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“New Wine in Old Flasks: the Just Price and Price-Controls in Jewish Law”¹

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Abstract: The *halakhah* (Jewish law) includes legislation aiming at might be called “social justice.” These *halakhot* (pl.) include the laws of *ona'ah* and *hafka'at she'arim / hayyei nefesh* – roughly analogous to the famous Medieval “just price” laws – as well as legal restrictions on middlemen and speculators. In the light of modern economics, these Jewish laws, like all attempts at price-fixing, are shown to be self-defeating; the means conflict with the ends sought. The conflict between religion and science is not limited to cosmology and biology, but may include economics as well. It is proposed that the *halakhah* be modified in such a way as to preserve – as much as possible – the integrity of both the *halakhah* and economic science alike; when an ethical system makes certain scientific presuppositions, it is sometimes possible to preserve the ethical system by disentangling it from its non-essential scientific presuppositions.

Keywords: price controls; price fixing; just price; jewish business ethics; religious economics

JEL Codes: A12, B11, D00, K20, P00, Z12

Louis Ginzberg once joked (1920: 97) that

The devil, according to Shakespeare, quotes Scripture. But if he is really as clever as he is reputed to be, he ought to quote Talmud, as there is hardly any view of life for and against which one could not quote the Talmud.

In particular, much ink has been spilled debating whether a given religion – say Judaism or Christianity – would favor this or that socio-economic system – for example, capitalism or socialism. One mainstream view argues that Judaism is generally in favor of private property, markets, and differential prices and wages. If so, Judaism is basically in favor of capitalism (e.g. Sauer and Sauer 2012; Lifshitz 2012; Paley 2006; Hill 1995: 373f.; Block, Brennan, and Elzinga 1985: 401-459 *passim*; Block and Hexham 1986: 375-461 *passim*; Tamari 1986, 1987, 1991, 2010).²

However, even if one concedes that Judaism is in favor of capitalism, such a characterization, no matter how accurate, is nevertheless extremely vague. For depending on the interpreter, “capitalism” can run anywhere from a highly interventionist corporatism (fascism) or a social-democracy (mixed economy), all the way to complete laissez-faire. In turn, laissez-faire capitalism could embrace not only Lockean or Nozickean minimal night-watchman government (minarchism) but even Gustave de Molinari's market-anarchism (anarcho-capitalism). So the statement that Judaism is in favor of capitalism really does not say very much. Aaron Levine (1985a, b; 2012) and Meir Tamari (1986, 1987, 1991, 2010) in particular argue that while Judaism would on the balance favor capitalism, it (Judaism) would nevertheless insist on several crucial checks and limitations on free-trade for the sake of justice, fairness, and the public good.

In order to accurately assess which socio-economic system Judaism would prefer, one must painstakingly analyze each and every individual Jewish law (*halakhah*) in detail.³ This present article aims to do precisely this with regard to one specific set of *halakhot* (pl.), namely *ona'ah* – the prohibition of charging unfair prices – and *hafka'at she'arim / hayyei nefesh*– price-controls imposed on foodstuffs. These laws are chosen specifically because of all Jewish laws, they are perhaps the most

apparently contrary to the operation to a free-market.⁴ We will show that the laws of *ona'ah* and/or *hafka'at she'arim / hayyei nefesh*⁵ may in fact institute price-controls, perhaps somewhat similar to the famous Medieval “just price” legislation (Kleiman 1987: 23, 39-44; David Friedman in Block, Brennan, and Elzinga 1985: 453).⁶ With respect to this set of laws, Judaism may have to be judged as opposed to rather than in favor of capitalism. Furthermore, we will show that in the light of modern economic theory, if the law of *ona'ah* constitutes price-control, then it, like all forms of price-control, would be inefficient and self-defeating, accomplishing the opposite of its intention (Coyne and Coyne 2015a, Schuettinger and Butler 1979, Morton 2001, Rockoff 2008, Levine 2012: 94).

If enforcement of *ona'ah* and/or *hafka'at she'arim / hayyei nefesh* price-controls turns out to be economically inefficient, an obvious dilemma arises for the Orthodox or traditionally observant Jew: what to do when science and religion apparently conflict? It is conventional to accept the possibility of conflict between religion and cosmology and biology (evolution),⁷ but it is not usually realized that a similar conflict can exist between religion and economic science. There is an important difference between the normative value judgments which any religion is entitled to make (such as that fairness ought to prevail over economic efficiency) versus positive-economic statements of strict causality, such as “rent control reduces the supply of rental housing” which, if true, no religion may deny. Applying the positive-normative distinction to religion, Walter E. Block has argued (1986: 451) that

if it can be shown that the precepts of some religion run counter to these factual statements [concerning economics], that is too bad for that particular religion. It is as if this religion is on record denying that the earth is round, or that water is composed of two parts hydrogen and one part oxygen.

Thus, religion and science may conflict not only in matters of cosmology and biology but also economics. Assuming it is true that rent-control reduces the supply of housing, any religion is perfectly entitled to argue that it prefers to promote “fair” lower housing prices even at the cost of reducing the supply of housing, for this is a normative judgment. This religion would accept the positive findings of

science but interpret their normative significance and implications differently. What the religion may not legitimately do, however, is declare that it aims at promoting the ready availability of housing through the imposition of rent-controls. In this case, the religion is not merely disagreeing on the moral significance of given scientific fact, but it is denying scientific fact itself. To quote Murray N. Rothbard (1970: 4, rpt. in Rothbard 2000 [1974]: 202),

It is no crime to be ignorant of economics, which is, after all, a specialized discipline and one that most people consider to be a “dismal science.” But it is totally irresponsible to have a loud and vociferous opinion on economic subjects while remaining in this state of ignorance.

One is not obliged to accept the normative assumption that ready supply of housing is a good thing, and therefore, one is not obligated to oppose rent-control. But that rent-control reduces the supply of housing is a scientific fact which cannot be denied without appropriate scientific proof. The religion may legitimately deny the positive scientific fact if and only if the rejection is accompanied by scientific proof. Whereas in normative matters of subjective judgment and ethical taste, no proof is strictly necessary (*de gustibus non est disputandum*). One is not obligated to scientifically prove the normative assertion that low housing prices are preferable to ready availability of housing, but one *is* obligated to prove the positive-scientific claim that rent-control does not reduce the supply of housing. Likewise, it requires scientific evidence to refute the positive-scientific claim that artificially low prices and ready supply of housing cannot be obtained simultaneously.

There is already an abundant literature on how a religion may or should deal with conflicts between religious belief and scientific facts concerning cosmology and biology. We will propose that such conflicts in matters of the economy should be dealt with in approximately the same manner as conflicts between science and the first chapter of Genesis. According to the traditional Jewish literature, it is possible to distinguish that which was received at Sinai from that which was determined by the Talmudic rabbis based on their own independent study of science. Therefore, one may alter the

halakhah (Jewish law) according to new discoveries of scientific fact without abandoning the essential “revealed” religious core of the law. The conclusion of this article will therefore be, in some ways, compatible with studies concerning ethical philosophers who wrongly presumed certain scientific facts which have later turned out to be inaccurate. These studies have attempted to demonstrate that the essential core of the ethical theory may survive even if the presumed scientific “facts” are suitably replaced. For example, Fred J. Miller (2013) has argued that while Aristotle himself had a negative attitude towards the morality of business, that this was because Aristotle lacked modern economic theory. Miller argues that one may replace Aristotle's own notions of economics with modern theory, while yet retaining unaltered the essence of Aristotelian virtue ethics (eudaimonism). Thus, Miller claims (2013), one may morally justify business activity using only a slightly modified Aristotelian ethical framework, wherein only the scientific facts of economics presumed by Aristotle are abandoned, while the essential core of Aristotelian ethics is left unchanged. This article will attempt to do something very similar, namely to demonstrate that the Talmud presumed certain scientific theories in its legislation, but that these scientific theories are not religiously authoritative, and that one may dispense with the Talmud's scientific assumptions – including those concerning economics – without rejecting the essential ethical, legal, or revealed-religious framework of the Talmud.

It is crucial to note that we will be analyzing Jewish law as a single, continuous whole, considering the Roman-era *Mishnah*, the Sassanid-era *Talmud*, and the Medieval codes of Jewish law as explaining each other. In other words, we are interested in what living Jewish law has to say for practical matters, rather than being concerned with what the historical *Mishnah* or *Talmud* meant. There is an important distinction to be drawn between the two approaches: on the one hand, one could isolate specific statements in the *Mishnah* or *Talmud* and situate them in their historical contexts according to the identities of their named-authors. On the other hand, one may consider Jewish literature as a continuous unity and study it in a relatively ahistorical fashion. Ephraim Kleiman's study of *ona'ah* (1987) takes the historical approach and notes that other scholars have taken the unity approach

(Kleiman 1987: 25 n. 2). This present article will take the unity approach, for our concern is not with what the specific authors of the *Mishnah* or *Talmud* meant as individuals, but instead with how living, evolving Jewish law has understood them.

Thus, this article will analyze what may be the most anti-market legislation in Judaism, *viz.* *ona'ah* and *hafka'at she'arim / hayyei nefesh*, and judge just how anti-market those laws actually are. If these laws constitute price-controls, then this is an extremely strong argument that Judaism may not be reconcilable with capitalism. On the other hand, if these laws are *not* forms of price-control, then this will strengthen the case that Judaism may be in favor of capitalism. Alternately, if these laws *are* forms of price-control *but* if there are easy means of circumventing or negating them, then once again, this will contribute to the argument that Judaism is – or can be – in favor of capitalism.

Aside from this article's contribution to a subject of parochially religious-Jewish interest, it will have ramifications that will be of interest to gentiles and academic scholars in three different ways: first, that it is not enough to merely say that a given religion is in favor of capitalism in general; one must qualify this generalization by studying specific laws. Second, that conflicts between religion and science are not limited to cosmology and biology, but may include economics as well. Where religion conflicts with modern economic science, one should treat this like any other conflict between science and religion rather than simply ignoring the conflict as if it does not exist. Third, that it is sometimes possible to distinguish between the essential core of an ethical theory on the one hand and any scientific facts presumed true by the ethical theorist on the other hand. When the scientific “facts” turn out to be false, it is not necessarily the case that one must abandon that ethical theory *in toto*. One may be able to preserve the essence of the ethical theory while discarding the false scientific “facts” which had been a merely secondary or tertiary part of the ethical theory.

This paper is organized as follows: section I summarizes the laws of *ona'ah* and *hafka'at she'arim / hayyei nefesh*, to establish the basic characteristics of these laws but without subjecting them to any critical analysis. Section II evaluates *ona'ah* to determine its purpose and intention and to judge

whether it constitutes a price-control or not. Section III does the same for *hafka'at she'arim / hayyei nefesh*. We shall find that *ona'ah* is not a price-control but that *hafka'at she'arim / hayyei nefesh* is one. Section IV evaluates price-controls in general according to contemporary economic theory, demonstrating the significance of the finding that *hafka'at she'arim / hayyei nefesh* is a price-control. Section V discusses a few sundry matters tangentially related to *ona'ah*, including rent-controls, minimum wages, and how *ona'ah* has influenced Israeli law. Section VI discusses halakhic (Jewish legal) restrictions on middlemen and speculators, showing that these restrictions are damaging as well, similarly to price-controls. Section VII is a philosophical discussion of what it means for price-controls and other economic regulations to be self-defeating, and in particular, how the halakhic economic regulations previously discussed defeat the specific Jewish ethical goals they are meant to accomplish. Section VIII criticizes one author's attempt to rehabilitate *hafka'at she'arim / hayyei nefesh* and demonstrate that it is *not* a price-control. This paper argues that that author's attempt must be judged unsuccessful, and that *hafka'at she'arim / hayyei nefesh* really *is* a price-control after all. Section IX investigates whether these Jewish laws are still in force today, whether they still possess any binding authority. This section concludes that some of these laws lie in desuetude, but that others are still problematically authoritative. Section X discusses whether the *halakhah* can be altered according to new scientific discoveries. Section XI uses the conclusion of the previous section - that the *halakhah* can indeed be altered to fit new scientific discoveries - to argue that the halakhic economic regulations ought to be altered or annulled according to the discoveries of modern economic science. Section XII concludes.

I. The Laws of *Ona'ah* and *Hafka'at She'arim / Hayyei Nefesh* Summarized

First, we must explore the history of Talmudic price-regulation in general, especially *ona'ah* and *hafka'at she'arim / hayyei nefesh*.⁸ Menachem Elon summarizes the general history of Talmudic price-legislation as follows (Elon 2008):⁹

It would seem that in the mishnaic period there were fixed prices, apparently determined by a competent authority (*BM* [*Bava Metzia*] 4:12, 5:7). There is evidence that in Jerusalem – prior to the destruction of the Temple – the market commissioners “did not supervise prices but [weights and] measures only” (*Tosef.* [*Tosefta*], *BM* 6:14); in Babylonia (at the commencement of the third century C.E.) there was supervision of prices at the instigation of the exilarch (*TJ* [*Palestinian Talmud*], *BB* [*Bava Batra*] 5:11, 15a; *TB* [*Babylonian Talmud*], *BB* 89a). The sages of that period were divided, however, on this matter. Some expressed the opinion that “price inspectors do not need to be appointed” and that competition between merchants would suffice to stabilize the price while others were of the opinion that it was incumbent on the court to supervise the prices because of the “swindlers” who hoarded commodities toward a time when they might be in short supply in order to sell them at a high price (*TJ* and *TB*, *BB* 89a). Over the course of time the view favoring price supervision apparently became generally accepted (*BB* 89a; *Yoma* 9a) and thus it was decided in the codes: “But the court is obliged to determine prices and to appoint commissioners for this purpose, to prevent everyone from charging what he likes ...” ([Maimonides] *Yad* [i.e. *Mishneh Torah*], [*Hilkhot*] *Mekhirah* 14:1; *Tur* and *Sh. Ar.* [*Shulhan Arukh*], *HM* [*Hoshen Mishpat*] 231:20).

