

**Understanding Rights in Context:  
Freedom of Contract or Freedom from Contract?  
A Comparison of the Various Jewish and American Traditions  
Michael J. Broyde and Steven S. Weiner\***

We are told that Contract, like God, is dead. And so it is. (Grant Gilmore, *The Death of Contract*, p 3, Ohio State University Press, 1974)

**I. Introduction:**

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

Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a “Rights” movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we “take rights seriously” we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.<sup>1</sup>

One can extrapolate something even more general from this, as part of the contrast between the Judaic approach to obligation and duty and the Christian view of rights and needs. The Christian (and particularly Protestant) mindset simply does not view “laws” and “rules” and “obligations” as the central framework upon which to consider complex issues of society. Many other virtues, including “love” and “piety,” successfully compete with “rules” and “precedent” for the heart and

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<sup>1</sup> Robert M. Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *Journal of Law and Religion* 5 (1987):65–74, at p. 67 (footnotes omitted).

***Freedom of Contract or Freedom From Contract? Michael J. Broyde & Steven S. Weiner***  
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soul of society in a Christian community, and serve as the central features of Christian jurisprudence.<sup>2</sup>

Indeed, many religious movements in the United States identify love as an overarching guiding principle. When there is some urgently felt need to change a doctrine or keep it in one way or another, “love” is frequently utilized as a way to modify law.<sup>3</sup> The premium that is to be put upon a religious entitlement is so coded. When Christianity takes love seriously, we often understand that to mean that love trumps other values and creates some sort of entitlement. But Jewish law embodies an approach where “an entitlement without an obligation is a sad, almost pathetic thing.”

There are, however, some areas of the Jewish tradition that can be conceptualized as rights. In this article we will contrast the approaches of Jewish law to those of common law in one of these areas: Contractual Freedom. What we will see, however, is that the Jewish legal system and common law have very different insights, and they approach the basic understanding of contract law in contrasting ways.

In a nutshell, this paper will show that even when the Jewish tradition really does speak in the rights language—as it does in the contract area—it still cannot bring itself to formulate the “right to contract” as a personal right at all, but only as a property obligation. One simply cannot have the personal right to contract in the Jewish tradition. This stands in full contrast with common law and American “freedom of contract.”

## II. Contract Law and Jewish Law

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<sup>2</sup> Professor Saiman of Villanova University School of Law has written insightfully about the sources of these fundamental differences and how they still resonate today in a number of ways. See Chaim N. Saiman, “Jesus’ Legal Theory -- A Rabbinic Interpretation,” *Villanova Law/Public Policy Research Paper No. 2007-12* (June 2007), available at SSRN: <http://ssrn.com/abstract=992280>. (This article argues that the polarized positions in many contemporary debates within American law -- law vs. equity, procedural vs. substantive justice, rules vs. standards, formalism vs. instrumentalism, and textualism vs. contextualism -- can be seen as manifestations of a fundamental disagreement between the rabbinic Jewish understanding of law and Christian jurisprudence as represented in the Gospels.)

<sup>3</sup> Consider the frequent references in contemporary Christian literature to the homosexual and love.

## A. Sale of Goods and Contract Law

The idea that honorable people keep their word and do not lie is a fundamental one found in nearly all societies, and it has clear roots in the biblical mandate that directs a person to "distance oneself from falsehood."<sup>4</sup> But yet, Jewish law (*halacha*) has always had a great reluctance to punish one who merely promises to do an action or engage in a future transaction and does not do so. The classical Talmudic rule was codified by Maimonides (Rambam, Egypt, 1135-1204) as follows:

Merchandise cannot be acquired by mere words. Even if a seller says to a buyer, 'I will sell you my house', the two agree on a price, the buyer says 'I will buy' and the seller says 'I will sell', and they declare this future transaction before witnesses - still it is void and as if they had never spoken. However, if title to the merchandise is transferred [by appropriate legal device], then even in the absence of witnesses, both parties are bound.<sup>5</sup>

