

March 2017

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Recommended Citation

Moshe O. Boroosan (2017) "Ordinary Unethical Behavior: Jewish Law, the Duty of Good Faith, and Abusive Return Practices," *Journal of Catholic Legal Studies*: Vol. 55 : No. 1 , Article 4.
Available at: <http://scholarship.law.stjohns.edu/jcls/vol55/iss1/4>

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NOTE

ORDINARY UNETHICAL BEHAVIOR: JEWISH LAW, THE DUTY OF GOOD FAITH, AND ABUSIVE RETURN PRACTICES

MOSHE O. BOROOSAN[†]

INTRODUCTION

Legally, a consumer's default contract with a retail seller is considered *caveat emptor*, and the consumer has no right to return items for a refund of the purchase price.¹ Nevertheless, the vast majority of large retailers have some form of return policy that grants consumers a right of return. These return policies appear to run the gamut, both in whether they impose return costs and processing fees on the consumer and in time limits and product restrictions.² Official return policies are not easy to enforce, however, and, as actually implemented by on-the-ground employees, many retailers' official return policies have become ones of liberal and almost unlimited returns, and consumers are often given a full refund even without proof of

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¹ See, e.g., *Swank v. Battaglia*, 164 P. 705, 706 (1917) ("The general rule of the common law is that, upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law." (internal quotation mark omitted)); see also *Cotton v. Reed*, 25 Misc. 380, 381, 54 N.Y.S. 143, 144 (Wayne Cnty. Ct. 1898); *French v. Vining*, 102 Mass. 132, 135 (1869); *Mixer v. Coburn*, 52 Mass. (11 Met.) 559, 562 (1846); *Windsor v. Lombard*, 35 Mass. (18 Pick.) 57, 59–60 (1836).

² See, e.g., Elyssa Kirkham, *10 Stores with the Best Return Policies—And 5 with the Worst*, TIME, Nov. 23, 2015, <http://time.com/money/4124760/returnpoliciesbest-worst> (describing—for the most opportunistic consumers—the retail establishments with the most consumer-friendly return policies); Chris Morris, *5 Stores with the Best Return Policies*, FORTUNE, Dec. 9, 2015, <http://fortune.com/2015/12/09/return-policies-stores-best-worst>.

purchase.³ Liberal return practices are also subject to abuse by opportunistic consumers who buy, use, and then return a product, thus obtaining what is essentially a free product rental.⁴ Such consumer abuse is extremely costly not only to retailers, but also to product manufacturers who end up stuck with products that are not defective and whose secondary market value is only a fraction of the products' cost.⁵

The abuse of retail return policies presents a unique dilemma in the law. On the one hand, return policies are nothing more than contracts, and consumers who return used products are simply exercising their rights under the contracts.⁶ Moreover, American contract law permits abusive returns if the customer complies with the retailer's return policy.⁷ On the other hand, return policies were never intended to provide

³ See *Return Policy—Warehouse Purchased Items*, COSTCO WHOLESALE, https://customerservice.costco.com/system/templates/selfservice/costco_en_us/#!/portal/200500000001002/article/200500000003179/Return-Policy-Warehouse-Purchased-Items (last visited Mar. 28, 2016).

⁴ See, e.g., Kirsten Grind, *Retailer REI Ends Era of Many Happy Returns: Customer Abuses Lead the Outdoorsy Chain To Nix Unlimited Exchanges*, WALL ST. J., (Sept. 15, 2013, 10:32 PM), <http://www.wsj.com/articles/SB10001424127887324549004579068991226997928>.

