The Role of Detrimental Reliance in the Law of Obligations: A Comparative Analysis

By

A. Yehuda (Ronnie) Warburg

1. American Law. 2. Halacha. 3. Concluding Remarks.

The purpose of this analysis is to understand the role of detrimental reliance in Halacha and American law of obligations in general, the doctrine of promissory estoppel in particular, and the halachic law of obligations and torts.

In this essay, we first review the state of American law and ask: Does the law recognize detrimental reliance and under which conditions does the law impose liability for it? Next, we explore how halacha addressed this issue and analyze the halachic grounds for such liability.

1. AMERICAN LAW

A review of the legal scholarship regarding promissory estoppel leaves one with the impression that either the rule is alive and well, waning or dying. In 1974, pronouncing its demise in general and the death of reliance in particular, Grant Gilmore wrote,[1] "'contract' is being absorbed into the mainstream of 'tort'." In effect, from the perspective of contract law, recovery is denied even though reliance is present.

In 1985, reaffirming its prominence of contract law in general and stating that promissory estoppel has been used to enforce promises when the formality of a bargain was absent in particular,

1 GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974).See also P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 771-778 (1979); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 52-54 (1981); Edward Yorio & Steven Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991); James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547 (1995); Randy Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996); Alan Schwartz & Robert Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661 ,671 (2007).

Farber and Matheson contended,[2] "In our view, the expansion of promissory is not, as some have argued, proof that contract is in the process of being swallowed by tort. Rather, promissory estoppel is being transformed into a new theory of a distinctly *contractual* obligation."

Seven years later, arguing that the doctrine of promissory estoppel has outlived its usefulness, Professor Jay Feinstein wrote,[3] "...promissory estoppel is no longer an appropriate doctrine.... Indeed, we ought to abandon not only promissory estoppel but also the framework of contract thinking that has given it vitality...".

Five years later, Sidney DeLong & Bob Hillman disputed the significance of the doctrine, claiming that it is unimportant due to the failure of most courts to embrace it and that it was[4] "a revolution that wasn't".

Challenging this view, Prof Juliet Kostritsky argued in 2002 that it is too soon to proclaim the demise of promissory estoppel and that the doctrine remains a vital theory in contract law.[5]

Subsequently, based on three hundred promissory estoppel cases decided between 1981 and 2008, Prof Marco Jimenez suggested in 2010 that this doctrine is a much more vital theory of recovery than has previously been presented and its importance will continue to grow in the coming decades.[6]

The diverse and conflicting scholarship surrounding the significance of promissory estoppel dictates that we present the extensive case law relating to the doctrine of promissory estoppel. The above generalizations must be tested and, if necessary, modified or abandoned in light of court decisions that were handed down over the past 75 years.

Before delving into these judicial opinions, we need to understand the building blocks of classical contract law. The threshold question is: which promises are enforceable and which are not? The law is naturally reluctant to afford remedy for every promise made. A promise to comply with an offer is not enforceable unless a consideration had been given by the promisor. For example, if I agree to accept $1,000 in full settlement of a debt of $1,500, the promise to forgo $500 is not binding since there is consideration for it. However, if I accept $1,000 and a pen, the latter may be

2 Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'*, 52 U. CHI. L. REV. 903 ,905 (1985). See also Juliet P. Kostrisky, *A New Theory of Assent-Based Liability Emerging under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 ,907 (1987); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 586 (1998).

3 Jay Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303,304 (1992).

4 Sidney DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch 22*, 1997 WIS. L. REV. 943.

5 Juliet P. Kostrisky, *The Rise & Fall of Promissory Estoppel or is Promissory Estoppel Really as Unsuccessful as Scholars Say it is: A New Look at the Data*, 37 WAKE FOREST L. REV. 101 (2002).

6 Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010).

consideration for a promise to forgo $500, for while consideration must be of some value, it needs not approximate the value of $500. In other words, there is a bargain or exchange factor in contracts – i.e., a pen – which is given by the promisor and is sought by the promisee.[7] The consideration – i.e., the pen – induces the promise-making and the promise induces the furnishing of the consideration. As Peter Benson noted,[8] if the fundamental role of consideration is that it fulfills the functions of form, the fact that parties expressly treat something as a consideration for the shared reason of giving legal effect to their intentions should be sufficient or at least relevant to the law's enforceability.

Though the enforcement of non-bargain promises could diminish the supply of promises and though the adoption of this policy will effectively be economically inefficient,[9] this bargain requirement limits the scope of the promisor's liability. In effect, it preempts the option of binding the promisor when the promise relies on his detriment but that reliance is not at the basis of what induced the promisor to make the promise.[10] In other words, it is the existence of a contractual obligation that justifies reliance. The presence of reliance does not guarantee that the reliance will be protected. The commitment must have been bargained for.

In bold contrast to focusing on the bargain principle, the reliance principle was introduced in 1936 by Fuller and Purdue as the underlying purpose of contract law.[11] If consideration is lacking, the individual who prompted another to rely on a promise should compensate the latter for any injury to his person or property. In short, in the absence of consideration, reliance that is foreseeable, reasonable, and substantial mandates the enforcement of the promise if injustice cannot be avoided. This "not-bargained-for" reliance – known as promissory estoppel – is embodied in Section 90 of the Restatement (Second) of Contracts.[12] The question hotly debated in legal scholarship is whether promissory estoppel is an alternative ground for identifying the existence of a bargain as deserving enforcement,[13] or whether it offers independent ground for tort-like conception of contractual recovery based on detrimental reliance – i.e., reliance enforcement?[14]

7 RESTATEMENT (SECOND) OF CONTRACTS, §71 (1) (1981).

8 Peter Benson, *The Unity of Contract Law, in* THE THEORY OF CONTRACT LAW 118, 167 (Peter Benson ed., 2001).

9 Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977); Charles Goetz & Robert Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1304-1305 (1980).

10 Kostrinsky supra note 2, at p. 964.

11 Lon L. Fuller & William Perdue Jr., *The Reliance Interest in Contract Damages (pts. 1 and 2)*, 46 YALE L.J. 52, 373 (1936-1937).

12 RESTATEMENT (SECOND) OF CONTRACTS, §90 (1981).

13 Jurisprudentially, the importance of reliance can be understood in two ways. The execution of a contract allows "individuals to bind themselves to a future course of conduct, to make it easier for others to arrange their lives in reliance on a promise". See Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 MICH. L. REV.489, 497 (1989). In other words, looking

In effect, whether one focuses on the promise or on the reliance depends on one's interpretation of Section 90 of the Restatement (Second) of Contracts. The section reads: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person, and which does induce such action or forbearance, is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be as limited as justice requires".

