Halacha and the Common Law

Arthur Lang
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The theoretical basis of *halacha* differs from that of דיני אמות עולם. Obligations and liability are regulated in *halacha* by defining the nature of an act, did a particular *ma’asa* occur, whereas the common law regulates with an eye toward social policy, what consequences were set in motion by an actor. *Halacha* turns on the act of stealing, the act of eating *matzoh*, the act of acquisition, the act of homicide, the act of damaging, and the act of marrying, rather than respectively, the interference with property rights, the acknowledgment of a symbol, the contract of sale, the violation of the right to life, the efficient allocation of risk, or the vows of marriage. This divergence in analytical rigor reaches three notable legal distinctions. Damages for loss of expectations are not assessed in *halacha* as they are under the common law, parties are not bound by contracting mutual promises or *דברים*, and consent plays no role in the criminal law. Moreover, *halacha* gives rise to the ubiquitous concept of *kinyan*, defining relationships between individuals, between individuals and property, and between individuals and government.

**Expectations and the Ban on Interest**

Common law damages for breach of contract are most readily understood to cover expenditures made by the non-breaching party in reliance of the contract. The parties entering into contract guarantee the expenses of their opposing parties in case of breach. This *reliance interest* in contract law has a correlation in *halacha*. A promisor is viewed as a quasi-recipient

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of the expenditures of the promisee who made them in reliance of the contract.\(^1\) As such, he is liable for restitution as if he received them. Common law, however, allows a party to collect more than his expenditures, but also his expectations of profits. The \textit{expectation interest} requires a party in breach to “‘compensate’ the plaintiff by giving him something he never had.”\(^2\)

\textit{Halacha} does not recognize damages for loss of expectations.

\textit{Halacha} bans payment of interest for monetary loans. It allows payment of rent for property loans. The difference between the two types of loans is well known. A borrower takes title to the money that he borrows but does not take title to tangible property that he borrows. Rent is the compensation to the lender, who still owns the rental property, for its use. By contrast, since a lender does not retain title to a monetary loan, he cannot charge rent for something that no longer belongs to him. Interest, then, can only be understood as compensation for loss of profits, payment for the loss of the expectations of the lender, “something he never had.”

The origin of the common law \textit{expectation interest} in contract law is found in tort law (the correlate to \textit{הלכה}). A suit in tort turns upon the \textit{consequences} of a deed, even distant ones, as long as they were reasonably foreseeable. Tort law considers reasonable expectations of profit as foreseeable losses. The \textit{expectation interest} in contract law follows because it is an expected consequence of entering into a binding agreement.\(^3\)

Tort law allows recovery for damages to expected gains including those caused by a party interfering with the conduct of a business. For instance, one who wrongly prevents another from

\(^1\)\textit{Kiddushin} 7a. Just as an \textit{אשה} becomes personally encumbered to a lender when a third party borrows from the lender, an \textit{אשה} becomes married to an \textit{אשה} when a third party of her choosing receives a ring or value from the \textit{אשה}. The reception of the borrower or third party is as if the \textit{אשה} received the loan and as if the \textit{ דין} received the ring or value.


\(^3\) Professors Fuller and Perdue point out that the expectation interest proceeded the credit economy to answer “(1) the need for curing and preventing the harms occasioned by [contractual] reliance, and (2) on the need for facilitating reliance on business agreements.” Id. at 62. This explanation is not sufficient for our purposes, as expectations are assessed in tort law.
selling his merchandise is held liable for the loss of the merchant’s profit. *Halacha* does not allow damages for loss of profit or expectations (מימין הוה). Hence, there is no expectation interest for breach of a binding agreement. So understood, interest is not a property for which a lender has claim against a borrower of a monetary loan.

Contracts and *Kinyan*

Relations and obligations between parties in the common law are regulated by contracts, which are legally enforceable promises. *Halacha*, by contrast, regulates relations and obligations with greater precision by utilizing the concept of *kinyan*, the act of taking title, possession or custody, or an act encumbering a person or his property. *Kinyan* can take place when a party tenders payment for the sale of land, takes a moveable object into his possession, or when a party lifts up an item such as a handkerchief belonging to an opposing party to become encumbered to the opposing party for the terms of an agreement.