The rule of the Talmud and of the classical *Rishonim* (early commentators) stands in direct contrast with the classical formulation of common law. Contract law shows absolutely no reluctance to enforce contracts for the future sale of goods which the seller does not yet possess at contract time. If either party to a binding sale agreement fails to perform, the Uniform Commercial Code (UCC) compels the breaching party to pay not just damages but also expectancy damages—i.e., enough money to make the damaged party as well off as if the contract had been followed through as agreed. Whether or not the seller owned such goods at the time the agreement was concluded could not possibly be more irrelevant to sale-of-goods doctrine within common law.

This starkly contrasts with original Talmudic law, which did not enforce agreements to sell goods not yet in the seller's possession. This was apparently prevailing law through the time of Maimonides, and it was based in a general reluctance of the Talmudic legal system to accept the idea of wholly personal (as

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<sup>4</sup> *Exodus 23:7*, for more on this, see the recent work *Teten Emet LeYakov* on the many issues involved in lying.

<sup>5</sup> Maimonides, *Mishne Torah, Laws of Sale*, chap. 1: par. 1-2.

opposed to property-based) obligations. However, around the thirteenth century, *halacha* embraced a more modern view which accepted deals for goods not yet owned by the seller.

Under common law, the enforceability of contracts for the sale of goods which the seller does not yet possess is taken for granted. Such contracts are extremely common forms of commercial transaction. (For example, trading in the futures market or commodities market is predicated on the premise that agreements to sell and buy specified goods at future times are valid.) Modern commerce could hardly imagine a system where purchase orders for goods not yet in inventory are not binding. The UCC provides explicit and unequivocal legal support for expectancy damages in the event of default on sale-of-goods contract, regardless of whether any goods were actually possessed by the seller.<sup>6</sup>

Such was not the approach of classical Jewish law where the legal effect of selling what one did not yet own or what was not yet in existence (like next year's crops) was the subject of a famous dispute. The origin of this dispute is found in the disagreement between the early Rabbis and Rabbi Meir (Israel, c. 100 CE) about the case of a man who attempts to wed a woman when marriage is not yet possible for them:

Suppose a man says to a woman, 'be wedded to me after I convert' or 'after you convert'... or 'after your husband dies'... she is not wedded. R. Meir rules: she is wedded.<sup>7</sup>

The Talmud interprets this argument as founded on the basic issue of whether a person has the power to make a deal involving property not yet in existence or not yet in his possession. The Talmud applies the argument to a variety of cases including the sale of: a field not yet acquired by the seller,<sup>8</sup> a tree's fruit that has not yet grown,<sup>9</sup> "what my trap shall ensnare" and "what I shall inherit".<sup>10</sup> In each

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<sup>6</sup>See UCC sections 2-706 through 2-709, and 2-711 through 2-713.

<sup>7</sup> *Kiddushin* 63a.

<sup>8</sup> *Bava Metzia* 16b.

<sup>9</sup> *Bava Metzia* 33b.

<sup>10</sup> *Bava Metzia* 16a and 33b.

of these cases, the Rabbis hold that neither the buyer nor the seller is bound to follow through with performance, nor would the breaching party be subject to any liability. This opinion was universally accepted as law by all major post-Talmudic authorities including Rambam,<sup>11</sup> R. Jacob b. Asher (*Tur*, Spain, 1269-1343) and R. Joseph Caro (*Shulhan Arukh*, Israel, 1488-1575).<sup>12</sup>

For certain, the Talmud contains several exceptions to the Rabbis' position, but even these exceptions reinforce the basic rule. The Talmud comments on the situation in which a seller does not own the promised property at the time of sale, but immediately afterwards does come to acquire it. The Talmud accepts the opinion expressed by R. Abba Arika (Babylon, 3<sup>rd</sup> century) that the aggrieved buyer is awarded ownership, because the seller is presumed to have purchased the property as agent for the buyer in order to clear his own name.<sup>13</sup> Additionally, the Talmud creates an exception by special enactment in the case of "what my trap shall ensnare," as a form of charity for a poor person to raise money for his daily needs by selling his catch for that very day before it is actually caught. Both of these are denoted as exceptions, and they reinforce the notion that the rule is to the contrary: There was no straightforward halachic way for a businessman to routinely sell that which he did not yet own. The most one can say is that as a form of charity, the desperately poor may engage in such sales.

