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ETHICAL DILEMMAS IN THE TELEMARKETER INDUSTRY*

The telemarketer industry has expanded rapidly over the last decade.[1] It currently employs 4.2 million people, generating about $200 billion in annual sales.[2]

Both the business practices of this industry and the way consumers have reacted to these practices present a number of serious moral dilemmas. These include the use of pressure tactics, pricing policies, conduct consumers engage in to thwart the telemarketer, and using the information the telemarketer offers without compensating him for the provision of that information.

By use of the case study method, we will explore the above issues and demonstrate how the moral dilemmas originating in the interaction between cold caller and customer spill over into society at large.

THE COLD CALLER

Ted Arrow: Hello. Mr. Oak, my name is Ted Arrow. I'm calling with an offer you will never regret accepting. It entails only a small amount of money.

Sidney Oak: By your own admission, you're a telemarketer. I don't speak to telemarketers. This conversation is over. Have a good—.

Ted Arrow: Please don't hang up. Give me twenty seconds. I'm not your run of the mill telemarketer. My call is about how to prevent identity theft. One of five families is today a victim of identity theft. You'll bless me every day of your life for the invaluable information I give.

Sidney Oak: I told you I don't speak to telemarketers. Besides, I have no need for your service. No one will steal my wallet. I protect it well. Have a wonderful . . .

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Ted Arrow: Please, please, just another 15 seconds.
Sidney Oak: O.K. The clock is running.
Ted Arrow: Give me two minutes and I'll show you how vulnerable you are to identity theft. If you're not convinced, I promise that you'll be rid of me instantly. O.K. Thanks! I take your silence as a yes to proceed. Just think how easily we give away our social security number. When we visit a doctor for the first time, we fill out a questionnaire. One of the items is our social security number. Our student and employee identification numbers are often times the same as our social security number. Once you give out your social security number, you lose control of it. You may trust the person that you directly give your social security number to, but other people employed by the organization will also have easy access to this piece of private information. Herein lies your vulnerability. Once someone has your name, address and social security number, that person can apply for and get a credit card in your name and charge it to the maximum. Because the identity thief can arrange a billing address that is different than your real address, you may not get wind of the fraud until you are already living in an irreversible nightmare.[3] Identity fraud is now the fastest growing crime in America, striking more than 2000 people per day. To date, victims who have reported this crime have spent more than 175 hours and more than $10,000 per incident just to resolve these problems.[4]
Sidney Oak: O.K. You have convinced me. I can especially relate to the questionnaires doctors ask you to fill out. So what are you selling and how much will it cost me?
Ted Arrow: Our company, called Identity Shield, has put together an audiocassette. In palpable form you will learn all the practical things you can do to prevent identity theft and minimize the damage to you if you ever are victimized by this crime. Learning was never made so painless. The cost to you is only $35.
Sidney Oak: Your offer sounds good. Tell me how to order.

Oak proved to be a very satisfied customer. The audiocassette actually changed his lifestyle. For one, he became extremely circumspect in releasing his social security number and obsessively tried to retrieve it from those to whom he already gave it. Oak made all the doctors he visited replace his social security number in their files with coded letters.[5] Oak prevailed upon his employer to issue him a new employee identification number that bore no resemblance to his social security

number. The audiocassette made Oak aware that identity thieves sift through people's garbage in order to retrieve pre-approved credit lines that are discarded by the people who received them in the mail. These pre-approved credit lines contain much valuable personal data. To thwart this practice called dumpster diving, Oak purchased a shredder and used it as an efficient tool to destroy documents containing personal data that he wanted to discard. Finally, to get an early warning of identity theft, Oak took up the audiocassette's $45 deal to have Identity Shield arrange to have three monthly credit reports sent to him. Oak planned to examine these reports closely for irregularities.

At his high school reunion dinner six months latter, Sidney Oak was seated at the same table as Mark Besser, whom the graduation yearbook dubbed as the class "know-it all." The conversation turned to telemarketers. Besser expressed an antipathy for telemarketers:

"What gall these companies have invading our privacy, often at the dinner hour, with useless offers. You know I was once awakened at 5:00 in the morning by a telephone ring. Thinking it was a call about a death in the family or worse, my heart sank as I answered the phone. Adding to my anticipated horror was that there was an agonizing pause of 30 seconds before I heard a voice. It turned out to be a pre-recorded auto dial from a telemarketer hawking a chemical treatment for my lawn. No matter how much I tried, I could not fall back to sleep after I hung up the phone. That experience was a wake-up call for me. I have resolved to take *revenge* against telemarketers. I started my campaign by hunting down the personal telephone numbers of the officers of the company that called me. Believe me, it took some nifty detective work to get these numbers. I can't describe to you the glee I felt when I called each of these culprits at 5:00 a.m. and asked them whether they used the company's chemical treatment product on their own lawns.

"My short-term goal is to get the telemarketer to hang up on me. My long-term goal is to do my part in encouraging telemarketers to exit the industry and to choose a job that doesn't entail pestering people.

"I'll tell you some of the things I do. Let me start with a relatively civilized response. As soon as I get the feeling I'm talking to a telemarketer, I demand to be connected to a supervisor. When the supervisor gets on I say immediately: 'I want to be put on your do not call list.' I, then, firmly say 'if you call again I'm going to exercise my right to sue you in small claims court for $500.'[6] As you can well imagine, it's not worth my time to keep a record of which telemarketers called and it goes without saying that I'm not prepared to incur the opportunity cost

involved in pursuing a repeat call telemarketer in small claims court. But, I think my bluff works well and the supervisor will actually make sure I'm not called again.

"When I'm in a whimsical mood, I have *fun* with the telemarketer. I quickly interrupt the sales pitch and advise my caller that I'm eating dinner, but request a number with which I can call back because I'm really interested in the chemical lawn treatment whatever. If I get a number to call back, I save it on my palm pilot. When I get a call from the next telemarketer I ask him to call me at another number in my den, and give him the previous telemarketer's number."[7]

While Oak shared Besser's bias against telemarketers and was entertained by Besser's tactics on how to take revenge against telemarketers, Oak felt compelled to say the following:

"Sure, telemarketers are generally an annoyance, but I would not tune off and respond in a robotic disconnect manner when a telemarketer calls. I just had a very satisfying experience with a telemarketing company called Identity Shield."

Because Oak felt that he was one up on the class "know-it-all," he went on to display what he learned from the audiocassette about how to prevent identity fraud. Instead of getting a nod of approval from Besser for his investment in the audiocassette, Oak got an earful of criticism:

"Friend, you were ripped off. Everything you picked up on the audiocassette on how to prevent and minimize damage from identity theft could have been culled free of charge from a booklet the Federal Trade Commission puts out called 'ID Theft: When Bad Things Happen to Your Good Name.'[8] Sorry to tell you, this publication can even be downloaded in PDF from the FTC Web Site."

The revelation that the information he bought from Identity Shield was available free of charge made Oak feel foolish. Oak's feeling of foolishness quickly turned into anger when Besser went on to express surprise why Oak needed Identity Shield to order credit reports. Using Identity Shield as a middleman, Besser exclaimed, unnecessarily inflated your expense. "You can order credit reports yourself directly from any of the three major Credit Reporting Agencies. Sorry to tell you, the first report, as far as I know, is free."

Apparently not noticing the devastating impact his critique had on Oak, Besser took Oak's experience with Identity Shield as an invitation to provide a matching experience with salespeople. No sooner than Besser finished his critique, he told Oak:

"I think it's always a good practice to try to bargain with a salesper-

son whenever possible. The other day, I went shopping with my wife, Claudia, for a double stroller at the Child Emporium. We found the double stroller we were looking for. It had a $185 price tag attached to it. When the salesperson, Mr. Simmons, came towards us and noticed how our two kids, Erez and Shalhavet, age 16 months and 3 years, respectively, were wandering all over the place, he must have sized us up that we desperately needed the stroller and therefore closing the deal would be a cake walk. Boy was he surprised when I blurted out: 'this stroller is overpriced. I'm sure I can get it cheaper at the Wunderkind Department Store.' With a noticeable tone of annoyance, Simmons replied 'No, it's not cheaper elsewhere and it's not our practice to bargain with customers. That's why we put a price tag on everything.' At this juncture, Claudia weighed in and said 'Mr. Simmons, excuse my husband's curtness. Let me tell you, we absolutely love this stroller and as you can see we desperately need it. Without it my sanity will be threatened daily. You see our problem is that our budget is very tight. How about a 10% discount from the price tag. If you can manage that, we'll think of you and bless you every day we use the stroller. What do you say? You'll be making our day.' Simmons scratched his head and rolled his eyes, but closed the deal on *our* terms."

THE USE OF PRESSURE TACTICS

In the opening vignette, both Arrow and Besser succeed in their commercial transactions by engaging in pressure tactics. Their conduct may run afoul of the biblical prohibitions against coveting (*lo tahmod*) and against desiring (*lo tit'avveh)*: "You shall not covet your neighbor's house. You shall not covet your fellow's wife, his manservant, his maidservant, his donkey, his ass, or anything that belongs to your fellow" (Exodus 20:14); "You shall not covet your fellow's wife, you shall not desire (*lo tit'avveh*) your fellow's house, his field and his slave and his maidservant, his ox and his donkey, and anything that belongs to your fellow" (Deuteronomy 5:18).

Before the prohibitions of *lo tahmod* and *lo tit'avveh* can be related to the case at hand, the parameters of these prohibitions must be defined. These parameters are a matter of dispute between Maimonides (*Rambam*, Egypt, 1135-1204) and R. Abraham of Posquieres (*Rabad*, 1125-1198). We begin with *Rambam's* formulation of these prohibitions:

> If one [B] covets the male slave or the female slave or the house or

> goods of another [S], or anything that it is possible for [B] to acquire from [S], and [B] weighs down [S] with friends or importunes [S] until he allows him to buy it, even though [B] gives [S] a high price for the item, [B] transgresses the negative commandment, "You shall not covet your fellow's house" (Exodus 20:14). No flogging is incurred for breach of this prohibition, since it does not involve action. Nor does [B] transgress this prohibition until he buys the object that he covets, as is exemplified by Scripture when it says, "the carved images of their gods you shall burn in the fire; you shall not covet and take for yourself the silver and gold that is on them, lest you be ensnared by it, for it is an abomination of Hashem, your God" (Deuteronomy 7:25). Thus implying that the transgression of coveting is effected only when accompanied by action.
>
> If [B] desires [S']s house or [S']s wife or [S]'s goods or any similar thing that [B] might buy from [S], [B] transgresses a negative commandment as soon as he thinks in his heart how he is to acquire the desired object and allows his mind to be seduced by it. For Scripture says, "[Y]ou shall not desire. . . ." (Deuteronomy 7:25).[9]

In his gloss on *Rambam's* text, *Rabad* makes three comments. First, *Rabad* finds it astonishing that *Rambam* regards *lo tahmod* as a prohibition not involving action. How can this be when the prohibition is not violated unless *B* actually takes possession of the article he covets? Can there be any greater action than taking legal possession? Nonetheless, *Rabad* agrees that *B* does not incur flogging for violating *lo tahmod* because *B* must return the object of his coveting to *S*. Finally, *Rabad* postulates that in the event *S* declared *rotse ani, i.e.* "I am willing" before *B* took legal possession of the article, *B* becomes free of the *lo tahmod* violation.[10]

