EDITED BY

AARON

LEVINE

The Oxford Handbook *of*

JUDAISM AND ECONOMICS

THE OXFORD HANDBOOK OF

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Prologue

The Oxford Handbook of Judaism and Economics explores how Judaism as a religion and Jews as a people relate to the economic sphere of life in modern society, and how they did so in past societies.

The intersection of Judaism and economics is multidimensional. To encompass its various aspects, articles for this volume were solicited from the scholarly community that fall into the following areas of study: Jewish Law and Ethics and the Modern Economy; Economic Public policy and Jewish Law; Comparative Law Studies Relating to Economic Topics; Economic Theory in the Bible and Talmud; Business Ethics and Jewish Law; Judaism and Economic History; and The Economics of Judaism.

Bringing together scholars from such diverse fields as economics, American law, Jewish law, Jewish history, and moral philosophy inevitably entails a clash in styles of writing. To make this volume as cohesive and seamless as possible, a certain degree of uniformity was deemed essential. The uniformity can be found in the way sources are quoted and in the transliteration style.

We recognize that some of the readers of this volume will lack a background in Jewish law. With this in mind the Introduction addresses at length the origin and development of Jewish Law. Treatment of this matter in the Introduction obviates a need for individual authors to provide the necessary background information pertinent for their contributions. Tedious repetition was thus avoided.

Given the interdisciplinary nature of this work, it is recognized that the reader will, at times, desire fuller definitions of terms than what appear in the chapters. The reader should therefore find the Glossary of this work a helpful feature.

Another feature of this work is that each chapter provides a Selected Bibliography. The purpose of the Selected Bibliography is to key in on the most essential sources a future researcher should initially consult with the aim of advancing the research on the particular topic.

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The Oxford Handbook of Judaism and Economics is the brainchild of Dr. Michael Szenberg, Coeditor of the *Oxford University Press Handbook Series on Economics*. Because economic theory in the *Talmud* is one of his many research interests, Dr. Szenberg proved extremely helpful from the outset in the design of this project. My profound gratitude goes to Dr. Szenberg for his prudent advice on the editorial issues that came up over the project; most of all, however, I am grateful for his enthusiastic encouragement throughout the project.

Putting together *The Oxford Handbook of Judaism and Economics* was a prodigious undertaking. Without very significant assistance, the project would have been beyond reach. I have many to thank.

First, my thanks to my friend Leon M. Metzger. Professor Metzger's expertise in finance and economic issues, his extensive experience as an arbitrator in Jewish courts, and his superior editorial skills were great assets for this project. As associate editor, Professor Metzger put his mark on this volume.

The editorial assistants for this volume, with the exception of Shaul Moshe Seidler-Feller, are all former students of mine at Yeshiva College. Their common denominator is a very strong background in economics and Jewish studies. In scholarship, character, and dedication to the task at hand, this group is representative of Yeshiva College at its best.

David Sidney, chief editorial assistant, has been engaged in this project from its inception. David's primary responsibility was editing and helping in the making of the Glossary. What he actually did was much more. For a number of the chapters, David had penetrating questions and incisive comments for the authors. David's work has brought a number of the ideas presented in this volume to a higher level of precision and organization.

Nathan Hyman assisted in the colossal tasks of copyediting and compiling the indices of this volume. He went considerably beyond these parameters by providing a number of the contributors with suggested improvements in both language and content. When the going got tough, Nathan's alacrity and effusive enthusiasm for the project gave me a much-needed lift.

Daniel Tabak's task was to ensure that the transliterations were put in uniform style. Daniel did much more. He carefully read a number of the chapters and presented the contributors with challenges and calls for clarification.

Shaul Moshe Seidler-Feller was officially involved with transliterations, ensuring uniformity in the presentation of authorities and in sundry stylistic matters. In many ways, Shaul went the "extra mile." He not only completed the task

with extradinary speed, but also proved a wizard in spotting missing information and subtle inconsistencies.

Kudos to Uri Westrich for his very capable and meticulous assistance in the preparation of the indices for this book.

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For the past thirty-seven years, I have been employed as a Professor of Economics at Yeshiva University. My profound appreciation to Mr. Richard M. Joel, President of Yeshiva University, for his tireless efforts to create a hospitable environment for scholarship and intellectual growth.

The bulk of the contributions for this volume is aimed at offering direction and even outright prescriptions for marketplace conduct and public policy. These works therefore loosely fall into the branch of Jewish scholarship that is concerned with the application of Jewish law to modern society, popularly called *Mishpat Ivri*—lit. Jewish/Hebrew jurisprudence. The distinctive contribution of the *Mishpat Ivri* chapters of this volume is that economic theory and economic analysis are applied to Jewish law as it relates to modern business practice and public policy. The participation in this volume of scholars of international repute is eloquent testimony that this field and related fields are vibrant academic research areas.

Thirty-seven years ago, when I first began my research into the interface of economics and Jewish law, the application of Jewish law to modern society through the lens of economic analysis and economic theory was a relatively virgin area of research, with few practitioners.[1] My gratitude therefore only increases over time to Rabbi Dr. Norman Lamm, former President and now Chancellor of Yeshiva University and Rosh Yeshiva of Yeshiva's affiliate, the Rabbi Isaac Elchanan Theological Seminary (RIETS), who encouraged my work greatly in those early years. Over the span of twenty years from 1980 to 2000, I published four books in Rabbi Lamm's series, *The Jewish Library of Law and Ethics*.

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1 In this early period researchers in the field of Economics and the Talmud included Robert Aumann, Barry Gordon, Zvi Ilani, Ephraim Kleiman, Yehoshua Liebermann, Roman A. Ohrenstein, Jacob Rosenberg, Aharon Shapiro, and Meir Tamari.

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THE OXFORD HANDBOOK OF

JUDAISM AND ECONOMICS

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INTRODUCTION

AARON LEVINE

Judaism and Economics explores how Judaism, as a religion, and Jews, as a people, relate to the economic sphere of life in modern society and how they did so in past societies.

Before elaborating on the themes of this volume, some preliminary remarks regarding Jewish law and its development over time are in order.

The Sources of Jewish Law

The sources of Jewish law begin with the *Pentateuch* (i.e., the Five Books of Moses), which, according to Orthodox Jewish tradition, was revealed by G-d to Moses at Mount Sinai (c. 1312 BCE).[1]

The authoritative literary sources dating from after the *Pentateuch* to the beginning of the second Temple period (fifth century BCE) are the Prophets (*Nevi'im*) and the Hagiographia (*Ketuvim*). Since the authors of these books were not primarily concerned with legal matters, the paucity of legal material in these works is not surprising. Nonetheless, the Prophets and Hagiographia provide a basis for various laws and legal institutions not mentioned in the *Pentateuch*.[2]

1 Pinchas Wollman-Tsamir, ed., *The Graphic History of the Jewish Heritage* (New York: Shengold Publishing Inc., 1963), 184. Mattis Cantor *The Jewish Time Line Encyclopedia*, (Northvale New Jersey: Jason Aronson, 1989), p. XIII gives the date for the Sinaic Revelation as 1313 BCE.

2 Menachem Elon, *Jewish Law, History, Sources and Principles, Ha-Mishpat Ha-Ivri*, volume III (Philadelphia: The Jewish Publication Society, 1994), 1,021.

According to Orthodox Jewish tradition, when G-d revealed the *Pentateuch* to Moses at Sinai, He concomitantly revealed to him the Oral *Torah*, which provided a detailed interpretation of the commandments found in the *Pentateuch*. For many centuries, the Oral *Torah* was not committed to writing, but instead it was kept alive by oral transmission from one generation to the next.[3]

Mishnah and the Babylonian and Jerusalem *Talmuds*

Out of fear that the oral tradition would be forgotten, the Oral *Torah* was eventually reduced to writing. This process occurred in two stages: the codification of the *Mishnah,* which took place in the land of Israel (beginning third century CE),[4] and the codification of the *Talmud*, which took place in both Israel (400 CE)[5] and Babylonia (sixth to seventh century CE).[6]

The laws of the *Mishnah* are mostly presented in the form of factual cases rather than through simple statements of the legal principles in abstract form. The authorities cited in the *Mishnah* are designated *tannaim* (from the Aramaic *tenai*—to hand down orally, "study," or "teach").[7]

The basic structure of the Babylonian *Talmud* and the Jerusalem *Talmud* is a commentary on the *Mishnah*. Both *Talmud*s, however, go considerably beyond this description. In that regard, both *Talmud*s include and discuss *Tannaic* sources that were not incorporated in the *Mishnah*. These sources are called *Baraitot*. In addition, the teachings of authorities, called *amoraim* (lit., interpreters), who lived beyond the *Tannaic* period, are discussed. For the Babylonian *Talmud*, these are the teachings of the generations of the third through fifth centuries.[8] For the Jerusalem *Talmud*, the teachings include those of the first three generations of the Babylonian *amoraim* and the five generations of *amoraim* who lived in Palestine. In addition, both *Talmud*s include *aggadic* material, which is biblical exegesis of specific books of the Bible.[9] In terms of literary form, the distinctive feature of both *Talmud*s is dialectic discussion in

3 TB *Berakhot* 5a; TB *Megillah* 19b; Exodus Rabbah 47:1.

4 Stephan G. Wald, "*Mishnah*," Michael Berenbaum and Fred Skolnik, eds., *Encyclopedia Judaica,* vol.14, 2nd ed. (Detroit: Macmillan reference, 2007), 319.

5 Ibid.

6 Stephen G. Wald cites evidence that the redaction of *Talmud Bavli* was an ongoing process that took place over many centuries and in many yeshivot, both prior and subsequent to the time of R. Ashi (d. 427 CE). See Stephen G. Wald, "*Talmud*, Babylonian," *Encyclopedia Judaica*, op. cit., vol. 19, 475.

7 Stephan G. Wald, "*Mishnah*," op. cit., 319.

8 Stephen G. Wald, "*Talmud*, Babylonian," *Encyclopedia Judaica*, op. cit., vol. 19, 470.

9 Louis Isaac Rabinowitz and Stephen G. Wald, "*Talmud* Jerusalem," *Encyclopedia Judaica*, op. cit., vol. 19, 483.

which various *tannaic* and *amoraic* sources are analyzed to elucidate some point of law.[10]

Savoraim

The immediate post-Talmudic period from 500 through 650 CE was called the era of the *savoraim* (lit., the "reasoners"). The preoccupation of the rabbis in this period was completing the redaction of the Babylonian *Talmud* and determining rules for decision in Jewish law.[11]

Geonim

In the next period, called the era of the *geonim* (lit., the "prides" or "geniuses"), religious Jewish life centered around the Babylonian academies of Sura and Pumbedita. Spanning from 650 through 1250 CE, the heads of the academies of Sura and Pumbedita had strong ties with the Jewish communities that had developed in Spain, Portugal, and North Africa.[12] These communities are typically referred to as the Sephardic communities.[13]

Driven by government persecution, Jews in the Geonic time steadily abandoned cultivation of the land and turned toward commerce and the trades. To address the new realities of everyday life, the new economic order proved a catalyst for the *Geonim* to enact innovative ordinances, called *takkanot*.[14]

The middle of the Geonic period corresponded with the early development of Jewish communities in the Rhine valley, typically called Ashkenaz. In this regard, a nascent Jewish community in Mainz can be identified in the middle of the tenth century.[15] Likewise, the existence of a Jewish community in Worms can be identified at the end of the tenth century.[16] Moreover, documentation of the existence of a Jewish community in Speyer in as early as 1084 is evident.[17] The three cities of

10 "*Talmud* Babylonian," op. cit., 470; "*Talmud* Jerusalem," op. cit., 483. For an extensive comparison between the two *Talmud*s, see "*Talmud* Jerusalem," op. cit., 483.

11 Menachem Elon, "*Mishpat Ivri*," *Encyclopedia Judaica*, op. cit., vol. 14, 340.

12 Ibid.

13 Alan D. Corre, Ezer Kahanov, Cecil Roth, Hyman Joseph Campeas, and Yitzhak Kerem, "Sephardim," Encyclopedia Judaica, op. cit., vol. 18, 293.

14 Menachem Elon, "*Takkanot*," *Encyclopedia Judaica*, op. cit., vol. 18, 446.

15 Bernard Dov Sucher Weinryb and Larissa Daemming, "Mainz," *Encyclopedia Judaica*, op. cit., vol. 13, 403.

16 Zvi Avneri, "Worms," *Encyclopedia Judaica*, op. cit., vol. 21, 226.

17 B. Mordechai Ansbacher and Larissa Daemming, "Speyer," *Encyclopedia Judaica*, op. cit., vol. 19, 100.

Mainz, Worms, and Speyer became closely aligned, organized synods, and enacted *takkanot* that were binding on the inhabitants of all three cities.[18]

The most famous of the early Ashkenazi authorities on Jewish law was R. Gershom b. Judah Me'or ha-Golah (Mainz, c. 960–1028). R. Gershom's name is connected with many ancient *takkanot*, most famous of which are his bans against bigamy and the unauthorized reading of private letters.[19]

In the Geonic period, works that distilled Talmudic discussions into practical rulings began to appear. The first work that had a semblance of a codification work was *Sefer ha-She'iltot*, authored by Rav Ahai (Babylonia, first half of the eighth century). The work was arranged according to the weekly portions of the *Pentateuch*. The narrative of a particular portion served as a springboard to discuss the subject matter from the standpoint of *halakhah* (Jewish law). Another early work of this genre, authored at about the same time, was *Halakhot Pesukot* by R. Yehudah b. Nahman Gaon. This work was arranged by subject matter and provided rulings along with a synopsis of the Talmudic sources on which the rulings were based.[20]

At the close of this period, Babylonia ceased to be the dominant center of the Jewish Diaspora. The Jewish communities in North Africa and Europe developed into the new centers of Jewish life.[21]

Rishonim

The next period, called the era of the *rishonim*, spanned from the middle of the eleventh century until the sixteenth century. In this period, three forms of post-Talmudic literary sources flourished. One form was basic commentary on the *Talmud*, without which the *Talmud* would be understandable only to the intellectual elite. Standing out in this regard was the commentary of R. Solomon b. Isaac (*Rashi*, France, 1040–1105) and the novellae of Tosafot (twelfth- through fourteenth-century French commentators). In the area of codification of law, the codes of R. Isaac b. Jacob Alfasi (*Rif*, Algeria, 1012–1103), Maimonides (*Mishneh Torah*, Egypt, 1135–1204), R. Asher b. Jehiel (*Rosh*, Germany, 1250–1327), and R. Jacob b. Asher (Spain, 1270–1340) were exemplary.