⁵ See Tom Rittman, *A Proactive Approach to Fighting Returns Fraud and Abuse*, RETAIL INFO SYSTEMS NEWS (Feb. 17, 2009), <http://risnews.edgl.com/retail-news/A-Proactive-Approach-to-Fighting>Returns-Fraud-and-Abuse36078>. To reduce customer abuse, retailers have recently undertaken measures to both identify and refuse return requests by opportunistic consumers and to limit employee discretion in granting returns. Some retailers have begun to implement point-of-sale information systems that allow them to quickly identify repeat returners. A company called The Retail Equation has developed software that allows retailers to identify customers whose buying patterns make them look like return abusers. The system works as follows: when a customer wants to return a product, the clerk asks for identification. Some of the customer's information is then sent by the store to The Retail Equation, which then creates a customer profile and a Return Activity Report for the customer. The profile of a potential return abuser is based on complicated algorithms that are customized for each client, and is based on characteristics like time, duration, dollar amount, and frequency of return behavior. If the database spots abuse, it will send back a signal denying the return. The technology is being used by many large retailers, including Best Buy, J.C. Penney, Victoria's Secret, Home Depot, and Nike. See Jennifer C. Kerr, *Retailers Tracking What Customers Return*, USA TODAY (Aug. 12, 2013, 12:09 PM), <http://www.usatoday.com/story/money/business/2013/08/12/retailers-tracking-customers-returns/2642607>; *Why the Retail Equation*, THE RETAIL EQUATION, <https://www.theretailequation.com/Retailers> (last visited Mar. 28, 2016).

⁶ See *infra* Part I.

⁷ See *infra* Part I.

consumers with free rentals of merchandise.⁸ While American law recognizes the implied covenant of good faith and fair dealing, that covenant has never been applied to bar abusive return practices.

This Note suggests that certain ethically-driven legal doctrines in Jewish law may provide the common law with a basis for conceptualizing the duty of good faith as an affirmative duty rather than as an exclusionary principle. Part I of this Note describes the implied duty of good faith and fair dealing embraced by the common law and the Uniform Commercial Code (“UCC”) as well as the criticism of the modern approach. Part II explores the Jewish ethical directive, “Thou shalt do that which is good and right,” and explains its implications in law. Part III argues that the duty to do “good and right” creates an affirmative duty not to abuse a store’s return policy. Part IV suggests that Jewish law’s duty to do “good and right” can serve as a basis for understanding the implied covenant of good faith and fair dealing. Part V concludes this Note’s analysis.

I. THE DUTY OF GOOD FAITH

Historically, courts and commentators have had difficulty defining the implied covenant of good faith and fair dealing.⁹ Many states and commentators have viewed the covenant as a vehicle in the law of contract for advancing the expectations of the contracting parties.¹⁰ Other states employ the doctrine to ensure that a party does not “violate community standards of decency, fairness, or reasonableness.”¹¹

⁸ See Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 470 (2001) (arguing that Internet sellers use return policies to encourage suspicious customers to shop on their websites).

⁹ See, e.g., *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014) (“The concept of good faith in the performance of contracts ‘is a phrase without general meaning (or meanings) of its own.’” (citations omitted) (internal quotation marks omitted)); *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 395 (N.J. 2005) (“Good faith is a concept that defies precise definition.”).

¹⁰ See Steven J. Burton, *Breach of Contract and the Common Law Duty To Perform in Good Faith*, 94 HARV. L. REV. 369, 371 (1980); Jason R. Erb, *The Implied Covenant of Good Faith and Fair Dealing in Alaska: One Court’s License To Override Contractual Expectations*, 11 ALASKA L. REV. 35, 36, 42 (1994) (“[Good faith is] a group of specific rules which evolved to insure that the basic purpose of contract law is carried out, the protection of reasonable expectations of parties induced by promises.” (internal quotation mark omitted)).

