

# Understanding Rights in Context: Freedom of Contract or Freedom from Contract? A Comparison of the Various Jewish and American Traditions

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## INTRODUCTION

More than twenty years ago, the late professor Robert Cover of Yale University Law School noted a crucial difference between the rights-based approach of common law countries and the duties-based approach of Jewish law. He remarked:

Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another, a “Rights” movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we “take rights seriously” we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.<sup>2</sup>

One can extrapolate something even more general from this, as part of the contrast between the Judaic mindset of obligation and duty and the common law mindset of rights and needs.

Ironically, in the realm of contractual freedom – the ability of parties to undertake binding obligations through an exchange of promises – it is classical Jewish tradition that is reluctant to recognize and enforce such obligations. Modern western societies show no hesitation in enforcing contractual promises as binding obligations; indeed, our contemporary systems of commerce are predicated on the

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<sup>2</sup> Robert M. Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *Journal of Law and Religion* 5 (1987): 67 (footnotes omitted).

strong enforcement of contractual commitments. In contrast, as we shall see, classical Jewish law protects freedom of choice over contractual interests. Perhaps, we argue, this is because Judaism sees moral obligation and duty as firmly rooted in the possession of free will and the ability to choose. Therefore, Jewish law is uncomfortable with allowing individuals to effectively contract away their future choices like a financial asset. In a sense, strong contractual obligations would weaken the foundation for strong moral obligations. From a classical Jewish moral standpoint, “freedom of contract” is less important than “freedom from contract.”

## II. CONTRACT LAW AND JEWISH LAW

### SALE OF GOODS AND CONTRACT LAW

The presumption that honorable people keep their word and do not lie is a fundamental one found in nearly all societies, and it has clear roots in the biblical mandate that directs a person to “distance oneself from falsehood” (Exodus 23:7).<sup>3</sup> Nevertheless, Jewish law (*halacha*) has always had a great reluctance to enforce, as a matter of civil law, mere promises and agreements to perform an action or engage in a future transaction. This classical Talmudic view was codified by Maimonides (Rambam, Egypt, 1135-1204) as follows:

Merchandise cannot be acquired by mere words. Even if a seller says to a buyer, ‘I will sell you my house’, the two agree on a price, the buyer says ‘I will buy’ and the seller says ‘I will sell’, and they declare this future transaction before witnesses still it is void and as if they had never spoken. However, if title to the merchandise is transferred [by appropriate legal device], then even in the absence of witnesses, both parties are bound.<sup>4</sup>

Per Maimonides, we thus see not only that title cannot generally be conveyed by mere words, but also that an agreement to conduct a future transaction – even a clear, firm, and well-evidenced agreement – does not create an enforceable obligation to follow through and perform.

Similarly, the Talmud speaks frequently of the inability to effect a binding sale of

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<sup>3</sup> For more on this, see the recent work by R. Yaakov Fish, *Titen Emet LeYaakov* (Jerusalem: 2003).

<sup>4</sup> Rambam, *Mishneh Torah, Hilchot Mechirah*, 1:1 2.

goods that are not yet in the seller's possession.<sup>5</sup> In the Talmud, the legal effect of selling what one did not yet own or what was not yet in existence, like next year's crops, was the subject of a famous dispute. The origin of this dispute is found in the disagreement between the early Rabbis and Rabbi Meir (Israel, c. 100 CE), over the case of a man who attempts to wed a woman when marriage is not yet possible for them (*Kiddushin* 63a):

Suppose a man says to a woman, 'be wedded to me after I convert' or 'after you convert'... or 'after your husband dies'... she is not wedded. R. Meir rules: she is wedded.

The Talmud interprets this argument as founded on the basic issue of whether a person has the power to make a deal involving property not yet in existence or not yet in his possession. The Talmud applies the argument to a variety of cases including the sale of: a field not yet acquired by the seller (*Bava Metziah* 16b), a tree's fruit that has not yet grown (*Bava Metziah* 33b), "what my trap shall ensnare" and "what I shall inherit" (*Bava Metziah* 16a, 33b). In each of these cases, the Rabbis hold that neither the buyer nor the seller is bound to follow through with performance, nor would the breaching party be subject to any liability. This opinion was universally accepted as law by all major post-talmudic authorities including Rambam,<sup>6</sup> R. Jacob b. Asher (*Tur*, Spain, 1269-1343) and R. Joseph Caro (*Shulchan Arukh*, Israel, 1488-1575)<sup>7</sup> Because in classical Jewish law a binding sale can only be effected by actually conveying title to the property – and not merely by agreeing to perform a sale in the future – it makes sense that the law will not enforce a sale of assets not

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<sup>5</sup> This article repeatedly discusses the validity of a contractual agreement (according to Jewish versus common law) when the goods being contracted over are not currently in the seller's possession. The reason the case discussed throughout this article is formulated as such, is because the contract cases presented in the Talmud were cases in which the goods being contracted over were not yet owned by either party (as will be seen in the Talmudic examples that follow in the text). However to be halachically accurate, we must note that normative Jewish law absolves sellers from binding promises for the sale of future goods even more broadly than this discourse implies. Even in cases where the seller is already in possession of the goods that he wishes to contract over, Jewish law has no mechanism for the enforcement of his verbal promise to do so. A perfect proof of this is found in the Rambam just presented, where although the seller clearly owns the deed to the house, which he refers to as "my house," his agreement to sell cannot create a binding obligation to perform a sale. Until and unless title to the property is actually and formally conveyed, no enforceable obligation arises and the seller can back out.