*Kinyan* makes agreements enforceable, not because the parties are held to mere words, but because a party or property became encumbered for that which was agreed. For example, normally an employee is free to quit his job before its completion. If the parties make a *kinyan* on the tools of an independent contractor, the worker is bound to complete his task as if he made a contract. Whereas the tradesman normally is the owner of the work coming out of his tools, the *kinyan* makes the *kinyan* to share title to the product the property of the employer.

Partnerships are formed when parties agree to share profits with one another. *Halacha* is not holding them to mere words, but to an implicit *kinyan* to share title to the profits coming out of their hands. This kind of *kinyan* is valid only for partners or a group in a reciprocal relationship. Without the reciprocal relationship, the loss of absolute ownership of...
labor for a period of time would amount to slavery, requiring a different kind of *kinyan*, which has long been abolished.

A well known distinction between common law and *halacha* is in the law of wills and estates. *Halacha* cannot routinely probate a testamentary will because a decedent no longer has ownership over property after he expires. He cannot give it away when he is not alive. The property does not become זכורה but immediately belongs to the intestate heirs. The decedent has to make a *kinyan* for the benefit of his testamentary distributees while he is yet alive so that they take title to the property before it descends to the intestate estate. Perhaps this difficulty is less pronounced with the proliferation of non-probate property and the required designation of beneficiary distribution.  

An object does not become a stolen until the thief makes a *kinyan* by picking it up without consent or by dragging it into an area of his own possession. Without the *kinyan*, the object remains in the possession of the owner and the thief is not liable for the risk of loss to the object. If the thief merely prevents the owner from exercising control over his object but does not physically take it into his own possession, he did not make a *kinyan* and is not liable.

A marriage takes effect through *kinyan*. The *kinyan* of marriage, the *ma’asa* of giving the ring or something of value to the bride, effects a change in the parties. The parties are redefined through the *kinyan* into married parties, more profoundly bound than parties to a vow or contract. Contracts are normally subject to intent and waiver, a weak theoretic basis for this venerable institution. Moreover, third parties are not bound by contracts to which they are not party. By contrast, the *kinyan* of marriage changes the dysoz so that she is redefined as an אישה אשת to the world, binding the liability of all third parties to her acquired status. Consent or waiver by the husband is irrelevant. The *kinyan* of divorce restores the original status of the parties.

An promise to sell or to make a gift, enforceable under contract law as long consideration

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7. ע" нем רכז ב: מְצוּאָה לָקִים דבְּרֵי חַתָּנָה אֶפֶלֶל בְּרֵי שֻׁמָּה חַתָּנָה, חוֹרָה שֵׁמוֹת עַכְּשִׁי לַשְׁלֵישַׁיָּו לַשְׁלָשׁ כָּל. חַתָּנָה: אֲבָל ויהי בְּנֵי קָדְוָה אוֹ לַשְׁלֵישַׁיָּו כָּל שֶׁבִּיא שָׁמָא לָדָד אָרוֹן הַחָוָה אוֹ בְּבַי מְצוּאָה לָקִים דבְּרֵי חַתָּנָה.  
8. ע" קידוטי של ב: יִלְּכֶּה בְּדָו דְּבָר מְסַמֵּם אוֹ מַה לְהַלְלָה בְּדָו דְּמַּיִּים דְּמַיִּים אוֹ מַה לְהַלְלָה בֶּעָל. דְּוִי נֶמֶאָה דְּמַיִּים דְּמַיִּים אוֹ לִתְּמָה לְתָוְרָה אוֹ לִתְּמָה לְתָוְרָה אַל כַּאֲשֶׁר הָיָה בֶּעָל.
is given, is not enforceable in halacha.⁹ Without a kinyan transferring title to the object, the promise is unenforceable, even if the promisor used a kinyan suder to encumber the object for the sale. An object can secure payment of a debt as long as the debt exists separate from the promise of sale or gift, but not to secure its own sale or gift.¹⁰

The reliant interest in halacha falls under the laws of arev. The ma’asa, or act, of lending to a third party is viewed as if the arev received the loan, as mentioned above. Even when someone becomes an arev after the money is lent and a kinyan is needed, he is understood to have assumed responsibility for the existing debt of the borrower. A party can become an arev to cover the expenses of a party benefiting a third party, who otherwise is liable for those expenses, but not for an act or amount for which nobody is liable.¹¹

