CHAPTER 18

THE THEORY OF "EFFICIENT BREACH": A JEWISH LAW PERSPECTIVE

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Efficient Breach

The Law and Economics school of thought has advanced a number of controversial claims in the name of economic efficiency—from promoting trading on inside information to providing markets for the sale of human organs—but none may be as provocative and challenging as the argument of entitlement and economic efficiency underlying the theory of "efficient breach."[1] In its view, there is a positive value in structuring a contractual remedy to permit, if not encourage, contractual breaches that will lead to the maximization of resources (i.e., economic efficiency).[2]

1 Its contemporary relevance is signaled by recent English and American case law addressing this matter. See, for example, *Attorney General v. Blake*, [2001] 1 A.C. 268, (2000) 4 All E.R. (UKHL); *Experience Hendrix LLC v. PPX Enters. Inc.*, 1 All E.R. 830 (Ct. App. 2003); *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F. 2d 692 (2d. Cir. 1991); *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P. 2d 113 (Colorado. 1995); *SEC v. JT Wallenbrock & Assoc.*, 440 F. 3d 1109 (9th Cir. 2006); *U.S.* v. *Snepp,* 444 U.S. 507 (1980). For additional case law, see Melvin Eisenberg, "The Disgorgement Interest in Contract Law," *Michigan Law Rev.* 559, 565 (2006): 105.

2 Robert Birmingham, "Breach of Contract, Damage Measures, and Economic Efficiency," *Rutgers L. Rev.* 273 (1970): 24; John Barton, "The Economic Bases of Damages for Breach of Contract," *J. Legal Studies* 277 (1972): 1; Richard Posner, *Economic Analysis of the Law* (1972), 56–72; Charles Goetz and Robert Scott, "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach," *Colum. L. Rev.* 554 (1977): 77; E. Allan Farnsworth, "Your Loss or my Gain? The Dilemma of the Disgorgement Principle in Breach of Contract," *Yale L.J.* 1339 (1985): 94. For a recent survey of the literature, see David Barnes, "The Anatomy of Contract Damages and Efficient Breach Theory," *S. Cal. Interdisc. L. J.* 397 (1997–1998): 6.

This theory can be illustrated by the oft-cited overbidder paradigm (OP1). In this paradigm,[3]

> Seller *S* signs a contract to deliver one hundred thousand custom-ground widgets at one dollar each to buyer B_1 for use in his boiler factory. After *S* has delivered the first ten thousand units, buyer B_2 comes to *S*, explains that he desperately needs twenty-five thousand custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers to *S* two dollars each for twenty-five thousand widgets. *S* sells to B_2 the widgets and therefore does not complete timely delivery to B_1, who sustains one thousand dollars in damages from *S*'s breach. Having obtained an additional profit of twenty-five thousand dollars on the sale to B_2 (twenty-five thousand units multiplied by the difference between two dollars and one dollar), *S* is fifteen thousand dollars economically ahead even after reimbursing B_1 for his loss (the difference between the additional profit of twenty-five thousand dollars and one thousand dollars of damages caused by the breach).

The conventional remedy of damages for breach of contract is the expectation standard, which places the plaintiff (i.e., the first buyer) in the position in which the plaintiff would have been had the contract been performed. According to this theory of efficient breach, the promisor (i.e., the seller) may breach the contract as long as he is prepared to pay the plaintiff his expectation damages.

Notable American economists, jurists, and philosophers have argued that, under such circumstances, said breach is economically, legally, philosophically, or morally uncontestable. Economic proponents of this theory embrace the Kaldor-Hicks Compensation doctrine, which posits that, if the defendant is made better off, even if there is a loss to the contracting party, such breach increases societal gain as long as the benefiting party is able to fully compensate the losing party.[4] In effect, contractual compliance does not necessarily entail actual performance, for the promisor may opt to breach the contract and pay damages. Though, as Richard Craswell noted, "this form of enforcement is rarely considered in the philosophical literature on promising, which usually assumes that promises must either (1) oblige the promisor to perform the promised actions, or (2) have no moral force at all,"[5] economic breach of contract involves an intermediate moral obligation to perform or pay damages. The classic formulation in jurisprudential thought of this position is, of course, Oliver Wendell Holmes' bad man:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not happen. In every

3 Posner, supra note 29, at 57.

4 Nicholas Kaldor, "Welfare Propositions of Economics and Inter-Personal Comparisons of Utility," Econ. J. 549 (1938): 49; John Hicks, "The Foundations of Welfare Economics," *Econ. J.* 696 (1939): 49. For a discussion of this principle, see Jules Coleman, "Efficiency, Exchange, and Auction: Philosophical Aspects of the Economic Approach to Law," *Calif. L. Rev.* 221 (1980): 68.

5 Richard Craswell, "Two Economic Theories of Enforcing Promises," in *The Theory of Contract Law: New Essays*, 19,27 (Peter Benson ed., Cambridge 2001).

> case, it leaves him free from interference until the time for fulfillment has gone by, and, therefore, free to break his contract if he chooses.[6]

Put slightly differently in a philosophical vein, the notion of a "promise" is to be understood in consequential terms. As Frank Menetrez observed:

> According to a consequentialist, the promisor ought, as always, to do whatever is likely to yield the best consequences overall. That is, the promisor ought to perform if performance is likely to yield better overall consequences, than breach, and otherwise ought to breach. Thus, when the time for performance arrives, the promisor is obligated to perform the promise only if an independent assessment of the consequences recommends performance.[7]

From this perspective, efficiency theorists would argue that economic efficiency, which leads to the maximization of resources by encouraging such actions that benefit some without injuring others, would be the litmus test for determining whether a contractual breach will yield such consequences. Should it yield such beneficial outcome, the breach should be executed rather than performance of the contract.

In effect, adopting this line of argument, one may be accepting a social contract, which, under certain conditions, individuals have chosen or conceived of the notion of wealth maximization as a fundamental moral value. And a utilitarian would advance the claim that a society that aims at wealth maximization will produce an ethically attractive amalgamation of happiness, of rights (to liberty and property), and of sharing with the less fortunate members of society.[8] Alternatively, the adoption of the theory of efficient breach eliminates the moral content from the contractual promise by permitting a breach based on grounds of economic efficiency.

An alternative approach to the morality of agreement compliance is argued by Craswell:

> [I]f there is a general principle that one ought not cause harm to others, that might be enough to justify some sort of rule against [agreement breaking].[9]

For example, promise-keeping may entail benefiting another such as proscribing the manipulation of another and exercising due diligence in guiding others to form certain expectations.[10] Consequently, promised performance that never transpires

6 Oliver Holmes, The Common Law, ed. by M. deWolfe Howe 236 (Boston, MA: Little, Brown & Co. 1963). Though the legal literature has attributed this statement to Holmes, it has been demonstrated that Holmes rejected this posture and was "speaking from the bad man's point of view." See Joseph Perillo, "Misreading Oliver Wendell Holmes on Efficient Breach and Tortuous Interference," *Fordham L. Rev*. 1085 (2000): 68.

7 Frank Menetrez, "Consequentialism, Promissory Obligation, and the Theory of Efficient Breach," *UCLA L. Rev*. 863, 874 (1999–2000): 47.

8 Richard Posner, "Utilitarianism, Economics and Legal Theory," *J. Legal Stud*. 103, (1979): 8. For a critique, see Jules Coleman, "Efficiency, Utility, and Wealth Maximization," *Hofstra L. Rev*. 509, 526–539 (1979–1980): 8.

9 Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising," *Michigan L. Rev*. 489, 499 (1989): 88.

10 Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA, 1998), 296–302.

or dashed expectations are "harms" caused to the promisee.[11] In this context, the "harm principle" posits that it is proper for the law to interfere with individual liberties since the individual has harmed another person.[12] In short, noncompliance with an agreement undermines the "harm principle." A clear articulation of this posture in general and the relationship between law and morality in particular emerges from the thinking of Joseph Raz. He observed:

> It follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law. To enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals. In this respect, it does not differ from the legal proscription of pornography.[13]

Complying with a promise may be deemed laudable; however, the failure to do so in and of itself is beyond the province of contract law. The bifurcation of contract law and morality into two separate domains is either because law should not enforce morality or because of their differing goals (i.e., law provides rules for an efficient system of interaction and morality entails the engendering of moral values such as trust in interpersonal relations).

