpat* 265:1.

88. Brown, *Personal Property* at 31 (cited in note 7); *Goods*, 36A CJS at § 4 (cited in note 55); *Automobile Ins. Co. v Kirby*, 25 Ala App 245, 145 So 123 (1932). At the common law, if the owner has offered a reward, the return of the lost property by the finder constitutes the performance of a [unilateral] contract and enables him to recover the amount stipulated. This is accepted as well in Jewish law, although it is perhaps limited only to the area of lost property; Joshua Falk-Cohen, *Sefer Meirat Ainayim Shulhan Arukh, Hoshen Mishpat* 265:6-7.

89. Moses Maimonides, *Mishnah Torah, Theft and Abandonment* 12:4; *Shulhan Arukh, Hoshen Mishpat* 264:3-5; *Goods*, 36A CJS at § 4 (cited in note 55).

90. Brown, *Personal Property* at 31 (cited in note 7). The leading case is *Reeder v Anderson's Adm'rs* 4 Dana (Ky) 193 (1836) which states:

> It seems to us that there is an implied request from the owner to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore there should be an implied undertaking to (at least) indemnify any person, who shall, by the expenditure of time or money contribute to a reclamation of the lost property.

91. Id. Of course, it would not be reasonable if the loss exceeds the value of the object.

92. As explained above, Jewish law would not require a worker to take such time off; if he did, compensation would be appropriate.

93. *Bava Meziah* 30b.

94. Id at 31b.

95. Maimonides, *Mishnah Torah, Theft and Abandonment* 12:4.

96. *Shulhan Arukh, Hoshen Mishpat* 265:1.

97. Moses Isserless (*Rama*), *Shulhan Arukh, Hoshen Mishpat* 264:5.

by Jewish law—divine commandment—it is unfair to grant him full pay, when he is additionally receiving divine reward for doing a *mitzvah*.[98] However, in a situation where the worker's employment is so competitive (or so easy) that a worker would only take time off for full pay, he is entitled to full pay.[99]

## IX. How Does the Finder Identify the Owner?

According to both Jewish and common law, there is an obligation to return the item to the original owner, and to make an effort to find that original owner.[100] However, how does a finder determine if the person who is claiming the article actually is the true owner, and not a person who lost a similar item and mistakenly thinks this item is his, or a thief trying to claim an item which is not really his? This dilemma is particularly problematic, since both Jewish and common law make a finder strictly liable if he returns the item to the wrong person and the true owner subsequently claims the item.[101] Jewish law addressed this issue at great length, while the common law left this as a matter of fact to be determined in each individual case, (although the legal principles used by both systems are similar).

According to Jewish law, one must return lost property to a person who provides witnesses that the item is his, or recounts unique characteristics of the item so as to make it highly likely that the item is his.[102] Whether the requirement that the finder return the object to one who furnishes indicia of true ownership is of Biblical origin or a later enactment of the Rabbis is the subject of an extensive Talmudic discussion.[103] The Talmud offers a practical

98. See comments of Jacob ben Asher (*Tur*), Moses Isserless (*Rama*), and Shabtai ben Meir (*Shakh*) all commenting on *Shulhan Arukh, Hoshen Mishpat* 264:4 and Blau, *Pithei Hoshen* at 8:n 10 (cited in note 3).

99. New York law allows payment of expenses to the state for state incurred expenses. However, unlike either the common law or Jewish law, such expenses were, in effect, paid by the *finder* since it was the finder in whom title vested. New York law allowed only expense of reimbursement, and only of expenses directly relating to the item itself; see *Laws of New York* at § 253 (cited in note 23) ("expenses of taking of custody, transportation, storage and appraisal, any special expense incurred in giving notice, and any other special expense attributable to administration of this article with respect to the particular property"). However, the finder was entitled to no expense reimbursement should the true owner come forward.

100. See Sections IV-V.

101. See material discussed in text accompanying notes 102 to 112.

102. As explained, in the text accompanying note 104, this second category is called *simanim* in Hebrew, and it literally means signals or marks.

