

RESEARCH ARTICLE

# What Is the Juxtaposition between Silicon Valley and Mount Sinai? Covenantal Principles and the Conceptualization of Platform-User Relations

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## Abstract

Over recent decades, several global tech giants have gained enormous power while at the same time generating various disputes with their end-users, local governments, and regulators. We propose that the Jewish concept of *covenant* can help the above parties, legal scholars, and wider society in addressing this complex legal reality. We present the challenge of disequilibrium between the above four parties against the main points of conflict: the requirement of customer consent; clear contractual provisions upon entry; options for reasonable customer exit; limitations on the platform's ability to exercise unilateral termination; profile-based discrimination; and liability for mere intermediation. We introduce the biblical concept of covenant, and we review its unfolding in Jewish tradition. Further, we conceptualize three main covenantal principles: (1) responsibility—God and humans are both conceived as moral agents; (2) reciprocity—God as a caring law giver, open to human appeals; and (3) reasonability—divine instruction as initially intelligible. We demonstrate how the latter principle of explainability is exercised in the biblical law narratives and how the story of Balaam stresses the significance of moral agency that cannot hide behind “mere intermediary” claims. In light of this analysis, we revisit the relationship between tech giants and tech users to demonstrate how covenantality offers novel ways to conceptualize the noted conflicts between the parties.

**Keywords:** law and technology; online platform regulation; Digital Markets Act; Digital Services Act; covenant; Jewish law and theology; democratic culture; consent

## Introduction: The Challenges of Global Tech Platforms

How ought society and law deal with the technology giants? And how should we conceptualize the relationship between these firms and their users? The Jewish concept of *brit* (covenant) can help legal scholars and society in general address this complex legal reality.

Contemporary democratic societies and the global economy as a whole face this multi-layered challenge and multifaceted dilemma in a broad variety of contexts. Now referred to with various intimidating acronyms—FAANG, GAFAM, AAMG—huge information technology firms—Google, Amazon, Apple, Facebook, Microsoft, and, according to some, Netflix—are commanding almost unlimited economic and political power (possibly even greater than

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that of many mid-size sovereign states), which is a growing source of concern.<sup>1</sup> Also referred to as tech giants, these entities are dominating many aspects of the lives of individuals and societies while controlling a variety of digital services, such as search, social networking, cloud computing, online advertising, content sharing and delivery, and communications. They are also moving into additional key areas that they might dominate in the near future, such as banking, travel, and transportation. Given the breadth of their presence and their reach into so many aspects of contemporary life, it is no surprise that there is a steady stream of conflicts between these firms and end users. Moreover, the speed of technological change alone makes it hard for local governments to keep pace with—much less anticipate—these challenges through laws and regulations. Furthermore, tech-related disputes often result from decisions made at remote locations far beyond the control of many nation-states (especially when these states are not the United States or China).

These companies have risen to dominance in very distinct ways. Each firm has excelled at or achieved a first-mover advantage in a specific subset of the digital market, yet almost all are currently converging to compete at many similar junctures thanks to aggressive acquisitions. They are joined by other Western, medium-sized but nonetheless dominant players (Netflix, Cisco, Oracle) and rising Eastern giants (Tencent, Alibaba). Although very different, we refer to them all as the *tech giants*.

The nature of the relationship between these global firms and their users is unique. Although it is tempting to do so, these firms cannot be compared to nation-states, for the latter entities exercise geographical sovereignty over subjects that could be transformed to other spheres of power.<sup>2</sup> The tech giants' source of power is far more difficult to name, for it entails market dominance, user consent, control over crucial resources, the assumption of public roles, access to troves of personal data, and more. And while these tech firms might seem to threaten the nation states in their existence, they are not really a viable substitute given their mostly virtual presence and international characters. Nonetheless, these firms can exercise substantial power and must be closely examined.

Even after setting aside the citizen-sovereign state regulatory paradigm as an option to address the tech giants, there is no shortage of potential frameworks to articulate the intriguing dynamic between users and firms. Scholars have discussed notions of trust,<sup>3</sup> fiduciary duties,<sup>4</sup> information custodians,<sup>5</sup> common carriers,<sup>6</sup> and even the antiquated laws of bailment.<sup>7</sup> There is also an abundance of theoretical and doctrinal concepts for justifying the limitation of the power of firms, such as competition (antitrust) law, data protection, or the firms' reliance on contracts of adhesion<sup>8</sup> and unfair manipulation.<sup>9</sup> Alternatively, the

<sup>1</sup> On the comparison between these firms and nation states, see Anupam Chander, *Facebookistan*, 90 NORTH CAROLINA LAW REVIEW 1807, 1842 (2012).

<sup>2</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 165, 173 (1983).

<sup>3</sup> ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 61 (2018); Aziz H. Huq, *The Public Trust in Data* 765 (University of Chicago Law School Public Law & Legal Theory Working Papers, Paper No. 765, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3794780](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794780).

<sup>4</sup> Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARVARD LAW REVIEW FORUM 11, 19 (2020); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UNIVERSITY OF CALIFORNIA, DAVIS LAW REVIEW 1183, 1209 (2016).

<sup>5</sup> TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 144 (2018).

<sup>6</sup> See Richard Epstein's recent position, as noted here: Tunku Varadarajan, *The "Common Carrier" Solution to Social-Media Censorship*, WALL STREET JOURNAL OPINION (January 15, 2021), <https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343>.

<sup>7</sup> Danielle Frances D'Onfro, *The New Bailments*, 97 WASHINGTON LAW REVIEW 97 (2022).

<sup>8</sup> Margaret Jane Radin, *The Deformation of Contract in the Information Society*, 37 OXFORD JOURNAL OF LEGAL STUDIES 505, 516 (2017).

<sup>9</sup> Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES IN LAW 157, 161 (2018); SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 379 (2019).

firms are also considered to be taking upon themselves public roles and should be subjected to the standards of public law (thus limiting their ability to impede speech, engage in discrimination, and the like).

Most recently, the European Union has taken additional steps to rein in the tech giants by introducing the Digital Markets Act<sup>10</sup> and the Digital Services Act.<sup>11</sup> These laws are the most ambitious attempt to date to regulate the tech giants. As of this writing, these massive pieces of legislation have not yet been finalized, and their full entry into force is still several months away. Yet their regulatory trajectory is clear: an attempt to single out very large and dominant tech companies and subject them to strict scrutiny, substantial burdens, and the risk of high fines. Indeed, both regulatory frameworks include specific categories that, to a great extent, address the tech firms we discuss. Article 3 of the Digital Markets Act includes a definition of *gatekeepers* that refers to tech firms that are, among other things, in an entrenched position of power. The regulation sets high thresholds of market valuation and number of users, clearly targeting the tech giants. Similarly, the Digital Services Act applies specific, far-reaching regulations to “very large online platforms” (designated so according to Article 25) with significant impact and to very large search engines. Size is defined primarily by the ability to reach 10 percent of the European Union’s population. Again, the entities defined in the Digital Services Act will most likely include the tech giants discussed. The focus of the Digital Markets Act is on limiting a tech firm’s ability to abusively harness its market power and thus prohibits combing data resources. It also regulates issues related to competition such as bundling, portability, and preinstalled services. The Digital Services Act focuses on harmonizing various European Union laws regulating various forms of illegal content. Furthermore, it addresses transparent advertising (especially when tailored) and disinformation monitoring and limitation. It draws out a liability exemption for content insofar as the intermediary had no knowledge of the illegality. It also introduces duties to inform when posted information is removed and restricted. The proposed legislation includes additional rules on transparency regarding the algorithms running recommendation processes while prohibiting the use of specific categories in the analysis, and various manipulative practices.

Nonetheless, legislators, regulators, thinkers, and scholars are constantly seeking additional paradigms to conceptualize the relationship between tech firms, end users, and local governments, which still eludes a simple definition.<sup>12</sup> Therefore, the desired conceptual framework is expected to contribute to the understanding of the nature of legal and democratic relationships at this time, focus the discussion on key conceptual points, and assist in pointing toward proper conceptual and regulatory responses. Accordingly, we suggest a relational paradigm from the realm of Jewish law and tradition<sup>13</sup>—the concept of *covenant*—in hope of promoting these objectives. The title of our article, “What Is the

<sup>10</sup> Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Brussels, July 22, 2022), <https://data.consilium.europa.eu/doc/document/PE-17-2022-INIT/en/pdf>.

<sup>11</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC/COM/2020/825 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>.

<sup>12</sup> Note, however, Joshua Fairfield’s argument that “old” laws are sufficient to keep up with the novel legal challenges technology generates. See generally JOSHUA FAIRFIELD, *RUNAWAY TECHNOLOGY: CAN LAW KEEP UP?* (2021).

<sup>13</sup> By using the term *Judaism*, we by no means imply that it signifies a monolithic Jewish worldview. See DANIEL BOYARIN, *JUDAISM: THE GENEALOGY OF A MODERN NOTION* (2018), remarking on the making and the personification of *Yahadut* (*Judentum*, or Judaism) into “a subject” (143). Compare, however, the critique of Boyarin by Adele Reinhartz, *Was the Word in the Beginning? On the Relationship Between Language and Concepts*, *MARGINALIA* (July 5, 2019), <https://themarginaliareview.com/word-beginning-relationship-language-concepts/>.

Juxtaposition between Silicon Valley and Mount Sinai?,” alludes to a well-known Jewish-Hebrew idiom. The Talmudic sages,<sup>14</sup> in their commentary on the book of Leviticus (*Sifra*) remark upon the biblical verse “And the Lord spoke unto Moses in Mount Sinai” (Leviticus 25:1), and question the textual nearness of the law of *Shemittah* (Sabbatical year) vis-à-vis the revelation at Mount Sinai. The Sages ask, “How do the case of *Shemittah* and Mount Sinai juxtapose?” (*mah inyan shemittah le-har sinai*) and provide several responses. This Talmudic question has morphed into shorthand for wondering about the possible relationship between two seemingly unrelated issues. In this article, we present such an inquiry regarding the relationship between contemporary problems of law and technology, and Jewish tradition.

### Covenant and Political Theology

The relationship between tech giants and their users seems categorically different from other historical and contemporary interactions between firms and their customers or clients. Indeed, for centuries, multinational companies have had impact on daily life. Some have accrued great wealth and political influence, which has even led nations to war in a move to protect these firms’ interests. Nonetheless, the current technology-based relationships are unique on several levels, thus calling for a novel paradigm.

The common conception of technology and of tech giants as omnipresent, omniscient, and omnipotent reflects their popular image as godly or divine.<sup>15</sup> What exactly *divinity* means, in terms of political theology, however, is far from simple. Though people tend to view God as a dictator, the concept of divine sovereignty in Jewish tradition portrays God rather as caring and relational.<sup>16</sup> This Hebraic political theology deeply challenges the dominant paradigm of Carl Schmitt.<sup>17</sup> Regardless of the critique against Schmitt,<sup>18</sup> his authoritarian approach remains highly influential in legal and political studies.<sup>19</sup> This leads us to *covenant*, a concept that has proven resilient and sustainable and is worth exploring in the present context. As we explain below, the biblical idea of covenant

<sup>14</sup> Or *HaZal*, the Hebrew abbreviation for *Hakhameinu Zikhram LiBhrakhah* (our sages of blessed memory), hence *the Sages* (as distinct from *sages*, which is understood to denote post-Talmudic rabbis as well). We also note that unless indicated otherwise, translations from the Hebrew throughout this article are by the authors.

<sup>15</sup> See, for example YUVAL NOAH HARARI, *HOMO DEUS: A BRIEF HISTORY OF TOMORROW* (2017).

<sup>16</sup> Consider YOCHANAN MUFFS, *THE PERSONHOOD OF GOD: BIBLICAL THEOLOGY, HUMAN FAITH, AND THE DIVINE IMAGE* (2005); YORAM HAZONY, *THE PHILOSOPHY OF THE HEBREW SCRIPTURE* 103–39 (2012).

<sup>17</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab, trans., 2005). Schmitt asserts: “All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries.”

<sup>18</sup> See for example the critique of Schmitt’s binarism by MARTIN BUBER, *BETWEEN MAN AND MAN* 86–89 (Ronald Gregor-Smith, trans., 2002). See Paul Mendes-Flohr, *The Kingdom of God: Martin Buber’s Critique of Messianic Politics*, 2 *BEHEMOTH: A JOURNAL ON CIVILISATION* 26 (2008). The “soft metaphysical” stance that the covenantal setting usually has as its background is illustrated by Steven Kepnes, *Reviving Jewish Theology: From a Soft Maimonidean to a Practical Biblical Metaphysics*, *MODERN THEOLOGY*, published ahead of print, August 20, 2022, <https://doi.org/10.1111/moth.12809>.

<sup>19</sup> Reviewing the legal scholarship on Schmitt is beyond the scope of this article. See, for instance, PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011), which takes Schmitt as a wake-up call for contemporary liberal societies, who tend to repress the idea of sacrifice.

provides a categorically different notion of relationship between governor and the governed.

The concept of covenant is foundational in Jewish law and tradition.<sup>20</sup> However, for various reasons, the concept of covenant is not dominant within global contemporary philosophical and ethical discourse. When considering a relationship between God and human subjects, we are tempted to envision a relationship between a commanding divine entity and a mortal one that merely obeys. This, however, is far from being the dominant paradigm in Jewish thought. The covenant is predicated on a relationship that is premised on dialogue. As such, covenantal relationality involves agency, reciprocity, and explainability.<sup>21</sup> Even though there clearly is a stronger party within the Judaic notion of covenant (that is, God), instructions by the governing side are usually conceived as explainable and in this sense transparent. For this reason, divine command morality is rare in Jewish tradition.<sup>22</sup> Therefore, we find the concept of covenant worthy of further exploration in the technology and policy context.

## Tech Giants vis-à-vis Users: Structural Legal Challenges

### *The Problem of Bigness: Old News Is Still News*

Why do the tech giants dominate the global news cycle and present numerous challenges to multiple governments? While the following *four* issues are not necessarily unique to these specific entities' roles, together they contribute to the alarming power of these firms:

First, the large tech firms are multinational entities, almost exclusively based in the United States (with a second generation of tech giants rising from China). Yet the users are spread worldwide. It is quite common that in specific regions outside the United States merely *one* tech giant is in a position of substantial market dominance.<sup>23</sup> Therefore, individuals are, at times, subjected to a foreign legal entity, whose leaders are beyond the reach of the individual's jurisdiction, rendering many of the rules set forth in their own state irrelevant or of limited impact and easily worked around.

Second, these firms are powerful entities with considerable political force and influence that is boosted by substantial lobbying, political contributions, and the hiring of former governmental officials. The tech giants are among the world's most valuable corporations and have made remarkable growth even in times of global crises—as evident during the COVID-19 pandemic.<sup>24</sup>

<sup>20</sup> See *Covenant: God's Law and the People's Consent*, in *THE JEWISH POLITICAL TRADITION, VOLUME 1: AUTHORITY* 5, 9 (Michael Walzer, Menachem Lorberbaum, Noam J. Zohar & Yair Lorberbaum eds., 2008). As Walzer et al. contend, "Israel's covenant is collective from the beginning, generating obligations not only between God and humankind but between every Israelite and every other, and an individualist account of this mutuality does not seem possible."

<sup>21</sup> Whereas reasonability requires the giving of initial rationales, explainability seems to be broader and looser: explanation requirements can be fulfilled via recourse to justification by authority (and not comprehensive reasons).