Last, if the enforcement of a promise qua promise means fulfilling an obligation (for example, keeping one's word even when doing so is inefficient or regardless of whether the promise has been relied upon), it follows that this characterization of the nature of this agreement-keeping is diametrically opposed to the aforesaid economic, legal, and philosophical rationales as well as the harm principle underlying the theory of "efficient breach." A most prominent contemporary secular perspective has focused upon the intrinsic value of promises (i.e., freestanding obligation of promise-keeping) rather than its instrumental value such as the avoidance of harm or efficient economic exchange as elaborated upon by Charles Fried, who observed that through agreement-making obligations emerge "just because [they have] promised."[14] Adopting such a stance imbues a promise with moral content and thereby disallows a breach based on grounds of economic efficiency.

11 For the problematics in grounding the duty to agreement-keeping in such a harm-based account, see Daniel Markovits, "Making and Keeping Contracts," *Va. L. Rev*. 1325, 1352-1366 (2006): 92.

12 See John Stuart Mill, *On Liberty* (David Spitz ed. 1975), 10–11. More recently, Raz argues, "compensating individuals for harm resulting from reliance on voluntary obligation is . . . a proper goal for the law." See Joseph Raz, "Promises in Morality and Law," *Harvard L. Rev*. 916, 937 (1982): 95.

13 Ibid.

14 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass, 1981) 16. See also, James Gordley, "Contract Law in the Aristotelian Tradition," in *The Theory of Contract Law* (Peter Benson ed., 2001), 265.

Jewish Law

Halakhah (i.e., Jewish law; *halakhot* in plural) distinguishes between legal and moral norms. The distinguishing characteristic between them is enforceability.[15] Whereas a halakhic-legal norm is enforceable by a *bet din* (i.e., a court of Jewish law), compliance with a halakhic moral norm is dependent upon individual volition.

There are two components required in the undertaking of an obligation: effectuating a *kinyan* (i.e., symbolic act of acquisition) and *gemirat da'at* (i.e., a concrete articulation of the parties' firm resolve to undertake the obligation).[16] The act of promising reflects the absence of *gemirat da'at* either because a promise entails executing an obligation in the future (e.g., a promise to sell goods) or a promise in respect to transferring title of something that is not yet in existence (e.g., *davar she-lo ba la-'olam*) such as an item that has not been produced or not in his possession (i.e., *eno bi-reshuto*), and therefore such promises are unenforceable in a *bet din*.[17]

Our presentation will address the issue of whether Jewish law explains the halakhic norm of a promissory obligation (i.e., halakhically enforceable agreement) in instrumental terms for which economic efficiency is its identifying characteristic, or is it grounded in, and underwritten by, the halakhic morality of promising? Is the goal of the Jewish law of obligations the enforcement of promises or the righting for—compensation for—harms? And how does the normative sense of the Jewish law of obligations impact upon agreement breaches among fellow-Jews[18] in general and "efficient breaches" in particular?

The efficacy of a promise is codified in the following fashion:

> When one conducts and concludes commercial transactions using words only (the negotiation and agreement not being completed by a formal act of acquisition), that person should stand by his word, even though none of the purchase price has been taken, nor a buyer's mark made on the goods, nor a

15 For the distinction between a halakhic-moral promissory obligation and a halakhic-legal promissory obligation, see Shillem Warhaftig, *The Jewish Law of Contract* (Hebrew)(Jerusalem: 1974), 16–30; Zorach Warhaftig, *Studies in Jewish Law* (Hebrew) (Ramat Gan: 1985), 87–93; R. Zalman Nechemiah Goldberg (Israel, contemporary), *The Halakhic-Legal Validity of a Promise*, (Hebrew) 13 *Tehumin* 371 (5752-5753); Berachyahu Lifshitz, *Why Doesn't Jewish Law Enforce the Fulfillment of a Promise?* (Hebrew) 25 *Mishpatim* 161 (5755), Itamar Warhaftig, *Undertaking in Jewish Law* (Hebrew) 407 (Jerusalem: 2001).

16 There is a scholarly discussion in academic literature regarding the need to avoid presenting invidious comparisons by utilizing modern legal concepts to elucidate Jewish legal categories. For a bibliographical reference regarding this methodological issue in analyzing Jewish law, see Shahar Lifshitz, "Oppressive Contracts: A Jewish Law Perspective," *Journal of Law and Religion* 101, 104, n. 8 (2008): 23. Therefore, throughout this presentation we describe agreement making as undertaking obligations (i.e., *hithayvut*) rather than creating a contract, which is a modern legal concept.

17 For varying approaches toward defining these concepts, see Shalom Albeck, *The Law of Property and Contract in the Talmud*, (Hebrew) (Tel Aviv: 1976); Shillem Warhaftig, n. 15 above; Berachyahu Lifshitz, *Promise: Obligation and Acquisition in Jewish Law*, (Hebrew) (Jerusalem: 1988); Itamar Warhaftig, n. 15 above.

18 See B *Pesahim* 91a; J *Pesahim* 8:6; Maimonides (Rambam, Egypt, 1135–1204) Responsa 448; R. Jacob b. Meir Tam (France, 1100–1171) Responsa 37 and 39.

> pledge given (for the price): Whoever withdraws from this type of transaction, whether buyer or seller, is deemed a faithless person.
>
> GLOSS: Even though in a transaction that is conducted and concluded by means of words only, where no money is tendered, one can withdraw from such a transaction. . . in any event, a person should stand by his word even though no act of acquisition has been performed, only mere words have passed between the parties. . . .[19]

Where no payment has been made, and the seller articulates an oral commitment to sell realty or personalty to a prospective buyer, and should either party renege on the agreement of sale he is stigmatized as a *mehusar amana* (lit., lacking faith). Given that no act of acquisition (i.e., *kinyan*) has been executed between the parties, technically either party may withdraw from consummating the sale. The noncompliance with the promise is unenforceable. Enforceability depends upon the execution of a *kinyan*.

Because of his reneging on an oral commitment, the community publicly shames him by proclaiming:

> Hear ye, hear ye, this person refuses to keep his word. He has caused displeasure to the scholars and therefore is no longer included among the community of Israel. The remnant of Israel shall not commit sin, nor speak lies (Zephaniah 3:13); for this man is a liar and has made himself a reneger.[20]

In short, the proclamation communicates the Jewish legal position that a promise is binding because of the halakhic need to keep one's word, albeit unenforceable by a *bet din*. Stripped to their essentials, promises create obligations because they are conventionally understood in Jewish law to create religious obligations.

Thus interpreted, the halakhic position regarding promise-keeping stands in bold contrast to the theory of promissory obligation propounded by Charles Fried. Fried's posture is articulated in the following fashion:

> There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, then to break it.[21]

The promissory obligation derives not from a religious and moral norm such as natural law, nor even from the reliance of what is promised, but from the

19 R. Joseph Caro (Ottoman Palestine, 1488–1575), *Shulhan Arukh*, *Hoshen Mishpat* 204:7; R. Moses b. Israel Isserles (Rema, Poland, 1525/30–1572), *Hoshen Mishpat* 204:11. All translations of *Shulhan Arukh* are culled from Stephen Passamaneck, *The Traditional Jewish Law of Sale* (Cincinnati, 1983), 120–21.

20 R. Moses b. Isaac Mintz (Germany, fifteenth century), Responsa *Maharam Mintz*, 1:no.160; R. Shalom Mordechai Schwadron (Maharsham, Poland, 1835–1911), *Mishpat Shalom*, *Hoshen Mishpat* 204.

21 Fried, n.14 above, 17. For antecedent thinking that fidelity to promises depends on the social convention of keeping agreements, see variant perspectives in David Hume, *A Treatise of Human Nature*, L.A. Selby-Bigge, ed. (Oxford: 1960) at Book III, Pt. II, Ch. V; John Rawls, *A Theory of Justice* (Cambridge, MA: 1971), 344–50; Neil MacCormick, "Voluntary Obligations and Normative Powers I" *Proc. Aristotelian Soc'y* (1972) 46 (Supp. Vol.) 59.

expectation that the promisor will do as he or she promised.[22] In the words of Stephen Smith,

> Fried's argument is that because a promisor has, by intentionally invoking a convention, created a belief that the promisor is under a moral obligation to do the promised thing, the promisor is in fact under such an obligation.[23]

In other words, the social convention of promising would have the effect of creating the obligation.[24] In Searle's nomenclature, Fried's argument for promise-keeping is grounded by deriving "ought" from "is."[25] But whereas Searle concedes that the derivation of "ought" from "is" belies an *institutional* '"ought," Fried's argues that it is a *moral* "ought." In short, such postures differ radically from the halakhic conception of promise-keeping. Avowing a diametrically opposed position, *halakhah* views promise-keeping as aligning oneself with the fulfillment of a religious norm rather than compliance with a norm of natural law, institutional moral norm, or moral norm established by social convention.