103. Id and *Bava Meziah* 27b. According to those authorities who rule *simanim* (marks or symbols) to be a biblically sufficient form of identification, this requirement is traced to the words "and so shalt thou do with his garment"; just as the garment is unique in that it



reason to explain the opinion which views these marks (*simanim*) as a pragmatic Rabbinic institution, a possibility that a thief might be able to furnish adequate *simanim* is clearly outweighed by the possibility that the rightful owner would be foreclosed from pursuing his property for lack of witnesses.[104] Early authorities attempt to resolve this dispute by distinguishing between three different kinds of signs or symbols.[105] First, striking, distinguishing characteristics ordinarily not found in such an object are efficacious to establish ownership, a universally accepted fact and on a biblical level.[106] The classic Talmudic example is the identification of a lost document by furnishing the information that a hole may be found next to a particular letter. It is nearly universally accepted that such markings are efficacious to establish facts even *on a biblical level.* The Talmudic controversy as to whether such marks are a rabbinic institution or of biblical origin bears on the second level, uncommon marks. This category embraces such factors as exact size, weight, number, and location of find.[107] These types of marks are common to many items, but it is unlikely that anyone but the owner would know them for a particular object. The third category, minimal marks, comprises those identifying characteristics which are not sufficiently unique to be accorded reliability, e.g., a general description of size or color such as large, small, red, etc.[108]

contains marks or symbols, so too any lost object which may be identified through marks or symbols must be returned. If symbols without eyewitness correlation are merely rabbinic, the biblical specification of "garment" has reference to claimants who may claim the article not by virtue of identification furnished by symbols or marks, but through the testimony of witnesses, which certainly suffices.

104. Furthermore, as explained in text accompanying note 110, Jewish law provided other means of isolating the potential thief. Practically, it is of no consequence in the ordinary law of lost property *why* one concludes the symbols or marks are efficacious. In either event, one claiming to be the rightful owner can recover from the finder by furnishing adequate symbols or marks. The significance of this discussion is of practical relevance in connection with other areas of Jewish law—for example, the court's decision allowing a woman whose husband has disappeared the right to remarry on the ground that a dead body has been identified as that of her husband.

105. Rabbi Solomon ben Meir (*Rashba*) and Rabbenu Nissim (*Ran*) on *Bava Meziah* 27b; Vidal of Tolosa, *Maggid Mishnah, Theft and Abandonment* 13:3; Shabtai ben Meir (*Shakh*) commenting on *Shulhan Arukh, Hoshen Mishpat* 267:2.

106. The different categories of marks or symbols is fully explained in Bassri, *Dinnai Mammonut* 3:2 (cited in note 3).

107. Such symbols will definitely suffice to recover lost property and therefore preclude any presumption of abandonment.

108. For a listing of various types of marks, see Blau, *Pithei Hoshen* at 5:1-15 (cited in note 3). It is clear, however, that a collection of insignificant symbols, can, in composite, become significant. Thus, one may not return a lost red shirt to a person who states that he, too, lost a red shirt, since there are many red shirts in the world; so too, one cannot return a lost shirt which is a size 15 to a person who states he lost a size 15 shirt. The same is true about sleeve size. One could, however, return a shirt to a person who identified that

Jewish law generally accepts that one returns lost property to an honorable person if that person presents marks of the middle category—uncommon marks.[109] The Sages added an additional condition to this rule: one should not return an object to an unknown person until that person presents some proof that he is an honorable person, and not a thief.[110]

The common law presented a similar type of legal rule, albeit without the detailed developments found in Jewish law. When the true owner discovered his object, and the finder refused to return the object, the owner would follow the civil procedure of that particular locale for reclaiming one's property in the possession of another. In common law of old, typically that was either trover or replevin, and if the finder claimed title, conversion.[111] Unlike Jewish law, common law and New York law treated the return of lost property no differently than any other civil case between two claimants, with one party claiming ownership of an item in the possession of another. There are hardly any cases which discuss *how* one goes about proving that one is the original owner of lost property; that presumably was the province of a jury or judge determination. For example, a recent New York case involved a true owner suing a finder of airplane tools who had mistakenly given the tools to a third party who claimed to be the owner (but wasn't as determined by the court). The court ruled that:

> At common law, a finder was entitled to the use, possession, and enjoyment of any property he had found as against the whole world, except for the true owner. It also followed, at common law, that a finder was not liable, civilly or criminally, for keeping the property he had found against all false claims of ownership,

he lost a size 15 red shirt with a 28 inch sleeve if such garments are uncommon. Many of these determinations are contextual. See, for example, Blau, *Pithei Hoshen* at 5:1 (cited in note 3) ("any item which has a mark that makes the item different from other similar items such that the loser of the item can recognize that it is his . . . ").

Jewish law also recognized that—at least in theory—even an item without clear marks can be returned to an owner who claims them if he says that he recognizes the item as his, if the person is a recognized Torah scholar known not to speak in haste. *Shulhan Arukh, Hoshen Mishpat* 262:21 (cited in note 11). There is a dispute between David Halevy (*Taz*) and Joshua Falk-Cohen (*Sema*) about whether any post-talmudic Torah scholars fall within this classification; compare their comments on id.

109. *Shulhan Arukh, Hoshen Mishpat* 267:4.

110. *Shulhan Arukh, Hoshen Mishpat* 267:6 and comments of Joshua Falk-Cohen (*Sema*) on id. Those authorities who rule that symbols and signs work on a biblical level, rule that one returns lost items even to a thief when he provides true symbols. Others rule that a thief needs to present witnesses to get back his own lost property; see Blau, *Pithei Hoshen* at 7:10 (cited in note 3).

111. *Dougherty v Norlin*, 147 Kan 565, 78 P2d 65, 66 (1938); *Wood v Pierson*, 45 Mich 313, 7 NW 888 (Mich 1881); *Goods*, 36A CJS at § 8A (cited in note 55).



> or even against claims of ownership which the finder reasonably believed to be false. Yet, at common law, if a possessor of goods, such as a finder, delivered property to a third person whom he reasonably believed to be the true owner—but was mistaken as to that fact—he became liable to claims by the true owner, notwithstanding his delivery of the found property to a third person by honest mistake.[112]

In the current New York statute there is no discussion of the remedy available to an owner whose item is returned to the wrong person by the police. Certainly the finder is not liable. There simply is no case law on the liability of the police for improperly returning items to someone other than the owner.

Thus, while Jewish law has a much more legally detailed system, the basic rules used by Jewish and common law remain the same in this area.

## X. Salvage from Destruction: An Exception to the Rules?

A unique application of the rules of abandonment and relinquishment occurs in both Jewish and common law: the case of salvage from destruction.[113] The Talmud recounts that one who rescues property facing destruction unpreventable by its owners or agents, acquires title to the property, even if the original owner is present, asserts ownership and denies that he constructively abandoned the property.[114] Some authorities, most notably Maimoni-

112. *Fisher v Klingenberger* 576 NYS2d 476, 478 (NY Civ Ct, 1991). Defendant in this case returned the object to a person who provided clear symbols (according to Jewish Law) but yet was actually a thief aware of the find. The court recounted:

> [A]n unidentified man had approached him in the parking lot next to the F.B.O. building. The man stated he was the owner of lost airplane tools, and he then satisfactorily described to [defendant] the contents of the toolbag. Whereupon, [defendant] accepted the unidentified man's claim of title and surrendered the tools to him then and there. The transcript of [defendant's] testimony on this point is:
>
> Q. (You gave up the tools) without asking for identification, or for his name?
>
> A. There was no need to do that. He knew what I had. I believed they were his. I would not have known him anyway. I was glad to get rid of them. I just wanted to get rid of them.

These facts explain the Sages' requirement that the person identify himself as an honorable person before claiming lost goods as his own, even if a symbol is provided.