Another literary form that flourished in this era was the *responsa* literature. It consisted of the answers that the great authorities in both Sephardic and Ashkenazic countries gave to specific questions in Jewish law that were directed to them. A sampling of the Sephardic authorities were the *responsa Rashba*, authored by R. Solomon b. Abraham Adret (Spain, c. 1235–1310), and the *responsa Ribash*,

18 Alexander Shapiro and B. Mordechai Ansbacher, "Shum," *Encyclopedia Judaica*, op. cit., vol. 18, 532.

19 Shlomo Eidelberg and David Derovan, "Gershon Ben Judah Me'or Ha-Golah," *Encyclopedia Judaica*, op. cit., vol. 7, 551.

20 Menachem Elon, "Codification of Law," *Encyclopedia Judaica*, op. cit., vol. 14, 769.

21 Ibid., 770.

written by R. Isaac b. Sheshet Perfet (Spain, 1325–1408). Representative of the Ashkenazic authorities were the *responsa* of *Maharam of Rothenburg*, authored by R. Meir b. Barukh (Germany, 1215–1293); the *responsa Rosh*, composed by R. Asher b. Jehiel; and the *responsa Maharik*, authored by R. Joseph b. Solomon Colon (Italy, c. 1420–1480).

From this period, there have also come down numerous collections of communal enactments, such as *Pinkas Va'ad Arba Arazot*, *Pinkas Medinat Lita*, and *Takkanot Mehrin*.[22]

Aharonim

The next period of development of Jewish law was the era of the *aharonim* (lit., the later scholars). While scholars differ on when this period begins, the general consensus is that it begins with the appearance of *Shulhan Arukh* by R. Joseph Caro (Ottoman Palestine, 1488–1575) and annotations to the *Shulhan Arukh*, *ha-Mappah*, which is popularly called the *Rema*, by R. Moses Isserles (Poland, 1525 or 1530–1572).[23] In his codification of Jewish law, R. Caro drew heavily on Sephardic authorities, while the *Rema* generally followed the Ashkenazic authorities.[24]

Much of the early work in the *aharonim* period entailed commentary on various parts of the *Shulhan Arukh* and *Rema*. The analyses of these authors often led them to formulate specific rulings. Examples of works of this genre include *Sefer Meirat Einayim* (*Sema*) by R. Joshua b. Alexander ha-Kohen Falk (Poland, 1565–1614), *Siftei Kohen* by R. Shabbetai b. Meir ha-Kohen (Poland, 1621–1662), and *Beit Hillel* to *Shulhan Arukh Yoreh De'ah* and *Even ha-Ezer* by R. Hillel b. Naphtali ha-Levi (Lithuania, 1615–1690).

The period of the *Aharonim* continues to the present day. Throughout this period, *aharonim*, through the medium of *responsa*, have dealt with everyday issues encompassing every sphere of life.[25]

Jewish Law in the State of Israel

When the State of Israel was established in 1948, Jewish law was officially incorporated only in the area of personal status. In a 1953 law, the legislature of the State, the *Knesset*, gave Jewish law exclusive jurisdiction in matters of marriage and divorce.

22 Menachem Elon, "Mishpat Ivri," *Encyclopedia Judaica*, op. cit., 340.
23 Ibid., 340.
24 Menachem Elon, "Codification of Law," op. cit., 770.
25 Menachem Elon, "Mishpat Ivri," op. cit., 340.

In 1950, the Knesset passed the Law of Return. This law granted every Jew the right to come to Israel and automatically become an Israeli citizen upon his or her arrival. An amendment to this law, passed in 1970, defined a Jew for purposes of this law as a person who is considered a Jew under Jewish law.

In a number of matters pertaining to public policy, Israeli law incorporates Jewish law. For example, Israeli law requires that soldiers be provided with kosher food. In addition, a 1962 law prohibits the raising, keeping, or slaughtering of pigs (except in specified areas populated mainly by non-Jews) in Israel.

In the area of civil law, the *Knesset*, in 1952, designated Jewish law as the "main but not the only or binding source for legislation." Several examples of early legislation in the history of the State where civil law is based on Jewish law are the prohibition of delay in the payment of wages and the right of a dismissed employee to severance pay.

In 1979, the Unjust Enrichment Act drew its principles and concepts from Jewish law. In a similar vein, legislation enacted in 1981 established that an offender must be assisted to return to the proper path and not reminded of his criminal past.

Jewish law made further inroads in civil law with the enactment of the Foundations of Law Act of 1980. That law provided that, when the court finds no answer to a legal question under statutory law or case law, or by analogy, it shall decide the issue "in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage." Differing opinions among Israeli jurists about the meaning of this phrase has effectively made it impossible for the court system to apply Jewish law in a blanket manner whenever there are "lacunae" in reaching a decision.

One further inroad was made in 1992 when legislation required the Jewish State to turn to Jewish law as the framework to protect human dignity and freedom.

To be sure, the *Knesset* has enacted legislation in the area of civil law that is contrary to Jewish law. One example of this is the right of a creditor to turn directly to the surety even without initial agreement to this effect.

Finally, in the deliberations of Israeli courts, particularly the Supreme Court, Jewish law has its influence but in no way plays a decisive role in deciding cases.[26]

Subject Matter of Judaism and Economics

The major theme of this volume is to what extent Jewish law accommodates and even enhances commercial practice today and in societies of the past. One aspect of this work is to show the positive contribution Jewish law makes to business ethics and economic public policy. Another facet is to identify the degree to which Jewish

26 Ibid., 354–56.

law accepts and adapts business practices based on the prevailing laws and customs of secular society.

Finally, this work investigates the degree to which Jews as a people have successfully integrated into American economic life, and the related question of how economic forces have played a role in causing the American Jew to assimilate, shedding religious practice and commitment.

Jewish Business Ethics—for Whom?

Many of the chapters of this volume deal with Jewish business ethics and economic public policy. The substance of these chapters describe rules for integrity and prescriptions against hurtful conduct. These rules apply to the Jew in his dealings with Jew and non-Jew alike. To elaborate:

First, according to the principle of *dina d'malkhuta dina* (lit., the law of the kingdom is law),[27] Jews are bound by secular laws relating to social welfare and the marketplace. The binding nature of secular law in these maters applies to interactions with both Jews and non-Jews. Generally, Jewish and secular laws governing such matters as pollution control, workplace safety, and animal welfare are the same. In some instances, however, secular governmental regulation may even extend beyond what Jewish law requires, (e.g., the minimum-wage law).

The application of *dina d'malkhuta dina*, according to R. Joseph Eliyahu Henkin (New York, 1881–1973), has changed over time. In the middle ages, secular governments gave Jews autonomy in matters of civil law. Under this license, Jews established a communal organization, called *kehilah*, and enacted legislation (*takkanot ha-kahal*—lit., ordinances of the community) and penalties for violators. The legal import of *dina d'malkhuta dina* was no more than to conduct oneself as a good citizen vis-à-vis civil laws and regulations of the government. In more-recent times, however, in the absence of the *kehilah* organization, *dina d'malkhuta* may assume the legal character of *takkanot ha-kahal* themselves. Specifically, in democracies where various governmental entities either legislate or have regulatory authority, Jews, who have a say in these matters, effectively cede their *takkanot ha-kahal* function to these governmental bodies. When civil law assumes *takkanot ha-kahal* status, civil law prevails, according to R. Henkin, even when the statute involved varies from Jewish law's position on the matter at hand. Accordingly, as the venue of initial jurisdiction for disputes between Jews, the Jewish court (*Bet Din*) must consider the relevant civil law statute before rendering its decision.[28]

27 Samuel, *Gittin* 10b. The preponderant opinion among halakhic authorities is that *dina d'malkhuta dina* has the force of biblical law. Cf. R. Avraham Duber Kahana Shapira (Poland, 1870–1943), *Devar Avraham* 1:1. A minority position is taken by R. Shemu'el b. Uri Shraga Phoebus (Poland, 1650–1705). In his view, *dina d'malkhuta* operates on the force of rabbinical law (*Beit Shemu'el*, *Even ha-Ezer* 28, note 3).

28 R. Joseph Eliyahu Henkin, *Kitvei ha-Grye Henkin*, vol. 2, 175–76; *Teshuvot Ivra*, no. 96, sec. 1(4).

The extent of *dina d'malkhuta dina* in commercial relations between Jews and non-Jews is indicated by the fact that the sole jurisdiction in disputes is the secular court.[29] This is in sharp contrast to the procedural rules for adjudicating disputes between Jews, where the venue of original jurisdiction is always the Jewish court. Specifically, neither party is permitted to move the case to secular court unless the Jewish court determines that the special circumstances of the case warrant such a move.[30]

For the ethical person, *dina d'malkhuta* is not just a set of rules and consequences one first discovers in the face of litigation. Instead, these are rules of conduct one must learn *before* interacting with both Jew and non-Jew in the marketplace. Moreover, the ethical person will not exploit the legal system by refusing to satisfy a just and rightful claim until a court, whether Jewish or secular, orders him or her to do so.

Second, while there is substantial overlap between Jewish and secular law in the prohibition of dishonest conduct of various sorts, Jewish law is more expansive. Examples of such expansiveness include Jewish law's notion of "fair competition,"[31] its prohibition against generating false goodwill,[32] and its parameters for permissible whistle blowing.[33] Jewish law prohibits not merely dishonest conduct; it imposes numerous prohibitions against causing someone needless mental anguish (*ona'at devarim*).[34] The question thus becomes whether the Jew's duty to the non-Jew encompasses a moral code beyond the strict requirements of *dina d'malkhuta*. The work of R. Zevi Hirsch Ashkenazi (*Hakham Tzevi*, Germany, 1660–1718) is relevant in this regard. In a diatribe against those claiming that the *Torah*'s prohibitions of dishonest behavior govern only transactions among Jews, R. Ashkenazi advances a powerful argument for nondiscrimination.

Preliminarily, he notes that by dint of *Torah* law, theft (*geneivah*) is prohibited even when the motive of the perpetrator is salutary. Consider the following examples: Suppose thief *T* intends to return his pilferage to the rightful owner and carries out the caper only to teach intended victim *V* to guard his property more carefully. Alternatively, suppose *T* desires to give *V* a gift, but *V* demurs, and so, as a means of accomplishing his objective, *T* steals an item from *V* and makes sure that two witnesses catch him red-handed in the act. The two witnesses will predictably come forward and implicate *T* in the crime. *T* will now finally get his wish to give *V* a gift, as the Jewish court will order *T* to pay *V* the "double indemnity" (*kefel*) payment imposed on a thief.

Salutary motives notwithstanding, the action of the thief in both of these cases is prohibited. R. Ashkenazi concludes that theft is *inherently* an abhorrent act.

29 R. Moses Isserles (Poland, 1525 or 1530–1572), *Rema*, *Shulhan Arukh*, *Hoshen Mishpat* 369:11; R. Abraham Isaiah Karelitz (Israel, 1878–1953), *Hazon Ish*, *Bava Kamma* 10:9, *Likkutim* 16:1.

30 R. Solomon b. Isaac (France, 1040–1105), *Rashi* at Exodus 21:1.

31 For a discussion of this issue from the standpoint of Jewish law, see Aaron Levine, *Moral Issues of the Marketplace in Jewish Law* (New York: Yashar Books, 2005), 93–195.

32 For a discussion of this issue, see *Moral Issues of the Marketplace in Jewish Law*, op. cit., 3–43.

33 For a discussion of this issue, see *Moral Issues of the Marketplace in Jewish Law*, op. cit., 423–83.

34 Leviticus 25:17.

Dishonest conduct sullies the character of the perpetrator and tarnishes his or her soul; hence, dishonest conduct directed at any human being is prohibited, no matter who the victim is.[35] R. Joseph b. Moses Babad (Poland, 1800–1872) writes in the same vein.[36] R. Ashkenazi observes, moreover, that Jews risk a more serious sin when they deal dishonestly with non-Jews than with Jews because, if the non-Jewish victim learns that the perpetrator is Jewish, the offender compounds the sin of theft with the additional offense of disgracing G-d's name (*hilul ha-Shem*). If the victim is Jewish, by contrast, the perpetrator does not commit *hilul ha-Shem*.[37] This distinction is explained by R. Bahya b. Asher (Saragossa, thirteenth century) as follows: If the victim is a gentile, the discovery that the perpetrator is a Jew may incite the non-Jewish victim to disgrace the Jewish religion and brand it a false belief system. When the victim is a Jew, however, discovery that the perpetrator is a fellow Jew presumably does not move the offended party to rail against his own religion as false.[38]

Hakham Tzevi's analysis has much import for the modern marketplace. Jewish law's prohibition of robbery and theft forbids far more than the readily recognizable violations of these transgressions. For instance, the use of leverage to change the terms of a completed deal unilaterally is considered extortion even if the disadvantaged party raises no protest because the change is effected through intimidation.[39] The use of unlawful sales pressure to effect a deal violates the prohibitions of *lo tit'avveh* (do not desire) and *lo tahmod*[40] (do not covet).[41] Misrepresentation (*geneivat da'at*) falls under either the prohibition against falsehood or that against theft.[42] It follows from *Hakham Tzevi*'s latter argument that prohibited dishonesty in relations with non-Jews extends beyond the dictates of *dina d'malkhuta dina* and encompasses the entire gamut of behavior the *Torah* labels dishonest conduct.

Moreover, *Hakham Tzevi*'s basic notion that dishonest behavior debilitates character suggests the wider application of *Torah* prohibitions relating to hurtful, though not technically dishonest, conduct. Representative of this category are the prohibitions against causing needless mental anguish (*ona'at devarim*) and against

35 R. Tzevi Hirsch Ashkenazi, *Hakham Tzevi* 26.

36 R. Joseph b. Moses Babad (Poland, 1800–1872), *Minhat Hinnukh*, *Mitzvah* 224. The notion that the *Torah* prohibits bad conduct not just on account of the hurtful effect it has on the victim, but also because it sullies the character of the perpetrator, finds expression in the work of Maimonides (*Sefer ha-Mitsvo*t 317). Maimonides espouses this principle in connection with the prohibition, "You shall not curse a deaf person. . . ." (Leviticus 19:14). Although the deaf person will not hear the curses, this conduct fosters the character traits of revenge and anger in the perpetrator.

37 *Hakham Tzevi*, op. cit.

38 R. Bahya b. Asher, *Rabbenu Bahya al-ha-Torah*, Leviticus 25:50.

39 For explication of the various violations that may be involved in exercising leverage in commercial and other settings, see *Moral Issues of the Marketplace in Jewish Law*, op. cit., 175–200.

