

## **The Metaphysics of Property Interests in Jewish Law**

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Virtually every first year law student has heard property defined as “a bundle of rights.”

That notion is seminal to an understanding of the notion of property in its various guises as reflected in common law. That which is bundled can be unbundled. Reversionary interests, remainders, life estates, riparian rights, mineral rights, air rights, servitudes, and much more, are easy to grasp once it is understood that just as light waves can be beamed through a prism and emerge as a spectrum of waves of different length and hence as distinct colors represented by the letters ROYGBIV, so is a fee simple absolute divisible into a wide spectrum of discrete rights. A light wave is a coalesced amalgam consisting of waves, each of which, when refracted, is perceived as a different color of the rainbow. A fee simple absolute is a bundled conglomeration of the sum total of rights recognized by the legal system. Those rights are separable in a manner analogous to separation of light waves into waves of different color.

Rights are vested in people. They serve as a legal and moral basis for the exercise of prerogatives, dominion, and even exploitation. To speak of property as a bundle of rights is somewhat of an oxymoron. It is not property that is a bundle of rights in the same sense that light is a bundle of waves each a different length or color. Property is that which may be utilized

as an instrument in assertion of rights and in securing compliance with such rights. More accurately, property is that with regard to which those separate and distinct rights may be bundled and exercised. The focus of the proprietor-property relationship is entirely upon the proprietor. The intrinsic nature of property is in no way changed or modified by its status as property.

Not so in Jewish law. In Jewish law the concept of property reflects not rights but ontology. To be sure, there are rights that flow from the proprietor-property relationship, but those rights flow from – and indeed are simply an epiphenomenon of – an ontological state, that is, a state of being having existence independent of those rights. The concept is metaphysical.

To say that the metaphysical is not subject to perception by the physical senses may be a tautology. But a metaphysician would have no problem understanding the proposition that metaphysical causes may have physical effects<sup>1</sup>. A metaphysician would certainly have no problem with the assertion that metaphysical reality may give rise to rights and duties in the natural world.

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<sup>1</sup> See, for example Plato, *Phaedo*, 100c-101d and 100e5-6.

An imprecise parallel lies in the institution of matrimony. In some primitive societies a wife was the property of her husband – or at least such is the common perception. But in no society was the husband the property of the wife. Yet in every society a wife had rights *vis-à-vis* her husband. Those rights did not arise from a property interest; they are the product of the state of matrimony. That is not to say that there cannot be rights without either a property interest or a particular ontological state. But in the marital relationship those rights arise from the state of matrimony and to talk of rights arising from the state of matrimony is to reify matrimony in a manner than can only be metaphysical. To be sure, modern man may have denuded marriage and reduced it to a collection of reciprocal rights and duties. But, traditionally, matrimony has been spoken of as an ontological state that comes into being with the union of bride and groom, a concept that explains, *inter alia*, the indestructibility and inseverability of the marital relationship in some traditions.

The notion that matrimony is an ontological state may be no more than a myth. But myths, whether or not they are literally true, serve as an aid in simplifying and comprehending difficult concepts. The abstract is difficult to comprehend precisely because it is abstract; the

tangible is more readily appreciated. Reification – even of the metaphysical—serves to transform the abstract into the tangible.

The most celebrated example of such an exercise is Plato’s Theory of Ideas. I doubt that anyone, including Plato, accepted the Theory of Ideas literally. Nevertheless, Plato did believe that a transcendental realm does exist and that there is some type of relationship between our physical world and that transcendental reality. Hence, Plato’s reification of that transcendental world in the Theory of Ideas and his explanation of our imperfect ability to understand the relationship between our world and that transcendental world by means of the Allegory of the Cave.

The notion of property as reflected in Jewish law must be understood as a reflection of an ontological relationship binding property to its proprietor. The relationship, and its effect upon property, is no more subject to sensory perception than is the state of matrimony; nevertheless, the metaphysical nature of that relationship does not diminish its ontological reality.

Additionally, although the status of a tangible object as property is metaphysical, that status comes into being in a very physical manner—a very clear example of a physical act having a metaphysical effect.

The Uniform Commercial Code §2-207 provides that property conveyed by a seller to a purchaser is transferred at whatever point in time or place at which the parties agree that such transfer shall occur. A meeting of minds is not merely a necessary condition of vesting of title but constitutes the essence of the conveyance. An owner of wheat in Chicago may contract for the delivery of a carload of wheat to a customer in New York City. The wheat is then shipped by train from Chicago to New York. While traversing the Horseshoe Curve in the vicinity of Pittsburgh, the train overturns and the wheat is irretrievably lost. Which party bears the loss, the seller or the purchaser? The answer depends upon the particular point in time or the place at which the parties agreed that title was to pass. That understanding can be spelled out in the sales contract thereby providing clear evidence of determination reached by a meeting of minds or it can be left for the legal system to puzzle out constructively or by application of statute. Be that as it may, the global answer is that title passes when and where the parties wish it to pass.