Notice some were of the opinion that “competition between merchants would suffice” (cf. Tamari 1987: 94), but that this opinion was eventually rejected by the Rabbinic consensus until “the view favoring price supervision apparently became generally accepted” in order to regulate prices and “to prevent everyone from charging what he likes.” Furthermore, that additional opprobrium and concern was directed at speculators, the “swindlers' who hoarded commodities toward a time when they might be in short supply in order to sell them at a high price.”

Shmuel Shilo defines *ona'ah* in particular as “the act of wronging another by selling him an

article for more than its real worth or by purchasing from him an article for less than its real worth” (Shilo and Elon 2008).¹⁰ Ephraim Kleiman defines *ona'ah* as “exploitation through price deceit” (Kleiman 1987: 25).¹¹ *Ona'ah* is based on an interpretation of the verse in Leviticus 25:14, “And if thou sell aught unto thy neighbor, or buy of thy neighbor's hand, ye shall not wrong (*tonu*) one another” (*Hil. Mekhira* 12:1; Shilo and Elon 2008; Kleiman 1987: 25). There are three different degrees of prohibited *ona'ah*.¹² First is where the discrepancy between the sale price and the official market price is more than one-sixth, whether above or below, i.e. whether over- or under-charging.¹³ In this case, the sale is null-and-void. Secondly, where the sale and market price differ by exactly this amount, in which case the transaction is binding but the victim is entitled to restitution of the full amount of the *ona'ah*, i.e. the amount of the prohibited one-sixth discrepancy. The third case is where there is less than a one-sixth discrepancy between sale and official market price; here, the sale is binding, and the injured party has no claim to compensation. There is a dispute among the Jewish authorities whether a discrepancy less than one-sixth is permitted or whether it is forbidden but non-actionable (Levine 2012: 54f.).

Meanwhile, closely related to *ona'ah* is another law, that banning *hafka'at she'arim* or “profiteering” – also known as the law ensuring access to food essential for the sustenance of *hayyei nefesh* or “life of the soul.”¹⁴ Menachem Elon defines *hafka'at she'arim* (profiteering) as “raising the price of a commodity beyond the accepted level, or that fixed by a competent authority” (Elon 2008). Similarly, Itamar Warhaftig says (1987: sec. “1”) that “a profiteer is one who causes the prices to rise in an artificial manner” and that the *halakhah* restricted “someone who causes prices to rise without economic justification.”

Whereas *ona'ah* is a Biblical prohibition which may be waived in certain cases by the parties involved, *hafka'at she'arim* is a Rabbinic enactment reinforcing the prohibition of *ona'ah* by forbidding the parties from voluntarily waiving *ona'ah* in certain situations (Elon 2008).¹⁵ ¹⁶ Furthermore, whereas *ona'ah* applies to nearly all goods and commodities whatsoever – with but a few exceptions, specifically real estate, slaves, bills, and consecrated objects (*Hil. Mekhira* 13:8-18, Kleiman 1987: 30,

Shilo and Elon 2008, Warhaftig 1988: sec. “C. Exceptions”, Lew 1995: 43, Tamari 1991: 76)¹⁷ – by contrast, *hafka'at she'arim* applies only to essential foodstuffs (*Hil. Mekhira* 14:1-2, quoted in Tamari 1991: 77; Elon 2008; Tamari 1987: 88).¹⁸ To summarize: *ona'ah* is a Biblical prohibition which prohibits certain degrees of over- or under-charging on all commodities except real estate, slaves, bill, and consecrated objects, but the parties to the transaction may waive the prohibition if there is mutual consent. *Hafka'at she'arim / hayyei nefesh*, by contrast, is a Rabbinic prohibition similar prohibiting over- or under-charging, but only for foodstuffs, and this prohibition cannot be waived, not even by the mutual consent of the parties.

Notice that the restrictions on permissible price seem to be with respect to a fixed, official price, not with respect to the costs incurred in production or acquisition. This is the view of Maimonides, and while it is the most prominent view, relied on by most authorities, there is another view. According to the Rashbam, one is prohibited to make a profit of more than one-sixth with respect to the costs he has incurred.¹⁹ According to this second view that *ona'ah* is cost-based, *ona'ah* is not a form of direct price-control, but rather it is a form of profit-limitation, aimed especially against middlemen.²⁰ However, many of the same sorts of objections to price-controls would apply to both interpretations of *ona'ah*, for *if* *ona'ah* turns out to constitute a price-control, then these two interpretations would merely have the mandated price be calculated on a different basis. Whether one restricts prices based on an officially fixed permissible sale price or whether based on costs of production and acquisition, either way, the result is a form of price-control. The question we will investigate is whether *ona'ah* is indeed a price-control at all.

Returning to the view of Maimonides that *ona'ah* is calculated based on some official price, it is not entirely clear, however, whether the fixed price is to be set arbitrarily, or whether it is supposed to bear some relation to the actual price level in the marketplace. Nor is it clear whether the *ona'ah* price is publicly announced or whether market participants must research the *ona'ah* price for themselves at their own expense. As Ephraim Kleiman notes (1987: 26), “nowhere does the Talmud explicitly

mention the reference price from which such a divergence is to be measured.” Warhaftig (1988: sec. “Introduction”) is equivocal on the matter, saying, “The correct price is officially set by the authorities or is the prevailing price in the marketplace.” Elsewhere, Warhaftig (1987: sec. “C. Summation and Application”) is more sure: according to the consensus view (inc. Maimonides), “the prices of essential items are fixed by the authorities,” and it is only in the view of Rashbam, he says, that prices are set by the market, because for Rashbam, *ona'ah* restricts profit with respect to costs, not a fixed price. Kleiman (1987: 26) disagrees, saying, “the relevant standard was none other than the going market price.”²¹ Levine (2012: 53) agrees with Kleiman, saying, “the reference price for an *ona'ah* claim is nothing other than the competitive norm.” However, neither Kleiman nor Levine reveal how this competitive norm is to be discovered when goods are heterogeneous and not all prices for a given good are identical.

Perhaps the intention of the law was that the courts would officially ratify as the fixed legal price whatever the prevailing market price already happened to be. In other words, when the courts thought that a general market rate had become settled (*yatzah ha-sha'ar* – cf. Levine 2012: 97), perhaps they would officially promulgate this as the fixed price, and any deviations from this price were considered *ona'ah* (cf. Kleiman 1987: 37). Indeed, discussing *hafka'at she'arim*, Maimonides declares (*Hil. Mekhira* 14:1), “the *beit din* is obligated to fix prices,” which implies a publicly promulgated official price. Similarly, Maimonides wrote elsewhere that “the court is required to ... set the prices” (Warhaftig 1987, quoting *Hilkhot Geneiva* 8:20 and *SA HM* 231:20-21). Likewise, discussing *hafka'at she'arim*, Levine says (2012: 93), “the *hayyei nefesh* [essential foodstuffs] edict required the Jewish court to appoint price commissioners to supervise the marketplace.”²² Tamari (1987: 95) speaks of when “a new communally adjusted price is announced.” Later, discussing *ona'ah*, Tamari similarly speaks of a publicly announced price, saying (1987: 97), “A just price cannot exist unless there exists a fixed price set through some legislative machinery.”

However, the *halakhah* also specifies that the victim of *ona'ah* has only a limited time to object

to the over- or under-charge, according to how long it is estimated it would take him to verify the proper price with an expert (*Hil. Mekhira* 12: 5-11; Warhaftig 1988: sec. “B. Period of Cancellation”; Kleiman 1987: 26; Tamari 1987: 97f.; Tamari 1991: 78; Weissman 1998: 86-88). This implies that there is no officially posted price which can be easily looked up on a public bulletin, but rather, that the law of *ona'ah* enforces whatever the market price may happen to be, and that a person must verify for himself what that price actually is (Kleiman 1987: 34 n. 19).²³ So it may be that no fixed price was officially established at all, and instead, it was assumed that the market price would speak for itself. In summary, it is not clear whether *ona'ah* and *hafka'at she'arim* envision a publicly declared official price, or whether it assumes that the correct price is something which exists independently and objectively on its own. Perhaps the prices for the two laws were fixed in two entirely different manners, with the *ona'ah* price being something market participants must discover for themselves (cf. *Hil. Mekhira* 12: 5-11), but the *hafka'at she'arim / hayyei nefesh* price being officially dictated and announced (cf. *Hil. Mekhira* 14: 1).

It is crucial to note as well that apart from the *beit din* (rabbinical court)'s authority to enforce *ona'ah* and *hafka'at she'arim / hayyei nefesh*, there is a wholly distinct power resting in the corporate, (relatively) democratic Jewish community (Epstein 1985: i-ii; Warhaftig 1987: s.v. “6. Price Fixing”; Levine 2012: 202) to regulate wages and prices (*Hil. Mekhira* 14:9, quoted by Levine 2012: 108; Levine 2012: 202; Lew 1985: 126; Elon 2008). As Meir Tamari notes (1991: 68), “the people of the city have the right to fix prices (either by majority vote for through their representatives)” (cf. Tamari 1987: 94). Itamar Warhaftig (1987 s.v. “6. Price Fixing”) quotes *Tosefta BM* 11:12: “The members of the community may determine prices and measures and wages, and they may enforce their decisions...” Similarly, Aaron Levine (2012: 108) quotes Maimonides, *Hilkhot Mekhira* 14:9 (cf. Tamari 1987: 94):

The residents of the city may agree among themselves to fix a price for any article they desire, even for meat and bread, and to stipulate that they will inflict such-and-such penalty upon one who violates the agreement.

Crucially, Aaron Levine comments on *Hil. Mekhira* 14:9, saying (Levine 2012: 108), “communal price-fixing legislation in the *hayyei nefesh* [i.e. essentials] sector may conflict with the 20% profit rate the *Beit Din* of the town sets for this sector” in enforcing the law of *ona'ah* or *hafka'at she'arim / hayyei nefesh*. This appears to be a straightforward, unambiguous power to impose wage and price controls even beyond the controls already imposed by the laws of *ona'ah* and *hafka'at she'arim / hayyei nefesh*.

It is not entirely clear whether *ona'ah* applies to wages as well. According to Shmuel Shilo, “it was laid down as *halakhah* that the law of overreaching [i.e. *ona'ah*] does not apply to the hire of laborers” (Elon and Shilo 2008, citing *Yad, Mekhirah*, 13:15). Aaron Levine concurs that *ona'ah* does not apply to most forms of wage-labor (Levine 2012: 193-197, 209). On the other hand, Itamar Warhaftig (1988, sec. “2. Transactions,” s.v. “b) employment”) notes that there are opinions on either side regarding whether wages are subject to *ona'ah*. But regardless, the corporate Jewish community did have the power to impose wage and price controls by some sort of (semi-)democratic procedure, entirely apart from the *beit din*'s enforcement of *ona'ah*, as we saw earlier. Thus, Meir Tamari (1987: 149) quotes the Talmud, *BB* 8b: “The people of the city are permitted to regulate weights, prices, and the wages of workers. They also have the power to punish those who do not carry out their regulations.”²⁴ Whether *ona'ah* applies to wages or not and whether *ona'ah* is a form of price-control or not, in any case wages were still subject to some form of price-control.²⁵

II. *Ona'ah* Evaluated

With the basic characteristics of the laws now summarized, we will first evaluate whether *ona'ah* constitutes a price-control. According to several interpreters, *ona'ah* is not meant as a price-control which bans deviations from the official price. Instead, it is only a measure meant to protect market participants from ignorance and asymmetric information.²⁶ This interpretation of *ona'ah* is based on an important exemptions to the law. Shmuel Shilo explains (Shilo and Elon 2008):

A stipulation between the parties stating, “on condition that there is no [prohibition of]

overreaching [i.e. *ona'ah*] therein” (i.e., in the transaction), or “on condition that you have no claim of overreaching against me,” is invalid (*Sh. Ar., HM 227:21*),²⁷ since the language used implies a stipulation contrary to a prohibition laid down in the Torah and one may not stipulate to set aside the Pentateuchal law; however, when the amounts involved in the transaction are specified, a stipulation of this nature is valid, since the injured party knows the precise amount of the overreaching to which he waives his right, and all stipulations in monetary matters are valid. ... There is no [prohibition of] overreaching [i.e. *ona'ah*] as regards “one who trades on trust” [*nosei be-emunah*] (*BM 51b*). “How so? If the seller said to the purchaser 'I purchased this article for so and so much and I wish to earn thereon so and so much,' the purchaser will have no claim against him for overreaching” (*Arukh ha-Shulhan [HM] 227:28*), “even if the overreaching amounts to more than one-sixth” (*Yad, Mekhirah 14:1*).