<sup>6</sup> Rambam, *Mishneh Torah, Hilchot Mechirah*, 22: 1-5.

<sup>7</sup> *Tur* and *Shulchan Aruch, Choshen Mishpat*, 209 and 211.

<sup>8</sup> Quite possibly, R. Meir concurs that mere promissory obligations cannot be enforced, but contends that the seller can formally convey title now as to his future interest in property yet to be acquired – taking full effect automatically upon the seller's acquisition of that property.

yet owned by the seller, since (in the Rabbis' majority view) a seller cannot convey title to property he does not yet own.<sup>8</sup>

For certain, the Talmud contains several exceptions to the Rabbis' position, but even these exceptions reinforce the basic rule. The Talmud comments on the situation in which a seller does not own the promised property at the time of sale, but immediately afterwards does come to acquire it. The Talmud accepts the opinion expressed by R. Abba Arika (Babylon, 3rd century) that the aggrieved buyer is awarded ownership, because the seller is presumed to have purchased the property as agent for the buyer in order to clear his own name (*Bava Metziah* 15a).<sup>9</sup>

Additionally, the Talmud creates an exception by special enactment in the case of "what my trap shall ensnare," as a form of charity for a poor person to raise money for his daily needs by selling his catch for that very day before it is actually caught. Both of these are denoted as exceptions, and they reinforce the notion that the rule is to the contrary: There was no straightforward halachic way for a businessman to routinely sell that which he does not yet own. The most one can say is that as a form of charity, the desperately poor may engage in such sales.

Only the actual conveyance of title by the seller through formal *kinyan* (acquisition) can close the deal according to classical Talmudic law. With the possible exception of R. Meir's minority opinion, the Talmud does not recognize a binding agreement to make a sale absent the actual transferring of the title. By contrast, contract law in the common law system shows absolutely no reluctance to enforce contracts for the future sale of goods which the seller does not yet possess at contract time. If either party to a binding sale agreement fails to perform, the Uniform Commercial Code (UCC) compels the breaching party to pay full expectancy damages – i.e., enough money to make the damaged party as well off as if the contract had been followed through as agreed. Whether or not the seller owned such goods at the time the agreement was concluded could not possibly be more irrelevant to sale-of-goods doctrine within common law.

Under common law, the enforceability of contracts for the sale of goods which the seller does not yet possess is taken for granted. Such contracts are extremely common forms of commercial transaction. (For example, trading in the futures market or commodities market is predicated on the premise that agreements to

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<sup>9</sup> Of course, this remedy is essentially left up to the seller to act on and thus does not have a great deal of teeth. Furthermore, it is not widely accepted as fully binding by post-Talmudic authorities (for example, Rambam, *Hilchot Gezeilah vi-Aveidah* 9:9) applies it only to a seller who acted deceptively.)

sell and buy specified goods at future times are valid, even if those goods are not yet owned by the seller or they do not even yet exist.) Modern commerce could hardly imagine a system where purchase orders for goods not yet in inventory or not yet manufactured are not binding. The UCC provides explicit and unequivocal legal support for expectancy damages in the event of default on sale-of-goods contracts, regardless of whether any goods were actually possessed by the seller.<sup>10</sup>

Why Jewish law, in contrast to the common law, shrank from enforcing binding promises to sell (whether such a sale entailed goods not yet owned, or goods currently in the seller's possession) is best understood in light of the broader rabbinic disdain for enforcing personal undertakings to perform specific acts as a matter of civil law. Compelling performance of specific acts by an individual as a matter of civil obligation to another party smacked of bondage – which the rabbis abhorred.<sup>11</sup>

Thus, while the common law accepted and embraced the penalties of debtor's prison and debtor bondage (i.e. selling a debtor who cannot otherwise pay off his debts into slavery or indentured labor) – until relatively recent times<sup>12</sup> – in Jewish law such deep restrictions on personal freedom as a consequence of financial obligations were strictly limited to situations where the obligation came about through some criminal wrong, such as theft, if the resulting debt could not be paid by the guilty perpetrator.<sup>13</sup> All other debts gave rise merely to an obligation enforceable against the debtor's property, not his person – i.e., there was no threat of peonage under Jewish law if a conventional debt was not paid. This means that if the defaulting party has no way of making restitution (i.e., he is too poor, even if by choice), he is functionally absolved from his obligation. When it comes to these obligations, the debtor need not indenture himself in order to reimburse his creditor even if no other means are in his possession.

We believe this sheds light on why the Talmudic rabbis shrank from enforcing

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<sup>10</sup> See UCC sections 2-706 through 2-709, and 2-711 through 2-713.

<sup>11</sup> See further discussion below in Section B (Sale of Labor and Contract Law).