Not so in Jewish law. Jewish law provides that no transfer or acquisition of property (save by inheritance) takes place other than by means of *kinyan*, i.e., an overt act that gives effect to the transfer. Certainly, Jewish law requires a meeting of minds. In its own terms, Jewish law defines meeting of minds as *gemirat da'at*, firm determination to convey on the part of the conveyor, and *semichat da'at*, reliance and acceptance of transfer on the part of the conveyee. We need not now explore the theory underlying the efficacy of *kinyan*. Suffice it to say that, in Jewish law, *kinyan* is the *sine qua non* of (virtually) all conveyances. For our purpose, concentration upon the function and *telos* of *kinyan* will be sufficient.<sup>2</sup>

The function of *kinyan* – and with it the notion of property in Jewish law - can best be understood on the basis of a “myth” that, feeble as it assuredly is, is inspired by Plato’s Allegory of the Cave.<sup>3</sup> Imagine that we possess metaphysical spectacles with which we may observe the metaphysical entities that permeate the physical world. We would see that every non-human

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<sup>2</sup> There are indeed scholars who regard “meeting of minds” as the sole operative factor in transfer of title. For them, *kinyan* serves either as evidence of a meeting of minds or is generative in nature in the sense that it creates firm determination and reliance. See R. Yechezkel Abramsky, *Dinei Mammonot*, 2<sup>nd</sup> ed. (Bnei Brak, 5729), pp. 10*f*. However, those theories of *kinyan* do not serve to explain why, for example, future interests cannot be conveyed or why inchoate interests are not recognized.

<sup>3</sup> See Plato, *Republic* 514a-520e.

physical entity is endowed with tentacles attached to itself by suction cups. The opposite side of each tentacle also sports one or more suction cups. The tentacles of many, and probably most, of those physical entities are attached to the shoulders of human beings by this second set of suction cups. The term “property” is nothing more than the term we use to indicate that the object to which reference is made is attached to a human being through the intermediacy of those tentacles. Although phenomenologically invisible, the attachment is real and ontologically tangible.

A law enacted as a conservation measure forbidding taking an ax in hand and cutting down an ancient redwood tree is readily comprehensible to the human mind. Quite similarly, the law forbids us to take a knife and sever the tentacles connecting a tangible physical object from the human being to which it is attached. The law also forbids seizing the tentacle from the shoulder to which it is secured and attaching it to one’s own shoulder. The term we use for that act is “theft.” The act is forbidden; the act is illegal, but it is efficacious. The act creates a new ontological reality: The property is no longer attached to its rightful owner and it is precisely the *kinyan geneivah*, i.e., the severance of the ontological relation between the property and its

rightful owner and the establishment of a new relationship between the property and the seizing intruder that constitutes the essence of theft. Kant described at length the metaphysics of morals. Jewish law always recognized the moral implications of the metaphysics of property.

*Kinyan* is nothing more and nothing less than removal of the tentacles from the shoulder of the person to whom it is attached and its reattachment to the shoulder of another. The act of *kinyan* is the physical means of accomplishing that metaphysical end and varies with the nature of the property being conveyed. Depending upon the nature of the surface to which a physical object adheres, different types of solvent are necessary to dissolve the glue binding the items to that surface. In the case of real property, payment of the purchase price, delivery of a deed or *hazakah*, the progenitor of livery of seisin enshrined in common law, has that effect. Dislocating and moving a chattel and delivering the reins of a domestic animal have the same effect as do various other modes of *kinyan*.

In *halipin*, i.e., exchange or barter, there is no requirement that each party perform a separate act of *kinyan*. Consummation of *kinyan* by one party automatically results in reciprocal vesting of *kinyan* in the other. Attachment of tentacles of the newly-acquired property by

operation of *kinyan* has the effect of also dislodging the tentacles attaching the property that is to be conveyed in exchange and forcing their attachment to the party whose property has been divested by means of overt *kinyan*.

It is of interest that in some few cases, e.g., the obligation of the father of a bride to deliver the stipulated dowry becomes binding without a formal, overt *kinyan*. The obligation is in the form of a *shi'bud* instituted in exchange for receiving an object of value, i.e., the delight experienced by a father in the marriage of his daughter. Although described as a verbal *kinyan*, it is actually a form of *halipin*: the father receives pleasure provided by the groom and, in turn, becomes obligated to the value of the dowry. The experience of pleasure provided by the groom to his father-in-law is itself reified and raised to the equivalent of conveyance of chattel. If *kinyan* is essentially a manipulation of metaphysical entities, it should not be surprising that emotional gratification provided by one person to another is equated with transfer of a physical object.

The owner of property may also renounce ownership by simply detaching the tentacles from his shoulder and casting them upon the ground thereby rendering the physical object *res*

*nullius*. That process does not require any great effort; the property can be abandoned by means of a mere verbal declaration renouncing ownership, in effect, by “blowing” the tentacles off one’s shoulder. The abandoned property is then available for seizure by any person who wishes to acquire title. Acquisition of title, even of an item that is *res nullius*, requires a physical act, i.e., a formal *kinyan*. This description of abandonment of property explains why property cannot be abandoned in favor of a particular individual or group of individuals to the exclusion of all others: abandonment requires removal of tentacles; unattached property is then available to everyone. Items of property that never had an owner are also endowed with tentacles. The virgin suction cups of those tentacles are available to all and sundry who then acquire title by affixing those suction cups to their shoulders.

As earlier noted, a thief also acquires a particular form of title, i.e., a *kinyan geneivah*, or “title of theft.” If property is a bundle of rights, it includes “negative rights” as well. I do not know whether Bill Gates or Warren Buffet suffer from insomnia. I do know that if either does have sleepless nights he is entitled to them. He has the “right” to worry about his property. I, on the other hand, sleep like a baby. I have no property worth worrying about and hence have no

“right” to sleepless nights. The owner of property has the “right” to suffer the loss of that property. To say that a thief has acquired a *kinyan geneivah* is to say that he has acquired the right to bear the financial consequence of the loss of the stolen object even if such loss results from *force majeure* or an act of G-d. Accordingly, despite the fact that the property would have been rendered valueless even if the thief had not stolen the property, he will be liable of payment of its full value at the time of the theft. That negative interest is acquired only by means of *kinyan*.