40 Deuteronomy 5:18.

41 Exodus 20:14. For explication of these prohibitions, see *Moral Issues of the Marketplace in Jewish Law,* op. cit., 189–91, 234–44.

42 For sources on the prohibition of *geneivat da'at*, see *Moral Issues of the Marketplace in Jewish Law*, op. cit., 8–9, 266 n. 26.

delivering a true but damaging report about someone (*lashon ha-ra*).[43] In its formulation of these duties of character, the *Torah* describes the target of the hurtful conduct as *ahiv* (his brother) and *amekhah* (your people), respectively. These expressions seem to indicate that the duties apply only in interactions with fellow Jews. Yet, since ill-intentioned, hurtful conduct surely debilitates character, it should be prohibited, at least on a hortatory level, irrespective of the target of the mistreatment.

Third, in the view of the medieval exegete, R. Menahem b. Solomon *Meiri* (*Meiri*, France, c. 1249–1306), Jew-and-non-Jew equality in Jewish law extends considerably beyond the parameters set out by R. Ashkenazi. *Meiri* categorizes all non-Jews who observe the seven Noahide laws[44] as people "disciplined in the ways of religion and civilization," who, as such, have a certain fraternity with the Jewish community. *Meiri* deems such people qualifying beneficiaries of deeds of kindness mandated seemingly only for fellow Jews. A case in point is the duty of a passerby to restore a lost article to its rightful owner (*hashavat aveidah*). Although the *Torah* formulates this obligation as a duty owed "your brother" (*ahikha*),[45] *Meiri* includes a non-Jew "disciplined in the ways of religion and civilization" as a beneficiary of this mandate. *Meiri* rules analogously regarding an income transfer P_1 realizes from P_2 that was not required under the terms of their commercial transaction. In realizing this "windfall," P_1 was not guilty of affirmative deception. Instead, P_1's "windfall" came about because of P_2's error (*ta'ut*). Suppose further that P_1 adjured P_2 to "carefully look into this transaction because I'm relying upon you." If P_2 is an idolater, P_1 may, as a strict matter of law, keep the "windfall." In the opinion of *Meiri*, the error must be rectified, and the "windfall" returned when P_2 is a gentile but not an idolater.[46]

The nineteenth-century halakhic authority, R. Tzevi Chajes (Poland, 1805–1855), quotes *Meiri*'s attitude toward non-Jews approvingly. Both the Christian and Muslim governments of his time, R. Chajes tells us, strenuously enforced the Noahide laws.[47]

43 Leviticus 19:15.

44 The seven Noahide laws consist of six prohibitions and one positive command. The six prohibitions are: (1) murder, (2) incest, (3) robbery, (4) eating the flesh of animals taken from the animal while it was still alive, (5) idolatry, and (6) blasphemy (Maimonides, *Mishneh Torah, Melakhim* 9:1). The seventh law is a matter of dispute. In the opinion of Maimonides, it consists of a duty to set up an administration of justice to enforce the other six laws (*Mishneh Torah*, op. cit., 9:14). Nahmanides (Spain, 1194–1270, *Ramban*, Genesis 34:13), however, expands the ambit of the seventh commandment to include the setting up of civil law and a penal code modeled after the laws of the *Torah* in these matters.

45 "You may not observe your *brother's* ox or his sheep lost and conceal yourself from them; you must surely return them to your *brother*" (Deuteronomy 22:1).

46 R. Menahem b. Solomon *Meiri*, *Beit ha-Behirah*, *Bava Kamma* 113b. For the type of social barrier the rabbis continued to maintain between the Jew and the non-Jew, who is "disciplined in the ways of religion and civilization," see *Beit Behirah*, *Hullin* 13b, B *Avodah Zarah* 6a.

47 R. Tzevi Chajes, *Kol Sifrei Maharats Hayyot*, *Tiferet L'Yisrael*, op. cit., 489—91. *Meiri*'s view has been subject to much discussion and analysis in the scholarly literature. Cf. Mosheh Halbertal, "*Bein Torah Le-Hohkhmah*," (Jerusalem: Hebrew University Magnes Press, 2000), 80–109; Y. Blidstein, "*Meiri*'s Attitude to Gentiles: Between Apologetics and Internalization" (Heb.), *Zion* 51 (1986): 153–66; J. Katz, "More on the Religious Tolerance of *Meiri*" (Heb.), *Zion* 46 (1961): 243–46; E. E. Urbach, "The Origins and Limitations of Tolerance in *Meiri*" (Heb.), in *Jacob Katz Jubilee Volume* (Jerusalem, 1960), 34–44; J. Katz, "Exclusiveness and Tolerance" (Oxford: Oxford University Press, 1986), 185–202.

If a non-Jew "disciplined in the ways of religion and civilization" qualifies as a beneficiary of supererogatory ethical conduct, afflicting this person with hurtful conduct is certainly morally repugnant. According to *Meiri*, the examples of *hashavat aveidah* and the case of *ta'ut* illustrate the general rule that all policies in the workforce and marketplace must apply uniformly to Jews and non-Jews.

Meiri's embracing attitude toward the gentile does not amount to advocacy of equal treatment of Jew and non-Jew. In prohibiting interest payments on a loan, the *Torah* states: "You may not pay interest to your brother—interest on money, interest on food, interest on any matter where it is paid. You may *tashikh* [take][48] from a stranger, but from your brother do not take interest" (Deuteronomy 23:20–21). *Meiri* understands that these verses differentiate between a Jewish and non-Jewish debtor. Given the fraternity *Meiri* saw between the Jews and the gentiles of his time, we would have expected him to say that interest should no longer be charged to gentiles; but he does not. In addition, he states that, in lending money, priority must be given to a Jewish borrower over a non-Jewish borrower. *Meiri*, however, retaining his generally favorable disposition toward gentiles, derives from the phrase, "you *may take* from a stranger," that the non-Jew's livelihood should be our concern: If he requests a loan, although we are not obliged to extend it interest-free, we should at least lend to him on interest, and not turn him away.[49] *Meiri* believes that the fully developed character trait of kindness is manifested partly in the bestowal of kindnesses upon gentiles, but that a higher level of kindness is still due to our own brethren.[50]

Fourth, the Jew's duty to the non-Jew in interpersonal relations is further extended beyond the dictates of *dina d'malkhuta dina* by the principle of *kiddush ha-Shem* (i.e., the duty to sanctify G-d's name). The application of this principle is illustrated by the following story involving R. Shimon b. Shetah (first century BCE):

48 *Meiri*'s interpretation of Deuteronomy 23:21 follows *Sifrei*, which interprets *tashikh* to be the active form (*kal*) of the verb, and, therefore, to mean *take*. Although understanding verse 21 differently than *Meiri*, *Maimonides* (*Mishneh Torah*, *Malveh* 5:1) also understands the word *tashikh* in that verse to mean take. *Bava Metsi'a* 70b, however, interprets *tashikh* as the causative form (*hiphil*) (i.e. to cause to take and therefore *to pay*). In this interpretation, the entire intent of the verse is just to make us draw an inference: that it is only permissible to cause a non-Jew to pay interest on a loan; however, it is forbidden to cause a Jew to pay interest on a loan. The verse heaps another transgression on top of that already spelled out in verse 20.

49 R. Menahem b. Solomon *Meiri*, *Beit ha-Behirah*, *Bava Metsi'a* 71a. See, however, Maimonides' interpretation of this verse (*Mishneh Torah*, *Malveh* 5:1).

50 Another rationale for the differential treatment of Jew and non-Jew in connection with *ribbit* proceeds from the work of Professor Michael Broyde and Rabbi Michael Hecht

In their treatment of the exemption Jewish law calls for in the duty to return lost property when the owner of the property is presumably a gentile, Professor Michael Broyde and Rabbi Michael Hecht invoke the reciprocity principle. This principle states that in a society where the secular law requires one to return lost property, irrespective of whom the owner might be, Jewish law would require this as well. What compels this conduct is the principle of *dina d'malkhuta dina*, discussed earlier. But, if secular law has no such requirement, Jews need not return lost property they find when the owner is presumably a non-Jew. Since, under this system of law Jews would despair from getting back their lost property because the law does not require the finder to return the lost item, the Jew need not be concerned to return the lost property of the non-Jew. The principle here is that the privileges of Jewish law were given only to those who are fully obligated and accepting of Jewish law (Michael Broyde and Michael Hecht, "The Gentile and Returning Lost Property According to Jewish Law: a Theory of Reciprocity," The Jewish Law Annual, vol. XIII, 31–45).

A logical extension of the reciprocity principle is the suspension of the ribbit interdict in connection with loan transactions when one of the parties is a non-Jew.

> It is related of R. Shimon b. Shetah that he once bought a donkey from an Ishmaelite. His disciples came and found a precious stone suspended from its neck. They said to him: "Master, 'The blessing of the Lord will bring riches . . . [Proverbs 10:22].'" R. Shimon b. Shetah replied: "I purchased a donkey, but I have not purchased a precious stone." He then went and returned it to the Ishmaelite, and the latter exclaimed of him, "Blessed be the Lord, G-d of Shimon b. Shetah."[51]

Since the Ishmaelite despaired of ever retrieving his lost precious stone, we can well understand the gratitude he felt toward R. Shimon b. Shetah. But this sentiment should have caused the Ishmaelite to bless R. Shimon b. Shetah. Instead, he blessed the G-d of R. Shimon b. Shetah. R. Jeroham Leibovitz (Poland, 1874–1936) posits that the Ishmaelite was not only filled with a sense of gratitude, but was overwhelmed by R. Shimon b. Shetah's conduct. The Ishmaelite witnessed no ordinary act of kindness, but the type of deed that made the *tzelem Elokim* (image of G-d) evident in the person of R. Shimon b. Shetah. The reaction of the Ishmaelite was in every way akin to the making of a blessing over a fruit before partaking of it. In the blessing over the fruit, we thank G-d for creating the "fruit of the tree." We declare that we see the greatness of the Creator in the fruit we are about to consume. So, too, the Ishmaelite saw the greatness of the Creator in the grand act of kindness of R. Shimon b. Shetah.

The words of R. Shimon b. Shetah, "I purchased a donkey, but I have not purchased a precious stone," cry out against veiled misconduct in the marketplace, whether or not the intended victim is a Jew. Since man is never more vulnerable to the wiles of the Evil Inclination than when given the opportunity for veiled misconduct, overcoming this temptation represents man's greatest triumph. This triumph is magnified when the intended victim is a non-Jew and overcoming the temptation is *kiddush ha-Shem*. Accordingly, the decision to refrain from veiled misconduct in interactions with non-Jews capitalizes on an opportunity for the greatest possible sanctification of G-d's name.[52]

Jewish Business Ethics

Let us now describe briefly the chapters in this volume that deal with business ethics.

Rabbi Yoel Domb demonstrates that Jewish law offers a viable and attractive way to preserve the dignity of the borrower and his business interests, balanced with the interests of his creditor. While Jewish law eschews the ancient idea of placing a debtor at the mercy of his creditor, it allows the use of some methods to protect the creditor's interests. Where the debtor exploits the creditor, Jewish law may even sanction imprisonment or forced labor to induce the debtor to honor his obligation to the creditor.

51 Deuteronomy *Rabbah* 3:3.

52 R. Jeroham Leibovitz, *Da'at Torah*, Parashat Bo, 123–27; Parashat Metsora, 130–33.

As a religion, Judaism generally has no problem with the notion of a competitive marketplace.[53] Nonetheless, Jewish law does not allow a market participant to interfere with transactions in progress in all circumstances. In his contribution to this volume, Rabbi Howard Jachter sets out to define the parameters of prohibited interloping conduct. While the prohibition of interloping conduct is a moral, as opposed to a legal, dictum, it has application to a wide variety of circumstances.

Dr. Asher Meir analyzes the ethical parameters for the investment of charity funds. The principles and sources that Dr. Meir identifies are procedures for accountability and standards of prudence and oversight. In particular, charity funds need to be invested with high regard for sustaining the principal and for adequate liquidity to ensure that the fund's mission is not compromised. Taken together, the Jewish laws regulating individual and communal investment constitute a well-defined religious framework for "socially responsible investment," a framework that can be of use for contemporary Jewish endowment funds.

Perfecting the art of moral rebuke (*tokhahah*) is an essential ingredient for improving the quality and efficiency of human interactions in all spheres of life, including market transactions. In his contribution to this volume, Dr. Moses L. Pava takes up the issue of what is needed to make moral criticism effective. The author presents the thesis that, if moral criticism is to be effective at all, it must always begin as a form of self-criticism. Toward this end Dr. Pava outlines a set of self-examination questions.

In many transactions, one of the parties possesses information unavailable to the other. This phenomenon is referred to as the asymmetric information problem. Unless counteracted, the asymmetric information problem will adversely affect the values of both efficiency and equity. In his chapter, Dr. Jonas Prager demonstrates that Judaism's reaction to the asymmetric information problem is multifaceted. On the one hand, Jewish law launched external enforcement mechanisms that inhibited malfeasance in the first place and punished it when discovered. But more important is Jewish law's insistence that the Jew deal with others with integrity. In this regard, the *Torah* appeals to man's religious instinct, admonishing him that, although he can excuse his conduct toward fellow man, he cannot escape the judgment of the All-knowing G-d. Finally, the "fear of G-d" must be instilled in man from early childhood by parents and the school system.

In their contribution to this volume, Dr. Fred Rosner and Rabbi Dr. Edward Reichman address the issue of organ donation. The primary point the authors make is that the value of human life is supreme in Judaism, as saving human life suspends nearly all biblical and rabbinic prohibitions. Accordingly, the prohibitions against desecrating, deriving benefit from, and delaying burial of the dead, and other prohibitions are all waived for the overriding consideration of saving the organ recipient's life. A related issue is whether financial compensation is permitted for organ donors or their families. The moral issues involved here

53 Cf. Aaron Levine, *Moral Issues of the Marketplace and Jewish Law* (New York: Yashar books, 2005), 128–70.

include the prohibitions against wounding and endangering oneself, the restriction against receiving payment for performance of a mitsvah (a religious deed), and the concept that our bodies are not our own, but rather gifts that the Creator charges us to care for with dignity and holiness. In the opinion of the authors, the preponderant view is that these concerns are all set aside for an organ transplant that saves a life. Therefore, Jewish law permits financial compensation for an organ donor. The principle of *dina d'malkhuta dina* means, however, that secular law must be taken into account. Currently, American law prohibits the sale of organs. Thus, in the United States, Jewish law reinforces secular law in prohibiting financial compensation for organ donation to either the donors or their families.