In other words, one cannot contractually stipulate that the very prohibition of *ona'ah* itself is nullified, but “one who trades on trust,” the *nosei be-emunah* can specify precisely how much he – the seller – is over- or under-changing, and even if the discrepancy is greater than one-sixth, since the precise magnitude has been made explicit to the other person, the sale is legal.

The fact that *ona'ah* can be circumvented by full-disclosure shows that *ona'ah* is not meant as a price-control but as a protection against asymmetric information (Weissman 1998: 90).²⁸ For example, Meir Tamari argues (1991: 82; cf. 1987: 96f., 1986: 408)

This view of the law of *ona'ah* primarily as a legal protection against exploitation, rather than an intervention in the price-fixing mechanism of the market, may be seen in the ruling of Maimonides. He rules that there can be no claim of *ona'ah* in those cases where it was made perfectly clear that the price charged was above the market rate of 1/6 or more. In other words, once full disclosure has been made, there is no longer any question of exploitation or oppression.

Similarly, Warhaftig (1988: sec. "Introduction") argues that *ona'ah* only applies when "one of the sides to the transaction is not aware that he is paying more or receiving less than that price." And again, Warhaftig (1988: sec. "A. Definition") states that the prohibition of *ona'ah* only applies when "the victim was not aware of the fraud and therefore it cannot be claimed that he waived or agreed to pay more than the market price." Finally, Warhaftig (1988: sec. "D. Stipulation and Waiver") concludes that,

Fraud is based on the withholding of information. It follows that if, for example, the seller explicitly stipulates that the price is higher than the market price, and the buyer accepts this, the laws of *ona'ah* are inapplicable.²⁹

Furthermore, as Seth Winslow Weissman notes (1998: 87), the fact that the victim of *ona'ah* is given a deadline by which time he must have consulted an expert to appraise the value of his purchase, after which time he loses his claim, shows that *ona'ah* is meant to protect against asymmetric information.

Ephraim Kleiman (1987) has perhaps the most detailed argument that this is the intent of the law of *ona'ah*. After quoting *TB BB 51b* concerning the *nosei be-emunah* (1987: 29), the one who waives *ona'ah* by disclosing the discrepancy, Kleiman concludes that the law of *ona'ah* "seems to have been intended only to prevent sharp dealers from taking advantage of the customers' lack of information concerning the current market price." He notes that the immediately following discussion in the Talmud is one prohibiting mixing new and old produce together in order to make the old produce falsely appear new, which he says (1987: 29) would "amount to what we would call in modern parlance truth in advertising or fair-trade regulations." Interpreting the laws of *ona'ah* and fair-appearance together, Kleiman concludes (1987: 29)

Their aim was to ensure that transactions took place under conditions of, as far as possible, full information. And in the view of the *Mishna*, this applied not only to the quality of goods traded but also to their prices.

In addition, Weissman and Kleiman both note the existence of one opinion that merchants were

not to protected by *ona'ah*, but only consumers, because merchants are experts (Kleiman 1987: 28 and Weissman 1998:88f., both quoting *TB BM 51a*). Although this is not the accepted by the Talmud as the final law (cf. *Hil. Mekhira 12:8*), Kleiman and Weissman argue that even the rejected opinion reveals a consensus concerning the underlying purpose of the law, *viz.* to protect the weak and ignorant against exploitation by those with superior knowledge. Furthermore, Kleiman argues that the Talmudic laws of interest as applied to futures markets demonstrate an appreciation by the Talmud that prices do fluctuate in a market (Kleiman 1987: 33-38) and he argues (1987: 38) that

We may thus conclude that the price which was supposed to serve as the reference standard for overcharging was the shortest of all short-run market ones - the one obtaining at the particular locality and particular moment at which the transaction concerned was effected. Such a price has little to be said for it on either equity or efficiency grounds. The ethics of the *ona'ah* rule applied not to the price itself, but to the withholding of information about it.

If this is the purpose of *ona'ah*, then it is not a price-control at all. According to this interpretation, the law of *ona'ah* is not meant to ban deviations from a given price, but only to ensure that market prices are formed under conditions of full information. According to Tamari (1987: 99), “the law of *ona'ah* would seem to require a public policy requiring full disclosure of the market prices of basic commodities.” Later, Tamari suggested (1991: 85) that “the law of *ona'ah* would ... seem to require communal or government action in order to make information about market prices freely available to all.” Thus, it appears that *ona'ah* would not constitute a problematic price-control (contra Block 1986, 1990, 2002).

Nevertheless, there are a few other potential problems with the prohibition which are worth pointing out. First, we should ask, is it moral to force merchants to give away information for free? Market research is costly, so why should merchants be forced to give their data away for free? The fundamental nature of entrepreneurship is acting on the basis of information and knowledge that not

everyone else possesses (Kirzner 1973). Permitting merchants to profit on the basis of private information therefore serves as an incentive to discover new information and capitalize that information in new products. Therefore, the prohibition of *ona'ah* may serve as an undesirable disincentive against entrepreneurial activity (Block 1986, 1990 and 2002).³⁰

Second, if producers and sellers are required to undertake market research at their own expense and to divulge the results of that information, it will be nearly impossible to know whether the cost is worth the benefit. Consumers will benefit, to be sure, but it may be that their benefit will be less than the cost undertaken by the sellers, and society will, on net, suffer a loss, not a gain. It would be preferable for a private firm to undertake market research and sell the results of their research to subscribers. In this way, it is feasible to weigh costs against benefits. If the money a person saves by subscribing to the market research bulletin is greater than the cost of the subscription fee, then there is a net benefit. But if the subscription fee is more costly than the savings one gets by having access to the information, then there is a net loss. By relying on the private market and the forces of supply-and-demand, one ensures that expensive and costly market research will be undertaken if and only if the benefits outweigh the costs. Making market research compulsory forestalls this process and creates the risk that research will be undertaken even when the costs exceed the benefits.

Third, in requiring the merchant to disclose the true cost or value of his wares, the law of *ona'ah* seems to presume the existence of a single “true” price that is distinct from the variable and indefinite market price. According to Warhaftig (1988: sec. “A. Definition”), one of the “assumptions at the base of this law” is that “there exists a standard market price from which the sale price deviated by a sixth or more.” But in fact, no such “standard market price” can possibly exist, and it is impossible to distinguish meaningfully between the generalized market price and the specific sale price. For a market is nothing but the collection of the individual interactions and transactions between willing participants, and so sale prices are not arbitrary and capricious deviations from some primeval, abstract market price. Instead, those sale prices embody valuable information, and those sales transactions *are*

the market. The market is not something that exists independently of the sales that occur within the market. To the contrary, the market *is* the aggregation of those very same sales. To distinguish between the market price and the sale price makes as much sense as distinguishing between the temperature of the ocean and the temperature of the water in the ocean; the one is composed of the other. Therefore, scientifically speaking, the market price at any given time *is* the sale price. In other words, the market price of a good is only what it actually sells for in a given, specific transaction. Prices emerge from the confluence of supply and demand, and every price communicates valuable and unique information about the conditions of the market at that place and at that time (Hayek 1945, 1948). Every market transaction is unique, a *sui generis* event, and its price communicates essential data. Therefore, scientifically speaking, there is only one way to determine what the market price is: find out the latest terms of sale.

Some scholars have caught a glimpse of the problem which heterogeneity poses to the law of *ona'ah*, but they have sometimes failed to realize its full significance. Meir Tamari (1986: 408; cf. Tamari 1987: 98) explains the Talmudic exemptions of sales of land, slaves, bills, and consecrated property from *ona'ah* as follows: “It may well be that the economic reason for this lies in the difficulty of assigning a price to these articles in view of the subjective evaluation involved.” To this, Walter E. Block replied (1986: 439), “Tamari quite correctly sees the 'difficulty of assigning a price to [certain] articles in view of the subjective evaluation involved.' ... He fails, however, to realize that subjective evaluations and differing attitudes toward risk apply to *all* purchases and sales in the market.”³¹ Similarly, Kleiman argues (1987: 30) concerning the exempted goods that “characteristic of all of them was the lack of a uniform market price.” But Kleiman does not notice that “the lack of a uniform market price” is characteristic of *all* goods, not only the goods which the Talmud exempted from *ona'ah*.³²

If goods and market conditions are heterogeneous and constantly changing, then it is meaningless to speak of the “true” price of a good, and therefore, *ona'ah* cannot be reasonably

enforced.³³ Indeed, according to Warhaftig (1988: sec. “G. Contemporary Application”),

The law of price fraud, as developed in Jewish law, is based on two basic assumptions:
a) The existence of a market price for the product; b) The ignorance of the buyer of the market price. Both these assumptions are problematic in a modern market. Can we speak of a market price today, when prices change from place to place and from time to time, and every seller does what he pleases? ... [O]*na'ah* can be measured only for standardized products. In the conditions of a modern market, a seller can claim in many cases that his product cannot be compared to that of his competitors, and it is the responsibility of the plaintiff to prove that they are indeed equivalent.

Warhaftig concludes (1988: end of sec. “C. Exceptions”) that “in most cases today it is impossible to establish a market price.” Furthermore, he states (*ibid.* s.v. “G. Contemporary Applications”) that “in a completely free market, where every merchant has his own price[, t]here is no market price, and therefore no *ona'ah*.”^{34 35} Menachem Elon makes a similar argument that *ona'ah* is not applicable to a modern market, saying (Shilo and Elon 2008)

The unique nature of the prohibition against overreaching is expressed by the conditions of its application: (1) The article to be sold must have a known market value; (2) the buyer must be unaware of this market value. These conditions severely impede the implementation of the law in our times, as the vast majority of items sold do not have a fixed, uniform price, and prices may vary considerably from place to place and among different vendors. Furthermore, a buyer would have difficulty in convincing a court that he did not know that prices of goods are likely to vary.

In conclusion, it would appear that the law of *ona'ah* is not legally binding because goods are essentially heterogeneous and there is no such thing as “the” true price of a good. It is not merely the case that merchants can easily circumvent the prohibition of *ona'ah* by disclosing the extent of their over- or under-charge relative to the “true” price – although this is true. Rather, it is that there is no

“true” price to begin with, and merchants have nothing to admit, and the law of *ona'ah* is no longer legally in force.³⁶

III. *Hafka'at She'arim / Hayyei Nefesh* Evaluated

As we have seen, *ona'ah* does not constitute a price-control because the prohibition is waived upon full-disclosure. However, the same is not true of *hafka'at she'arim / hayyei nefesh*, the price-limitation on foodstuffs.

Whereas *ona'ah* may be waived, *hafka'at she'arim / hayyei nefesh* cannot. As Warhaftig says (1988: sec. “F. Fraud...”), “Profit limitation is an obligation not subject to change through stipulation or waiver, unlike *ona'ah*.” And in the words of Maimonides (*Mishneh Torah, Hilkhoh Mekhira* 14:1, trans. Levine 2012: 102):

We have already explained that he who does business on trust (*nosei be-emunah*) and says “I make so much and so much profit” is not subject to the law of overreaching (*ona'ah*), and even if he says “I bought this article for a *sela* and am selling it to you for ten,” it is legitimate.³⁷ Nevertheless, the court is obligated to regulate prices³⁸ [*lifsok ha-she'arim*] and appoint officers of the law, so that people at large will not be able to reap whatever profit they desire, but should earn a profit of only one-sixth [i.e. 20%].

Maimonides immediately proceeds to clarify that this only applies to essential foodstuffs (*Hil. Mekhira* 14:2). According to Aaron Levine (2012: 104),

Maimonides conveys the notion that the price ceiling for *hayyei nefesh* items [i.e. essential foodstuffs covered by *hafka'at she'arim*] is absolute and precludes the possibility for S and B to strike a deal that effectively allows S to earn a profit in excess of 20%.

Whereas is permitted to commit *ona'ah* as long as one specifies the precise extent of the over-charge, in the specific case of foodstuffs, the rabbinical courts are required to enforce the one-sixth law of

hafka'at she'arim / hayyei nefesh even when the market participants themselves wish to waive it.

Quoting the Medieval commentator Rabbi Menahem ha-Meiri, Menachem Elon (2008) summarizes the distinction between *ona'ah* and *hafka'at she'arim / hayyei nefesh* as follows: whereas *ona'ah* is a Torah prohibition which applies to all goods (except land, slaves, bills, and consecrated property),

The law of profiteering [i.e. *hafka'at she'arim / hayyei nefesh*] on the other hand has its source in rabbinic enactment designed to prohibit the setting of prices in excess of the customarily accepted ones, even if the purchaser is aware of and agrees to the inflated price; "... even when he [the seller] says 'it cost me one *sela* and I want to earn two on it,' he has not transgressed the law of *ona'ah* but he is prohibited by rabbinic enactment [of *hafka'at she'arim / hayyei nefesh*] from making a profit of more than one-sixth in essential commodities" ([Meiri,] *Beit ha-Behirah*, BM 51b).