<sup>22</sup> See the discussion below (*infra*, 111 and accompanying text) under "Covenantality: Biblical and Post-biblical Characteristics."

<sup>23</sup> Google, for example, has controlled over 97 percent of some aspects of mobile search in Europe. See Aoife White & Natalia Drozdiak, *Europe's Failure to Tame Google's Dominance Is a Lesson for U.S.*, *BLOOMBERG* (July 6, 2020), <https://www.bloomberg.com/news/articles/2020-07-06/europe-s-failure-to-tame-google-s-dominance-is-a-lesson-for-u-s>.

<sup>24</sup> Daisuke Wakabayashi et al., *Big Tech Could Emerge from Coronavirus Crisis Stronger than Ever*, *NEW YORK TIMES* (March 23, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-amazon-youtube.html>.

Third, these firms have a strong grip on the formation of social discourse. Indeed, in the past, conglomerates exercised similar power by influencing and even controlling the press and media. Yet the fact that some of these firms *are* the actual discourse platform that they can control seamlessly and without being noticed makes this concern far more acute.<sup>25</sup> In addition, and as opposed to the media giants of the past, the tech giants have been late to embrace their important social role and the responsibilities that come with their newly vested powers,<sup>26</sup> and regulators were similarly slow to apply these responsibilities to them.

Fourth, the power disparity between these firms and individuals can lead to devastating outcomes for those who cross these firms' path.<sup>27</sup> The firm can banish individuals from their community, render them forgotten and unfindable, and lock them out of their important memories and belongings—and all this without engaging with them physically.<sup>28</sup> Again, there is nothing substantially novel with the seemingly futile battle between powerless individuals and an ever-powerful firm. Yet this noted concern is exacerbated given the fact that the interpersonal and civic discourse is more than ever dependent upon these sophisticated technological platforms. The tech giants, in other words, are virtually everywhere (pun intended). On the other hand, users would face substantial hurdles if they choose to exit the relationship with the relevant firms. The firms cannot be easily unilaterally abandoned and are reluctant to delete content and information pertaining to users even after asked to do so.<sup>29</sup>

Some of these concerns, and especially the last one, quickly bring much older religion-based establishments and relationships from the premodern era to mind. The ability to punish by excommunication, ostracism, and shunning has long been part of the soft power vested with religious organizations and hierarchies. As we explore below, perhaps such extensive force should be countered with a legal conceptualization that takes into consideration humanist (or pragmatist) religious ideas.

### Unique Concerns

Beyond the newer versions of the older concerns, the enhanced digital environment brings with it four novel worries.

First, in many instances the relationship between firm and user is premised on an apparent form of consent,<sup>30</sup> which results (and is derived) from agreeing to the relevant terms of use (more on the nature and failings of such consent, below).<sup>31</sup> This is as opposed to the historical relationship with global vendors and manufacturers whose products were merely purchased in a one-time transaction, sometimes indirectly (thus eliminating any formal contractual linkage between the seller and buyer). In other words, the tech giants are

<sup>25</sup> Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 UNIVERSITY OF CALIFORNIA, DAVIS LAW REVIEW 1149, 1158 (2018): "Technology mediates relationships of power between human beings and other human beings."

<sup>26</sup> *Id.* at 1192, 1209.

<sup>27</sup> *Id.* at 1156.

<sup>28</sup> In this regard, these corporations have a capacity comparable to those of premodern institutions that banned deviating individuals who, in their eyes, misbehaved. This observation is relevant for our scholarly attempt to broaden the scope of modern discussion.

<sup>29</sup> Compare with the discussion and sources in Tal Z. Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE LAW REVIEW 138, 154, (2014); See also M. Todd Henderson, *The Nanny Corporation*, 76 UNIVERSITY OF CHICAGO LAW REVIEW 1517, 1531 (2009).

<sup>30</sup> Note that Kar and Radin argue that these dynamics cannot be referred to as valid contracts, referring to them as "contracts" (with parenthesis) or pseudo-contracts. Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARVARD LAW REVIEW 1135, 1140 (2019).

<sup>31</sup> Balkin, *supra* 25, at 1163.

in privity with billions of humans—privity that leads, for both parties, to expectations of mutual rights and obligations.<sup>32</sup>

Second, these relationships are ongoing and often tightly controlled and even customized, featuring specific terms or experiences for specific users—again as opposed to the often one-time purchase of goods from a global and dispersed merchant or service provider. The noted trend of customization is a tectonic shift from the uniform (and in this regard, blind) treatment that has dominated the economy since the industrial revolution.<sup>33</sup>

Third, the relationship between tech giants and users is such that it allows the firms to collect vast amounts of personal information about every user. Using current advanced capabilities of data analytics, such personal data can be stored, analyzed, and commodified. The knowledge derived from such analyses can be used to generate a more substantial interaction between the firm and existing and prospective users. Furthermore, the data can be used nefariously—for launching discriminatory pricing regimes, attempts to manipulate users, or even to prejudicially exclude them.<sup>34</sup>

Fourth, in some of the settings at the basis of these relationships, the technology firms argue that they should not be found liable for potential harms derived from their actions, as these constitute the mere intermediation of the actions and speech of others. According to this argument, the tech giants are common carriers,<sup>35</sup> platforms or facilitators that should not be held accountable for the wrongs resulting from the usage of their platforms. Below we take a closer look at three crucial legal issues that are derived from these four concerns and are unfolding in various academic and policy contexts: (1) entering, exiting, and consent; (2) tailoring, censoring, manipulation, and opacity/transparency; and (3) intermediation.

### *Entering, Exiting, and Consent*

As explained, the interactions with tech firms are premised on a specific text: the terms of use. These terms of use constitute legal documents presented to users at central junctures and are presumed to be read, understood, and accepted. That they are read, understood, and accepted is a well-known legal fiction.<sup>36</sup> Few users indeed read these forms of documents<sup>37</sup> or have the capability of understanding them.<sup>38</sup> And these insights are not lost on the tech firms, who often pack these legal documents with one-sided terms, waivers, and disclaimers. Naturally, there are some outliers—firms that invest time and money in crafting readable and accessible terms<sup>39</sup>—and settings in which sophisticated parties closely read the relevant contracts.

The terms of use are often supplemented by additional documents. These might include privacy policies, community guidelines, and codes of conduct that map out permitted and prohibited forms of behavior to various degrees of clarity and abstraction. With very few

<sup>32</sup> For a critique of this dynamic, see Nancy S. Kim, *Clicking and Cringing*, 86 OREGON LAW REVIEW 797, 832 (2007).

<sup>33</sup> For a discussion of these cycles of commerce, see JOSEPH TUROW, *THE AISLES HAVE EYES: HOW RETAILERS TRACK YOUR SHOPPING, STRIP YOUR PRIVACY, AND DEFINE YOUR POWER* 219 (2017).

<sup>34</sup> See Tal Z. Zarsky, *Mine Your Own Business! Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion* 5 YALE JOURNAL OF LAW AND TECHNOLOGY 1, 29 (2002–2003).

<sup>35</sup> See Varadarajan, *supra* 6.

<sup>36</sup> See discussion in Radin, *supra* 8; Kar & Radin, *supra* 30.

<sup>37</sup> In similar contexts, see Yanis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 JOURNAL OF LEGAL STUDIES 1, 32 (2014).

<sup>38</sup> Scholars who have analyzed these documents using automated tools that assess the readability of documents have made predictable yet unfortunate findings regarding the extreme difficulty for individuals with a high school education to properly comprehend these texts. See Uri Benoliel & Shmuel Becher, *The Duty to Read the Unreadable*, 60 BOSTON COLLEGE LAW REVIEW 2255, 2275 (2019); Yonathan A. Arbel & Shmuel Becher, *Contracts in the Age of Smart Readers*, 90 GEORGE WASHINGTON LAW REVIEW 83, 95–96 (2022).

<sup>39</sup> David A. Hoffman, *Relational Contracts of Adhesion*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 1395, 1433 (2018).

exceptions, the contractual language in these documents is drafted by the firm's lawyers.<sup>40</sup> The firms indeed introduce timely changes to these documents, yet these are driven mostly by specific legal requirements<sup>41</sup> rather than users' preferences. The nature of the noted legal and technological architecture allows firms to argue that the entire user experience is governed by the agreements and subjected to contract law. This has led to an abundance of issues and conflicts.

An initial point concerns the *formation* of the contract—especially regarding the autonomy and capacity of the users upon its entry. This point of contention relates to the act of acceptance or assent to the agreement between users and the internet platforms—the most basic prerequisite for contract formation. These notions are also related to that of consent, which is required under laws governing the *processing* (a term that includes, among other functions, collection, analysis, and usage) of the personal information that is often collected as part of this interaction.<sup>42</sup> Obtaining consent is a popular (though certainly not exclusive)<sup>43</sup> measure to assure such processing is lawful.

In all these contexts, legal theory and practice have set standards that identify which online behaviors provide sufficient evidence of accepting the contractual language and which forms of disclosure prior to such acceptance subject users to the disclosed terms. In the context of general contract law, the notion of contractual acceptance and assent could be established on the basis of either the objective or subjective theory of contracts. The subjective theory of contracts is premised on the advancement of the individual's autonomy and would thus call for the assurance of the individual's meaningful assent to the contractual framework. However, contract law, especially in the United States is dominated by the objective theory of contracts, according to which the external appearance of consent should establish contractual formation. This perspective is driven by the economic consideration of promoting commerce and allowing for reliance on external cues. It therefore leads to a low threshold for establishing contractual assent in commercial settings.<sup>44</sup>

In the context of data protection and the transfer of personal information, the nature of appropriate consent sharply differs among legal regimes. The European Union's General Data Protection Regulation calls for consent that is (among others) informed<sup>45</sup> and at times "explicit."<sup>46</sup> In the United States, rules regarding such consent are less clear, yet they are considered to be more lenient than those of the European Union.<sup>47</sup> Yet even the European

<sup>40</sup> In very limited instances, these foundational texts were drafted or approved by the relevant community. For a noted exception, consider Wikipedia's community documents. See for instance David A. Hoffman & Salil Mehra, *Wikitruth Through Wikiorde*, 59 EMORY LAW JOURNAL 151, 175 (2009). Note that in some cases firms have begun to engage in public consultations, which influences their conduct. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE LAW JOURNAL 2418, 2451 (2020).

<sup>41</sup> See Kevin E. Davis & Florencia Marrota-Wurgler, *Regulatory Spillovers: The Case of GDPR* [General Data Protection Regulation] 1, 6 (working paper, on file with authors).

<sup>42</sup> This is the terminology of the European Union's data protection laws. European Parliament and Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119), Article 4(2).

<sup>43</sup> The General Data Protection Regulation, for example, offers several additional avenues for enabling lawful processing even without obtaining consent, such as showing that the processing was necessary for pursuing a "legitimate internet." General Data Protection Regulation, Article 6(f).

<sup>44</sup> For a discussion of these two perspectives of contract law, and a critical assessment of the rise of the "objective" view, see Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASHINGTON UNIVERSITY LAW QUARTERLY 57, 57–59 (1992).

<sup>45</sup> General Data Protection Regulation, Article 4(11).

<sup>46</sup> For the European Union's regulatory perspective on this notion of consent, see General Data Protection Regulation, Articles 6(1)(a), 7, 8 (children's consent).

<sup>47</sup> Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 JOURNAL OF HIGH TECHNOLOGY LAW 370, 372–78 (2014), discussing and critiquing the limited U.S. approach of notice and consent as applied to the collection of personal data online.



Union's data regime allows firms to present users with extensive data usage policy disclosures that users reluctantly and sheepishly accept. The best example of this dynamic is that of cookie notices, which present users with the option to agree to online tracking prior to accessing a website, yet are generally ignored by users, rendering the entire scheme somewhat of a farce.<sup>48</sup>

Such standards of assent are conceptualized in various technological practices that manifest consumer agreement. Consider the concept of *clickwrap* (a term coined in the sales of software on analogy with *shrink-wrap*), according to which the act of checking a box (or clicking a button) constitutes consent to a lengthy text presented online. These concepts and others articulate—some might say, fictitiously—the process of formulating an agreement that includes language users might not have reviewed (or even had a chance to do so). To some extent, the user's ability to rescind the contract after the fact has led courts to accept contracts formulated in a pay-now-terms-later process in which terms accessible only *after* formation are nonetheless enforceable given the ability to reject the contract after the fact.<sup>49</sup>

In addition to formation, courts worldwide are also grappling with the enforceability of these contracts, especially regarding clauses setting jurisdiction and choice of law and clauses addressing dispute resolution.<sup>50</sup> Therefore, contract law generally—and the law of standard form contracts in particular—provides an important context for governing these digital spaces and for understanding the limitations of power. Yet it is questionable whether contractual doctrines such as “unconscionability” and “*contra proferentem*”<sup>51</sup> are suitable and can successfully govern the abundance of issues here unfolding, especially the courts' general reluctance to intervene.<sup>52</sup>

As opposed to entering the relationship, legal issues also arise regarding its *exit* and termination. First, consider the platform's ability to unilaterally terminate the agreement. Firms have generally reserved the right to remove users by drafting broad provisions. These provide the platforms with substantial discretion to unilaterally terminate accounts and leave users with limited redress. In response, law and policy have applied a variety of measures to regulate these contractual aspects. Courts have begun to intervene in instances in which termination by the platforms seemed to be unfair, arbitrary, or constitute an abuse of power—yet have chosen to refrain from interfering in many other high-profile situations. For instance, when Wikileaks was banished from Amazon Web Services, the world's leading cloud provider, hosting facilities (most likely because of pressure from the U.S. government), its options for legal recourse were extremely limited given the broad termination clauses in its hosting agreement.<sup>53</sup>

On the other hand, consider the user's ability to unilaterally exit. While in most cases ceasing to use the platform is simple (as these services usually do not require membership fees), completely removing one's digital footprint from the systems presents more of a challenge. Maximillian Schrems famously launched a multiyear battle against Facebook to

<sup>48</sup> See Matt Burgess, *We Need to Fix GDPR's Biggest Failure: Broken Cookie Notices*, WIRED (May 28, 2020), <https://www.wired.co.uk/article/gdpr-cookie-consent-privacy>.

<sup>49</sup> See, for example, J. Easterbrook's opinion in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1996).

<sup>50</sup> For a recent analysis of the enforceability of Facebook's choice of law clauses vis-à-vis consumers in view of Israel's Standard Forms Contract Law, see P.C.A. 1901/20 *Troyam v. Facebook* (Isr. Supreme Court, July 26th, 2022).

<sup>51</sup> The rule of construing a contract against its drafter when ambiguity arises.

<sup>52</sup> Kar & Radin, *supra* 30.

<sup>53</sup> Anahad O'Connor, *Amazon Removes WikiLeaks from Servers*, NEW YORK TIMES (December 2, 2010), <https://www.nytimes.com/2010/12/02/world/02amazon.html>. See discussion in Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARVARD CIVIL RIGHTS–CIVIL LIBERTIES LAW REVIEW 311, 330–51 (2011).

achieve his removal.<sup>54</sup> The European Union has introduced the “right to be forgotten” to promote this objective as well.<sup>55</sup> The difficulty to exercise an effective exit might have a substantial impact on the ongoing relationship between the parties even if there is no dispute in sight.<sup>56</sup> It is therefore an important remedy, and its limitation constitutes a substantial impediment to the users’ rights.