The law of arev does not provide for compensation of expectations. The arev is obligated only for a real a debt as if he was the true beneficiary of an expense. By contrast, with its broad sweep holding parties liable for all foreseeable consequences, the remedy in law for breach of promise is recovery of expected gain. The remedy in equity has gone even further. Courts of chancery have developed equitable conversion out of the promise to sell, so that a home is sold before title has changed. The party promising to buy assumes the risk of fire and destruction of the property in most states, including New Jersey,¹² even while the seller of the property is still in possession and entitled to that possession before closing. This is perplexing. A party promising to sell under contract has only promised to sell, has not sold, and equity forces the buyer to assume risk while leaving the owner in possession. Compare to halacha, where a buyer tendering monetary payment for personal goods makes a complete kinyan according biblical law,

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⁹. 245 Choshen Mishpat 1

¹⁰. choshen mishpat 9, 68 N.J. 20 (Ch. 1904, buyer assumes risk when contract to buy is signed).
but is withheld from the acquisition by the rabbinic law until delivery, because risk is better to remain with the seller as long as he remains in possession.\footnote{13}

An individual can become encumbered to perform a service, work or even to enter into a commonwealth and submit oneself to majority rule.\footnote{14} A person can become encumbered so that payment can come from only a particular property. However, the encumbrance is not to sell or give the particular property, but to secure a debt on it. The recipient of the encumbrance assumes the risk of loss because the debtor may force him to accept the property as payment, but the property still belongs to the debtor who may tender cash payment of the original debt if the property increases in value as long as he still owns it.\footnote{15}

A hired employee is only liable for the cost of hiring a replacement, not for damages caused by his breach.\footnote{16} For example, if a worker quits a job in perishable goods, or preparing for a special event such as a wedding, he liable to compensate for the cost of hiring a replacement. The worker was committed to perform the work for which his opposing party relied, who passed over the opportunity to hire someone else. His liability is for the cost of performance, not for losses incurred through the breach, and certainly not for expected profits. A written liquidation clause is valid if it assess the actual value of the job, but can never include expectations of profit unrelated to the value of the service to be rendered.\footnote{17} The expectancy interest awarding profits unrelated to the value of the service a fiction of the common law.

\footnote{13} הבא مثل דג מת ב: אמבר רביahkan דבר חיות מועט קוחר, למפק מז מאמר משך הקוק הנורא שמא
יאמר על נשמו חותם ועליה שוק אופי דרשא דלקוק עד שמלות אלא. גוריה שמי דמח דלוקצ קאמט.

\footnote{14} See 231 Choshen Mishpat 28 for a discussion of whether laws of the community are decided by the majority in the presence of all or by simple majority. See 163 Choshen Mishpat 1, where majority of the seats of city executive/judicial council are determined by majority vote, while only a minority may be allocated by those paying the majority of taxes. Perhaps this is a balance between one-man, one-vote and money is speech for which the Court has struggled since Buckley v. Valeo. 424 U.S. 1 (1976).

\footnote{15} 103 Choshen Mishpat 6.

\footnote{16} See also the 333 Choshen Mishpat 6. See also the 333 Choshen Mishpat 6.

\footnote{17} "כ"מ ק"ד ב: ההוה גבר דקבר אריעו מחביחי אמור אמי מברנה תל אוהב ואלה ו לשם רבד אמור אסר ביא אתסה ולא אסר ביא אתסה ולא קא ניון אefa כן דקבר מילאיה חיותה גמה בולאה אה בקימה.
Criminal Law and Causation

Just as *kinyan* defines the nature or status of property and people; the *ma’asa* defines the nature of the criminal acts. For example, homicide, the *ma’asa* of killing, is categorically forbidden. Lack of consent is not an element. The common law, by contrast, with its weak *actus reus* element of only acting to cause a consequence, raises questions over laws banning consensual euthanasia.  

Euthanasia is an *act* of killing but without the *consequence* of homicide, the violation of the right to life. This conundrum is avoided in *halacha*, as the victim is not free to determine the criminality of an act and cannot consent to an act of euthanasia because *halacha* turns upon the intrinsic nature of an act or *ma’asa*.  