Dr. Ronald Warburg investigates Jewish law's attitude toward the "efficient breach." The proponents of the theory of "efficient breach," espoused by academicians in the field of Economics and Law, claim that individuals should be allowed to breach a contract and pay damages if they can pursue a more profitable activity. The net result is more wealth for society as a whole. Since the defendants pay damages, the plaintiffs are fully compensated for the injury they have suffered. In his chapter, Dr. Warburg argues that, if we wish to take seriously the moral character of the Jewish law of obligations, we should not encourage efficient breaches. In the context of the issue of trade secrets, Dr. Warburg demonstrates that Jewish law implicitly rejects the theory of "efficient breach" by requiring the violators to disgorge their ill-gotten profits.

Economic Public Policy and Jewish Law

A number of chapters in this volume make public policy proposals rooted in Jewish law.

Professor Michael Broyde addresses the issue of whether Jewish law would support the proposals that would make international law a law for all people and nations. Many in the legal community now contend that the effects of globalization and the diminishing role of national boundaries call for a more expansive system of international law, sometimes referred to as world law. In his chapter, Professor Broyde identifies three principles in Jewish law that might serve as a foundation for establishing international law as the law for all nations and all people. Explored in detail, these principles are treaty law, commercial custom derived from international law, and *dina d'malkhuta dina*.

From the standpoint of Jewish law, Professor Broyde does not see much promise for this proposal to gain any traction. In the Jewish tradition, authority alone does not create law; law must rest on the pillars of justice and fairness as well as on basic right and wrong. Before law can be truly valid, there must be *both* procedural and substantive fairness in the legal system.

Professor Broyde suspects that world law will never meet this dual standard in that it requires the depoliticization of international law, where the wrongs of the mighty are judged by the same standards as the wrongs of the weak and the powerful are held to the same standards of conduct as the powerless.

Another public policy issue that is given treatment in this volume from the standpoint of Jewish law is the joint chapter by Professor Yehuda Klein and Mr. Jonathan Weiser, Esq., that explores the philosophical foundations of sustainable development. The authors discuss the contending worldviews that inform our relationship with the natural world and show how they affect our understanding of the concept of sustainability. In particular, the authors review the ethical assumptions that underlie anthropocentric, ecocentric, and theocentric environmentalisms. Professor Klein and Mr. Weiser demonstrate that Judaism adopts the theocentric worldview. They identify immutable targets toward which to direct practical applications. In Judaism, G-d is the context for all of the potentially conflicting environmental theories. This focus speaks for the need to achieve a synthesis among the various worldviews.

In my chapter, I place the recent global recession in the context of Jewish theological thought. I show that the conduct of the players in the subprime mortgage sector violated specific moral principles. Moreover, no amount of wrongdoing by these players could have spiraled into an international financial meltdown without the financial innovation of the securitization process. I show that Jewish law rejects the legal underpinning of this financial innovation. To prevent the recurrence of the current debacle, Jewish law's *imitatio Dei* principle calls for the restructuring of the incentive system that economic actors face. It consists of replacing the current system of perverse incentives with sticks and carrots designed to tilt economic actors toward virtue and away from wrongdoing.

Since *imitatio Dei* is no more than a guidepost for the form that acts of kindness should take, it does not mandate policies that entail significant per capita expenditure. But *imitatio Dei* applied to the subprime mortgage market is a much more robust principle because implementation of "carrots" and "sticks" in this sector prevents the economy from falling into an abyss. The *imitatio Dei* program hence fulfills the government's antipoverty mandate, which justifies greater expenditure.

Aside from the incentive system, the current malaise indicates we are living in a society of broken promises. Improving the moral climate of society hence entails reinforcing the values of integrity and taking responsibility seriously. Jewish religious thought puts the onus on parents and the educational system to accomplish this.

Rabbi Dani Rapp examines the legal status of unions. He demonstrates that, under Jewish law, workers do not have any power or rights until they agree to unionize. There are two categories of unions: those that represent the entire labor force in a certain area, and those that do not. The former acquires the powers of an agreement among tradesmen. They can coerce new laborers to join the union, restrict members from withdrawing, and are not constrained by laws regarding agreements. When the union does not represent the entire labor force in the local area, the union may not coerce nonunion workers to join, may

prevent strikebreaking only among members who originally voted to strike, and is constrained by laws concerning agreements. For both categories of unions, a labor relations board should be established to govern union powers.

For *halakhah* to confer real negotiating power and significant rights upon a union, the union would have to be formed by unanimous agreement. Despite the difficulties involved in forming a halakhically valid union, workers are not totally without protection because the government is entitled to regulate the relationship between labor and management. Any laws they pass are binding and enforceable in Jewish courts.

The Israeli economy experienced rapid inflation between 1973 and 1985, accompanied by an expansion of dollarization and indexation. These developments generated an extensive literature on monetary issues in Jewish law. These issues included the following: Are United States dollar loans permissible, or do they constitute a form of prohibited interest? Is it permissible to index to the dollar or to the Consumer Price Index (CPI)? Is there a fundamental distinction between official devaluation and depreciation? Dr. Daniel Schiffman distills these discussions. He finds that the majority of rabbis allowed dollar and dollar-indexed loans. Indexation to the CPI, however, was far more controversial.

During the same time, Jewish law was applied to the phenomena of black markets in foreign currency, exchange controls, foreign currency trading in globalized markets, the unofficial crawling peg, and the effects of various subsidies on the CPI and on exchange rates. Many of these phenomena had never been discussed in previous rabbinic literature.

The rabbinic analysis of all these new issues, according to Dr. Schiffman, did not lead to significant rabbinic innovations in the realm of Jewish monetary doctrine. Only one doctrinal change had practical implications. That change was the ruling by some rabbis that, under high inflation, debtors who repay late are liable for the opportunity costs that they impose on creditors. For the first time, the Talmudic concept of opportunity cost was applied to problems of monetary instability.

Textual examination of the rabbis' response to the monetary issues of this period suggests, according to Dr. Schiffman, that the rabbis relied on their own intuition in matters of economics, rather than consulting with professional economists. The leading decisors of the late twentieth century are known to have consulted with experts in science, technology, and medicine. Unfortunately, little is known about the extent of professional relationships between rabbis and economists.

Dr. Meir Tamari's chapter investigates the balance between private property and economic freedom needed for wealth formation, on the one hand, and morality and communal justice, on the other. He describes the conceptual framework of the value system Judaism presents for economic activity. The recognition of moral and social responsibilities, both of the individual and of society, requires both moral education and regulation and restrictive legislation to protect weaker members of society.

A constant spiral of "more is better than less" creates a culture of "wants" translated into "needs," of appeals to egoism and selfishness, and of conspicuous

consumption. In such a culture, the defenses of morals and ethics inevitably crumble as each individual struggles to find his place at the ever-receding top of the spiral. This creates jealousy, envy, and hatred that inevitably destroy the social fabric of society. Society needs, therefore, to provide both parameters for acceptable standards of living as well as the education toward a pattern of social living that permits enjoyment of the essential and legitimate private property and economic activity. Judaism provides both the moral literature and communal norms essential for such parameters of "enough" that must not be confused with philosophies of poverty or egalitarianism.

Aspects of Jewish Law that Inhibit Accommodation with Prevailing Commercial Practice

In examining the extent to which Jewish law inhibits the Jew from smoothly integrating into the economic life of society, an easily identifiable negative here is its prohibition against interest payments (*ribbit*) in inter-Jewish loan transactions. Recognition that a viable loan market is essential to finance basic research, capital formation, business growth, and the housing market, makes the interest payment prohibition a significant negative factor in excluding Jews from full participation in the functioning of the economic system.

One could argue, however, that the innovation of *hetter iska* (described below) in the sixteenth century goes a long way toward removing the prohibition of *ribbit* as a factor that excludes Jews from full participation in the economic life of society. Basically, *hetter iska* restructures an otherwise loan transaction into a special type of partnership, discussed in the *Talmud*, called *Iska*.[54] In the *iska* partnership, one party supplies the funds, while the other party manages the funds. Most importantly, in the *iska* arrangement, the financier takes on the role of a silent partner with no decision-making or managerial role, while the recipient of the capital conducts business and is the decision maker in respect to the funds he receives. This type of partnership is regulated by *halakhah*. Against this basic structure, *hetter iska* adds various features to make the arrangement attractive from the financier's perspective.

Several chapters in this volume address *ribbit* and *hetter iska*. Rabbi Dr. J. David Bleich's contribution explains the mechanics of *hetter iska* in detail and the limitations of its use. Rabbi Bleich also demonstrates why *hetter iska* should not be regarded as a contrivance. Finally, he addresses the issue of how the secular courts would treat *hetter iska*.

54 TB *Bava Metsi'a* 104b.

In the *hetter iska* described in the *Talmud*, the arrangement calls for the division of profits and losses equally between the financier and the managing partner. Professor Jeffrey L. Callen considers a variation of this basic *iska* model, which was innovated by the Nehardean rabbis of the *Talmud*. Professor Callen analyzes this variant of *iska* both from the standpoint of the prohibition of *ribbit* and the incentive system it sets up. Professor Callen also discusses post-Talmudic rationalizations of the profit-and-loss divisions of *iska* in light of modern Principal-Agent Theory.

Hetter iska does not promote a smooth integration of Jewish law and secular commercial practice because prohibiting interest payments in inter-Jewish loan transactions but allowing interest payments in loan transactions between Jews and non-Jews is discriminatory. Rabbi Daniel Feldman's chapter in this volume addresses this issue. In his chapter, Rabbi Feldman offers a theory of why the *Torah* prohibits *ribbit*. Rabbi Feldman views the prohibition against interest in inter-Jewish loan transactions as a law designed to solidify the familial bond that joins *all* members of the Jewish nation. It does so by requiring a lender to forgo a reasonable profit when lending money to even nonfamily members. Alternatively, the duty to forgo interest on a loan is an expression of the fundamental Jewish value of kindness that all members of the Jewish people are entitled to receive from a coreligionist. If the prohibition of interest is designed to build bonds among Jews and to express a kindness one owes to a coreligionist, the exclusion of non-Jews in the prohibition is understandable as the rarefied responsibility inherent in the law of *ribbit* extends only to those who are extended family, which is the entire Jewish people.

In his contribution to this volume, Professor Roger Lister shows that the Jewish giver or recipient of a guarantee is at risk of transgressing the prohibition of usury if a Jew is lender or borrower or if both lender and borrower are Jews. The danger is particularly significant when an arrangement is ruled by English law. In England, the law of principal and surety is complex and tends not to provide the degree of separation between surety and other parties that is required by Jewish law.

Aspects of Jewish Law that Promote Integration into the Economic Life of Society

Let us now turn to aspects of Jewish law that promote integration into the economic life of society. One principle, explicated above, is *dina d'malkhuta dina* (i.e., the law of the Kingdom is law). Another principle is *kinyan situmta* (lit., acquisition by means of making a mark). This principle says that Jewish law recognizes

whatever merchants customarily do to consummate a deal as a valid mode of acquisition even if the particular mode is not mentioned in the *Talmud*.

Dr. Ron S. Kleinman and Dr. Amal Jabareen use these two principles, along with other Jewish law concepts, to identify the moment of transfer of ownership in e-commerce. Of particular concern for them is whether ordering an item online actually effects transfer of ownership or just a contractual duty on the part of the vendor to supply the merchandise to the buyer.

In his study of historical societies, Professor Yaakov Elman shows that the rabbis of the *Talmud* were well-aware of the laws of the land as well as contemporary business practices. The rabbis made these laws and practices work for the benefit of the Jewish community. Areas of everyday life that benefited from this integration included commercial activity, land tenure, and increasing the supply of ritual items.

In his study of Hebrew documents from Ashkenazic communities in the thirteenth to the fifteenth centuries, Professor Yosef Rivlin shows how these documents, operating within the parameters of Jewish law, facilitated economic activity. Of particular interest is how the marriage contract was used to promote family life by innovating incentives to preserve the dowry against loss and erosion. In the commercial sphere, Professor Rivlin shows how a type of reversible sale, called *mashkanta be-nakyata*, did not violate *ribbit* law, while, at the same time, it promoted the mutual interest of the buyer and seller.

Economic Theory in the Bible and Talmud

Economic public policy and guideposts for ethical conduct in the modern societal setting begin for Jewish law by identifying ethical principles and economic theory in both the Bible and the *Talmud*. A number of the chapters of this volume set out to accomplish that goal.

Professor Eliakim Katz and Professor Jacob Rosenberg investigate whether the Biblical law of theft can be explained by economic considerations. The law of theft requires the thief who is caught and found to return the stolen article and pay the owner a fine equal to the value of the article. By admitting to the theft on his own initiative in a court, and returning the stolen article to its owner, the thief, however, is relieved of the fine. The waiver of the fine is at once an incentive for the thief to confess, but it also reduces the penalty for theft. Hence, it is necessary to weigh the net impact of these two opposing effects on the welfare of owners. Professors Katz and Rosenberg use a simple model to consider the conditions under which such pardons increase social welfare.

The absence of effective policing in Biblical and Talmudic times, the difficulties of obtaining a conviction in a Jewish court, and the likely very low

probability of apprehension and conviction of a thief all argue for a pardon regime.

I examine the Biblical account of Eliezer's conduct as a matchmaker against Judaism's ethical norms. I demonstrate that, despite the various discrepancies between Abraham's instructions to Eliezer and what happened at the well, on the one hand, and Eliezer's account of them, on the other, Eliezer conducted himself ethically. My chapter also shows that Eliezer's conduct followed the approaches and techniques modern bargaining theory recommends for success, including the use of leverage, creating value, framing, and the understanding of the phenomena of vicious and virtuous cycles.

Professor Jacob Rosenberg and Professor Avi Weiss develop a new approach to the Jubilee laws that can help explain some of the anomalies in the laws. They show that the laws are consistent with two goals. The first is a desire to attain economic efficiency by "spreading the wealth"—limiting the ability of an individual to control resources and thus monopolize markets. The second is to try to avoid the development of slavery within the Jewish nation.

Professor Ephraim Kleiman analyzes a number of cases in the *Talmud* involving the financing of a public good. These cases include the costs of fortifying a town, compensation for goods jettisoned to lighten a ship's burden, and the formula of how to apportion a communal manure heap. Professor Kleiman's analysis leads him to generalize how the rabbis of the *Talmud* from the second and third centuries CE handled the financing of goods involving externalities. Comparison with the corresponding rules of the somewhat-later Theodosian and Justinian Codes underscores the difference in attitudes between the ancient Jewish and Roman legislators.