The majority position of the Talmudic rabbis is best understood by realizing that generally there is no rule of enforcement for a promise in Jewish law. Only the actual conveyance of title by the seller through formal *kinyan* (acquisition) can close the deal. Outside of R. Meir's minority opinion, the Talmud shows no recognition of the idea of a binding agreement to make a sale as distinct from the actual transferring of title. Bilateral executory contracts—the ordinary form of

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<sup>11</sup> Maimonides, *Mishne Torah, Laws of Sale*, 22: 1-5.

<sup>12</sup> *Tur* and *Shulhan Arukh, Hoshen Mishpat*, 209 and 211.

<sup>13</sup> *Bava Metzia* 15a. Of course, this remedy is essentially left up to the seller to act on and thus does not have a great deal of teeth. Furthermore, it is not widely accepted as fully binding by post-Talmudic authorities (for example, Maimonides (*Laws of Robbery and Loss* 9:9) applies it only to a seller who acted deceptively.)

contemporary purchase and sale agreements—are invalid as a matter of Jewish law.<sup>14</sup>

Nor is the Talmudic approach very unusual, as it resembles very much pre-modern common law. As one classical textbook notes:

Consider, for example, an agreement made in the year 1450 and involving an exchange of oral promises - 150 bushels of wheat for L10. On the original exchange of promises, no obligation in debt arose; that action would lie only if the wheat were actually delivered, or at least a ‘property’ in the wheat were transferred. Even after 1500, when special assumpsit began to expand as a remedy on promises, the great bulk of special assumpsit cases described in the reports involved plaintiffs who had already performed.<sup>15</sup>

As in early common law, the one contractual obligation apparently recognized by the Talmud was debt: Conveying title in goods to a buyer created a debt for the agreed purchase price in favor of the seller. The creditor, according to Talmudic law, was entitled to satisfy his debt by collecting from any property the debtor possessed, even if acquired after the debt arose. Moreover, the debt created a lien for the creditor on real property of the debtor, so that the creditor could recover his debt from property conveyed by the debtor to third parties after the debt arose.<sup>16</sup> After some debate, it was decided that this lien, too, applied even to property acquired after the debt arose, what modern UCC considers a floating lien.<sup>17</sup>

## **B. The Sale of Labor and Contract Law**

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<sup>14</sup> See quotation from *Mishne Torah*, cited at footnote 5.

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

<sup>16</sup> *Bava Batra* 157a.

<sup>17</sup> *Bava Batra* 157b in the name of Rav Ashi (Babylonia, 352–427). Many commentators (see R. Samuel b. Meir (Rashbam, France, c. 1080/85-c.1174)) have understood the floating lien rule as something of an aberration in the conceptual framework of the Talmud, and considered it a special Rabbinic enactment to facilitate the extension of credit. In any event, though, the rules about after acquired property make it clear that there existed some level of an obligation to pay money and to the level of a floating lien.

In labor contract cases, as in sale of goods cases, we have a sweeping Talmudic renouncement of promissory enforcement: "If an employer and laborer agree to a labor contract and then one of them backs out, the aggrieved party has no legal claim for damages."<sup>18</sup> Of course, as we saw in sale of goods cases, this does not mean that there is no protection of contractual interests. Analogous to what we have seen in sale of goods cases, a labor agreement from the Talmudic perspective is rather like a unilateral contract in common law. Once an employee fully performs his contracted work, the employer is in debt for the full contracted wages.<sup>19</sup> Thus, the promises alone create no obligations per se, but performance by one particular party (the laborer, the promisee) will obligate the other (the employer, the promisor).