Under the common law, consent categorically redefines an otherwise criminal act of theft. In *halacha*, a thief is held civilly liable. Common law, which does not punish for intrinsic acts, requiring a weak *actus reus* element, criminalizes the consequential deprivation of property without consent. *Halacha*, with its strong *ma’asa* element, does not criminally punish the act of taking possession of property. The *ma’asa* otherwise does not carry culpability when consent is given. This removes the justifiable difficulty of why *make only monetary restitution*.  

Since *halacha* turns upon the intrinsic nature of an act, it distinguishes between direct acts

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18. *Vacco v. Quill*, 521 U.S. 793 (1997) upheld the traditional distinction between an omission such as withdrawal of treatment, and assisted suicide, in which an act is committed. Note however, the satisfaction of *actus reus* by breaching or causing a breach of duty. A doctor who turns off a respirator at the request of a patient “is to be be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor in discontinuing life support is simply allowing his patent to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient’s life, and such conduct cannot possibly be categorized and an omission.” *Barber v Superior Court*, 147 Ca. App. 3d 1006 (1983).  

19. Common law homicide was traditionally defined as killing a human *in being*. Recently, some states codified feticide as homicide so that the *actus reus* element is causing the death of a victim without consent of his mother! “‘Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” *Tex. Penal Code Ann.* 1.07.  

20. Note however, in 22 תמצ מזר 29 the victim has the choice of remedy either forcing the *make only monetary restitution* as in 22 שמות 16.
and indirect acts that cause damage to property. Indirect causation of damage to property of another is forbidden\(^{21}\) as long as it is not collateral to the use of an owner to his property.\(^{22}\) However, usually only direct acts give rise to monetary liability; the actor acted to damage property. Difficulty arises in the analysis of certain indirect acts which are nonetheless liable. These can be viewed as damaging acts because they are certain to happen and the causal damage is complete at the time their occurrence. For example, throwing a glass vase off a roof is a direct act, a *ma’asa* of destroying the vase. Removing a net that might have caught the falling vase, causing it to break, is not a *ma’asa* of destroying the vase, but indirectly causes the vase to be destroyed when it hits the ground.\(^{23}\) On the other hand, the act burning a negotiable instrument preventing its owner from collecting its face value completes the damage immediately at the time of the act and is a liable act.

*Halacha* nonetheless, cannot bind a party to pay for damages to expectations. The act is defined during its instance of existence and future interests are simply not present. Expectations often can be preserved by another act or by the immediate restoration of the damaged property. A party is liable for the act of destroying property, not for his inaction to prevent future damage.

**The Consent of the Governed**

What kind of polity gives rise to a system of law that defines the status of people, property and acts? We compare the basis of sovereignty in common law countries with a commonwealth based upon *halacha*.

Title to land in America follows a chain that originates from an original grant by the state. Heirless intestate land escheats to the state and does not become * kepker*. The law of escheat is blind as to whether the state is governed by the many in their corporate capacity, by the few in

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21. **ב"ג צ"א:** יאכז אומתת נמה בצייקן אפוך.
22. **ב"ג צ"א:** יאכז אומתת נמה בצייקן אפוך.
23. **ר"מ הר"מ:** ומכ הווה כלא שול מריא גוג ופוז הווה זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריך זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכה זכריכ
partnership, or by a single ruler. In proprietary colonies, land escheated to the proprietor. The holding of the proprietor eventually escheated to the Crown, as most colonies become royal colonies. Today, in England, ownerless land still escheats to the Crown, whereas in America, land escheats to the State, which replaced the Crown.

In the 1600’s land in Virginia escheated to the Virginia Company. Land in Massachusetts escheated to the Massachusetts Bay Company. Every colony maintained sovereignty over its territory and taxed with the aid of an elected council, whether they were owned by public corporations whose owners bought and sold their shares on the market, by a single proprietor, or by the Crown. Today, the state is owned by the people in their corporate capacity. It exercises at least the same degree of sovereignty as the joint-stock companies exercised almost 400 years ago.