<sup>12</sup> In the United States, imprisonment for unpaid debts was abolished around 1833 at the Federal level and in most states; in Europe this only occurred beginning in the 1860's. Interestingly, two signatories to the Declaration of Independence, James Wilson & Robert Morris, were both later incarcerated for unpaid debts. See "Debtor's prison," accessed February 6, 2012, [http://en.wikipedia.org/wiki/Debtors'\\_prison](http://en.wikipedia.org/wiki/Debtors'_prison).

<sup>13</sup> See Exodus 22:2 which mentions involuntary sale as a Hebrew slave specifically as a remedy for theft. See also Rambam, *Hilchot Avadim*, 1:1 ("there is no one other than a thief who is sold as a slave by a rabbinical court").

binding promises. The rabbis were exceedingly averse to the notion of potentially imposing restrictions on personal action as a matter of civil obligation on anyone, even a defaulting party, and therefore shirked the notion of allowing parties to enter into binding contractual promises to perform particular acts. Bilateral executory contracts – the ordinary form of contemporary purchase and sale agreements – are invalid as a matter of classical Jewish law.<sup>14</sup>

Although the Talmudic approach differs from the modern common law approach, it certainly has precedent. In fact, it very much resembles pre-modern common law. As one classical textbook notes:

Consider, for example, an agreement made in the year 1450 C.E. and involving an exchange of oral promises – 150 bushels of wheat for £10. On the original exchange of promises, no obligation in debt arose; that action would lie only if the wheat were actually delivered, or at least a ‘property’ in the wheat were transferred. Even after 1500 C.E., when special assumpsit began to expand as a remedy on promises, the great bulk of special assumpsit cases described in the reports involved plaintiffs who had already performed.<sup>15</sup>

As in early common law, the one contractual obligation apparently recognized by the Talmud was debt. Conveying title in goods to a buyer created a debt for the agreed purchase price in favor of the seller. The creditor, according to Talmudic law, was entitled to satisfy his debt by collecting money (or else other property of the debtor’s choosing) in the debtor’s possession, even if acquired after the debt arose. Moreover, the debt created a lien for the creditor on real property of the debtor, so that the creditor could recover his debt from property conveyed by the debtor to third parties after the debt arose (*Bava Batra* 175a). After some debate, it was decided that this lien, too, applied even to real property acquired after the debt arose, what modern UCC considers a floating lien (*Bava Batra* 157b).<sup>16</sup> It bears

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<sup>14</sup> See quotation from Rambam, *Mishneh Torah*, cited in footnote 6.

<sup>15</sup> Dawson, Harvey, & Henderson, *Cases and Comment on Contracts* (The Foundation Press, Inc., 1987), 273.

<sup>16</sup> In the name of Rav Ashi (Babylonia, 352–427). Many commentators (see R. Samuel b. Meir, Rashbam, France, c. 1080/85–c.1174) have understood the floating lien rule as something of an aberration in the conceptual framework of the Talmud, and considered it a special rabbinic enactment to facilitate the extension of credit. In any event, though, the rules about after acquired property make it clear that there existed some level of an obligation to pay money, even unto the level of a floating lien.

emphasis that there was generally no enforceable obligation for a debtor to convey any particular property or perform any services – and there was certainly no legal risk for the debtor of being sentenced to indentured labor or debtor’s prison. The only risk was that the debtor’s property could potentially be seized to pay the debt.

### THE SALE OF LABOR AND CONTRACT LAW

In labor contract cases, as in sale of goods cases, we have a sweeping Talmudic renunciation of promissory enforcement: “If an employer and laborer agree to a labor contract and then one of them backs out, the aggrieved party has no legal claim for damages.”<sup>17</sup> Of course, as we saw in sale of goods cases, this does not mean that there is no protection of contractual interests. Analogous to what we have seen in sale of goods cases, a labor agreement from the Talmudic perspective is rather like a unilateral contract in common law. Once an employee fully performs his contracted work, the employer is in debt for the full contracted wages.<sup>18</sup> Thus, the promises alone create no obligations per se, but performance by one particular party (the laborer, the promisee) will obligate the other (the employer, the promisor).

In Talmudic law, restitutionary interests on both sides are also protected. An employer can get his money back, and the employee who has partially performed is entitled to partial compensation. Recovery for work performed is analogous to quantum meruit in common law. The question of exactly how to value partial performance is a complex one in common law.<sup>19</sup> Talmudic authorities engage in a fairly sophisticated debate on this issue, and generally give the party not in default the choice between pro rata contract price and “contract price less cost of completion” as possible standards for recovery.<sup>20</sup> Note that Talmudic quantum meruit is available even for the defaulting employee (although the employer “has the upper hand” in choosing a standard), thus long anticipating the comparable common law development chronicled in *Britton v. Turner*.<sup>21</sup>

Interestingly, the Talmud is emphatic that a laborer paid by the hour (or by any unit of time, as opposed to a job contractor), is entitled to recover pro rata contract

<sup>17</sup> Rambam, *Mishneh Torah, Hilchot Sechirut*, 9:4.

<sup>18</sup> Rambam, *Mishneh Torah, Hilchot Sechirut*, 11:1.