Beyond the noted and somewhat specific doctrinal questions are broader queries as to the adequacy of contract law and theory to appropriately regulate the complicated relationships here unfolding. For instance, Margaret Radin argues that contracts—especially those mostly applying a “boilerplate” form should not be used to relinquish the individual’s basic rights.<sup>57</sup> In the context before us, this pertains to speech-and-association-related rights.<sup>58</sup> She further notes that contracts should be a result of a “dialogue” between the parties that is absent here.<sup>59</sup> Similarly, Cass Sunstein explains that issues related to civic behavior and human rights should not be governed merely by markets and commerce but by laws and government. In other words, people should decide on these crucial issues in their capacity as citizens and at the ballot box rather than through their capacities as consumers. As consumers, individuals are not necessarily attuned to broader social concerns but are focused on maximizing their financial resources in these relevant transactions.<sup>60</sup> Thus, these arguments state that the paradigmatic reliance on the contractual language of the terms of use to govern the conduct of both sides of the agreement is an unacceptable compromise and should be set aside in favor of other rules and norms.

Yet another strand of thought challenges the logic of reliance on the lengthy contract to regulate the relationship between the parties from a very different direction. As almost no one reads and understands these contracts, the firms should be judged based on their actions, and policed by market forces, information flows, reputational damages, and specific regulation. Reliance on the terms of use should be treated as a fictitious notion to be abandoned.<sup>61</sup> To some extent, contractual terms should be considered as merely attributes of the relevant product or service and should be treated as such.<sup>62</sup>

### *Tailoring, Censoring, Manipulation, and Opacity/Transparency*

The interface between users and the tech giants unfolds in a digital environment. This leads to at least two of the unique outcomes noted above: the opportunity to collect vast amount of personal information, and the ability to control and even customize the user’s interface. Integrating these two elements generates a reality that could be either a blessing or a curse. It could prove highly beneficial if the firms choose to use it to tailor and deliver information

<sup>54</sup> Case C-362/14, Maximilian Schrems v. Data Protection, 2015 ECLI:EU:C:2015:650 (October 6, 2015).

<sup>55</sup> European Parliament and Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119), Article 17 (also referred to as the “Right to erasure”).

<sup>56</sup> Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUMBIA LAW REVIEW 75, 95 (2004) (relying on and referring to ALBERTO O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES, 35 (1970)).

<sup>57</sup> MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW, 123–24 (2012).

<sup>58</sup> Note that such rights are commonly limited by contracts—consider for instance nondisclosure agreements. The issue before us is of course one of degree and providing the tech giants with the ability to systematically have an impact on these rights. For a recent discussion, see David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 94 WASHINGTON UNIVERSITY LAW REVIEW 165, 169–71 (2019).

<sup>59</sup> RADIN, *supra* 57.

<sup>60</sup> Zarsky, *supra* 29; CASS SUNSTEIN, REPUBLIC.COM 2.0 128 (2009); Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM LAW REVIEW 1525, 1528 (2012).

<sup>61</sup> See Omri Ben-Shahar, *One-Way Contracts: Consumer Protection Beyond Law*, 6 EUROPEAN REVIEW OF CONTRACT LAW 221, 225 (2010).

<sup>62</sup> This notion continues an older premise set forth by Arthur A. Leff, *Contract as Thing*, 19 AMERICAN UNIVERSITY LAW REVIEW 131, 138 (1970).

that they believe the user would find most helpful and relevant.<sup>63</sup> It also allows for creating an environment that users will find friendly and safe for their discourse. Yet this ability could prove highly detrimental if used merely to promote the interests of the platforms (and those of their affiliates and possible sponsors). This tension unfolds in a variety of contexts, yet it is most prevalent in the policies of the social networks regarding removing various forms of content (or failing to do so),<sup>64</sup> and that of tailored marketing and advertising, while possibly taking advantage of the users' weaknesses.<sup>65</sup>

One of the key responses to the fear of manipulation is providing greater *transparency* concerning the way these firms collect personal data (through the specific website and elsewhere), analyze, and utilize it. Similarly, firms are required to provide *explanations* (and thus produce or satisfy the moral-legal requirement of *explainability*) for the outputs that users receive and experience.<sup>66</sup>

The calls for transparency and explainability have unfolded in various contexts. Data protection laws have led the way.<sup>67</sup> In addition, consumer protection laws as well as others (such as election or credit rating laws<sup>68</sup> in some instances) have moved to require the providing of greater insights to algorithmic processes. New proposals and actual laws focused on decision-making processes powered by artificial intelligence and machine learning) also prominently rely on providing users with greater insights<sup>69</sup> as to the inner workings of the automated process, at times aspiring to break open the so-called black box. At the same time, some firms have responded voluntarily. For instance, Facebook has introduced measures to promote these objectives such as publishing transparency reports, the firm's code of conduct, and founding an oversight board.<sup>70</sup> These steps and others possibly limit the ability to manipulatively remove content and push specific ads, as these actions are now open to public scrutiny.

Unsurprisingly, transparency requirements meet substantial pushback. Firms are reluctant to reveal information as to their inner workings. They argue that sharing such data might compromise trade secrets, thus strengthening their opponents<sup>71</sup> and enable the gaming of the algorithm. Thus, it would have an impact on the firm's incentives to invest in such technological processes and on the accuracy and overall fairness of the process's outcomes (given the ability of some users to effectively game it and thus sidestep crucial filtering mechanisms).<sup>72</sup>

<sup>63</sup> Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICHIGAN LAW REVIEW 1417, 1474 (2014).

<sup>64</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARVARD LAW REVIEW 1598, 1654 (2017–2018).

<sup>65</sup> Ryan Calo, *Digital Market Manipulation*, 82 GEORGE WASHINGTON LAW REVIEW 995, 999 (2013).

<sup>66</sup> Margot E. Kaminski, *The Right to Explanation, Explained*, 34 BERKELEY TECHNOLOGY LAW JOURNAL 189, 211 (2019).

<sup>67</sup> See European Parliament and Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119), Articles 12–15.

<sup>68</sup> See Fair Credit Reporting Act, 15 U.S.C. § 1681g(f)(1)(c) (2012), as discussed in FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 282 (2015).

<sup>69</sup> For the recent legislative efforts in the European Union, see Proposal for a Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act), COM (2020) 206 (April 21, 2021), available online. For the United States, see The Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019). See also the discussion of the European Union's proposed Digital Markets Act and Digital Services Act, *supra* 10 and 11 and related text.

<sup>70</sup> Klonick, *supra* 40.

<sup>71</sup> Sandra Wachter, Brent Mittelstadt & Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 INTERNATIONAL DATA PRIVACY LAW 76, 99 (2017).

<sup>72</sup> Jane R. Bambauer & Tal Z. Zarsky, *The Algorithmic Game*, 94 NOTRE DAME LAW REVIEW 1, 25 (2018). It is also possible that, at the end of the day, such additional information will not be sought by users, thus rendering the investment in these processes wasteful.

Firms will further argue that many of the processes driven by artificial intelligence and machine learning are highly automated, complex, and ever-changing. Therefore, providing meaningful explanations is almost impossible, and in any event will require a compromise in terms of the process's accuracy and overall efficiency. Note that these arguments will not prove convincing should society consider the right to receive a meaningful explanation to be fundamental, and thus justify substantial changes in the platform's process. Also, they will not hold if receiving such explanations is considered important to enhance the individual's autonomy, especially in situations where crucial decisions about her or him are being made beyond their control. Thus, society is still struggling to figure out what weight to attach to explainability requirements, how they are best justified in this context, and how must they be balanced against other interests.

### *Mere Intermediation?*

In some of their key capacities, the tech giants have chosen to reflect calls for liability or regulation by claiming that the negative implications resulting from their actions are derived from the actions of others. Consider Google's early responses to search outcomes (such as for terms with the word *Jew*),<sup>73</sup> ads served (stereotypical ads to minorities), and Facebook and Twitter's response to attempts through their systems to interfere in elections in Germany, the United Kingdom, and the United States.<sup>74</sup>

In such instances and others, it is other users who create and upload content that harms others, incites violence, or violates copyright. It is an external force that uses the platform's services to circulate prohibited materials or market using negative stereotypes. And it is others who nefariously use the platform to undermine democratic processes such as elections and even public discourse. The tech giants merely provide the platforms that many choose to use for good and very few elect to abuse. Thus, one might argue that it is not the tech giants that we must blame for the mentioned outcomes but these users. Furthermore, placing extensive liability on them will choke their incentive and ability to innovate. It would also motivate them to extensively censor and chill the speech they are facilitating, given the potential for liability. Some of these arguments are even reflected in the law. In the United States, Article 230 of the Communications Decency Act provides broad immunity to platforms from the speech harms they facilitate.<sup>75</sup> When threatened with the prospect of liability, the tech giants invoke this crucial law and praise the freedom it provides them with.

A vast corpus of scholarship and policy analysis has closely examined the extent to which online intermediaries should be held liable for their intermediation efforts, as well as what form of diligent moderation is required to escape such liability. Yet, again, beyond the somewhat technical discussion is a substantive/normative one—one that involves establishing the moral responsibility entities should have for the consequences of their actions, even if merely caused via intermediation and moderation (or lack thereof).

<sup>73</sup> For a recent story discussing the offensive anti-Semitic images received when searching for "Jewish Baby Strollers," see Ben Sales, *A Google Search for "Jewish Baby Strollers" Yields Anti-Semitic Images: An Extremist Campaign May Be to Blame*, JEWISH TELEGRAPH AGENCY (September 25, 2020), <https://www.jta.org/2020/09/25/united-states/a-google-search-leads-to-anti-semitic-images-it-may-be-an-extremist-campaign>. On the ethics of automated search-engine results, see Boaz Miller & Isaac Record, *Responsible Epistemic Technologies: A Social Epistemological Analysis of Auto-completed Web Search*, 19 *NEW MEDIA AND SOCIETY* 1945, 1953 (2017).

<sup>74</sup> Some aspects of this discussion were addressed throughout Facebook's and Twitter's hearings following the noted scandals. See *Zuckerberg and Dorsey Face Harsh Questioning from Lawmakers*, *NEW YORK TIMES* (November 17, 2020), <https://www.nytimes.com/live/2020/11/17/technology/twitter-facebook-hearings>. Note that given recent events, firms have begun to accept their responsibility for these events.

<sup>75</sup> 47 U.S.C. § 230; see also Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 *NOTRE DAME LAW REVIEW REFLECTION* 33, 38 (2019). On the importance of section 230 in the law, see JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 78 (2019).

### *The Challenge of Incommensurability*

The conflicts of miscommunication between tech users, tech firms, and state regulators do not unfold in a legal and intellectual vacuum. They occur within an atmosphere in which there is a widespread feeling that diverse human beings (and their preferences) and different human cultures have nothing in common. The wider cultural background for that is the fractures that accompany modernism: from the late nineteenth century's "death of God" thesis and the crisis of values heralded by Nietzsche to the cultural fragmentation of the twentieth century (which was amplified by massive immigration waves) and relevant media processes. All these had amplified the problem of incommensurability, or the lack of a common axiological ground between individuals, cultures, and societies.<sup>76</sup> This axiological diversity only deepens when facing the tremendous similarity of technological means: most human societies are enjoying the benefits of the same internet and digital technologies. However, sharing the same technological tools does not necessarily pave paths for shared legal resolutions.

In the legal context, as Sunstein has written, "Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized."<sup>77</sup> The phenomenon of human diversity is generally a positive one, yet it has downsides: the challenge that numerous modern societies (let alone humanity as a whole) experience is a deep inability to achieve broad societal agreements on various foundational moral and legal issues. Many scholars try to meet the challenge by deploying ideas akin to John Rawls's notion of "overlapping consensus,"<sup>78</sup> but the multicultural setting makes it utterly challenging to open and fruitfully conduct the conversation that can lead to such consensus.<sup>79</sup> This condition of incommensurability is one of the main challenges that underlie contemporary clashes between tech users, tech firms, and state regulators.<sup>80</sup> In the condition of incommensurability, as the public's preferences greatly vary regarding whether specific matters could be governed by contract and whether personal information and control could be exchanged for online services, it is harder to avoid conflicts by means of constructive discursive interaction.<sup>81</sup>

To the problem of incommensurability we may add another initial concern within modernist discourses. As Erich Fromm had argued, such discourses feature some inclinations toward radical individualism on the one hand, and dictatorship on the other.<sup>82</sup> Both are predicated upon the categories of necessity and contingency, notions that rule out the (typically pragmatist) category of the possible, which is vital for democracy that is predicated on the trust in the ability of humans to act positively in the not-yet arrived future.

<sup>76</sup> See Alasdair MacIntyre, *The Relationship of Philosophy to Its Past*, in *PHILOSOPHY IN HISTORY* 31 (Richard Rorty, Jerome B. Schneewind & Quentin Skinner eds., 1984).

<sup>77</sup> Cass Sunstein, *Incommensurability and Valuation in Law*, 92 *MICHIGAN LAW REVIEW* 779, 796 (1994).

<sup>78</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 340 (1999).

<sup>79</sup> See Jonathan Cohen, *Deliberation, Tradition, and the Problem of Incommensurability: Philosophical Reflections on Curriculum Decision Making*, 49 *EDUCATIONAL THEORY* 71, 79 (1999).

<sup>80</sup> For a recent discussion of the incommensurability challenge in the context of the tech giants, particularly regarding their ability to regulate speech while balancing various related interests, see Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 *COLUMBIA LAW REVIEW* 759, 804 (2021).

<sup>81</sup> On incommensurability as a major challenge on the way toward a construction of, as Shannon Vallor calls it, a "global technomoral virtue ethic" discourse, see SHANNON VALLOR, *TECHNOLOGY AND THE VIRTUES: A PHILOSOPHICAL GUIDE TO A FUTURE WORTH WANTING* 35 (2016). Interestingly, Vallor neither recognizes the Jewish virtue ethics tradition nor considers the idea of covenant as candidate for promoting such a "global technomoral virtue ethic." Yet we find that the pragmatist trajectory of Vallor's argument has a deep affiliation with the idea of covenant.

<sup>82</sup> See ERICH FROMM, *ESCAPE FROM FREEDOM* 24 (1941).

Can the Hebraic idea of covenant prove helpful in addressing these legal-ethical concerns and the moral limitations they require vis-à-vis the incommensurability of our age? The idea of covenant includes some pragmatist, relational, middle ways<sup>83</sup> that appealed to the founders of modern democracy, and thus it merits our scholarly attention today.

## The Hebraic Idea of Covenant and Its Explication in Jewish Law

### *What Is between the Disciplines?*

Why should we turn to religious and metaphysical notions when dealing with secular challenges of law and policy?<sup>84</sup> Is religion an obstacle for human solidarity, or could it be its catalyst? If religious traditions are not conversation stoppers,<sup>85</sup> but rather relate deeply to virtue ethics, and are worthy of consideration (as various scholars contend),<sup>86</sup> considering Jewish tradition should be a viable option. Rabbi Jonathan Sacks held that religious traditions are an indispensable resource for a universal ethics:

Above all, as Francis Fukuyama ... points out, it was religion that first taught human beings to look beyond the city-state, the tribe, and the nation to humanity as a whole. The world faiths are global phenomena whose reach is broader and in some respects deeper than that of the nation state.