So even though *ona'ah* does not constitute a price-control, *hafka'at she'arim / hayyei nefesh* is – on the contrary – most definitely a price-control. Whereas *ona'ah* is designed only to protect against information asymmetry, *hafka'at she'arim / hayyei nefesh* is a full-blown control of prices. Indeed, Maimonides speaks explicitly of “appoint[ing] officers” because “the court is obligated to regulate prices.” Hence, Meyer S. Lew (1985: 42) states that “Maimonides ruled that punishment was to be meted out to those who raised prices. The community was duty bound to regulate commodity prices.”³⁹ Similarly, Meir Tamari appears to be discussing *hafka'at she'arim / hayyei nefesh* when he states (1991: 68; cf. 1987: 94, 1991: 70) that “The obligation of the *beit din* [rabbinical court] to appoint officials who, in addition to their role as supervisors of weights and measures, will control prices of basic goods is recognized by all the codes.”⁴⁰

Moreover, as we saw earlier, the corporate, (relatively) democratic Jewish community (Epstein 1985: i-ii; Warhaftig 1987: s.v. “6. Price Fixing”) possesses the power to regulate wages and prices independently of the *beit din* (rabbinical court)'s enforcement of the laws of *ona'ah* and *hafka'at*

she'arim / hayyei nefesh (*Hil. Mekhira* 14:9, quoted by Levine 2012: 108; Warhaftig 1987 s.v. “6. Price Fixing” quoting *Tosefta BM* 11:12; Lew 1985: 126; Elon 2008; Tamari 1991: 68, 1987: 94). This appears to be a straightforward, unambiguous power to impose wage and price controls even beyond any controls already imposed by the laws of *ona'ah* and *hafka'at she'arim / hayyei nefesh*. In short, while *ona'ah* may not be a price-control, *hafka'at she'arim / hayyei nefesh* certainly is one.⁴¹ And the community's power to impose wage and price controls is exactly that. But we must ask, what would the economic effects of these laws be? Would these effects be desirable? And would these effects run counter to the intentions behind these laws?

IV. Price-Controls in Economics⁴²

As we saw, *hafka'at she'arim / hayyei nefesh* specifically fixes the prices of essential foodstuffs, and this gives us an insight into the intention of the law: presumably the law is meant to ensure a stable and reliable food supply especially for the poorest and weakest of society and especially in times of famines and other disasters. The question is, are the means appropriate to the ends? Because essentials are vital for the maintenance of life, the goal of the Rabbis was presumably to make sure they are always available. But since luxuries are not so important, it is not so crucial to guarantee continual access. However, the problem with adopting price controls for the necessities and allowing a free market for luxuries, is that paradoxically, the very opposite results will obtain than what was intended. That is, price controls are actually an impediment to continued supply of a good, while economic freedom is the best guarantee, at least on this side of the Garden of Eden, that shortages will not arise (Walker 1976). And so in fact, the means adopted – i.e. enforcement of *hafka'at she'arim / hayyei nefesh* – are absolutely incompatible with the presumed ends of the Rabbis. Enforcement of *hafka'at she'arim / hayyei nefesh* would result in the very opposite of what was intended, and tragically so. Establishing and enforcing price-controls in essentials while allowing a free-market in luxuries will produce a paradox of continued plentiful supply of luxuries while essentials will dwindle into

insufficiency, exactly the situation that was sought to be avoided. One may visit contemporary (early 2016) Venezuela for an idea of what this looks like.

The problem with all price controls is that prices – i.e. rates of exchange between two goods, or one good and money – have an essential role to play in an economy.⁴³ Without exaggeration, they are the only means by which a large-scale society can function. The sole alternative to prices is central planning,⁴⁴ but ever since the unraveling of the Soviet Union, most people are properly suspicious of central planning.⁴⁵ Suppose that for some reason there is a surplus of mechanics and a shortage of electricians. The way the price system handles such a challenge is simplicity itself. The wage of mechanics falls, and that of electricians rises. This leads people who have attained or can attain both skills to switch from the former to the latter. Over the long-term, students just entering trade school will tend to decide to study to become electricians instead of mechanics, on account of the higher wages in the former. Similarly, if there is a great demand for cabbage and small demand for broccoli relative to supply, the price of the former will rise and that of the latter, fall. This will again tend to lead entrepreneurs, as if by an “invisible hand,” to tailor their offerings to the wishes of consumers. The higher price of cabbage will call forth more of this vegetable, and the lower price of broccoli will reduce incentives to bring that product to market, at least on the part of all those who attempt to maximize their returns. As for those who ignore these market signals, all other things being equal they will tend towards bankruptcy. It is in this way that a decentralized market can function in a rational manner without any central direction at all. This may not seem important to some, but it has great importance for our welfare; no less than the feeding, clothing and sheltering of the persons of humanity is at stake.

Price-controls, of course, prohibit the movement of prices without government permission. But in the time it takes for bureaucrats to discern the relative disequilibrium of mechanics and electricians, or of cabbage and broccoli – to say nothing of the hundreds of thousands of other items in a modern economy – there is no possibility of rectifying matters sufficiently so as to attain a smoothly

functioning economy. In this regard *hafka'at she'arim / hayyei nefesh* would not be a total disaster. Instead of preventing such price changes, it merely retards them. This Talmudic law allows prices to fluctuate plus or minus 20% from the official market price. If resources can be fully allocated by, say, a price change of only 10%, then *hafka'at she'arim* will have no explicit deleterious effect on the economy. But if full resource allocation is possible only with a price change of greater than 20%, say of 30%, then *hafka'at she'arim* will restrict the change to 20% and prohibit the most efficient use of society's resources and will therefore restrict the potential for consumer want-satisfaction.⁴⁶

Profits are the means by which consumers signal to the producers and suppliers their priorities and preferences; and profit-and-loss signals therefore provide essential feedback in the market process (Coyne and Coyne 2015b: 9-12). If people come to fear they may not have enough eggs and cheese for their growing children, profits in egg and cheese production will rise. This will draw increasing investments into this industry – for investors seek profit opportunities – and draw investments away from competing industries. The increased investment will spur additional production in eggs and cheese, and production will be reduced in competing industries for which demand is less urgent and from which investment was withdrawn. But if the government artificially limits profits, this process will be frustrated according to the extent of the intervention. Profit controls serve like a perverse warning sign to the entrepreneur and investor. In the absence of controls, he had looked upon all investment opportunities on an equal basis, focusing on the items which people demonstrated were most important to them, so as to maximize his own returns by serving the customers to their own satisfaction. But now, with price controls and profit limitations, he will tend to avoid these options. There will be economic perversity as a consequence. Whereas in a free-market, resources flowed away from industries producing less urgently-required resources and towards industries producing essentials, once price-controls are imposed on essentials, the very opposite will occur. Resources will flow away from industries producing necessities, where they are most needed, and towards luxuries, where they are not. Given the presumed goal of the Rabbis, the mandate to impose regulation on necessities and to

allow freedom for luxuries is the very opposite of what will best serve the community. Given the Rabbis' goals, then if we have to have government interference in the economy, it would be far better to control extravagant items and to leave essentials strictly alone. Were price-controls to be imposed on luxuries and a free-market allowed in essentials, then investment would flow away from luxuries and towards essentials, and the goals of the Rabbis would be better accomplished.

One might object that all this is true only in the long-term, when production can adjust to new prices. Perhaps in the short-term, price-controls are actually beneficial for assisting the poor weather the adverse conditions. In the short-term, supply is relatively fixed – the supply curve is a vertical line – and so supply cannot adjust to prices anyway. However, price-controls are self-defeating in the short-term as well, due to their effect on *demand*. Whereas the quantity supplied will increase in the long-term in response to an increase in price, it is equally true that quantity demanded will decrease in the short-term in response to that same increase in price. In other words, prices serve to ration scarce supplies in the short-term by modulating demand. For example, suppose a famine has struck and there is only a small quantity of grain left. If the price is allowed to remain at its customary level, then consumers will continue to consume the same quantity of grain as they have before, unless strict rationing measures are imposed, such as establishing quotas or requiring rationing coupons in addition to money. But if the price of grain is allowed to rise in response to the shortage induced by the famine, then consumers will consume less grain in the short-term, stretching out the limited supply over a longer period until enough time has passed that supply can increase in response to the higher price. Therefore, not only are price-controls disastrous for their effect in reducing quantity supplied, but they cause equal damage in increasing quantity demanded, compared to the lesser quantity which would be demanded if the price were allowed to increase. Price-controls established in times of privation and famine thus serve to harm the very people they are intended to help in not one but two ways, like Marshall's analogy of the two blades of a scissors coming from opposite sides: when supplies are short, price-controls reduce the quantity supplied and increase the quantity demanded relative to what they

would be in a free-market, thus making the famine or disaster doubly insufferable. The consequences of price-controls, therefore, are never what they aim to be, but instead, they produce queues (Coyne and Coyne 2015b: 19), black markets (Coyne and Coyne 2015b: 20), and product quality deterioration (Coyne and Coyne 2015b: 20). Price-controls even promote discrimination (Coyne and Coyne 2015b: 20, Levine 2012: 193). Ordinarily, a person can indulge in their racist or sexist – or otherwise discriminatory – preferences only by suffering a reduction to their profits. For example, if markets are clearing and supply equals demand, a person cannot refuse to sell to blacks unless they are willing to lose a substantial portion of their customer base. In fact, railroad firm lobbied against Jim Crow for precisely this reason (Gorman 2008 quoting Roback 1986). But when minimum prices cause demand to exceed supply, discriminators can afford to indulge their preferences. If there are already more customers than there are supplies to sell them, then the seller loses little by deciding to sell only to whites. Thus, price-controls have several negative consequences aside from their simple promotion of surpluses and shortages.

For these reasons, one must reject the economic logic underlying the moral values expressed in Aaron Levine's statement that (1985a: 424):

Raising price on the basis of an upward shift of the demand curve is regarded in Jewish law as unethical when the shift is rooted in a changed circumstance, e.g. war, which makes the consumer's need for the product desperate. Similarly unethical is the raising of a price when the shift is due to an artificially created need by dint of religious law.

First, Levine has confused an upward or rightward shift of the demand curve with a downward or leftward shift of the supply curve. Warfare does not increase demand but rather it decreases supply. It is not that people wish to eat more food in wartime than they used to consume in peacetime; it is rather that war makes food harder to come by at any given price. Invading armies of the time lacked supply lines, and they sustained themselves from the fields. They may have also burned whatever they could consume themselves. Therefore, the supply of all crops at a given price would have shifted left. Now, it

is true that demand will shift right as consumers speculatively anticipate a future rise in prices due to the supply shock. In other words, consumers will be willing to spend more for a given quantity of food in the present because they anticipate that prices will rise in the future because of the war. But this rightward shift in demand is in response to the anticipated leftward shift in supply. Therefore, the principal effect of warfare is a leftward supply shock, and the rightward shift in demand is merely a secondary response to that supply shock. Levine has somehow neglected the primary shift in supply and focused on the secondary shift in demand. In any case, however, Levine has failed to realize that a price-control in this situation will be self-defeating and harm the very people it is meant to help. The economist *qua* economist cannot pass judgment on normative, ethical values, but it is his sworn duty to highlight when the means are inappropriate to the end. Here, when warfare has caused a decrease in the supply of essential goods, prices must be allowed to increase for two reasons: first, to call forth an increase in supply, and second, to reduce quantity demanded and allocate the limited supply that remains. If, on the contrary, a price-control is imposed, then there will be no incentive for suppliers to alleviate the privation and consumers will consume too much and fail to economize the limited supply. As an economist, Aaron Levine cannot dispute the ethical claim made by Judaism. But as an economist, he should have argued that the Jewish insistence on a price-control in these situations would harm the very people meant to be helped. The economist must always be value-free and never question a normative value, but as a positive scientist, his task is to show when the means chosen will fail to accomplish the given normative end. Judaism is entitled to demand a price-control in these situations, but it must realize that it will be defeating itself and frustrating the accomplishment of its (Judaism's) own desires. Levine (1985b: 447) is completely wrong to argue that a price-control in a situation of scarcity or shortage “would not really impose much of a problem in terms of resource allocation.” Similarly, the positive economist cannot agree with Meir Tamari's assertion that trade restrictions are legitimate where the merchant is “earning excessive profits or where there is no benefit to the consumer” (Tamari 1991: 69). Because all prices communicate essential information (Hayek 1945) and

because price-signals alone efficiently promote economic coordination, there is, in general, no scientific way to declare that a profit is excessive or detrimental to the consumer. Profit-and-loss signals provide feedback which is essential to the healthy and effective operation of the market process (Coyne and Coyne 2015b: 9-12).

V. A Few More Remarks on *Ona'ah*

Let us make a few relatively tangential remarks on *ona'ah*. As we saw earlier, Menachem Elon argues that the prohibition of *ona'ah* is no longer legally binding because goods are too heterogeneous for there to be such a thing as the “true” price of a good. But Elon himself proceeds to belie his own words when he testifies – crucially, without objection or complaint – that the laws of *ona'ah* have in fact influenced civil law in the modern State of Israel (Elon 2008; cf. Tamari 1987: 99):

In the State of Israel there are a number of laws designed to combat profiteering in essential commodities. The Commodities and Services (Control) Law, 5718 – 1957, provides for various means of supervision over commodities declared to be subject to control by the minister charged with implementation of the law, enforceable on pain of imprisonment, fine, and closing down of a business, etc. The Tenants' Protection Laws, 5714 – 1954 and 5715 – 1955, control maximum rentals for residential and business premises and also limit the right of ejection to grounds specified in these laws only. These laws are supplemented by the provisions of the Key Money Law, 5718 – 1958. The Restrictive Trade Practices Law, 5719 – 1959, restricts, among others, the artificial manipulation of price levels at the hands of a monopoly or cartel. In the Knesset debates preceding the passing of these laws, some members relied on Jewish law in support of their arguments (*Divrei ha-Keneset* vol. 7, p. 564; vol. 14, p. 1822; vol. 18, p. 2176; vol. 21, p. 169; vols. 23, pp. 372, 374, 383; vol. 24, pp. 2478, 2514).