In *halakhah*, is there an additional ground for promise-keeping based upon the argument that the promisor caused harm by induced reliance, and that is what creates the binding nature of the promise? A promissory obligation as conventionally understood and induced reliance obligation overlap, but they are not identical. This reliance-based duty is distinguishable from the duty to perform the promise. This duty comes into play only after the promise is not performed. Accordingly, the reliance duty is not to be confused with the duty of promise-keeping, but rather a duty to ensure that one who relies upon another's promise is compensated for being harmed. Is the violation of a reliance-based duty actionable in a *bet din* or is it similar to the contravention of a promissory obligation, a toothless tiger providing no judicial redress?

Responding to our question, the Talmud instructs us:

22 The need to protect the promisee's expectations is a recurring theme in the literature. See Alfred Corbin, Contracts, Sec. 1, at 2 (1952), Charles Goetz and Robert Scott, "Enforcing Promises: An Examination of the Basis of Contract," *Yale L.J.* 1261, 1265-1271 (1980): 89.

On a rudimentary level, one of the bases of this expectation is that the conventional understanding of promise-keeping is that promissors remain obligated even if the human calculus determines that "the best overall" would dictate otherwise. See Joseph Raz, "Promises and Obligations," in *Law, Morality and Society: Essays in Honor of H.L.A. Hart* (P. M. S. Hacker and J. Raz eds., 1977), 210, 221–22.

23 Stephen Smith, "Towards a Theory of Contract," in *Oxford Essays in Jurisprudence: Fourth Series*(Jeremy Horder, ed., 2000), 107, 113.

24 Admittedly, Scanlon concurs with Fried's approach that the social practice of agreement making may create certain expectations. However, the existence of these practices fails to explain why reneging upon agreement is wrong. See Thomas Scanlon, "Promises and Practices," *Philosophy and Public Affairs* 199 (1990): 19. In fact, Fried concedes that the grounds for being morally obligated to fulfill a promise lie elsewhere. See Fried, n. 14 above, 14. In Scanlon's estimation, the moral duty for promise keeping derives from "general principles arising from the interests that others have in being able to rely on expectations about what we are going to do." Thomas M. Scanlon, "Thickness and Theory," *J. Philosophy* 275, 283 (2003): 100. For an elucidation of these moral principles, see Thomas Scanlon, n. 10 above, 295–327.

25 John Searle, "How to Derive 'Ought' from 'Is'," *Philosophical Review* 43 (1964): 73. For the classic critique of Searle's approach, see R. M. Hare, "The Promising Game," *Rev. Internationale de Phil.* 398 (1964): 18.

> If someone gives money to his friend to serve as his agent to go and purchase wine for him during the season while the price was low. And he was negligent and failed to buy it the law is that he has to pay him wine according to the low price. . . .[26]

Here, a promise was made, the promisee relied upon the promisor, and the promisee incurred pecuniary loss. The Talmud concludes that the promisor is liable to compensate for the harm suffered. Should we infer from this ruling that induced reliance affords a judicial remedy in the case of an explicit promise unaccompanied by the execution of a *kinyan*?

The dominant approach is that compensation resulting from a breach of an induced-reliance obligation is because the promisor explicitly agreed at the time the agreement was executed to reimburse the promisee for such loss resulting from failure to consummate the wine purchase. In other words, in the absence of said agreement, any harm suffered from reliance would be unrecoverable. Reliance of the promisee upon the oral commitment of the promisor does not engender monetary liability.[27]

Even pursuant to the minority opinion, however, promissory reliance will only engender monetary liability if it is a halakhically enforceable promise. As R. Aaron b. Joseph ha-Levi (Ra'ah, Spain, c. 1235–1300) notes:

> Here (*Bava Metsi'a* 73b), even though the agent did not contractually agree to assume liability [for failure to fulfill his promise], since the principal gave him money with which to purchase merchandise, and the principal would have either purchased it himself or arranged for another to do so had not the agent promised to do so, and the principal relied upon him and gave him the money based upon the reliance; for that reason the agent is liable to pay the loss caused by the reliance on his promise.[28]

Ra'ah's position contains four propositions. The first is that one does not require an agreement that explicitly stipulates that consequential damages are recoverable. The second proposition is that in the absence of such agreement, by giving money to the agent to effectuate a wine purchase at a location where the selling price was lower than others give, the promisee relied upon the promisor's compliance. The third proposition is that the words of the promisor serve as the act of inducing

26 B *Bava Metsi'a* 73b.

27 R. Solomon b. Abraham Aderet (Rashba, Spain, c. 1235–c. 1310), *Hiddushe ha-Rashba*, B *Bava Metsi'a* 73b; R. Asher b. Jehiel (Rosh, Germany & Spain, c. 1250–1327), B *Bava Metsi'a* 5:69; R. Mordecai b. Hillel (Germany, 1240?–1298) B *Bava Kamma* 114:115; R. Joseph Habiba (*Nimmukei Yosef*, Spain, beg. of fifteenth century) B *Bava Metsi'a* 44a; R. Jacob b. Jacob Moses Lorbeerbaum of Lissa (Poland, c. 1760–1832), *Netivot ha-Mishpat* (*Bi'urim*), *Hoshen Mishpat* 176:31, 183:1, 304:2, 306:6, 333:14; R. Avraham Yeshayahu Karelitz (Israel, 1878–1953), *Hazon Ish*, B *Bava Kamma* 22:1; Maharsham, *Mishpat Shalom*, *Hoshen Mishpat* 176:4.

Cf. R. Moses Sofer (Hatam Sofer, Pressburg, 1762–1839), Responsa *Hatam Sofer* no. 168 representation of the dominant position.

28 Though numerous authorities identify the authorship of this view with R. Yom Tov b. Abraham Ishbili (Ritba, Spain, c. 1250–1330), in fact, Ritba is citing the teaching of Ra'ah, his teacher. The text identifies the position with "*moreh ha-rav*" (i.e., his rabbinical teacher). Usage of this appellation refers to Ra'ah. See Issac Brand, "HaNosei Ve'noten Be'devarim: Between Contractual Obligation and Tortuous Reliance," (Hebrew) *Mechkarei Mishpat* 5, notes 107,122–124 (2008): 24.

reliance by the promisee. Moreover, and in the context of Ra'ah's posture more importantly, it is the *be-hahi hana'ah* (i.e., because of the benefit created by the induced reliance that establishes a surety relationship between the two parties) he undertakes the obligation, and therefore the promise becomes halakhically binding upon the promisor and enforceable in case of breach.[29] Similar to an *'arev* (i.e., one who assumes liability because the creditor parted with monies on the strength of his assurance) the individual who was hired to transact business is liable because the investor relied upon him. It is the halakhic-legal norm of suretyship rather than the halakhic-moral norm (i.e., promissory obligation or induced reliance) that endows halakhic-legal validity to the agreement.[30]

To summarize: The undertaking of a promise regardless whether it induces reliance or not mandates the promisor's compliance, albeit a breach of a promise will not be actionable. In other words, in reneging of a promise, the promisee is frequently harmed because he relied on the promise. Concerning compliance with the promise, however, harm is irrelevant. One is halakhically morally obliged to fulfill the promise qua promise (i.e., the religious duty of promise-keeping regardless of whether the promisee has detrimentally relied on the promise or not).[31] In other words, the binding nature of the promise is independent and free-standing, separate from induced-reliance obligation.

Having presented the dichotomy between halakhic-legal norms and halakhic-moral norms in general and a rudimentary definition of a promissory obligation in particular, now we may begin to explore actual cases of breaches of various

29 See generally Baruch Kahane, *Israel: Guarantee* (Hebrew) (Jerusalem: 1991), 78–90, who subscribes to this interpretation of Ra'ah.

30 The underlying premise of Ra'ah's posture is predicated upon the fact that the context of liability is within the framework of *hithayvut* (i.e., undertaking an obligation), rather than being a form of consideration as a vehicle to execute a *kinyan*. See Berachyahu Lifshitz, "Consideration in Jewish Law—A Reconsideration," *The Jewish Law Annual* 115, 122-123 (1989): 8; Berachyahu Lifshitz, *The Promise* (Hebrew) (Jerusalem: 1988), 214. Cf. Kahane, n. 29 above, 6, n. 8.