Judaism is one of those voices. The prophets of ancient Israel were the first to think globally, to conceive of a God transcending place and national boundaries and of humanity as a single moral community linked by a covenant of mutual responsibility (the covenant with Noah after the Flood).<sup>87</sup>

By considering the contribution of covenant to the scholarship of law and technology, we assume that pragmatist (as distinct from fundamentalist) religious ideas have the potential of widening our moral scope, rather than narrowing it.<sup>88</sup> We propose that the idea of covenant may help in rehabilitating interhuman trust amidst a fragmented world and offer a blueprint for doing so. After the collapse of the presumptuous universalist ideologies of modernism (the major *-isms*, such as communism, capitalism), it is worth noting that the covenantal vision by no means implies that human differences be overcome or eliminated.<sup>89</sup>

<sup>83</sup> See Peter Ochs, *Max Kadushin as Rabbinic Pragmatist*, in *UNDERSTANDING THE RABBINIC MIND: ESSAYS ON THE HERMENEUTICS OF MAX KADUSHIN* 165 (PETER OCHS ed. 1990); HANNAH E. HASHKES, *RABBINIC DISCOURSE AS A SYSTEM OF KNOWLEDGE* 111–81 (2015).

<sup>84</sup> On the pragmatist grounds of covenantal thinking in Jewish tradition, see Nadav S. Berman, *The Application of the "Pragmatic Maxim" in Jewish Tradition: The Case of Rabbi Hayyim Hirschensohn*, *JOURNAL OF RELIGION* (forthcoming 2022).

<sup>85</sup> As in the famous phrasing by Richard Rorty in *Religion as a Conversation Stopper*, 3 *COMMON KNOWLEDGE* 1 (1994). See the discussion by Stuart Rosenbaum, *Must Religion Be a Conversation-Stopper?*, 102 *HARVARD THEOLOGICAL REVIEW* 393, 398 (2009).

<sup>86</sup> See, e.g., VALLOR, *supra* 81, at 61, 63, who argues: "we would be foolish to neglect the rich resources for our task already available to us within the classical virtue traditions of Aristotelian, Confucian, and Buddhist ethics. These resources are of more than historical interest, as the shared conceptual pillars of these systems will turn out to be critical to the successful management of our own present condition ... Paradoxically, while humanity today faces challenges of a wholly unprecedented sort, a close look at how premodern traditions understood moral cultivation might in fact be our best preparation for what lies ahead."

<sup>87</sup> Jonathan Sacks, *Global Covenant: A Jewish Perspective on Globalization*, in *MAKING GLOBALIZATION GOOD: THE MORAL CHALLENGES OF GLOBAL CAPITALISM* 210, 212 (John H. Dunning ed. 2003).

<sup>88</sup> On the possible contribution of pragmatist religious sensitivities to morality, see, for example, LARRY A. HICKMAN, *JOHN DEWEY'S PRAGMATIC TECHNOLOGY* 191–92 (1992).

<sup>89</sup> Sacks, *supra* 87, at 227. On the essential moral value of human and cultural diversity, see JONATHAN SACKS, *THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS* (2002).

As Sacks writes, “We are not yet in sight of a global contract whereby nation states agree to sacrifice part of their sovereignty to create a form of world governance. That is a distant prospect. Biblical theology, however, suggests an alternative, namely a global covenant. “Covenants are more general, moral, and foundational than contracts.”<sup>90</sup> If, as Robert M. Cover thought, there are in Jewish tradition some ideas that are relevant even to modern secular law,<sup>91</sup> the idea of covenant can be a candidate for providing deeper reflection on contemporary contractual theories that often have only a minor binding moral force.

In recent years, scholars of Jewish law and technology have promoted the notion that Jewish tradition has much to contribute to the tech policy discussion.<sup>92</sup> In view of these notions, the idea of covenant in Jewish (or Hebraic<sup>93</sup>) tradition may contribute to deliberating the complex problems of tech users vis-à-vis tech firms and regulation. Here, we follow José Faur,<sup>94</sup> Suzanne Last Stone,<sup>95</sup> Roberta R. Kwall,<sup>96</sup> and other legal scholars who emphasized the covenantal qualities of Jewish law, namely its humanistic and fallibilistic (sensitive to particular life conditions and to past mistakes) qualities.<sup>97</sup> This jurisprudential quality assists in considering the widely discussed phenomenon of the collapse of interhuman and legal trust in the context of technology users, tech corporations, and state regulators, and the ways this trust might be rehabilitated, through common effort of world religions and cultures.

### **Covenantality: Biblical and Post-biblical Characteristics**

Covenant is a biblical idea, which has some background in Near Eastern cultures—Hittite, Mesopotamian—in the vassal treaties of Assyria, and more.<sup>98</sup> Similar to such political or international treaties, the relationship between God and the people of Israel was portrayed as asymmetrical. But different from such treaties, the stronger side in the biblical covenant (namely, God) is deeply interested in the physical and moral well-being of the weaker side. Indeed, as we learn from the frequent instruction to care for and love the orphan, widow,

<sup>90</sup> Sacks, *supra* 87, at 229. There are debates over the conceptual relationship between covenant, law, and contract. Is contract a mechanism of the covenant? Or is covenant an institution of the law? For the sake of this article, we assume that covenant is the overarching authoritative and moral concept that influences how particular laws are formed and interpreted. By that we clearly differ from typical positivist conceptions of law, whether Hobbesian or Schmittian.

<sup>91</sup> See Robert M. Cover, *Nomos and Narrative*, 97 HARVARD LAW REVIEW 4, 9 (1983) (arguing that legal traditions include “not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it”).

<sup>92</sup> See, e.g., Gertrude N. Levine & Samuel J. Levine, *Internet Ethics, American Law, and Jewish Law: A Comparative Overview*, 21 JOURNAL OF TECHNOLOGY LAW AND POLICY 37 (2016); Kenneth A. Bamberger & Ariel E. Mayse, *Privacy in Society: Jewish Law Insights for the Age of Big Data*, 36 JOURNAL OF LAW AND RELIGION 495 (2021).

<sup>93</sup> Despite several distinctions between the terms *Hebraic* and *Jewish*, we use them interchangeably here.

<sup>94</sup> See José Faur, *Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective*, 14 CARDOZO LAW REVIEW 1657, 1661 (1992).

<sup>95</sup> See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARVARD LAW REVIEW 813, 843–44 (1993).

<sup>96</sup> Roberta R. Kwall, *The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights*, 14 VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW 893–900 (2012).

<sup>97</sup> On pragmatic fallibilism, see Nadav S. Berman, *Pragmatism and Jewish Thought: Eliezer Berkovits’s Philosophy of Halakhic Fallibility*, 27 JOURNAL OF JEWISH THOUGHT AND PHILOSOPHY 86 (2019).

<sup>98</sup> See MOSHE WEINFELD, DEUTERONOMY AND THE DEUTERONOMIC SCHOOL 59–157 (1992). Note that we have no presumption of discerning the ultimate origin of the idea of covenant. On the concept of covenant between the Hebrew Bible and the New Testament, see Christoph Koch, *Covenant*, in ENCYCLOPEDIA OF THE BIBLE AND ITS RECEPTION ONLINE (2012), <https://doi.org/10.1515/ebr>.

and stranger (Deuteronomy 10:18 and dozens of other instances in the Pentateuch),<sup>99</sup> the Hebraic covenant stresses that not mere force but *care* should govern social relationships.<sup>100</sup> Based on the Hebrew Bible, covenant became an overarching concept in early Jewish tradition, which remained influential in later Judaism (after going through several modification and conceptual adjustments). We suggest defining Jewish covenantality as comprising responsibility, reciprocity, and reasonability.

Covenantality enjoyed a renaissance within twentieth-century American Jewish thought, and our conceptualization is clearly influenced by this renaissance. A main proponent of the idea of covenant is Rabbi Eugene B. Borowitz,<sup>101</sup> who accounted for its affiliation with the modern democratic ethos. Another proponent is Rabbi David Novak, who in his book *Covenantal Rights* highlights the connection between covenantality and sociality.<sup>102</sup>

We also note the contributions of David Hartman,<sup>103</sup> Daniel J. Elazar,<sup>104</sup> Irving (Yitz) Greenberg,<sup>105</sup> and Alan L. Mittleman.<sup>106</sup> Their covenantal sensitivities emphasize the elements of responsibility, reciprocity, and reasonability. In addition to its foundational role in Judaism, the concept of covenant was influential in the development of Western democratic ethos, in nourishing the enlightenment and federalist humanist trajectories,<sup>107</sup> and in human rights discourse,<sup>108</sup> which in their turn, were taken seriously by Jewish sages.<sup>109</sup>

### *The Hebraic Covenant: General Characterizations*

In general, covenant is a legal agreement that defines a relationship between two parties. There are, obviously, various forms of covenants, including those between equal parties and those between asymmetric ones. The dialogical temper of covenantal thinking in Jewish tradition is introduced by two facts, linguistic and axiological. First, as Sacks observed, the English verb *to obey* has no clear equivalent within the early Hebrew language. When the

<sup>99</sup> The translation of this biblical verse and the next ones, are based on the Jewish Publication Society's TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES (1985).

<sup>100</sup> See Benny Porat, *Brotherhood as a Political Metaphor* [Hebrew], in *SEARCH OF SOLIDARITY: AN ISRAELI JOURNEY* 13, 25, 60 (Yedidia Z. Stern & Benny Porat eds., 2014). The above relational scheme is well expounded philosophically by Charles Hartshorne, who contends, "The divine attributes are abstract types of social relationship." CHARLES HARTSHORNE, *THE DIVINE RELATIVITY: A SOCIAL CONCEPTION OF GOD* 156 (1948).

<sup>101</sup> EUGENE B. BOROWITZ, *RENEWING THE COVENANT: A THEOLOGY FOR THE POSTMODERN JEW* 207–65 (1991).

<sup>102</sup> DAVID NOVAK, *COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY* 78 (2000) ("[O]ne cannot understand the covenant as the true locus of all rights and duties, if one takes the individual person as the ontological starting point. The core of the covenant is not the relationship between God and the individual human person; it is the relationship between God and the community he has elected for this covenantal relationship. That is certainly clear from the teaching of Scripture itself.").

<sup>103</sup> See, for instance, DAVID HARTMAN, *A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM* 21–41 (1997); Hartman argues that human transactions are the archetype of covenant theology.

<sup>104</sup> See DANIEL J. ELAZAR & STUART A. COHEN, *THE JEWISH POLITY: JEWISH POLITICAL ORGANIZATION FROM BIBLICAL TIMES TO THE PRESENT* 1–44 (1985).

<sup>105</sup> See IRVING GREENBERG, *FOR THE SAKE OF HEAVEN AND EARTH: THE NEW ENCOUNTER BETWEEN JUDAISM AND CHRISTIANITY* 161–75 (2004).

<sup>106</sup> See ALAN L. MITTLEMAN, *THE SCEPTER SHALL NOT DEPART FROM JUDAH: PERSPECTIVES ON THE PERSISTENCE OF THE POLITICAL IN JUDAISM* 71–90 (2000).

<sup>107</sup> See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); *FEDERALISM AND POLITICAL INTEGRATION* (Daniel J. Elazar ed., 1984); *POLITICAL HEBRAISM: JUDAIC SOURCES IN EARLY MODERN POLITICAL THOUGHT* (Gordon Schochet, Fania Oz-Salzberger & Meirav Jones eds., 2008).

<sup>108</sup> See PHILIP GORSKI, *AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT* 37–59, 143–72 (2017).

<sup>109</sup> See Amos Israel-Vleeschhouwer, *The Attitudes of Jewish Law Toward International Law: Analyzing Jewish Legal Materials and Processes* [Hebrew] 49–172 (2012) (unpublished Ph.D. dissertation, Tel Aviv University).



biblical God instructs Israel to “hear,” it means being able to challenge oneself and receive a reasoned moral voice.<sup>110</sup> Second, the dominant model of divine command morality, according to which morality is *fully* dependent on God’s command and on the arbitrary divine will (a theory that is prevalent in Christianity and Islam), has only a minor place in Jewish tradition, as Avi Sagi and Daniel Statman have observed.<sup>111</sup> The outcome of these sensitivities in Jewish tradition is a thick concept of both interpretation and the phenomenon of dispute,<sup>112</sup> which paves the way for a moderate pluralism.

The following taxonomy of the idea of covenant is indebted to Rabbi Hayyim Hirschensohn, a modern pioneer of thinking about Judaism and modernity through the covenantal prism.<sup>113</sup> Hirschensohn’s account of biblical covenants appears in his *Elleh Divrei haBrit* (these are the words of the covenant), where he analyzes the unfolding of biblical covenants: from the universal Noachide covenant with humanity as a whole (Genesis 9:1–7) and its rainbow symbol,<sup>114</sup> to the particular-national Israelite covenant (Exodus 20:1–23).<sup>115</sup> These covenants (the Noachide and the Israelite) are not mutually exclusive, but rather complementary and based on care for all human beings and tolerance toward other civilizations.

The biblical covenant is formulated between and assented by God and human beings, who are fallible (but not *fallen*<sup>116</sup>). The possibility of sin or moral decline, in addition to the possibility of divine repentance, create the possibility, if not the *necessity*, of renewal and amendment of earlier biblical covenants. This partnership between God and humans is predicated on the biblical notion of *imago dei*, namely the likeness (however partial) between God and humans, all of which are created in the image of God.<sup>117</sup> This point is crucial: the nearness of God (Deuteronomy 4:7) gives the biblical covenant its unique traits that seemingly could not exist between humans and an extremely transcendent deity.

In early Jewish tradition, the constitution of covenant was not a one-time event (at Mount Sinai), but rather a *process* of covenant making, re-navigating, and reaffirming. This process is documented throughout the Pentateuch and later in the books of Joshua, Samuel, Kings (in the days of Kings David, Solomon, Josiah, and so on) and to Ezra and Nechemia (see Ezra

<sup>110</sup> See JONATHAN SACKS, *LESSONS IN LEADERSHIP: A WEEKLY READING OF THE JEWISH BIBLE 251–56* (2015) (discussing *parashat* (weekly Torah reading of) Ekev). If Sacks is correct, then the famous expression of loyalty in Exodus 24:7 (“na’aseh ve-nishm’a”), that the Israelites stated after the Sinaitic revelation, should be interpreted as being open to *hear* God’s word and properly implement it in their lives, rather than as *do and obey*.

<sup>111</sup> See Avi Sagi & Daniel Statman, *Divine Command Morality and Jewish Tradition*, 23 *JOURNAL OF RELIGIOUS ETHICS* 39, 61 (1995); Jacob Joshua Ross, *Divine Command Theory in Jewish Thought: A Modern Phenomenon*, in *INTERPRETATION IN RELIGION* 181 (Shlomo Biderman & Ben-Ami Scharfstein eds., 1992).

<sup>112</sup> See MOSHE HALBERTAL, *INTERPRETATIVE REVOLUTIONS IN THE MAKING: VALUES AS INTERPRETATIVE CONSIDERATIONS IN MIDRASHEI HALAKHAH* [Hebrew] 197–204 (1999), who states that for the Sages, “the legitimacy for dispute is anchored in certain conceptions that ascribe multiplicity of meaning to revelation itself” (198).

<sup>113</sup> On Rabbi Hayyim Hirschensohn’s thought, see ELIEZER SCHWEID, *DEMOCRACY AND HALAKHAH* (Amnon Hadary, trans., 1994); DAVID ZOHAR, *JEWISH COMMITMENT IN A MODERN WORLD: RABBI HAYYIM HIRSCHENSOHN AND HIS ATTITUDE TOWARDS MODERNITY* [Hebrew] (2003).