Elon fails to object that under Israeli law – unlike the *halakhah* – buyers and sellers cannot

evade the price-controls by announcing the precise extent of the divergence. If *ona'ah* is meant only as a protection against asymmetric information, and if *ona'ah* is waived in the case of full-disclosure, then it cannot be used as a justification or basis for a conventional rent-control ordinance, which typically is binding even in the case of full-disclosure. It is strange that Elon thought it irrelevant that the *halakhah* of *ona'ah* – unlike Israeli law of rent-control – provides for a means by which to circumvent the law. Nor does Elon recall his earlier objection that *ona'ah* in general should not apply to a modern economy where goods are heterogeneous and prices disparate.

And since Elon mentioned the Tenants' Protection Law, a brief remark on rent-control may be warranted. The same analysis we gave previously concerning price-controls is equally applicable to rent-control (Block and Olsen 1985, Morton 2001: 52f., Rockoff 2008, Bourne 2015), including in Israel (Werczberger 1988, cited in Bourne 2015: 76). Well-intentioned politicians and government officials, concerned with housing shortages and high prices, especially for the poor, have enacted such legislation in order to improve matters. Instead, the very opposite has occurred. The controls serve as a warning device, alerting entrepreneurs of the dangers of any investment in housing. Landlords tend to neglect maintenance because rent is too low to pay for proper maintenance, and rental housing quality deteriorates. New construction of rental property tends to cease, and existing rental properties are converted into owner-occupied housing or into commercial and office space, which are not rent-controlled. Even the fear of possible future rent controls can have these effects, thus, paradoxically, raising prices, and reducing vacancy rates. In contrast, luxury high-rise office towers, hotels, shopping centers and industrial parks have never been subjected to rent controls, and as a result, there are no shortages in these markets, and vacancy rates are oft-times in the double digit range. As Swedish economist Assar Lindbeck noted, “In many cases rent control appears to be the most effective technique presently known to destroy a city – except for bombing” (quoted in Bourne 2015: 73). Many of these effects exhibited themselves in Israel as well, where the imposition of rent-control led to a halt in construction of new rental housing (Werczberger 1988: 282) and neglect of maintenance

(Werczberger 1988: 286). The damage caused by rent-control in Israel was mitigated by the exemption from rent-control of all properties built after 1953 (Werczberger 1988 *passim*), by the significant trend from rental to owner-occupied housing (Werczberger 1988 *passim*), and by the legalization of key money (security deposit) in 1958 (Werczberger 1988: 279). Key money allowed tenants and landlords to capitalize and internalize the benefits of rent-control (Werczberger 1988: 288), essentially converting the forgone rent into an alternative form not subject to rent-control. In other words, rent-control did relatively minimal damage only because it was effectively repealed and circumvented relatively quickly.

Meanwhile, we might note that the wages of workers are just another price, and as with all other forms of price-control, intervention in wage-rates will produce either shortages or surpluses (unemployment). For example, where minimum wages or mandatory union membership drive wages above the market-clearing rate, employers will reduce their demand for employees, producing permanent unemployment (Siebert 2015, Levine 2012: 191-193, 209). Ironically, then, the minimum wage hurts the very people it is meant to help, producing self-defeating consequences (Levine 2012: 191-193, 209). For this reason and others as well, Aaron Levine argues that Jewish law would reject any form of minimum wage (Levine 2012: 191-210). But as we saw earlier, the corporate community had the power to democratically regulate wages independent of the rabbinical court. Even though fixing wages would presumably have been intended to safeguard the workers' standard of life, their more likely consequence, if sufficiently enforced, would have been to create permanent unemployment.

Aaron Levine, concluding that Jewish law cannot countenance the imposition of legislated minimum wages, argues that the community's power to regulate wages ought to be utilized instead to judge certain contracts as unconscionable – for example, a private employment contract stipulating that the employee is forbidden to seek additional employment on the side even though the employee's wage is insufficient to live on (Levine 2012: 202-204). Let us suppose for the sake of argument that such a

contract nullification would have no negative effects. The problem is that Levine nowhere indicates what would constrain the democratic community to use its power only in such responsible ways. It is not enough to argue that the community ought to limit the exercise of its own power. Such a mere warning without institutional safeguards will turn out to be impotent. As Lord Acton famously declared (1887), “All power tends to corrupt; absolute power corrupts absolutely.” Therefore, Thomas Jefferson declared (1798), “In questions of powers, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.” And as James Madison warned (1788), “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” Unfortunately, Levine does not indicate that there are any constitutional limitations on the democratic community's power to impose wage-controls. And voters tend not only to be rationally ignorant, but they often vote expressively based on what makes them feel good or what satisfies their consciences (Caplan 2007). It is not hard to imagine the electorate of the Jewish community voting to impose wage-floors, naively and idealistically believing that this will improve the welfare of the poor. But according to Levine, there seem to be no institutional safeguards against such abuse of democratic power. A robust political system cannot trust in blind faith that the right people will be in power. Robustness in political economy means ensuring tolerably good results even under adverse, sub-optimal conditions (Pennington 2011). An unconstrained democratic power to impose wage and price-controls fails to satisfy this criterion. Perhaps a corollary of Murphy's Law is in order: if power – even democratic power – can be abused, it will be.

VI. Restrictions Against Middlemen and Speculators

Given these negative effects of price-controls, it is profoundly unfortunate that Talmudic economic regulations were applied against speculators and middlemen as well (*Hil. Mekhira* 14: 4-8; Warhaftig 1987 *passim*; Tamari 1987: 88-90, 1986: 406; Kleiman 1987: 35f.), whom economic science

today recognizes as performing indispensably valuable roles when they are allowed to act freely.

According to Menachem Elon (2008),

Particular care was taken to maintain a cheap supply of essential products in Erez Israel [i.e. the Land of Israel], where no middleman between producer and consumer was tolerated: “It is forbidden to speculate in essential commodities in Erez Israel but everyone shall bring from his barn and sell so that these [commodities] may be sold cheaply” (*Tosef. Av. Zar.* 4:1; *BB* 91a, *Yad, Mekhirah* 14:4; *Sh. Ar. HM* 231:23); however, it was decided that in the case of a commodity in free supply or where a middleman worked to prepare and process the product, such as baking bread from wheat, profit-making was permitted, even in Erez Israel (*Tosef. Av. Zar.* 4:1; *BB* 91a and Rashbam, *Yad Ramah* and *Beit ha-Behirah ibid.*; *Yad, Mekhirah* 14:4; *Sh. Ar., HM* 231:23). The sages sought in various ways to eliminate the factors which made for a climate for profiteering. Thus it was forbidden to hoard produce bought on the market, lest this cause prices to rise and bring losses to the poor, and in a year of famine no hoarding at all was permitted (not as much as a “cab of carobs”), not even of the produce harvested from one's own field (*BB* 90b; *Yad, Mekhirah* 14:5–7).

Similarly Isidore Epstein (1985: iv):⁴⁷

For the same reason [viz. 'safeguarding the standards of life of the consumer'] provision was made cutting out the middleman's profit in the case of eggs ... The prohibition applies apparently to all foodstuffs.

Likewise Meyer S. Lew (1985: 185):⁴⁸

Wholesalers of foods were only to have a small profit while retailers were allowed a larger margin. Similarly, the Talmud forbids agencies or middlemen to deal in articles of food. The farmer was to sell direct to the consumer.

Finally, Meir Tamari (1991: 69):⁴⁹

This would place the *halakhah* in favor of direct producer-consumer marketing arrangements in agricultural produce, which negate the profits of the middlemen. ...

Essential goods may not be bought up by speculators hoping to resell them in times of scarcity.

Furthermore, Meir Tamari links the profit-limitation of *hafka'at she'arim / hayyei nefesh* (which applies only to essential foodstuffs) with the restrictions on middlemen, saying (Tamari 1991: 68; cf. Tamari 1987: 89) that there are

a number of Talmudic statements that disapprove of profits earned in the trade of basic goods essential to the individual's welfare, and sometimes even the trade itself.

These enactments and injunctions betray a fundamental misunderstanding of the economic roles of middlemen and of hoarders and speculators. When a speculator buys up a large quantity of the supply today, it can only be to sell it sometime in the future. The speculator does not plan on consuming everything himself; he can profit only by eventually relinquishing his hoard. Nothing is being destroyed or disposed of; everything the speculator purchases, he purchases to sell again. Therefore, we must ask why he does this. The answer is that the speculator, in buying when prices are low and selling when prices are high, is in fact doing nothing other than buying when supplies are plentiful and selling when supplies are scarce. By doing so, he evens out the fluctuations in the long-term; he prevents prices from rising in times of privation as much as they would have risen without him. By buying when prices are low, he reduces the supply at a time when the supply is plentiful, and by selling when prices are high, he increases supply at the time when supply is scarce. For example, suppose that today there is a supply of one million lbs. of wheat at a price of \$1/lb. And suppose the speculator believes that a famine is coming, and that next year, there will be only 100,000 lbs. of wheat at a price of \$10/lb. So he purchases 300,000 lbs. of wheat today, driving up the price to perhaps \$3/lb. today. But next year, when the famine arrives and the price of wheat rises to \$10/lb. because there is only 100,000 lbs. available, he releases his hoard of 300,000 lbs. onto the market, increasing the supply

from 100,000 lbs. to 400,000 lbs. of wheat, and decreasing the price from \$10/lb. to say \$6/lb. Without the speculator, there would have been a fluctuation from year to year, from one million pounds at \$1/lb. in the present to only 100,000 lbs. at \$10/lb. the next year. But the speculator evened out the fluctuation so that there was 700,000 lbs. at \$3/lb. now and 400,000 lbs. at \$6/lb in a year. The speculator reduces the supply and increases the price at a time of plenty and decreases the price and increases the supply in the future, at a time of famine. Yes, the speculator does profit: he spent say \$300,000 (300,000 lbs. at \$1/lb.) and earned back \$3 million (300,000 lbs. at \$10/lb.), making a profit of \$2,700,000 (also minus the interest foregone). But what a service he has done to the community, saving them from famine! His profit is nothing other than the signal and symbol of how much good he has performed for others (cf. Holcombe 2014: 394f., s.v. “Where do dissipated transitional profits go?”). Therefore, when the *halakhah* punishes speculation and hoarding, this does nothing other than to potentially condemn the innocent to privation or even starvation. The speculator does almost exactly what Joseph did in the famous Biblical story, when he foresaw through prophecy the coming lean years and stored up grain in the royal granaries – and yet whereas the Bible upholds Joseph as a hero, the *halakhah* condemns the non-prophetic speculator as a villain.

The animus against middlemen is similarly ill-conceived.⁵⁰ It might be thought that middlemen do nothing but tack on a profit without doing anything productive. According to Itamar Warhaftig (1987: sec. “3”), “One of the contributory causes of high prices is excessive intermediary trading as every additional middleman adds to the final price.” However, this is the opposite of the truth. Warhaftig adds (1987: sec. “C”) that “It is well known that the prices of fruits and vegetables are elevated by unnecessary intermediate trading.” Maybe this *is* well-known, but it was also well-known in antiquity that the sun revolves around the earth and that illnesses are caused by an excess of humors. Similarly, Meir Tamari says (1986: 406), “the sages of the Talmud saw the increased costs caused by middlemen as detrimental to the poor and weaker classes.” But as Walter E. Block said to Tamari (Block 1986: 440), “If so, then the sages were seeing something that simply is not true.” The only way that a

middleman can attract business is by offering either a lower price or greater ease and convenience.

Suppose wholesaler A is selling to customer B. Retailer (middleman) C can break into this chain and insert himself as an intermediary only by offering terms that are simultaneously better to both A and to B. Wholesaler A will not sell to retailer C and customer B will not buy from retailer C unless A and B both benefit from permitting C to intervene in the middle of the chain. The retailer frees the customer from the burden of having to deal with a separate wholesaler for every one of the hundreds of different goods he purchases. Meanwhile, the retailer frees the wholesaler to concentrate on his specific area of comparative advantage - *viz.* production – instead of areas where the wholesaler is less competent. If this were not so, if the consumer and wholesaler could both save money, time, and effort by dealing directly with each other, then neither would bother to interact with the retailer or middleman. Thus, the middleman does not increase costs, but on the contrary, he decreases them. As the colonial American Reverend John Witherspoon (one of the teachers of James Madison) observed in 1786 (McDurmon 2010: 56f), the authors of legislation restricting middlemen

considered that every hand through which a commodity passed must have a profit upon it, which would therefore greatly augment the cost to the consumer at last. But could anything in the world be more absurd? ... [I]t may be safely affirmed that the more merchants, the cheaper [the] goods, and that no carriage is so cheap, nor any distribution so equal or so plentiful, as that which is made by those who have an interest in it and expect a profit from it.