The applicability of Section 90 resonates in numerous holdings that articulate the building blocks of promissory estoppel. Regardless of whether promissory estoppel is viewed as a consideration substitute or a form of relief for instances of detrimental reliance, for the past 60 years, many courts basically specified the three identical elements that had to be there before invoking this rule: (1) a clear and definite promisor should reasonably foresee what could induce reliance; (2) a change of position in reliance on the promise; and (3) the resulting injury.[15]

In other words, do we attempt to emphasize that there has to be a clear and definite promise to trigger Section 90 and invoke promissory estoppel as a consideration substitute? And if a breach of this agreement occurs, are specific performance or expectation damages forthcoming, or do we focus on the portion of Section 90 whereby it is the promisor's obligation to prevent reasonably foreseeable harmful reliance and downplay the need for a clear and definite promise?[16]

In effect, if we adopt the latter understanding of the doctrine of promissory estoppel, then even in the absence of a definite promise, the inducement of detrimental reliance suffices to award reliance damages. Stated differently, if promissory estoppel is construed as a consideration

at reliance through the lens of economic efficiency considerations. Alternatively, "if there is a general principle that one ought not to cause harm to others, that might be enough to justify some sort of rule against [agreement-breaking]". See Craswell, id., at p. 499. In effect, reliance is to be viewed through the prism of a harm theory for honoring an agreement.

14 Kostrinsky, supra note 2; Stanley Henderson, *Promissory Estoppel & Traditional Contract Doctrine*, 78 YALE L.J. 343, 346 (1969); Yorio & Thel, supra note 1, at p. 111,112,152; Farber & Matheson, supra note 2, at p. 903, 945.

15 Schafer v. Fraser, 290 P.2d 190, 202 (Or. 1955); Miller v. Lawlor, 66 N.W.2d 267, 272, 274 (Iowa 1954); Overlook v. Central Vermont Public Service Corp.,237 A.2d 356, 358 (Vt. 1967); Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 436 S.W.2d 889, 896 (Tex. 1969); Talley v. Teamsters, Chauffeurs, Warehousemen & Helpers, 357 N.E.2d 44, 47 (Ohio 1976); Klinke v. Famous Recipe Fried Chicken, Inc., 616 P.2d 644, 646 (Wash. 1980); English v. Fischer, 660 S.W.2d 521 (Tex. 1983); Powers Construction Co. v. Salem Carpets, Inc., 322 S.E.2d 30, 33 (S.C. Ct. App. 1984); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985); Mark Twain Plaza Bank v. Lowell H. Listrom & Co., Inc., 714 S.W.2d 859, 863 (Mo. Ct. App. 1986); Quake Construction, Inc. v. American Airlines, Inc., 565 N.E.2d 990, 1004 (Ill. 1990); Black Canyon Racquetball Club, Inc. v. Idaho Fist Nat'l Bank, 804 P.2d 900, 911 (Idaho 1991); Chem- Tek, Inc. v. General Motors Corp., 816 F.Supp. 123 (D. Conn. 1993).

16 National Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889-890 (Iowa 1989); Budget Marketing, Inc. v. Centronics Corp., 927 F.2d 421, 427 (8th Cir. 1991).

substitute, the purpose of awarding expectation damages is to restore the promise to the position it would have occupied had the promise been kept in full; and if promissory estoppel is understood as protecting detrimental reliance, then the goal of reliance damages is to restore the promisee to the position it would have occupied in the absence of contractual agreement by reimbursing for losses that may have been incurred.[17] Stated differently, an individual may reasonably and foreseeably rely on a promise that is not sufficiently clear or definitely enforceable.[18]

For scholars such as Yorio and Thel,[19] despite the existence of Section 90 of the Restatement, courts in actuality are enforcing promises that are serious manifestations of intent rather than reliance "as justice requires". Yet, here again, an exhaustive and systematic review of case law should uncover the parameters of the doctrine of promissory estoppel.

Though some scholars, as we have mentioned, surveyed the state of American law during certain periods regarding the significance of the doctrine of promissory estoppel, the most comprehensive examination was undertaken by Prof Eric Holmes who summarized a wealth of judicial opinions that emerged from every state jurisdiction between the 19th century and the 1990's.[20]

In his seminal essay, Holmes expounded on the various types of promissory estoppel that emerged throughout America's legal history. Without addressing the gamut of the various promissory estoppels, we will ask: Is this doctrine a substitute for consideration, or is it an independent claim for relief based on detrimental reliance?

Over the past 75 years, numerous jurisdictions employed promissory estoppel in situations where consideration was absent.[21] In one case, for example, a union resolution assured a union

17 Fuller & Perdue, supra note 11, at p. 54; Richard Craswell, *Expectation Damages and Contract Theory Revisited* 28-33 (Stanford Public Law, Working Paper, No. 925980, 2006).

18 Bixler v. First National Bank, 619 P.2d 895, 898 (Or. Ct. App. 1980); Franklin v. Stern, 858 P.2d 142, 145 (Or. Ct. App. 1993).

19 Yorio & Thel, supra note 1, at p. 161-166, 136-137.

20 Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLIAMETTE L. REV. 263 (1996).

21 Edmonds v. County of Los Angeles, 255 P.2d 772 (Cal. 1953); Miller v. Lawlor, 66 N.W.2d 267, 272-274 (Iowa 1954); Southern Cal. Acoustics Co. v. C.V. Holder, Inc., 456 P.2d 975, 979 (Cal. 1969); School District No. 69 of Maricopa County v. Altherr, 458 P.2d 537, 544 (Ariz. Ct. App. 1969); Clifton v. Ogle, 526 S.W.2d 596, 602 (Tex. Ct. App. 1975); Roseth v. St. Paul Property and Liab. Ins. Co., 374 N.W.2d 105, 110-111 (S.D. 1985); Smith v. City of San Francisco, 275 Cal. Rptr. 17 (Cal. Ct. App. 1990); Bill Brown Construction Co. v. Glen Falls Ins. Co., 818 S.W.2d 1 (ten. 1991); Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, 804 P.2d 900, 907 (Idaho 1991); Foley Co. v. Warren Eng'g Inc., 804 F.Supp. 1540 (N.D. Ga. 1992); B & W Glass, Inc. v. Weather Shield Mfg., Inc. 829 P.2d 809 (Wyo. 1992); Lavoie v. Safecare Health Serv., Inc., 840 P.2d 239, 249 (Wyo. 1992); Winspear v. Boring Co., 880 P.2d 1010 (Wash. Ct. 1994); Cohen v. Wolgin, 1995 WL 33095, at 5 (E.D. Pa 1995). For dozens of other cases in almost all jurisdictions during the past 75 years subscribing to promissory estoppel as a substitute for consideration, see Holmes, supra note 20.