¹¹ *DDP Roofing Servs., Inc. v. Indian River Sch. Dist.*, C.A. No. S09C-01-035 RFS, 2010 WL 4657161, at *3 (Del. Super. Ct. Nov. 16, 2010) (internal quotation

With the advent of the Uniform Commercial Code (“UCC”) in 1958, the covenant of good faith and fair dealing gained greater prominence in contract law.¹² The UCC did not impose an overreaching code of ethics in the formation of contracts. Instead, implying terms to a contract remained the principal function of the covenant.¹³ The General Provisions of Article 1 of the UCC declares, “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”¹⁴ The UCC defines “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”¹⁵ When the transaction involves merchants, the UCC raises the standard of good faith to “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹⁶

The UCC definition of good faith has been subsequently criticized as being overly ambiguous. One commentator has referred to the duty of good faith as an “excluder” that has no definition of its own.¹⁷ Under this construction, the meaning of good faith can only be grasped by comparison to corresponding instances of bad faith.¹⁸ Despite formulating the obligation of

mark omitted); see, e.g., *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006); *Brunswick Hills*, 864 A.2d at 395.

¹² See U.C.C. § 1-304 (2015) (“Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.”); see also § 1-201(b)(20) (“‘Good faith,’ except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.”).

¹³ See § 2-204(3) (2015) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”).

¹⁴ *Id.* § 1-203 (2015).

¹⁵ *Id.* § 1-201(b)(20) (2015).

¹⁶ *Id.* § 2-103(1)(b) (2015).

¹⁷ Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968) (“[G]ood faith . . . is best understood as an ‘excluder’—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.” (footnote omitted)). See generally Edward J. Imwinkelried, *The Implied Obligation of Good Faith in Contract Law: Is it Time To Write its Obituary?*, 42 TEX. TECH. L. REV. 1 (2009) (arguing that the UCC’s endorsement of the covenant of good faith has not had the desired effect of promoting honesty in business dealings).

¹⁸ Summers, *supra* note 17; see also Constance A. Anastopoulo, *Bad Faith: Building a House of Straw, Sticks, or Bricks*, 42 U. MEM. L. REV. 687, 696 (2012) (describing the substantive duty of good faith, which is defined by what is not good faith, as “circular reasoning”).

good faith by negative implication, under this theory, the basis of the duty of good faith and fair dealing in contractual expectations cannot be avoided: “In most cases the party acting in bad faith frustrates the justified expectations of another.”¹⁹ The Restatement (Second) of Contracts adopted the “excluder” definition of good faith, and imposes an obligation of good faith considerably broader than that required under the UCC. The Restatement provides, “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”²⁰ In defining “good faith and fair dealing” the Restatement provides, “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”²¹ Additionally, the Restatement adopts an even more descriptive definition of the obligation of good faith: “Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.”²² Subsequent analysis has attempted to refine the obligation of good faith by developing approaches to assess the reasonable expectations of the parties.²³ Despite these efforts, most courts stop short of treating the duty of good faith “as any sort of independent duty” or “engraft[ing] implied at law terms onto an actual

¹⁹ Summers, *supra* note 17, at 263.

²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

²¹ *Id.* § 205 cmt. a.

²² *Id.* § 205 cmt. d.

²³ See, e.g., Steven J. Burton, *Breach of Contract and the Common Law Duty To Perform in Good Faith*, 94 HARV. L. REV. 369, 372 (1980) (suggesting that the cost of performance to the promisor be used as an additional factor considered in determining whether a breach of contract occurred in bad faith); Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 402 (1978) (arguing that the covenant of good faith “has a common core of meaning consisting of a spectrum of related, objective qualities” which must be considered).

agreement.”²⁴ The modern doctrine of the duty of good faith is thus little more than a “precept” that “shape[s] the performance of actual undertakings, but no more.”²⁵

II. JEWISH LAW AND THE DUTY OF GOOD FAITH

It has been observed that Jewish law has never truly been “divorced from ethics . . . and both ethical principles and religious sanctions functioned naturally and normally to elevate and improve the developing rules of law.”²⁶ Jewish law, rather, is “interpenetrated throughout with morality, piety and equity.”²⁷ The inherence of a moral order in normative Jewish law has been described by one scholar as follows:

“A peculiar character” . . . is given to the rabbinical laws, however, by the fact that the interpretation of the civil and criminal legislation in the Pentateuch, with its elaboration and amplification in the unwritten law, is not purely juristic, but is consciously guided and controlled by the moral and social principles which are equally a part of the . . . Torah In a technical phrase, Jewish ethics are impressed upon the Halakah The Torah was not for the Jewish Doctors of the Law merely a Corpus Juris, a volume of statutes on all kinds of subjects, ritual and ceremonial, criminal and civil; it was—to give it modern expression—a revelation of God’s ideal for men’s conduct and character. Their task was, therefore, not solely to give a juristic definition of the statutes, with application to the various cases that were expressly or by implication covered by them, but to widen the scope of the law in accordance with its spirits and principles.²⁸

²⁴ Nicholas R. Weiskopf, *Wood v. Lucy: The Overlap Between Interpretation and Gap-Filling To Achieve Minimum Decencies*, 28 PACE L. REV. 219, 219, 231 (2007).

²⁵ *Id.* at 219; see, e.g., *Dunn v. CCH Inc.*, 834 F. Supp. 2d 657, 663 (E.D. Mich. 2011) (noting that the covenant of good faith and fair dealing “cannot . . . create new terms which do not exist in the contract”). Some courts have explained that their hesitancy to recognize an expanded duty of good faith is based on the fear that they would be opening a “Pandora’s Box.” See generally Lisa Spagnolo, *Opening Pandora’s Box: Good Faith and Precontractual Liability in the CISG*, 21 TEMP. INT’L & COMP. L.J. 261 (2007). Other commentators explain that “[s]ilence in the face of the foreseeable bespeaks a shared intent not to regulate or restrict.” Weiskopf, *supra* note 24, at 219.

²⁶ GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW: A BRIEF ACCOUNT OF BIBLICAL AND RABBINICAL JURISPRUDENCE* 5 (1993).

²⁷ *Id.*

²⁸ *Id.* (internal quotation mark omitted) (quoting GEORGE FOOT MOORE, *JUDAISM IN THE FIRST CENTURIES OF THE CHRISTIAN ERA* 139–46 (1927)).

Consistent with this approach, the Talmud imposes an ethical principle called *lifnim meshurat hadin*, which requires one to do the finer, nobler thing and forego one's legal rights.²⁹ Although *lifnim meshurat hadin* is often thought of as principle of equity,³⁰ one should not confuse an ethical norm with a "rule of equity" applicable in a court proceeding."³¹ As used in Jewish law, equity refers to the principles developed by the Rabbis "to correct the harsh effects of strict law."³² Put differently, *lifnim meshurat hadin* refers to those instances where parties must yield for purposes of fairness, even if the law is on their side.

Based on these ethical principles, the rabbis of Israel enacted numerous laws called *takanot* to either "soften the effect of the . . . [*halakha* or] to render obligatory that which formal *Torah* law had ordained as meritorious but optional."³³ One of the most famous manifestations of this notion derives from the verse in Deuteronomy which requires each person to "do that which is right and good in the [eyes] of the Lord."³⁴ The verse in Leviticus states:

Do not try the Lord your God, as you did at Massah. Be sure to keep the commandments, decrees, and laws that the Lord your God has enjoined upon you. Do what is right and good in the sight of the Lord, that it may go well with you and that you may

²⁹ THE BABYLONIAN TALMUD, Baba Mezi'a 83a (Isidore Epstein trans., 1935). The Talmud relates the following story which illustrates the ideal of conduct which is *lifnim meshurat hadin*, or beyond the letter of the law:

Some porters . . . broke a barrel of wine belonging to [Rabba bar Bar] Huna. Thereupon he seized their garments; so they went and complained to Rab. "Return them their garments," he ordered. "Is it the law?" [Rabba bar Bar Huna] enquired. "Even so," he rejoined[,] "*That thou mayest walk in the way of good men.*" Their garments having been returned, they observed[,] "We are poor men, have worked all day, and are in need[,] Are we to get nothing?" "Go and pay them," he ordered. "Is it the law?" he asked. "Even so," was his reply, "*and keep the path of the righteous.*"

Id. (footnotes omitted).