Professor Yehoshua Liebermann presents a "Talmudic search model" and analyzes it in light of George Steigler's theory of the economics of information. In the economic theory of information, price search is typically conducted before purchase (ex ante). In the Talmudic search model, price search takes place mainly *after* the purchase (ex post). Professor Liebermann buttresses his thesis with his analysis of how a complaint of price fraud (law of *ona'ah*) is treated in the *Talmud*. Of particular importance is the encounter between the merchants of the city of Lydda and R. Tarfon. R. Tarfon raised the overcharge limit from one-sixth to one-third of the market equilibrium price. This change in law made the merchants happy. Their mood quickly changed when R. Tarfon also lengthened to a full day's time the window the buyer had ex post to cancel or modify the transaction on the basis of finding a cheaper alternative. Realizing that R. Tarfon had traded off an extra profit margin for extra ex post search time, the merchants preferred the original, more conservative paradigm of a smaller profit margin along with a considerably shortened ex post search time. Professor Liebermann opines that, for market settings of the Talmudic genre, where a single equilibrium price exists and products are homogeneous, the Jewish law model is more efficient.

Professor Jacob Rosenberg presents an economic approach to understanding fire damages in Jewish law. He demonstrates that the law of strict liability in the case

of fire damage to a dwelling above leads to an efficient level of care in the sense that it minimizes the social cost of the fire accident. The same liability rule is not economically efficient, however, in the case of fire damage to a neighboring field. In that case, the negligence rule induces both the damager and the victim to exercise an optimal level of care. This explains why, in the case of fire damage to a neighboring field, the law exempts the damager from liability if he lit the fire at an appropriate distance from the neighbor's field.

Professor Lawrence H. Schiffman investigates the monetary theories that underlie the Talmudic laws that pertain to currency (coinage) and commodities, and the trading of one currency against another or even multiple currencies against each other. The debates recorded in the *Talmud* provide perspectives on the views of the ancient rabbis regarding a number of issues in economic theory. These issues include the nature of currency and commodities, the relationship of the value of currency to price fluctuations, inflation, the use of precious metals to establish monetary standards, and criteria for valuing currency in an international market. Professor Shiffman's chapter examines particular passages in both the Jerusalem and Babylonian *Talmud*s to elucidate those concepts and trace their historical progression. The rabbis are shown to follow a situational, monometallic system allowing for a relativistic determination, whether an object functions as currency or commodity. Despite known evidence to the contrary, Talmudic economic thought assumed that the value of currency remained constant whereas that of commodities changed in response to market conditions.

Professor Keith Sharfman considers from an economic perspective the manner in which Jewish law resolves disputes over the value of legal entitlements. Relative to valuation in other legal systems, Jewish law's most important and distinctive feature is that it tries most valuation disputes before three-judge panels that determine value by majority rule rather than before a single judge or a larger lay jury. Rather than adopt the one-size-fits-all approach of other legal systems, Jewish law instead uses a layered, contextual approach, deploying additional administrative resources, procedural safeguards, and monetary adjustments in situations where economic theory suggests that they are needed. Jewish law's surprising sophistication in this area offers valuable insight to modern legal theorists and policy makers who today are struggling to devise their own solutions to the age-old problem of legal valuation.

Professor P.V. (Meylekh) Viswanath and Professor Michael Szenberg show that markets from antiquity can provide valuable information about the importance of different factors in market pricing of assets. In their chapter, the authors discuss a text from the Babylonian *Talmud* that deals with seasonal prices and trading volume fluctuations in land markets in Roman Palestine. They argue that these fluctuations are probably due to information asymmetry and uncertainty regarding the value of land and the crops growing on it. Modern regulatory authorities might learn from the *Talmud* and work to reduce information asymmetry.

Comparative Law Studies that Relate to Economics

A number of chapters in this volume have addressed issues of comparative law relating to economics. All these papers have already been introduced earlier under various headings, with the exception of Professor Adam Chodorow's essay. Professor Adam Chodorow compares how Jewish law and federal tax law define interest payments. Notwithstanding that both systems define interest payments as a payment for the use of money, the two systems diverge substantially in their holdings regarding a wide range of transactions. Both systems struggle with the question of when to respect the form of a transaction and when to take account of the underlying economic reality, often reaching different conclusions. Comparing the different approaches to the laws of interest reveals how underlying goals, practical constraints, and structure of the legal system affect the development of the law.

Judiasm and Economic History

A number of the historical studies contributed to this volume fit well into the theme of how Jewish economic law fostered participation in the economic life of society. These chapters have already been introduced. The remaining historical paper is described below.

Laurence Rabinovich, Esq., explores aspects of the metrological and monetary systems reflected in Jewish legal writings. The archaeological and numismatic evidence Mr. Rabinovich brings to bear sheds light on the monetary aspects of Abraham's purchase of the Makhpelah cave (Genesis 23), the half-shekel Sanctuary tax, as well as rabbinic interest in topics such as the relationship between gold and silver.

In comparing biblical texts and archaeological evidence from the period of the First Commonwealth (c. 1000 BCE–586 BCE) with other records of the ancient world, it is apparent that weight standards in Judea were modified on at least one occasion. A similar comparison for the Second Commonwealth period (c. 515 BCE–70 CE) establishes yet another change.

The Economics of Judiasm

Last, several chapters deal with the economics of Judaism. Professor Barry R. Chiswick tracks the economic status of American Jewry over the past three centuries. His primary focus is the occupational status of Jewish men and women compared

to non-Jews, with additional analyses of earnings, self-employment, and wealth. Taken together, his data suggest that Jews made greater investments in human capital, earned greater returns from these investments, and were more responsive to economic incentives than others.

He draws a number of lessons from the economic experience of American Jewry. First, the Jews sought out niches in the labor market in which they would be subject to less discrimination. Some of these niches were in "socially suspect" occupations, such as in entertainment, including the emerging movie industry in the early decades of the twentieth century. When rewarding sectors opened up, Jews entered them.

Second, the economic experience of American Jewry was the application of entrepreneurial and decision-making skills. From the Colonial Jewish merchants and financiers, to the German Jewish shop owners, to the present managers and professionals, Jews demonstrated a capacity for successful entrepreneurial activity.

Third, the Jews placed high value on learning the skills necessary for advancement, given the time and place.

Professor Carmel Ullman Chiswick discusses the strong impact of economic forces, and changes in the economic environment, on American Jewish observance and American Jewish religious institutions in the twentieth century. Through the opportunity-cost concept, she explains decision making in the realm of religious practice and observance. These decisions relate to time and money spent, including human capital decisions, for both oneself and family. She notes how the orthodox, conservative, and reform branches of Judaism responded to these economic forces.

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PART I

ECONOMIC THEORY IN THE BIBLE

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CHAPTER 1

THE RIGHT TO RETURN: THE BIBLICAL LAW OF THEFT

ELIAKIM KATZ AND JACOB ROSENBERG

Introduction

According to Jewish Law, a thief who is caught and found guilty must return the stolen article[1] *and, in addition*, pay the owner a fine equal to the value of the article.[2] The thief can avoid this fine by admitting to the theft on his own initiative in a court and returning the stolen article[3] to its owner.[4] In this chapter, we refer to such canceling of a fine as a *pardon*. The pardon is explained in the Talmud by the legal dictum "*Mode BeKnass Patur*" (i.e., "he who confesses in a fine is exempt").

A possible motivation for this pardon may be found in the high threshold required for a conviction in Jewish Law. According to the rules of evidence in Jewish Law, conviction requires two witnesses who observed a crime directly, or who can provide evidence that leaves no doubt whatsoever that the accused individual committed the crime. The stringency of these rules of evidence makes it extremely difficult to obtain a conviction. In view of this, the offer of pardon may be viewed as an incentive to the thief to return the stolen article voluntarily.

1 In this paper we use the term *article* to refer to a good that is, or may be, stolen. This includes both inanimate articles as well as livestock.

2 See Maimonides (Rambam, Egypt, 1,135–1,204), *Mishne Torah Geneivah* 1:4. Also note that in some cases the fine may be greater.

3 Or, in certain cases, its monetary value.

4 *Mishneh Torah, Geneivah,* op. cit., 1:5.

The practice of granting a pardon to (or reducing fines imposed on) those who have committed crimes of property is still current. For example, on more than one occasion, the Israeli army has granted a general pardon to individuals who return stolen military equipment. Under such amnesties, individuals who return stolen equipment are exempt from any punishment. In contrast, if the stolen equipment is returned after the thief is caught, the thief is punished by a fine or a prison sentence.[5]

Granting a complete pardon to a thief in order to induce him to return a stolen article is a special case of a more general incentive mechanism.[6] If the fine imposed on a convicted thief who did not confess voluntarily is $\mathbf{F}$ ($> \mathbf{o}$), then imposing a fine $\mathbf{F} - \boldsymbol{\delta}$ ($\boldsymbol{\delta} > \mathbf{o}$) on a confessed thief constitutes an incentive to confess and return the stolen article. And it is important to note that $\boldsymbol{\delta} > \mathbf{o}$ encompasses $\boldsymbol{\delta} > \mathbf{F}$ (i.e., a reward).[7]

The granting of incentives to thieves in order to motivate them to return stolen articles induces some stolen articles to be returned. On the other hand, since a thief knows that he can avoid penalties associated with theft if he decides, for whatever reason, to return a stolen article, this reduces the risk associated with stealing and encourages more thefts. Hence, it is necessary to weigh the net impact of these two opposing effects of incentives to return on the welfare of owners.[8] This is the purpose of the analysis presented below. The analysis is based on explicit assumptions regarding the behavior of thieves and the difference between the value of the stolen article to the thief and its value to the article's owner.

In our analysis, we assume that the thief does not know the value of the stolen article before the theft takes place. This model permits us to compare situations where (a) fines are imposed on thieves and no pardon is granted, and (b) pardons are granted to thieves who return stolen articles. The model is outlined in the following section and a detailed numerical example is presented in the appendix.

5 Another example, in a different context, is that of amnesties granted to tax evaders. The implications of such amnesties have received considerable attention in the economic literature. See fn. 10.

6 Incentives to self-report infractions have been discussed in the economics literature. For example, there exists an extensive literature that deals with tax amnesties. See, for example, Arun S. Malik and Robert M. Schwab, "The Economics of Tax Amnesties," *Journal of Public Economics* 46 (October 1991): 29–49; Robert Innes, "Remediation and Self-Reporting in Optimal Law Enforcement," *Journal of Public Economics* 72 (June 1999): 379–93; James Andreoni, "The Desirability of a Permanent Tax Amnesty," *Journal of Public Economics* 45, (July 1991): 143–59. Another relevant area in the economics literature is the subject of self-reporting in environmental crimes. See Louis Kaplow and Steven Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," *Journal of Political Economy* 102 (June 1994): 583–606. These two topics, however, are different from the case studied in this paper, with regard to the nature of the pardon and/or the nature of the crime.

7 The analysis presented in this chapter focuses solely on a pardon. This is because Jewish Law views theft as a religious transgression, so that a reward is not a relevant consideration within this context.

8 Providing thieves with incentives to return stolen articles cannot reduce, and may increase, the welfare of thieves. Hence, by looking solely at the welfare of owners, we are providing a more stringent test of the possible positive effect of such incentives. Moreover, given that Jewish Law disapproves of theft, in theological terms, we ignore the welfare of thieves.

Economic Model

I. No pardon

I *(a) Thieves*

There exist a continuum of stealable articles and a continuum of potential, risk neutral, thieves. To simplify the analysis we assume that each stealable article may be stolen by one specific thief: In other words, thieves do not compete with each other to steal a given article. The mass of stealable articles and the mass of potential thieves are both set at 1.[9]

Stealing requires incurring costs of equipment and time by the thief. These costs are distributed uniformly across the population of potential thieves, and the distribution is defined over the interval [0, 1]. Each thief knows the specific cost, **C**, which he will face if he chooses to engage in a theft.

The value of an article to its owner is 1. This enables us to express all values in terms of the article's value to its owner. In contrast, prior to the act of stealing "his" article, a thief does not know the value[10] of this article (to him). What the thief does know is the distribution of the post-theft value of the article: It is high, $\mathbf{B_H}$, or low, $\mathbf{B_L}$ (> 0), with probabilities **p** and **1 – p**, respectively. Since in general owners attach a greater value to an article than does a thief, we assume that Bi < 1 (i = L, H). Specifically, $\mathbf{0 < B_L < B_H < 1}$.

After a thief has stolen his article, he will be apprehended with a probability **q**, in which case he has to return the article and pay a fine, **F**. The probability that he is not caught is **1 – q**.

Hence, after the theft has taken place the expected utility of the thief is

$$\mathbf{V_H = (1 - q)\, B_H - qF} \tag{1}$$

if the article transpires to be of the **H** type, and

$$\mathbf{V_L = (1 - q)\, B_L - qF} \tag{2}$$

if the article transpires to be of the **L** type.

In the absence of a pardon, the thief's gross[11] expected utility of theft, $\mathbf{U_N}$, is a weighted average of the two ex post expected utilities.

$$\mathbf{U_N = pV_H + (1 - p)\, V_L} \tag{3}$$

A necessary condition for theft to occur is that $\mathbf{U_N > 0}$,which clearly requires that $\mathbf{V_H > 0}$. Moreover, given that $\mathbf{V_H}$ and $\mathbf{V_L}$ are both smaller than 1, $\mathbf{U_N < 1}$. In this

9 The mass of potential thieves may be smaller than the mass of stealable articles without affecting our results.

10 For example, its resale value in a stolen goods market.

11 Before subtracting the costs the thief incurs in stealing.

connection note that, in Jewish Law, $\mathbf{F = 1}$. Hence, for $\mathbf{V_H}$ to be positive, $\mathbf{B_H}$ must exceed q / (1 – q). This implies that, for any thefts to take place, **q** must be significantly smaller than 0.5, (since $\mathbf{B_H < 1}$). Given the stringency of the rules of conviction in Jewish law, $\mathbf{q < 0.5}$ is a reasonable assumption.

In view of the above, all thieves for whom $\mathbf{U_N > C}$ will engage in theft, and all those for whom $\mathbf{U_N \leq C}$ will not. This implies that, in the absence of pardons or rewards, the marginal thief will be characterized by costs $\mathbf{C_N^* = U_N}$. Therefore, the proportion of actual thieves in relation to potential thieves equals $\mathbf{U_N}$.