Restitutionary interests on both sides are also protected. An employer can get his money back, and the employee who has partially performed is entitled to partial compensation. Recovery for work performed is analogous to *quantum meruit* in common law. The question of exactly how to value partial performance is a complex one in our own legal system.<sup>20</sup> Talmudic authorities engage in a fairly sophisticated debate on this issue, and generally give the party not in default the choice between *pro rata* contract price and 'contract price less cost of completion' as possible standards for recovery.<sup>21</sup> Note that Talmudic *quantum meruit* is available even for the defaulting employee (although the employer "has the upper hand" in choosing a standard), thus long anticipating the comparable common law development chronicled in *Britton v. Turner*.<sup>22</sup>

Interestingly, the Talmud is emphatic that a laborer paid by the hour (or by any unit of time, as opposed to a job contractor) is entitled to recover *pro rata* contract price for partial performance, even where the laborer defaults (except where the work is time critical—then, 'contract price less cost of completion' may

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<sup>18</sup> Maimonides, *Mishne Torah, Laws of Hiring*, 9:4.

<sup>19</sup> Maimonides, *Mishne Torah, Laws of Hiring*, 11:1.

<sup>20</sup> See, for example, *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (1973).

<sup>21</sup> Glosses of Tosafot, *Bava Metzia*, 76a. R. Moshe Isserles (Rama, Poland, 1525/30-1572). *Choshen Mishpat*, 333:3

<sup>22</sup> *Britton v. Turner*, 6 N.H. 481 (1834).

be used). In setting forth this particular rule, the Talmud cites the Biblical verse, "The [children of Israel] are My slaves,"<sup>23</sup> and homiletically comments: "My slaves, and not the slaves of men."<sup>24</sup> As much as any statement, this is a statement of core values and not just of contract law.

Indeed, in contrast to the Talmud's treatment of sale of goods cases, Talmudic protection of labor contracts goes somewhat beyond debt and restitution. Recall that labor contracts are something like unilateral contracts under Talmudic law. Common law has developed a number of grounds for preventing the promisor in a unilateral contract from withdrawing his/her offer, even where there has not yet been full performance by the promisee. These grounds include partial performance,<sup>25</sup> reliance,<sup>26</sup> and "firm offers" supported by formality or extra consideration.<sup>27</sup> The Talmud and its commentaries recognize a number of similar grounds for relief for the laborer when the employer calls things off before complete performance. In the following section, we shall examine these grounds, as well as some other bases for recovery in a labor agreement, in some detail.

**Reliance interest - employee.** The employer must pay for any wages which have been lost as a result of his making and then breaking the work agreement. These are reliance damages: The laborer is compensated for wages he could have made by accepting a different job, an opportunity which is now no longer available to him because of his reliance on the employer's offer. This reliance recovery is neither explicitly mentioned in the original Talmudic texts dealing with laborers nor in Maimonides, but it is introduced as well-grounded in Talmudic tort principles by early Talmudic commentaries<sup>28</sup> and is clearly spelled out in the *Shulhan Arukh*:

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<sup>23</sup> *Leviticus* 25:42.

<sup>24</sup> *Bava Metzia*, 10a.

<sup>25</sup> *Restatement of Contracts*, Second. Sec. 45.

<sup>26</sup> *Drennan v. Star Paving Co.*, 51 Cal. 2d 409 (1958).

<sup>27</sup> *Mier v. Hadden*, 148 Mich. 488 (1907).

<sup>28</sup> Glosses of R. Solomon b. Abraham Adret (Rashba, Spain, c. 1235-c. 1310), *Bava Metzia*, 76b.