member that he would receive retirement benefits if he remained with the union and declined any outside offers of employment. After the union reneged on that assurance, the court held that the assurance was equivalent to a promise and therefore awarded the plaintiff with expectation damages.[22] In another case, after signing a standard contract for serving as an agent for a life insurance company, the plaintiff became concerned about a provision that addressed the termination of his policy. An insurance company officer orally assured the plaintiff that only fraud or a breach of a fiduciary duty could serve as grounds for policy termination. Subsequently, having encountered financial troubles, the insurance company terminated the plaintiff's policy. Plaintiff sued and the court awarded expectation damages based on the oral promise that circumscribed the grounds for the termination.[23] In an employment case, the doctrine of promissory estoppel as a consideration substitute is applicable where there is an oral employment-at-will agreement, which has been violated.[24] In a 1991 decision, though the promise was not sufficiently definite to constitute an offer in contract law, circumstances demonstrated that the commitment was sufficient and that the promisee relied on the promisor's words. In reply to a trucker's request for full insurance coverage for cargo, an insurance agent promised unequivocally that he would extend full coverage. After the trucker was involved in an accident that damaged some of the cargo , the insurance company denied coverage. The trucker sued and was awarded damages based on the agent's oral assurance.[25] Likewise, a patient persuaded a nurse to quit her hospital job and nurse him at his home for the remainder of his life, promising to build a house and deed it to her. The nurse kept her promise but the patient reneged on his. Despite the absence of consideration, the court held that the nurse was entitled to damages.[26]

Similarly, rather than focusing on the promise as an element of mutual assent, and therefore a substitute for consideration, courts have, over the same span of time, endorsed promissory estoppel grounded in the tort of detrimental reliance wherein it is the promisor's obligation to prevent or refrain from causing harmful reliance, which was reasonably foreseeable by the promisor.[27] For

22 Van Hook v. Waiters Alliance Local 17, 323 P. 2d 212, 220 (Cal. Dist. Ct. App. 1958)

23 Litman v. Massachusetts Mutual Life Insurance Co., 739 F. 2d 1549 (11th Cir. 1984)

24 Mers v. Dispatch Printing Company, 483 N.E.2d 150, 155 (Ohio 1985)

25 Bill Brown Construction Co. v. Glens Falls Ins. Co., 818 S.W.2d 1 (Tenn. 1991)

26 Luther v. National Bank of Commerce, 98 P.2d 667 (Wash. 1940).

27 Jackson v. Kemp, 365 S.W.2d 437 (Tenn.1963); Wheeler v. White, 398 S.W. 93, 97 (Tex. 1965); Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 190 N.W.2d 71, 75 (Minn. 1971); Sanders v. Arkansas-Missouri Power Co., 593 S.W.2d 56 (Ark. Ct. App. 1980); Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784 (Cal. Ct. App. 1980); Bixler v. First National Bank of Oregon, 619 P.2d 895 (Oregon Ct. App. 1980); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Green v. Interstate United Management Servs. Corp., 748 F.2d 827 (3rd Cir. 1984); Eavenson v. Lewis Means, Inc., 730 P.2d 464 (N.M. 1986); Mers v. Dispatch Printing Co., 529 N.E.2d 958 (Ohio Ct. App. 1988); Rosnick v. Dinsmore, 457 N.W.2d 793, 800 (Neb. 1990); Lehman, 857 P.2d 455 (Colo. Ct. App. 1992); Franklin v. Stern, 858 P.2d 142, 145 (Oregon Ct.

example, a plaintiff-franchisee was promised that his sublease of property leased to a franchisor would be renewed after its termination date, provided that the franchise remains financially sound. When the defendant later refused to renew the lease, arguing that he would never have executed the franchise agreement had he known that the defendant would renege on his promise to renew the lease, reliance damages were awarded by a New York court.[28] In another holding, a plaintiff bank had loaned money to a person who furnished his life insurance policy as collateral. The defendant insurer orally promised to inform the plaintiff bank when the borrower defaults on paying his premium, but failed to do so. Relying on Section 90 of the Restatement, a Minnesota court awarded reliance damages to the plaintiff-bank.[29] In an employment case, which is hardly contractual, plaintiffs sought enforcement of a former employer's alleged oral promise to pay a bonus, invoking the doctrine of promissory estoppel. Since a California court was unable to verify that such a promise had been made, recovery for reliance damages was denied.[30]

Finally, one of the most oft-cited cases (*Hoffman v. Red Owl Stores Inc.*[31]) stands for the enforcement of a promise i.e., pre-contractual reliance that the plaintiff would receive a franchise as an investment. Detrimentally relying on a series of promises that the defendant would grant him the franchise, a plaintiff sued when the franchise failed to materialize. Despite the fact that the parties neither made a preliminary agreement governing the negotiation process nor agreed to various terms material to the creation of a contract, a Wisconsin court employed promissory estoppel in order to award reliance damages to the plaintiff.[32]

In a more recent Wisconsin case,[33] a plaintiff lawyer pledged a loan to finance a new restaurant in exchange for a promised partial ownership interest. Thinking that he was firmly promised a share and contingent on honoring his pledge, the plaintiff provided business and legal advice as needed. Eventually, the defendant found alternative financing sources and cut the plaintiff out of the deal. Relying on the defendant's promise, the plaintiff sued him in court. Invoking Hoffman v. Red Owl Stores, the court emphasized that defendant's actions must have induced detrimental reliance.

App. 1993); Brook v. Hanover Trust Co., 818 F.Supp. 1152 (N.D. Ill. E.D. 1993); Tierney v. Capricorn Investors, 592 N.Y.S.2d 700 (N.Y. App. Div. 1993). For dozens of other cases in almost all jurisdictions during the past 75 years subscribing to promissory estoppel as a contract-tort doctrine of detrimental reliance, see Holmes, supra note 20.

28 Trilogy Variety Stores v. City Products Corp., 523 F.Supp. 691 (S.D. N.Y. 1981).

29 Bank of Commerce v. Employers' Life Insurance Co, 381 N.W.2d 164 (Minn. 1979).

30 Division of Labor Law Enforcement v. Transpacific Transportation Co., 69 Cal. App. 3d 268, 137 Cal. Rptr. 855 (1977).

31 Hoffman v. Red Owl Stores, Inc, 26 Wis.2d 683, 133 N.W.267 (1965).

32 For recent legal commentary regarding this case, see Gregory Duhl, *Red Owl's Legacy*, 87 MARQ. L. REV. 297 (2003); Robert Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007); William Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010).