To be sure, a thief does not acquire absolute title to his ill-gotten gains. Primarily, he is vested with one of a bundle of rights, *viz.*, the right to suffer loss if the object is destroyed. The rightful owner retains the right to the return of his property *in rem* and the thief may return the stolen property and suffer no further liability. But if the object cannot be restored, even as a result of an “act of G-d,” the thief, through the act of theft, acquires the “right” to suffer the loss and, accordingly, he must compensate his victim by payment of the value of the property at the time of theft.

The metaphysical analysis of the negative right to suffer the financial consequences of loss or destruction of the stolen property is identical to the analysis of the conveyance of a particular positive right: At the time of theft, only the tentacle representing the negative right to suffer loss in the event of destruction is detached from the victim and attached to the thief. All other tentacles, or parts of the tentacles, remain firmly attached to the rightful owner.

Nevertheless, the thief's title may ripen into a more comprehensive property interest. If person steals flour and bakes it into bread, or steals lumber and fashions it into a piece of furniture, the rightful owner no longer has a claim for restoration of the stolen property. The reason does not lie in a theory involving recognition that value reflecting expended labor has been added by the thief. Were that the case, the victim would at least be entitled to the option of recovering the stolen property and compensating the thief for the value added. The explanation is that conversion of a raw material into a finished product serves as a further *kinyan*, i.e., it serves to vest additional property interests in the thief. The thief, in converting the raw material, succeeds in plucking off all remaining tentacles binding the property to its prior owner and attaching those tentacles to himself. He remains liable for the value of the property at the time of

theft in much the same manner as a debtor is liable for repayment of a loan. A *shi'bud* or servitude in the person is generated at the time of theft. Cast in the context of the Myth of the Tentacles, this means that the tentacles attaching property to its rightful owner cannot be removed from the rightful owner in any way without the owner's tentacles becoming attached to the person of the thief. Put somewhat differently, the thief may succeed in detaching the owner's tentacles from his property in whole or in part and replace them with his own but the owner's tentacles are "sticky" in nature and adhere themselves to the person of the thief. Consequently, the thief is liable to compensate his victim by virtue of the *shi'bud ha-guf* he has acquired in the body of the thief.

The liability of a bailee is of the same nature and arises in the same manner. The obligations of a bailee arise not from some abstract duty of care but from a *kinyan*. That *kinyan* serves to convey a negative right upon the bailee, *viz.*, the right to be held liable for loss of the bailed property in accordance with the nature of the bailment: negligence in the case of a gratuitous bailee; theft and loss in the case of a bailee for hire; and even more extensive liability

in the case of a borrower. In each case the *kinyan* serves to transfer that negative right from bailor to bailee.

The Myth of the Tentacles serves to explain why Jewish law does not recognize a property interest in intangible, inchoate property or the efficacy of the transfer of a future interest. Such property interests do not exist because *kinyan* cannot be performed with regard to that which does not exist or with regard to that which is not tangible. The usual form of *kinyan* involves a physical act performed upon the item transferred, i.e., *meshikhah*, or dislocating and causing the movement of the item conveyed, signifying its exit from its domain of the grantor and entry into the domain of the grantee, or *mesirah*, i.e., delivery of the reins of an animal. But there are other forms of *kinyan* that do not require the act to be performed upon the property conveyed, e.g., *agav karka*, transfer by accession, in which the *kinyan* is made on real property and “moveables,” i.e., chattels, are automatically conveyed as well when such is the intent of the parties. Chattels need not be located on the real property in order to be transferred by accession. If it is understood that *kinyan* is more than meets the eye, viz., that it is designed to effect detachment and reattachment of tentacles, it becomes obvious that, although that phenomenon

can be accomplished without contiguous tactile contact, it can nevertheless not occur unless the object is “real.” Tentacles cannot attach to property that does not yet exist or to property in which one does not yet have an interest. Future interests cannot adhere to one’s shoulder in the present by means of suction cups.<sup>4</sup> For a similar reason property cannot be conveyed to a person not yet in existence.

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<sup>4</sup> This exposition readily reflects the position of the early-day authorities who maintain that future interests (*davar she-lo ba le-olam*) are intrinsically unconveyable. See *Levush, Hoshen Mishpat* 209:4; *Noda bi-Yehuda, Mahadura Tinyana, Even ha-Ezer*, no. 54, sec. 12; *Netivot ha-Mishpat* 207:18; *Imrei Binah, Hilkhoh Halva’ah*, no. 63; *Hazon Ish, Dema’i*, no. 17. See also *Teshuvot Rivash*, no. 328 and *Tashbaz*, IV, no. 13. Cf., however, *Nemukei Yosef, Bava Mezi’a* 66b; *Sefer ha-Yashar*, no. 592; Rashba, *Bava Mezi’a* 66b; *Teshuvot Maharam Minz*, no. 35; *Derishah, Hoshen Mishpat* 209:3; *Teshuvat Mahari Basan*, no. 19; and *Teshuvot R. Alexander Sender Margoliyot, Even ha-Ezer* no. 37, sec. 14, who maintain that such conveyances fail because of a lack of a “meeting of minds.” Cf., *Tosafei ha-Rosh*, cited in *Shittah Mekubetzet, Bava Batra* 142b. See also R. Elchanan Wasserman, *Kovez Shi’urim, Bava Batra*, sec. 276, who asserts that these conflicting views are reflected in the controversy with regard to whether *situmta*, i.e., a non-statutory *kinyan* born of trade practice, is effective as a conveyance of a future interest. Thus, for example, *Kezot ha-Hoshen* 201:1, peremptorily dismisses the notion that *situmta* is valid for effecting such conveyances. However, even according to the authorities who recognize the efficacy of *situmta* with regard to future interests, the conveyance is not consummated until the future interest is actualized or, in the terms of the Myth of the Tentacles, until the separated tentacles can attach themselves to a concrete object.