If the workers could have found alternate work yesterday when this employer agreed to hire them, and now they cannot find any work, then ... the employer must pay them full wages discounted by the value of leisure. If they can now find work at reduced wages, the employer need pay them only the difference.<sup>29</sup>

It is important to notice that while reliance can be the basis for enforcing promissory expectancy in common law, the Talmudic authorities view reliance as a pure tort action.<sup>24</sup> Accordingly, the Talmudic authorities would only grant damages equal to the actual reliance loss—not the lost expectancy. Thus, if the alternative job available to a worker at contract time was for a lower rate than the contract, then the defaulting employer would be liable to pay only for the lost opportunity—i.e., the lower rate. In a similar case, common law would hold the employer to his promise and award full contract rate damages.<sup>22</sup>

**Reliance interest - employer.** Defaulting employees may cause reliance damages to an employer if, for example, the market price of labor has risen since the original time of agreement. The Talmud is rather explicit on the point that the employer is not generally entitled to recover such damages from the employee. If the employee claims restitution for partial performance, then the employer can essentially cover his reliance by using the contract price less cost of completion standard to calculate the employee's recovery.<sup>30</sup> However, if the cost of completion exceeds the contract price, or if the employee has no restitutionary claim, then the employer's reliance is not generally protected. The Talmud does make an exception for cases where the contracted work is time critical—e.g., the removal of soaking flax (which, if not done on time, means ruined flax) or musical performance for a wedding. What the Talmud grants even in those cases, however, appears to be only a choice of limited remedies: The employer may either promise his defaulting workers extra money to get them to finish (if they are ignorant enough of the law to fall for that!) and then pay only the original contract price,<sup>31</sup> or else he may hire other workers and recover his reliance (the actual cost of

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<sup>29</sup> See note X above.

<sup>30</sup> *Bava Metzia*, 76b.

<sup>31</sup> This particular remedy is reminiscent of the outcome in common law duress cases like *Alaska Packers' Association v. Domenico*, 117 F. 99 (1902).

completion less the contract price) out of any property that the employees have deposited with him.

**General relief for reliance damages by the employer does not seem possible under Talmudic law.** A number of Talmudic authorities<sup>32</sup> argue that tort doctrine allows recovery of consequential damages in the case of workers who default on soaking flax, where the employer's property has been knowingly jeopardized by the workers. These authorities claim that the limited Talmudic remedies listed earlier apply as limitations only for non-performance of the act, but in the flax case, where property of the employer is literally at stake, tort doctrine is applicable and protects the employer. Where property is not at stake, and the employer did not previously exact a security deposit from his employees, the Talmudic response to the employer who must now hire new workers at a higher market rate would evidently be: If you don't like the rate, don't have the work done. In summary, the reliance interests of the employer receive some (but only a limited measure of) protection under Talmudic law.

**Partial performance.** If the employer rescinds after the employee has begun work or even substantial work preparation (e.g., arrived at the work site), the employee is entitled to damages for his lost wages. Here, an expectancy measure is used, however: Regardless of whether the employer had any other opportunities at contract time, he is entitled to his contract salary, discounted by any salary he can now earn at other jobs (or in the alternative, discounted by an amount equal to the value of leisure instead of working). This rule appears explicitly in the Talmud itself, and is enunciated clearly in *Shulhan Arukh*.<sup>33</sup>

This last rule is rather puzzling: Uncharacteristically, the Talmud enforces a partially executory bargain and awards expectancy damages. The rationale generally given by Talmudic commentaries for this anomalous rule runs more or less as follows. When an employee arrives or begins performance, he is tendering his half of the bargain. Once the employer accepts this tender, the debt on his part for the contract price is created (conditioned on complete performance by the employee). If, after accepting this initial tender, the employer then rejects

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<sup>32</sup> Responsa of *Terumat Hadeshen*, cited in Glosses of Rama, *Choshen Mishpat*, 333:6.