The dispute between *Rambam* and *Rabad*, according to R. Vidal Yom Tov of Toloso (*Maggid Mishne*, Fl. 14th cent.), turns on the fundamental matter of what constitutes the essence of the *lo tahmod* prohibition. *Rabad* regards *lo tahmod* as prohibiting *B* from obtaining an object from *S* by means of coercion. *Lo tahmod* is hence an aspect of the prohibition against theft (*gezel*). Given that *lo tahmod* is an aspect of *gezel, B* is required to reverse the transaction he conducted with *S*. Because *S*'s declaration of *rotse ani* removes the coercive element in the transfer, the transaction becomes free of *lo tahmod*. *Rambam*, on the other hand, regards *B*'s efforts to overcome *S*'s resistance (*hishtadlut)* as constituting the essence of the *lo tahmod* prohibition. *Lo tahmod* is hence not an aspect of *gezel*. Moreover, the circumstance that *lo tahmod*

is not violated unless *B* acquires the object of his coveting does not categorize this prohibition as one involving the commission of an action. Given that *S*'s declaration of *rotse ani* in no way cancels the *hishtadlut B* has already done, the *lo tahmod* prohibition remains intact. Now, if *S* declared *rotse ani* before the transaction was completed, *B* violates only *lo tahmod,* but is not in violation of *gezel*. Accordingly, *B* is under no obligation to reverse his transaction with *S*. Nonetheless, absent *S*'s declaration of *rotse ani, B* compounds his *lo tahmod* violation with an infraction of *gezel* as well. Here, *Rambam* is in agreement that *B* must reverse his transaction with *S*. But, what requires *B* to return *S* his article in exchange for the money he paid is not *lo tahmod,* but rather the prohibition against *gezel*.[11]

In clarifying *Rambam*'s position, one point remains. What role does acquisition of the object of coveting play in the *lo tahmod* interdict? Is it merely a technicality of law that must be satisfied, or is it a measure of the degree of coveting that is necessary for the interdict to be violated? Addressing this issue, R. Yaakov Yisrael Kanievsky (Israel, 1899-1985) posits that *lo tahmod* in *Rambam*'s formulation is a transgression of the heart and the condition that *B* does not violate *lo tahmod* unless he acquires the object of his coveting conduct should be looked upon as the measure of the degree of coveting *B* must have in order to violate *lo tahmod*. It is because *lo tahmod* is a transgression of the heart that *Rambam* characterizes the interdict as involving no action when it is violated.[12]

If we accept R. Kanievsky's formulation, *B* may very well violate *lo tahmod* without committing any pestering action whatsoever. Consider the following scenario: *B* makes a $200 bid for *S*'s article. *S* refuses *B*'s offer. *B*, then, asks *C* to bid, say, $300 for the article and instructs him not to reveal to *S* that he is acting as *B*'s agent. *B* continues to use fronts until he acquires the article he wants. The salient feature of this scenario is that *B* goes about to acquire *S*'s object without subjecting *B* to any pestering action whatsoever. Here, *B*'s *hishtadlut* consists of an orchestration he sets up to overcome *S*'s initial resistance to sell him the article. Given that *B* has succeeded in acquiring the article of his coveting, his coveting has reached the requisite level to violate the *lo tahmod* interdict.[13]

LO TAHMOD AND THE COMMERCIAL STATUS OF THE ITEM

Another fundamental issue to clarify in respect to *lo tahmod* and *lo tit'avveh* is the commercial status of the item *B* seeks to acquire. Is the

item at hand something *S* put up for sale or does the prohibition basically apply to an item that *S* did not put up for sale? Addressing this issue, R. Solomon b. Joseph Ganzfried (Hungary, 1804-1886) posits that *lo tahmod* and *lo tit'avveh* refer only to the setting that the item in question was not up for sale.[14]

Support for R. Ganzfried's position can be seen from the following. Consider that lumped together with the various commercial items mentioned in connection with *lo tahmod* and *lo tit'avveh* is the prohibition of coveting and desiring a neighbor's wife. Consider also that at Deuteronomy 5:18 where the prohibition is formulated as *lo tit'avveh,* the Torah switches to *lo tahmod* in connection with a fellow's wife. Hence, the only setting where *lo tahmod* is repeated both at Exodus 20:14 and at Deuteronomy 5:18 is in connection with a non-commercial case. The prohibition against coveting a neighbor's wife should therefore be taken as the model to define both *lo tahmod* and *lo tit'avveh* as referring to the seeking of an item that is not accessible to the one who seeks to acquire it. Just as the woman *B* covets is a woman who is married and is not on standby to be divorced and become accessible to him, so too the commercial items mentioned at Exodus 20:14 and Deuteronomy 5:18 refer to items *S* owns but has not put up for sale.

Consider also that putting an item up for sale signals on the part of *S* a desire to part with the item provided the price is right. Now, if *lo tahmod* and *lo tit'avveh* apply even when *S* puts up the item for sale, *B* should be in violation of *lo tahmod* only if he exerts pressure on *S* to accept his original bid, but not if he increases his bid for the item. Expanding the ambit of *lo tahmod* to include the instance when *B* offers a higher bid is understandable only in the instance where *S* did not initially put up the item at hand for sale. Here *S*'s flat rejection of *B*'s initial offer should be taken as an implicit affirmation of what *B* already knows, namely, that the item at hand is not for sale. Because we have no signal from *S* that he wants to put the item up for sale, we should view *B*'s higher bid for the item as a form of pressure to change *S*'s attitude toward the item and put it up for sale.

What the above conceptualization does is to make *lo tit'avveh* and *lo tahmod* into prohibitions to plot and exert pressure on *S* to stop looking at the item at hand in terms of personal attachment and, instead, to look upon it merely as a commodity that can be traded in the marketplace.

LO TAHMOD, LO TIT'AVVEH AND ITEMS PUT UP FOR SALE

Does the above analysis lead to the conclusion that *lo tahmod* has no application at all to the instance where *S* puts up the article for sale? No. A number of different scenarios can be identified: Let us look first at a scenario that involves only persuasion: *S* puts up an article for sale with no asking price. Because no specific price demand accompanies *S*'s offer, *S*'s notice amounts to an invitation to the public to enter into a negotiation with him. Accordingly, if *B* increases his bid or sends friends to convince *S* to accept his initial bid, these tactics should all be viewed as forms of negotiation and therefore not violate *lo tahmod*.

Let us now turn to a number of scenarios that may entail coercion: Suppose *S* sets a specific price for his article. Does *S*'s specific ask price amount to a preemptive message to *B* that he will not accept less? If the specific ask price amounts to an advanced "no" in respect to a lower bid, *B*'s lower bid should be viewed as a form of pressure on *S* to change his mind and therefore violate *lo tahmod*. Our basic assumption as to what the specific ask price conveys can, however, be questioned. Consider that when *S* puts up an article for sale, he cannot expect the item to sell on the spot, as every commercial item has its own inventory cycle. Accordingly, when *B* offers a price lower than the asking price, two alternative strategies are open to *S*. One tack is to reject the low offer in favor of waiting for the customer that will pay the price that is indicated on the price tag. Alternatively, *S* can take up the lower offer and seize upon the opportunity to liquidate his inventory at a faster rate than he could normally expect. If *S*'s liquidity needs are great he may find it quite rational to take the second course. Since *B*'s lower bid speaks not only of his own needs, but also to *S's* self-interest, *B*'s lower bid should not be viewed as pressure he exerts on *S* to change his mind.

EXERTING PRESSURE TO GET A DISCOUNT

A variant of the above case produces a scenario where *B*'s conduct may well constitute pressure or coercion: *S* puts up his article for sale at a specific price. *B* offers to buy the article at a lower price. *S* rejects *B*'s lower price offer and goes on to say: "I'm confident that there are many customers around that will pay the price marked on the price tag. I know you'll be happier with the 10% discount you propose, but I'm here to make money. My store is not a mechanism for income redistribution." Reacting to *S's* rejection, *B* says: "I really love this item and I would like

to buy it now, but the price you ask strains my budget, could you please give it to me at a 10% discount." Consider that *S* has already informed *B* that he does not want to make the item available at a discount. *B's* subsequent plea for a discount should therefore be characterized as exerting pressure on *S* to change his mind and hence violates *lo tahmod*.

The legitimacy for *B* to pressure *S* for a discount, as it appears to this writer, turns on the issue of whether *lo tahmod* is violated when the pressure the object seeker exerts is not to make the owner sell the object to him, but rather confer the item to him as a gift. Addressing the issue of the applicability of *lo tahmod* in the gift case is R. David Ariov (Israel, contemp.). R. Ariov marshals a number of authorities that adopt a strict view here.[15] Counted in this group is R. Israel Meir ha-Kohen Kagan (Radin, 1838-1933), who cautions a bridegroom not to exert pressure on his future father-in law to increase his dowry.[16] If exerting pressure on *S* to give up his article as a gift is a violation of *lo tahmod* and *lo tit'avveh,* then, so too is exerting pressure on him to sell the article at a discount.

LO TAHMOD, LO TIT'AVVEH AND THE SELLER'S CONDUCT

The prohibition against coveting is formulated in the codes in terms of the behavior of the buyer. By logical extension, posits R. Yaakov Yeshayahu Bloi (Israel, 1929-), the interdict should prohibit the seller from coveting the *money* of the buyer. Accordingly, the use of pressure tactics by the seller to make a sale is prohibited conduct.[17]

If the basic model for *lo tahmod* is the setting where the item at hand is not up for sale, *S* should have wide latitude in the conventional commercial setting to overcome *B*'s resistance by offering him or her better terms or a better price. Walking into a store, for example, signals on the part of *B* that he or she is interested in buying the item provided the price and other terms are right. Similarly, if *B* grants an appointment to *S*, the appointment signals that *B* is interested in buying provided the price and terms are right. In both these instances there should be no ethical issue for *S* to overcome *B's* initial rejection by making a better offer.

Suppose, however, *S* barges in on *B* and makes a sales pitch to him. Here *lo tit'avveh* and *lo tahmod* should prohibit *S* from offering a more favorable price as a means of overcoming *B*'s initial rejection of the offer. If *S* wants to continue his sales pitch he must first secure *B*'s explicit permission to do so.

The application of the prohibition of *lo tahmod* to the conduct of the seller requires further clarification. Consider that the salesperson (S) is an employee. Who violates *lo tahmod*? Is it the employer (E), S, or, perhaps, both? The issue entails a number of scenarios. We'll initially assume that S acts on his or her own and the high pressure sales pitch is not part of the protocol of S's training.

We begin with the case where S works on a straight salary basis. Here, the revenue from the high pressure sale goes to the company and not directly into S's pocket. Accordingly, S's sales pressure should not be characterized as coveting the customer's money for himself. Reinforcing this judgment is the possibility that the high pressure tactic will get S into trouble. This will be the case when success at the task at hand in no way is predicated on the need to engage in high pressure tactics and the practice of such conduct brings on complaints against S to his or her boss. In the scenario just described S is not guilty of coveting the customer's money. But, consider, if the customer does not declare at the conclusion of the deal, *rotse ani*, the sales transaction must be characterized as *gezel*. Now, if S consummates the transaction by taking the customer's credit card number, S is guilty of effecting a transaction that is *gezel*. Accordingly, E, as the proprietor of the business, is obligated to cancel the transaction and give the customer a refund. Although S does not violate *lo tit'avveh* and *lo tahmod*, S is, nonetheless, guilty of facilitating a prohibited transaction.