<sup>19</sup> See, for example, *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (1973).

<sup>20</sup> Tosafot, *Bava Metzia* 76a. See also *Rama, Choshen Mishpat*, 333:3.

<sup>21</sup> *Britton v. Turner*, 6 N.H. 481 (1834).

price for partial performance, even where the laborer defaults (except where the work is time critical – then, “contract price less cost of completion” may be used). In setting forth this particular rule, the Talmud cites the biblical verse, “The [children of Israel] are My slaves” (Leviticus 25:42), and homiletically comments: “My slaves, and not the slaves of men” (*Bava Metzia* 10a). As much as any statement, this is a statement of core values and not just of contract law.

Indeed, in contrast to the Talmud’s treatment of sale of goods cases, Talmudic protection of labor contracts goes somewhat beyond debt and restitution. Recall that labor contracts are comparable to unilateral contracts under Talmudic law. Common law has developed a number of grounds for preventing the promisor in a unilateral contract from withdrawing the offer, even where there has not yet been full performance by the promisee. These grounds include partial performance,<sup>22</sup> reliance,<sup>23</sup> and “firm offers” supported by formality or extra consideration.<sup>24</sup> The Talmud and its commentaries recognize a number of similar grounds for relief for the laborer when the employer calls things off before complete performance. In the following section, we shall examine these grounds, as well as some other bases for recovery in a labor agreement, in some detail.

**RELIANCE INTEREST-EMPLOYEE.** The employer must pay for any wages which have been lost as a result of his making and then breaking the work agreement. These are reliance damages: The laborer is compensated for wages he could have made by accepting a different job, an opportunity which is now no longer available to him because of his reliance on the employer’s offer. This reliance recovery is neither explicitly mentioned in the original Talmudic texts dealing with laborers nor in Maimonides, but it is introduced as well-grounded in Talmudic tort principles by early Talmudic commentaries<sup>25</sup> and is clearly spelled out in the *Shulchan Aruch*:

If the workers could have found alternate work yesterday when this employer agreed to hire them, and now they cannot find any work, then ... the employer

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<sup>22</sup> *Restatement of Contracts*, Second. Sec. 45.

<sup>23</sup> *Drenman v. Star Paving Co.*, 51 Cal. 2d 409 (1958).

<sup>24</sup> *Mier v. Hadden*, 148 Mich. 488 (1907).

<sup>25</sup> R. Shlomo Aderet (1235-1310), *Chidushei ha-Rashba, Bava Metzia* 76b.



must pay them full wages discounted by the value of leisure. If they can now find work at reduced wages, the employer need pay them only the difference.<sup>26</sup>

It is important to notice that while reliance can be the basis for enforcing promissory expectancy in common law, the Talmudic authorities view reliance as a pure tort action. Accordingly, the Talmudic authorities would only grant damages equal to the actual reliance loss – not the lost expectancy. Thus, if the alternative job available to a worker at contract time was for a lower rate than the contract, then the defaulting employer would be liable to pay only for the lost opportunity – i.e., the lower rate. In a similar case, common law would hold the employer to his promise and award full contract rate damages.

**RELIANCE INTEREST - EMPLOYER.** Defaulting employees may cause reliance damages to an employer if, for example, the market price of labor has risen since the original time of agreement. The Talmud is rather explicit on the point that the employer is not generally entitled to recover such damages from the employee. If the employee claims restitution for partial performance, then the employer can essentially cover his reliance by using the contract price less the cost of completion standard to calculate the employee's recovery (*Bava Metzia* 76b). However, if the cost of completion exceeds the contract price, or if the employee has no restitutionary claim, then the employer's reliance is not generally protected. The Talmud does make an exception for cases where the contracted work is time critical – e.g., the removal of soaking flax (which, if not done on time, means ruined flax) or musical performance for a wedding. What the Talmud grants even in those cases, however, appears to be only a choice of limited remedies: The employer may either promise his defaulting workers extra money to get them to finish (if they are ignorant enough of the law to fall for that!) and then pay only the original contract price,<sup>27</sup> or else he may hire other workers and recover his reliance (the actual cost of completion less the contract price) out of any property that the employees have deposited with him.

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<sup>26</sup> *Shulchan Aruch, Choshen Mishpat*, 333:5.

<sup>27</sup> This particular remedy is reminiscent of the outcome in common law duress cases like *Alaska Packers' Association v. Domenico*, 117 F. 99 (1902).

**GENERAL RELIEF FOR RELIANCE DAMAGES BY THE EMPLOYER DOES NOT SEEM POSSIBLE UNDER TALMUDIC LAW.** A number of Talmudic authorities<sup>28</sup> argue that tort doctrine allows recovery of consequential damages in the case of workers who default on soaking flax, where the employer's property has been knowingly jeopardized by the workers. These authorities claim that the limited Talmudic remedies listed earlier apply as limitations only for non-performance of the act, but in the flax case, where property of the employer is literally at stake, tort doctrine is applicable, thereby protecting the employer. Where property is not at stake, and the employer did not previously exact a security deposit from his employees, the Talmudic response to the employer who must now hire new workers at a higher market rate would evidently be: If you don't like the rate, don't have the work done. In summary, the reliance interests of the employer receive some (but only a limited measure of) protection under Talmudic law.