³⁰ See, e.g., AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW 254 (1991).

³¹ THE BABYLONIAN TALMUD, *supra* note 29, at 7b.

³² *Id.* at 7a.

³³ Aaron Kirschenbaum, *Modern Times, Ancient Laws—Can the Torah Be Amended? Equity as a Source of Legal Development*, 39 ST. LOUIS U. L.J. 1219, 1228 (1994) [hereinafter *Modern Times*].

³⁴ *Deuteronomy* 6:16–19 (Jewish Publication Society 1999).

be able to possess the good land that the Lord your God promised on oath to your fathers, and that all your enemies may be driven out before you, as the Lord has spoken.³⁵

Commentators have homiletically interpreted the verse *v'asita hayashar v'hatov*, “[a]nd thou shalt do that which is right and good” in a way purporting to be deeper than its plain or literal meaning.³⁶ According to these commentators, the duty to do “right and good” is a “legislative policy . . . aimed at producing affirmative action.”³⁷ Moreover, the duty to do “right and good is an explicit command of sacred Scripture” and “the provisions subsumed under it are rabbinic enactments (*takkanot*) promulgated as specific applications of the general biblical mandate.”³⁸ Accordingly, Jewish law permits a court to essentially coerce people to conduct themselves above and beyond the law and to perform acts not required by scripture.

³⁵ *Deuteronomy* 6:16–19 (Jewish Publication Society 1999) (footnotes omitted).

³⁶ See, e.g., RAMBAN, COMMENTARY ON THE TORAH, DEUTERONOMY 6:18, 87–88 (1976). Ramban writes:

In line with the plain meaning of [s]cripture the verse says, “Keep the commandments of G-d, His testimonies, and His statutes, and, in observing them, intend to do what is right and good in His sight only.” And [the expression in the verse before us] *that it may be well with thee* is a promise, stating that, when you will do that which is good in His eyes, it will be well with you, for G-d does *good unto the good, and to them that are upright in their hearts*. Our Rabbis have a beautiful Midrash on this verse. They have said: “[*That which is right and good*] refers to a compromise and going beyond the requirement of the letter of the law.” The intent of this is as follows: At first, he [Moses] stated that you are to keep His statutes and His testimonies which He commanded you, and now he is stating that even where He has not commanded you, give thought, as well, to do what is good and right in His eyes, for He loves the good and the right. Now this is a great principle, for it is impossible to mention in the Torah all aspects of man’s conduct with his neighbors and friends, and all his various transactions, and the ordinances of all societies and countries. But since He mentioned many of them—such as, *Thou shalt not go up and down as a talebearer; . . . neither shalt thou stand idly by the blood of thy neighbor; . . . Though shalt rise up before the hoary head* and the like—he reverted to state in a general way that, in all matters, one should do what is good and right, including even compromise and, going beyond the requirements of the law [*lifnim meshurat hadin*]. . . . Thus, [a person must seek to refine his behavior] in every form of activity, until he is worthy of being called “good and upright.”

Id. (footnotes omitted).

³⁷ KIRSCHENBAUM, *supra* note 30.

³⁸ *Id.* at 254–55 (internal quotation mark omitted).

A classic example of ethically-driven rabbinic legislation is known as the “law of the abutter.”³⁹ Kirschenbaum describes the “law of the abutter” as follows:

It often happens that a farmer stands to gain much if he can acquire the field bordering on his own. Farms, it is true, are constantly coming on the market; but it is not very practical for a man to possess two farms separate and distant from each other. If, however, the neighboring farm, contiguous to his, is put up for sale, then he is much more inclined to buy it. Clearly, guarding two adjacent fields is more convenient, and working them simultaneously more economical.