<sup>114</sup> According to the Talmudic tradition, the Noachide covenant includes seven basic laws, most of which are prohibitional: (1) not to worship idols (*avodah zarah*); (2) not to curse God (*birkat ha-shem*); (3) not to commit murder (*reẓah*); (4) not to commit adultery, bestiality, or sexual immorality (*gillui arayot*); (5) not to steal (*gezel*); (6) not to eat flesh torn from a living animal (*ever min ha-hai*); (7) to establish courts of justice (*dinim*). See TOSEFTA, *AVODAH ZARAH* 9:4; BABYLONIAN TALMUD [BT], *Sanhedrin* 56a–60a; see also NAHUM RAKOVER, *LAW AND THE NOAHIDES: LAW AS A UNIVERSAL VALUE* 9–30 (1998). On the universal trajectory in early Judaism, see Marc Hirshman, *Rabbinic Universalism in the Second and Third Centuries*, 93 *HARVARD THEOLOGICAL REVIEW* 101–15 (2000).

<sup>115</sup> HAYYIM HIRSCHENSOHN, *ELLEH DIVREI HABRIT* [Hebrew], vols. 1–3 (1926–1928).

<sup>116</sup> Compare with 136 below.

<sup>117</sup> YAIR LORBERBAUM, *IN GOD’S IMAGE: MYTH, THEOLOGY, AND LAW IN CLASSICAL JUDAISM* (Michael Prawer, trans., 2015); YOCHANAN MUFFS, *THE PERSONHOOD OF GOD* 1–4, 171–78 (2005); JOSHUA A. BERMAN, *CREATED EQUAL: HOW THE BIBLE BROKE WITH ANCIENT POLITICAL THOUGHT* 3–50 (2008).

10:1–44; Nehemiah 13:1–31). The biblical idea of covenant has an aspect of election or national chosenness, but this election is predicated primarily on a commitment to fulfilling the divine moral vocation, rather than mere privilege. As part of that, the earth and heaven are not only testifying in the biblical covenant (Deuteronomy 32:1–52) but also depicted as benefactors and punishers—depending on the deeds of the Hebrews.<sup>118</sup> It is noteworthy that Christianity had originated as a renewal of the biblical covenant,<sup>119</sup> based on biblical verses such as Jeremiah 31:30–32, which speaks of a “new covenant.”<sup>120</sup> In this regard, Christianity is a product and continuity of the biblical covenantal ethos itself.<sup>121</sup>

What is the legal import of the covenantal ethos? Does it enable legal flexibility, or does it mandate a form of originalism? As José Faur has contended, the covenant puts much weight on the side of the interpreter, whose moral discretion is validated by the covenant.<sup>122</sup> In the Sinaitic covenant, *the subjects of the law have a profound role in interpreting and reshaping the very conditions of the religious contract (that is, covenant) by which they are obligated.*<sup>123</sup> Hebraic covenantality holds human beings highly credible. The covenant is thus a form of deep contractual agreement between two parties by which they take upon themselves mutual responsibility. The centrality of the covenant in the Hebraic ethos is also recognized outside the circle of Jewish legal studies.<sup>124</sup>

#### *The Possibility of a (Relatively) Voluntary Entry and Exit*

Although the requirements of the Hebraic covenant are demanding, the right to exit or opt out is a real possibility. Even though the biblical covenant is by no means liberal in the modern sense, it involved many volitional elements in terms of entry and exit. If a person wanted to join the Jewish people (as Ruth the Moabite did)<sup>125</sup> or to exit the covenant (as many Israelites of the northern tribes did when assimilated in Assyria: see 2 Kings 17),

<sup>118</sup> See Hava Tirosh-Samuels, *A Jewish Perspective on Religious Pluralism*, 8 *MACALESTER INTERNATIONAL* 73, 78 (2000), who states that “the covenantal paradigm established a dialectical relationship between Israel’s well-being as experienced in history and Israel’s commitment to God. When Israel is exclusively loyal to God ... Israel flourishes and prospers. But when Israel forgets the special covenant with God and adopts the ways of other ‘gods,’ it incurs great suffering.”

<sup>119</sup> It is probably for both this reason and as a reaction to the modern higher criticism in biblical studies, that many Jews developed a “firewall mentality”—unwilling to entertain the idea that gradual covenantal process is rooted in early Jewish tradition. See BENJAMIN D. SOMMER, *REVELATION AND AUTHORITY* 22 (2015).

<sup>120</sup> See Koch, *supra* 98.

<sup>121</sup> There are, obviously, important reservations to be made about the way in which certain trajectories in early Christianity seemingly deviated from the dynamic temper of biblical covenants. See for instance CHRISTINE HAYES, *WHAT’S DIVINE ABOUT DIVINE LAW? EARLY PERSPECTIVES* 140–64 (2015), especially her analysis of Saint Paul’s rigid concept of divine truth.

<sup>122</sup> Faur, *supra* 94, at 1675 (“What was ratified at the covenant on Sinai was not the ‘intention’ of the lawgiver, but the actual law, as understood by those who received it. It follows that the task of the judiciary is not to recapture the ‘original intent’ of the legislator, but to apply the *text* of the law to the situation at hand, by making innovative connections, generating, thereby, fresh meaning and understanding of the law.”).

<sup>123</sup> A natural product of this covenantal ethos are Talmudic stories, such as that of Honi the Circle-drawer (*hame’agel*), in which God is called into earthly jurisdiction. The story of Honi the Circle-drawer appears in MISHNAH, Ta’anit 3:8. Variations of this story appear in BT, Ta’anit 23a, and TALMUD YERUSHALMI, Ta’anit 3:9–10. See Suzanne Last Stone, *Rabbinic Legal Magic: A New Look at Honi’s Circle as the Construction of Law’s Space*, 17 *YALE JOURNAL OF LAW AND THE HUMANITIES* 97 (2005).

<sup>124</sup> See, for instance, the following observation by Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 *VIRGINIA LAW REVIEW* 583, 626 (1993): “The book of Exodus records God’s proposition to Israel ... This calling gave Israel its special character as a people ... This consciousness by the community that its identity and status were based upon a relationship with God is an ongoing biblical theme.”

<sup>125</sup> In post-biblical Judaism, the ritual process for joining the Jewish people was significantly transformed, yet the basic fact is that entrance into the Jewish commonwealth is initially open for every human being. See MENACHEM FINKELSTEIN, *CONVERSION: HALAKHAH AND PRACTICE* 15–160 (Edward Levin trans., 2006), who refers (15, 31) to Maimonides’s

they could do so. To be sure, the Hebraic covenant is very explicit about who is the stronger side and about the priority of goodness over evil deeds,<sup>126</sup> but the choice is ultimately left to human beings to make.

Because of the covenantal recognition of human imperfection, interpersonal rebuke has a vital role in Jewish tradition and in the formation of its discursive character.<sup>127</sup> Where dissatisfaction increases and turns into an overarching resentment, human beings may quit or exit the covenant, by joining (or assimilating into) another religion or nation. To be sure, joining a social group or leaving it is never a simple task. In every group of belonging (such as a family or a nation), joining or exiting is, in most cases, complex emotionally, financially, and technically. The covenantal setting is no different.

Based on the relative voluntariness of the biblical covenant, later covenantal thinkers emphasize the indispensability of *consent*.<sup>128</sup> This observation is inherent in Jewish tradition, and for this reason, the Sages were troubled by the seeming imposition of the Torah on the Israelites at Mount Sinai. This concern is not merely external to the Hebrew Bible, as we learn from the reparative revelation to Elijah at Mount Sinai (1 Kings 19:8–12), which presents a “still small voice,” alluding to the former, forceful revelation at Sinai. The Sages were similarly concerned by the relatively passive role of the Israelites at Sinai and their consent to rules they could not fully understand at the time. The Sages consequently claimed that the Israelites reaffirmed their covenantal commitment later in the days of Queen Esther in Persia, in the early Second Temple period.<sup>129</sup> The import of such covenantal theological normativity for those who remain loyal to the covenant, and to the learned sages more particularly, goes as far as the possibility of *disapproving* God’s laws,<sup>130</sup> or suspending divine law, when moral concerns are at stake.<sup>131</sup> Such hermeneutical veto is an authentic expression of the space left to human reasoning by God in the covenantal ethos.

### *Relational Aspects of the Covenant*

Clearly, the covenant between God and his people was *asymmetrical* and not egalitarian in the modern sense. However, the Hebraic covenant emphasizes *commitment*, *partnership*, and *mutuality*: “I will be ever present in your midst: I will be your God, and you shall be my

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assertion in *Mishneh Torah*, Laws of Prohibited Sexual Relations (*hilkhot issurei bi’ah*) 12:17, 20, that every gentile who willingly undergoes conversion legitimately joins the people of Israel.

<sup>126</sup> On the importance of choosing goodness over evil and facing the attraction to Thanatos, death, and destruction in the thought of Nietzsche, Marx, Freud, Schmitt, and others, see JONATHAN SACKS, *FUTURE TENSE: JEWS, JUDAISM, AND ISRAEL IN THE TWENTY-FIRST CENTURY* 20–23 (2009).

<sup>127</sup> See MATTHEW S. GOLDSTONE, *THE DANGEROUS DUTY OF REBUKE: LEVITICUS 19:17 IN EARLY JEWISH AND CHRISTIAN INTERPRETATION* (2018).

<sup>128</sup> See the illuminating observation by KENNETH SEESKIN, *AUTONOMY IN JEWISH PHILOSOPHY* 50–51 (2001) (“The reason the Bible emphasizes consent is that it wants to say that human beings participate in the holy order not as slaves but as moral agents. Rather than authorship, the Bible presents the idea of appropriation under the guise of partnership ... there is no passage where God asks the people to submit to divine authority without receiving an account of what that commitment entails.”).

<sup>129</sup> BT, Shabbat 88a. The textual jumping board for this discussion is a verse in Exodus 19:17 “and they stood at the bottom [*be-tahtit*] of the mount,” which is interpreted by the sages to mean either that the Israelites stood *under* Mount Sinai and were forced by God to accept the Torah, or they are buried under the mountain. On the question whether the ancient covenant still binds for later generations, see HIRSCHENSOHN, *supra* 115, 1:75–80.

<sup>130</sup> Elliot Dorff conceptualizes Jewish law in organic terms, as a body that has both stability and change. See ELLIOT N. DORFF, *FOR THE LOVE OF GOD AND PEOPLE: A PHILOSOPHY OF JEWISH LAW* 3–85 (2007).

<sup>131</sup> Hirschensohn wrote, “But if the majority of the public is not capable of fulfilling it [a certain rabbinic enactment, or *gzerah*] due to difficulties it poses to the demands of daily life, this enactment does not apply to them [the public] at all and it is canceled ... for the maturity [*hallut*] of the enactment and its details are particular to each and every congregation.” HAYYIM HIRSCHENSOHN, *SEFER MALKI BAQODESH* [Hebrew] 100–01 (David Zohar ed., 2013); ZOHAR, *supra* 113, at 86. See also Oren Gross, *Venerate, Amend ... and Violate*, 46 *ARIZONA STATE LAW JOURNAL* 1151 (2015).

people” (Leviticus 26:12). The biblical God is not an arbitrary (and surely not a hostile) sovereign, but displays consistent game rules by which he plans to abide: “if you follow my laws and faithfully observe my commandments. I will grant your rains in their season, so that the earth shall yield its produce and the trees of the field their fruit” (Leviticus 26:3–4). Therefore, when humans feel that God is violating his promise for a fair retribution, resentment arises, which the Bible initially reaffirms (as in the book of Job).<sup>132</sup> This biblical portrayal of a comprehensible world is perhaps what leaves room or provides a mode, for the high degree of autonomy that we find in Jewish law.<sup>133</sup>

To be sure, there are important transformations in post-biblical Judaism. The end of the biblical prophecy era does not mean that God ceases to function as a partner, nor that he ceases to be the object of prayers and Torah study. Yet, the more intimate and immediate dialogue found in the Hebrew Bible is transformed into the interpersonal discourse of the *beit-midrash* (house of study)—that is, to the exegetical activity of interpreting the sacred texts.<sup>134</sup>

### **Covenantal Principles: Responsibility, Reciprocity, and Reasonability**

In light of this review of the intellectual-historical seating of the concept of covenant in Jewish tradition, below we conceptualize with a focus on its three axiological components: responsibility, reciprocity, and reasonability.

#### **Responsibility**

Both parties to the covenant, God and human beings (the Hebrews in the Jewish case), are considered moral agents who are being held accountable for their deeds vis-à-vis the duties and principles of the covenant. The power asymmetry between the parties—God is clearly stronger—does *not* imply that no obligations are cast on the stronger side; God’s omnipotence is the basis of his benevolence and mercy. The idea of creation in Jewish tradition reflects a divine involvement and responsibility.<sup>135</sup> In this sense, the Jewish idea of covenant shifted significantly from the prevalent authoritarian Near-Eastern model. The biblical covenants assume that human beings are capable of moral action<sup>136</sup> and that they have the faculty (however limited) of distinguishing between good and evil.

What, ultimately, is the nature of responsibility in covenantal thought? As implied in the term *responsibility* (response-ability), the human *verbal* capacity to respond to the divine call<sup>137</sup> is central to what responsibility is. This dialogical leitmotif is dominant in the Hebrew

<sup>132</sup> On the profound place of confrontational religiosity in the Bible and in Talmudic writings, see DOV WEISS, *PIOUS IRREVERENCE: CONFRONTING GOD IN RABBINIC JUDAISM* (2017). For further refinement of the exegetical nature of confrontational religiosity, see MENACHEM FISCH, *COVENANT OF CONFRONTATION: A STUDY OF NON-SUBMISSIVE RELIGIOSITY IN RABBINIC LITERATURE [Hebrew]* (2019).

<sup>133</sup> See HANINA BEN-MENAHEM, *JUDICIAL DEVIATION IN TALMUDIC LAW: GOVERNED BY MEN, NOT BY RULES* (1991).

<sup>134</sup> On the nature and unfolding of this exegetical culture, see MOSHE HALBERTAL, *PEOPLE OF THE BOOK: CANON, MEANING AND AUTHORITY* (1997); ELIEZER BERKOVITS, *NOT IN HEAVEN: THE NATURE AND FUNCTION OF JEWISH LAW* (2010).

<sup>135</sup> See ELIEZER BERKOVITS, *GOD, MAN, AND HISTORY* 65 (2004) (“Creation, as the bond between God and the world, necessarily involves God in the destiny of the world ... To care is to be involved.” Furthermore, in the biblical narrative God is portrayed as courting the Israelites; Moses, for his part, advocates faith in God as the best choice for his people— “Who is like unto Thee, O Lord, among the gods?” (Exodus 15:11)—as if God competes with other deities.).

<sup>136</sup> The doctrine of Fallenness, and surely its strict interpretations (which are more prevalent in Western Christianity), seems incompatible with the above description of sustainable moral capacity.

<sup>137</sup> Despite the notion that prophecy belongs to the remote past, many thinkers hold that in some sense, divine call remains a live option. For a prominent articulation of such dialogical stance without lapsing into fundamentalism, see ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* (1976). On the complications of halakhah

Bible, from the creation of the world by divine words, through the echoing question “where are you?” (*ayekah*; Genesis 3:9). This dialogical character of humans and language is foundational of the human condition as coexistence with others. Many actions that humans carry out have consequences and cause possible harms for other humans, animals, and the environment—and for that, they are *responsible*.

The biblical moment of *ayekah* (which is shared by Abrahamic religions more broadly) is at the core of what we term today as *answerability*, *accountability*, and *explainability*. The Bible further emphasizes the narratological fact that God turns to humans (“and God said to Abraham/Moses/the Israelites ...”), thus assuming that they have a choice to refuse or ignore this call—as in the biblical story of Jonah. Humans are thus considered as having moral freedom and capabilities and a linguistic capacity that enables them to interact verbally with humans and with God; the conversation is not one-sided, but dialogical.<sup>138</sup> The covenantal notion of responsibility implies that interhuman speech and dialogue are vital.