<sup>33</sup> *Shulhan Arukh*, *Choshen Mishpat* 333:2.

performance, he is simply throwing away that which he has already accepted, and it is his loss—his debt for the contracted wages is enforceable. One might also theorize that the rule simply reflects the truth that in reality, an employer who backs out after his employee has begun has quite probably caused his employee reliance damages.

Of course, proving those damages is not always easy. If an employee's job search ended after meeting his/her employer, the employee may well have no idea and be unable to prove whether other opportunities had been available at contract time. The partial performance rule might be viewed as simply a presumption at law that the aggrieved employee relied on the promise of wages to forego other job opportunities. The language of some Talmudic commentators<sup>34</sup> is consistent with this explanation. Recovery of promised wages after partial performance would then, in principle, be a tort-based reliance recovery, similar to the reliance recovery discussed earlier.

### III. Modern Halachic Perspective: Contract Law Revisited

As we mentioned earlier, the major halachic authorities—including the *Tur* and *Shulhan Arukh*—have continued to uniformly endorse the position of the Rabbis about not selling that which one does not yet own, and more or less eviscerated all modern contract law based on that view. However, beginning around the thirteenth century, many Jewish law authorities found it possible to also accept the ruling that a person could indeed obligate himself to sell property he would later acquire, by calmly distinguishing between an obligation to sell and an actual sale.

That surprising rule is nowhere to be found in the Rambam; it is found first in a relatively obscure, virtually out-of-print medieval work by R. Samuel ben Isaac Ha-Sardi (Spain, 1225) entitled *Sefer HaTerumot*,<sup>35</sup> which is then incompletely echoed by the *Tur* and *Shulhan Arukh*, and indeed faces no opposition in any later writings. R. Yechiel Michel Epstein (*Arukh ha-Shulhan*, Lithuania, 1829-1908), an early twentieth century codifier, follows in step with

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<sup>34</sup> Glosses of Tosafot, *Bava Metzia*, 76b.

<sup>35</sup> Number 64.

these rulings, and notes: "and so, any person can give or sell property not yet in existence or in his possession, in this way."<sup>36</sup>

How was this surprising turnaround halachically accomplished? The key lay in revisiting the laws of debt, rather than contract, as we have already hinted. One important idea was the ruling by a majority of scholars that a debt created by agreement did not have to be expressed in fixed monetary terms; one could also become indebted to supply another person with food, for a fixed or indefinite term.<sup>37</sup> Rashba adds a responsum that one could likewise indebt himself to pay his earnings over a future period to a creditor. From this rule, arguably Talmudic in origin but not exploited within the Talmud, it was no leap at all for the *Tur* to conclude that the indebtedness could be for some measure of wheat or other property. Since the technique involves not sale but debt, and the goods are formally being used only as a standard to measure the amount of indebtedness, the debtor must supply the property specified or its value in satisfaction of the debt—regardless of whether the property in question was ever owned by him. Thus, through mechanics of debt, Jewish law achieved full compatibility with the expectancy model of the UCC.<sup>38</sup>

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<sup>36</sup> *Arukh Ha-Shulhan* 60:11.

<sup>37</sup> This rule is disputed by Maimonides, *Mishne Torah, Laws of Sale*, 11:16 - but R. Abraham ben David (Ravad, France, 1125-1198), R. Moses b. Nahman (Ramban, Spain, 1194-1270), and a majority of other scholars stood firm.