Others interpret that Ra'ah's position is that an induce-reliance obligation is to be assimilated in the halakhic norms of obligations' natural neighbor—namely, torts. Properly understood, the promisor induces the promisee's reliance triggered by "*ha'na'a*" and, in the wake of a breach, damage ensues and the promisor is obligated to compensate the promisee because of the induced-reliance generated. See Yechiel Kaplan, *Elements of Tort in the Jewish Law of Surety*, (Hebrew) 9–10 *Shenaton ha-Mishpat ha-'Ivri* 359 (5742–5743); Brand, n. 28 above. A breach of a reliance-induced obligation entails a contravention of "the remnant of Israel shall not commit sins or lies." See R. Isaac b. Moses of Vienna (*Or Zaru'ah*, Germany and France, c. 1180-c. 1250) Responsa *Or Zaru'a* 1:748; Rosh, B *Hullin* 3:34, Brand, 28 above, 29, n. 96. In effect, pursuant to Ra'ah's view, a breach of a promissory obligation involves the violation of a "the remnant of Israel shall not commit sins or lies" two times (i.e., once for breach of the promissory obligation and a second time for breach of reliance-induced obligation).

Thus, insofar as the halakhic-moral norm of promissory obligation, promises are given halakhic-moral effect qua promises. However, according to Ra'ah, as far as the halakhic-legal norm of promissory obligation is concerned, promises are given effect qua reliance-inducing acts. It follows that a breach of a promissory obligation occurs when you have induced someone to rely upon you. The person inducing the reliance and subsequently causing a breach must be viewed as an individual who is reneging on a commitment or acting tortuously. Regardless of the halakhic classification of the promisor's breach, judicial redress is contingent upon the integration of the *halakhot* of obligations or torts into the picture.

31 For varying explanations addressing the rationale for nonenforcement of a promissory obligation, see Zorach Warhaftig, n. 15, above 87; Shalom Albeck, *The Nature of Contract in Jewish Law*, (Hebrew) 6 *Iyyunei Mishpat* 517–518 (1978–1979); Lifshitz, n. 15 above, 178–180; I. Warhaftig, n. 15 above, 468–469.

agreements for the purpose of understanding how Jewish law addresses the theory of "efficient breach."

One of the Jewish legal overbidder paradigms (OP2) is codified in the following manner:

> If one is in the process of negotiating to acquire or lease a thing, whether real property or moveable property and (during this process) someone else comes and lawfully acquires it, this latter person is deemed wicked (his transaction, however, is valid). This same rule applies when one wishes to hire himself out to an employer (and during the course of negotiations, another person comes and takes the position). . . .
>
> GLOSS: . . . All the above only treats the case in which a price between parties (to a sale) has been mutually agreed upon, and only the act of formal acquisition is lacking (to complete the sale). If, however, no price has yet been agreed upon, the seller wants so and so much, and the buyer wants to pay less, it is permissible for another party (to break into those negotiations). . . .[32]

In rabbinic sources, preempting a sales transaction or an employment agreement is metaphorically compared to an *'ani ha-mehapekh be-harara* (lit., a poor person preparing a cake and another snatching it from him).[33] At what point is an interloper precluded from interfering with negotiations for a deal? According to one opinion, the interdict applies as long as a deal is being brokered; whereas, according to others, a third party may interfere only before the final phase of negotiations prior to the consummation of a *kinyan*.[34]

One who interferes with either the negotiations or the final stage of the brokering of a deal and purchases the item is labeled a "*rasha*'" (i.e., a wicked person).[35] Though the designation serves to stigmatize the offender, nevertheless, the purchase is valid and no formal claim for damages may be leveled against him.

In effect, the interloper's action is viewed morally objectionable in the eyes of Jewish law.[36] Though morally objectionable, nevertheless, his behavior is not actionable in a court of Jewish law.[37] *'Ani ha-mehapekh ba-harara* serves as one of the numerous illustrations of behavior that is morally inappropriate, albeit beyond the halakhic-legal realm of the norms of obligations. Moreover, in stark contrast to OP1, where promoting self-interest and economic welfare is the underlying basis for legal entitlement by the promisor, here the dynamics of OP2 illustrate the

32 *Shulhan Arukh*, *Hoshen Mishpat* 237:1.

33 B *Kiddushin* 59a.

34 See Aaron Levine, *Free Enterprise in Jewish Law*, (New York: 1980), 124–26.

35 The interloper interdict applies even if the second bidder is unaware of the first agreement. Under such circumstances, once aware of the agreement, the second bidder must withdraw his bid. See R. Moses Feinstein (New York, 1895–1986), *Iggerot Moshe*, *Hoshen Mishpat* 1:60.

36 This infraction of a halakhic-moral norm either violates "doing what is proper and good in the eyes of God," or entails encroaching upon someone's livelihood. See R. Moses b. Petahiah Isserlein (Germany, 1390–1460) *Terumat ha-Deshen* 340; R. Solomon b. Isaac (Rashi, France, 1040–1105), B *Bava Metsi'a* 71a.

37 However, if the *bet din* is aware that the interloper is momentarily attempting to snatch away another's anticipated gain, a *bet din* may step in and direct the interloper to withdraw his bid. See R. Samuel b. Moses de Medina (Maharashdam, Greece, 1506–1589) Responsa *Maharashdam*, *Hoshen Mishpat* 259; Maharsham, *Mishpat Shalom*, *Hoshen Mishpat* 237.

working of a halakhic-moral norm of promissory obligation where we are concerned with the religious propriety, fairness, and appropriateness to hold individuals to promises that they have voluntarily made. Last, the halakhic interloper interdict is more solicitous of a promissory obligation and reliance on preagreement representations than American law traditionally is.[38]

This halakhic-moral dimension of the promissory obligation continues to operate in the workings of another overbidder paradigm (OB3) in the following Talmudic discussion:

> A certain individual told his friend: "If I ever sell this field I will sell it to you for 100 *zuz*." He subsequently went and sold it to another individual for a 120 *zuz*. R. Kahane said: the first one acquired it.
>
> An objection is raised. R. Ya'akov Nehar Pakod objected: "But this individual did not sell him the field voluntarily. Rather, the additional *zuzim* coerced him to sell." The *halakhah* is according to Rabbi Yaakov Pakod.[39]

Similar to other agreements of sales, this one envisions that the parties will comply with the terms of the agreement and that the transfer of ownership ultimately will occur.[40] This agreement, however, is informed by a *tenai* (i.e., condition). When one transfers ownership of either land or moveable goods to another, and either the transferor or the transferee has placed conditions on the transaction, which conditions are susceptible of fulfillment: If the conditions are fulfilled, the item, acquisition of which had been formally effected, is deemed purchased; if the conditions are not fulfilled, no sale has occurred. In our scenario, the seller stipulated that if he decides to sell it and he will sell it to him (i.e., the first bidder).

Hence, should the seller agree to sell, R. Kahane argues that the seller must keep his promise and sell it to the first prospective buyer. R. Ya'akov Pakod, however, demurs and argues that the transfer of the extra profit serves as a means of coercing the seller to transfer ownership to the second prospective buyer and, therefore, the sale to him is valid. In these circumstances, the seller was not interested in selling the field but sold it to the prospective second buyer in order to capitalize on a windfall profit. In other words, the windfall profits coerced him to sell to the second person. Given the presence of duress, the fulfillment of the *tenai* never materialized and therefore the seller may break his promise and sell the field to the overbidder.[41] The logical inference that can be drawn from this case is that, had the seller sold it to the second bidder for one hundred *zuzim*, the first bidder would have been entitled to specific performance as a remedy enforceable by *bet*

38 For attempts to reform the state of the law, see Avery Katz, "When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations," *Yale L. J.* 1249 (1996): 105; Richard Craswell, "Offer, Acceptance and Efficient Reliance," Stan. L. Rev. 481 (1996): 48; Lucian Arye Bebchuk and Omri Ben-Shahar, "Precontractual Reliance," J. Legal Stud. 423, 427 (2001): 30.

39 B *Avodah Zara* 72a.

40 The implicit assumption is that the transfer was in actually done "*me-akhshav*," (i.e., from now when he decides to sell it). See Itamar Warhaftig, n. 15 above, 184.