In a variation of the above scenario, E instructs S to engage in high pressure tactics whenever customer resistance is encountered. Since S is E's employee, E's instruction should be viewed as "sending a friend to overcome the buyer's resistance." Accordingly, E violates *lo tit'avveh* and *lo tahmod*. S is here, too, guilty of facilitating *lo tahmod*. If the customer does not declare *rotse ani* at the conclusion of the transaction, S will be guilty of facilitating the prohibition of *gezel* as well.

Let's now consider the scenario where S works on a commission basis. The most serious infraction in this scenario occurs when E trains S in high pressure tactics and instructs him to use these tactics to overcome customer resistance. Given that any sale concluded by S generates revenue directly for both himself and for E, S's use of high pressure tactics violates for him both *lo tit'avveh* and *lo tahmod*. In addition, for every successful high pressure sale, E violates *lo tahmod*. Moreover, if the customer does not declare *rotzei ani* at the conclusion of the deal, S will be guilty of affecting a transaction entailing *gezel*. As the proprietor of the business, the onus will be on E to cancel the deal and give the customer a refund.

Finally, in the instance where S engages in high pressure tactics on his own and not at the behest of E, S alone violates *lo tit'avveh*, *lo tahmod* and the prohibition of *gezel*. Although E is entirely disconnected from the high pressure tactics, the deal is *gezel* and, as the proprietor of the business, the onus is on E to cancel the deal and give the customer a refund.[18]

TED ARROW AND THE ETHICS OF SALES PRESSURE

The most salient feature of the Arrow-Oak incident is that Oak never invited Identity Shield to call him. Arrow's cold call was therefore tantamount to barging in on Oak's home. Once Oak tells Arrow that he never speaks to telemarketers, Arrow's maneuvering to get Oak's attention could be regarded as both *lo tit'avveh* and *lo tahmod* conduct. A saving factor here is that Oak interrupted Arrow's sales pitch before he got a chance to articulate a specific offer. Oak's initial resistance to hear out Arrow was therefore a refusal to grant Arrow a favor to present his offer, and not a rejection of any specific offer. Because Oak did not reject any specific offer, Arrow's push to gain Oak's attention should not violate *lo tahmod*.

Provided his call is made at a reasonable hour, there is nothing wrong for Arrow to try to overcome Oak's initial resistance and plead to allow him to be heard out. But, once Oak refuses to continue the conversation, Arrow's persistence runs the risk of violating the prohibition of causing someone needless mental anguish (*ona'at devarim)*.[19] It goes without saying that insulting Oak as a desperate means of getting his attention to continue the sales pitch violates the *ona'at devarim* interdict. Consider that no minimum amount of unnecessary aggravation is required for violation of *ona'at devarim*.[20] Accordingly, if Arrow's call comes in at the customary dinner hour (5 p.m.-7 p.m.) and Oak, in fact, interrupts his dinner to pick up the call, the call is inherently *ona'at devarim* conduct, irrespective of whether Oak ends up buying the product as a result of the call.

TELEMARKETING FOR A CHARITABLE CAUSE

A variation of the above case occurs when Arrow is a charity solicitor. R. Bezalel Stern dealt with an analogous case: Rabbi (*R*) has in his possession *matsa* for the night of Passover in excess of his own religious requirement (*mitsva)* needs. His friend (*F*) has no *matsa* to fulfill his

mitsva need and therefore requests *R* to either sell or give him the excess supply. Here, *F's* efforts to overcome *R's* initial resistance to make the *matsa* available to him violates neither the *lo tit'avveh* or the *lo tahmod* interdicts. This is so because absent *F's* pleadings and exertions, *R*, is, in any case, obligated to make the *matsa* available to *F* so that he can fulfill his *mitsva* need.[21] Similarly, in the case at hand, Oak is obligated to give charity as a religious duty.[22] Making use of persuasion of all sorts to overcome Oak's initial rejection to contribute to the charitable cause should therefore not entail a violation of *lo tit'avveh* and *lo tahmod* on the part of Arrow. Similarly, Arrow's persistence and persuasion to overcome Oak's resistance should not amount to causing him *needless* mental anguish and should therefore not violate *ona'at devarim*. One caveat, however. To be sure, Oak has a religious duty to give charity. But, Oak may feel that he is not obligated to support the particular organization Arrow is soliciting funds for. Accordingly, Arrow does not have an unlimited license to push his cause on Oak. At some point, Arrow's persistence and pestering become a violation of *ona'at devarim*.

OVERCOMING A REFUSAL WHEN THE REFUSAL IS BASED ON ERRONEOUS INFORMATION

With the aim of clarifying another point in the law of *lo tahmod,* let us change the opening vignette a bit. Instead of having Oak interrupt Arrow before Arrow gets a chance to make a specific offer, let us assume that Oak is silent until Arrow gets to make a specific offer. Recall that Oak offers two different reasons for rejecting the offer. One reason is his belief that he has no need for the audiocassette because identity theft occurs mainly in the context of a stolen wallet. The second reason is that he never deals with telemarketers. Since Arrow's cold call barges in on Oak and the conversation reaches the point where Oak rejects Arrow's specific offer, pressing on with his sales pitch amounts to *lo tahmod* conduct for Arrow. But, there is a saving factor here. Consider the first reason Oak gives for not being interested in the offer. Oak's understanding of identity fraud is very naïve. Setting him straight on this matter and showing him how vulnerable he is to falling victim to this crime should not amount to *lo tahmod* conduct and should not violate the *ona'at devarim* interdict. This is so because both coercion and pestering conduct should be defined in terms of inducing someone to cooperate with you by *reducing* that person's options. Inducing someone to cooperate

with you by *expanding* that person's options is neither coercion nor pestering conduct. It is *persuasion* and hence permissible conduct.[23]

But, Oak also mentions that his practice is never to deal with a telemarketer. Should Arrow take the two reasons Oak cites as independent reasons for his rejection? Or, does Arrow have a right to treat the two objections as intertwined. If the reasons are indeed intertwined, then, perhaps, Arrow can continue in his sales pitch based on the further assumption that Oak does not deal with telemarketers only because he has had disappointing experiences with them in the past. This will surely not be the case this time. Arguing against pushing on with the sales pitch is the Talmudic principle that a man never sees a disability when it comes to his own interests (*en adam ro'eh hova le-atsmo)*.[24] Given the possibility that pressing on with the sales pitch violates *ona'at devarim* and constitutes *lo tahmod* conduct, Arrow must say to Oak something to the effect "Sir, may I very briefly show you why you *are* vulnerable." For Arrow to continue with the sales pitch, he must get an affirmative response from Oak.

CUSTOMER PRESSURE ON A SALESPERSON

In the second half of the case study, we find Mark and Claudia Besser exerting pressure on Mr. Simmons to sell them the double stroller at a lower price than the $185 price tag. Recall the proposition we made earlier that a price tag does not amount to an implicit preemptive rejection of a lower bid on the part of a customer. This is so because every item has an inventory cycle and the seller cannot therefore expect to liquidate an item the minute he puts it up for sale. The customer therefore has a right to regard his lower bid as an offer to the salesperson to liquidate the item sooner than his normal expectancy. The offer to buy the item below the price tag price therefore does not violate *lo tahmod*. But, Mark Besser did not content himself merely to offer a lower price. Instead, he claimed that the stroller was cheaper in the same marketplace at Wunderkind's. Besser had not actually identified the cheaper price. Rather, his assertion "I'm sure this stroller is cheaper at Wunderkind" was done merely to rattle the salesperson. Because he makes a claim without first investigating whether the assertion is rooted in fact, Mark Besser's assertion is a lie and violates the prohibition against lying (*lo teshakkeru)*.[25] Recall that this tactic did not succeed in securing the stroller at a lower price. Mark hence does not violate *lo tahmod* with his lie. Nonetheless, since Mark uses a lie as a means of exerting pressure

on Simmons to lower the price, Mark does violate *lo tit'avveh*. Claudia's conduct is, however, a different matter. Her stratagem of flattery and invoking pity succeeded. Claudia hence violates *lo tahmod*.

In securing the double stroller at the discount price, the couple may also be in violation of the prohibition against creating a false impression (*genevat da'at)*.[26] Consider that the pressure Claudia exerts in the form of flattery and a plea for kindness is enhanced because she apologizes for the rude conduct of her husband. Perhaps, it is Claudia's apology that makes the difference and pushes Simmons over the edge to give the discount Claudia requests. Now, if the interaction between Mark and Claudia with Simmons is spontaneous and Claudia's apology is sincere, Claudia's conduct does not create a false impression and hence it violates only the law of *lo tahmod*. But, suppose the interaction of the couple with Simmons is the "acting out" of a preconceived plan designed to get the stroller at a discount. The game plan calls for an initial attack of nastiness by Mark to be followed by an effusive apology by Claudia for her husband's shameful conduct. The apology is, of course, not sincere, and, instead, is but a component of the scheme to get the discount. Once having taken the side of the salesperson, the script calls for Claudia to go into her desperate-ingratiating routine to get the discount. The idea is to plant in Simmons's mind the image that Claudia is a wonderful gentle soul that is always suffering from the nastiness of her husband. Here's a chance to help out a battered wife and an overwhelmed mother! If in the final analysis, it is the false impression created by the "team script" that induces Simmons to give a discount he would not otherwise give, the couple would be compounding *lo tahmod* with an infraction of *genevat da'at*.

THWARTING THE TELEMARKETER

Mark Besser describes various tactics that he uses in order to end a telemarketer call quickly. There can be no doubt that the telemarketer's cold call amounts to an invasion of Besser's privacy and Mark therefore has no duty to hear out the telemarketer. Bolstering this judgment is that since 1991 the recipient of a telemarketer call has had the legal right to disconnect the telemarketer in the future by demanding to be put on a "do not call" list.[27] Interrupting the telemarketer and demanding that he should be put on the "do not call" list efficiently accomplishes for Besser the dual goals of minimizing the current invasion of privacy he suffers and insures that the invasion of privacy will not be repeated in the future. The tactics Besser describes generally go beyond

these goals and are designed to induce the telemarketers to quit their jobs or at least hang up on him.

What is at issue here is identifying the legitimate boundary for exercising one's entitlements. Perhaps, most fundamental here is the minimum harm rule for self-defense. This principle states that if *A* seeks to harm *B*, *B* may take action to avoid this harm but must do so in a manner that minimizes harm to *A*.