A simple numerical example will clarify the above. Suppose that the low value of the article to the thief (i.e., $\mathbf{B_L}$) is 0.125 (that is, 12.5 percent of its value to the owner), $\mathbf{B_H = 0.75}$, $\mathbf{q = 0.2}$ and $\mathbf{F = 1}$[12]. Using the above parameter values, the post-theft expected utility of the article to the thief will be $\mathbf{V_L = (0.8)\ 0.125 – (0.2)\ 1 = –0.1}$ with a probability $\mathbf{1 – p}$, and $\mathbf{V_H = (0.8)\ 0.75 – (0.2)\ 1 = 0.4}$, with a probability **p**. Now, let $\mathbf{p = 0.5}$ (50 percent of the articles are expected to be of the H type). In this case the gross expected utility of the thief (before the theft takes place) under a no pardon regime is:

$$\mathbf{U_N = (0.5)(–0.1) + (0.5)(0.4) = 0.15}$$[13]

Since $\mathbf{U_N = 0.15}$, all thieves for whom cost is smaller than 0.15 will engage in stealing. But since by assumption costs are distributed uniformly across the potential thieves, this implies that 15 percent of potential thieves will engage in theft, and that 15 percent of stealable articles will be stolen.

I *(b) Owners*

$\mathbf{U_N}$ is the mass of articles that are actually stolen (and their proportion of all stealable articles). The expected utility loss to (the risk neutral) owners is the mass of articles stolen by thieves who are not caught, $\mathbf{(1 – q)\ U_N}$, minus the fines collected from those who are caught, $\mathbf{q(U_N)F}$. Hence, the expected utility loss to an owner in the absence of pardons, $\mathbf{L_N}$, is

$$\mathbf{L_N = (1 – q)\ U_N + q\,(U_N)\ F = U_N\,(1 – q + qF)}$$

Which, substituting for $\mathbf{U_N}$ from (3), yields,

$$\mathbf{L_N = (1 – q – qF)\ (pV_H + [1 – p]V_L)} \qquad (4)$$

II. Pardon

II *(a) Thieves*

If a pardon is offered to thieves who return a stolen article, some stolen articles may be returned. In order to induce a return of at least some articles by the offer

12 As mentioned above, in Jewish Law the fine is equal to the full value of the article to the owner.

13 In other words, 15 percent of the article's value to the owner.

of a pardon, the thief's return of the article must yield a greater utility than the utility derived by keeping it. Since returning the article yields utility of 0, it will be kept only if doing so yields a negative utility. Hence, in order to make a pardon meaningful, we assume $\mathbf{V_L < 0}$. Also, as mentioned above, a necessary condition for theft to occur is that $\mathbf{U_N} > 0$, which clearly requires that $\mathbf{V_H > 0}$. Given a pardon, a thief will return an article of low value and keep an article of high value.

When pardons are granted to thieves who return stolen articles, the thief knows that, if he chances on a low value article, his ex post utility from the theft will be 0. Therefore, given a potential pardon, the gross expected utility before stealing, $\mathbf{U_P}$, is derived from (3) by substituting 0 for $\mathbf{V_L}$.

$$\mathbf{U_P = pV_H}, \tag{5}$$

which is greater than $\mathbf{U_N}$, since $\mathbf{V_L < 0}$.

Hence, the marginal thief is such that $\mathbf{C_P^* = U_P > U_N}$; that is, the availability of a pardon raises the number of thieves.

This is not surprising. The possible pardon makes theft more profitable (less risky), and therefore encourages more individuals to engage in theft. Note that a proportion $\mathbf{(1 - p)}$ of stolen articles are returned under the pardon regime, in contrast with the no pardon case, where no article is returned voluntarily.

II *(b) Owners*

The expected utility loss to owners in this case, $\mathbf{L_P}$, equals the expected cost of *unreturned* and uncaught articles, $\mathbf{U_P\ (1 - q)p}$, minus the expected fine on caught articles, $\mathbf{(U_P)q\ p\ F}$. From (5) this yields:

$$\mathbf{L_P = (U_P)\ p\ (1 - q) - (U_P)p\ q\ F = (1 - q - qF)\ p^2\ V_H} \tag{6}$$

III. Comparing Owners' Losses Under Alternative Regimes[14]

We are now in a position to determine the circumstances wherein a pardon increases the welfare of owners.

The difference between $\mathbf{L_P}$ and $\mathbf{L_N}$, which may be referred to as the Loss Gap, is:

$$\begin{aligned}\mathbf{DD = L_P - L_N} &= \mathbf{(1 - q - qF)(p^2V_H - (pV_H + [1\text{-}p]\ V_L))} \\ &= \mathbf{(1 - q - qF)(1 - p)(V_L + pV_H)}\end{aligned} \tag{7}$$

Hence, the sign of **DD** is as the sign of $\mathbf{V_L + p\ V_H}$.

The above condition has an appealing intuitive explanation. The mass of thieves under a no pardon regime is $\mathbf{U_N = p\ V_H + (1 - p)\ V_L}$, and the mass of thieves newly induced to steal by the pardon is $\mathbf{U_P - U_N = p\ V_H}$. The introduction of a pardon regime therefore increases losses to owners by $\mathbf{(1 - q - qF)p(U_P - U_N)} = \mathbf{(1 - q - qF)p^2\ V_H}$ (since $\mathbf{1 - p}$ of the stolen articles are returned). At the same time, the pardon induces a $\mathbf{1 - p}$ of the original $\mathbf{U_N}$ to return the stolen articles, implying

14 For further elaboration see the appendix.

a reduction in loss to $(1 - q - qF)(1 - p)\ U_N = (1 - q - qF)(1 - p)(pV_H + [1 - p]V_L)$, yielding the above condition.

Interpretation and Implications

Figure 1.1 is a numerical illustration of our results, for the values $B_L = 0.125$; $q = 0.2$; $p = 0.5$; $F = 1$.

In this figure, we plot expected utility losses for different values of B_H, as a result of being exposed to potential thefts under a pardon and under a no pardon regime.

Several points of interest emerge.

First, to ensure that V_H is strictly positive, B_H must be bounded below. Using the parameter values above, B_H must exceed 0.25.[15] This therefore is the starting value of B_H on the horizontal axis.

Second, for values of B_H that are small, defined as sufficiently close to 0.25, the loss to owners under a pardon necessarily exceeds the loss to owners in the absence of a pardon. To see this, consider the expected loss for $0.25 < B_H < 0.38$. For these values of B_H, no thefts take place under a no pardon regime: **For** $B_H < 0.38$, $U_N = pV_H + (1 - p)V_L$ is negative (since $V_L < 0$) so that owners lose nothing. However, within the pardon regime, the ability of thieves to avoid exposure to the negative V_L by returning some stolen articles implies that $U_P > 0$ for $B_H > 0.25$ and thefts do take place. And, while $(1 - p)$ of articles stolen in the pardon regime are returned, the owners still lose a proportion of these.

Third, in both regimes the loss increases with B_H: A higher value of B_H increases the thief's expected utility from stealing, raising the number of articles stolen. However, within a pardon regime, the effect of B_H on (owners') losses is smaller, because some of the articles are returned voluntarily: The effect of B_H on losses within the no pardon regime is multiplied by p within the pardon regime.

This is easily seen by noting that,

$$\frac{\partial L_N}{\partial B_H} = p(1-q)(1-q-qf)$$

$$\frac{\partial L_P}{\partial B_H} = p^2(1-q)(1-q-qf)$$

The slope of L_N is therefore greater than that of L_P, and, *above a certain level of* B_H, *the pardon regime is superior.*

A further result concerns the relation between the losses of the owners under the different regimes and the value of p. As expected, an increase in p, which generates more thefts, raises the expected loss of owners under both regimes. What

15 Because $V_H > 0$ requires that $(1 - q)\ B_H - q\ F > 0$. In this case: $0.8B_H - 0.2 > 0$.

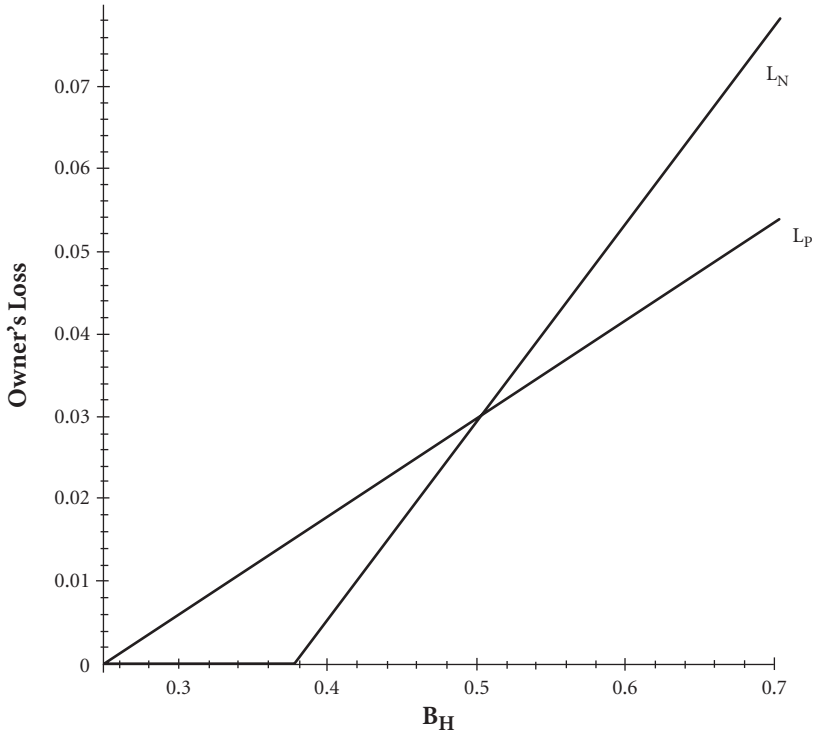

FIGURE 1.1

appears surprising, however, is that, for values of **p** that are not too large, an increases in **p**, which also implies that a smaller proportion, **(1 – p)**, of stolen articles are returned under a pardon regime, reduces the Loss Gap.

This is illustrated in Figure 1.2 for the same numerical values as above (except that $\mathbf{B_H}$ is set equal to 0.5, and **p** is allowed to vary).

Note that, for *all* parameter values, $\mathbf{L_N = L_p}$ at **p = 1**.[16] This is because, when all articles are **H**, no articles are returned within a pardon regime. Hence, when **p = 1**, the pardon has no impact, and, trivially, $\mathbf{L_N = L_p}$. Also, note that, for low values of **p**, no thefts take place under both regimes. However, as **p** rises, thefts begin for lower **p** under the pardon regime than under the no pardon regime. This implies that for some low **p** the pardon regime generate a greater owner loss. Hence, if the $\mathbf{L_p}$ curve is to cut the $\mathbf{L_N}$ curve at some **p** below 1, it must cut it from above: At that point the slope of $\mathbf{L_p}$ in **p** is smaller than the slope of $\mathbf{L_N}$ in **p** and for these values of **p** the pardon regime is superior.

In Figure 1.3, we consider the relationship between **p** and $\mathbf{B_H}$. All points on the curve **DD = 0** in Figure 1.3 represent all the combinations of **p** and $\mathbf{B_H}$ for which $\mathbf{DD = L_p - L_N = 0}$. These combinations of **p** and $\mathbf{B_H}$ are such that owners are indifferent between a pardon and a no pardon regime.

16 Recall that $\mathbf{DD = L_p - L_N = (1 - q - qF)(1 - p)\ (V_L + p\,V_H)}$.

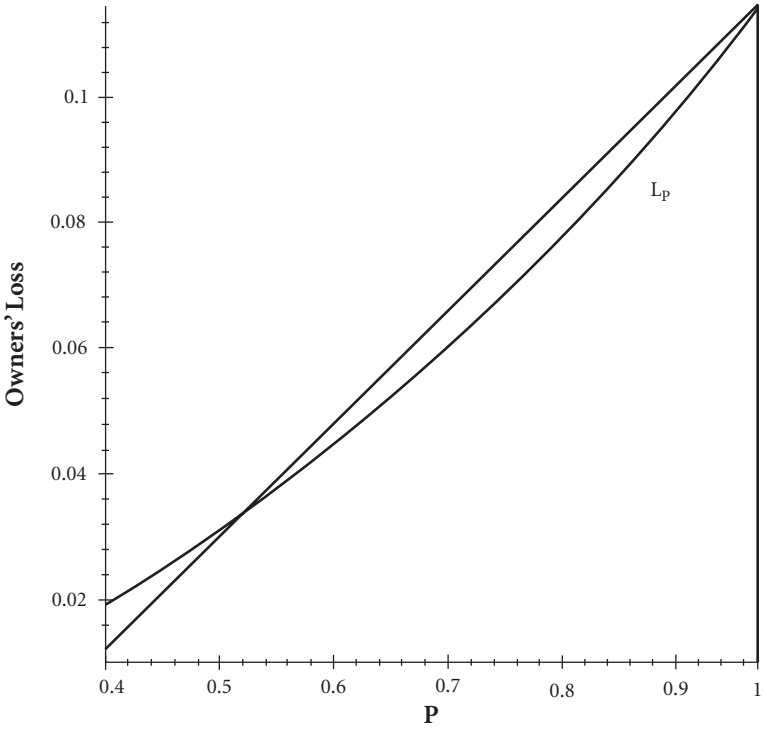

FIGURE 1.2

The slope of the curve **DD = o** is negative because, as shown above (Fig. 1.1), an increase in $\mathbf{B_H}$ raises the relative benefit of a pardon regime and reduces the Loss Gap. At the same time, *in the relevant range*, an increase in **p** also decreases the Loss Gap. Consequently, the slope of **DD = o**, in the ($\mathbf{B_H}$, **p**), is negative.

All combinations of $\mathbf{B_H}$ and **p** to the right and above the curve **DD = o** imply that the pardon regime is superior to the no pardon regime ($\mathbf{L_p < L_N}$).

The impact of a change in **q** (the probability of apprehension) is reflected by the two **DD = o** curves. A lower **q** increases the range for which the pardon regime is superior since the importance of returning stolen articles voluntarily is increased.