<sup>38</sup> Another debt-related rationale for the transformation, referred to by the *Sefer HaTerumot*, is the rule mentioned previously about the floating lien that attaches to after acquired property. This rationale is somewhat more puzzling. If the point is to prove that the Talmud recognized personal—as opposed to property-based—obligations, it is hard to see how the lien rule illustrates this any better than the basic rule that the creditor can collect from any property held by the debtor himself, whenever acquired. (A similar question may be asked about those commentators who regard the floating lien as a special Rabbinic edict, but who were not similarly troubled by the personal obligation of the debtor to satisfy the debt.) Evidently, the lien rule is not being noted to prove the personal nature of the obligation to repay a debt. We would instead explain it as follows: The floating lien is cited as an illustration of a property right—namely, the lien—which is born of a transaction (creation of the debt) occurring before the property is owned by the conveyor of the right. The precise analogy is: Just as debt can help create lien rights on property not yet owned by the debtor (perhaps by special Rabbinic edict), so too can debt help create full title to property not yet owned by the debtor.

Thus, debt has proven to be a very fertile vehicle for building up a framework of commercial contract law. But the Jewish tradition never waived from its absolute denial of a right to contract in which a person could undertake as a matter of personal obligation a future act. “Contracts” as a personal obligation do not really exist in Jewish law.

#### **IV. Vestiges of Original Perspective and a Contrast with Freedom of Contract**

It would appear that Jewish law has evolved to an equivalent place as the UCC with regard to contract law, at least from a functional point of view. However, we think it is significant that while English common law developed contract by turning away from debt and towards notions of personal duty, Jewish law instead revisited and broadened its conceptions of debt, while remaining increasingly uncomfortable with restrictions on personal liberty. The models we have seen above show that Talmudic thinkers—unlike authorities of common law—do not conceptualize a contractor's obligation as a binding promise which must be obeyed, and which—when breached—gives rise to a tort-like liability for damages. Instead, Talmudists speak of the obligation as a debt which must be paid off or as an automatic lien; either way, there is no sense of "promise" or the possibility of "breach". Fulfilling the contract is not "performance" but merely a way of paying off the debt or satisfying the lien, as is the payment of expectancy in cash.

What is the importance of this conceptual difference? Why indeed must promissory enforcement enter through the back door of Jewish law, and not enter through the front door of “promise keeping”? This is certainly not because the Talmud underestimates the importance of keeping promises. The sages held nothing back in condemning he who fails to stand by his word. Rather, the loyalty of Talmudic authorities to adopt a vocabulary of true personal obligation may well embody a strong statement of public policy: a commitment to protect freedom of choice. Ironically, "freedom of contract" is routinely spoken of in Western literature as one of the basic societal freedoms that law must protect. Charles Fried, in *Contract as Promise*, writes the basic doctrine as such:

Security of the person, stability of property, and the obligation of contract were for David Hume the bases of a civilized society.<sup>39</sup>

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

Thus the law of torts and the law of property recognize our rights as individuals in our persons, in our labor, and in some definite portion of the external world, while the law of contracts facilitates our disposing of these rights on terms that seem best to us.<sup>40</sup>

Thus, the modern Western idea is that enforcing promises gives individuals freedom in the sense of more opportunities for autonomous commerce and economic growth and to be stripped of our liberty rights based on our autonomy to agreed to be so stripped.

By contrast, the Talmud seems to place greater value on the freedom to break—not make—contracts. "The children of Israel are My slaves' - they are not the slaves of men," is the Talmudic reading of Leviticus 25:42. The Talmud<sup>41</sup> emphasizes this teaching in explaining why even a defaulting laborer is entitled to *pro rata* wages for the time he did work. Later Talmudic commentaries proposed establishing maximum durations for labor contracts,<sup>42</sup> in the spirit of "they are not the slaves of men." The Talmudic perspective evidently views promissory enforcement as an institution of bonding and binding—not of freedom. Promissory enforcement gives a person the "freedom" to barter away his/her future free choice. A promise may be made in the light of current needs and expectations, and subsequently, at the time of enforcement, the promisor's freedom of choice is gone—the promisee controls both parties. According to the Talmud, a person can sell his/her property, but cannot sell his/her own choice. Not keeping one's word is unethical and damages the promisor's credibility; yet, letting the promisee collect

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<sup>39</sup>Fried, *Contract as Promise*. Harvard University Press, 1981. p. 1.