*Teshuvot Rivash* cites and rebuts an earlier scholar who allegedly asserted that conveyance of a future interest fails simply because there is no “meeting of minds” with regard to what lies in the future. Accordingly, that scholar argued, if another factor is present that does not serve to generate determination, e.g., an oath to honor the conveyance, the *kinyan* is effective. In accordance with his thesis, that scholar justified the validity of Esau’s sale of his birthright, a future interest, on the basis of the fact that it was accompanied by an oath. R. Chaim ibn Attar, *Commentary on the Bible*, Genesis 25:33, declares that, although future interests can be transferred, nevertheless, inchoate interests cannot be conveyed and that Esau’s oath was designed to assure that he would not assert inchoate rights associated with his birthright.

This perspective regarding a *shi'bud nekhasim* serves to resolve yet another perplexity. That a person's property may be seized in satisfaction of a debt is readily understandable. The concomitant of the debtor's duty to repay a debt is the creditor's right to seize the debtor's property. The right to claim property from a successor in title is less readily understandable. The debtor's title to the land is extinguished with transfer of the

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[It may be of interest to note that the earlier scholar was identified by Rivash's interlocutor as R. Jacob ben ha-Rosh, the author of *Tur Shulhan Arukh* who, in turn, proffered his comments in the name of Rosh. Rivash peremptorily derides the thesis advanced and its attribution to R. Jacob ben ha-Rosh or to his father. Those comments now appear in the published biblical commentary of the *Ba'al ha-Turim, Peirush ha-Tur he-Aruk al ha-Torah*. R. Joseph Saul Nathanson, *Sho'el u-Meshiv, Mahadura Telita'ah*, II, no. 163, asserts that had Rivash been aware of that work he would have accepted the view conveyed to him.

Contrary to the view of *Sho'el u-Meshiv*, it seems to this writer that the flavor of Rivash's dismissive comment, "Neither the Rosh nor Rabbenu Ya'akov are signatories to it," reflects Rivash's awareness of a manuscript ascribed to R. Jacob and it is precisely the authenticity of that attribution that Rivash challenges. Rivash disputes the provenance of the manuscript precisely because he is convinced that it contradicts at least one clearly evident matter of Halakhah. Rivash's skeptical reaction to attribution of authorship of previously unknown manuscripts to luminaries of an earlier generation is reflected in the attitude of more recent authorities, particularly *Hazon Ish* and R. Moshe Feinstein, to newly-discovered rabbinic manuscripts. See R. Moshe Bleich, "The Role of Manuscripts in Halakhic Decision-Making: *Hazon Ish*, His Precursors and Contemporaries," *Tradition*, Winter 1993.

Parenthetically, *Sho'el u-Meshiv's* acceptance of the view presented in this source parallels his espousal of the concept of a proprietary interest in intellectual property. See *infra*, note 8. Each of those positions can be entertained only upon rejection of the notion that property interests are the product of ontology.]

property to a third party. What causes the claim against the purchaser to give rise to a lien that travels with the land? Of course, it might be argued that the funds advanced serve as a *kinyan* conferring a limited property interest that vests in the creditor immediately, i.e., the right to seize the property in the event of non-payment of the debt. If so, having conveyed that right to the creditor, the debtor cannot assign absolute title to the purchaser of that property. But what of property acquired by the debtor only subsequent to contracting the debt? No interest can be conveyed in after-acquired property. How then does the creditor acquire the right to prevent conveyance of absolute title in after-acquired property?

The matter is entirely resolved upon recognition that a *shi'bud nekhasim* is a derivative of a *shi'bud ha-guf*, i.e., that the lien against property flows from a lien *in personam*. The creditor's tenacles attach themselves to the person of the debtor. All of the debtor's property is attached to his person by similar suction cups. Accordingly, that property is also attached to the creditor, albeit indirectly, through the intermediacy of the debtor's *shi'bud ha-guf* binding the debtor to the creditor. Hence, any after-acquired

property becomes attached not only to the debtor but also to the creditor by means of the debtor's act of acquisition.

Underlying this analysis is the notion that a *shi'bud nekhasim* arises from a *shi'bud ha-guf* and that no *shi'bud nekhasim* in after-acquired property could possibly arise in the absence of a *shi'bud ha-guf*.<sup>5</sup> But it does seem apparent that a *shi'bud nekhasim* can never arise other than as the product of a *shi'bud ha-guf*. Even hypothecation does not eliminate the *shi'bud ha-guf* by creating a *shi'bud nekhasim* exclusively. Rather, hypothecation is a limitation upon the ambit of the tentacles constituting the *shi'bud ha-guf* allowing them to extend only to the hypothecated property through the mediation of a *shi'bud ha-guf*.<sup>6</sup>

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<sup>5</sup> For evidence supporting that thesis see this writer's *Be-Netivot ha-Halakhah*, II (New York, 5759), 191-194.