The element of responsibility in the covenant brings with it the idea of *red lines*—hence the notion of *boundary* (*seyag*) in Jewish law.<sup>139</sup> Such red lines are reflected in the notion that human dignity is beyond commodification: not everything is for sale.<sup>140</sup> Based on that, slavery, for example, is viewed negatively.<sup>141</sup> At the same time, and despite the legalistic temper of Jewish law, it is in many ways permissive. Based on the melioristic or positive Jewish view toward this world, in Jewish law there is a vast realm of *reshut* (optional matters, as distinct from *hovah*, or duty), that the law is generally permissive about, unless there is a good reason to question the legitimacy of this or other behavior.<sup>142</sup>

### Reciprocity

In the Hebrew Bible and in later Jewish tradition, covenant is predicated on *relational* grounds, and is examined first and foremost in terms of deeds and actions.<sup>143</sup> Covenant, in this regard, is not a dictator’s game between powerful and powerless,<sup>144</sup> but a dialogical

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vis-à-vis prophecy, see AVINOAM ROSENAK, THE PROPHETIC HALAKHAH: RABBI A. I. H. KOOK’S PHILOSOPHY OF HALAKHAH [Hebrew] (2007).

<sup>138</sup> On verblat and speechlessness in the Jewish tradition, see ANDRÉ NEHER, THE EXILE OF THE WORD: FROM THE SILENCE OF THE BIBLE TO THE SILENCE OF AUSCHWITZ (David Maisel trans., 1981).

<sup>139</sup> On the significance of negative commandments in Judaism vis-à-vis the modern technological condition of human omnipotence, see HANS JONAS, *Contemporary Problems in Ethics from a Jewish Perspective*, in PHILOSOPHICAL ESSAYS: FROM ANCIENT CREED TO TECHNOLOGICAL MAN 168, 181 (1974).

<sup>140</sup> This moral intuition is presented by MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012). In BENJAMIN (BENNY) PORAT, JUSTICE TO THE POOR: THE PRINCIPLES OF WELFARE REGULATION FROM BIBLICAL LAW TO RABBINIC LITERATURE [Hebrew] 21–58 (2019), Porat suggests that the biblical opposition to enslavement (see Genesis 47:13–26) stands at the core of the Mosaic principles of social justice.”

<sup>141</sup> See BT, Kiddushin 22b, which states that since the Israelites (and by extension, every human being) are God’s servants, they cannot—in the strict sense—be the slaves of a human being. Another, more concrete example, for a rigid covenantal limit is expressed in the disgust toward the phenomenon of commodifying dead bodies (as exemplified in the “Body Worlds” exhibitions). See AVIAD HACOEN, TORAH AND LAW: JEWISH LAW IN THE WEEKLY PORTION [Hebrew] 217–24 (2011).

<sup>142</sup> Walzer et al., *supra* 20, at 552, define the category of *reshut* in the following manner: “lit., ‘permission, license,’ opposite of ‘prohibition’; often used to designate a normatively neutral realm contrasted with the realm covered by *mitzvah* or Torah.”

<sup>143</sup> Rachel Sabath Beit-Halachmi, *Refining the Covenant*, in A LIFE OF MEANING: EMBRACING REFORM JUDAISM’S SACRED PATH 89, 92 (Dana Evan Kaplan ed., 2018): “The covenant evolved and was characterized by a mutual commitment. God would protect Abraham and his descendants, and they, in turn, would maintain their faith in God and observe God’s commandments.”

<sup>144</sup> As in Marxist theories and as implied by antiliberal theories such as that of Carl Schmitt, *supra* 17. The capitalism-socialism dispute is vast and clearly exceeds the scope of this article. It seems, however, that there is a considerable agreement nowadays in the social-democratic milieu that a functioning economy needs private

distribution of care and authority between the parties, in a way that is built on trust, justice, free choice, and reciprocity.<sup>145</sup> The outcome is that in the covenantal setting (unlike a dictatorship), disappointment, resentment, and punishment are real possibilities. This mutuality has its narratological grounds in the Bible. The biblical covenant is often portrayed as a marriage between God and the Israelites (Jeremiah 2:2).<sup>146</sup> Accordingly, the violation of fidelity on both sides is conceived as betrayal (Ezekiel 16:25). From God's side, disloyalty of humans is associated with the performing of idolatry,<sup>147</sup> which is a violation of the covenantal relationship; from the human side, experiencing unjust suffering (personal or collective) evokes the problem of divine justice and theodicy. For this reason, there is (roughly speaking) only a weak emphasis on dogmatic creed in Jewish tradition, which is fairly permissive concerning expressing one's opinion, even about doctrinal matters foundational to the covenant.<sup>148</sup> This is a natural product of its covenantal mutuality. In Jewish tradition, interactions and engagements (or more generally, pragmatic interestedness<sup>149</sup>) are endorsed.

As noted above, in the Hebraic covenant, God is portrayed as a benevolent (this is also how the phenomenon of trial—or testing, *nissayon*—in the Bible can be interpreted<sup>150</sup>) rather than an omnipotent tyrant. Human beings, their relative weakness notwithstanding, are yet instructed not to manipulate God by magical means, divinization, and so on.<sup>151</sup> In the covenantal setting, relationships are not defined merely by power structures and hierarchies. For this reason, the weaker side (namely, humans) is not exempted from moral responsibility. Even when God changes the rules of the game (for example, in the new laws after the Flood, or post-Diluvium; see Genesis 9:1–17), the new regulation is not strictly imposed, but instructed, and is open to human responses and to later divine revisions. The biblical covenant has special attentiveness to the suffering of the poor and the weak; this is a basic lesson that the Hebrew Bible draws from the enslavement of the Israelites in Egypt.<sup>152</sup>

### Reasonability

Jewish tradition emphasizes the *reasonability* of the divine instruction. In general, the commandments or divine instructions are conceived as initially comprehensible: divine

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enterprise and free markets for growth and at the same time regulation and governmental security nets for the poor.

<sup>145</sup> See Yonatan Y. Brafman, *Neither Authoritarian nor Superfluous: A Normative Account of Rabbinic Authority*, in *JEWISH PHILOSOPHY IN AN ANALYTIC AGE* 276 (Samuel Lebens, Dani Rabinowitz & Aaron Segal eds., 2019).

<sup>146</sup> The term *covenant* is foundational in family law, specifically in the context of the marital bond vis-à-vis the no-fault divorce (we thank Pinhas Shifman for this remark).

<sup>147</sup> See Moshe Halbertal & Avishai Margalit, *Idolatry* 9–36 (Naomi Goldblum trans., 1992).

<sup>148</sup> David M. Grossberg, *Orthopraxy in Tannaic Literature*, 41 *JOURNAL FOR THE STUDY OF JUDAISM* 517 (2010).

<sup>149</sup> See Nadav S. Berman, *Interest, Disinterestedness, and Pragmatic Interestedness: Jewish Contributions to the Search for a Moral Economic Vision*, in *THE SPIRIT OF CONSCIOUS CAPITALISM: THE CONTRIBUTION OF WORLD RELIGIONS AND SPIRITUALITIES* (Moses L. Pava & Michel Dion eds., forthcoming), sections 1, 3.

<sup>150</sup> See Jacob Licht, *Testing in the Hebrew Scriptures and in Post-Biblical Judaism* [Hebrew] 13–29 (1973).

<sup>151</sup> *Id.* at 30–39. On the sublimation of magic within the Talmudic idea of jurisdiction, see Last Stone, *supra* 123, at 122, emphasizing possible overlaps between religion (and prayer in this regard) and magic, and at the same time warning that “anyone familiar with litigation appreciates the persistence of ‘magic-like’ rituals in law. In-court procedures are so rigidly followed that they can be reduced to a set of procedural steps that apply to all cases.”

<sup>152</sup> As Maimonides contended in *MISHNEH TORAH, Laws of Gifts to the Poor* 10:3, God is “close to the cry of the poor” (referencing Exodus 22:26), and therefore one ought to be sensitive to the harm of vulnerable people, for “the covenant establishes their protection” (*brit kerutah lahem*). See also how R. Ya'akov B. Asher, *ARBA'AH TURIM, Yoreh De'ah, Laws of Charity*, § 247, expounds on this issue. On such sensitivity as central to the biblical ethos, see Micah Goodman, *MOSES' LAST ORATION* [Hebrew] 89–186 (2014), who argues that the Mosaic legacy stressed that social justice and sensitivity are necessary conditions for political success.

instruction is expected to make sense, to be reasonable, even if this reasonability might not be immediately transparent to every external observer.

The Talmudic tradition developed a distinction between *mishpatim* (ordinances, ethical-civil laws) and *huqqim* (statutes, ritual laws),<sup>153</sup> which was later conceptualized by Rabbi Sa'adiah Gaon<sup>154</sup> as the distinction between rationally comprehended commandments (*sikhli'iyot*) and categorically incomprehensible (*shim'iyot*) divine laws.<sup>155</sup> However, as explained in many primary sources of Jewish law and the body scholarship about it, the idea that God's teaching is (across the board) moral and that it makes moral sense is central in Jewish tradition.<sup>156</sup> In other words, it is not only the interpersonal and social religious laws that are purposeful: so, too, are the so-called ritual commandments.<sup>157</sup>

At the same time, as Maimonides had argued, there is a built-in contingency in the specifications of particular commandments, as they inescapably contain a certain degree of unexplainability in their details.<sup>158</sup> It seems that there is here a *transparency/opacity zero-sum game* (call it *transparency/opacity conservation law*) in Jewish law—and perhaps in any legal system, since the aim for an apodictic, non-justified law (this is often the case in legal codices) makes it harder for the readers or the addressees of the law to seek for the rationales of particular laws. On the other hand, when the law includes all the relevant information and reasons, the reader is flooded with information and easily loses sight of principles and of the big picture. The quest for a *fully* explainable and transparent law is thus problematic or even illusionary.<sup>159</sup>

Jewish tradition also includes less rationalistic<sup>160</sup> approaches to the importance of reasons for the commandments. Kabbalistic or mystical approaches, such as the book of *Zohar*, often hold that every detail of the commandments has far-reaching ramifications, not only on earthly matters but also on theurgic ones, on divinity itself.<sup>161</sup> In the Kabbalistic context, the covenantal notion of reasoned divine law (or *covenantal explainability*) is thus preserved, even as the nature of these reasons varies dramatically.

<sup>153</sup> See BT, Yoma 67b.

<sup>154</sup> SAADYA GAON, *THE BOOK OF DOCTRINES AND BELIEFS* 93–114 (Alexander Altmann, trans., 1948).

<sup>155</sup> See ISAAC HEINEMANN, *THE REASONS FOR THE COMMANDMENTS IN JEWISH THOUGHT: FROM THE BIBLE TO THE RENAISSANCE* 51–56 (Leonard Levin, trans., 2008). On competing models of accounting for the commandments, “Priority of Theory” versus “Priority of Practice,” see DANIEL RYNHOLD, *TWO MODELS OF JEWISH PHILOSOPHY: JUSTIFYING ONE’S PRACTICES* (2005), who conceptualizes the latter model.

<sup>156</sup> See Sagi & Statman, *supra* 111, and more comprehensively AVI SAGI, *MORALITY AND RELIGION: THE JEWISH STORY* (Batya Stein, trans., 2021), chapters 5–14; MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 83–171 (1978).

<sup>157</sup> On purposiveness in Jewish law, see DAVID WEISS HALIVNI, *MIDRASH, MISHNAH, AND GEMARA: THE JEWISH PREDILECTION FOR JUSTIFIED LAW* (1986); Zvi Zohar, *Teleological Decision-Making in Halakhah: Empirical Examples and General Principles*, 22 *JEWISH LAW ASSOCIATION STUDIES* 331–62 (2012).

<sup>158</sup> See MAIMONIDES, *THE GUIDE OF THE PERPLEXED* 506–10 (Shlomo Pines, trans., 1963). See also MOSHE HALBERTAL, *MAIMONIDES: LIFE AND THOUGHT* 164–96 (2014), which analyzes Maimonides’s rationales for removing the Talmudic discussion (*shaqla ve-tarya*) from *Mishneh Torah* in order to create a bottom line or ruling. This presumed transparency, or the shortening of discussion-protocols in order to provide a user-friendly manual, came (according to Maimonides’s critics) at the expense of the element of explainability.

<sup>159</sup> Our use of this term is indebted to ELIEZER GOLDMAN, *On the Non-illusionary Faith*, in *EXPOSITIONS AND INQUIRIES: JEWISH THOUGHT IN PAST AND PRESENT* [Hebrew] 361–71 (Avi Sagi & Daniel Statman eds., 1996).

<sup>160</sup> For a critical assessment of various late-medieval manifestations of this approach, see Yair Lorberbaum, *The Rise of Halakhic Religiosity of Mystery and Transcendence*, 34 *DINÉ ISRAEL* 1 (2020).

<sup>161</sup> See, for example, MOSHE HALLAMISH, *AN INTRODUCTION TO THE KABBALAH* 232–33 (Ruth Bar-Ilan & Ora Wiskind-Elper, trans., 1999), writing that for Kabbalists, “Observance of the Torah and the commandments creates the direct link between man and the world of *aš[er] ilut*. To perform positive precepts is to make internal links in that world, and to avoid making negative precepts prevents complications and disturbances in the descent of divine effulgence.”

### Explainability, Human Agency, and the Law's Sensitivity to Real-Life Situations

Whereas the elements of responsibility (both divine and human) and reciprocity are considered as trivial in Jewish tradition,<sup>162</sup> the element of explainability merits some elaboration in the present context. Explainability is the reason, as discussed below, for the significance of the biblical law narratives, and it is the reason why legal rigidity is often considered problematic in Jewish law and in its philosophical accounts.

The human expectation for the explainability of God's commandments obviously cannot always be fulfilled. As many scholars of Jewish law have noted, a certain degree of un-explainability might even be a heuristic postulate of divine law, set in place in order to establish moral-religious education (or character education, *bildung*).<sup>163</sup> However, reasonability has a solid basis in the Hebrew Bible, and in halakhah<sup>164</sup> (Jewish law). This invites the reader to ask what are the rationales that underlie a given ordinance. Furthermore, in the case of statutes (or ritual laws, such as the red heifer<sup>165</sup>), there are basic coherences that apply; even if the overarching rationale (or the mechanism of purification, in the case of the red heifer) is unclear, there is usually an internal or *formal*-rationality (in Max Weber's phrase): the components of the law are expected to cohere with one another.<sup>166</sup> Therefore, it would be extremely unconvincing to describe the Hebraic covenant as arbitrary or deprived of reasons and reasonability. For this reason, codification, legal rigidity, and stringency<sup>167</sup> are considered by many halakhists as sources of concern.<sup>168</sup> Moreover, as we shall now detail, this discomfort is grounded in the Pentateuch itself—the foundational and formative text of the covenant.