These considerations are equally apparent, however, to the prospective seller. Aware of the eagerness with which his neighbor views the possibility of the sale, the seller, with the strictly legal prerogatives of ownership on his side, is tempted to raise the price—for his neighbor, not for others.

At this point, the law intervenes. The farm goes to the neighbor—but at the fair market price.⁴⁰

The essential idea of the law of the abutter is derived from the words *yashar*, meaning “straight, right, equitable,” and *tov*, meaning “good.”⁴¹ The law of the abutter provides that the “good” that is done to benefit the neighbor must be “right” inasmuch as it does not entail any loss or harm to the seller.⁴² Granted, the seller’s freedom to sell has been restricted, but it has only been restricted “to the point of denying him the opportunity of making a profit by exploiting the vulnerability of his neighbor.”⁴³ However, he has not been denied the full market value of his property.⁴⁴

In sum, “it is impossible to mention in the Torah all aspects of man’s conduct with his neighbors and friends, and all of his various transactions, and the ordinances of all societies and countries.”⁴⁵ The Torah therefore directs each person to do what is “good and right” and requires each person to refine his behavior in every form of activity until he is worthy of being

³⁹ See *Modern Times*, *supra* note 33, at 1232. In Hebrew, law of the abutter is *dina d’bar metzra*.

⁴⁰ *Id.*

⁴¹ See generally RAMBAN, *supra* note 36 (explaining that the law of the abutter represents a practical manifestation of the concept doing good and right).

⁴² *Modern Times*, *supra* note 33, at 1233.

⁴³ *Id.* at 1233–34.

⁴⁴ *Id.*

⁴⁵ RAMBAN, *supra* note 36, at 88.

called good and right. To that end, the rabbis promulgate rabbinic enactments as specific applications of the general directive. The law of the abutter is just one application of “good and right,” but it is one that has become a “permanent fixture in Jewish law.”⁴⁶

III. THE DUTY TO DO “GOOD AND RIGHT” PROHIBITS ABUSIVE RETURN PRACTICES

Based on the foregoing, it is submitted that the obligation to engage in conduct that is “good and right” prohibits a person from abusing a store’s return policy by purchasing an item with the intention of returning it. Although the rabbis of Israel cannot arbitrarily legislate against immoral practices, Jewish law regarding consumer transactions is replete with ethical admonitions towards both sellers and buyers. It is evident from these ethical admonitions that the Torah frowns heavily upon unethical conduct in consumer transactions and that rabbinic legislation in this context is appropriate.

A. *The Duty To “Speak the Truth in One’s Heart”*

Under Jewish law, the first stage in an agreement is when one party makes the decision to accept an offer to sell or buy.⁴⁷ At that point, a person is ethically bound to complete the transaction. This ethical duty stems from the scriptural imperative to “speak[] truth from the heart.”⁴⁸ Even if this decision is never communicated to the purchaser, it is nevertheless praiseworthy for seller to carry through with this decision even if the buyer subsequently tenders a higher bid. Although the seller is not legally obligated to sell at the lower price, a seller who does so is said to have engaged in an “especially pious act.”⁴⁹ Likewise, once a buyer has made a decision to buy at a certain price but has not yet communicated his decision to the seller, it is praiseworthy for the buyer to pay that price even if the seller subsequently reduces the sale price.

⁴⁶ *Modern Times*, *supra* note 33, at 1233.

⁴⁷ Hershey H. Friedman and Abraham C. Weisel, *Should Moral Individuals Ever Lie? Insights from Jewish Law*, JEWISH LAW ARTICLES (July 30, 2003), http://www.jlaw.com/Articles/hf_LyingPermissible.html.

⁴⁸ *Psalms* 15:2 (New American). In Hebrew, *dover emet bilvavo*.

⁴⁹ In Hebrew, *midat hassidut*.