41 Rashi, *Avodah Zara* 72a *s.v. zuzei*; R. Joseph b. Solomon Colon Trabotto (Maharik, Italy, c. 1420–1480), Responsa *Maharik*, *Shoresh* 20, *Anaf* 8.

din.[42] Moreover, said conclusion that the default remedy for breach of an agreement is specific performance rather than expectation damages dovetails with our representation that the halakhic-legal norm of promissory obligation mandates the fulfillment of a halakhic norm of keeping one's promise and therefore the promisee is entitled to actual performance.[43] The remedy of specific performance is not limited to an agreement to sell immediately realty or personalty (i.e., *hakna'a*—property conveyance),[44] the focal point of this Talmudic discussion, but equally extends to an agreement that obligates the parties now and the transfer of ownership or other obligations will occur in the future (i.e., *hithayvut*).[45]

What happens, however, if the promisor stipulates in advance a sum payable as damages (i.e., liquidated damages) upon breach of the agreement. For example, if *S* obligates himself to sell the field to *B*, and a penalty will be imposed upon *S* for nonperformance, may *S* breach the agreement and pay the liquidated damages, which will serve as compensation to *B*?[46] The answer to this question lies with understanding how *halakhah* wants to address noncompliance of a promise. If the goal of *halakhah* is to compel specific performance, then such a clause ought to be unenforceable.

42 Rosh, *'Avodah Zara* 5:23; *Shulhan Arukh*, *Hoshen Mishpat* 206:1. Clearly, an agreement for sale must be accompanied by the requisite *kinyan*. See Rashi, *'Avodah Zara* 72a, *s.v. lekha*; Rambam, *Mishneh Torah*, *Mekhirah* 8:7; R. Jacob b. Asher (Germany and Spain, 1270?–1340), *Arba'ah Turim*, *Hoshen Mishpat* 195:11.

43 Interestingly enough, though Fried adopts a teleological approach to promise-keeping, emphasizing the moral dimension of the promissory obligation, nevertheless, he argues that a breaking of a promise entitles one to expectation damages rather than specific performance. See Fried, n. 14 above, 16–17. One cannot simultaneously advocate promissory morality and the awarding of expectation damages in cases of a breach.

The endorsement of such a view would give an incentive for promissors to break their promises. The correlation between moral duty to keep a promise and that the law should enforce an agreement is noted by legal scholars. See E. Allan Farnsworth, Contracts, Section 12.1 at 755–56 (3rd ed.: 1999).

44 The assumption is that the passage in B *'Avodah Zara* 72a is dealing with a sale rather than an agreement to sell. See R. Aaron Perahiah ha-Kohen (Greece, seventeenth century); Responsa *Perah Matteh Aharon* 1:7; R. Sasson, Responsa *Torat Emet*, 133. Cf. R. Meir Abulafia (Rama, Spain, 1170?–1244), *Yad Rama*, B *Bava Batra*, 1:26; R. Shabbetai b. Meir ha-Kohen (*Shakh*, Lithuania, 1621–1662), *Hoshen Mishpat* 66:128.

45 Employing a formula of *hithayvuth* coupled with the use of the term "*me-akhshav*" (i.e., from now) will establish the undertaking of an obligation for contemplated actions in the future. See R. Hayyim b. Israel Benveniste (Turkey, 1603–1673) *Kenesset ha-Gedolah*, *Mahadurah Batra*, *Hoshen Mishpat* 61, *Hagaha* 10:2. Cf. Responsa *Torat Emet*, 133. Furthermore, whether there is an additional requirement that a person's property serve as a guarantor by the promisor to create a halakhically legal promissory obligation (i.e., *shi'bud nekhasim*) is subject to debate. See *Netivot ha-Mishpat, Hoshen Mishpat* 39:17, 60:7, 203:6; R. Aryeh Leib b. Joseph ha-Kohen Heller (Poland, 1745?–1813) *Ketsot ha-Hoshen*, *Hoshen Mishpat* 203:2, 206:1. For the grounds for mandating specific performance in case of a breach of an obligation, see B *Bava Batra* 2a; Rashi, B *Bava Batra* 2b, *s.v. ve-ta'amo*; *Tosafot*, (medieval Talmudic glosses, France and Germany, twelfth–fourteenth centuries) B *Bava Batra* 3a, *s.v. ki ratsu*; Rosh, B *Bava Batra* 1:3; *Tosafot*, *Ketubot* 54b *s.v. af al pi*. For the parameters of specific performance in acquisitions and undertaking obligations, see S. Warhaftig, n. 15 above, 316–33; I. Warhaftig, n. 15 above, 133, 135, 182–85. Though the halakhic promissory obligation implies that an agreement should not be breached and hence should be specifically enforced, nevertheless, an agreement for personal services such as a decree ordering an employee specifically to perform under an employment agreement is construed as involuntary servitude. See Shillem Warhaftig, *Jewish Labor Law* (Hebrew) (Tel Aviv: 1969), 122–29. However, there are legists who contend that a worker or a contractor (i.e., *kabbelan*) who executes a *kinyan* prior to commencing employment cannot rescind his or her agreement for services. See R. Tam cited in *Tosafot*, B *Bava Metsi'a* 48a, *s.v. ve-hu*; *Hiddushe ha-Ritba*, B *Bava Metsi'a* 75b, *s.v. ha-sokher*; R. Jacob b. Joseph Reischer (Czech Republic, c. 1670–1733); Responsa *Shevut Ya'akov*, 2:184; R. Moses b. Joseph Trani (Mabit, Ottoman Palestine, 1500–1580); Responsa *Mabit* 2:132.

46 This question is similar to the situation of a private equity capital commitment, the agreement of which stipulates that if the investor fails to meet his or her capital call there is a remedy for default (e.g., losing his or her entire investment). I thank Leon M. Metzger for this observation.

However, if the telos of the system is to redress the nonperformance by compensating for promissory noncompliance, then such a clause ought to be enforceable. Under such an agreement, the liquidated damages serve as a deterrent, an in terrorem effect to give compensation to the injured party and avoid the expense of litigation in *bet din*. In other words, the payment of liquidated damages does not actually preclude the obligation to perform the agreement. In principle, in cases of promissory noncompliance, a claim for specific performance may be advanced in *bet din*. To avoid the expense of litigation in *bet din*, however, an agreement to pay the liquidated damages may serve as a deterrent to promissory noncompliance.[47] In effect, should the promisor fail to pay liquated damages, the agreement accompanied by a *kinyan* would stipulate that specific performance be in place.[48] In each case, there must be a factual determination whether the crafted provision of the agreement providing for penalty damages is designed to reinforce the act of *kinyan* or is incorporated as a judicial remedy for a potential breach. If the purpose is the former, the promisor must keep his promise; if it is the latter, he may breach his promise and pay damages.[49]

What happens if the promisor breaches the agreement and in the process secures profits from his wrongdoing?[50] Generally, pursuant to *halakhah*, the recoverable damages are calculated based on the expectancy interest (i.e., the difference between the position in which the damaged party would have been had the agreement not been breached and the position in which it is because of the breach). The plaintiff is entitled to be reimbursed and placed in as good a position as he would have been had the defendant performed his obligations.[51] Is the victim of the

47 Rashba, Responsa *Rashba* 3:202-203; *Shulhan Arukh*, *Hoshen Mishpat* 12:9; R. Elijah b. Solomon Zalman (Gra, Lithuania, 1720–1797), *Bi'ur ha-Gra*, *Hoshen Mishpat* 12:17. Cf. R. Elijah b. Hayyim (Greece, 1530?–1610?); Responsa *Maharanah*, 1:66, who challenges this position and in the final analysis endorses this position. The impact of the issue of "*asmakhta*" (i.e., the absence of firm resolve of the promissor) is beyond the scope of this presentation.

48 *Tosafot* B *Betsah* 20a *s.v. nazir*; *Bi'ur ha-Gra*, n. 45 above; R. Moses b. Isaac Judah Lima (Lithuania, 1605?–1658) *Helkat Mehokek*, *Even ha-Ezer* 50:22; *Netivot Ha-Mishpat*, *Hoshen Mishpat* 12:6 (*Bi'urim*) and 15 (*Hiddushim*). R. Samuel b. David Moses ha-Levi (Poland and Germany, 1625?–1681), *Nahalat Shiv'ah*, 8:10 who notes that this conclusion is unanimously accepted. Cf. R. Joseph Saul Nathanson (1810–1875), Responsa *Sho'el u-Meshiv*, *Mahadura Tinyana*, 2:81 who argues that the option to choose between performing the agreement or breaching it and paying damages is limited to marital engagements and judicial compromise and is inapplicable to commercial transactions. For the problematics of adopting such a posture, see *Divrei Geonim* 86:1.

49 Responsa *Torat Emet* 64 (end). However, in the case of a breach should the promisee proceed to request recovery of the penalty damages without submitting a claim for specific performance, the promisee loses his right to this remedy. See R. Moses Joshua Judah Leib Diskin (Maharil Diskin, Lithuania and Ottoman Palestine, 1817–1898) Responsa *Maharil Diskin*, vol. 1 (end), *Pesakim* 148.