**PARTIAL PERFORMANCE.** If the employer rescinds after the employee has begun work or even substantial work preparation (e.g., arrived at the work site), the employee is entitled to damages for his lost wages. Here, however, an expectancy measure is used. Regardless of whether the employee had any other opportunities at contract time, he is entitled to his contract salary, discounted by any salary he can now earn at other jobs (or in the alternative, discounted by an amount equal to the value of leisure instead of working). This rule appears explicitly in the Talmud itself, and is enunciated clearly in *Shulchan Aruch*.<sup>29</sup>

This last rule is rather puzzling: Uncharacteristically, the Talmud enforces a partially executory bargain and awards expectancy damages. The rationale generally given by Talmudic commentaries for this anomalous rule runs more or less as follows. When an employee arrives or begins performance, he is tendering his half of the bargain. Once the employer accepts this tender, the debt on his part for the contract price is created (conditioned on complete performance by the employee). If, after accepting this initial tender, the employer then rejects performance, he is simply throwing away that which he has already accepted, and it is his loss – his debt for the contracted wages is enforceable. One might also theorize that the rule simply reflects the truth that in reality, an employer who backs out after his

<sup>28</sup> R. Yisroel Isserlin (1390-1460), *Terumat ha-Desben*, cited in Rama, *Choshen Mishpat*, 333:6.

<sup>29</sup> *Shulchan Aruch*, *Choshen Mishpat*, 333:2.

employee has begun has quite probably caused his employee reliance damages.

Of course, proving those damages is not always easy. If an employee's job search ended after meeting the employer, the employee may well have no idea and be unable to prove whether other opportunities had been available at contract time.<sup>30</sup> The partial performance rule might be viewed as simply a presumption at law that the aggrieved employee relied on the promise of wages to forego other job opportunities. The language of some Talmudic commentators<sup>31</sup> is consistent with this explanation. Recovery of promised wages after partial performance would then, in principle, be a tort-based reliance recovery, similar to the reliance recovery discussed earlier.

### PARTNERSHIP AGREEMENTS

In the same vein as we have seen with respect to contracts for the sale of goods and for labor services, Maimonides<sup>32</sup> rules that partnership agreements involving future services are generally not binding, unless the partnership is focused on tangible, existing items of property for which title can be currently assigned:

[1] When partners wish to create a partnership ... as a general rule, through the same various methods by which a purchaser acquires title, the partners may acquire joint title to the shared money/property that is the subject of the partnership.

[2] However, professionals who wish to form a partnership regarding their professional services – even if they perform *kinyan*, a formal act of acquisition [by which title to tangible goods is acquired], they are not deemed partners [i.e. they are not bound as such]. Thus: if two tailors or weavers agree to split equally the proceeds of their respective businesses, this does not create a [binding] partnership, *because a person cannot sell that which does not yet exist*.

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<sup>30</sup> However in such a case, we assume that other opportunities were available, for the same rate of compensation as the job he was offered, and he is therefore reimbursed according to the expectancy measure, as stated above.

<sup>31</sup> Tosafot, *Bava Metzia* 76b.

<sup>32</sup> Rambam, *Mishneh Torah, Hilchot Sbluchin vi-Shutfin*, 4:1-2

<sup>33</sup> *Shulchan Aruch, Choshen Mishpat*, 176:1-3.

The *Shulchan Aruch* rules similarly.<sup>33</sup> Admittedly, the Rama (a later gloss on the *Shulchan Aruch*) cites authorities who do endorse mechanisms for creating binding partnerships to engage in business that is not yet subject to a formal conveyance, at least in some circumstances. We explore more closely the evolution of halacha with respect to the binding nature of contracts in our next section.

### III. MODERN HALACHIC PERSPECTIVE: CONTRACT LAW REVISITED

As we mentioned earlier, the major halachic authorities—including the *Tur* and *Shulchan Aruch*—endorsed the position of the rabbis about not selling that which one does not yet own, thus more or less eviscerating the basis of what would eventually become modern contract law. However, beginning around the thirteenth century, many Jewish law authorities found it possible to also accept the ruling that a person could indeed obligate himself to sell property he would later acquire, by re-conceptualizing sales according to the “debt” paradigm.

That surprising substitution is nowhere to be found in the Rambam; it makes its first appearance in a relatively obscure, virtually out-of-print medieval work by R. Samuel ben Isaac ha-Sardi of Spain entitled *Sefer ha-Terumot*:

And in a case in which he obligates himself with something which is not found at his place, and is not in his possession, he is obligated. And even though it was taught in a *baraita* that if one says ‘What I am to inherit from my father is sold to you,’ or ‘What my net shall bring up is sold to you,’ [it is as if] he has said nothing, so we see that anything that is not yet in existence, or else is in existence but is not in his possession, in all of these cases he does not acquire it, these words are in a case of [when he uses the language of] sales or gifts. But if he uses the terminology of debt [obligation], he is able to obligate himself as much as he wants, even with something that is not in existence, and even with something that is not in his hand. Like we find in the case of one who creates a lien for his debt on that which he will acquire, like we have established that [in a case in which he says] ‘That which I will acquire,’ that such a thing does come under an obligation for his debt.<sup>34</sup>

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<sup>34</sup> R. Shmuel ha-Sardi (1190-1256), *Sefer ha-Terumot*, no. 64, 2.