B. The Duty To Not Renege on a Nonbinding Agreement

A party who has verbally agreed to the terms of an agreement is not legally obligated to perform until the party has made a formal act of acquisition called a *kinyan*.⁵⁰ Nevertheless, a party that reneges on a verbal commitment is called *mechusar amanah*, or “untrustworthy.”⁵¹ The concept of *mechusar amana* is derived from the verse “the remnant of Israel shall do no iniquity.”⁵²

This verse is also the source of the principle called *hin zedek*, which cautions that “one must not speak one thing with the mouth and another with the heart.”⁵³ In his commentary on the Talmud, Rashi notes that this principle applies to consumer transactions. Thus, a person should not negotiate a transaction if the person intends to withdraw before the deal is completed.⁵⁴

⁵⁰ Under basic Jewish law, a contract for the sale of chattels is not fully enforceable until the purchaser has performed a *kinyan*, one of several physical acts regarding the property. See generally J. David Bleich, *The Metaphysics of Property Interests in Jewish Law: An Analysis of Kinyan*, 43:2 TRADITION 49 (2010); Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1769 (1997) (explaining the *kinyan* as custom for transferring property).

⁵¹ See SHULKAN ARUKH *Choshen Mishpat* 204:7.

⁵² *Zephania* 3:13 (New American). In Hebrew, *shearit yisrael lo ya'asu avlah v'lo yedaberu chazav*.

⁵³ MICHAEL L. RODKINSON, NEW EDITION OF THE BABYLONIAN TALMUD 121 (1918). The Talmud relates:

Rab Kahana was given money [in advance payment] for flax. [S]ubsequently flax appreciated, so he came before Rab. “Deliver [the goods] to the value of money you received,” said he to him, “but as for the rest, it is a mere verbal transaction, and a verbal transaction does not involve a breach of faith.” For it has been stated: A verbal transaction: Rab said: It involves no breach of faith; R. Johanan ruled: It does involve a breach of faith.

An objection is raised: R. Jose son of R. Judah said: What is taught by the verse, *A just hin ye shall have?* Surely, “*hin*” is included in “*ephah*”? But it is to teach you that your “yes” [hen] should be just and your “no” should be just! Abaye said: that means that one must not speak one thing with the mouth and another with the heart.

Babylonian Talmud: Tractate Baba Mezi'a, COME-AND-HEAR.COM, http://www.come-and-hear.com/babamezia/babamezia_49.html (footnotes omitted) (last visited March 30, 2016).

⁵⁴ RODKINSON, *supra* note 53, at 124.

C. *Mi Shepara*

Traditionally, Jewish law does not recognize the common law concept of an executory agreement—a contractual obligation to sell or buy property.⁵⁵ Moreover, simply transferring money to acquire title of personal property is not enough of an event to acquire its title. Rather, the buyer must perform an act of acquisition to acquire title of personal property.⁵⁶ Nevertheless, there is one caveat: The transfer of money imposes on the buyer and the seller a moral obligation to not renege on the deal.⁵⁷ If one of the parties retracts from the deal, he is subjected to a severe curse, called *mi shepara*, by the Jewish courts.⁵⁸

Besides the moral obligation engendered by the *mi shepara* curse, there are also legal ramifications. Where the seller reneges on a sale after the buyer has tendered cash, the seller is considered a bailee over the cash and is liable to reimburse the buyer for the cash if the cash is lost.⁵⁹ However, once the seller-bailee has formally accepted the *mi shepara* curse, the seller is no longer required to reimburse the buyer if the cash is lost.⁶⁰

Although there is no clear statement of law regarding abusive return practices in Jewish law, the duty to do what is “good and right” provides the rabbis of Israel with the authority to enact legislation to prohibit such abusive return practices. As mentioned above, the duty to do “good and right” does not provide the rabbis of Israel with unfettered authority to legislate, absent supporting evidence for such legislation in the Torah. Nevertheless, based on the foregoing, it is submitted that Jewish law and literature contain enough support to authorize the rabbis to prohibit abusive return practices. Such practices are inconsistent with the spirit of Jewish law and the duty to do “good and right.”