50 Clearly, proponents of the theory of efficient breach would oppose disgorging such gains. See Sidney DeLong, "The Efficiency of a Disgorgement as a Remedy for Breach of Contract," *Ind. L. Rev*. 737, 742–45 (1989): 22; Farnsworth, n. 1 above, 1380–82.

51 For example, if an employee retracts his offer to work for a company, and the employer can only recruit a replacement at a higher salary and the company incurs additional losses related to the worker's decision to leave, so the company is entitled to recover the differential in the worker's salary from the retracting worker and possibly all other damages. On a halakhic-moral level, *dinei shamayim*, the retracting employee is obligated to compensate for all losses including but not limited to consequential damages. See *Shakh*, *Hoshen Mishpat* 333:39; *Ketsot ha-Hoshen*, *Hoshen Mishpat* 333:3; *Hazon Ish*, *Hoshen Mishpat* 23:25; *Divrei Geonim*, 105:1; *Piskei Din Rabbaniyyim* 15:237 (hereafter:PDR). In other words, the goal of compensation is to reinstate the employer to his financial situation that existed prior to hiring the retracting worker. Cf. David Bass, *Contracts According to Din Torah,* (Hebrew) 17,118 in *Keter*, vol. 1. (Shlomo Ishon and Yitzchok Bazak, eds., 1996).

breach of the agreement entitled to bring an action for tort damages against the perpetrator of this breach (i.e., the expectancy interest)?

Let's address the issue of trade secrets, which is based on the breach of relationally specific duties between the employee and the employer.[52] Clearly, if an employee receives on-the-job training, his employer cannot prevent him from working for himself or a competitor.[53] To qualify as a trade secret, the information, commonly a customer list, business design, or technological process, must confer a competitive edge and it must remain secret.[54] To prevent disclosures of technological developments, business information, and customer-related information, employers may block public access, using passwords and restricting employee access to sensitive locations, and execute confidentiality agreements. In the main, trade secret cases arise when disloyal employees use or disclose their employer's secrets contravening a duty of confidentiality grounded in an employer-employee agreement. As a condition to his employment, the individual had signed a contract in which he obligated himself to refrain from disclosing certain trade secrets due to their market value. But the employee chose to breach the agreement. Can the employer sue him for damages?

In his treatment of the unauthorized opening of a letter and possession of a letter addressed to another, R. Hayyim Shabbetai (Greece, 1556–1647) argued that, though it was unclear whether the victim was entitled to damages, nevertheless, even if the damage was remote (i.e., *gerama*) the offender should be chastised.[55] Although we know all acts entailing remote damages are not actionable in a *bet din*, one remains proscribed from engaging in such tortuous behavior.[56] Should an individual engage in such acts, there are halakhic-moral—to

52 Most agreements will be structured with a provision prohibiting disclosure by an employee who is told a secret in confidence. In other words, we are dealing with an employee who is undertaking an obligation with his employer to refrain from acting in a certain fashion (i.e., disclosure of a trade secret). For the sake of this presentation, we assume that such a construction of an agreement that mandates abstention from an act is valid. See I. Warhaftig, supra n. 15 above, 201–5. Even according to the legists, who invalidate this type of an agreement, should the agreement stipulate that a breach will bring attendant damage, or a penalty will be imposed in the wake of a breach, such an agreement will be valid. See R. Isaac Weiss (Israel, 1902–1989), Responsa *Minhat Yitzhak* 6:170:18. Second, given that tangibility is defined as something that possesses height, width, and depth (see R. Hai Gaon [Babylonia, 939–1038], *Sefer Mekah u-Mimkar*, Vienna ed., *Sha'ar* 2) and therefore a trade secret should be viewed as a "*davar sh'ein bo mamash*" nevertheless, based upon commercial practice (i.e., *minhag ha-soharim*), rabbinic legislation, or its recognition by civil law, it is deemed as something with tangibility. See R. Solomon b. Jehiel Luria (Maharshal, 1510?–1574) Responsa *Maharshal, siman* 36; Responsa *Mabit* 3:225; R. Abraham Zevi Hirsch b. Jacob Eisenstadt (Lithuania, 1813–1868) *Pithei Teshuva*, *Hoshen Mishpat* 212:1–2; R. Abraham David b. Asher Anschel Wahrmann (Poland, c. 1771–1840), *Kesef ha-Kedoshim*, ad loc.; *Netivot ha-Mishpat*, *Hoshen Mishpat* 201:1; R. Joseph ibn Lev (Turkey, 1505–1580) Responsa *Mahari ibn Lev* 1:46.

53 I. Warhaftig, n. 15 above, 174–77. Additionally, see Responsa *Hatam Sofer*, *Hoshen Mishpat* 1:23; Responsa *Minhat Yitzhak*, see n. 52 above. However, for the efficacy of a postemployment agreement not to compete, see Warhaftig, ibid.; Aaron Levine, *Moral Issues of the Marketplace in Jewish Law*, (NY: 2005), 139–74.

54 Roger Milgrim, *Milgrim on Trade Secrets*, Section 5.02 [1], (New York: 2007). Trade secrets are to be distinguished from the information that must be continuously used in the employer's business. Consequently, any knowledge and technical information learnt in the workplace can be appropriated by the employee and used in a future job. See R. Malchiel Tenenbaum (Poland, d. 1910) Responsa *Divrei Malkiel* 3:151; Rabbi Meir Arik (Poland: nineteenth century), Responsa *Imrei Yosher* 3:269.

55 Responsa *Torat Hayyim* 3:47.

56 B *Bava Batra* 22b; *Shulhan Arukh*, *Hoshen Mishpat* 386:3.

be distinguished from halakhic-legal—consequences to such behavior. A *bet din* has three options: it could grant an injunction demanding that an employee cease and desist from disclosing these documents, regardless whether these are letters or trade secrets; it could invoke a communal ban for the individual to be automatically shunned[57] until he desists or declares his willingness to compensate for any future damages;[58] or actually it can order him he to compensate the victim for any ensuing damages.[59] In short, disclosing professional secrets of one's employer serves as grounds for shunning of the employee, or compensatory tort damages assessed to the employee.

On what grounds does *halakhah* proscribe these nonconsensual takings? A contemporary rabbinic and legal scholar suggests that the protection of trade secrets rests on a privacy argument. Since *halakhah* recognizes some degree of privacy is a necessary condition for reinforcing one's own persona and dignity and a condition for the existence of many of our most meaningful social relationships, people have a right to be free from personal nonconsensual intrusions into their lives, including but not limited to trade secrets.[60] This scholar's line of argument has serious difficulties. First, there is no general obligation to refrain from infringing upon another's privacy.[61] Though there are situations in which the appropriation of information is halakhically improper just because it infringes upon someone else's privacy,[62] the disclosure of trade secrets is not one of them. In other words, privacy is justified

57 Whether the unlawful opening of a letter automatically labels the offender as socially shunned or serves as grounds for invoking a ban is subject to dispute. See Nahum Rakover, *Protection of Privacy in Jewish Law*, (Hebrew) (Jerusalem: 2006), 119–24.

58 *Shulhan Arukh*, *Hoshen Mishpat* 55:1, *Netivot ha-Mishpat* (*Hiddushim*) ad loc. 3; *Rema*, *Hoshen Mishpat* 386:3. And, in fact, decisors have invoked injunctions against individuals attempting to divulge professional secrets. See Responsa *Noda bi-Yehudah*, *Mahadura Tinyana*, *Hoshen Mishpat* 24; Responsa *Divrei Malkiel* 3:157.

59 Whether the offender must undertake an obligation to pay for ensuing damages by executing a bona fide halakhic agreement is subject to debate. See *Sha'ar ha-Mishpat*, *Hoshen Mishpat* 26:2.

60 Rakover, n. 57 above, 29–141, 149–52. Prof. Rakover argues that a seventeenth-century legist invokes a privacy argument as grounds for protection of a trade secret. However, upon review of the responsum, one will find that the privacy argument is advanced for other reasons. See R. Mordechai Ha-levi (Egypt: seventeenth century), Responsa *Darkhei No'am*, *Hoshen Mishpat* 38; Rakover, ad. locum, 150. For a similar perspective on the notion of privacy in *halakhah*, see Emanuel Rackman, "Privacy in Judaism," Midstream 28 (1982): 31; Norman Lamm, "The Fourth Amendment and Its Equivalent in Halakha," Judaism 16 (1967): 53.