113. Literally, *avudah mikkol adam,* "lost to the whole world." *Bava Meziah* 22b. See Rabbi Solomon Yitzhaki (*Rashi*), *Bava Kama* 66a, who asserts that this case, a *Tannaitic* interpretation of *Deut* 22:13 is the Biblical source for the principle of abandonment in lost property. For a longer discussion of this issue, see J. David Bleich, *The Controversy Concerning the Sotheby Sale*, 8 Cardozo L Rev 91 (1986).

114. *Shulhan Arukh, Hoshen Mishpat* 259:7; Joshua Falk-Cohen (*Sema*) commenting on id.

des, accept that this rule is an application of the general rules of abandonment, and that when the owner really can prove that he never relinquished the object, it remains his.[115] However, most authorities reject this interpretation, and rule that once an object is about to be destroyed, and its owners are helpless to prevent this destruction, abandonment is legally imposed, and the item is ownerless as a matter of law.[116] In these cases, an express negation of intent to abandon by the owner would be of no avail. As the Talmud comments, "It is as if one protested against his house collapsing or against his ship sinking in the sea."[117] The presumption of abandonment in these instances is so strong that no negation will be given effect, either because the law decides that the negation is not consistent with the owner's true state of mind[118] or, even if consistent, the law refuses to recognize unrealistic intent so contrary to normal behavior.[119]

Common law, too, had an exception to its general rules of lost property in the case of items facing destruction rather than loss. Common law authorized two distinctly different types of payment in that context. The first was called "salvage"; in the context of maritime law, one who saved another's vessel or property from destruction[120] was entitled to a reward that would be determined by the court. Unlike all other circumstances, this payment was not necessarily related to the value of the services rendered, but was based on a number of factors, including the social utility of the work done, its risks, and many other factors unrelated to the normal rules used to compensate one for unrequested work done.[121] This rule, however, was limited to situations where salvage occurred at sea; in all other circumstances, one who saves another's property from potential destruction intending to be paid for that service is entitled to payment based on quasi-contract, "based on the assumed [common law] obligation of compensation by one who has been enriched by the non-officious act of another."[122] Thus, one who saw another's house burning, and rescued goods from the house was entitled to payment based on how much a person would have paid for those services at that time. This is considerably more

115. Maimonides, *Mishnah Torah, Theft and Abandonment* 11:10.
116. *Shulhan Arukh, Hoshen Mishpat* 259:7.
117. *Bava Meziah* 24b; *Shulhan Arukh, Hoshen Mishpat* 259:7.
118. Commentary of Asher be Yeheil on *Bava Meziah* 24b.
119. Joshua Falk-Cohen (*Sema*), *Shulhan Arukh, Hoshen Mishpat* 259:7.
120. Literally, "*zuto shel yam*," the classic talmudic case of destruction.
121. Childs, *Personal Property* at § 335 (cited in note 35).
122. Brown, *Personal Property* at 31 (cited in note 7).



than compensation for lost wages generally given by the common law to one who returns lost property in lieu of hourly work.

New York law, it would appear, continued the common law tradition that no reward would be given in all cases of land-based salvage and (at least implicitly) rejected the notion of compensation for "finding" lost objects threatened by destruction. However, New York's lost property law explicitly excludes from its regulation maritime salvage[123] and New York continues to grant rewards for maritime salvage.[124]

## XI. Above and Beyond the Obligation of the Law

Jewish law adds one additional "rule." In any case where the finder has the legal right to assume title to the lost property, Jewish law[125] provides that one who wishes to follow the good and righteous path should act beyond the requirements of the law,[126] and return all identifiable lost property even though the circumstances would dictate an irrefutable presumption of abandonment. Indeed, several authorities[127] are of the opinion that the option of acting above the requirements of the law is not left to the individual as a matter of personal choice, but is imposed, by force if necessary, as a matter of duty by a Jewish court. This opinion is based on the well known Talmudic statement: "Jerusalem was destroyed only . . . because they based their judgments strictly on the law of the Torah and did not act beyond the letter of the law."[128]

Obviously, the common law, as well as New York law, each system of purely secular law and not a religious legal system, imposes no such extra-legal duties.