33 Cosgrove v. Bartolotta,150 F.3d 729 (7th Cir.1998).

It is not enough to simply argue that a promise has been made. The plaintiff must demonstrate that his reliance on that promise caused him financial harm. In this case, the pledge was not the cost to the plaintiff. Acknowledging that there was no contract stipulating that plaintiff would receive a partial ownership interest in the company in exchange for his investment and that it was not clear that the reliance was extensive, the court awarded expectation damages based on the fair market value of the promised ownership interest.[34]

Invoking reliance theory of promissory estoppel raises the problem of distinguishing between reasonable or foreseeable and unreasonable or unforeseeable reliance. As Prof Randy Barnett aptly observed,[35] "No contractual theorist thinks that any and all detrimental reliance justifies a promissory estoppel claim. In other words, in addition to a promise, the plaintiff needs 'reliance something' to get a recovery under any reliance theory of promissory estoppel. Whatever that 'something' is, it cannot be reliance, which is present in any event. Thus, all reliance theories of promissory estoppel require appeal to some factor apart from reliance to distinguish enforceable promises (which are accompanied by reliance) from unenforceable ones....".

The applicability of the reliance doctrine is a vehicle for acknowledging the existence of a relationship of trust between promisor and promisee.[36] Though the word "trust" appears in neither Section 90 nor in the foundational elements of the rule of promissory estoppel[37], trust plays a pivotal role in judicial decisionmaking.

Distinguishing between reliance and trust, Prof John Chung noted:[38]

> "The focus on reliance is exclusively about the *ex post* judicial inquiry as to whether the promisee's conduct was reasonable. In other words, the examination of reliance is about a court reviewing a record after the fact. At that point, the individual has been removed from the process; the process has been thrown into the hands of the lawyers and the court. The act that constituted the reliance has already occurred, and the court determined whether such an act was reasonable under an objective standard.
>
> An examination of trust focuses on a different moment in time and a different stage in the process. It is about the *ex ante* decision made by the individual before reliance

34 Said conclusion assumes that you receive an award of expectation damages for a claim of promissory estoppel in Wisconsin. For differing opinions regarding this question, see *Hoffman v. Red Owls, Inc.*, supra note 31; Kramer v. Alpine Valley Resort, Inc., 108 Wis.2d 417, 321 N.W. 2d 293, 294 (1982); Werner v. Xerox Corp., 732 F.2d 580, 585 (7th Cir. 1984).

35 Randy Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413, 1423-1424 (1999).

36 Jay Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1386.

37 See supra note 15.

38 John Chung, *Promissory Estoppel & the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 38, 51 (2008).

> occurs... It is the point when the promisor, alone in her conscience, decides whether to engage in conduct that objectively constitutes reliance. There is no judicial involvement at that point, and no external inquiry imposing objective, judgmental standards".

Clearly, there may be a relationship of trust between promisee and promisor. Yet, as life experiences have shown, some promises are sincere and well-intentioned while others are deceptive and fraudulent. Moreover, whereas in a primitive economy marked by interpersonal ties there develops trust, in our free-market economies today we deal with people who are strangers to us and the development of trust may be an elusive goal. On the other hand, places of employment and markets of goods, insurance, investment, and credit can exist only when relationships are founded on trust. Therefore, the law needs to intervene and establish which promises are legally enforceable. As such, a promisee may rely on a promise even though he does not trust the promisor because he knows that the law enforces the promise. It is not surprising, therefore, to find numerous holdings where plaintiffs prevailed on promissory-estoppel claims due to the existence of relationships of trust based on ongoing social, business, employment, or fiduciary ties between the parties.[39]

In short, a cursory glance at many decisions made over the past 75 years reveals that promissory estoppel is not only far from extinct, but has developed in depth and breadth, and indeed deserves to be addressed in contract law hornbooks. Among the various roles of this doctrine, promissory estoppel remains as a relief for detrimental reliance.

2. HALACHA

Does halacha[40] espouse a theory of detrimental reliance as an operative doctrine of halachic obligations?

The efficacy of a promise is memorialized in a section of one of the restatements in the following fashion:[41] When one conducts and concludes commercial transactions using words only

39 See Kostritsky, supra note 2, at p. 923-929. However, only social ties that result in substantial economic reliance may be eligible for invoking promissory estoppel. See Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898); Greiner v. Greiner, 293 P. 759 (Kan. 1930); Atria v. Vanderbilt Univ., 142 F. App'x 246, 256-257 (6th Cir. 2005).

40 Many of the sources of halacha for our presentation have been culled from the following works: BARUCH KAHANE, HOK LEYISRAEL: AREVUT (Guarantee Law) 6-7, 78-90, 438 ,441, 445, 449 515, 518, 553 (Hebrew, Jerusalem, 1991); ITAMAR WARHAFTIG, HITCHAYIVUT (OBLIGATIONS) 237-238, 429-438 (Hebrew, Jerusalem, 2001); MICHAEL WYGODA, HOK LEYISRAEL: SHEKIRUT (Hire & Loan) 171 (Hebrew, Jerusalem, 1998).

41 Shulhan Aruch, Hoshen Mishpat 204.7, Rema, Hoshen Mishpat 204.11. The translation has been culled from STEPHEN PASSAMANECK, THE TRADITIONAL JEWISH LAW OF SALE 120-121 (1983).

(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 (price) pledge given: Whoever withdraws from this type of transaction, buyer or seller, is deemed untrustworthy.

> "GLOSS: Even though in a transaction that is conducted and concluded by means of words only, where no money is tendered, one may withdraw from such a transaction... a person should stand by his word even though no act of acquisition has been performed, and only words have been exchanged by the parties...".

In the absence of a written commitment accompanied by the execution of *kinyan* (i.e., a symbolic act of transfer) and the delivery of payment, should either party renege on the oral commitment, it would be is labeled as a *mehusar amana* (lit., untrustworthy). ...the community may shame him by announcing,[42] "Hear ye, hear ye: this person refuses to keep his word.... The remnant of Israel shall not commit sin, nor speak lies (Zephaniah 3:13); for this man is a liar and has proclaimed himself reneger".

In short, halacha views promise-keeping as aligning oneself with a religious-moral norm, namely the obligation to keep one's word. One is duty-bound to keep one's promise regardless of whether it induces reliance or not.