Concluding Remarks

According to Jewish Law, a thief who is caught and found guilty must return the stolen article *and, in addition*, pay a fine equal to the value of the article. However, this fine is waived if the stolen article is returned voluntarily. In this chapter we suggest that the waiver of the fine represents recognition by Biblical law of the benefits of incentivize thieves to return stolen articles. It seems likely that there was

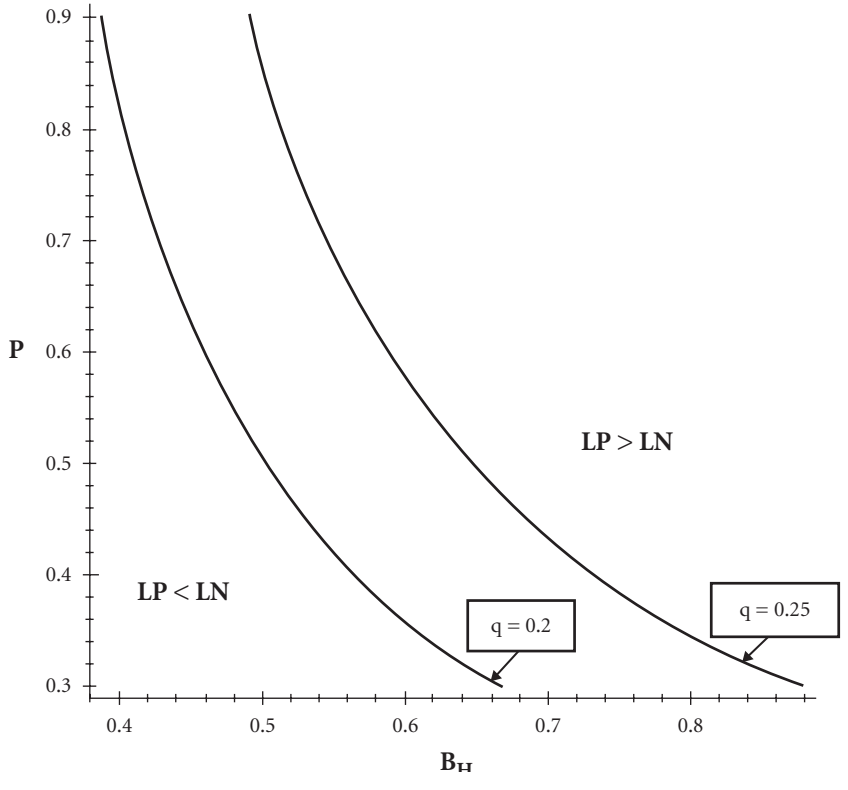

FIGURE 1.3

little in the way of a meaningful policing in Biblical and Talmudic times. In view of this, and in the face of the difficulties of obtaining a conviction in a Jewish court, the probability of apprehension and conviction of a thief must have been very low. In certain circumstances, therefore, it made economic sense to provide an incentive to thieves who discovered they had gotten less than they bargained for to return the stolen articles. It appears that recognizing this, as well as the role of incentives, the Biblical law of theft attempted to provide such an incentive by offering a pardon to thieves who voluntarily returned stolen articles.

APPENDIX: THE ECONOMIC MODEL: A NUMERICAL EXAMPLE

We illustrate our analysis by using a numerical example. The notations used here follow that of the text, and the parameters are as follows:

B_L = the high value of the stolen article to the thief.
B_H = the low value of the stolen article to the thief.

F = the fine.
q = the probability of apprehension.
p = the proportion of high-valued articles.

Table A1.1 provides simulated theft data for selected values of the exogenous variables that are indicated in the table's titles, for both the no pardon and the pardon regimes. The calculations are described below.

(a) No pardon regime—First column: There exist one thousand stealable articles and one thousand potential, risk neutral, thieves. Each stealable article may be stolen by one specific thief. The value of an article to its owner is unity. Prior to stealing "his" article, a thief does not know the value[17] of this article to him. He, however, knows that it has one of two possible values: a high value, $\mathbf{B_H = 0.75}$, or low value, $\mathbf{B_L = 0.125}$, with probabilities $\mathbf{p = 0.5}$ and $\mathbf{(1 - p) = 0.5}$, respectively.

After a thief has stolen his article, he will be apprehended with a probability $\mathbf{q = 0.2}$, in which case he has to return the article and pay a fine equal to $\mathbf{F = 1}$. The probability that he is not caught is

$$\mathbf{(1 - q) = 0.8}$$

Hence, *after the theft has taken place* the expected utility of the thief is

$$\mathbf{V_H = (1 - q)\, B_H - qF = (0.8)(0.75) - (0.2)(1) = 0.4} \qquad \text{(A1)}$$

if the article transpires to be of the high value (**H** type), and

$$\mathbf{V_L = (1 - q)\, B_L - qF = (0.8)(0.125) - (0.2)(1) = -0.1} \qquad \text{(A2)}$$

Table A1.1 Theft data for selected levels of p and q

		q = 0.2		**q = 0.2**		**q = 0.12**	
		p = 0.5		**p = 0.25**		**p = 0.25**	
		1	**2**	3	**4**	5	**6**
		No-pardon regime	**Pardon regime**	No-pardon regime	**Pardon regime**	No-pardon regime	**Pardon regime**
1	Number of thefts	150	***200***	25	***100***	127	***135***
2	Number of articles voluntarily returned	0	***100***	0	***75***	0	***101***
3	Number of thieves caught	30	***20***	5	***5***	15	***4***
4	Fines paid	30	***20***	5	***5***	15	***4***
5	Number of articles lost to their owners	120	***80***	20	***20***	112	***30***
6	Loss to owners	90	***60***	15	***15***	97	***26***

Given: $B_L = 0.125$; $B_H = 0.75$; F = 1; The number of stealable articles = 1,000

17 For example, its resale value in a stolen goods market.

if the article transpires to be of the **L** type.

In the absence of a pardon, the thief's gross[18] expected utility of theft, $\mathbf{U_N}$, is the weighted average of the two ex post expected utilities.

$$\mathbf{U_N = pV_H + (1-p)\,V_L = (0.5)(0.4) + 0.5(-0.1) = 0.15} \qquad \text{(A3)}$$

Given our assumption of uniformly distributed costs, the proportion of potential thieves engaging in theft equals $\mathbf{U_N = 15\%}$, implying that the number of thefts is **0.15% of 1,000 = 150**. This is shown in the first column of the first row in Table A1.1.

The number of thieves caught is **150q = 20% of 150 = 30,** and each of these pays a fine of **1** (see first column, third and forth rows).

The number of articles that are lost to their owners is **150 – 30 = 120**. Deducting the fine paid to owners by apprehended thieves, we obtain the average loss to owners (i.e., **120 – 30 = 90**; sixth row).

(**b**) **Pardon Regime—Second column:** When pardon is granted to thieves who return stolen articles, the thief knows that, if he chances on a low value article and therefore returns it, his ex post utility from the theft will be 0. Therefore, given a potential pardon, the gross expected utility before stealing, $\mathbf{U_p}$, is derived from (A3) by setting $\mathbf{V_L = 0}$.

$$\mathbf{U_p = p\,V_H + (1-p)(0) = (0.5)(0.4) + 0.5(0) = 0.2} \qquad \text{(A4)}$$

The proportion of potential thieves engaged in theft has risen by 5 percent, to $\mathbf{U_p = 20\%}$, and the number of thefts is therefore **20% of 1,000 = 200**. This is shown in the first row of the second column in Table A.1.

After stealing, 50 percent of the thieves (recall that **p = 0.5**) find that that their stolen articles are of low value and therefore return them. The number of returned articles is, therefore, **50% of 200 = 100** (second row). Of the **100** nonreturned articles, **20** articles are caught and the fine paid is **20** (third and fourth row).

Total owners' loss under pardon regime is, therefore, the nonreturned and noncaught articles (fifth row) minus the fine = **80 – 20 = 60** (sixth row).

The number of theft is generally higher and never lower in the pardon regime, since the expected benefit from stealing is higher in this regime. However, for the parameter values used in the table, the number of voluntarily returned articles overweighs this disadvantage and the pardon regime is superior.

18 Before subtracting the costs the thief incurs in stealing.

(c) A reduction in p—No Pardon Regime—Third column: Suppose that the proportion of high-value articles declines to $\mathbf{p = 0.25}$. Since this is the only change we repeat the calculations presented in (a) except that we substitute in (A3) $\mathbf{p = 0.25}$ and $\mathbf{1 - p = 0.75}$ to obtain:

$$\mathbf{U_N = p\,V_H + (1 - p)\,V_L = (0.25)(0.4) + 0.75(-0.1) = 0.025} \qquad \text{(A5)}$$

Hence, the proportion of thieves engaged in theft declines to $\mathbf{U_N = 2.5\%}$, and the number of thefts is **2.5% of 1,000 = 25**. This is shown in the first row of the third column in Table A1.1. The number of thieves caught is $\mathbf{q\ (25) = 0.2(25) = 5}$; each is paying a fine of **1** (third and forth rows). The number of articles that are lost to their owners is $\mathbf{25 - 5 = 20}$ and, deducting the fines paid by the thieves, we obtain the average loss to owners, $\mathbf{20 - 5 = 15}$ (sixth row).

(d) A reduction in p—Pardon Regime—Forth column: Repeating the calculation in **(b)**, but assuming $\mathbf{p = 0.25}$ and using (A4), yields

$$\mathbf{U_P = p\,V_H + (1 - p)(0) = (0.25)(0.4) + 0.25(0) = 0.1.} \qquad \text{(A6)}$$

The proportion of thieves engaged in theft equals $\mathbf{U_p = 10\%}$, and the number of thefts is **10% of 1,000 = 100.** This is shown in the first row of the second column in Table A1.1.

After stealing, 75 percent of the thieves discover that their stolen articles are of low value, and these articles are returned under the pardon regime. The number of returned articles are $\mathbf{(0.75)(100) = 75}$ (second row). Of the **25** nonreturned articles, **5** articles are caught and the fine paid is **5** (forth row). Total owners' loss under the pardon regime is: the nonreturned and noncaught articles = 20 (Fifth row) minus the fine = 20 – 5 = 15 (sixth row).

A lower level of **p** reduces the number of theft in both regimes (compare row 1 in columns 3 and 4 to row 1 in columns 1 and 2, respectively). This is a general result since a lower proportion of high-valued articles reduce the expected benefit from stealing. However, the reduction is greater in the no pardon regime than in the pardon regime (compare the reduction of the number of thefts between columns 1 and 3 versus the reduction between columns 2 and 4), leading to a decrease in the advantage of pardon regime. Table A1.1 highlights this result: The lower level of **p** yields that both regimes are identical in terms of owners' loss.

(e) The impact of a change in q—columns five and six: To show the impact of a reduction in the probability of apprehension, **q**, we recalculate the formulas in **(a)** and **(b)** for $\mathbf{p = 0.25}$ and $\mathbf{q = 0.12}$. The results of these calculations are presented in columns 5 and 6, respectively. Comparing columns 5 and 6 to columns 3 and 4 illustrates that, starting from a set of parameters for which both regimes yields an

identical loss to owners, a lower **q** yields that the pardon regime is superior to the no pardon regime. A low **q** means that only a small proportion of thieves are caught, so that the voluntary returning of articles, which exists only in the pardon regime, is the main source of reduced owners' costs.

Conclusion

In this appendix we demonstrated that that the waiver of the fine (pardon regime) may represent recognition by Biblical law of the benefits of encouraging thieves to return stolen articles. In certain circumstances—for example, such as presented in column 2 and 6—it makes economic sense to provide an incentive to return the stolen articles. The absence of effective policing in Biblical and Talmudic times, the difficulties of obtaining a conviction in a Jewish court, and the likely very low probability of apprehension and conviction of a thief, **q**, all militate toward a pardon regime. It appears that, recognizing this, the Biblical law of theft attempted to provide such an incentive by offering a pardon to thieves who voluntarily returned stolen articles.

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CHAPTER 2

ELIEZER THE MATCHMAKER: ETHICAL CONSIDERATIONS AND MODERN NEGOTIATION THEORY

AARON LEVINE

Introduction

In modern society, the dealmaker is one of the most admired economic actors. Through discretion, initiative, creativity, and daring, the dealmaker brings parties together into a mutually advantageous enterprise.

We will focus on the Biblical account of how Eliezer, servant of Abraham, made the matrimonial match between Rebecca and Isaac, described in Genesis 24:1–67. First, we will consider the propriety of the test Eliezer devised in light of the Torah's ethical principles. We will also examine the various discrepancies between Abraham's charge to Eliezer and what happened at the well, on the one hand, and Eliezer's account of them, on the other. Our second concern will be whether the stratagems Eliezer employed as a matchmaker conform to the success formulae recommended by modern theorists in the field of negotiations.

Eliezer's Matchmaking Adventure—Ethical Considerations

Ethical evaluation of Eliezer's conduct perforce begins with the following Midrashic passage:

> Said R. Aha: The table-talk of the servants of the Patriarchs' households is more notable [literally: "beautiful"] than the Torah of their descendants. Eliezer's story is recorded and recapitulated, taking up two to three pages, whereas one of the fundamental rulings of the Torah, that the blood of a creeping thing defiles in the same way as the flesh, is known to us only through the superfluity of one letter in the Scriptures.[1]

R. Aha's dictum apparently puts an imprimatur of ethical propriety on Eliezer's conduct, explaining why the Torah devoted "two to three pages" to record so many moral enigmas regarding his actions. This is implied by R. Abraham Abele b. Hayyim ha-Levi Gombiner (Poland, ca. 1637–1683) in a comment on one of the details of the story. R. Gombiner discusses specifically the protocol that one should not eat before feeding his animals.[2] He opines that this does not apply to drink; one may drink before giving his animals to drink. R. Gombiner derives this from Rebecca's response to Eliezer's request for a drink at the well: "Drink and I will even water your camels."[3] The Torah records this event to teach practical law.[4]

Even as R. Aha's dictum puts the imprimatur of propriety on Eliezer's conduct, we must still set Eliezer's specific actions against the ethical norms of Judaism. Without identifying the underlying principles, it is dangerous to apply lessons learned from Eliezer's conduct to other contexts. Moreover, some of what Abraham said and what Eliezer actually did is subject to dispute.[5] We will therefore take a position on what Eliezer actually did and said, following a representative sampling, if not the great majority, of commentators.

Eliezer's Agency Role

Before analyzing Eliezer's conduct, one must note that Eliezer was acting in the capacity of a *shaliah*, or agent, on behalf of Abraham, his master. Eliezer's commission was to bring home a suitable mate for Isaac.[6] Indeed, Eliezer's first order of

1 *Genesis Rabbah* 60:11.

2 BT *Berakhot* 40a.

3 Genesis 24:26; R. Abraham Abele b. Hayyim ha-Levi Gombiner, *Magen Avraham* to *Shulhan Arukh, Orah Hayyim* 167, note 18.