The rule is then incompletely echoed by the *Tur* and *Shulchan Aruch*<sup>35</sup> but is gradually embraced by later authorities, with little or no opposition in more recent writings. R. Yechiel Michel Epstein, an early twentieth century codifier, follows in step with these rulings, and notes: “and so, any person can give or sell property not yet in existence or in his possession, in this way.”<sup>36</sup>

How was this surprising turnaround *halachically* accomplished? The key lay in revisiting the laws of debt, rather than contract. One important idea was the ruling by a majority of scholars that a debt created by agreement did not have to be expressed in fixed monetary terms; one could also become indebted to supply another person with food, for a fixed or indefinite term.<sup>37</sup> Rashba adds a responsum that one could likewise indebt himself to pay his earnings over a future period to a creditor. From this rule – arguably talmudic in origin (according to its proponents) but not exploited within the Talmud<sup>38</sup> – it was but a small leap for the *Tur* and the *Shulchan Aruch* to conclude that the indebtedness could be for some measure of wheat or other property.<sup>39</sup> Since the technique involves not sale but debt, and the goods are formally being used only as a standard to measure the amount of indebtedness, the debtor must supply either the property specified or its value in satisfaction of the debt – regardless of whether the property in question was ever owned by him. Thus, through mechanics of debt, Jewish law achieved full compatibility with the expectancy model of the UCC.<sup>40</sup>

## VESTIGES OF ORIGINAL PERSPECTIVE AND A CONTRAST WITH FREEDOM OF CONTRACT

It would appear that Jewish law has evolved to an equivalent place as the UCC

<sup>35</sup> See *Tur*, *Choshen Mishpat* 60 and 71 who quotes a similar view of the *Sefer ha-Terumot* for this aspect of the rule of obligation and debt forgiveness. Indeed, *Beit Yosef* quotes various aspects of this rule of the *Sefer ha-Terumot* many times in *Tur*, *Beit Yosef*, *Choshen Mishpat*, 60 and 71-73. See also *Shulchan Aruch*, *Choshen Mishpat*, 60:6 where the rule of the *Sefer ha-Terumot* is quoted, albeit without any explanation of how significant an exception to the rule this is.

<sup>36</sup> *Aruch ha-Shulchan*, *Choshen Mishpat*, 60:11

<sup>37</sup> This rule is disputed by Maimonides, *Mishneh Torah*, *Hilchot Mechira*, 11:16 – but Raaved (R. Abraham ben David, France, 1125-1198), Ramban (Spain, 1194-1270), and a majority of other scholars stood firm.

<sup>38</sup> For example, if the rule against binding sale of future earnings can be this easily circumvented merely by “indebting” oneself in the ultimate amount of the earnings, then why the need for a special Talmudic exception enabling the poor to sell their daily earnings in advance? See above, section II., at p. 51.

<sup>39</sup> *Tur*, *Choshen Mishpat*, 60 and *Shulchan Aruch*, *Choshen Mishpat*, 60:6.

with regard to contract law, at least from a functional point of view. However, it is significant that while English common law developed contract by turning away from monetary debt and towards notions of personal duty to perform, Jewish law instead revisited and broadened its conceptions of debt while remaining uncomfortable with the notion of one person or entity being empowered under civil law to compel another individual to perform a particular service or conduct a future transaction. The models we have seen above show that even those relatively recent halachic thinkers who eventually accepted a practical mechanism for contractual enforcement did not conceptualize a contractor's obligation as a binding promise which must be obeyed – unlike authorities of common law. Instead, halachists see contractual promise as a creative way to measure or define monetary debt, but which need not be thought of as ever creating any actual personal obligation to convey a specific piece of future property or to perform any other particular action. Talmudists thus speak of the obligation as a debt which must be paid off, or else as an automatic lien (i.e. a form of property ownership); either way, there is no sense of an enforceable “promise” to perform future actions or services. Fulfilling the contract is not “performance” but merely a way of paying off the debt or satisfying the lien, as is the payment of expectancy in cash.

What is the importance of this conceptual shift? Why indeed must promissory enforcement enter through the back door of debt in Jewish law, and not enter through the front door of “promise keeping”? This is certainly not because the Talmud underestimates the importance of keeping promises. The Sages held nothing back in condemning he who fails to stand by his word.