Independent of the duty to keep one's promise, is promise-keeping based on the fact that the promisor caused harm by inducing the promisee to detrimentally rely on the promise? Is the violation of a reliance-based duty actionable in a *beth din* (court) or is it akin to a promissory obligation, a toothless tiger, providing no *beth din* relief?

Answering this question, the Talmud teaches us,[43] "If someone gives money to his friend to serve as his agent to proceed and purchase wine for him during the season when the price is low, and the agent was negligent and failed to make the purchase, the law (says) that he has to pay the low price for wine...".

Here, the promisee relied on the promisor and incurred losses because the promisor failed to comply with his commitment to purchase the wine. Despite the absence of a *kinyan*, Talmud concludes that remuneration is mandated due to the financial loss incurred. Prior to affording monetary relief in a case of an induced-reliance obligation, many authorities including Rabbeinu Tam, Ri, Ran, Nimmukei Yosef, Rosh, Ramban, Maharach Ohr Zarua, Mordechai, Rashba, Shulhan Arukh, Maharash Enzel, and Maharashach require that when he accepts the assignment, the

42 Teshuvot Maharam Mintz 1.160; Mishpat Shalom, Hoshen Mishpat 204.
43 Bava Metzia 73b.

promisor agrees that the promise would be reimbursed for damages, including profit loss.[44] Even in case of an express stipulation by the promisor that he is liable for failing to keep his promise, Rashba, Maharam of Rothenberg, Maharam of Padua, Bah, Yam Shel Shlomo, Shakh, Radbaz, Nahalat Shiva, and Shoeil u-Meishiv contend that any such loss is to be subsumed either in the category of "*grama*" which is indirect harm and therefore does not generate monetary relief[45] or, given that it isn't definite, if profit would have been yielded, there is an exemption from liability.[46] The implication of this Talmudic ruling as understood by the said sages is that the promisee's reliance on the promisor's oral commitment does not engender monetary liability.[47]

Nevertheless, R. Aaron ben Joseph Halevi, aka Ra'ah, stated:[48] "Here (*Bava Metzia* 73b), even though the agent did not contractually agree to assume liability [for failure to fulfill his promise], because 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 the agent not promised to do so, and the principal relied on him and gave him the money based on that reliance, for that reason the agent is liable to pay the loss caused by the reliance on his promise".

As explained elsewhere,[49] "Ra'ah's position contains four propositions: First, one does not require an agreement that explicitly stipulates that consequential damages are recoverable. Second, the proposition is that in the absence of such an agreement, by giving money to the agent to effectuate wine purchase at a location where the selling price was lower than others, the promisee relied on the promisor's compliance. Third, the words of the promisor serve as the act of inducing

44 Rabbeinu Tam, Bava Metzia 74a; Ritva in the name of Ri,Shitah Mekubezet 73b, *sub verbo*. 'hi'; Ran and Nimukei Yosef, Bava Metzia 104a; Piskei Harosh, Bava Metzia 9.4,7; Hiddushei Haramban, Bava Metzia 104a; Maharach Ohr Zarua cited by Teshuvot Maharam of Rothenberg, Prague Ed. 298, 921; Mordechai, Bava Kama 9.114-115; Hiddushei ha-Rashba, Bava Metzia 73b; Beth Yosef in the name of the Rashba's students, Beth Yosef 328.2; Shulhan Aruk Hoshen Mishpat 328.2; Teshuvot Maharash Enzel 6.62; Teshuvot Maharshach 1.167

45 Teshuvot Harashba 3.227, 7.187,4.20; Teshuvot Maharam of Rothenburg 821; Teshuvot Maharam of Padua 62; Bah, Tur Hoshen Mishpat 61.7; Yam shel Shlomo, Bava Kama 9.30; Shakh, Hoshn Mishpat 292.15; Teshuvot Haradvaz 399; Teshuvot Nahalat Shiva 65; Teshuvot Shoeil Umeishiv, Mahadura Kama, 3.56.

46 Shakh, Hoshen Mishpat 61.10.

47 Piskei Harosh, Bava Metzia 5.69; Mordechai, Bava Kamma 114.115; Sha'ar Hamishpat 176.4; Hazon Ish, Bava Kama 22.1; Mishpat Shalom Hoshen Mishpat 176.4.

48 Hiddushei Haritva Hahadashim, Bava Metzia 73b. Though numerous decisors identify the authorship of this position with R. Yom Tov b. Abraham Ishbili (Ritva), he cited the teaching of Ra'ah, his teacher. The text identifies the view with "*moreh ha-rav*" (i.e., his rabbinical teacher). Usage of this appellation refers to Ra'ah. See Issac Brand, *Hanosei Venotein Bedevarim: Between Contractual Obligation & Tortuous Reliance*, (Hebrew) 5 MEHKAREI MISHPAT24, notes 107,122-124 (2008).

49 Ronald Warburg, *The Theory of Efficient Breach: A Jewish Law Perspective*, *in* THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 340,347-348 (Aaron Levine ed., 2010).

reliance by the promise. More importantly, the fourth proposition in the context of Ra'ah's posture 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 halachically binding on the promisor and enforceable in a case of breach.[50]

It is the halachic norm of *arevut* i.e., the guarantee rather than the halachic norm of promise-keeping that endows validity to the agreement. Conventionally, should a borrower default on his loan, the *arev* (guarantor) undertakes to pay the lender. Here, we apply the institution of *arevut* in a non-loan transaction to transform a promissory obligation into an halachically and legally enforceable duty. The breach of the promissory obligation is contingent upon the fact that the promisor induced someone to rely on his promise. Just as a guarantor's obligation to compensate is created by the trust that is engendered by the creditor's conviction that the guarantor will compensate him in case the borrower's default on a loan, should an individual be negligent and fail to purchase wine at a lower price for another person as promised, akin to an *arev*, he is liable to indemnify him for any ensuing loss.[51] Since the Ra'ah's time there have been quite a few authorities who subscribed to his approach of a promissory obligation based on the detrimental reliance grounded in *hilkhot arevut* and awarded damages for a loss of profits.[52]

In the absence of an explicit agreement between the parties, it is the engendered trust that serves as the vehicle for obligating the promisor to comply with his promise. In fact, pursuant to some authorities, including notably Ra'ah, the benefit from the trust is construed as a *ma'aseh kinyan* i.e., a symbolic act of firm resolve to effectuate the agreement and akin to money that is conventionally transferred from one party to another.[53] However, others demur and argue that it is as if the

50 KAHANE, supra note 40, at P. 78-90. And in order to be granted relief some poskim require that the profit loss must be clear and definite. See Ravyah cited by Mordechai, Bava Kama 125; Sefer Ravya, Deblitsky ed. No.957; Bet Habehirah, Bava Metzia 69a, *sub verbo*. 'pirshu'; Netivot Hamishpat 183.1;Teshuvot Hatam Sofer, Hoshen Mishpat 178; Hazon Ish, Hoshen Mishpat 22.2.