Let us explicate the minimum harm principle with the prototype case, called the *rodef* case. In this case *H* pursues (*rodef) V* with the intent to kill him. Here, everyone is duty bound to save *V* from being killed, even to the extent of killing *H*. Now, if the threat to *V* can be neutralized by means less drastic than killing *H*, the lesser means must be utilized.[28] If a rescuer (*R)* kills *H*, when it is evident that he could have affected the rescue by applying less than lethal force to *H*, *R* is put to death on account of taking *H's* life.[29] This principle is called *yakhol le-hatsilo be-ahad me-evarav* (lit. he could have saved him [the victim] with one of his [the pursuer's] limbs, henceforth, *yakhol le-hatsilo*). Note that the Talmud calls for, if possible, the issuance of a warning to *H* to desist.[30] Some authorities take the warning to desist requirement to be an application of the principle of *yakhol le-hatsilo*.[31]

Perhaps, the mandate of *yakhol le-hatsilo* applies only to a bystander. But, as far as the would-be victim is concerned, consider that he is engulfed in a life and death struggle with the perpetrator. We should therefore have no right to expect him to have the presence of mind to remove the threat against his life with anything less than lethal force. R. Isaac b. Sheshet Perfet (Spain, 1325-1408) invokes the above line of reasoning to exempt the would-be victim from any duty to warn the *rodef* to desist before taking action to defend himself.[32] By logical extension, argues R. Judah Rosanes (Turkey, 1657-1727), the same line of reasoning should be used to exempt the would-be victim from the *yakol le-hatsilo* requirement.[33] Other authorities that take this line are R. Eliyahu Mizrahi (1440-1525)[34] and R. Mordecai b. Abraham Jaffe (Prague, ca. 1535-1612).[35] R. Solomon b. Isaac (France, 1040-1105) [36] and R. Meir b. Todros ha-Levi Abulafia (Spain, ca. 1170-1244),[37] however, lump together the bystander and the would-be victim. In his analysis of the issue of *yakhol le-hatsilo*, R. Israel Rosen musters support for Mizrahi's view and proposes that Rashi's and Maimonides' comments on this issue can be read to be consistent with Mizrahi's view.[38]

The principle of restraint in self-defense applies, according to R. Asher b. Jehiel (Germany, 1250-1327), not only to a case where the

victim faces a potentially lethal threat, but also to a simple assault case. In this regard, R. Asher rules that if *A* assaults *V, V* may respond only with the minimum force necessary to neutralize the threat he faces. If *V* responds with more force than is necessary, *V* becomes liable for his attack no less than *A* bears responsibility for initiating the attack on *V*. The principle that informs *V's* liability in the latter case, according to R. Asher, is the *yakhol le-hatsilo* principle.[39]

We take it as a given that the minimum harm principle is a rule of conduct for any victim regardless of the type of harm he faces, whether it is monetary, bodily injury or abuse. Recall the opinion that in the prototype *rodef* case that the *yakhol le-hatsilo* constraint applies only to a bystander who assumes the role of rescuer, but not to the would-be victim himself. Would this school of thought suspend the minimum harm rule for the victim himself regardless of the type of harm he faces? No. Recall that the rationale for suspending the *yakhol le-hatsilo* protocol is the recognition that a would-be victim lacks the presence of mind to operate on the level of rationality to use just enough force to neutralize the threat. Suspension of *yakhol le-hatsilo* is understandable, therefore, only when the would-be victim finds himself engulfed in a life and death struggle. But, when the situation confronting the victim is not even remotely life threatening, we expect the victim to have the presence of mind to neutralize the threat he faces by means of the method that will exert the least harm to the one who unlawfully threatens his interests.

The operativeness of the *yakhol le-hatsilo* constraint for the victim when the attack he faces entails no lethal threat to him whatsoever, either directly or indirectly, can be seen from a point in law relating to *avid inish dina le-nafshei* (lit. a man may enforce the law for himself, henceforth *avid inish dina*): *H*'s ox attacks *V*'s ox and lodges itself on top of *V*'s ox. Two options are open to *V* to save his ox from injury. One possibility is for *V* to pull away his own ox. Another possibility is to push away *H*'s ox. The latter stratagem is clearly potentially more damaging for *H*. In this situation *V* is entitled to enforce the law for himself and take action to rescue his animal from injury. But, *V* is expected to use the least harmful method from the perspective of *H*. Accordingly, suppose *V* rescues his animal by pushing away *H*'s animal and as a result *H*'s animal is killed. *V* bears responsibility for the loss.[40]

At this juncture, let us note that the type of monetary loss *V* faces depends on the past record of the aggressor ox. *H*'s ox can be categorized as either a *tam* (lit. ordinary) or *mu'ad* (lit. forewarned). The first three times the ox gores it is called a *tam*. The liability of the

owner is limited to a responsibility to make good for only one half the damage inflicted. This sum is collectible only from the asset of the goring ox itself. If a bull gores three times and the owner was duly warned after each incident, the owner must pay full damage for the fourth, and all subsequent incidents. The law that makes *V* responsible for the death of *H*'s ox if *V* pushed away *H's* ox instead of pulling away his own ox makes no distinction whether the aggressor ox is a *tam* or *mu'ad*. What this lack of distinction in law between the two cases shows, according to R. Solomon b. Abraham Adret (Spain, ca. 1235-1310), is that the owner of the lower ox is expected to think calmly and save his animal by means of the method that entails the least potential damage for the owner of the upper ox. Rescuing his animal by means of pushing away the upper animal therefore makes *V* liable for the upper animal's death.[41]

What can be generalized from the *avid inish dina* case is that the *yakhol le-hatsilo* protocol is operative even for the victim, provided that the detriment the victim faces entails no threat whatsoever to his life.

Let us now apply the minimum harm self-defense doctrine to how Mark Besser should handle the cold call from a telemarketer. Since Mark has no duty to hear out the telemarketer, cutting him off and insisting that he be put on the "do not call" list is no more than exercising his legitimate rights. To be sure, such treatment will faze the telemarketer and cause him mental anguish, but this response is a minimum self-defense response and hence does not violate for Mark the *ona'at devarim* interdict.

Recent federal legislation has changed what constitutes the minimum self-defense response to a telemarketer. As of June 27, 2003, the Federal Trade Commission launched a national do not call registry. Telemarketers who call listed people could be fined up to $11,000 for each violation. Not all telemarketing is covered by the above rules. Polling, surveys, and calls from political and charitable organizations are exempt. In addition, the rules allow calls from firms with existing business relations with consumers.[42] Now, if Besser is certain that he does not want any contact whatsoever with telemarketers, his minimum self-defense strategy consists of registering in advance of receiving any telemarketing calls on the national "do not call" list. Waiting to receive a telemarketer call and demanding only then to be put on the "do not call" list violates the minimum defense principle as advance registration avoids the unpleasant encounter with the telemarketer altogether.

BLUFFING TO SUE THE TELEMARKETER

The significant number of complaints governmental bodies receive that telemarketers are ignoring their own "do not call" lists makes for the judgment that for Besser to just request the cold caller to put his name on the "do not call" list is not always sufficient to stop future calls by the same telemarketer. Accordingly, Besser may legitimately feel that he needs an "additional edge" to insure that the telemarketer will actually abide by his wishes and not call again. Consider that under current Federal statute, if a telemarketer calls Mark after he has requested the company to place him on its own "do not call" list, Mark has the right to sue in small claims court for actual monetary damages or $500 per violation (whichever is greater). Suing a telemarketer for ignoring its "do not call" list may cost Mark significantly in terms of both time and out of pocket expense. Given Mark's right to stop an unwanted cold call, is it permissible for him to bluff the telemarketer with an idle threat to sue if the unwanted call is repeated? Making a commitment to do something with no intention to carry it out is ordinarily unethical conduct. Such conduct violates Abaye's (4th century) dictum of *hin tsedek* (lit. [Your] yes [should be] righteous).[43] But, in the case at hand, Mark's bluff is directed only to thwart unethical conduct toward him. An analogous case involves the hiring of a worker to perform a task that requires immediate attention on the part of the worker. If the worker abandons the work before completion the employer will suffer material loss. These circumstances are referred to in the Talmud as the *davar ha-aved* (lit. something is lost) case. In the *davar ha-aved* case, the employer has the right to cajole the reneging worker to stay on the job by offering him a raise. If the tactic succeeds, the employer bears no responsibility to make good on his promise for a raise. Moreover, if the worker demands the extra fee up front, the differential pay is recoverable in a *Bet Din* (Jewish Court). This tactic is referred to as *mat'an* (lit. he deceives them).[44] Likewise in the case at hand. Since Besser's bluff to sue is directed only to thwart the telemarketer from violating his privacy which is protected by the federal statute, bluffing the telemarketer with the aim only that the telemarketer should not call again, does not constitute unethical conduct.

MOCKING THE TELEMARKETER

Clearly falling outside the pale of minimum harm self-defensive conduct is Besser's prank to waste the time and aggravate the telemarketer by

either initially feigning interest in the product or engaging him in deliberate idle conversation. Because the conduct exceeds the boundaries of reasonable self-defense, Besser is guilty of causing needless mental anguish and violates *ona'at devarim*. Taking *ona'at devarim* to a more blatant level of violation is Besser's conduct of mocking the telemarketer to the point that his caller hangs up on him.

THE COLD CALL ENTAILING *ONA'AT DEVARIM*

An essential component in making the case that the telemarketer is entitled to be treated with a minimum harm self-defense response is that, provided the call is placed at a reasonable hour, there is nothing unethical about making the cold call. The case for the minimum self-defense response is hence predicated on the dual premises that there is nothing unethical about making the call, but, at the same time, there is nothing unethical for the recipient to handle the call in a manner that will insure that both the conversation is as short as possible and that the call is not made again.

The aforementioned holds well if the telemarketer calls between 8:00 a.m.-9:00 p.m. But suppose the telemarketer calls at a time that is outside this window. Within the current legal environment, federal law prohibits telemarketers to call outside the 8:00 a.m.-9:00 p.m. window and some states have legislation pending that would forbid calls during the dinner hour, 5:00-7:00 p.m.[45] Given the illegality of telemarketing calls outside the 8:00 a.m.-9:00 p.m. window, a telemarketing call placed in this illegal time window should inherently be regarded as an abuse of the recipient and hence be treated as a violation by the telemarketer of *ona'at devarim* interdict. If the cold call is inherently a violation of *ona'at devarim,* is the recipient still bound by the minimum harm self-defense? Relevant here is the following ruling of R. Pinhas ha-Levi (Barcelona, 1235-1300) in respect to the ethics for *V* to insult *H* in response to *H's* initial insult of him. In the opinion of R. Pinhas ha-Levi, *V* violates *ona'at devarim* only if he *initiates* an insult to *H*. But, in the instance where *H* insults *V,* the Torah does not expect *V* to react with silence and be . . . "a stone that has no one to turn it over." Instead, *V may* save himself . . . "from the words of the other's mouth which is filled with cunning and deceit, with every means by which he can rescue himself."[46]

Analogously, if Besser receives a telemarketer call outside the 8:00 a.m.-9:00 p.m. window, he would not be ethically at fault if he either

hung up on the telemarketer or expressed outrage for calling at an unreasonable hour.

From the standpoint of conducting oneself with the highest standards of piety, the curt responses just described apparently meet only an acceptable behavioral standard, but fall short of the ideal in piety. Consider that in the instance where *H* initiates an insult at *V,* the ideal for *V,* according to R. Pinhas ha-Levi, is not to get upset and lash out at *H*. Instead, it is praiseworthy for *V* to hear his disgrace and not reply.[47]

What Mark's ideal response to a telemarketer that calls outside the reasonable time window should not, however, be derived from R. Pinhas ha-Levi's case. To be sure, silence is the admirable response for *V* when the pain *H* inflicts on him is directed and is confined to him alone. It is quite a different matter when Besser receives a call from a telemarketer at 5:00 a.m. The call Besser receives at this unreasonable hour should not be viewed as an isolated incident, but rather as reflecting industry practice. Because the harm Besser experiences is in motion to inflict others as well, silence is not an option here. Mark must do his share to insure that this practice will be stopped. The proper reaction is therefore to speak to the telemarketer's supervisor and vigorously protest the practice and, at the same time, report the infraction to the appropriate regulatory body.