Furthermore, transportation does nothing less than to fundamentally transform a good from one good into another. An apple in New York City is not the same good as an apple in New Orleans. If the two goods were identical, then the inhabitant of New Orleans would be indifferent between them. But since the inhabitant of New Orleans definitely prefers apples in New Orleans to apples in New York, this demonstrates that the two goods are not the same. Transporting an apple from one place to another performs an economic transformation of its utility every bit as real as the man who prunes the apple

tree. The processes of growing apples and transporting them are physically distinct, but economically speaking, they both transform goods from one kind to another and create utility or value where there was none before. As Thomas Sowell notes (1975: 68f.)

If the same physical thing is assumed to have the same value without regard to space or time, then the middleman is simply cheating people. ... In reality, they [the producer and consumer] deal through the middleman because he is changing the value of things by relocating them, holding them to times that are more convenient, assuming various risks by stocking inventories – and doing so at *less cost* than either the producer or consumer could. ... In short, middlemen can continue to exist only insofar as they can perform certain functions more cheaply than either the producer or consumer. But no matter how varied and complex these functions may be, they amount ultimately to relocating things in time and space, and the physical fallacy which denies value to that operation necessarily indicts middlemen as mere cheaters.⁵¹

According to Warhaftig (1987: sec. “3”), these restrictions on middlemen no longer apply in a modern economy. In his words,

It is possible that in a modern economy, it is no longer true that the owner can sell to the public without effort, and therefore he is permitted to sell through a middleman. Since the middleman is expending effort to make the product available throughout the sales network, he is also entitled to a profit.

However, this was equally true in the time of the Talmud. It has *always* been true that middlemen expend effort. And it has *never* been the case that farmers could sell to the public without effort. On the contrary, if farmers had ever been able to sell to the public with less effort than the middlemen, then the middleman would not have come into existence. It was precisely because the middleman's opportunity costs were less that he was able to charge lower prices than the farmer would have been able to. If it took less effort – measured by individual subjective opportunity cost – for a farmer to sell his produce

than it took a middleman, then a farmer would be able to undercut the middleman's prices. The fact that middlemen exist proves that they lower prices and incur a smaller opportunity cost. Nevertheless, we thank Warhaftig for arguing that the Talmud's restrictions on middlemen no longer apply, even if his reason was equally true when the Talmud was written.

Meanwhile, Keith Sharfman (2006) has attempted to defend the Talmudic regulations against speculation using Martin Weitzman's "shortage syndrome" model. Following Weitzman, Sharfman argues that speculation is inefficient "when a market is not clearing for some reason, such as when there is a state-mandated price ceiling on the relevant commodity" (Sharfman 2006: 190). When prices are below market-clearing and quantity demanded exceeds quantity supplied, then queues will develop and the first consumers in the queue will hoard more than is efficient given the "true" equilibrium price. According to Sharfman (2006: 190),

The most obvious policy solution to the shortage/hoarding phenomenon is to allow prices to rise. But this may be politically untenable in some circumstances. An alternative, second best solution is to initiate some kind of anti-hoarding policy.

At this point, Sharfman (2006: 191) introduces the "sixteen percent rule" and argues that it "has many of the same characteristics as the price controls contemplated in the Weitzman model."⁵² Sharfman leaves it as an open question "whether the sixteen percent rule makes good policy sense" (2006: 191), but says that "we may take the rule as a given constraint" (2006: 191). Taking the "sixteen percent rule" as a given, Sharfman speculates that the Talmudic restrictions on speculation are an effective response to inefficient hoarding and queuing caused by the imposition of price-controls (2006: 191). But a few complications are worth noticing: first, Sharfman argues that what is problematic is not professional speculation but rather consumer hoarding (2006: 183, 184, 187, 190). By contrast, the tenor of the treatments by most other authors suggests the Talmud was more concerned with professional speculators. For example, Warhaftig speaks (1987: sec. "2") of "when a merchant withholds a product until a shortage develops in order to cause a price rise" and he adds (1987: sec. "C") that "[t]he

prohibition applies to the merchant and to the consumer” alike. Second, Sharfman's defense does not account for the Talmud's criticism of middlemen. But most importantly of all, what Sharfman's analysis really proves is not that speculation ought to be restricted, but that the price-control of *hafka'at she'arim / hayyei nefesh* ought to be abolished. If price-controls cause queues, hoarding, and shortages, then the most reasonable response is to repeal price-controls. Thus, Sharfman's argument actually reinforces our own, that the prohibition of *hafka'at she'arim / hayyei nefesh* is undesirable and inefficient. It may be that it is political inexpedient to repeal the price-control, but that is a tragedy deserving only lament.

VII. Economic Intervention: A Self-Defeating Morality

Therefore, price-control legislation will do little to help the poor and suffering, and will in fact do much to make their straits even worse. And yet according to Isidore Epstein, all these economic regulations have an ethical basis, for he prefaces a discussion of Talmudic economic legislation by stating (1962: i),

morality was made the dominating factor of communal life, and the underlying principle of all legislation regulating social and economic relations.

Similarly, according to Menachem Elon (2008),⁵³

Certain authorities even regard the prohibition [of *ona'ah* specifically] as being religiously based, unrelated to civil law (Rabbenu Hanannel, *BM* 51b; Asheri, *BM* 4:7), indicating that this law originated from the ethical imperative of conducting business fairly and amicably, based on the verse “that your brother may live with you” (Lev. 25:36).

As Elon shows, this is not the universal view, but it lends support to the suggestion that the laws prohibiting *ona'ah* and *hafka'at she'arim* were enacted with an intention towards justice and fairness.

Warren Goldstein also interprets these laws as having an ethical basis, and he explicitly

specifies that the goal is to improve the welfare and quality-of-life of the poor. In a work dedicated to demonstrating how Jewish law aimed at “defending the human spirit from abuse by the powerful” (2006: 1), Goldstein states (2006: 447),⁵⁴

Jewish law ... intervenes to help the poor. For example, price controls are imposed on essential goods to make them affordable to the poor. Such an intervention benefits people ... The poor can thus benefit, together with others.

Similarly, in a “volume ... show[ing] that justice, equity and humanity are central to the *halakhah*” (Lew 1985: ix), Dayan (rabbinical judge) Meyer S. Lew argues (1985: 5),

That justice and compassion motivated the many rabbinical and communal enactments and ordinances adopted and applied by the religious and lay leaders through the ages is further proof of a deep concern for the weal of the community, the welfare of the family and the rights and freedoms of the individual.

Moreover, according to Lew, not only were the “rabbinical and communal enactments and ordinances” in general meant to further “the weal of the community”, but price-controls specifically were intended to improve the quality-of-life of the poor (Lew 1985: 184f.):⁵⁵

The Rabbis regarded the raising of prices above their actual value as a serious threat to the economic welfare of the public. ... It is obvious that these rules were designed to control prices which would otherwise be higher and bear harshly upon the poor. ... In any event care was taken to prevent unscrupulous merchants from taking advantage of the poor.

Similarly, Isidore Epstein states (1962: iv),

the prices were fixed not at individual discretion, but were corporately determined with a view to safeguarding the standards of life of the consumers.

Likewise, Itamar Warhaftig concludes (1987: sec. “C. Summation and Application”),

there exists a measure of intervention and supervision designed to ensure that the lower

economic classes will be able to purchase essential items at affordable prices.

According to Meir Tamari (1987: 91), “The basic concern behind these injunctions ... was the welfare of the average consumer.” And finally, Aaron Levine states that according to Rabbi Joshua ben Alexander ha-Kohen Falk (*Semah*), the purpose of these laws is “to allow consumers to achieve subsistence without undue hardship” (Levine 2012: 93).

These scholars all argue that the Talmudic economic regulations are not intended as a purely moral (deontological) measure, but they specify a consequentialist aim.⁵⁶ The price-controls are imposed, not because they are inherently just and righteous and fair regardless of consequences, but quite to the contrary, these laws were created in order to improve the lives of the poor in a practical, consequentialist sense. How tragic then, that in all likelihood, these laws would have the exact opposite consequence, and tend to make life worse for nearly everybody. In other words, these laws would tend to be self-defeating, accomplishing the very opposite of their intentions. Therefore, our present criticism of Talmudic economic regulations is not based on a foreign, non-Jewish ethical standard. Instead, these *halakhot* are ineffective at accomplishing a specifically Jewish end. We are not rejecting the ethical end of Judaism in favor of some other religion or philosophy, but rather, we are criticizing Jewish authorities for having selected a means that is inappropriate for their specifically Jewish end (cf. Milton Friedman 1985: 408; Block and Hexham 1986: 451, 455f.).

Furthermore, if the Talmudic economic regulations would tend to make miserable the lives on innocent human beings, we might justifiably ask, what can be the worthiness of an ethic which makes life almost universally less enjoyable? Surely material quality-of-life itself has *some* ethical value. After all, the prophet did declare, “the L-rd that created the heavens, He is G-d; that formed the earth and made it, He established it, He created it not a waste, He formed it to be inhabited” (Isaiah 45:18). Moreover, there is evidence that the Talmudic legislation was definitely intended – at least partially – to promote material welfare: for when the price of sacrificial doves increased, Rabbi Simeon ben Gamliel famously taught that women who were previously obligated to bring five sacrifices henceforth needed

to bring only one.⁵⁷ Similarly, the rabbi Samuel threatened to change his opinion and teach more leniently that certain utensils were kosher after the Passover and that certain myrtles were kosher for the *lulav* on Sukkot (Feast of Tabernacles) unless the merchants selling those items would lower their prices.⁵⁸ All this suggests that consequentialist considerations played at least *some* role in the establishment of the Talmud's social legislation. Apparently the Talmud did not have a purely consequences-indifferent, “come hell or high water” deontological notion of justice and morality. And so without committing ourselves to full-blown consequentialism, it nevertheless appears that a business or social ethic which produces almost exclusively negative practical consequences must at least be doubtful, and should be faced with skepticism. According to Roderick T. Long (2002),

Whatever they may say officially, most consequentialists would be deeply disturbed to discover that their favoured policies slighted human dignity, and most deontologists would be deeply disturbed to discover that their favoured policies had disastrous consequences.

Long adds (2012),

one of the advantages of the eudaimonistic approach, as I understand it, is that it avoids both the excessive consequence-sensitivity of utilitarianism and the excessive consequence-insensitivity of deontology.

Furthermore, Long states (2013),

the fact that all but the hardest deontologists generally try to show that their favoured policies will in fact have good consequences, while all but the hardest consequentialists generally try to show that they're not committed to morally outrageous conclusions, suggests that most professed deontologists and consequentialists are actually, to their credit, crypto-eudaimonists.

Therefore, if the laws in question – viz. *hafka'at she'arim*, regulations against middlemen and speculation, and communal imposition of wage and price controls – would tend to produce almost

universally and exclusively negative consequences, we should at least be skeptical of how moral or just those laws can really be. These laws could perhaps turn out to be an example of what Derek Parfit called a “self-defeating morality” (1979: 533):

There are certain things we ought to try to achieve. Call these our moral aims. Our moral theory would be self-defeating if we believed we ought to do what will cause our moral aims to be worse achieved.

According to Parfit, a moral theory is “formally self-defeating” when a moral theory that is an end unto itself irrespective of the consequences, fails to be accomplished. He does not reference Kantian deontology, but that appears to be something like what he means by a moral theory that is an end unto itself. Such a moral theory is formally self-defeating when it fails to be executed. By contrast, a moral theory is “substantively self-defeating” when the moral theory intends certain “substantive aims” or consequences which fail to be accomplished by the performance of the stipulated causal action.⁵⁹

Parfit's examples all fall into the categories of prisoner's dilemmas and public goods, where private and social costs and benefits diverge. In these cases, a moral theory which specifies one ought to take action for one's own personal benefit (or for one's own family) will produce worse consequences not only for others but even for oneself, compared to if one had violated the moral theory and instead acted for others (or for others' families). In such cases, Parfit says, the self-interested moral theory is “self-defeating.” In other words, if a moral theory specifies some aim to be accomplished, then that accomplishment must somehow matter at least to some degree, and the moral theory is self-defeating if that aim fails to be accomplished by the performance of the stipulated action. The *halakhah's* economic regulations appear to fall into this category; they intend lofty and admirable moral aims, but their enforcement would tend to produce consequences the very opposite of what they intended.