#### *The Law Narratives in the Pentateuch: How Covenantal Framework Effects the Law*

As we explained above, in Jewish tradition, covenantal framework results in a dialogical or relational legal temper and hence the recognition of codification as a source of legal concern. Some might argue that this covenantal flexibility is merely a post-biblical invention. However, below, we briefly consider the four Pentateuchal law narratives (*sippurei ha-hoq*) or “ad hoc legal situations,”<sup>169</sup> that illustrate the dialogical covenantal nature and its openness, namely the inability of the written commandment to cover every possible scenario. These narratives, which were thoroughly analyzed by Simeon Chavel,<sup>170</sup> who calls

<sup>162</sup> In other words, God is conceived in Jewish tradition as present (as different from *Deus absconditus* conceptions), and human beings are held accountable, based on the assumption that they have free will.

<sup>163</sup> See, e.g., BERKOVITS, *supra* 135, at 87–136.

<sup>164</sup> On Jewish law and its uniqueness as a legal system, see for instance CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW (2018).

<sup>165</sup> Or *parah adumah*, see Numbers 19. The rabbinic discussion of this Mosaic law is found in tractate Parah (*Mishnah* and *Tosefta*).

<sup>166</sup> On the element of coherence in Jewish law, see Avinoam Rosenak, *Truth Tests, Educational Philosophy, and Five Models of the Philosophy of Jewish Law*, 78 HEBREW UNION COLLEGE ANNUAL 149, 159–64 (2009).

<sup>167</sup> See the comprehensive analysis by Benjamin Brown, *Halakhic Stringency: Five Types in Modern Times* [Hebrew], 20–21 DINÉ ISRAEL 123 (2001).

<sup>168</sup> See Leon Wiener-Dow, *Indeterminate Midrash, Indeterminate Halakhah*, 27 JEWISH LAW ASSOCIATION STUDIES 50 (2017); on fallibilistic Halakhic tendencies see Berman, *supra* 97. In modern times, the creation of nation-states intensified the problem of legal rigidity from a new angle. See Leora Batnitzky, *From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law*, 26–27 DINÉ ISRAEL 7 (2009–2010). Charles Taylor's comment on “modern nomolatri” is telling: “the ‘code fetishism,’ or nomolatri, of modern liberal society ... tends to forget the background which makes sense of any code: the variety of goods which the rules and norms are meant to realize, and it tends to make us insensitive, even blind, to the vertical dimension. It also encourages a ‘one size fits all’ approach: a rule is a rule.” CHARLES TAYLOR, *A SECULAR AGE* 707 (2007).

<sup>169</sup> MICHAEL FISHBANE, *BIBLICAL INTERPRETATION IN ANCIENT ISRAEL* 98 (1989).

<sup>170</sup> See SIMEON CHAVEL, *ORACULAR LAW AND PRIESTLY HISTORIOGRAPHY IN THE TORAH* 1–22 (2014).



them *oracular novellas*, are (1) the blasphemer (Leviticus 24:10–23); (2) impure men who were incapable of bringing the Paschal sacrifice (Numbers 9:6–14); (3) the desecrator of the laws of the Sabbath day by gathering wood (Numbers 15:32–36); and (4) the daughters of ZelopheḤad and the lacuna regarding inheritance law (Numbers 27:1–11). What these cases have in common is the biblical description as an open legal question that Moses himself failed to answer.<sup>171</sup> As Michael Fishbane has observed, these inner-biblical legal narratives testify to the dynamic and covenantal making and modification of these laws.<sup>172</sup>

Ultimately, the answer to each of these four queries is prophetic: Moses consulted directly with God, who delivered the answer to Moses. The scriptural evidence is fascinating on two counts. First, the law narratives reveal that the existing law does not explicitly cover possible lacunas.<sup>173</sup> Second, in the case of the daughters of ZelopheḤad, not only is the question raised honored by the narrator, but *God himself* reaffirms their appeal: “The plea of ZelopheḤad’s daughters is just: you should give them a hereditary holding among their father’s kinsmen; transfer their father’s share to them” (Numbers 27:7). Yet it would be a mistake to conclude that biblical law is merely casuistic and lacks any formal dimension. Mosaic law and its value-oriented legislation,<sup>174</sup> which reaches its systematic peak in the Decalogue (Exodus 20:1–13; Deuteronomy 5:6–17), stands out when compared with neighboring legal systems in the ancient Near East.<sup>175</sup> Whereas the legal systems of other ancient Near East lands were not presumed to constitute comprehensive legal codes, the Pentateuch does present itself as such.<sup>176</sup> At the same time, and perhaps for this very reason, narratives are part of the biblical composition.

The conception of Mosaic law as authored by a benevolent and reason-giving God who provides space for human interpretation became formative in the Talmudic hermeneutic culture.<sup>177</sup> Because the covenant is an interpersonal encounter between God and humans<sup>178</sup> and is premised on a constant encounter between humans (*bein adam lehavero*, in Talmudic jargon), the idea of an immutable law, a once-and-for-all edict that transcends circumstances, seems to contradict the covenantal ethos. In the Pentateuchal narratives of the law, it appears that the Bible itself is pushing against such immutable legal conception. The rich narratological (or *aggadic*) world of the Hebrew Bible nourished the moral understanding of later Jewish sages and led them to recognize the value of legal flexibility and sensitivity to varying concrete circumstances.<sup>179</sup> The reflexivity of Jewish law to

<sup>171</sup> FISHBANE, *supra* 169, at 96–97. On these four ad hoc cases, see *Id.* at 98–106. On these law narratives as background for the tannaitic law, see MOSHE SIMON-SHOSHAN, *STORIES OF THE LAW: NARRATIVE DISCOURSE AND THE CONSTRUCTION OF AUTHORITY IN THE MISHNAH* 78 (2012), who writes, “these biblical narratives present unique circumstances ... which account for the emergence of a particular law or ruling. These texts are at once stories and legal sources.” In the present context, they reveal something dear about the reflexiveness of Mosaic law to bottom-up human concerns.

<sup>172</sup> FISHBANE, *supra* 169, at 96–97, writes: “The covenantal laws are the basis for many citations, precedents, and cross-references ... that the various legal collections in the Hebrew Bible were each subject to repeated exegetical revision ... where the received laws were sufficient for certain circumstances, but required modification or expansions in the light of new considerations, they were appropriately emended so as to make them viable once again.”

<sup>173</sup> *Id.* at 106.

<sup>174</sup> See MOSHE GREENBERG, *Some Postulates of Biblical Criminal Law*, in *STUDIES IN THE BIBLE AND JEWISH THOUGHT* 25–41 (1995).

<sup>175</sup> For example, the laws of Ḥammurabi.

<sup>176</sup> See FISHBANE, *supra* 169, at 96.

<sup>177</sup> See BARRY S. WIMPFHEIMER, *NARRATING THE LAW: A POETICS OF TALMUDIC LEGAL STORIES* 10 (2011), highlighting the unique Talmudic equilibrium between law and narrative, or *nomos* (*halakhah*) and narrative (*aggadah*). JANE L. KANAREK, *BIBLICAL NARRATIVE AND THE FORMATION OF RABBINIC LAW* 174 (2014), argues, “Through making biblical narrative legal, classical rabbinic literature reveals law as a central aspect of their cultural construct.”

<sup>178</sup> On encounter as basic to Jewish theology, see BERKOVITS, *supra* 135, at 3–77.

<sup>179</sup> The topic *halakhah vis-à-vis aggadah* has been researched extensively. See the review and references by ROSENK, *supra* 137, at 43–63; LORBERBAUM, *supra* 117, at 61–88.

circumstances goes hand in hand with the inclination for explainability, and sages are usually expected by their rabbinic interlocutors and by the public to make sense of how they reached this or another conclusion.<sup>180</sup>

### *The Narrative of Balaam and Balak: Reconsidering the Claim of Being a Mere Intermediary*

Another way to comprehend the significance of covenantality vis-à-vis issues related to law and technology in general, and the tech giants in particular, is by considering the biblical story of Balak and Balaam (or *Bil'am*, as his name is pronounced in Hebrew) (Numbers 22–24). Balaam, who had magical skills, is from a plain biblical perspective (*peshat*) a member of the Noachide covenant. He was asked by Balak the king of Moab to curse the Israelites, then a collective of nomad refugees, to prevent them from trespassing the land of Moab. God is angered by this request and prevents Balaam in various ways from carrying out the notorious Moabite plan, and instead makes Balaam bless the Israelites.

Within this broader story, two issues are relevant to the present context: (1) Balaam, as a magician, can be described as a proto-technology officer<sup>181</sup> who is expected by the Moabites to provide a magical service, of the kind identified as black magic;<sup>182</sup> and (2) Balaam's claim that he has no initial responsibility for his actions (Numbers 22:18, 38; 23:12) because he is a mere vessel of God's will. This claim of being a mere intermediary can be understood as piety (namely, Balaam's insistence not to manipulate God), but in the immediate context, it mainly mirrors Balak's intention to use Balaam as magician—as an offensive proxy. After the epistemic lesson that God teaches Balaam with the ass whose mouth is opened and speaks (Numbers 22:22–30), Balaam declares, “For there is no divination [*naḥash*] in [the descendants of] Jacob, neither is there any magic [*kessem*] in Israel” (Numbers 23:23). Many commentators throughout the generations learned from this story that the Hebrew Bible prohibits the making of magic into the cosmic operation system at the expense of morality.<sup>183</sup> Justice and compassion, and not mere force (however mystical or noble) are the main interest of the biblical God and of the covenantal ethos.<sup>184</sup>

Yet there is also a lesson from this biblical story in the context of law and technology. Balaam claimed to be a mere intermediary in providing his service. Balak attempted to utilize a magical mechanism (or service), and God asserts and clarifies that the agent cannot presume to lack agency.<sup>185</sup> On the one hand, Balaam does say to Balak that his hands are tied

<sup>180</sup> See the historical demonstrations provided by ADIEL SCHREMER, MA'ASE RAV: HALAKHIC DECISION-MAKING AND THE SHAPING OF JEWISH IDENTITY [Hebrew] (2019).

<sup>181</sup> On the implicit existence of technology in premodern periods (under the terms *techne*, *ars*, *art*, and so on), see HICKMAN, *supra* 88, at 80–106; ERIC SHATZBERG, TECHNOLOGY: CRITICAL HISTORY OF A CONCEPT (2018).

<sup>182</sup> Midrash (early rabbinic interpretation) BAMIDBAR RABBAH, interestingly suggests in chapter 20 that Balak also was a magician, and even more talented than Balaam. Perhaps Balak had speculated that such task might be particularly risky.

<sup>183</sup> See SHRAGA BAR-ON, LOT CASTING, GOD, AND MAN IN JEWISH LITERATURE: FROM THE BIBLE TO THE RENAISSANCE [Hebrew] 107–18 (2020). On the Talmudic commentaries on Balaam and his magical skills, see Ephraim E. Urbach, *Homilies of the Rabbis on the Prophets of the Nations and the Balaam Stories*, 25:3 TARBIZ 272 (1953). On early Jewish magic more broadly, see YUVAL HARARI, JEWISH MAGIC: BEFORE THE RISE OF KABBALAH (Batya Stein, trans., 2017).

<sup>184</sup> An important scholarly voice concerning the biblical attitude toward magic is YEHEZKEL KAUFMANN, THE RELIGION OF ISRAEL: FROM ITS BEGINNINGS TO THE BABYLONIAN EXILE 40–42, 78–86 (1972). To his mind, “The distinctive mark of all pagan rituals is that they are not directed toward the will of the gods alone. They call upon self-operating forces that are independent of the gods, and that the gods themselves need and utilize for their own benefit.” *Id.* at 40–41. For a questioning of the difference between the presumable pagan-free monotheism and its polytheistic alternatives, see HALBERTAL & MARGALIT, *supra* 147, at 137–62.

<sup>185</sup> Compare Nadav S. Berman, *Jewish Law, Techno-Ethics, and Autonomous Weapon Systems: Ethical-Halakhic Perspectives*, 29 JEWISH LAW ASSOCIATION STUDIES 91 (2020), at § 4, discussing the verse “The sword devours” (2 Samuel 11:25) and the problem of moral agency.

because God himself is binding him. Yet the Bible makes clear that God is not a mere tyrant, but substantiates worldly creation on law and providence on principles of justice, compassion, and goodness (see Deuteronomy 6:18, 16:20; Micah 6:8; and many more).<sup>186</sup> Justice and mercy are supreme to magic.

In Jewish tradition, as in other normative traditions, there is no illusion about the possibility of a complete freedom or liberation within human life. Rather, Judaism endorses an approach in which lawfulness is conceived as an expression on freedom.<sup>187</sup> In other words, covenant opens the stage for a verbal dialogue, instead of mere technical causation or violence. The biblical warning against false prophecy (such as that of Hananiah, the son of Azzur; see Jeremiah 28 and Deuteronomy 17:2–5), stresses the idea that religion does not provide a false comfort or moral holidays, but rather demands effort and devotion. Balaam's narrative reaffirms the broader biblical principle of a pan-human covenantality with God in which human beings are held responsible and cannot presume to be mere intermediaries because every significant action requires moral discretion.

### ***Covenant's Ramifications for Law and Technology: Partnership, Dialogue, and Consent***

Our analysis thus far provides us with a wider perspective over the concept of covenant. The phenomenon that describes both the power of the subjects of the covenant and how divine legislation (or instruction) is perceived is formulated in Jewish tradition as the “agreement of the public” (*haskamat hazibbur*).<sup>188</sup> It refers to the phenomenon of a group of people who democratically deliberate collective matters of common interest and concern.<sup>189</sup> This kind of dialogical social reasoning is the ground for understanding the sociality in Jewish tradition. Its rationale is as follows. When a human collective is conceived of as *nothing but* the servants of God in a covenant based exclusively on obedience, there is no room for pragmatic human reasoning. In such a case, divine commandments are typically considered as irrational statutes (*huqqim*) rather than rational laws (*mishpatim*).<sup>190</sup> However, in a *dialogical* covenantal conception of theology and of the political, which is dominant in Jewish sources, the human collective is perceived to be granted significant deliberative status.<sup>191</sup> Traditional rabbis assume the existence of an interpretive continuity throughout the generations, which sets the ground for the possibility of future generations to engage with the ancient Sinaitic covenant. Moreover, the ability of later generations to take an active part in the ongoing formation of Jewish law is predicated on such conception of historical continuity.<sup>192</sup> Given such framing, the aggregate deliberations of the people, can

<sup>186</sup> Rabbi Samson Raphael Hirsch, in his commentary on Numbers 22:21 (trans. to the Hebrew Mordecai Breuer, 1990, at 263) remarks on Balaam's difficult process of shifting from magical manipulation to the moral one summoned by God.

<sup>187</sup> A formative example is MISHNAH AVOT 6:2, which reads: “And it says, ‘And the tablets were the work of God, and the writing was the writing of God, graven upon the tablets’ (Exodus 32:16). Read not *harut* [graven] but *herut* [freedom]. For there is no free person [*ben horin*] but one who is occupied with the study of the Torah.”

<sup>188</sup> On this concept, see Yossi Turner, *Authority of the Public in Rabbi Hayyim Hirschensohn's Religious Zionist Thought* [Hebrew], in JUDAISM: A DIALOGUE BETWEEN CULTURES 31 (Avi Sagi, Dudi Schwartz & Yedidia Z. Stern eds., 1999).

<sup>189</sup> Collective intentionality (which is a kind of social epistemology) is manifested profoundly in Jewish tradition. See, for example, the analysis of “covenantal memory” by JOSEPH E. DAVID, JURISPRUDENCE AND THEOLOGY IN LATE ANCIENT AND MEDIEVAL JEWISH THOUGHT 123–24 (2014).

<sup>190</sup> See the above discussion (around 135) under “Covenantal Principles: Responsibility, Reciprocity, and Reasonability.”