REVENGE AND GRUDGE BEARING AGAINST THE TELEMARKETER

Mark's response to the 5:00 a.m. telemarketer call went considerably beyond berating the supervisor for the practice and reporting the infraction to the appropriate regulatory authorities. Mark set out to take revenge on the policy makers of the firm that bear ultimate responsibility for the pain he experienced. Toward this end, Mark hunted down the personal telephone numbers of the culprits and called each at 5:00 a.m. to ask them whether they used the company's chemical treatment product on their own lawns. Mark's tit for tat response raises the issue of whether he violated the biblical infraction against revenge: "You shall not take revenge (*lo tikom*)*. . . .*" (Leviticus 19:18).

The prototype case of *lo tikom* is elucidated in the Talmud as follows:

> [B] said to [L],"Lend me your sickle, and [L] said to [B], "No." The next day, [L] said to [B], "Lend me your hatchet," and [B] said to [L],

> "I am not lending it to you—just as you did not lend me your sickle." This is taking revenge.[48]

Nahmanides (Spain, 1194-1270) takes note that the salient feature of the prototype case of *lo tikom* speaks of the instance where *A* has no monetary duty to *B*. But, suppose *A* owed *B* money, caused him damage, or stole something from him. *B* has every right to seek satisfaction of his legitimate claim against *A*. Doing so is not a violation of *lo tikom*.[49]

What proceeds from Nahmanides is that Besser's stratagem of cutting off the telemarketer and requesting that his number (Besser's) be put on the "do not call" list does not raise an issue of *lo tikom*. Such conduct amounts to no more than the pursuit of his legitimate rights. But, hunting down the personal telephone numbers of the culprits and calling each at 5:00 a.m. to ask them whether they used the company product on their own lawns violates *lo tikom*.

Another objectionable aspect of Besser's conduct is his attitude. Besser's actions are not driven entirely by a desire to protect his and other people's privacy rights. Mixed into Besser's motivation is a desire for revenge. Besser is in violation of the biblical prohibition against bearing a grudge: "[Y]ou shall not bear a grudge (*lo tittor*) against the members of your people" (Leviticus 19: 18). *Rambam* formulates *lo tittor* in the following manner:

> . . . [W]hat is bearing a grudge? Reuben says to Shimon: Rent me this house or lend me this ox and Shimon refuses. Subsequently, Shimon comes to Reuben to borrow or rent from him and Reuben replies: Here it is, I am willing to lend you; I am not like you, I shall not pay you back in your own coin. Whoever behaves like this is guilty of violating the prohibition of "You shall not bear a grudge." But he should eradicate the matter from his heart and not harbor a grudge. For so long as he harbors a grudge and remembers it, he is in danger of taking vengeance. . . .[50]

Note that *Rambam* understands *lo tittor* not only to prohibit Reuben from engaging in "I'm not like you" conduct vis a vis Shimon, but also prohibits Reuben from guarding the resentment he has against Shimon. Instead, Reuben should "eradicate the resentment from his heart." What can be inferred from *Rambam's* statement, according to R. Avrohom Ehrman (Israel, contempt.), is that there is no moral objection against Reuben's initial feeling of resentment against Shimon. This is so because it is only a normal human reaction for Reuben to

resent Shimon for rebuffing him in his request for a favor. Since the Torah never legislates on involuntary feelings, the spontaneous feeling of resentment that Reuben has for Shimon cannot be prohibited. But, on matters that depend on the free will the Torah does legislate. Accordingly, what *lo tittor* prohibits is for Reuben to guard or harbor his resentment against Shimon. Instead of fostering the resentment he has for Shimon, Reuben should take action to eradicate the ill feeling he has for Shimon.[51]

Rambam's dictum speaks directly to Besser. At once, it offers him solace. Specifically, Besser should not be criticized for his initial feeling to take revenge on the policy makers responsible for his getting the 5:00 a.m. call. Given the outlandish hour of the call, the smoldering feelings for revenge that lodge within his heart are understandable and he therefore bears no moral blame for them. Getting his revenge by actually calling the policymakers of the telemarketer firm at 5:00 a.m. violates for Besser *lo tikom*. But, to carry out his tit for tat plan Besser must expend much time and energy to unearth the names and home telephone numbers he needs. Suppose Besser never gets the information he needs. Because he does not implement the plan Besser is free of *lo tikom*. Notwithstanding the failure of the plan, Besser is guilty of guarding his grudge while he desperately scampers about for the information he needs. Besser is therefore guilty of keeping alive and even possibly magnifying his initial feeling for revenge. Besser is hence guilty of *lo tittor*. As a means of extricating himself from *lo tittor*, Besser should abandon his original plan of revenge and instead resolve that he will take action only to exercise his legitimate rights. The minute Besser abandons the plan of revenge and moves in the direction of asserting his rights with a minimum harm self-defense strategy, Besser fulfills Maimonides' mandate of "eradicating the resentment from his heart."

YOU GOT "RIPPED-OFF" AND PRICE FRAUD (*ONA'AH*)

In the opening vignette, Mark Besser reacts to Sidney Oak's recounting of a satisfying experience with Identity Shield by telling Oak that he was ripped off. Why pay $35 for an audiocassette on how to prevent identity theft when the FTC publishes the same information for free? Besser's diatribe presents two issues. One issue is the ethics of charging any price whatsoever for the audiocassette when the information it conveys is available free elsewhere. If charging a price is legitimate, the issue of fair pricing comes to the fore.

We begin with the recognition that Besser's assessment that "you were ripped off" is valid only for those who are well read and sophisticated in the art of information gathering. Such a person will not need a call from a telemarketer to convince him that he is vulnerable to identity theft. Moreover, such a person will also be already somewhat familiar with the information Identity Shield seeks to sell or at least know that the relevant information can be obtained free from any of a number of sources. Consequently, this category of person will not take up Identity Shield on its offer in the first place. But, for the person who is not aware of the serious problem of identity theft, Identity Shield provides a definite benefit. The benefit consists of showing the person that he needs the information on how to prevent identity theft. The analogue here is the matchmaker (*shadhan*) and the commercial broker (*sirsur*). Likewise, Identity Shield is an information broker. Its service is to persuade the customer that he needs information on how to prevent identity theft, and then it goes on to offer to access that information to the customer in a palatable form. The service Identity Shield provides goes beyond the minimum criterion halakha (Jewish Law) sets for a *shadhan* or a *sirsur* to be entitled to a fee. Let us examine this criterion and relate it to Identity Shield.

Perhaps, the most fundamental point to be made is that the *sirsur* earns his fee for recommending to either a buyer (*B*) or seller (*S*) a counterpart for his transaction. If it is, however, assessed that the recommended counterpart is so obvious that *S* or *B* would have made their connection without the *sirsur*'s efforts, the *sirsur* is not entitled to any fee.[52]

To get his fee the *sirsur* need not have been commissioned by one of the principals to pursue the deal. His services are analogous to the one who enters a neighbor's field and plants it without permission. If the field is suitable for planting, the planter is entitled to the customary wages of a contracted planter.[53] The *sirsur's* fee is hence rooted in the certainty that his service is a definite benefit, worth money, for the parties involved.

It should be noted that the fee the *sirsur* earns is for the connection he makes, and is not predicated on the provision of any minimal amount of toil and effort to push the deal through. Demonstrating this is the allocation of the *sirsur* fee when a number of brokers are involved in making the transaction happen. Here, the lion's share of the *sirsur* fee goes to the person whose efforts bring the transaction to a successful conclusion. This person is called the *gomer* (closer). Also due a part of the *sirsur* fee is the *mathil*, i.e., the person who gets the transaction started. The *mathil* is entitled to his fee even if the principals cut him

off immediately and work out all the details themselves. Exerting the smallest claim for a portion of the *sirsur's* fee is the person who is neither *mathil* nor *gomer*, but, nevertheless, expended toil and effort to move the transaction forward.[54]

What proceeds from the above discussion of the law of *sirsur* is that Identity Shield is entitled to charge Oak for its audiocassette on how to prevent identity theft even though the information the cassette conveys is available free from the FTC. Absent the call from Arrow, Oak would not have sought out this information on his own nor would this information have fallen into his hands. Identity Shield's *sirsur* service consists therefore in persuading Oak that he has a need for this information.

Let us now turn to the issue of fair pricing. For the sake of simplicity, let us initially assume that Identity Shield's product consisted not of an audiocassette, but rather a copy of the FTC booklet. In assessing the "fairness" of Identity Shield's price of $35, the relevant legal principle here is the law of *ona'ah* (price fraud). The law of *ona'ah* prohibits an individual from concluding a transaction at a price that is more favorable to himself than the competitive norm. Depending on how widely the price of the subject transaction departs from the competitive norm, the injured party may have recourse to void or adjust the transaction.[55]

In applying the law of *ona'ah* to the case at hand, consider that Identity Shield incurs no expense other than postage and handling in connection with the FTC booklet it sends out. Its charge therefore is almost entirely for its *sirsur* service of convincing customers that they need the information on how to prevent identity fraud. Identity Shield's profit amounts therefore to a return on the owner's labor services, consisting of the research they did to conceive the business plan and the time they put into training the telemarketers on how to convince customers that they need the information on how to prevent identity fraud. The issue of "fair" pricing for the case at hand, then, turns on whether the law of *ona'ah* applies to the price of labor services.

Before relating the law of *ona'ah* to the labor market, we take note that halakha classifies a worker as either a per diem worker (*po'el*) or a piece-worker (*kabbelan*). What distinguishes the *po'el* from the *kabbelan* is the provision for fixed working hours. While the *po'el*'s contract obligates him to perform work for his employer at specified hours over a given period of time, no such clause is included in the *kabbelan's* agreement.[56] Given the controlling nature of the fixed-hour factor, the absence of this provision retains *kabbelan* status for an employee even when his contract calls for him to complete the project by a specified date.[57]

In his treatment of the law of *ona'ah* as it pertains to the labor market, *Rambam* rules that *ona'ah* applies only to a *kabbelan* and not to a *po'el*.[58]

Proceeding from the above discussion is that the law of *ona'ah* should theoretically govern the pricing policy of Identity Shield. To be sure, the company is essentially selling a *sirsur* service, but it does not fall into the category of *po'el*. The return on the owner's "toil and effort" that is factored into the price Identity Shield charges for its audiocassette is a finished output at the juncture when the firm's telemarketers call potential customers and therefore should be regarded as the sale of *kabbelan* labor services to the public.

While Identity Shield's pricing policy is theoretically governed by the *ona'ah* law, it must be recognized that the reference price in an *ona'ah* claim is the competitive norm. If Identity Shield is the only firm that performs the *sirsur* service of persuading people that they need the information how to prevent and deal with the problem of identity theft, then, Identity Shield enjoys monopoly status and its pricing policy is not regulated.

A variation of this case occurs when another firm, say, Identity Protection Services, offers the same or a superior product compared to Identity Shield but charges a lower price. Here, Identity Shield is in violation of *ona'ah*. A complication arises when two or more firms are in the industry. Each firm offers a differentiated service and charges a different price. Since a reference price cannot be identified here, an *ona'ah* claim is not honored.