VIII. Aaron Levine's Interpretation of the Essential Foodstuffs Profit-limitation

But Aaron Levine's interpretation of the profit-limitation (*hafka'at she'arim*) ordinance

concerning essential foodstuffs (*hayyei nefesh*) is unique and requires its own treatment.⁶⁰ Levine notes from the outset of his analysis that price-controls are self-defeating (Levine 2012: 22, 93-95, 110). He recognizes that prices serve as signals (Levine 2012: 93) directing the allocation of resources (Levine 2012: 94), and that profits serve the same function as well (Levine 2012: 94). Price-controls will generally result in shortages, black markets, and the necessity for rationing (Levine 2012: 94). Furthermore, price-controls discourage new entry by alternate suppliers (Levine 2012: 94). Therefore, he attempts to show that the profit-limitation of *hafka'at she'arim* is not a price-control at all. In Levine's interpretation (2012: 106), "the rabbis set the price ceiling above the equilibrium price" (cf. Levine 2012: 107, 110, 111). But the price ceiling is not the price which the rabbis enforce. As Levine says (2012: 107, 111),⁶¹ "Because the price ceiling is a matter of public knowledge, some may, however, erroneously regard it as a mandated price." In fact, it is not the rabbinic price ceiling but rather the equilibrium market price which constitutes the mandated price which binds sellers. "It is the role of these supervisors to survey the marketplace and make sure that no one sells above the competitive norm" (Levine 2012: 107; cf. 2012: 111). If the sellers are bound, not by the rabbinic price ceiling but rather by the competitive market price, then what function does the rabbinic price ceiling serve? Levine answers that "the usefulness of setting a price ceiling is that it signals the rabbis when remedial measures should be put in place ... [including] a rationing system" (Levine 2012: 107, 111),⁶² to be implemented after the market price has increased such that "the price ceiling becomes the competitive norm" (Levine 2012: 107, 111).⁶³ In other words, sellers are bound by the competitive market price itself, and the price commissioners of the court enforce the market price, not the price ceiling. The function of the price ceiling is only to serve as a signal; once the market price increases to the point that it equals or exceeds the price ceiling, then further interventions become warranted, including non-price rationing (cf. Levine 1985a: 423). For Levine, the market price is to be allowed to freely fluctuate, but if supply shocks (Levine 2012: 107) cause the competitive market rate to increase until it reaches the official price ceiling, this will serve as a signal for the *beit din* (rabbinical court) to

institute non-market rationing schemes. Furthermore, this mechanism is to be coupled with the communal institution of wage and price controls (Levine 2012: 108, 111), which may conflict with and supersede the *hayyei nefesh* ordinance (Levine 2012: 108). The purpose of these controls is to eliminate economic rents and profits (1985a: 423; 1985b: 448f.; 2012: 109, 112).

But there are a few problems with Levine's interpretation: first, in Levine's interpretation, there is still a system of price-controls, only the price which is enforced is not the official price declared by the *beit din*, but rather the supposed competitive market rate. In other words, there is a sort of terminological dispute about what to call the price that is enforced, but there is still *some* price that is enforced. The entire purpose of Levine's interpretation was to deny that the Talmud imposed price-controls, for he admitted that price-controls are self-defeating (Levine 2012: 22, 93-95, 110). But after all his efforts, his interpretation still results in there being a price-control, only the price that is enforced is not the official price promulgated by the courts, but rather the price which the courts perceive to be the market price. Either way, a price-control is still being enforced. A price-control is still a price-control regardless of whether the price that is enforced is an officially promulgated price or whether it is the preexisting *status quo* market price from which future deviations are prohibited. If deviations from the *status quo* market price are prohibited, then this still constitutes a price-control with all its attendant negative effects. If the equilibrium market-clearing price changes but the *status quo* market price continues to be enforced, then the market will be unable to clear, and there will be economic misallocations and dislocations. Furthermore, in his interpretation, once the market price rises to equal the official price, at that point, the court is supposed to institute non-price-rationing, which means there is still a price-control. Furthermore, Levine says that all this is to be coupled with communal wage and price controls. So all Levine has done is to replace one form of price-control with another.

Second, it is difficult to understand how the market price could ever rise to meet the official price-ceiling if the commissioners punish every deviation from the market price. How are prices to rise if sellers are bound by the *status quo* market prices?⁶⁴ As we noted, enforcement of the *status quo*

market price is still a price-control. Suppose the market price is today \$10 and the official price-ceiling is \$20 (following Levine's interpretation that the two differ). When the market price rises to \$20, Levine would say, this would serve as a signal to the court to take remedial action, including rationing (Levine 2012: 107).⁶⁵ But how is the market price to rise from \$10 to \$20 if the first merchant to charge \$12 (deviating more than one-sixth from \$10) is immediately punished and forced to sell at \$11 (within one-sixth)? If every significant deviation from the market price is immediately prevented, how will the market price ever change? Perhaps Levine assumes the price will change only gradually, from \$10 to \$11 to \$12, etc., \$1 at a time, until it finally reaches \$20, instead of going straight from \$10 to \$20. Starting with a price of \$10, then one may charge \$11.67, i.e. $\frac{1}{6}$ more than \$10. Then, when \$11.67 has become the new general price-level, one may charge $\frac{1}{6}$ more than that, or \$13.60. This process will continue until one finally reaches \$20, the efficient market-clearing price which was desired all along. But if an increase from \$10 to \$20 is necessary to achieve market-clearing equilibrium, then the last thing we want is to delay that transition by forcing it to be gradual, compelling the price-transition to proceed by proportions of $\frac{1}{6}$. The faster the transition is made, the less painful it will be and the fewer economic disruptions and dislocations it will cause. If the current market price is \$10 and some alert entrepreneur realizes that the market will clear only at \$20, then we want him to be able to immediately charge \$20. We do not want him to have to first charge \$11.67, then wait until all his competitors charge \$11.67 too (so that \$11.67 becomes the new market price), and then charge \$13.60, etc., repeating this tedious process until \$20. There appears to be no theoretical economic reason why such a gradual transition would be desirable.

Nor did Levine ever indicate that he had such a gradual transition in mind in his statement that the price-level would be permitted to change even as deviations from it were simultaneously prohibited. Instead, it appears more likely that Levine relied on a static-equilibrium conception of price theory, whereby the general market rate of prices changes according to the actions of a mythical Walrasian auctioneer without any individual market participant ever having changed his own prices. If

every market participant is a price-taker rather than a price-setter, then no market participant can be responsible for changing the general price-level. But then who did change the price-level? Apparently, according to the static conception, the price changed itself without any human input. But according to theory of the market as a “process” (Kirzner 1997, following Mises), the general price-level can change only as a result of individual market participants changing their prices. The general price level will change from \$10 to \$20 when merchants individually change the prices they charge, in response to individually changing perceptions of relative supply and demand by different market participants.

If the Talmud assumed a static-equilibrium model of a general price-level that changes without any individual market participants changing their prices, then *hafka'at she'arim* would definitely be a price-control – contrary to Levine's interpretation – for the court commissioners would have to ban every deviation from the market price by individual merchants and thus prevent the price from ever changing. It is meaningless to allow the general price-level to change if every individual merchant is forbidden to alter the prices he charges. Levine's attempt to show that *hafka'at she'arim* is not a price-control will have failed. At best, prices would be permitted to change only gradually, in the manner which we have indicated, from \$10 to \$11.67 to \$13.60, but without passing directly from \$10 to the market-clearing rate of \$20. Interpreted in this way, *hafka'at she'arim* would not constitute a pure price-control, but it would nevertheless put a brake on economic adjustments and unnecessarily prolong the agony of economic disequilibrium. But if the Talmud understood the market as a “process,” as with Mises and Kirzner, then the Talmud would have understood that the general price-level changes if and only if individual merchants change their prices. In that case, allowing the general price-level to change necessarily presumes that merchants have full freedom to charge whatever prices they wish. Therefore, the Talmud could not have intended what Levine argues it did, namely that the commissioners were to ban individual merchants from deviating from the market price at the same time that the general price-level was to be allowed to somehow fluctuate until it reached the official price. Either the Talmud assumed that the market is a dynamic process, and Levine's interpretation of the Talmud is untenable;

or else the Talmud assumed static-equilibrium, and *hafka'at she'arim* is indeed a price-control, contrary to Levine's intended aim. Or it is possible that the purpose of the law was to prolong economic adjustment by forcing price changes to be unnecessarily gradual and step-wise, in which case Levine has failed once again to prove *hafka'at she'arim* is not a price-control.

Interestingly, Levine assumes that the law of *hafka'at she'arim* as recorded in the codes of Jewish law no longer applies, but he never specifies the legal mechanism by which this law has been annulled. He states (2012: 109, 112):⁶⁶

What survives is not the 20% figure *per se*. This figure made sense only for the marketplace and economic conditions that existed at the time of the enactment of the ordinance. The general objection to “excessive profits” for those who deal in essential products should, however, remain. What should be substituted for the 20% figure today is the notion that the ideal is to craft government tax and regulatory policy to eliminate economic rents in the *hayyei nefesh* [essential foodstuffs] sector. In other words, the goal should be to prevent profits in this sector from exceeding opportunity cost earnings.⁶⁷

Unfortunately, Levine's scheme of taxing profits above opportunity costs to eliminate rents is not any better than the original price-control which he sought to avoid. As we showed earlier, profits and losses are essential signals to investors and producers. Profits motivate new entry while losses inspire exit. Taxing excess profits would therefore deter new entry, as Levine himself says (2012: 94). For example, if a famine has struck a land and the price of food has skyrocketed, the excess profits will encourage foreign suppliers to divert their food supply from their own domestic market where profits are normal, to the famine-stricken market where profits are excess. If suppliers are forbidden to earn higher profits in the famine-stricken market than in their own local market, then they will have no incentive to export supplies to alleviate the famine. Levine's scheme of taxing excess profits would thus disrupt the price-mechanism and create disorder in the market, just like any other price-control. Levine's error is especially puzzling because he himself correctly pointed out how essential profits are for coordination

and signaling (Levine 2012: 94) and that price-controls are therefore self-defeating (Levine 2012: 110). Hence, it is not clear why Levine considers it desirable to eliminate profits. Perhaps it is because in Neoclassical static-equilibrium analysis, “above-normal profit is taken as an indicator of monopoly, and evidence of an inefficient allocation of resources” (Holcombe 2014: 388; cf. DiLorenzo 1988: 321f. and Pasour 1987: 124-126). But if so, then as Randall G. Holcombe has recently pointed out (2014: 390, 400),

profit is a sign of increased efficiency in the allocation of resources, not a sign of inefficiency. Consider this even within a comparative static framework. If one starts with the situation in which all markets are in equilibrium and there are no economic profits, and then an entrepreneur introduces an innovation into the market that generates economic profits, that profit will be the result of either an innovation that lowers the cost of production of the entrepreneur’s output, or produces a good or service that purchasers value more than the alternatives previously available. Either way, the profit is an indication that resources are being allocated more efficiently than before, and welfare has increased. . . . Above-normal profits indicate a welfare loss within a static framework, because using competitive equilibrium as a benchmark for efficiency, the firm making above-normal profit is doing so by producing an inefficiently low quantity to maintain that profit. However, when profit is the result of innovation, a competitive industry is the wrong benchmark, because the output would not have been produced were it not for the lure of future profit.

In general, profits are a signal and an incentive for entrepreneurs to cut costs and introduce innovations which will benefit consumers (Holcombe 2014, Coyne and Coyne 2015b: 9-12.). Therefore, eliminating profits will remove the incentive for innovation and cost-cutting. Furthermore, Holcombe (2014: 389) asks us to

Consider the factors that actually have led to an increase in welfare in the context of

neoclassical welfare economics. Would anyone argue that the reason people are better off today than they were a century ago, or two decades ago, is because the economy is closer to a Pareto optimal allocation of resources now? Welfare has increased because of economic progress, and the Pareto optimal allocation of resources that lies at the foundation of welfare economics is almost irrelevant to the factors that have actually led to increases in welfare. The static efficiency of Pareto optimality has little relationship to actual economic welfare, and its corollary that welfare maximization requires the economic profit be eliminated has very little relevance to actual economic welfare. Actual improvements in welfare are the result of economic progress, not moving closer to a Pareto optimal allocation of resources.

Therefore, it is not clear why we would want to eliminate economic rents and tax excess profits, as Levine counsels us. Perhaps what Levine meant is that excess profits should be taxed only in the case of monopoly (cf. Levine 2012: 95) but not in the case of above-normal returns for successful entrepreneurship and innovation. If so, then this would bring us into the field of the theory of monopoly, which is beyond this article's scope.⁶⁸ In any case, whereas Levine attempted to show that *hafka'at she'arim / hayyei nefesh* does not constitute a price-control, nevertheless, every one of his interpretations ultimately reduces to some form of price-control or another.

IX. Are these Laws Still in Force?

We have now seen that while *ona'ah* is not a price-control, enforcement of *hafka'at she'arim / hayyei nefesh* and the restrictions on middlemen and speculation would be self-defeating like all price-controls. Likewise, there is no doubt that the community's power to democratically impose wage and price controls would be economically self-defeating as well and produce unremittingly negative consequences.

The question is, what if anything can be done about all this? As we already saw, the prohibition

of *ona'ah* is no longer legally binding because there is no such thing as the “true” price of a good (Shilo and Elon 2008; Warhaftig 1988: sec. “G. Contemporary Application”, end of sec. “C. Exceptions”). Perhaps the same applies to the law of *hafka'at she'arim / hayyei nefesh* as well, which also prohibits deviations of $\frac{1}{6}$ from the price. If *ona'ah* cannot be enforced because there is no such thing as a “true” price from which deviations of $\frac{1}{6}$ are prohibited, then the same ought to be true of *hafka'at she'arim / hayyei nefesh*. Indeed, we saw that Aaron Levine states (2012: 109, 112) that “What survives is not the 20% figure *per se*. This figure made sense only for the marketplace and economic conditions that existed at the time of the enactment of the ordinance.”