61 Whereas a secular legal system offers right-based arguments to legitimate a right to privacy, when we are dealing with a duty-based system, such as the Jewish legal system, one justifies the duty rather than pointing to the right. See this writer's, "May One Destroy a Neighbor's Property In order to Save One's Life," in *Turim: Studies in Jewish History and Literature Presented to Dr. Bernard Lander* (Michael Shmidman, ed., 2007), 331–60. Consequently, we have formulated the privacy argument as a violation of a duty rather than as an assertion of a right.

62 Regarding mandating documentation production in the context of a bet din proceeding, see Rosh, Responsa *Rosh* 68:25; R. Joshua b. Alexander ha-Kohen Falk (Poland, c. 1555–1614) *Sema*, *Hoshen Mishpat* 17:15; *Netivot ha-Mishpat*, (*Bi'urim*), *Hoshen Mishpat* 17:6. Here again, the requirement illustrates, not a right to privacy, but the parameters of the obligation of rendering testimony. The absence of an obligation to submit documents in a particular case gives rise to a concomitant right of privacy. On one hand, the submission of documentation as testimony is a fulfillment of "*gemilut hesed*," (i.e., an act of kindness). See PDR 5, 132, 139–42; 7:316; Rabbi Zalman Nehemiah Goldberg (Israel, contemporary) *Lev ha-Mishpat*, vol. 1, 13. On the other hand, in a situation that such an act will not be beneficial, one has the right to retain a zone of privacy regarding personal matters. Cf. Itamar Warhaftig, "Clarification of Facts in a Trial by Violating the Privacy of the Individual," (Hebrew) *Mishpete Eretz* 209 (2004): 2 who conceptually follows Rabbis Rackman's, Lamm's, and Rakover's understanding of the role of privacy in *halakhah*. See n. 60 above.

as a means to promote individual autonomy, personhood, and feelings of intimacy.[63] The divulging of trade secrets does not involve the violations of intimate relationships and feelings usually associated with privacy.[64] A cursory review of the rabbinic sources indicates that an infraction of privacy is to be subsumed in a specifically defined halakhic-legal category of trespass and theft, rather than under a general notion of privacy.[65] Therefore, it is not surprising to find that disclosure of trade secrets entails the violation of a specific duty—namely, theft.[66]

May a victim of a breach of an agreement pursue a restitutionary claim to recover profits because of that breach?[67] R. Ezekiel b. Judah Landau (Czech Republic, 1713–1793), author of *Noda' Bi-Yehuda*, addressed the following scenario: A scholar authorized a publisher to print his own commentary at the margin of *Mishnayot*. After completing the printing, the publisher had destroyed the type forms used in the printing, but retained the typeset characters for a future printing of the publisher's own edition of *Mishnah*. By paying the stipulated amount for the printing of his commentary, though the actual characters belonged to the publisher, the scholar understood that any benefit the publisher derived from his work in the arrangement of the characters accrues to the scholar. On the other hand, the publisher claimed that, since he owned the selfsame characters, the scholar was not empowered to dismember the character layout and arrangement.[68]

63 Charles Fried, "Privacy," *Yale L. J.* 475, 477–78 (1968): 77; Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," in *Philosophical Law: Authority, Equality and Personhood*(ed. Richard Bronaugh, 1978), 147, 164.

64 However, in other contexts such as professional responsibility (e.g., rabbinic, mental health, and medical confidentiality) the notion of halakhically protecting feelings is recognized under the rubric of "evil speech" (i.e., *leshon ha-rah*). See J. David Bleich (New York, contemporary), "Survey of Recent Halakhic Periodic Literature, Rabbinic Confidentiality," *Tradition* 33 (Spring 1999), 54; Rakover, n. 57 above, 159–69.

65 J. David Bleich, *Contemporary Halakhic Problems* (NY: 1995), 307. Though from a dogmatic-conceptual perspective *halakhah* differs from American law (see n. 60 above), nonetheless, various eminent commentators equally contend that American law does not recognize a general right to privacy and argue that privacy rights are derivative. See H. J. McCloskey, "Privacy and the Right to Privacy," *Philosophy* 17, 31 (1980): 55; Judith Thomson, "The Right to Privacy," *Philosophy and Public Affairs*, 295, 312 (1975): 4; Richard Epstein, "Privacy, Property Rights and Misrepresentations," *Ga. L. Rev*. 455, 463–65 (1978): 12.

66 R. Chaim Pelagi (Izmir: nineteenth century), Responsa Hikekei Lev, 1, Yoreh De'ah 49; *Kesef ha-Kedoshim*, *Hoshen Mishpat* 183:4; R. Samuel Wosner (Israel, contemporary), Responsa *Shevet ha-Levi* 4:220; PDR 14:289, 292; R. Ya'akov Yeshayahu Bloi (Israel, contemporary), *Pithei Hoshen*, *Sekhiruth* 7: note 24.

67 In recent years, this issue has been the subject of some discussion regarding insurance law. See Menachem Slae, *Insurance in the Halakha*, (Tel Aviv: 1982), 128–34; J. David Bleich, "Survey of Recent Halakhic Literature," *Tradition* 52, 60 (1997): 31; Nahum Rakover, *Unjust Enrichment in Jewish Law* (Jerusalem: 2000); Itamar Warhaftig, "Insuring Another's Property," (Hebrew) *Shaarei Tzedek* 7 (5767), 99–106. The theory of efficient breach presumes unilateral termination by breach. It is within this context that we pose our question whether *halakhah* protects the disgorgement interest or not. In contrast, should the promisee respect the right of the promisor's right to opt for nonperformance, under such conditions whereby there exists mutual consent for termination there is no halakhic or moral reason to deny the promisor his gains. Under such an arrangement, the promisor knows the actual value the promise assigns for the contracted-for commodity and, by disclosure of this information, the parties can agree on an amount that the promisee will accept in lieu of performance of the agreement. Under such conditions, there would be no requirement to disgorge gains that were made possible by the breach.

68 Responsa *Noda bi-Yehudah*, *Mahadura Tinyana*, *Hoshen Mishpat* 24. Earlier treatments of this responsum in secondary literature fail to note the publisher's proprietary right in the typeset. See, for example, Nahum Rakover, *Copyright in Jewish Sources*, (Hebrew) (Jerusalem: 1991), 104; Jonathan Blass, *Unjust Enrichment* (Hebrew) (Jerusalem: 1991), 92; Aaron Levine, *Economic Public Policy and Jewish Law* (NY: 1993), 188. Cf. Responsa *Divrei Malkiel* 3:157, who equally understood that the publisher owned the type forms.

Invoking the Talmudic principle that, if the defendant derives benefit and the plaintiff sustained a loss (i.e., *zeh nehene ve-zeh haser-hayyav*), R. Landau opined that, because the publisher benefited from the scholar's work in the character layout, the publisher must compensate the scholar for the value of the benefit.[69] There exists an implied obligation that the beneficiary did not intend to cause loss to another without providing compensation. In other words, deriving benefit from a person's work mandates compensation.[70] In an employer-employee context, even if the actual working materials belong to the employer, the employee, by dint of investing time and energy, is entitled to compensation for his performance. Despite the publisher's proprietary right,[71] the employer must compensate the employee for his efforts. Failure to provide compensation entails an act of quasi-theft.[72]

The question is whether the misappropriation of a trade secret entitles the employer only to recover the value of the information or additionally requires the employee to disgorge any profits that were accrued by using this information. As we already observed, according to R. Landau, the scholar will be compensated for the value of the layout arrangement of the type forms; the publisher, however, will retain any accrued profits from using the arrangement. In other words, given that the scholar may have sold more copies of his work without the presence of competition by the rival publication, the publisher must compensate him for the loss of this business. The beneficiary, however, is not obligated to share his profits or disgorge them and give them to the owner (i.e., the scholar).[73]

Under what circumstances is the promisor who breached his employment agreement regarding confidentiality of trade secrets obligated to disgorge his profits? The *Mishnah* records a controversy between R. Yosi and other Sages about a person who rents a cow and lends it to a third party. While in the possession of the third party, it dies naturally. The opinion of the Sages is that the third party, who is liable for accidents, is obligated to pay the renter, and that, if the renter swears that it died a natural death, he is not obligated to pay the owner. In effect, the renter profits from a cow that belongs to someone else. R. Yosi demurs and exclaims, "How shall one engage in business with another person's cow? The [value of the cow] must be returned to its owner."[74]

69 Entitlement to the compensation is contingent upon the fact that the scholar lost potential revenue from his own edition due to the issuance of the publisher's newer edition.