<sup>6</sup> These comments serve to support the conceptual basis for the rejection of the view of R. Shimon Grunwald, *Teshuvot Maharshag*, I, *Yoreh De'ah*, no. 5 and *No'am*, II (5719), 33-37, and of R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, nos. 62-63, regarding payment of interest by corporations. See R. Ya'akov Yitzchak Weisz, *Teshuvot Minhat Yizhak*, III, no. 1, sec. 3. Since every debt generates a *shi'bud ha-guf*, hypothecation does not serve to avoid a prohibition against payment of interest on the grounds that the obligation to make such payment does not devolve upon the person of the debtor, but only upon property. That assertion is devoid of halakhic import if there cannot exist a *shi'bud nekhasim* in the absence of a juridically prior *shi'bud ha-guf*.

Despite the contrary opinion of some authorities, it seems to me that Jewish law does not recognize inchoate rights such as those reflected in intellectual property for the simple reason that tentacles, even though they are metaphysical, cannot attach themselves other than to physical entities.<sup>7</sup> Tentacles may be metaphysical but they can link only that which is tangibly present in the physical world.

The notion that property is a concept associated with that which is concrete but does not encompass the ephemeral or the inchoate is poignantly reflected in a German case regarding electrical power. In the early years of electricity, a German citizen was accused of having stolen electricity. The facts were firmly established but the case was nevertheless dismissed. The facts of the 1899 case are as follows: A man rented an apartment that was furnished with electricity. A meter measured the amount of current that was consumed; however, the tenant, a clever handyman, withdrew the current before it reached the meter.

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<sup>7</sup> See R. Isaac Shmelkes, *Teshuvot Bet Yizhak, Hoshen Mishpat*, no. 80. Cf., the view of R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meishiv, Mahadura Kamma*, I, no. 44. The extensive rabbinic literature devoted to this topic focuses upon the rights of a publisher and upon issues of unfair competition rather than the rights of the author in his intellectual property. Cf., however, R. Moshe Feinstein, *Iggerot Mosheh, Orach Hayyim*, IV, no. 40, sec. 19. It is probably precisely because rights to intellectual property were not recognized that the *herem* was harnessed as a device to achieve the desired effect.

Criminal proceedings for theft were eventually brought against him and the accused tenant was found guilty. On appeal, however, the Reichsgericht, the highest German court at the time,<sup>8</sup> acquitted the accused.<sup>9</sup> The court, in a careful and rather formal opinion, wrote that theft, according to the text of section 242 of the Criminal Code in force in Germany at the time, can be perpetrated only upon "*Sache*," i.e., "things" or "objects." The concept of a *Sache*, according to the court, was subject to interpretation and interpretation required an exploration of prior linguistic usage in legal settings. The court found that "things," according to the concept of German and Roman law, are physical objects that occupy a given space. Since case law was bound to this historical juristic meaning of the word, electricity could not be conceived of as a "thing" but only as a *Kraft* or force.

In effect, the court ruled that property interests are limited to concrete physical objects and not to electricity which is a power rather than an object.

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<sup>8</sup> The Reichsgericht was the highest German court between 1879 and 1945.

<sup>9</sup> Judgment of May 1, 1899, Reichsgericht, Ger., 32 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 165.

The remedy, of course, was the enactment of a new statute specifically criminalizing the theft of electricity.<sup>10</sup> This gap in the law was filled by a statute of April 9, 1900, which expressly made punishable the theft of electricity by means of “leiter” or conductor attached to a power line.<sup>11</sup> Nevertheless, in a decision of December 8, 1933,<sup>12</sup> the *Reichsgericht* held that the operation of an automatic telephone by means of altered coins did not constitute an offense under this law, since it was accomplished by technical means not contemplated therein. The laws of June 28, 1935, are designed to prevent the recurrence of such decisions and to bring the jurisprudence of the courts into harmony with the “German legal conscience.”<sup>13</sup>

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<sup>10</sup> In Jewish law there might be recovery for theft of electricity on the basis that the person appropriating electricity generated by another has derived financial benefit at the expense of another. The party generating electricity has expended funds for the purchase of fuel in order to generate electricity; the user of electricity has directly benefited from the expenditure of those funds. However, in Jewish law that is a cause of action entirely different from theft.

<sup>11</sup> RGBl., I, 228

<sup>12</sup> *Entscheidungen in Strsachen*, 65.

<sup>13</sup> By the “Gesetz zur Anderung des Strafgesetzbuchs” of June 28, 1935, Art. 8, a provision on the “misuse of automats,” designed to correct this decision, is inserted in the *Reichsstrafgesetzbuch* as 265a.

In Jewish law as well there is always the possibility of plugging the lacunae by means of rabbinic legislation provided that there is a properly constituted body enjoying such legislative power.

The Myth of the Tentacles does not require the conclusion that a conveyance can be only of a fee simple absolute but that particular rights cannot be conveyed. Property is indeed a “bundle of rights” but only in the sense that property is a kind of substratum or *Ding an Sich* in which multiple interests coalesce. Each of those interests can be teased out of the bundle and separately conveyed. Example of conveyance of only a particular right abound.