51 Hiddushei Harashba, Kiddushin 6b; Hiddushei Haritva, Kiddushin 7a; Mordechai, Bava Metzia 370; Teshuvot Maharik, Shoresh 181; Teshuvot Imrei Yosher 2.55; Be'ur Hagra, Hoshen Mishpat 209.32; Derisha, Hoshen Mishpat 291.2; KAHANE, supra note 40, at p. 6, 441.

52 Ravya, supra note 50; Ra'avad, Shita Mekubezet, Bava Metzia 73b; Netivot Hamishpat 176.31, 183.1, 304.2,306.6,333.14; Teshuvot Imrei Yosher 1.86; Teshuvot Avnei Nezer, Evan Ha-Ezer 407; Teshuvot Even Shetiya 79; Teshuvot Har Hacarmel, Hoshen Mishpat 10; Divrei Gaonim 96.47; Teshuvot Panim Meirot 1.82; Teshuvot Meishiv Davar 3.15; Hazon Ish, Bava Kama 22.1; Teshuvot Torat Hayim 1.85; Teshuvot Dvar Yehoshua 1.93; Dibrot Moshe, Bava Metzia 2, p. 503; Piskei Din Rabbanayim (hereafter: PDR) 3.18, 30; 17.289, 295. Alternatively, damages for preclusion of profits are grounded in *nezikin*, i.e., torts. See Ketzot Hahoshen 333.2.

53 In fact, this understanding was equally applied towards defining the *arev*'s obligation in a loan transaction. See *Sefer Hamakneh, Kiddushin* 7a; *Teshuvot Meorot Natan* 81:6.For additional sources and examination see Shamma Friedman, *Hana'ah and Acquisitions in the Talmud*, (Hebrew) 3 DINE ISRAEL 115, 123-130 (1972); BERACHYAHU LIFSHITZ, ASMACHTA (PROMISE) 212-213 (Jerusalem 5748).

promisor received the money and his will has been actualized that is, his will is that the agreement be performed. Similarly, we construe an *arev* as if he received money and his will has been realized i.e., that the delivery of money to the creditor is guaranteed.[54] The common denominator of both approaches is that the engendered trust creates contractual liability grounded in the institution of *arevut*.

Other decisors, however, focused on the harm caused by reliance on the promise. They direct their attention to the promissory commitment rather than to the engendered trust or the promisee's right to trust there would be no harmful reliance and the promisor's duty to prevent (or not cause) it, as was reasonably foreseeable by the promisor i.e., the tort principle of *grama*.[55] Just as an *arev* must reimburse the creditor for a defaulted loan, the promisor must compensate the promisee for harm that his action caused. Here, the contractual establishment of an *arevut* relationship generates a tortuous obligation to compensate for incurred damages.

Though the majority of *poskim* (decisors) disagree with Ra'ah,[56] their divergence is limited to the issue of whether in the absence of an express agreement to pay damages, a claim for an anticipated clear loss of profits is collectible.

Let us first explore whether Ra'ah's theory of detrimental reliance has been applied in other contexts. Next, we shall examine whether some authorities who rejected Ra'ah's posture regarding loss of profits[57] endorsed his approach in other areas of halacha nonetheless? To state it differently, was the death knell of a theory of detrimental reliance sounded hundreds of years ago with the appearance of Ra'ah approach that related to lost profits, or is Ra'ah's posture applied in other halachic contexts to this very day?

For example, he addressed a situation in which an employer promised to hire an employee. If he were not promised, the employee could have found work, but after the employer reneged on his promise and the employee did not find other work, the rate of compensation to be remitted is akin to a *poeil bateil* (idle employee[58]) rather than to expectancy damages i.e., the salary he would have

54 Teshuvot Maharshach 1.137; Hazon Ish, Hoshen Mishpat, Likkutim 17.1; LIFSHITZ, supra note 53, at p. 268; KAHANE, supra note 40, at p. 84, 530-531.

55 Teshuvot Harosh 102.1, 104.7; Netivot Hamishpat 200.13; Teshuvot Rabbi Akiva Eiger 134; Yechiel Kaplan, *Elements of Tort in the Jewish Law of Surety*, (Hebrew) 9-10 SHENATON HAMISHPAT HAIVRI 359 (1982-1983); WARHAFTIG, supra note 40, at p. 430 n. 119.

56 See text accompanying to supra notes 45-47. Additionally see Rabbeinu Hananel in Shibolei Haleket (Hasida, ed.) 135; Teshuvot Beth Ephraim, Hoshen Mishpat 28; Zalman N. Goldberg, *The Validity of the Obligation to Sell in a Preliminary Agreement*, (Hebrew) 12 TEHUMIN 279, 296-297 (5751). In fact, it was Nahalat Tzvi's assessment that all *rishonim* (early authorities) disagreed with Ra'ah posture. See Nahalat Tzvi, Hoshen Mishpat 292.20. Cf. Hatam Sofer's appraisal of the view of *rishonim* regarding this issue. See Hatam Sofer, supra note 50.

57 See supra note 44.

58 The amount is half of the agreed-upon wage. See Taz, Shulhan Aruch, Hoshen Mishpat 333.1

received as an employee. As Ra'ah explained:[59] "And the justification for this compensation [termination – A.Y.W] is based on what we stated earlier in BM 73b. Anyone who promises his friend and his friend relied on him and if it wasn't for his promise [induced reliance – A.Y.W] loss would have not been incurred, he is obligated to pay if he acted negligently".

In other words, here again we find that *hilkhot arevut* are invoked within the framework of labor relations. Consequently, there is a contractual obligation to pay damages due to the sense of trust engendered by the promisor, namely the employer. The trust generated serves as *gemirat da'at* – i.e., firm resolve that the parties are seriously undertaking this venture; in our case, wine purchase.