IDENTIFYING THE COMPETITIVE PRICE WHEN NOT-FOR PROFIT FIRMS ARE IN THE INDUSTRY

Suppose not for profit companies are reaching out and actively educating the public on the problem of identity theft. Other firms hence provide *gratis* the same *sirsur* service performed by Identity Shield. Does this make the reference price for Identity Shield's service a zero price and make it unlawful for Identity Shield to charge any price for their audiocassette?

The issue, as it appears to this writer, turns on whether a zero, and for that matter, a below market price, can serve as the reference price in an *ona'ah* claim. Elsewhere, we have shown that the reference price in an *ona'ah* claim is the price the marketplace commands for the item in question. Accordingly, a discount price, whether it is rooted in an invest-

ment or philanthropic motive, does not serve as a reference price in an *ona'ah* claim.[59] Objecting to Identity Shield's $35 fee based on the circumstance that other entities are actively promoting public awareness of the problem of identity theft and charging no fee for this service does not therefore automatically deligitimize Identity Shield's fee. If there is basis to call to question the fee, it would have to be based on evidence that public awareness of the problem of identity theft was so pervasive that Oak would have easily picked up that he has a "need" for the information to prevent identity theft without the call from Identity Shield.

DOUBLE DIPPING ON THE *SIRSUR* FEE

One final variant. Let us use the opening vignette to illustrate it. Recall Identity Shield's audiocassette recommended Oak to pay the company $45 up front to arrange to have three monthly credit reports sent to him. In this aspect of their business, Identity Shield is guilty of a "rip off." The company is "double dipping" on its *sirsur* fee. Consider that Identity Shield has already collected a *sirsur* fee of $35 from Oak. To be sure, the legitimacy for collecting this fee is compensation for convincing Oak that he needs information on how to prevent identity theft. But, Oak is also paying the fee to actually get the information he needs on what he should do to prevent identity theft. Once Oak receives the audiocassette, he should be viewed as actively searching the marketplace to get the best deal on purchasing his own credit report. Given that Oak could order the credit reports directly from one of the three credit bureaus at a cost of, say, $9 per report (the first report is free), the audiocassette's advice to buy the credit reports through Identity Shield for a $45 up front fee is decidedly ill-suited advice and violates for Identity Shield the prohibition against proffering ill-suited advice (*lifnei iver)*.[60] Since Identity Shield has already collected a *sirsur* fee for advising Oak that one of the things he needs to do to prevent identity theft is to obtain his credit reports, the company has no right to charge a second fee for the same advice again. Accordingly, any price Identity Shield charges above the price that was available to Oak by obtaining the credit reports directly from any of the credit bureaus should be governed by the law of *ona'ah.*

EXPLOITING THE TELEMARKETER

The law of *sirsur* provides the backdrop for a moral dilemma entailing exploiting the telemarketer by making use of the information he offers

and not compensating him for it. A variation on the opening vignette illustrates this dilemma. Suppose that Oak in the course of his conversation with Arrow experiences a rude awakening and realizes that he indeed is very vulnerable to becoming a victim of identity theft and therefore needs the information to prevent it. But, why take Arrow up on his offer when the information Oak needs can probably be obtained free of charge by visiting the FTC's web site and surfing the net for articles in the popular literature on identity theft? To exploit the valuable insight regarding vulnerability, which Arrow had given him, Oak thanks Arrow for his time and for the information he provided him and politely tells him that he does not want to take up Identity Shield's offer. Oak proceeds then to research out the information he needs. Getting the information he needs entails for Oak no out of pocket expense. Does Oak owe Identity Shield anything for the information imparted?

R. Jehiel Michel Epstein (Belarus, 1829-1908) dealt with a similar case: *S* is in the market to sell his house. *A1* offers *S* his *sirsur* services to induce *B* to buy the house. *S* refuses *A1*'s offer, giving *A1* various excuses why he does not want to deal with *B*. *S*, then, proceeds to pursue *B* on his own as a customer to buy his home and concludes the deal without the benefit of a *sirsur*. Alternatively, *S* enlists the *sirsur* services of *A2* to make a deal with *B* for the sale of his home. In both these instances *S* owes *A1* the *sirsur* fee due a *mathil*. Moreover, suppose *A1*'s suggestion makes *S* resolve immediately to sell his home to *B*, but pushes off *A1* because he sees an opportunity to get his friend *A2* involved in the deal as a *sirsur*. *S* prefers to have *A2* conclude the deal and have *A2* collect the lion's share of the *sirsur* fee as the *gomer*. In this scenario *S* owes *A1* the entire *sirsur* fee. Nonetheless, if *S* insists that the excuses he offered *A1* as to why he did not want to sell his house to *B* were truthful at the time and circumstances forced him to reconsider and sell to *B* through a different *sirsur, A1* will not have recourse in a *Bet Din* (Jewish Court) to collect more than the fee of a *mathil*. Moreover, *Bet Din* will not even require *S* to affirm his side of the story by means of oath. Nonetheless, if *A1's* assertion is true, *S* is morally obligated to pay *A1* the entire *sirsur* fee.[61]

R. Epstein's ruling finds ready application to the case at hand. There can be no doubt that Arrow's insight on vulnerability and the statistic he provided on the average cost of fixing an identity theft problem is valuable information for Oak. Getting persuaded that he has a need for the information is a benefit worth money to Oak. Accordingly, as soon as Oak resolves to *get* the information on how to prevent iden-

tity theft, he owes Identity Shield a *sirsur* fee. To be sure, Arrow is hawking the audiocassette and not a *sirsur* service. But, recall that a *sirsur* earns a fee for providing a definite benefit and he is entitled to that fee even if he was not commissioned in advance to perform the service. Oak therefore owes Identity Shield the value of the service he received. But, how do we calculate the value of this fee? If there is an organized market in respect to persuading people that they need information on how to prevent identity theft, the competitive fee for this service will reflect supply relative to demand forces. Because the competitive fee reflects the interaction of market forces, the norm would neither equal the maximum sum someone would pay for this benefit nor the minimum fee someone would demand to provide this service. Instead, the competitive norm would be somewhere in between these two values. In the case at hand, there is no competitive norm to refer to. Accordingly, the fee must be set equal to the *minimum* price Identity Shield would charge for tying up a telemarketer for, say, the 10 minutes Arrow spent with Oak. This amounts to no more than the pro-rated hourly wage Identity Shield pays its telemarketers. For argument sake let us assume that this amounts to $2.

Once it is recognized that Oak owes Identity Shield $2 for their *sirsur* service, Oak cannot get away with just thanking Arrow for the information and hang up. Instead, Oak should say: "thanks for the information. I owe you money for your time. Give me an address."

"YOU GOT RIPPED OFF" AND *ONA'AT DEVARIM*

Irrespective of the ethics of Identity Shield's pricing policy, if Oak can do nothing to cancel or modify the deal he entered into, perhaps, Besser's revelation to Oak that he was "ripped-off" amounts to causing Oak needless mental anguish and violates for Besser the *ona'at devarim* interdict. Relevant here is the following Talmudic passage, recorded at *Ketubbot* 17b:

> Our Rabbis taught: How does one dance (what does one sing or recite) before the bride? Bet Shammai say: "the bride as she is." And Bet Hillel say: "Beautiful and gracious bride!" But Bet Shammai said to Bet Hillel: "If she was lame or blind, does one say to her: 'Beautiful and gracious bride'? Whereas the Torah said: "Keep thee far from a false matter (Exodus 23:7)." Said Bet Hillel to Bet Shammai: "According to your words, if one [B] has purchased a "bad purchase" from the mar-

> ketplace (*ha-shuk*) , should one [F] praise it in his eyes or deprecate it? Surely [F] should praise it in his eyes." Therefore, the Sages said: "Always should the disposition of man be pleasant with *ha-beriyyot* (lit. fellow-man)."

Talmudic decisors follow Bet Hillel's view.[62] Identifying the parameters of the "bad purchase" case is therefore critical in judging the propriety for Besser to tell Oak that his purchase of the audiocassette from Identity Shield was a "rip-off."

One basic issue for clarification is whether *B* has recourse to cancel or modify the sale. R. Samuel b. Joseph Strashun (Lithuania, 1794-1872) rejects this possibility. If the "bad purchase" is reversible in some manner on the basis of defect or overprice, lying to *B* that he did well is ethically wrong. R. Strashun draws support for his thesis by pointing out that the Talmud refers to the "bad purchase" as having come not from any specific seller, but rather from the marketplace (*ha-shuk*). The indication is that *B* has no recollection from whom he bought the article. Since returning the item to get a refund or adjustment on account of defect or overprice is not open for *B*, it is permissible for *F* to lie and praise *B* for his selection.[63] R. Israel Meir ha-Kohen (Radin, 1838-1933) understands the "bad purchase" case in the same manner as R. Strashun.[64]

The "bad purchase" case requires further clarification. Perhaps, the directive to praise the purchase is limited to the instance where the person who is asked for an opinion, *F,* is a bystander who is a stranger. Given the reasonableness of the assumption that the two will have no further contact, *F's* goal should be to help *B* make the best of his situation. Praising the purchase is therefore the indicated course of action. But, suppose *B* shows the purchase to a closely connected person such as his parent, spouse or good friend. Perhaps the response here should be geared with the aim of maximizing *B's* long-term interest. To be sure, *B* has no recourse now to fix his mistake, but the purchase manifests irresponsible marketplace conduct on his part**.** With the aim of setting *B* straight, the closely connected person should tell the truth. By being told the truth, *B* will not *repeat* his mistake in the future.

Support for restricting the response of praise for the "bad purchase" case to the instance where *F* is a stranger can be drawn from the nuance of expression the Talmud chooses to employ in connection with the aphorism it quotes: "Always should the disposition of man be pleasant with *ha-beriyyot* (lit., fellow-man)." Note that the Talmud describes the connection between *B* and *F* as *beriyyot,* i.e., fellow human beings. Other expressions such as friends (*re'im, haverim*) or neighbors (*shekhenim*)

could have just as easily been used. The use of the phrase *ha-beriyyot* indicates that the prototype case for the response of "praise" is the instance where the connection between parties is that they are strangers.

Further support for the above distinction can be seen by an examination of the rationale behind the permissibility for *F* to lie in the "bad purchase" case. Commentators have offered a number of rationales.[65] We take R. Yom Tov Ishbili's (Seville, ca. 1250-1330) understanding as expressing the mainstream rationale here. In his view, Bet Hillel espouse the *darkhei shalom* (lit. ways of peace) principle.[66] What this principle asserts is that falsehood is legitimate conduct when its purpose is to end conflict and/or to avert the outbreak of discord. But, the ending of what conflict is referred to here? If we take the "bad purchase" case to refer to the instance where *B* has no recollection where he bought the item, *B's* doubts about his purchase is producing ill feeling toward no particular seller. If the *darkhei shalom* principle is invoked here, it must, therefore, refer to ending *B's* inner torment that he made a "bad purchase" and hence wasted his money. By telling *B* that he did well with his purchase, *F* brings *B* into a state of inner peace.[67]

Once it is recognized that it is the *darkhei shalom* principle that is the basis for allowing and even recommending *F* to lie to *B* and tell him that he did well with his purchase, consideration of the impact of the lie on *B's* long term inner peace or welfare must be taken into account. Consider that *B's* "bad purchase" may just be a fluke, but, on the other hand, it may manifest irresponsible marketplace conduct. If the latter is the case, then, the mistake will be repeated again and again unless it is corrected. What should *F* make of the mistake? Now, if *F* is a stranger, why should he be concerned with possible adverse long-term ramifications of his lie? Consider the "bad purchase" may be nothing but a fluke that will be corrected in the future. Assuming the worst, *F* should have the right to rely on those that are closely connected to *B* to take on the responsibility to correct his ways. Consideration of possible adverse effects on *B* becomes, however, decidedly relevant if *F* is closely connected to *B*. Now, if *F* is *B's* parent or someone in charge of his guidance or education, responsibility devolves upon that person to set *B* straight. "Wounds of a lover are faithful, whereas kisses of an enemy are burdensome" (Proverbs 27: 6).