123. *Laws of New York* at § 251 (cited in note 23) ("The term 'property' as used in this article means money, instruments payable, drawn or issued to bearer or to cash, goods, chattels, and tangible personal property other than . . . wrecks governed by the provisions of the navigation law . . . ").

124. *Davidson v State*, 514 NYS2d 615, 1987 Am Marit Cases 2483 (Ct Cl 1987) (state brought action to determine ownership of two 1,000-pound bronze cannons cast in 1748. The cannons were discovered by skin divers in a lake. Court awarded skin divers $34,000 for salvage of cannons).

125. *Bava Meziah* 24b; Maimonides, *Mishnah Torah, Theft and Abandonment* 11:7.

126. In Hebrew, *lifnim me-shurat hadin*.

127. Mordecai ben Hillel on *Bava Meziah* 257; Meir MaChoen of Rothenberg, *Hagaot Mamaniot* on Maimonides, *Theft and Abandonment* 11:7; Shabtai ben Meir (*Shakh*), commenting on *Shulhan Arukh, Hoshen Mishpat* 259:3.

128. *Bava Meziah* 30b.

## XII. Conclusion

This comparison of the underlying principles used by Jewish and common law in the field of returning lost or misplaced property provokes a number of fascinating insights: As is commonly observed, Jewish law imposes duties in situations where the common law does not; so, too, Jewish law is willing to use the law to advance ethical values not normally considered as "law" by the common law. Jewish law is quicker to infuse morality and religion into even the most technical areas of the law.

What is startling is that a comparison of Jewish law with the common law in the area of returning lost property reveals that there are many areas of near identity in the legal rules: in fact, the overlap is nearly astonishing. Jewish law and common law provide very similar or identical answers to eleven of the thirteen questions posed, or an 84% overlap. As shown in the following chart, Jewish law and New York law provide very similar or identical answers to only two of the thirteen basic questions posed or an overlap of 16%. Common law and New York law provide very similar or identical answers to four of the thirteen questions posed, for an overlap of 32%.[129]

129. All three legal systems provide very similar or identical answers to each other in two of the thirteen questions posed, for an overlap of 16%.



## XIII. This Chart Compares Principles Used by Jewish, Common and New York Law in the Area of Lost Property

| Legal System Issue | Jewish Law | Common Law | New York Law |
|---|---|---|---|
| When does one become a finder? | Seeing | Possession | Possession |
| Is there a distinction between lost and mislaid property? | Yes | Yes | No |
| Is the finder a bailee? | Yes | Yes | No |
| What types of bailee is the finder? | Majority: for hire<br>Minority: gratuitous | Majority: gratuitous<br>Minority: for hire | Not applicable |
| Can the finder ever acquire title unless owner abandoned or relinquishes? | No | No | No |
| Does the finder have title superior to all but owner? | Yes | Yes | Not superior to police |
| Is the finder entitled to a reward from loser? | No | No | No |
| Is the finder entitled to expense reimbursement? | Yes | Yes | Yes |
| Is the finder obligated to compensate true owner if item is returned to person other than true owner? | Yes | Yes | No if police err |
| Is there a salvage exception? | Yes | Yes | Partially |
| Who is responsible for finding true owner? | Finder | Finder | Police |
| Are there any extra-legal duties | Yes | No | No |
| What happens to lost property whose owner never appears, but which was not abandoned? | Finder can use it, but never gains title | Finder can use it, but never gains title | Finder gains title |

Jewish law and common law provide very similar or identical answers to eleven of the thirteen questions posed, or an 84% overlap. Jewish law and New York law provide very similar or identical answers to two of the thirteen questions posed or an overlap of 16%. Common law and New York law provide very similar or identical answers to four of the thirteen questions posed, for an overlap of 32%. All three legal systems provide very similar or identical answers to each other in two of the thirteen questions posed, for an overlap of 16%.