Another example in labor relations is the ruling recorded in a *baraita* and *Shulhan Arukh* that a reneging employee must pay compensation.[60] The justification of such an award is based on *hilkhot nezikin* (laws of damages) rather than on an *arevut* obligation. In other words, the *halakhot* of *grami* (direct causation), the tort rule of *shevet* (loss of work-time), or rabbinic enactment serve as grounds for liability.[61] For example, in both scenarios of employees who renege on their promise, Rosh would only mandate liability based on the norms of *grami*.[62]

Another application of Ra'ah's position in employment relations deals with one person's rescission on a promise to work for another. Generally speaking, an employee has the right to rescind his employment at any time, even in the middle of a workday.[63] That being said, should the employer suffer irreparable monetary damage (in addition to the loss of time it took to replace him with another worker), the employee should pay damages based on *nezikin* rather than on the norms of contract violation. In other words, though one may argue that we could invoke Ra'ah's theory of detrimental reliance, numerous authorities mandated monetary relief based on the tort principles of *grami* i.e., direct causation of harm or akin to actual *hezek* (harm) with one's hands,[64] or based on a rabbinical enactment.[65] Though Ramban and Nimmukei Yosef reject Ra'ah's position regarding lost profits, when addressing early termination by an employee, they endorsed a theory of detrimental reliance[66] and Maharasham concurred.[67]

59 Hidushei Haritva, Bava Metzia 75b.

60 Bava Metzia 76b; Hoshen Mishpat 333.2

61 Tosafot, Bava Metzia 76b, *sub verbo* 'ayin'; Hiddushei Haran in the name of Ramban, Bava Metzia 76b; Rashba, Shita Mekubetzet, Bava Metzia 76b; Ketzot Hahoshen, supra note 53; Sma, Hoshen Mishpat 333.8; Netivot Hamishpat 333.3.

62 Rosh, supra note 44; Teshuvot Harosh 104.7.

63 Bava Metzia 10a; Bava Kama 116b.

64 Tosafot Ri, Bava Metzia 76b, *sub verbo* 'ein'; Piskei Harosh, Bava Metzia 6.2; Sma, Hoshen Mishpat 333.8; Mahaneh Ephraim, Hailkhot Sehirut 18. Ketzot Hahoshen 333.2-3.

65 Netivot Hamishpat 333.3; Hidushei R. Akiva Eiger, Bava Metzia 76a, *sub verbo* 'hoz'ru'.

66 Hidushei Haramban, Bava Metzia 76b, *sub verbo* 'vehavei yodea'; Nimmukei Yosef, Bava Metzia 75b. Given that Ramban argues that the *arev's* liability is due to the benefit he receives that the creditor trusts him to repay the loan should the borrower default, which is why it is not surprising

In another labor relations case, an individual hired individuals to work in the field of a third party without the laborers' knowledge that the field was owned by a third party and without the awareness of the third party that people were working his field. Though he rejected liability for the loss of anticipated profits in the wine scenario, here Rashba concluded that, given that the laborers lost a day of work, the individual who hired them, despite having failed to benefit from their efforts, is obligated to pay them akin to an *arev*.[68] In fact, there are numerous instances where Rashba subscribed to Ra'ah's views.[69]

In another case, person A asked person B to lend him an animal and send it to him with person C – etc. If someone requests of his friend to borrow his animal and instructs him "send the animal with so-and-so", once his friend takes the animal from his possession, Nimmukei Yosef who rejects Ra'ah's posture relating to lost profits, here contends that he is obligated to pay any monies related to the animal based on *arevut*.[70]

In short, though certain decisors such as Rashba, Ramban, and Nimmukei Yosef rejected the detrimental reliance approach when addressing lost gains, the same decisors endorsed that perspective and imposed liability in instances such as labor relations.

The said conclusion equally applies to other *poskim*. Despite the fact that many authorities have rejected the Ra'ah theory in the context of lost profits[71] as we have shown, numerous *poskim* argued that an obligation can be established by invoking the institution of *arevut* in a wide range of scenarios.[72] For example, when person A tells his friend B: "rescue C from prison", A is obligated to compensate B for his efforts in facilitating C's release.[73] In another case, a debtor who is willing to pay his outstanding debt is instructed by the creditor to give the money to a third party. The debtor may pay the third party and will no longer owe the creditor. In effect, the creditor's directions are to be construed as an obligation akin to an *arev*.[74] Should a defendant agree to appear at a *beth din* proceeding and the plaintiff fails to appear, given that the defendant relied on the plaintiff's appearance, all the court and *toain* (rabbinical advocate) legal fees incurred by the defendant should be paid by the plaintiff.[75] In another example, Reuven promised to engage in

that the same rationale underlies his position here. See Hiddushei Haramban, Ketubot 101b and BB 44a.

67 Teshuvot Maharashdam, Yoreh De'ah 205.

68 Hiddushei Harashba, Bava Metzia 118a.

69 Teshuvot Harashba 1.1006,1016; Hiddushei Harashba, Kiddushin 6b. 8b.

70 Nimmukei Yosef, Bava Metzia 56b.

71 See supra, text accompanying notes 44-46.

72 KAHANE, supra note 40, at p. 82-84

73 Teshuvot Divrei Ribot 73.

74 Hiddushei Haritva, Bava Metzia 73b.

75 Teshuvot Noda Beyehuda, Mahadura Tinyana, Eveb Ha-Ezer 90; Imrei Bina in the name of Mordechai, Dayanim 21; PDR 3:18, 30.

work gratis for Shimeon with the understanding that incurred expenses would be remunerated by Shimeon. When expenses were outlaid, Reuven informed Shimeon that he changed his mind and refused to complete the work without paying him for his services. Given that Shimeon relied on Reuven that the work would be done gratis, Shimeon only remains liable for the expenses associated with the work.[76] If a broker receives instructions to sell an investment product and fails to carry out the instructions of his client who then sustains losses due to the broker's inaction, according to a contemporary *beth din* decision the broker is liable due to his obligation to sell and is viewed as an *arev*.[77] Finally, if a party breaches a promise to marry and expenses had been incurred due to the engagement, the promisor who induced the reliance is to be construed as an *arev* who pays the creditor in the event that the debtor defaults on the loan.[78]

As aptly noted by Rabbi Baruch Kahane, who wrote a systematic treatise on *arevut*, the application of the institution of *arevut* to breaches of promissory obligation meant equally that the *arev's* obligation i.e., the parameters of the promisor's obligation in cases of detrimental reliance are molded by the actual halachic norms that govern the conventional *arevut*. For example, engendered trust quantified in monetary terms is equivalent to the sum of the loan. Consequently, being a guarantor for a loan with interest engenders trust only with regard to the principal and therefore he is exempt from paying that interest should default transpire.[79] Hence, should one obligate himself as an *arev* and declare to his friend "give five hundred dollars to so-and-so and I will give you six hundred dollars", according to Netivot Hamishpat, who in numerous contexts endorsed the theory of detrimental reliance,[80] concluded that the *arev's* engendered trust is limited to the amount that he directed his friend to lend a third party.[81] Hence, Netivot Hamishpat would concur that this same conclusion would equally apply to a breach of a promise that incurs harm. What is the halacha regarding an *arev* who undertakes his obligation by stating that he is prepared to be secondarily liable for any amount that the creditor will lend a third party? Will such an obligation will be binding depends on the well-known controversy of whether one can obligate himself to pay a "*davar sheino katzuv*", i.e., an indeterminate amount or not? If one accepted the view that such a commitment is binding, then an *arev* may obligate himself to an indeterminate amount.[82] Others, notably RAMBAM who argued that the undertaking would be ineffective under such conditions,