An object can also be conveyed for a particular use to the exclusion of all other uses. A “use” itself is inchoate and cannot be transferred. But the physical component of an item of property that makes such a use possible *can* be conveyed. That factor is distinct from factors that make other uses possible. Hence, that factor may be isolated and conveyed to the exclusion of

all others. Thus, servitudes exist in Jewish law. A servitude, in Jewish law, is the transfer of an

interest in the underlying property and is termed a *shi'bud*. A revocable servitude is generally termed a license. The notion of a servitude reflects the concept of some interest inherent in the property whereas a license has the flavor of a right or privilege that is personal in nature. In Jewish law, a license is certainly revocable because it conveys no property interest. It merely allows for acts to be performed on sufferance. If no right vests, there exists at most a mere promise of ongoing sufferance. Even if the license is granted in return for valuable consideration a cause of action will arise only for recovery of funds expended, but not for specific performance. A servitude, on the other hand, is the conveyance of a particular aspect of the property and vests in the recipient immediately.

Jewish law does not, and could not, recognize the sale of commodity futures in a conventional sense. Nevertheless, it is quite possible, at least in some cases, to transfer a future interest by means of utilizing a device making it possible to alienate a particular present interest. The “fruits of a tree” (*peiros dekel*) do not exist until they are grown. Hence, as “a thing that has as yet not come into the world” (*davar she-lo ba le-olam*), no present property interest has vested and, consequently, title to the fruit cannot be alienated. But, it is entirely possible to transfer title

to the physical component of a tree that is responsible for the production of fruit. Transfer of *dekel le-peirotav*, i.e., “the tree for its fruits,” is not the conveyance of a future interest; it is the conveyance of a particular, presently existing, component of the tree.

The owner of a tree becomes the owner of fruit yielded by the tree because it is the issue or *yozei* of his property, just as the owner of a cow becomes the owner of its calf simply because the calf is the progeny of the cow. True, the proprietor of the tree becomes the owner of the fruit only when the fruit comes into existence. But, it is not necessary to acquire all the rights that coalesce in the ownership of a tree in the conventional sense in order to acquire title to its emerging fruit. Inherent in a fruit tree is a “power” that causes fruit to grow. Title to the power to produce fruit that is resident in the tree is sufficient to vest title to the fruit in the owner of that power at such time as the fruit comes into existence since the fruit is the issue of that power.

Students of philosophy are familiar with the Aristotelian notion of an entelechy. For Aristotle, all future acorns are present in an oak tree in miniscule form from the moment of the tree’s inception, albeit they cannot be perceived by the naked eye, just as all ova produced in a woman’s lifetime are present in the *corpora lutea* present in a female child’s ovaries at birth.

Aristotle's entelechy may be metaphysical rather than physical but is certainly located within the confines of a physical entity. Jewish law reifies that entelechy and regards it as a presently existing, tangible entity.

The basic concept is eloquently expressed in an anecdote well known among rabbinic scholars. In European communities of not so long ago, householders often owned cows that were kept in the backyard so that milk, butter and cheese would be readily and cheaply available. Rabbinic appointments came with certain emoluments, usually including a parsonage and often a cow. It happened that a wagon driver in the city of Brest-Litovsk, known among Jews as Brisk, suffered the loss of his horse upon which he depended to eke out a meager livelihood. He approached the rabbi of the city, the famed R. Chaim of Brisk, with his woe. The rabbi responded by telling him that he did not have sufficient money to purchase a replacement for the deceased horse and would find it difficult to raise the requisite funds. Instead, he offered the wagoner his cow and advised him to sell the cow and buy a horse with the funds realized from the sale. He added a wry comment to the effect that "although the householders of Brisk

may not be sufficiently charitable to provide a horse so that a poor man might earn a livelihood, they will not allow their rabbi to remain without a cow.”

Sure enough, the rabbi was promptly provided with a replacement for his cow. A delegation presented the cow to the rabbi with the declaration: “Rabbi, we are not giving you absolute title to the cow. We give you the *parah le-helbah*, the cow for its milk.” Rabbi Chaim accepted in good humor with the comment, “The householders of Brisk are not only consummate scholars they are also charitable individuals. They did not give me absolute title because of their quite cogent fear that I might give away this cow as well and they would be forced to provide yet another cow. Now, since I do not have title to the cow, they have effectively prevented me from doing so. However, they did not have to give me title to the cow for its milk; they could simply have granted me the right to consume the milk! That would have been a personal, non-transferable right of use with the result that I would have no right to share the milk with others. But they are charitable people and so they enabled me to acquire absolute title to the milk. Now, if a poor man comes to my door begging for food, I can at least give him a glass of milk and a piece of cheese.”

Rights in real property extend *ad infernos et ad coelum*. But, air rights standing alone are inchoate and cannot be transferred. Nevertheless, the Talmud and the Codes entertain the notion of a condominium which, above the first floor, is essentially ownership of space between certain altitudes, but they carefully distinguish between the sale of mere air and the conveyance of a servitude to erect a structure, on stilts if necessary, on the land. The former is inchoate; the latter a servitude on the land itself and is not at all inchoate.

As a practical matter, rights are divisible; some can be conveyed while others are reserved. Thus, Jewish law recognizes a right of usufruct, life estates, servitudes that run with the land and various other property rights. Servitudes in particular, as is the case with other conveyances, can be for a specific term or made defeasible by a condition subsequent. Applying the Myth of the Tentacles, we may say that the tentacles are composed of a variety of strands or tendrils, each one identified with a particular property right. The tentacle may be unraveled and each tendril separately attached, detached and reattached.