<sup>40</sup> *Ibid*, p. 2.

<sup>41</sup> *Bava Metzia* 10a.

<sup>42</sup> Glosses of Tosafot, *Bava Metzia* 10a.

damages treats the promise of performance like the promisee's property. If a person damages someone else's property interests, this person must pay, but he/she cannot surrender ownership of his/her own free choice. To accord legal status to an executory bilateral contract is to allow the bartering of individual free choice in the marketplace. To the Talmud, contract enforcement means bondage, not freedom.

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

It is prohibited for a person to hire himself out as a worker in another's employ contractually for more than three years.<sup>43</sup>

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

Distaste for the sale of free choice is manifested in certain elements of modern common law as well, albeit in a much more limited way and in a more limited circumstance. Specific performance is regarded as an unusual remedy only to be given sparingly.<sup>44</sup> Especially when personal service is involved and the specter of forced labor looms most threateningly in the background, common law courts are loath to decree specific performance. In *Fitzpatrick v. Michael*, for example, it is concluded that decreeing the specific performance of personal services "would result in a species of peonage on the part of the servant... which would be intolerable."<sup>45</sup> The Talmudic reluctance to grant expectancy damages for wholly executory bargains represents a similar, but much broader concern for the protection of individual freedom, which extends even to monetary remedies.

Moreover, it is interesting to note that several recent trends in contract law promote the value of freedom to break, as opposed to freedom to make, contract.

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<sup>43</sup> *Pitchai Choshen*, volume 3, chapter 7, paragraph 1

<sup>44</sup> *Curtice Brothers Co. v. Catts*, 72 N.J.Eq. 831 (1907).

<sup>45</sup> *Fitzpatrick v. Michael*, 177 Md. 248 (1939).

One is the Lochner-era of law where the U.S. Supreme Court relied on "freedom of contract" to justify turning a blind eye to commercial exploitation of the poor and weak. Grant Gilmore's *The Death of Contract* chronicles the modern muddying of purist contract doctrine through the replacement of consideration doctrine with fairness-based doctrine, and through the liberalization of excuses for non-performance. Similarly, courts have shown a growing readiness to police bargains and reform or invalidate contracts, applying doctrines like duress, inadequacy of consideration, and unconscionability.<sup>46</sup> A common argument<sup>47</sup> is that many contract situations in our world involve parties with unequal bargaining power. This inequality undercuts the validity of the contracts so formed, both because the weaker party's consent is tainted by duress, and because it may be unconscionable for a court of justice to enforce an agreement which brutally takes advantage of a weaker party.

## V. Conclusion

Original Talmudic contract law, and current Jewish law vocabulary, may reflect a similar concern for the powerless. This is not to suggest that modern contract law is moving toward a framework that abandons promissory enforcement. As we have seen earlier, Jewish law has, as a practical matter, evolved to the point where it can support a modern, industrial economy that thrives on advance purchase orders and "just-in-time" inventory management. Notwithstanding, the Talmudic message that "they are not the slaves of men" has important meaning for our society as well. Admirably, our legal system has lately chosen to show some empathy for individuals whose economic weakness is unconscionably exploited, and who wind up selling cheaply their own freedom.

"We are told that Contract, like God, is dead. And so it is." So goes Grant Gilmore's famous opening line in *The Death of Contract*.<sup>48</sup> Ironically, we have seen that in more ways than one; it might actually be the religious perspective of the Talmud which accounts for the weakness and leniency of Talmudic contract doctrine. We might say that for the Talmud, Contract is dead because God lives.

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<sup>46</sup> *Henningsen v. Bloomfield Motors, Inc.*, 350 F.2d 445 (1965).

<sup>47</sup> Dawson, "Economic Duress - An Essay in Perspective." 45 Mich.L.Rev.253 (1947).

<sup>48</sup> Gilmore, *The Death of Contract*. Ohio State University Press, 1974.