76 Mahaneh Ephraim, Poalim 6. Cf. Teshuvot Maharik, shoresh 133.
77 PDR 9:16, 50.
78 Even Ha'azel, Hilkhot Zehiyah and Matanah 6,24; PDR 3: 57, 62.
79 Beth Yosef, Yoreh De'ah 170; Shakh, Yoreh De'ah 170.5.
80 See supra note 52.
81 Netivot Hamishpat 207.9. Whether the halachic norms of obligation mandate that he pay the additional monies, see discussion in KAHANE, supra note 40, at p. 79.
82 Shulhan Aruch, Hoshen Mishpat 131.13.

would equally contend that an *arev* cannot obligate himself to an indeterminate sum of money expended by the creditor.[83]

Another issue to be resolved is whether the engendered trust is contingent on the fact that the creditor (or in our case, the promisee) actually transferred money to the debtor/promisor or not? One opinion is that engendered trust is unrelated to the actual transfer of money and therefore, the fact that the creditor or promisee failed to actually receive the monies is irrelevant.[84] Others argue that engendered trust does not suffice and that there must be *gemirat da'at* – i.e., firm resolve between the parties that the *arev* bond has been established. When someone receives the money, we construe it as if he was privileged to receive it for the *arev* (and it is as if the *arev* received it) and that is what obligates the *arev*. In the absence of the transfer, we cannot obligate the *arev* to pay.[85]

3. Concluding Remarks

At this juncture, a brief comparison of the halachic and American legal traditions may be helpful. Emerging from American law, we encounter two types of promissory estoppel: one which is a substitute ground of consideration, i.e., identifying the existence of a bargain as deserving enforcement; and another estoppel which is a tort-like conception of contractual recovery based on detrimental reliance. The former type of estoppel requires that the promise be clear and definite, whereas the estoppel grounded in detrimental reliance focuses on the harm caused due to the induced reliance generated by the promisor.

On the other hand, in halacha, it is the engendered trust emerging from the institution of *arevut* that may either serve as a substitution for a *ma'aseh kinyan* or the realization of the desired promissory compliance. It is the halachic-legal norm of suretyship rather than the halachic-moral norm (i.e., promissory obligation) that endows halachic –legal validity to the agreement. Unlike American law, Ra'ah's view 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*.[86] Alternatively, we move out of the universe of obligations and enter the sphere of *nezikin* (tort) focusing on the promisee's right to trust and the promisor's duty to prevent (or not cause) harmful reliance that should have been reasonably foreseeable by the promisor, i.e., the tort principle of *grami*. As such, whereas American law views promissory estoppel solely through the lens of contract law, Jewish law construes breaches of promissory

83 Hilkhot Malveh Veloveh 25.13.

84 Hiddushei Haramban, Kiddushin 8b.

85 Ibid.

86 Berachyahu Lifshitz, *Consideration in Jewish Law- A Reconsideration*, 8 JEWISH LAW ANNUAL 115, 122-123 (1989); LIFSHITZ, supra note 53, at p. 214.

obligations unaccompanied by conventional forms of *kinyan* as either viewed through the prism of obligations or *nezikin*.

The common denominator of both legal systems is found when the promisor decides whether to engage in conduct that objectively constitutes reliance; namely, the moment in time that the promise may engender trust in the promise to act. Nonetheless, though the element of trust is a building block in understanding the consequences of a breach of a promissory obligation in both systems, they differ in essence and nature . Whereas American law conveys no objective judgmental standards to calibrate the element of trust, Jewish law employs the institution of *arevut* and its multifarious norms to understand and mold the contours of a theory of detrimental reliance in obligations and torts.

Though both systems speak in terms of "trust" as a constituent element in enforcing a breach of promissory obligation jurisprudentially speaking, the fact that one system is religious and the other is secular belies a different underpinning. In American law, costs that promisees incur when relying on a promised performance of an act that never materialized reflects the harm theory of keeping contracts, according to certain legal commentators.

As Professor Richard Craswell noted,[87] "If 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".

In other words, based on the harm theory of agreements, some scholars argued that the duty to comply with a promise is simply the obligation not to cause harm. Therefore, if trust induces reliance and subsequently harm is caused due to a breach of the trust, judicial relief may be in place.

Hence, if the promise is withdrawn before anyone changed their position, this school of thought would contend that the promise may be breached without harming anyone, and therefore the obligation to keep the promise loses its meaning and significance.[88]

However, in halacha one is obligated to act on a promise as promised (i.e., the religious duty of promise-keeping regardless of whether the promisee has detrimentally relied on the promise or not), and the promise must be kept regardless of whether it is enforceable in a *beth din*. In other words, the binding nature of the promise is independent and free-standing, separate from the induced-reliance obligation.[89] Consequently, the engendered trust serves as the basis for the *beth din*'s judicial enforcement of the promise that was breached and caused harm rather than as the rationale

87 Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, supra note 13, at p. 499. Cf. with those commentators who view contract law in terms of its economic consequences. See Goetz & Scott, supra note 9; Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003).

88 Fuller & Perdue, supra note 11, at p. 53-57; Neil McCormick, *Voluntary Obligations and Normative Powers*, 46 PROCEEDINGS ARISTOTELIAN SOCIETY 59, 62-67 (Supp. Vol. 1972)

89 As we mentioned, a breach of a promise unaccompanied by a kinyan or detrimental reliance is not actionable. See text accompanying note 42.

for arguing that one must keep a promise. Consequently, even if the promise is withdrawn before anyone has changed their position or harm has been caused, the duty to keep one's promise stands.

The attempt to correlate concepts of a religious legal system with those of a secular legal system risks serious anachronism and may give rise to invidious comparisons. Having examined the theory of detrimental reliance as expounded and propounded in Jewish and American law, I hope to have avoided Santanya's reproach that comparison "is the expedient of those who cannot reach the heart of things compared".[90]

90 GEORGE SANTANYA, CHARACTER AND OPINION IN THE UNITED STATES 166 (N.Y.1920).