But, this is not a matter of logical necessity; it is simply a description of an ontological universe we cannot observe. In an alternative universe, all or some of the strands of which the

tentacle is composed might be irreversibly fused. There might also exist a universe in which such strands, or some such strands, once divided and separately attached cannot again be detached. Such an alternative universe does exist. The Gemara, *Bava Kamma* 90a, records an opinion to the effect that real property brought by a bride to a marriage cannot be conveyed to a third party even if both husband and wife join in the conveyance. Jewish law knows nothing of tenancy by the entirety. Hence, real property brought by a wife to the marriage remains vested in the bride. The husband acquires a right of usufruct for the duration of the marriage with the use of proceeds restricted to enhancing the family's standard of living. The husband also acquires a right of inheritance with regard to the underlying estate. As a result, for the duration of the marriage, the wife retains ownership of the underlying estate while the husband enjoys a life estate coupled with an irrevocable right of inheritance should his wife predecease him. As cited by the Gemara, Rabbi Eliezer maintained that those rights, once separated, cannot be conveyed to a third party either individually by either party or jointly by both entering into the conveyance. In effect, in this case, the separated strands bundled in the tentacles cannot be made to adhere to the shoulders of a third party. Only when the two rights again become merged, either by

termination of the life estate by divorce or by the husband's inheritance of the underlying estate, which is automatic and requires no *kinyan*, can they be transferred.

There are no wills in Jewish law in the conventional legal sense of the term because devised property vests only upon the death of the testator. A corpse cannot be seized of property: death of the physical body causes detachment of the attached metaphysical tentacles. Nevertheless, an identical effect can be achieved by means of an *inter vivos* transfer given effect a moment before death or by utilization of some other device. Intestate inheritance can also be explained by the Myth of the Tentacles. In *inter vivos* transfers, the suction cup must, by operation of *kinyan*, be removed from the shoulder of the proprietor and attached to the shoulder of another. Inheritance takes place *nolens volens* and is entirely automatic. When life no longer exists, the seal attaching the suction cup to the body is broken; the tentacle detaches itself from the body and seeks out the heir or heirs to whom it reattaches itself without need of a physical act in the form of *kinyan*. Although, according to the opinion cited above, individual property rights of husband or wife in property brought to the marriage by a bride, or the strands of the tentacle representing them, cannot be detached, and transferred to a third party, upon death of the

husband, his property interests (i.e., his life estate and right of inheritance) becomes extinguished. If the wife predeceases her husband, title to the underlying fee passes to the husband by inheritance, which requires no *kinyan*, and merges with his right of usufruct.

The Myth of the Tentacles is no more and no less a myth than is the notion of a magnetic field. If iron filings are placed on a piece of paper and a magnet is passed under the paper, the filings will align themselves in the shape of the magnet. We speak of the existence of a magnetic field that causes this phenomenon to occur. But we cannot see, feel, touch, smell or hear the magnetic field. We can only see the effect of this invisible, unperceivable entity. We might just as readily speak of the angel of magnetism that resides in magnetized iron and stretches out its tentacles to grasp iron filings. Indeed, we might say that iron is magnetized precisely because a particular angel has taken up residence within its confines. The angel of magnetism has a voracious, insatiable desire for iron filings. When brought into proximity with iron filings it stretches out angelic tentacles in an attempt to seize such filings. A magnetic field is either a metaphysical construct endowed with ontological reality – not materially different from an angel — or a convenient myth employed to explain certain physical phenomena in a manner that

renders them more comprehensible to the human intellect. The Myth of the Tentacles is similarly either a depiction of ontological reality or a myth designed to explain legal phenomena in a manner that makes them more comprehensible to the human mind.

This analysis of the notion of property in Jewish law is also relevant to the understanding of contracts in Jewish law. The distinction between words of promise and words of contract is known to all who are familiar with the legal system. Only words of contract have the power to create enforceable obligations; words of promise are vacuous platitudes. There is a certain symmetry between conveyance of property and entry into a contract in the common law system. Transfer of title requires a meeting of minds. A binding contract arises only when there is seriousness of intent and reliance on the part of the contracting parties. Words of contract reflect deliberative determination; words of promise are not indicative of seriousness of purpose. As a general rule, in Jewish law, mere words are of no impact and are dismissed as frivolous. Consequently, words of contract are no different than words of promise.

Little wonder, then, that there are no contracts in Jewish law. But, of course, there are contracts in Jewish law. Contracts, to be binding, must be accompanied by a very particular

form of conveyance. The simplest and most paradigmatic form of contract is one that arises between a debtor and a creditor. Acceptance of a loan creates a *shi'bud ha-guf*, or obligation *in personam*. That obligation is not simply a personal obligation but, literally, a servitude upon the body. Acceptance of a loan serves to convey a property interest in the body of the debtor. The loan is “guaranteed” by the body, not as a Shylockean entitlement to a pound of flesh, but as a servitude upon the body that serves to establish a property interest in the property of the debtor and hence in any handiwork he may produce. The biblical phrase “the debtor is the slave of the creditor” (Proverbs 22:7) is understood in a quasi-literal manner: A slave is the property of his master; a creditor has a property interest in the debtor. That property interest cannot give rise to peonage only because such exercise of a property interest is barred by Scripture other than as governed by the institution of *eved ivri* or indentured servant. Thus, the debtor cannot be forced to seek employment in order to satisfy his debt since that would be tantamount to involuntary servitude. Nevertheless, the creditor’s “property interest” in the person of the debtor creates a servitude against any property the latter may own or acquire just as title to property acquired by a slave vests in the master of the slave. Similarly, the creditor’s “property interest” gives rise to a

servitude upon the handiwork of the debtor just as the property interest of the master extends to the handiwork of his slave.