70 One commentator on the *Noda bi-Yehudah* argued that Rabbi Landau's avowed position is compensation is due from benefiting from the publisher's property and therefore an untenable view. See *Hagahot ha-Baruch Ta'am*, Responsa *Noda bi-Yehudah*, 2: 35b. However, as indicated, our read of R. Landau's position is markedly different.

71 The suggestion has been advanced that compensation is derivative of the fact that the scholar has a partial proprietary right in the typeset arrangement. See Responsa *Divrei Malkiel* 3:157. R. Israel Trunk (Poland, 1820–1893), Responsa *Yeshu'ot Malko*, *Hoshen Mishpat* 22. *Noda bi-Yehudah*'s responsum does not belie such an understanding. Moreover, once the scholar is paid for his work, he relinquishes any ownership right. See Rosh, B *Bava Kamma* 9:14.

72 *Arba'ah Turim*, *Hoshen Mishpat* 371:10; *Bi'ur ha-Gra*, *Hoshen Mishpat* 363:14.

73 See also, Rabbi Abraham Samuel, Responsa *Amudei Esh*, 66b; Responsa *Divrei Malkiel*, 3:157.

74 M *Bava Metsi'a* 3:2; B *Bava Metsi'a* 35b. We are assuming that the owner did not authorize the lending of the cow to a third party. See *Sema*, *Hoshen Mishpat* 307:5; *Shakh*, *Hoshen Mishpat* 307:2

Though the *halakhah* is in accordance with R. Yosi's view,[75] decisors disagree whether the invoking of his position allows for profit sharing only for the disgorgement of profits.[76] The minority position in this matter is to permit profit sharing. For example, if a person *B* builds a house upon his neighbor *N*'s land and rents it to a third party *T*, in addition to *B*'s paying rent for using the land, any rental income received from *T* must be shared with *N*.[77] Invoking R. Yosi's position, the legist argues that the profit sharing results from the proprietary right of the landowner and the contractor. Similarly, if a tenant pays insurance premiums and the property is subsequently destroyed by fire, a minority of authorities opine that the insurance compensation is divided between the renter and the property owner.[78] The majority opinion, however, understands that invoking R. Yosi's view entails disgorgement of all profits.

In short, the disclosure of a trade secret may entail a breach of an agreement or the violation of a proprietary right. In other words, the resulting consequences of a disgorgement of profits is grounded either in a breach of a written agreement or a violation of a proprietary right. Adopting a property-based conception of trade secrets may lead to different outcomes than propounding an agreement approach.[79] Choosing between a property- and contract-based approach framework would define what information an employee has learned is protected. Under a contractual approach, any valuable information learned on the job would receive protection. In contrast, under a property conception, a trade secret claim will be scrutinized in light of information known in the industry in question, regardless of whether the employer believed it to be secret. A second matter where the clashing approaches could make a difference is regarding the grounds for liability of the former employee. Under the agreement approach, the former employer need not prove the secrecy of the information. Even if the information is readily available in the public domain, it is a breach of an agreement for the former employee to disclose knowledge gained by him in confidence, which is a violation of his fiduciary obligation not to use such information. Last, regarding the scope of liability for a disclosure of a trade secret, under a property-based view, the new employer, which knowingly uses the trade secret of the former employer, would be liable for use of the secret; under an agreement approach, however, the new employer, which has no agreement with the trade secret holder, would not be liable for use of the secret.

75 *Arba'ah Turim*, *Hoshen Mishpat* 307:5; *Shulhan Arukh*, *Hoshen Mishpat* 307:5.

76 The impression that one may draw from Professor Levine's presentation of R. Yosi's position is that in every situation the remedy is disgorgement of ill-gotten gains. See Aaron Levine, n. 68 above, 136–38. Our review of the topic suggests otherwise.

77 Rema, Hoshen Mishpat 375:7; Rabbi Akiva Eger (Germany: nineteenth century), *Hiddushe Rabbi Akiva Eger*, Hoshen Mishpat 375:7.

See also, *Hazon Ish*, *Hoshen Mishpat*, B *Bava Kamma* 22:5; R. Hanokh Agus, (Poland, 1860–1940), *Marheshet* 2:35; Jonathan Blass, n. 68 above, 92–93.

78 See *Pithei Hoshen*, *Sekhirut* 6:19, n. 44.

79 Conceiving a trade secret as a property right, which includes, most significantly, the right to exclude parties not in contractual privity, may lead to a different outcome than conceptualizing trade secret law as one based on a contractual obligation executed between the parties.

Conclusion

More than forty years ago, Moshe Silberg, a former justice of the Israeli Supreme Court, observed:

> Why should a man pay his debt or fulfill an obligation which he has undertaken? The Roman lawyers, as well as any modern lawyer, would be most surprised by such a question. It is clear, they would say, that the duty of payment of a debt is the correlative of the concept of ownership, and one cannot exist without the other. . . . In Jewish law . . . when a person refuses to pay his debt . . . the concern of the court is not the creditor's debt, his damages, but the duty of the debtor, his religious-moral duty. . . .[80]

Implicitly relying upon a Hofheldian analysis of rights and duties, Silberg argues that a statement about a right entails a statement about a duty and a statement about a duty entails a statement about a right.[81] Conceptually speaking, when dealing with a right-based system, one justifies the duty by pointing to the right; if one requires justification, it is the right that one must justify. When one is dealing with a duty-based system, such as the Jewish legal system, however, one must justify the duty and cannot do so by pointing to the right. Although on a jurisprudential plane there is a conceptual difference between Jewish and other secular legal systems, on a halakhic legal plane, there is no substantive legal difference between Jewish and other legal systems. Clearly, the Jewish legal system, similar to other legal systems, recognizes the notion of property rights. From a halakhic-conceptual perspective, however, we are dealing with two different systems. Jewish law focuses upon duties while others focus upon rights. During the last forty years, contemporary decisors of Jewish law, Jewish historians, law professors, and philosophers alike, have subscribed either wholeheartedly, or with certain reservations, to Silberg's analysis. His conclusion, however, that the Jewish legal system is duty-based has been affirmed by all.[82]

80 Moshe Silberg, "Law and Morals in Jewish Jurisprudence," *Harvard Law Review* 306, 312–13 (1961): 75, reprinted in Moshe Silberg, *Talmudic Law and The Modern State* (New York, 1973), 61, 68–69.

81 For a brief summary of the relevant jurisprudential literature, see Alan White, *Rights* (New York, 1984), 55–73. Compare Feinberg's suggestion that rights are logically prior to duties and serve as grounds for obligations in Joel Feinberg, *Social Philosophy* (NJ: 1973), 58, 62; see also Phillip Montague, "Two Concepts of Rights," Philosophy and Public Affairs 372–73 (1980): 9. Implicit in this understanding of the relationship between rights and duties is the notion that it makes a difference which derivative is from which. See Ronald Dworkin, *Taking Rights Seriously* (London, 1979), 171; Jeremy Waldron, *The Right to Private Property* (London, 1988), 69–73. In our presentation, we are focusing upon the jurisprudential, rather than the practical, differences between the two legal systems regarding duties and rights.

82 J. David Bleich, *Contemporary Halakhic Problems* (New York, 1995), 307; Michael Broyde, "Human Rights and Human Duties in the Jewish Tradition" in *Human Rights in Judaism: Cultural, Religious and Political Perspectives* (Michael Broyde and John Witte eds., 1998), 273–82; Haim Cohn, *Human Rights in Jewish Law* (New York, 1984); Robert M. Cover, "Obligation—A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 65-74 (1987): 5; Menachem Elon, *Jewish Law* (Philadelphia, 1994), 117–19; Martin Golding, "The Primacy of Welfare Rights," *Social Philosophy and Policy* 119 (1984): 1; Isaac Herzog, *Main Institutions of Jewish Law*, vol. 1, (London, 1936), 46; Aaron Kirschenbaum, "The Good Samaritan and Jewish Law," *Dine Israel* 7, 15-18 (1976): 7; Berachyahu Lifshitz, "Shetar and Arevut, (Hebrew) in *Memorial Volume to Gad Tedeschi* (Jerusalem, 1995), 35–39; David Novak,

Our study has highlighted the dynamics of the halakhic-moral and halakhic-legal obligation to keep a promise. To wit, *halakhah* as a duty-oriented system mandates that under certain conditions in cases of a breach of an agreement, a promisor must disgorge all of his ill-gotten gains.

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