Several additional scenarios can be identified: Suppose *F* is a close friend of *B* but can reasonably assume that *B's* parent or teacher will tell him the truth about the purchase at hand. Here, *F's* false compliment will surely explode in his face. Since *darkhei shalom* does not permit a lie

that will be exposed,[68] the close friend has no choice but to tell *B* the truth. Finally, suppose *F* has reason to believe that there is no one around that will straighten out *B*. Here, since *F* has a long term close relationship with *B*, responsibility devolves upon him to do the job. Setting *B* straight involves much more than just criticizing *B* for the purchase he made. Pride may cause *B* to deflect the criticism and focus only on the hurt *F* inflicts on him. If *B* reacts in this way, *F* may very well violate the *ona'at devarim* interdict. Rather, *F* should couple his criticism with a remark like: "the Candelabrum is overpriced. Next time you're in the market for a silver item, be sure to check out Zlomowitz and Sander on Eden Commons Boulevard."

Let us now apply the various scenarios of the "bad purchase" case to evaluate the propriety for Besser to pronounce to Oak that he was "ripped-off." Consider that Oak has no legal recourse to cancel or modify the deal he made with Identity Shield. Accordingly, if Besser is not Oak's close friend, it is permissible for him to nod approvingly at the purchase. If Besser cannot bring himself to do this even in a "feebly polite" way, silence would be the appropriate reaction. Going to the other extreme and telling Oak that he was "ripped off" and explaining to him exactly why may run afoul of the *ona'at devarim* interdict. This is so because the judgment that Oak's purchase was a "rip-off" is valid only from the perspective of people like Besser who are well read and sophisticated in the art of comparison-shopping. If Oak is neither well read nor sophisticated in the art of comparison-shopping, the "overcharge" Oak suffered from the deal he made with Identity Shield cannot be said to reflect irresponsibility in engaging in a market search before making a purchase. Because the rip-off is all rooted in Oak's ignorance and lack of sophistication in information gathering, telling him he was ripped-off and explaining to him why will serve no useful purpose in the future unless Oak can count on someone to help him in comparison-shopping in the future. Besser should ask himself why Oak still thinks he did well with his purchase from Identity Shield a full four months after the purchase. Surely, Besser is not the first one Oak is relating his satisfactory experience with Identity Shield. The reasonable judgment is that no one from Oak's inner circle was prepared to say to him something like the following: "you were ripped-off. The next time you want to take up an offer, run it by me. I'll show you how to check it out." Accordingly, unless Besser is willing to couple his criticism of the purchase with an offer of assistance in comparison-shopping in the future, his com-

ment: "you were ripped off because . . ." runs afoul of the *ona'at devarim* interdict.

ELEVATING ONE'S SELF AT THE EXPENSE OF SOMEONE ELSE'S DEGRADATION

In voicing his criticism of Oak's purchase, Besser does not content himself in telling Oak he was "ripped-off" and explain why but takes Oak's story as an invitation to provide a "matching story" from his own experience. Besser goes on to relate how he and his wife teamed up to masterfully pressure the salesperson at the Child Emporium to give them the best deal possible on a double stroller. By contrasting his own prowess in making a good deal with the "rip-off" Oak fell into in his deal with Identity Shield, Besser rubs in for Oak the bad purchase more poignantly and hence violates the *ona'at devarim* interdict on an aggravated level. Moreover, the contrast of stories projects Besser's shrewdness in getting the best deal possible in a more flattering light than he would otherwise obtain. *Magnifying* one's self at the expense of some one else's degradation runs afoul of R. Yose b. Hanina's dictum: "Anyone who elevates himself at the expense of his friend's degradation has no share in the world to come (*mitkabbed bi-kelon havero en lo helek le-Olam ha-Ba*)."[69]

SUMMARY AND CONCLUSION

The salient feature of the telemarketing industry is the uninvited or cold call. This feature creates a natural tension between the commercial strivings of the industry's practitioners, on the one hand, and its targeted customers, on the other hand. The ethical pitfall for the telemarketer is not to fall prey to *lo tahmod, lo tit'avveh* and *ona'at devarim*. In trying to thwart the designs of the telemarketer, the pitfall for the targeted consumer is not to go beyond the boundaries of the minimum harm principle. At the other extreme, feigning non-interest in the telemarketing product, but all along listening carefully to the information with the aim of using it advantageously may well deprive the telemarketer of his entitled *sirsur* payment.

From the standpoint of halakha, regulation of the telemarketer industry to reduce the inherent tension between the cold callers and the targeted customers is desirable. One favorable development towards this end began in 1985 with the self-regulating initiatives the industry

took to maintain "do not call" lists at the request of its customers.[70] Since 1991, Federal legislation requires telemarketers to maintain these lists. Within the current legal environment, federal law prohibits telemarketers to call outside the 8 a.m.–9:00 p.m. window and some states have legislation pending that would forbid calls during the dinner hour, 5:00-7:00 p.m.

The most recent development of great significance that should reduce the inherent strain between the telemarketer and the target consumer is the launching of a national "do not call" registry. The Federal Trade Commission launched this registry as of June 27, 2003. Telemarketers who call listed people could be fined up to $11,000 for each violation.

The new law does not cover non-profits, politicians, and survey taking organizations. In addition, the rules allow calls from firms with existing business relations with consumers. Registration on the national do not call list hence does not stop these firms from calling.

In the first year of the operation of the "do not call" list more than 62 million telephone numbers were posted to the list.[70] To put this number in perspective, there are about 166 million residential phone numbers in the United States.[71]

A recent survey on how well the "do not call" list was working showed that 87% of households who registered received fewer calls. According to the study, these consumers received an average of 30 telemarketer calls a month before the list went into effect and only six such calls per month after registration.[72]

The telemarketing industry estimates that the "do not call" list could cut its business in half, costing it up to $50 billion in sales each year.[73] In March, 2004, MCI announced that it was laying off 4,000 employees, or more than 7% of its workforce. The company ascribed the layoffs to the "do not call" list.[74]

One expert was more optimistic: "Consumers who don't sign the national registry may be more responsive to phone pitches."[75] The effect of the new law, then, may be to give the telemarketer industry a radical face-lift and transform it into a "kinder and gentler" industry.

NOTES

1. Perry Bacon Jr., Eric Rosten, *Time,* vol. 17, Issue 17, April 28, 2003, p. 56.
2. Jonathan Krim, "Do-Not Call Registry to Begin Today; Industry Faults FTC on steps to Block Unwanted Telemarketing," *Washington Post,* June 27, 2003, p. E1.
3. "ID Theft: When Bad Things Happen to Your Good Name," Federal Trade Commission, www.consumer.gov/idtheft/info.htm.
4. www.creditnexus.com/index.html.
5. Oak had his doctors replace his social security number with the corresponding Hebrew letters. Just for good measure Oak interchanged each corresponding Hebrew letter with its counterpart in the *at bash gar dak gematria* system.
6. "Taking Action Against Telemarketers Who Won't Take No For an Answer," *National Fraud Information Center,* www.fraud.org/telemarketing/teletips/action.htm.

   As of June 27, 2003 The Federal Trade Commission launched a national "Do Not Call" registry. To register the consumer need only call the toll-free number 1-888-382-1222 or visit the web site at www.donotcall.gov. Telemarketers who call listed people could be fined up to $11,000 for each violation. (See, David Ho, "FTC Launches Do Not Call List," Associated Press, June 27, 2003).
7. Besser got this and other whimsical ideas on how to make telemarketers hang up on you from Mike Quinn, *Telecom-Digest*: vol. 16, Issue 130, Message 3 of 6.
8. See note 3.
9. Maimonides, *Yad, Gezel* 1:9-10.
10. R. Abraham of Posquieres, at *Yad*, loc.
11. R. Vidal Yom Tov of Toloso, *Maggid Mishne*, *Yad*, loc.cit.
12. R. Yaakov Kanievsky, *Birkat Perets, Parshat Yitro*. With significant additional nuances, R. Michael Rosensweig (*Beit Yitshak,* Rabbi Isaac Elchanan Theological Seminary, vol. 19, 1987, 215-227) arrives at the same understanding of *Rambam*'s position.
13. The notion that it is possible to violate *lo tahmod* without committing any pestering action whatsoever is a novelty. Consider that *Rambam*'s formulation of *lo tahmod* conduct describes various forms of pressure, i.e., vexing (*hiftsir*); sending friends to exert influence (*hikhbid alav re'im*); and increasing one's bid (*natan lo damim rabbim)*. Perhaps, the issue turns on the philosophical underpinning of the *lo tahmod* prohibition. In his explication of *Rambam*'s position on the *lo tahmod* interdict, R. Michael Rosensweig (*Beit Yitshak,* ad loc.) points out that a number of views on this matter have been expressed. Nahmanides (*Ramban,* Spain, 1194-1270, Leviticus 19:1) avers that the various prescriptions between man and man appearing in *Parshat Kedoshim* correspond to the Ten Commandments. Along this line, . . . [Y]ou shall love your fellow as yourself . . . (Leviticus 19:19) corresponds to the *lo tahmod* interdict. R. Abraham Ibn Ezra (Spain, 1089-1164, Exodus 20:14), however, finds the

philosophical roots of the prohibition of *lo tahmod* in the Torah's mandate to be "one who rejoices in his lot." What this entails is to believe that no efforts and maneuvering will be successful in acquiring something God does not want us to have. Now, if *lo tahmod* is rooted in . . . "love your friend as yourself . . ." , then, as long as *A* insures that in the process of acquiring *B's* article no one, including himself, pesters *B*, *A* should be free of the *lo tahmod* interdict. But, if the basis of *lo tahmod* is the mandate to be joyous in the lot God gives us, any orchestration *A* sets up to overcome *B's* initial refusal to sell him the article should violate for A *lo tahmod,* notwithstanding that *A* insures that no one pesters *B* along the way.