Accordingly, as might be anticipated, contracts for specific performance are generally void. Contracts for future sale of real property, as well as whether such a contract can render a subsequent sale to a third party nugatory, is the subject of significant discussion. Such contracts are generally regarded as void because the contract itself does not serve as a conveyance of a tangible property interest. An inchoate obligation to engage in a future conveyance cannot be established by contract precisely because it is not a conveyance.<sup>14</sup>

Examined through the prism of the Myth of the Tentacles, the matter is readily understandable. A contract to repay a loan is nothing other than the conveyance of a servitude upon the person of the debtor. The tentacles binding the debtor to the creditor do not attach

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<sup>14</sup> See *Kezot ha-Hoshen* 206:1; *Netivot ha-Mishpat* 206:2; and *Imrei Binah, Dinei Halva'ah*, no. 21. See also R. Pinchas Scheinberg, *Taba'at ha-Hoshen* 203, as well as the much earlier and more extensive discussion of R. Aaron Sasson, *Teshuvot Torat Emet*, no. 133. Both authorities focus upon the particular formula employed in such a contract and regard the validity of such contracts as predicated upon conveyance of a lien upon the person for future performance as distinct from a mere undertaking to perform an act. In effect, they concede the doctrinal point regarding the unenforceability of contracts but interpret the rulings of earlier authorities who upheld such contracts as based upon language generating an immediately conveyed *shi'bud*. Similarly, the conveyance of a reciprocal *shi'bud* is imputed to partners who bind themselves by contract to share the future earnings of either partner. See Rema, *Hoshen Mishpat* 176:3.

themselves to all aspects of the debtor's body, as is the case with regard to a slave, but they do attach themselves "to the body for its usufruct." Those tentacles attach themselves to the elements within the debtor's body capable of producing handiwork. The creditor cannot compel the debtor to actualize those elements by seeking employment solely because of scriptural constraints against peonage. Also conveyed in the contract is an interest in property presently owned by the debtor as well as property subsequently acquired by him. Through the intermediacy of the debtor's body the creditor's tentacles become superimposed upon all property attached to the debtor; similarly, later-acquired property becomes attached to the creditor in a like manner.

Since "a laborer may withdraw even in the middle of the day" (*Bava Mezi'a* 10a), there are no oral employment contracts in the sense of a contract that can serve as a basis for enforcement of specific performance. That is not at all surprising since "mere words" do not constitute a conveyance. Early-day authorities disagree with regard to whether *kinyan* is effective in generating an enforceable obligation for specific performance. If not, the reason is that because, with the exception of the institution of *eved ivri*, a person has no power to convey

his body. As expressed in the talmudic dictum: “For unto Me are the children of Israel slaves and not slaves to slaves” (*Bava Kamma* 116b).

Latter-day scholars had difficulty explaining the position of those authorities who maintain that *kinyan* renders employment contracts enforceable. Some reasoned that the *kinyan* does indeed generate a *kinyan ha-guf*, i.e., a conveyance of the body, but one that is limited in scope and duration and hence permissible since it does not rise to the level of peonage. Others regard it as giving rise to a mere servitude, i.e., a qualitatively more limited type of conveyance analogous to the conveyance of a right of usufruct.

The status of *mammon she-ein lahem tove'im* — “money that has no claimants” — is also illuminated by this thesis. Various tithes and other gifts must be presented to priests and Levites. The obligation is incumbent upon the owner who must designate the portion of the produce or the items that must be presented and who enjoys the prerogative of choosing a particular priest or Levite as the recipient. Nevertheless, should the owner fail to deliver the gift, no individual priest or Levite has standing to advance a claim against him. Nor can a group of potential recipients join in a “class action.” Hence, the property is described as “money that has no

claimants.” Effectively, the obligation to deliver the gifts to a member of the class of potential recipients is reduced to a personal obligation rather than a concomitant of a right enjoyed by the recipient.

Applying the Myth of the Tentacles, the status of such property is readily explainable.

Designation of produce or other required gifts serves a sacerdotal purpose but has no effect upon property interests because the tentacles binding the property to the proprietor remain undisturbed. Since the donor has the option of choosing the particular recipient, no member of the class of potential recipients enjoys the prerogative of establishing a property interest by attaching his own tentacles to the designated property; nor, for the same reason, does a potential recipient acquire a *shi’bud ha-guf* that could enable his tentacles to seize the body of the owner of such property. A financial obligation or an obligation to deliver property that is unaccompanied by a *shi’bud* is nothing more than a personal obligation unaccompanied by the transfer of any property interest. That state of affairs reflects ontological reality, i.e., it reflects the fact that no property interest of any kind can vest in any potential recipient because of the

ontological reality that no such recipient has the capacity to apply his tentacles to either the property in question or to the person of the proprietor.

Law is not metaphysics; nor is Halakhah. By the same token, legal scholars are not metaphysicians. Nevertheless, metaphysical constructs serve to make legal concepts more readily grasped by the human mind much in the same way that Kant's categories impose a structure upon the universe and thereby make it comprehensible to us. Such is the function of the Myth of the Tentacles.