Rather, the reluctance of Talmudic authorities to endorse the enforcement of contractual promises to perform as such may well embody a strong statement of public

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<sup>40</sup> Another debt-related rationale that can be used to explain the transformation, referred to by the *Sefer ha-Terumot*, is the rule mentioned previously about the floating lien that attaches to after acquired property. This rationale is somewhat more puzzling. If the point is to prove that the Talmud recognized personal—as opposed to property-based—obligations, it is hard to see how the lien rule illustrates this any better than the basic rule that the creditor can collect from any property held by the debtor himself, whenever acquired. (A similar question may be asked about those commentators who regard the floating lien as a special rabbinic edict, but who were not similarly troubled by the personal obligation of the debtor to satisfy the debt.) Evidently, the lien rule is not being noted to prove the personal nature of the obligation to repay a debt. We would instead explain it as follows: The floating lien is cited as an illustration of a property right—namely, the lien—which is born of a transaction (creation of the debt) occurring before the property is owned by the conveyor of the right. The precise analogy is: Just as debt can help create lien rights on property not yet owned by the debtor (perhaps by special rabbinic edict), so too can debt help create full title to property not yet owned by the debtor.

policy: a commitment to protect freedom of choice. Ironically, “freedom of contract” is routinely spoken of in Western literature as one of the basic societal freedoms that law must protect. Charles Fried, in *Contract as Promise*, writes the basic doctrine as such:

Security of the person, stability of property, and the obligation of contract were for David Hume the bases of a civilized society.<sup>41</sup>

Fried goes on to elucidate the notion of contract as a fundamental civil right as follows:

Thus the law of torts and the law of property recognize our rights as individuals in our persons, in our labor, and in some definite portion of the external world, while the law of contracts facilitates our disposing of these rights on terms that seem best to us.<sup>42</sup>

Thus, the modern Western idea is that enforcing promises gives individuals freedom in the sense of more opportunities for autonomous commerce and economic growth – including the opportunity to be stripped of our future rights, based on our consensual agreement in advance to be so stripped.

By contrast, the Talmud seems to place greater value on the freedom to break – not make – contracts. “The children of Israel are My slaves’ - they are not the slaves of men,” is the Talmudic reading of Leviticus 25:42. The Talmud (*Bava Metzia* 10a) emphasizes this teaching in explaining why even a defaulting laborer is entitled to pro rata wages for the time that he did work. Later Talmudic commentaries proposed establishing maximum durations for labor contracts,<sup>43</sup> in the spirit of “they are not the slaves of men.” The Talmudic perspective evidently views promissory enforcement as an institution of bonding and binding – not of freedom. Promissory enforcement gives a person the “freedom” to barter away their future free choice. A promise may be made in the light of current needs and expectations, and subsequently, at the time of enforcement, the promisor’s freedom of choice is gone – the promisee controls both parties. According to the Talmud, a person can sell their property, but cannot sell their own free choice. Not keeping one’s word is unethical and damages the promisor’s credibility; yet, letting the promisee collect damages treats the promise of performance like the promisee’s

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<sup>41</sup> Charles Fried, *Contract as Promise*. (Cambridge: Harvard University Press, 1981), 1.

<sup>42</sup> *Ibid.*, 2.

<sup>43</sup> *Tosafot, Bava Metzia* 10a.

property. If a person borrows money/property or damages someone else's property interests, this person must repay that value, as a monetary debt; but he or she cannot surrender ownership of his own free choice to another mortal. There is a clear aversion to obligating people in this way.<sup>44</sup> To accord legal status to an executory bilateral contract is to allow the bartering of individual free choice in the marketplace; to the Talmud, contract enforcement means bondage, not freedom.

Indeed, in the area of labor law – where the debt theory approach of the *Sefer ha-Terumot* is simply not elastic enough to allow debt to create binding labor contracts – this aspect of Jewish law surges to the forefront in terms of practical Jewish law: Freedom to contract is substantially restricted in the area of labor law. For example, a standard hornbook of Jewish law states that the normative rule is:

It is prohibited for a person to hire himself out as a worker in another's employ contractually for more than three years.<sup>45</sup>

Substantial restrictions on labor contracts remain in place in Jewish law.

Distaste for the sale of free choice is manifested in certain elements of modern common law as well, albeit in a much more limited way and in a more limited circumstance. Specific performance is regarded as an unusual remedy only to be given sparingly.<sup>46</sup> Especially when personal service is involved and the specter of forced labor looms most threateningly in the background, common law courts are loath to decree specific performance. In *Fitzpatrick v. Michael*, for example, it is concluded that decreeing the specific performance of personal services “would result in a species of peonage on the part of the servant... which would be intolerable.”<sup>47</sup>

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<sup>44</sup> In light of all that has just been said about the Talmud's aversion to imposing personal obligations in financial matters on individuals, Jewish laws' broad acceptance of oaths to regulate future conduct may at first blush seem contradictory (see *Shulchan Aruch, Yoreh Deah, 37*). However, while it is true that oaths governing future conduct do create personal moral obligations, such obligations run from the individual directly to the Almighty, and no personal obligation or indenture is thereby created to another person. Therefore, the Talmudic rabbis were not uncomfortable with the institution of oaths, including in financial and business matters. Insofar as no civil obligation (*bein adam le-chavero*) is created by a promise to God, the Talmudic rabbis were not concerned by it. The only sort of binding undertaking to be guarded against was the sort that could be seen as, or result in, the indenturing of one human being to another.