<sup>191</sup> A correlate legal idea appears in the writings of the German legal scholar Friedrich Carl von Savigny (1779–1861), who influenced the nineteenth-century Rabbi Zacharias Frankel. Savigny is considered as the founder of the historical school of legal theory, which conceived national morality as premised on traditional roots, that legislators constantly strive to interpret pragmatically.

<sup>192</sup> See HAYYIM HIRSCHENSOHN, FALSE CONCEPTS AND THE TRUTH [Hebrew] 93–94 (1932).

be considered as a form of collective reasoning and deliberation. The agreement of the public is a form of partnership (albeit not an *equal* one) with God, in the unfolding constitution of the covenant.<sup>193</sup>

### Revisiting the Relationship between Tech Giants and Tech Users

Below we revisit the substantive questions of law and technology and offer responses to fundamental legal problems pertaining to the relationship between tech firms and tech users, based on and inspired by the idea of covenant, as portrayed above.

#### *Entering, Exiting, Dialogue, and Consent*

When the commercial rule of tech firms is considered against the Hebraic concept of covenant, or covenantality, which is based on voluntary association and commitment, it is clear that neither tech firms nor customers are exempted from accountability to the other parties. From this perspective, entering into a commercial (or any long-term and substantial) association should be an action of mutual consent with a possibility of exit (in reasonable terms). Therefore, the somewhat ritualistic process of providing users with full information as to the platform's terms of use and their modification in real time<sup>194</sup> could be justified rather than viewed as an empty gesture. When structured along the lines here discussed, the covenant paradigm does not categorically reject the notion of addressing (or even regulating?) the most central elements of life through a contractual framework.<sup>195</sup> Furthermore, the principle of mutuality mandates that given sound reasons, the two sides to the agreement have the possibility of ending the relationship (as in marital relations and divorce). Further inquiry must establish to what extent it is acceptable and justified to intentionally encumber (possibly given the *ex-ante* preferences of both contractual parties) the option to exit—for instance, by requiring a party to fill out extensive forms and by applying cool-off periods. Note that in both contexts the actual content agreed upon is, for the most part dictated by one party, yet other work-arounds are (and thus could be, in the tech context) applied to enable an equitable outcome.

Finally, the fact that the covenant includes, facilitates, and perhaps even encourages internal deliberation is aligned with the most recent evolving initiatives of oversight boards that provide feedback from stakeholders.<sup>196</sup> Indeed, Facebook has famously introduced its oversight board, which has already faced very difficult and timely issues regarding Donald Trump's account.<sup>197</sup> Regardless of whether the recent decisions are correct and acceptable, the overall deliberative move seems to lend the platform credence and public credibility, thus providing some evidence that the covenantal perspective might prove fruitful.

<sup>193</sup> “The [divine] covenant is articulated in accordance with the ordinary inter-human terms by which the people are setting their agreements. This is the real type of this nation-covenant [*brit-am*], and ... should not be imposed by strong-arming, coercion or compulsion.” HIRSCHENSOHN, *supra* 115, 3:56.

<sup>194</sup> This is as opposed to firms that utilize “sneak-in” provisions that allow them to unilaterally modify the agreement. See Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts: An Empirical Perspective*, 55 *GEORGIA LAW REVIEW* 657, 661–63 (2020).

<sup>195</sup> On the tensions between the terms *covenant* and *contract*, see *supra* 90.

<sup>196</sup> See discussion of Klönick's work, *supra* 40, and relevant text.

<sup>197</sup> Oversight Board, Case Decisions 2021-001-FB-FBR (published May 5, 2021), I.

### **Tailoring, Manipulation, and Explainability**

Allowing digital platforms to carry out manipulative actions that undermine the best interests of the users should not be perceived as a part of normal and acceptable commercial transactions. The same could be said of arbitrary censorship of a legitimate discourse. These concerns could be mitigated by assuring sufficient explainability throughout the user experience. As we note above, covenantal explainability emphasizes the importance of reasonability and explainability, as well as accountability, more broadly.

The idea of covenant provides an ethical model in which the stronger side nonetheless has an inherent moral commitment to provide explanations to the other party,<sup>198</sup> which is conceived as its covenantal partner (recall the paradigm of the marriage between God and Israel). The relational model provides an advantage as the right to explainability is not necessarily derived from the users' autonomy or the need to protect them from harm (the leading justifications for recognizing these rights today). Rather, it is premised on the need and duty to generate a reciprocal, fair, prosperous, and sustainable relationship. This basic understanding sets in place an amoral obligation that has the capacity to restrain potential work-arounds by tech giants that might argue that no harm is inflicted<sup>199</sup> or personal data used in relevant actions, and thus disclosure should remain minimal. In the technological context, such explanations should pertain to codes that are both legal (such as the underlying rules and contracts) and technological (the programmed interface running the systems).

The idea of covenant provides additional weight to pro-explainability claims and tilts the discussion as to the extent of regulatory intervention in that direction. However, the covenant does not mandate an absolutist position regarding the need for explainability. The philosophy of Jewish law—and covenantality in this regard—is not illusionary regarding the feasible range of the explainability mandate.<sup>200</sup> It recognizes the legal fact that divine law includes some aspects that are not *fully* comprehensible or rationalizable. As noted above, there seems to be some transparency/opacity zero-sum games, which exist in any legal system. Thus, similarly, a policy that allows tech giants to maintain some degree of indispensable opacity while assuring that their users are provided with sufficient or good-enough insight to their inner workings and the principles of proper use can be acceptable.

On the side of the users, and considering the covenantal emphasis on individual responsibility, the prohibition against the gaming of systems (and their enforcement by law) could be justified.<sup>201</sup> This conclusion somewhat opposes the position of scholars such as Brunton and Nissenbaum, which legitimizes obfuscation efforts.<sup>202</sup> More specifically, these scholars explain that there are only limited ethical impediments to providing false data to tech giants as part of an effort to obfuscate profiling, tailoring, and customizing practices. Brunton and Nissenbaum make this argument while discussing the morality of submitting false queries to search engines and swiping credentials at shopping venues. Yet as noted

<sup>198</sup> Above we alluded to the etymology of the term *responsibility* as *response + ability* (around 67) under “The Challenge of Incommensurability.” For a recent call for requiring technology firms to abide by rules of responsibility-by-design for automated processes (rather than allowing them to put the blame on the algorithm) that would be backed by auditing functions, see FRANK PASQUALE, *NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI 12* (2020).

<sup>199</sup> Another analytical option might be expanding the notions of harm in these contexts, which might present concerns of overregulation and abuse. *But see* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 *BOSTON UNIVERSITY LAW REVIEW* 793 (2022).

<sup>200</sup> See the distinction mentioned above, between rational and partially irrational commandments.

<sup>201</sup> See Bambauer & Zarsky, *supra* 72.

<sup>202</sup> See FINN BRUNTON & HELEN NISSENBAUM, *OBUSCATION: A USER'S GUIDE FOR PRIVACY AND PROTEST* (2015).

above, the covenant also sets obligations on the user side, calling the morality of such actions into question.<sup>203</sup>

### **Mere Intermediation?**

Can tech firms be considered mere service providers? From a covenantal point of view, both legal parties are real—neither can presume to be a nonparty: Based on the covenantal vision, and given a long-standing provider-customer relationship, it would be unacceptable to ignore the moral and legal responsibilities this relationship entails for both parties. As suggested above in the case of Balaam and Balak, covenantal tradition is at odds with eliminating personal obligations related to various aspects of life. Differently from John Rawls's famous model of the veil of ignorance,<sup>204</sup> which arguably diminishes (or even undermines) the uniqueness of agents in the moral sphere, in the covenantal setting the differences are essential for understanding how relationships are conceived and function. From this perspective, it would be implausible that tech firms will presume to be absent, when they hold so much power. Therefore, current popular arguments calling for providing absolute immunity to tech giants so as to enhance their motivation to innovate, or protect their speech, should be taken with more than a grain of salt.<sup>205</sup>

### **Conclusion: Divinizing or Un-divinizing Tech Giants? A Call for Responsibility**

We propose the idea of covenantality as an axiological scheme for rethinking conflicts in law and technology. Our proposal stems from the belief that Jewish law can contribute to non-Jewish legal systems and cultures (including non-Abrahamic, Eastern ones),<sup>206</sup> as it contributed to Abrahamic traditions. The concept of covenant, we propose, can serve as an Archimedean point that has the potential of repairing and integrating the fragmented conceptual schemes that dominate the human and legal sciences in the present. Covenantality assumes that even if the incommensurability thesis is true to some extent regarding the various values technology policy disputes involve (and human cultures are surely diverse), the idea of a shared human ethos *can* serve as a postulate, namely as a heuristic or regulative vision.<sup>207</sup>

Covenantality might already be arriving to the tech space—at least in the European Union and in the context of broader obligations for the tech firms. It is fair to assume that, as regulatory measures to address the challenges presented by the tech giants worldwide are set forth, some measures would partially accept segments of the noted paradigm, while rejecting others. Yet the recently minted DMA and DSA<sup>208</sup> provide an interesting and promising test case. Both frameworks push back against the tech giants' influence, striving to overcome the tech giants' attempts to escape the EU's jurisdiction. The laws counter the tech giants' domination of the discourse by introducing extensive transparency requirements and additions to the firms' liability. They sidestep the user's consent by a broad set of

<sup>203</sup> Within biblical tradition, responsibility increases precisely where one's action is invisible: "Thou shalt not curse the deaf, nor put a stumbling-block before the blind, but thou shalt fear thy God: I am the Lord" (Leviticus 19:14; see also Deuteronomy 27:15–25). In the specific halakhic context of the duties of the customer, there is a prohibition against deceiving a salesperson. BT, Bava Mezi'a 58b.

<sup>204</sup> See RAWLS, *supra* 78, at 136–41.

<sup>205</sup> See Balkin, *supra* 25, for a similar argument.

<sup>206</sup> See Cover, *supra* 91; Last Stone, *supra* 95.

<sup>207</sup> The basis for that was described by William James in his 1896 lecture, *The Will to Believe*: When people deliberate and act based on the assumption that a common good is achievable and that there is a moral point in striving toward it, many problems would be easier to address. William James, *The Will to Believe*, 5 *NEW WORLD* (1896), 327.

<sup>208</sup> See *supra* notes 10, 11, and accompanying text.

mandatory, non-waivable rules. They counter the firms' ability to abuse the vast troves of personal information at their disposal by outlawing some practices and providing greater transparency about others.

The relationship between the DMA's and the DSA's impact and the notion of covenantal concepts will only become apparent in the coming years. Yet the texts of these laws provide some clues and early conjectures. Overall, the DMA focuses on the commercial aspects of the relationship between the tech-giants and the users. It provides (for instance in Article 6) some enhanced forms of "exit" (given the portability rights and ability to unsubscribe). It also enhances the transparency of some firms' operations. However, it does not address social duties the tech-giants should assume, or the form of special relationship they have formed with their clients. The focus, rather, is very much on notions of competition law.

The DSA, however, seems to be more relevant to our covenant-based analysis. It addresses the obligations that tech giants should assume given their dominant social role as intermediaries and facilitators of access to a vast variety of users. This is reflected in requirements pertaining to their liability, their duty to explain and even refrain from harmful acts (such as "dark patterns" in Article 52). What is less apparent in the DSA's current language is the role it calls upon users to assume—for instance in the form of personal responsibility—as being part of this ongoing relationship. But in the broader picture, it seems that the new EU legislation (DSA and DMA) is heading toward a more covenantal mindset, in which tech firms are expected to adhere to what we termed here as the three Rs: responsibility, reciprocity, and reasonability. The analysis we provide above might assist in fine-tuning this response to comply with a long-standing tradition of covenantality.

The ethos of covenantality, we submit, is *not* exclusive to Judaism: it is found in many other pragmatist or humanist traditions, Abrahamic or other, that emphasize relationality, integration, commitment, and individuality.<sup>209</sup> Furthermore, it may well be the case that various strands of post-Holocaust Judaism lost much of the covenantal sensitivities.<sup>210</sup> Yet, covenantality—whose holism resembles and in fact predates the concept of the social web (and World Wide Web as such)<sup>211</sup>—may serve as a paradigm for rethinking contemporary problems of tech's interactions, services, standardization, and regulation. The notion of the covenant might also indicate the needed components for formulating a resilient and sustainable relationship between asymmetric parties given historical precedent and thus can be applied to other contexts. Can anyone assure that the covenantal paradigm will prove beneficial at the empirical level? Clearly not. Yet, the long career of the idea of covenant, with its core principles of responsibility, reciprocity, and reasonability, as well as its distinct voluntary traits, give us a reason to think that covenant is at least worth considering.

In the present digital age, the tech giants not only wield enormous power but also enjoy an imagery of God-like entities<sup>212</sup> that is manifested in the semi-futuristic discourse about who will dominate future societies.<sup>213</sup> The idea of covenant is helpful in this regard, as it warns against the deification of anything beyond God (Exodus 20:2–4 in the Decalogue, and

<sup>209</sup> For a valuable mapping of how relational ethical approaches (Jewish and non-Jewish) may overlap, see ELIEZER HADAD, *HUMAN DIGNITY AND THE DIVINE IMAGE: EQUALITY AND DIFFERENCE* [Hebrew] (2019). As noted above, we find such moral elements (relationality, integration, etc.) discussed in VALLOR, *supra* 81.

<sup>210</sup> See the critique by Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 *TRADITION* 64, 103 (1994).

<sup>211</sup> See, e.g., JONATHAN ROSEN, *THE TALMUD AND THE INTERNET* (2001).

<sup>212</sup> See Balkin, *supra* 4, at 1185. In a similar context (that of Uber), see, for instance, Brian Fung, *Uber Settles with FTC over "God View" and Some Other Privacy Issues*, *LOS ANGELES TIMES* (Aug. 15, 2017), <https://www.latimes.com/business/technology/la-fi-tn-uber-ftc-20170815-story.html>.

<sup>213</sup> See ROEY TZEZANA, *RULERS OF THE FUTURE: LEVIATHANS, SHARKS AND THE HOPE FOR CHANGE* [Hebrew] (2017).

many other instances). This prohibition is not technical or arbitrary, but rooted in the implicit humanist ethos of the Bible, namely the creation of all human beings in the image of God (Genesis 1:27).<sup>214</sup> Against the idea of resemblance between God and the created humans, idolatry is a theological and anthropological sin at once. In the modern world, with its alleged idolatrous urge,<sup>215</sup> the prohibition against idolatry has a profound moral significance.<sup>216</sup> In the context of tech firms, the pitfall is obvious: viewing them as gods typically entails a diminishing of the status of tech users, the customers. The idea of covenant as described above can challenge the problematic image of tech giants as gods. In Jewish tradition, God is conceived as the stronger party, yet caring for and committed to humans and humanity. There is an asymmetry in the biblical covenant, but this asymmetry does not dictate a mere brutality; rather it is a relational engagement. If in the Hebraic ethos God is portrayed as so committed, the initial *a fortiori* lesson of responsibility and humility for any human, less than divine authority is clear.

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<sup>214</sup> See LORBERBAUM, *supra* 117; HADAD, *supra* 208.

<sup>215</sup> See, e.g., EMIL L. FACKENHEIM, ENCOUNTERS BETWEEN JUDAISM AND MODERN PHILOSOPHY 171–98 (1973).

<sup>216</sup> On the technological context see Berman, *supra* 185, at § 3.3.1, § 6.3; and more broadly Cohen, *supra* 79; HALBERTAL & MARGALIT, *supra* 147.

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