14. R. Solomon b. Joseph Ganzfried, *Kitsur Shulhan Arukh* 182:5.
15. R. David Ariav, *Le-Re'akha Kamokha* (Jerusalem: Ariav, 2000), pp. 49-50. See also R. Bezalel Stern, *Be-Tsel ha-Hokhmah*, 3:45.
16. R. Israel Meir ha-Kohen Kagan, *Ha-Mitsvot ha-Katsar, lo ta'asseh* 40.
17. R. Yaakov Yesha'yahu Bloi, *Pithe Hoshen, Hilkhot Geneva ve-Ona'ah,* p. 30, note 26. See also *Le-Re'akha Kamokha,* op. cit. pps. 48-49.
18. R. David Ariov dealt with an analogous case: A makes use of high pressure tactics to convince B to sell his home to C. C is entirely unaware of A's efforts on his behalf. In addition, A concludes the transaction with C's money. Given that A is not exerting high pressure tactics to acquire the home for himself, A, in the opinion of R. Ariov, does not violate *lo tahmod*. Because C is entirely unaware of what A is doing on his behalf, C also is not in violation of *lo tahmod*. (See *Le-Re'akha Kamokha*, op. cit. p. 61). R. Ariov's conclusion can be put to question. To be sure, A is free of *lo tahmod*. But, if B did not declare *rotse ani* at the conclusion of the transaction, the transaction must be characterized as *gezel*, with the consequence that C has no right to take possession of the home.
19. *Mishna, Bava Metsi'a* 4:10; R. Isaac b. Jacob Alfasi (Algeria, 1012-1103), *Rif*, *Bava Metsi'a* 4:10; R. Asher b. Jehiel (Germany, 1250-1327), *Rosh*, *Bava Metsi'a* 4:22; R. Jacob b. Asher (Germany, 1270-1343), *Tur*, *Hoshen Mishpat*., 228:3; R. Joseph Caro (Israel, 1488-1575), S*hulhan Arukh*, *Hoshen Mishpat* 228:4; R. Jehiel Michel Epstein, (Belarus, 1829-1908), *Arukh ha-Shulhan*, *Hoshen Mishpat* 228:2.
20. *Mekhilta* Exodus 180:22.
21. R. Bezalel Stern, *Be-Tsel ha-Hokhma*, 3:43.
22. Leviticus 25:35; Deuteronomy 15: 7-8, 10. In respect to agricultural produce, the Torah prescribes a 10% obligation (Deuteronomy 14:22). Talmudic decisors differ as to whether the 10% benchmark applies to income as well. Opinions in the matter range from an income tithe requirement arising from biblical law to one established by rabbinical edict. In his survey of the Responsa literature, R. Ezra Basri concludes that the majority opinion regards the 10% level as a definite obligation, albeit by dint of rabbinical decree. In any case devoting less than 10% of one's income to charity is considered by the rabbis to reflect an ungenerous nature. (R. Ezra Basri, *Dinei Mamonot* vol. 1, p. 405).
23. The distinction between persuasion and coercion made in the text is taken from Paul Heyne, *The Economic Way,* 6th ed. (New York: Macmillan, 1991), p. 367.

24. *Shabbat* 119b.
25. R. Jonah b. Abraham Gerondi (Spain, ca. 1200-1264), *Sha'arei Teshuva, sha'ar* 3*;* R. Israel Meir ha-Kohen Kagan, *Sefat Tamim;* R. Hillel Litwack*, Mi-Devar Sheker Tirhak ,* p. 47.
26. The biblical source of the *genevat da'at* interdict is disputed by Talmudic decisors. Maimonides (*Yad, De'ot* 2:6) and R. Jonah b. Abraham Gerondi (*Sha'arei Teshuva, Sha'ar* 3, *ot* 184) place such conduct under the rubric of falsehood (*sheker*). R. Yom Tov Ishbili (Seville, ca. 1250-1330, *Ritva, Hullin* 94a), however, subsumes it under the Torah's admonition against theft (*lo tignovu*, Leviticus 19:11). What *lo tignovu* enjoins is both theft of property and "theft of the mind" by means of deception.
27. Federal Telephone Consumer protection Act, Public Law 102-243.
28. R. Yonatan b. Shaul, S*anhedrin* 74a; *Yad, Rotse'ah* 1:7; *Rosh, Sanhedrin* 8:1; *Sh. Ar.,* op. cit., 425:1; *Ar. ha-Sh.*, op. cit. 425:6.
29. R. Yonatan b. Shaul, loc. cit.; *Rosh*, op. cit.; *Sh. Ar,* op. cit.; *Ar. ha-Sh.*, op. cit. *Rambam* (*Yad,* op. cit. 1:13) understands the punishment to be "in the hands of Heaven," as opposed to being meted out by *Bet Din*. For an explanation of *Rambam's* view, see *Ar. ha-Sh.*, loc. cit.
30. *Sanhedrin* 72b.
31. R. Pinhas ha-Levi (Barcelona, 1235-1300), *Sefer ha-Hinnukh* 601; R. Joseph Rozin (Poland, 1854-1936), *Tsafnat Pa'ane'ah, Sanhedrin* 72b.
32. R. Isaac b. Sheshet Perfet, Responsa *Ribash* 238.
33. R. Judah Rosanes, *Mishne le-Melekh* at *Yad, Hovel u-Mazzik* 8:10.
34. R. Eliyahu Mizrahi, *Mizrahi,* Genesis 32:8.
35. R. Mordecai b. Abraham Jaffe, *Levush,* Genesis 32:8.
36. R. Solomon b. Isaac, *Rashi, Sanhedrin* 57a, 74a.
37. R. Meir b. Todros ha-Levi Abulafia, *Rama, Sanhedrin* 57a.
38. R. Israel Rosen, "Killing a Pursuer in Self-Defense," *Tehumin,* vol. 10, pp. 76-89.
39. R. Asher b. Jehiel, *Bava Kamma* 3:13.
40. *Bava Kamma* 28a; *Yad, Hovel u-Mazzik* 6:6-7; *Tur,* op. cit. 382:2; *Sh. Ar.,* op. cit. 382:2; *Ar. ha-Sh.,* op. cit. 383:6.
41. R. Solomon b. Abraham Adret, *Rashba, Bava Kamma* 28a.
42. "Do-Not Call Registry to Begin Today; Industry Faults FTC on Steps to Block Unwanted Telemarketing," op. cit., E1.
43. Abaye derives his prohibition against making an insincere promise at *Bava Metsia* 49a in the following manner: In connection with the biblical prohibition against false weights and measures, the Torah writes: "Just (*tsedek*) balances, just weights, a just *efa*, and a just *hin* you shall have" (Leviticus 19:36). Since the *hin* is a measure of smaller capacity than the *efa*, its mention is apparently superfluous. If accuracy is required of a large capacity, it is certainly required in measures of small capacity. This apparent superfluity leads Abaya to connect *hin* with the Aramaic word for "yes," *hen*, giving the phrase the following interpretation: Be certain that your "yes" is *tsedek* (sincere) and (by extension) be certain that your "no" is *tsedek* (sincere). If an individual makes a commitment or an offer, he should fully intend to carry it out.

    The duty to insure that a commitment is made in a sincere manner is referred to as the *hin tsedek* imperative.

44. *Rosh*, op. cit., *Yad*, op cit.; *Tur*, op. cit., *Sh.Ar.*, op. cit; *Ar. ha-Sh.*, op. cit. 333:19.
45. "Telemarketers Face Pressure Do Not call Lists Put Jobs at Risk," *The Morning Call*, October 20, 2002, www.gryphonnetworks.com/press/articles/2002 10 20.asp.
46. R. Pinhas ha-Levi of Barcelona, *Sefer ha-Hinnukh* 338.
47. *Sefer ha-Hinnukh,* op. cit. 338.
48. *Yoma* 23a.
49. Nahmanides, *Ramban,* Leviticus 19:18.
50. Maimonides, *Yad, De'ot*: 7:7-8.
51. R. Avrohom Ehrman, *Journey To Virtue* (New York: Mesorah Publication, Ltd., 2002), pp. 62-68.
52. *Ar. ha-Sh.,* op. cit., 185:12.
53. R. Meir b. Barukh of Rothenburg (1215-1293) quoted by R. Elijah b. Solomon Zalman (Vilna, 1720-1797), *Be'ur ha-Gera* to *Sh. Ar., Hoshen Mishpat,* 185 *ot* 13.
54. *Ar. ha-Sh.,* op. cit., 185:10,12.
55. For details and sources for the law of *ona'ah* and how it applies to the modern marketplace, see, Aaron Levine," *Ona'ah* and The Operation of The Modern Marketplace," *Jewish Law Annual*, Hebrew University, vol. XIV, 2003, pp. 225-258.
56. R. Meir b. Barukh of Rothenburg, *Responsa Maharam* 477; R. Isaac b. Moses of Vienna (ca. 1180-1250), *Or Zaru'a* 3, *Bava Metsia, piska* 242; R. Meir ha-Kohen (end of 13th cent.), *Haggahot Maimoniyyot, Sekhirut* 9:4.
57. R. Jekuthiel Asher Zalman Zausmir (d.1858), Responsa *Mahari'az, siman* 15, *amud* 14, *tur* 1.
58. Maimonides, *Yad, Mekhira* 8:15. For a discussion on how Maimonides derives the principle that the law of *ona'ah* does not apply to a *po'el,* see, Aaron Levine, *Economic Public Policy And Jewish Law* (Hoboken, New Jersey: Ktav Publishing Co. Inc., Yeshiva University Press, 1993), pp. 41-42.
59. See Aaron Levine, *Case Studies in Jewish Business Ethics* (Hoboken: Ktav Publishing House Inc. and Yeshiva University Press, 2000), pps. 133-135.
60. *Torat Kohanim*, Leviticus 19:14; Maimonides, *Yad, Rotse'ah* 12:14.
61. *Ar.ha-Sh.,* op. cit., 185:10.
62. R. Jacob b. Asher, *Tur, Even ha-Ezer* 65:l; R. Joseph Caro, *Sh. Ar., Even ha-Ezer* 65:1; R. Jehiel Michel Epstein, *Even ha-Ezer* 65:1.
63. R. Samuel b. Joseph Strashun, *Rashash, Ketubbot* 17a.
64. R. Israel Meir ha-Kohen Kagan, *Hilkhot Issurei Rekhilut Kelal* 9:12.
65. For two alternative explanations, see R. Judah Lowe b. Bezalel, *Maharal, Ketubbot* 17a and R. Nethanel b. Naphtali Levi Weil, *Korban Netanel* at *Rosh, Ketubbot* 2:2, note 4.
66. R. Yom Tov Ishbili, *Ritva, Ketubbot* 17b.
67. For an explicit application of the notion that the *darkhei shalom* principle can refer to inner peace, see R. Jacob b. Joseph Reicher (Austria, d. 1733), *Iyun Yaakov*, commentary on *Ein Yaakov, Sanhedrin 43a*.
68. R. Jacob b. Joseph Reicher, *Iyun Yaakov*, commentary on *Ein Yaakov, Yevamot* 63a.
69. *Jerusalem Talmud, Hagiga* 8a. For application of the prohibition of *mitk-*

abbed bi-kelon havero to negative comparison advertising, see Aaron Levine, *Case Studies in Jewish Business Ethics* (Hoboken: New Jersey: Ktav Publishing House Inc., Yeshiva University Press, 2000), pp. 60-67.

70. Caroline E. Mayer, "In 1 Year, Do-Not-Call List Passes 62 Million," washingtonpost.com, Thursday, June 24, 2004, p.E05.
71. "Do-Not Call Registry to Begin Today; Industry Faults FTC on steps to Block Unwanted Telemarketing," *Washington Post,* June 27, 2003, op. cit., p. E1.
72. "In 1 Year, Do-Not-Call List Passes 62 Million," op. cit.
73. Ibid.
74. Ibid.
75. Brian Steinberg, Suzanne Veronica and Yochi J. Dreazen, "Do Not Call Registry Is Pushing Telemarketers to Plan New Pitch," *The Wall Street Journal*, July 2, 2003.