<sup>45</sup> R. Yaakov Yishaya Blau, *Pitchei Choshen Hilchot Sechirut* (Jerusalem: *Machon li-Hoyraah*, 1985), 140.

<sup>46</sup> *Curtice Brothers Co. v. Catts*, 72 N.J.Eq. 831 (1907).

<sup>47</sup> *Fitzpatrick v. Michael*, 177 Md. 248 (1939).



The classic Talmudic reluctance to grant expectancy damages for wholly executory bargains represents a similar, but much broader concern for the protection of individual freedom, which extends even to monetary remedies.

Moreover, it is interesting to note that several recent trends in contract law promote the value of freedom to break, as opposed to freedom to make, contracts. One is the *Lochner*-era of law, where the U.S. Supreme Court relied on “freedom of contract” to justify turning a blind eye to commercial exploitation of the poor and weak. Grant Gilmore’s *The Death of Contract* chronicles the modern muddying of purist contract doctrine through the replacement of consideration doctrine with fairness-based doctrine, and through the liberalization of excuses for non-performance. Similarly, courts have shown a growing readiness to police bargains and reform or invalidate contracts, applying doctrines like duress, inadequacy of consideration, and unconscionability.<sup>48</sup> A common argument<sup>49</sup> is that many contract situations in our world involve parties with unequal bargaining power. This inequality undercuts the validity of the contracts so formed, both because the weaker party’s consent is tainted by duress, and because it may be unconscionable for a court of justice to enforce an agreement that brutally takes advantage of a weaker party.

“We are told that Contract, like God, is dead. And so it is.” So goes Grant Gilmore’s famous opening line in *The Death of Contract*.<sup>50</sup> Ironically, we have seen that in more ways than one; it might actually be the religious perspective of the Talmud that accounts for the weakness and leniency of Talmudic contract doctrine. We might say that, for the Talmud, Contract is dead because God lives.

## CONCLUSION

Original Talmudic contract law and current Jewish law vocabulary may reflect a similar concern for the powerless. This is not to suggest that modern contract law is moving toward a framework that abandons promissory enforcement in practice. As we have seen earlier, Jewish law has, as a practical matter, evolved to the point where it can support a modern, industrial economy that thrives on advance purchase orders and “just-in-time” inventory management. Notwithstanding, the Talmudic message that “they are not the slaves of men” has important meaning for

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<sup>48</sup> *Henningsen v. Bloomfield Motors, Inc.*, 350 F.2d 445 (1965).

<sup>49</sup> Dawson, “Economic Duress - An Essay in Perspective,” *Michigan Law Review* 45 (1947), 253.

<sup>50</sup> Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974).

our society as well. Admirably, our legal system has lately chosen to show some empathy for individuals whose economic weakness is unconscionably exploited, and who wind up cheaply selling their own freedom in the marketplace.

Of course, in the practical world of *beit din* adjudication it is worth repeating that which we noted above in the end of Part III: normative Jewish law is now virtually fully compatible with the expectancy model of the UCC. Between the mechanics of “debt” and the expansive application of “the law of the land is the law”<sup>51</sup> common to rabbinical courts in the United States, contracts are routinely enforced in rabbinical courts, even if the exact mechanism for such enforcement is different in Jewish law than in the classical common law approach.

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<sup>51</sup> Three theories of “the law of the land is the law” predominate the halachic discourse:

1. R. Yosef Karo (*Shulchan Aruch, Choshen Mishpat*, 369:6-11) rules that secular law is *halachically* binding only to the extent that it directly affects the government’s financial interests. Thus, secular laws imposing taxes or tolls would be valid under Jewish law, but laws for the general health and safety of society would not.
2. Rama (*Choshen Mishpat*, 369:11) agrees that secular laws directly affecting the government’s financial interests are binding, but adds that secular laws which are enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law. In this model, all health and safety regulations would also be binding.
3. R. Shabbetai b. Meir ha-Kohen (Shach) (Comment no. 39 to *Shulchan Aruch, Choshen Mishpat*, 73:14), disagrees with Rama in one respect. He believes that even if secular laws are enacted for the benefit of the community, they are not valid under Jewish law if they are specifically contrary to indigenous halachic precepts. Thus, general health and safety rules would be binding, but – for example – Jewish law has a rule that rooftop railings must be about a meter high. As such, a secular law setting a lower height as the standard would not be accepted as *halachically* valid.

Although there was substantial debate among *halachic* authorities as to which approach to follow, it seems that most modern authorities agree that, at least outside of the State of Israel, Rama’s view should be applied, and such is the view of all four of the deans of *halacha* in America in the previous generation: Rabbis Moses Feinstein, Joseph Elijah Henkin, Joseph Baer Soloveitchik, and Joel Teitelbaum; see R. Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, no. 62; R. Yosef Eliyahu Henkin (1881-1973), *Teshuvot Ibra* II, no. 176; R. Hershel Schachter, *Nefesh ha-Rav* (Jerusalem: *Reishit Yerushalayim*, 1994), 267-69 (citing the view of Rabbi Soloveitchik); and R. Yoel Teitelbaum (1887-1979), *Divrei Yoel* I, no. 147. In this view, almost all applications of secular law are valid under Jewish law as well.