It is settled law that one who bought land directly from an Indian tribe will not prevail against a third party that bought the same land from the government at a later date. Ultimately, the chain of title has to trace to the state. Land ownership in American, therefore, is not a ותואמש without a sovereign, but founded upon the sovereignty of the people in their corporate capacity over the land under the individual fee holder.

The power of the purse historically correlated with political power. Monarchies that failed to convene Parliaments were limited to established revenues. Nations that devised legislatures to tax under the consent of the governed to meet their needs avoided violent revolutions. Societies that developed the principal of taxation by representation have thrived.

The temporal power of sovereignty over the land did not exist in biblical Israel. The right to the land did not rest with an earthly sovereign. Ownerless land did not escheat to the government but became והפש. The implication of this halacha, as found in the writings of Talmudic scholars before Magna Charta, is that government cannot legislate or tax without the

24. Johnson and Graham's Lessee v. William M'Intosh, 8 Wheaton, 543(1815)
consent. People owned land in their own name, not on top of the title of their rulers. The people also held land in complete equality.

If a person became indebted, he could not be forced to pay interest. If he could not pay back at all, and if his land was not encumbered by the loan, the loan was forgiven in the seventh year. If the lender took encumbered land, it was returned in the year of Jubilee. Note carefully. The loss of land has been the source of disenfranchisement, oppression and revolution throughout the ages. Since land in ancient Israel was inalienable, there was no escheat, no original acquisition by a sovereign. Without the power of escheat, government lacked legislative capacity over the people and their property as a sovereign. Authority remained with the people requiring their consent to own taxation, providing a fundamental political blessing and bulwark for liberty.

Can a people without sovereign capacity tax? The answer is found in the concept of reliance and kinyan. An employer offering a job to a worker is bound to pay the agreed wages, even without a kinyan. He is not bound to pay the wages under the law of arev. As discussed earlier, a party entering into the reciprocal relationship of a partnership is not bound by the agreement. The majority in a partnership or in a trade guild can bind the minority to rules governing their work product. In the same manner, all people living within a city are bound to one another for their protection and benefit. Thus a guild can govern or restrict the work product of all members. The collective has a claim to the work product and a compulsion against the individual by virtue of their coming together in mutual society. This is

25. Or Zarua wrote in the name of Rabbi Eliezer Mitz
26. לע יתב א"ב מ ע"ע ד"ע חוטר פועש ולא מוביכ הלוח והならない עני ש ситות פועלין ודרحتياج קומן של אחרים לע חוסר השפע של העונה, המ שמוסדריה ד Countries שופטרים ושופטים והלאה בברך כהן גדול זה דגל.
27. 176 Choshen Mishpat 3.
28. לע"ה ל"ז קסיד"ה ס"ק ט ט"כ כל ערבי מ"כ כל ביותר מ"כ ב"מ קוזי ב ורשעש החיפה לחרות מ"כ ש"מ של חסידים. ביאר התלמוד קסיד"ה מ"כ להר discord ח"ס interdisciplinary עם הז"ה כף כל התחתי מ"כ.
the origin of the consent of majority, the power to tax and govern without a sovereign. It is the
true social contract.

This distinction is great. A nation in which the people in their corporate capacity own the
land, as in the modern democracies, has the power to tax and legislate over every aspect of property. The government is the original possessor of the land. It has power of
escheat and hence a claim to the individual and his property. In a tax dispute, the government
can seize the property of a taxpayer placing the burden of proof on the individual. The
government and its courts can regulate contracts and the relationship between contracting parties
since. By contrast, in a nation in which the individual owns his land by way of
right, as in Israel, there is no rule of the state to tax and legislate derives purely from the consent of the majority. The commonwealth has the burden of proof in a
case against an individual taxpayer, although the taxpayer still has the burden of providing
security for his case.

Conclusion

Duty in halacha is guided by the requirement of a ma’asa. Liability is evaluated by the
commission of a ma’asa. This requisite differs from the actus reus element of the common law.
The common law looks toward social policy, measuring prudence with respect to consequences.
Halacha, by contrast, is an intrinsically moral system of law, evaluating the universal act,
maintaining exacting logical consistency in defining relationships between people and their

29. Occasionally, local merchants will bring a claim of that a country with an open
economy has no restriction of trade, and according to the theory of a country could do business in the city competing with a local resident on different block.

30. 
property.