⁵⁵ *Id.* at 116.

⁵⁶ *Id.* at 116–17.

⁵⁷ *Id.* at 121.

⁵⁸ *Id.* at 120–21.

⁵⁹ *Id.* at 121–22.

⁶⁰ See SHULKHAN ARUKH, *Choshen Mishpat* 198:15.

IV. JEWISH LAW PROVIDES OBJECTIVE STANDARDS FOR THE DUTY OF GOOD FAITH

Jewish law provides objective standards for measuring compliance with the implied covenant of good faith and fair dealing in retail transactions. The three ethical directives discussed above can be summarized as imposing the following ethical duties. First, the duty to speak the truth in one's heart means that a person's actions must reflect that person's inner intentions. It would thus be unethical for a person to purport to be interested in purchasing a product if the person had no true intention of keeping the item. Second, the duty to not renege on a verbal agreement means that a person should not verbally inform a store's proprietor that the person wants to purchase an item if the person does not truly want the product.⁶¹ Lastly, once a buyer enters a consumer transaction, the buyer should not renege on the agreement, even if the buyer is not yet legally bound to the sale.

Consumers who purchased items without any intention of keeping them would thus run afoul of the implied covenant of good faith and fair dealing. First, the consumers' actions would certainly be inconsistent with their inner intentions. Second, the consumers would have falsely stated to store proprietors that they desired to purchase the items. Lastly, the consumers would have entered into a transaction and reneged on it without any apparent reason. Such conduct is wholly inconsistent with the implied covenant of good faith and fair dealing. A customer who engaged in such conduct would thus be unable to return the item to the store, notwithstanding the store's official, written return policy.

CONCLUSION

The frequent abuse of return policies presents a unique legal dilemma in both Jewish and American law. Under both legal systems, a consumer is permitted to exercise the right to return

⁶¹ This duty is more applicable when a consumer is shopping at a small business. In a large business, it is common for a customer to browse the store and purchase items without ever speaking to the seller—the owner, for example. In such a situation, the consumer will never have the opportunity to articulate an intention to purchase an item. Nevertheless, if consumers are faced with this situation, consumers should be frank with store representatives and state that they have no true intention of purchasing or keeping store merchandise.

an item pursuant to a store's return policy under any circumstances. This is true even where a customer purchased an item with absolutely no intention of keeping it and where the store will suffer financial harm as a result of the return. This Note submits that such practices are prohibited under the Jewish law's obligation to do that which is "good and right" and under the American law's implied covenant of good faith and fair dealing. Moreover, the Jewish law's ethical admonitions regarding consumer transactions provide a framework for defining the nebulous covenant of good faith and fair dealing in terms of the affirmative obligations it places upon parties to a consumer transaction as opposed to the excluder approach of the modern doctrine.

Finally, the prevalence of the absolutist attitude towards legal rights has caused some scholars to lament the diminishing value of law as a moral regulator in the lives of individual citizens.⁶² But this notion is not a new one. Indeed, Rabbi Yohanan said Jerusalem was destroyed because the Jewish courts based their judgments strictly upon biblical law and did not go beyond the requirements of the law.⁶³ Both Jewish law and American law anticipated and provided for this eventuality in the form of the duty to do that which is "good and right," and the implied covenant of good faith and fair dealing, respectively. It would behoove the American legal system to utilize these duties to promote morality within our legal systems and to ensure justice for all.

⁶² Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 327 (1961) ("It looks as if the more postliberal humanity proceeds on the paths of its culture and civilization, the more the value of law, as a stabilizer, an educating moral regulator in the individual's life, will diminish.").

⁶³ RODKINSON, *supra* note 53, at 70.