4 R. Samuel b. Nathan ha-Levi Kolin (Bohemia, 1720–1806), *Mahatsit ha-Shekel* to *Shulhan Arukh, Orah Hayyim*, ad loc.

5 Cf. endnote 79.

6 Genesis 24:2–9; *Moshav Zekenim mi-Ba'alei ha-Tosafot* to Genesis 24:67; *Tosafot* to *Ketubbot* 7b. Some authorities understand Eliezer's agency role as merely to bring home a suitable mate for Isaac.

business and first words of communication with Bethuel and Laban were to identify himself as Abraham's servant.[7] Eliezer then revealed that he was sent to find a wife for his master's son.[8]

Eliezer's *shelihut* status is a critical factor in the analysis of the ethics of his conduct.

One fundamental guidepost for the agent (*A*) in Jewish law is that *A* must conduct all his affairs in accordance with the specific instructions of his principal (*P*). Departing from those instructions violates the agency relationship between *P* and *A* and is grounds for *P* to void the transaction *A* concluded on his behalf. In the absence of specific instruction, *A* may not use his own discretion; instead, he must assess the mindset of *P* and act accordingly. Illustrating this is a law regarding the portion of the crop that the farmer must separate and give to a *kohen* (priest), called *terumah*. If terumah is not given, it is prohibited to consume the crop, and one who violates that prohibition is subject to capital punishment at the hands of heaven.[9] While Torah law allows the terumah obligation to be satisfied with even a single grain, the Sages established standards for giving: A generous person gives one-fortieth; an average person gives one-fiftieth; and a penurious person gives one-sixtieth.[10] Now, suppose *P* appoints *A* his agent in separating *terumah* from his crop but does not specify how much to separate. The rule is as follows:

> If [a person] says to his agent: "Go and separate *terumah* on my behalf," but he gives no instructions as to how much *terumah* he wishes to be taken, [the agent] should separate *terumah* in accordance with the mindset of the owner, and if he does not know the mindset of the owner, he should separate using the intermediate standard, taking one part in fifty as *terumah*. If it turns out that [the

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Marriage is entered into in two stages. In the first, *eirusin*, the man gives the woman an object of value and recites a standard marriage proposal to her in the presence of two witnesses. While *eirusin* does not permit the couple to live together, it confers marital status on them in most respects, and the woman requires a divorce before she can marry again. The second stage, *nissu'in*, is effected by means of entering a canopy (*huppah*) where a religious ceremony is performed. Only after *huppah* is the couple permitted to live together as man and wife.

Midrash Lekah Tov derives from the narrative that Eliezer effected *eirusin* on behalf of Isaac. The Midrash contrasts the two gifts Eliezer gave Rebecca, saying that the first, which he gave her at the well (Genesis 24:22), was not for *eirusin*, while the second, after Rebecca's family agreed to the match (Genesis 24:51–53), was.

R. Hizkiyah Hizkuni (France, thirteenth century) agrees. Initially, he observes, we find Rebecca's family responding affirmatively and enthusiastically to Eliezer's marriage proposal: "Here, Rebecca is before you; take [her] and go . . ." But in the morning, after Eliezer had given Rebecca the second gifts, the family insists that Rebecca delay her departure: "Her brother and her mother said, 'Let the maiden remain with us days or a set of ten [months]; then she will go'" (Genesis 24:55). Eliezer's second gift, he argues, accounts for their change of attitude. Until then, the family thought the plan was for Eliezer to bring Rebecca to Isaac, who would begin the marriage ceremony with *eirusin*. Eliezer's second gift, however, effected *eirusin* on behalf of Isaac. The family therefore felt that Rebecca could remain at home until the *nissu'in* stage, as was indeed the custom (*Hizkuni* to Genesis 24:53, 55).

Further evidence that Eliezer's mandate was not only to bring home a suitable mate for Isaac, but to effect *eirusin*, and even possibly *nissu'in*, on behalf of Isaac, are the various sources that read into the narrative that, while Eliezer was still in Aram Naharaim, the blessings prescribed for these ceremonies were already recited. See Tractate *Kallah* and *Pirkei de-Rabbi Eliezer.*

7 Genesis 24:33–34.

8 Ibid., 24:37–38.

9 Leviticus 22:14; Maimonides (Rambam, Egypt, 1135–1204), *Mishneh Torah*, *Ma'akhalot Asurot* 10:19.

10 BT *Hullin* 137b.

> agent] subtracted ten parts from the intermediate standard, or added ten to this standard, his actions are not invalidated, and the *terumah* that he separated is accorded the status of *terumah*.[11]

Another guidepost for *A* is that he operates under an implicit mandate from *P*: *le-takkonei shaddartikh ve-lo le-avvotei* (I sent you to improve my situation and not to impair it). The import of this dictum is that the slightest error committed by the agent severs the agency.

Illustrating the *le-takkonei shaddartikh* principal is the following case involving payment of a debt through an agent: *B* owes *L* $1,000. *B* gives $1,000 to *A* and instructs *A* to give *L* the money as payment for his debt. *B* tells *A*, "Pay my debt and retrieve from *L* the deed of indebtedness." *A* gives *L* the $1,000 as payment. But when *A* asks *L* to return the deed of indebtedness, *L* refuses, claiming he took the $1,000 as payment for another debt that *B* owed him. The second debt of $1,000, *L* explains, was the subject of an oral contract and therefore the deed of indebtedness, which evidenced the first loan, remains intact. *L*'s claim that a parallel debt was owed him is believed[12] and *L* has the right to use his document to collect another $1,000 from *B*.[13] Now, had *A* obtained the deed of indebtedness from *L* before paying him the $1,000, *L* would have been unable to claim a second $1,000 from *B*. Notwithstanding that A followed precisely the sequence of actions *B* specified in his instructions (i.e., to pay the debt and retrieve the deed) *A* must deal with *L* in a manner ensuring that *L* does indeed return the document.[14] Accordingly, prudence demands *A* to reverse the sequence of actions *B* mentioned and pay only after retrieving the document from *L*. Since the *le-takkonei shaddartikh* mandate requires *A* not only to carry out his commission in a manner conforming to explicit instruction, but to do so in a manner protecting the interests of his principal, *A* is deemed negligent in first paying and only then asking for return of the document. Consequently, *A* must compensate *B* for his loss.[15]

Further illustrating the *le-takkonei shaddartikh* principle is an aspect of the law of *ona'ah* (price fraud),[16] which prohibits an individual from concluding a transaction at a price more favorable to himself than the competitive norm.[17] A transaction involving *ona'ah* is regarded as a form of theft.[18] Depending on the magnitude of the

11 Mishnah, *Terumah* 4:4.

12 *L*'s claim has credibility on the basis of the principle called *miggo* (lit., "since"), which states that, if a litigant could have won the case with a superior argument and instead advanced a weaker one, even the weaker plea is believed. Since *A* gave *L* the $1,000 without witnesses, *L* could have used the document he had to claim $1,000 from *B* by attesting that he received no money from *A*. Accordingly, *L* retains his right to collect $1,000 from *B* even when *L* concedes that he did indeed receive $1,000 from *A*, but accepted it as payment of a parallel debt *B* owed him that was only orally entered into.

13 BT *Ketubbot* 85a.

14 R. Alexander b. Joshua ha-Kohen Falk (Poland, 1555–1614), *Sema* to *Shulhan Arukh*, *Hoshen Mishpat* 58, note 4.

15 BT *Ketubbot* 85a; R. Joseph Caro (Safed, 1488–1575), *Shulhan Arukh*, *Hoshen Mishpat* 58:1.

16 "When you make a sale to your fellow or when you buy from the hand of your fellow, do not victimize one another" (Leviticus 25:14).

17 *Baraita* at BT *Bava Metsi'a* 51a; Rif, ad loc.; *Mishneh Torah*, *Mekhirah* 12:1; Rosh to *Bava Metsi'a* 4:17; *Tur*, *Mekhirah* 227:1; *Shulhan Arukh*, *Mekhirah* 227:1; *Arukh ha-Shulhan*, *Mekhirah* 227:1.

18 BT *Bava Metsi'a* 61a; *Sema* to *Shulhan Arukh*, *Hoshen Mishpat* 227, note 1.

price's deviation from the competitive norm, the injured party may have recourse to void or adjust the transaction. The sages identified three degrees of ona'ah. Provided the price discrepancy falls within the margin of error,[19] plaintiffs right to void the transaction is recognized when the difference between the sale price and the reference price was more than a sixth.[20] A differential of exactly one-sixth entitles neither party to void the transaction; the plaintiff is, however, entitled to full restitution of the *ona'ah*.[21] Finally, third-degree *ona'ah* occurs when the sale price differs from the market price by less than one-sixth. In that case, the transaction not only remains binding, but the plaintiff has no legal right to recoup the price differential.[22]

When one or both of the parties to the transaction is an agent, the rules of *ona'ah* are modified. If the plaintiff informed the defendant that he was acting as an agent for a particular person, the occurrence of *any* amount of *ona'ah* allows the principal to invalidate the transaction. This applies even when the transaction falls into an exempt category, where the restitution procedure is either modified or does not apply altogether, as, for example, in real estate transactions. The principal here is *le-takkonei shaddartikh ve-lo le-avvotei*.[23]

This application of *le-takkonei shaddartikh* to the law of *ona'ah* has implications for an agent's risk taking. The agent is a victim of *ona'ah* because he relies on his knowledge of alternative market possibilities and takes the chance that the price he agreed to is indeed the "fair" market price. Had he only engaged in sufficient market research, he would not have overpaid or accepted a below-market price. *Le-takkonei shaddartikh* hence dictates that the agent should not undertake "unnecessary risk" (i.e., risk he could eliminate with sufficient diligence and patience).

We have demonstrated that even when *A*'s action does not directly and explicitly violate *P*'s advance instruction, *P* may still have recourse to invalidate the action. This obtains when either the judgment that produced *A*'s action clearly does not represent *P*'s mindset, or the outcome resulted from *A*'s assumption of unnecessary risk. The flip side is that it is unethical, based on the *hin tsedek* (good faith) imperative, for *A* to intentionally violate the parameters of his authority in the hope that

19 BT *Bava Batra* 78a and Rashi, ad loc.; *Shulhan Arukh*, op. cit. 220:8.

20 *Shulhan Arukh*, op. cit. 227:4, and *Sema*, ad loc., note 6. R. Jonah b. Abraham Gerondi (Spain, ca. 1200–1263), quoted in *Tur*, loc. cit.; in *Rema*, *Shulhan Arukh*, loc. cit.; and in *Arukh ha-Shulhan*, op. cit. 227:4. Ruling in accordance with R. Jonah is R. Asher b. Jehiel, Rosh to *Bava Batra* 5:14. He expresses a minority view that, as long as the plaintiff does not uphold the transaction, the offender, too, is given the prerogative of voiding it. The offender's right proceeds from the magnitude of the price discrimination involved. Because the concluded price diverged more than one-sixth from the market norm, he may insist that the original transaction be treated as an agreement consummated in error (*mekah ta'ut*). Once the transaction is, however, upheld by the plaintiff, the offender loses his right to void the sale, since the offender enjoys no such right when his offense consists of the less severe violation of contracting for a sale price involving second-degree *ona'ah.* Conferring *full* nullification rights on him when his offence is graver seems counter to all canons of equity.

21 BT *Bava Metsi'a* 50b; *Shulhan Arukh*, op. cit. 227:2.

22 Ibid.

In third degree *ona'ah*, plaintiff's claim is denied only when the transaction involved a nonstandardized product. If the product was homogeneous, plaintiff's claim for the differential is honored. (See *Arukh ha-Shulhan,* loc. cit.)

23 BT *Ketubbot* 100a; *Shulhan Arukh*, op. cit. 227: 30. In the event the seller is victimized in a transaction with an agent of the buyer, authorities dispute whether the case is treated as an ordinary *ona'ah* case, or whether the seller is entitled to nullification rights, regardless of the degree of *ona'ah* involved. See *Tur*, op. cit.

P will resign himself to accept the outcome. The *hin tsedek* imperative requires an individual to fully intend to carry out any commitment or offer he makes.[24] It dictates that *A*, upon accepting an agency role from *P*, must fulfill *P*'s reasonable expectations by basing his conduct on an honest assessment of *P*'s mindset and not assuming unnecessary risk.

Eliezer's Test at the Well and the *Le-Takkonei Shaddartikh* Mandate

Two issues require consideration in assessing whether Eliezer acted properly as an agent according to Jewish law: whether Eliezer undertook unnecessary risks, and whether his conduct corresponded to a reasonable assessment of what Abraham himself would have done. Let us begin with the Torah's account of the test Eliezer devised to select a mate for Isaac:

> And he said, "God, God of my master, Abraham, may You so arrange it for me this day, and do kindness with my master, Abraham. See I stand here by the spring of water and the daughters of the townsmen come out to draw water. Let it be that the maiden to whom I shall say, 'Please tip your jug so I may drink,' and who replies, 'Drink, and I will even water your camels,' her will You have chosen for Your servant, for Isaac; and may I know through her that You have done kindness with my master."[25]

R. Jonathan's critique of Eliezer bears directly upon whether his test entailed unnecessary risk:

> R. Samuel b. Nahmani said in the name of R. Jonathan: Three individuals made requests in an improper manner. Two were answered in a proper manner, and one was answered in an improper manner. They are: Eliezer, servant of Abraham, King Saul b. Kish, and Yiftah the Gileadite. Eliezer, servant of Abraham, made an improper request when he sought a wife for his master's son, Isaac, as it is written that Eliezer prayed to God: "Let it be that the maiden to whom I shall say, 'Please tip your jug etc. [so I may drink],' and who replies, 'Drink and I will even water your camels,'[26] let her be the one you have designated for your servant, for Isaac."

24 The prohibition against making an insincere promise is derived by Abbayei (Babylonia, fourth century CE) at BT *Bava Metsi'a* 49a in the following manner:
Regarding the Biblical prohibition against false weights and measures, the Torah writes: "Just (*tsedek*) balances, just weights, a just *efah*, and a just *hin* you shall have" (Leviticus 19:36). Since the *hin* is a measure of smaller capacity than the *efah*, its mention seems superfluous. If accuracy is required in measures of large capacity, it is certainly required in smaller measures. This apparent superfluity leads Abaya to connect *hin* with the Aramaic word for "yes," *hen*, resulting in the following interpretation: Be certain that your "yes" is *tsedek* (sincere) and (by extension) be certain that your "no" is *tsedek* (sincere). If an individual makes a commitment or an offer, he should fully intend to carry it out.

25 Genesis 24:12–14.

26 Ibid., 24:14.