However, this would not account for communally-imposed price-controls nor the restrictions on speculation and middlemen. Because these laws have no reference to the $\frac{1}{6}$ fraction with respect to the “true” price of a good, we cannot say that these laws are no longer binding on that account. And Isidore Epstein looks forward to the implementation of these laws in the modern State of Israel with great satisfaction and delight, saying of the Talmudic rabbis and their social legislation that (1962: xii)

in what they accomplished they not only anticipated much that is best in the social ethics of modern civilization, but what is more, have provided the Jewish state of the future with valuable material for setting up on earth a Kingdom of G-d.

Thus, it appears too soon to pronounce this set of laws to be of merely antiquarian interest. We must assume that many of these halakhic economic regulations are alive and well. If they conflict with modern economic theory, then this constitutes a serious political and religious problem. Furthermore, it is unfortunate that we cannot assume that the Jewish religious courts (*batei din*) will be populated by judges who are familiar with modern economic theory. What then, should we do when Jewish law and economic theory conflict?

X. Changing *Halakhah* (Jewish Law) in Response to Scientific Discoveries

But in asking what to do when there is a conflict between economic theory and the *halakhah*,

we must first ask whether the traditionally-observant Jew can even admit the premise of this question. Is it even possible for the *halakhah* to be wrong? This allegation, that certain Talmudic economic regulations are self-defeating, will obviously be disconcerting and even threatening to traditional Jews. After all, the claim is that their traditional literature and laws are simply wrong. It is possible that traditional Jews might stubbornly and proudly respond that no, if economic science contradicts the *halakhah*, then the economic science must be wrong, for a sacred religious tradition cannot be wrong. But is this really the only possible response the traditional Jew can give?

In fact, no, rejection of science in favor of the claims of the religious tradition is not the only option the traditional Jew has, for there exists in the traditional Jewish literature an alternative which grants more credence to science. Long ago, the post-Talmudic rabbis realized that the medicine of the Talmud contradicted their own post-Talmudic medical science. The 10th-century Babylonian rabbi, Sherira Gaon, wrote,⁶⁹

We must tell you that our Rabbis were not physicians. They merely said what they observed among patients here and there. These are not commandments [which must be obeyed]. Therefore, do not rely on these cures [in the Talmud].

Yehuda Levi comments on this passage (2006 [1983]: 223),

Thus Rav Sherira Gaon did not consider our Sages' statements regarding medicine to be an integral part of the Oral Torah, but rather simply advice based on their own experience.

This is why no one has ever heard of an Orthodox Jew objecting to the education taught in medical schools today, even though it contradicts the medicine taught in the Talmud: because the medicine of the Talmud is not considered part of the Sinaitic tradition, but rather as something the Talmudic Rabbis determined by their own study and observation as ordinary human scientists. Therefore, the traditional Jew has no compunction against disregarding the Talmud's medicine in favor of modern medicine.

In fact, according to one story told by the Talmud, the Rabbis themselves admitted that they

were incorrect in a matter of astronomy, and that the view of the gentile astronomers was to be preferred (*Pesahim* 94b).⁷⁰ Therefore, Maimonides wrote,⁷¹

Do not ask of me that all [that the Sages] mentioned on the subject of astronomy be compatible with the facts of the matter, because academic knowledge at that time was deficient. They did not speak of these matters as a tradition from the Prophets, but rather because they were the scholars of that generation in these matters, or because they learned them from the scholars of the era.

Likewise, Maimonides's son, Rabbi Avraham ben ha-Rambam, wrote in his famous introduction to the *Ein Yaakov* that (Glick 1916: vii)⁷²

[W]e are not in duty bound to defend the opinions of the sages of the Talmud, concerning medicine, physics and astrology, as right in every respect simply because we know the sages to be great men with a full knowledge of all things regarding the Torah, in its various details. Although it is true that in so far as knowledge of our Torah is concerned, we must believe the sages arrived at the highest stage of knowledge, as it is said, 'In accordance with the instructions which they may instruct thee,' etc. (Deut. 17:11), still it is not necessarily so concerning any other branch of knowledge. ... [T]hey did not arrive at the true ultimate conclusion of everything outside of the Torah.

Citing the *gaonim* (the rabbis of the era immediately following the completion of the Talmud), the 19th-century German rabbi, Samson Raphael Hirsch wrote in a private letter (*teshuva*),⁷³

The primary approach which should be kept in mind by anyone who studies the words of the Sages is this: our Sages were scholars of the G-dly faith, the recipients and transmitters and instructors of its teachings, its laws, its commandments, and rules. They were not especially expert in science, mathematics, astronomy, and medicine – only to the extent necessary for knowledge, observance, and performance of the Torah. We do not find that this [scientific] information was transmitted to them from Sinai.... Their

great [scholars] were proficient in all fields of knowledge and the sciences in keeping with the accepted truths of their times, and they were equal in this realm of knowledge and science to all the other great scholars in other nations, whose wisdom and teachings were accepted as well-known in their generation...

Dayan Meyer S. Lew says briefly that the rabbis of the Talmud “had knowledge of scientific subjects as known in their time” (1985: 3), and Rabbi Gil Student (2001) considers it to be elementary that

Moshe did not receive scientific knowledge at Sinai and that science was not transmitted throughout the ages to the great rabbis. ... If the sages did not receive all of science from Sinai, then from where did they gain their scientific knowledge? As we have discussed elsewhere, the talmudic rabbis were keen observers of the world and performed experiments to better understand reality (e.g. *Chullin* 45b, 57b). Additionally, they consulted with scientists of their time. Aside from explicit mentions of consultations with doctors in the Talmud (e.g. *Chullin* 77a), there are many striking similarities between Greek and Roman science on the one hand and talmudic science on the other. While it is certainly possible that Aristotle and the rabbis arrived at certain identical conclusions independently, it is very likely that some rabbis were either familiar themselves with Greek and Roman science or consulted with doctors who were. ... There is nothing heretical in respectfully saying that some sages were incorrect in regard to some scientific facts.

Meanwhile, Rabbi Marc D. Angel (2008: 16) quotes the late Chief Rabbi of Tel Aviv, Haim David Halevy, as writing (*Asei Lekha Rav* 5:49),

If it becomes clear through precise scientific method that a specific idea expressed by our sages is not entirely correct, this does not mar their greatness, Heaven forbid, and their greatness as sages of Torah. Their words relating to Torah were stated with the power of the holiness of Torah with a kind of divine inspiration; but their other words on

general topics were stated from the depth of their human wisdom only.

Finally, Rabbi Hershel Schacter, *rosh yeshivah* (rabbinical dean) at Yeshiva University's Rabbi Isaac Elchanan Theological Seminary forthrightly declares (2014: 50) the Rabbis of the Talmud

clearly also relied on on the scientists of their time, as we all do. Sometimes this means that they relied on what was later discovered to be the scientific mistakes of their time.

Therefore, we propose that just as the Talmudic rabbis did not receive medical knowledge from Sinai, but rather used the accepted medical science of their day to interpret the relevant Torah laws, so too, we should say that the Talmudic rabbis accepted the economic science of their day and used it to interpret the Torah. Why should medical science and economic science be considered fundamentally different? Of course, modern economic science is not necessarily accurate, and it could very well be that Talmudic economic science was more correct than modern economic science. But the traditional Jew should at least admit the possibility that just as the Talmudic rabbis relied on the medical science of their day and did not speak on medical matters from Sinaitic tradition, the same could be true of economics as well.

But even if it were admitted that Talmudic economic understanding is mistaken, the question would still remain whether the *halakhah* may be changed in light of the new scientific understanding. There is the serious danger that changing the *halakhah* whenever it contradicts science, will end up disrupting Judaism as a whole and create religious and legal chaos. As Rabbi Gil Student warns (2001), following the Medieval *Sefer ha-Hinukh*,

Even if the sages were mistaken on certain scientific facts, the overall corpus of rabbinic literature must still remain the basis of Judaism. It is better to tolerate a few errors than to encourage religious chaos. As we will see, some take this approach in regard to every single *halakhah* and will never allow changing an *halakhah* based on modern science. Others are more willing to change some *halakhot*. However, the suggestion that since the rabbis did not have access to modern science we must reject their entire world view

is both over-reactive and impractical. That would destroy the Jewish religion and the Jewish people.

Therefore, we must tread lightly and carefully. Still, there are occasions when changing the *halakhah* is warranted in light of new scientific developments, and Rabbi Gil Student has encyclopedically catalogued (2001) a variety of different responses which various rabbis have historically made in light of new scientific developments which contradicted the *halakhah*. One response is simply not to change the *halakhah* at all, and there are two different justifications for this approach. One way is to say that unfortunately, the *halakhah* became fixed with the writing of the Talmud and that today's rabbis simply lack the authority to change the *halakhah* in the way which the rabbis of the Talmud could have.⁷⁴ Another is to be skeptical that modern science is really trustworthy at all.⁷⁵

However, Student says, there is another historical approach, which has been to indeed change the *halakhah* when it contradicts new scientific discoveries. According to him (2001),

Another possible response is to advocate changing *halakhah* whenever it seems to contradict science. This can come from two different understandings. The first is simply that the sages of different generations did not have any special understanding of science. Rather, they knew the science of their times and occasionally erred alongside the leading scientists of their generations. Others would argue the exact opposite. The rabbis had divine assistance in understanding scientific reality. If so, how can contemporary science disagree with the sages' perception of reality? Evidently, reality has changed. Whether it is due to changes in climate, diet, exercise patterns, or even what some term “micro-evolution”, nature has changed and the scientific facts of 1500 to 2000 years ago are sometimes different from what we observe today. Therefore, it is not that *halakhah* changes but that it must relate to a new reality.

But whether it is scientific knowledge which has changed – meaning that the Talmudic rabbis were in

error – or whether it is scientific reality which has been altered – meaning that the Talmudic rabbis were correct in their day on matters of scientific fact, but that the scientific nature of reality has changed since then – the practical consequence is the same, that the *halakhah* should be changed accordingly.

However, there is also a third possibility raised by Student (2001). This response is “much more nuanced [and a]ccording to this view, science is used by the sages in two ways.” Sometimes, Student says, the scientific knowledge of the Talmudic rabbis was itself a source for legislation. But at other times, he says, “the sages used science is to explain a received tradition or an observed phenomenon”. In other words, the rabbis already had a tradition that such-and-such was the law, and they used their scientific knowledge to justify a law which was already in existence. This distinction has important consequences for what to do when the *halakhah* contradicts new scientific developments, as Student explains (2001):

These two uses of science by the Talmudic rabbis lead to different reactions when the science is revised. In the first case, when the *halakhah* is based on the science, once the understanding of reality is changed the *halakhah* must be as well. ... However, in the second type, science was only used to explain the *halakhah*. If the science is shown to be incorrect, the *halakhah* should not be changed. Rather, a new explanation should be sought to explain the *halakhah*.⁷⁶

Yehudah Levi makes a similar distinction saying (2006 [1983]: 228),

The answer to this question [of whether the *halakhah* must be changed in the light of new scientific developments] evidently depends on the basis of the *halakhah*: if the *halakhah* has been handed down from Mt. Sinai, it will not be affected by scientific discovery; on the other hand, if it is explicitly based on the presumed facts, determining these facts will affect the *halakhah*.

With all this said, there remains a strong, hallowed tradition in Jewish law which allows

halakhah (Jewish law) to change in response to scientific discoveries. Hershel Schachter (2014: 50) is cautiously permissive, stating,⁷⁷

we shouldn't rush to change the *halakhah* because scientists can change their minds.

Halakhah needs to be around for a long time. But if many years pass and something is accepted as a scientific fact [which contradicts *halakhah*], then we need to reconsider the *halakhah*.⁷⁸

Schachter concludes (2014: 50),⁷⁹

if there is a *halakhah* that is clearly based on a [scientific] mistake, that you cannot interpret differently, and is outright incorrect, how can you continue observing it? It's based on a mistake. We believe in *Torah min HaShamayim* {lit. "Torah from the heavens"} – it's a Divine code. If there is a mistake, it's a man-made mistake. *HaKadosh Baruch Hu* {lit. "the Holy One, Blessed be He"} doesn't make mistakes.

XI. Changing the Jewish Price-Controls in Response to Discoveries in Economics

Now that we have established the fact that the traditional Jew *can* admit that *halakhah* is sometimes mistaken when it disagrees with modern science, we must ask again: what can we do about the economic regulations in particular? As we have seen, *ona'ah* is relatively easy to account for: the prohibition does not apply where the buyer and seller make a suitable stipulation to waive it. Furthermore, the prohibition does not even apply in the first place where goods and prices are heterogeneous, which is certainly the case today. It seems that the law of *ona'ah* is probably no longer legally authoritative, and even if it is, it is easily circumvented.

But *hafka'at she'arim / hayyei nefesh* is more difficult, because the *halakhah* is explicit that it cannot be waived. Nevertheless, it is possible to say that just as *ona'ah* is no longer legally binding because there is no "true" price to enforce, so too with *hafka'at she'arim*. This is made easier by the fact that whereas *ona'ah* is a Torah-prohibition, *hafka'at she'arim* is merely Rabbinic (Elon 2008, Warhaftig

1988: sec. “F. Fraud...”). Rabbinic laws are considered to carry less authority than Torah laws, and so nullifying a Rabbinic law is easier than nullifying a Torah law. If it is possible to deem the prohibition of *ona'ah* to no longer apply, then *a fortiori* the same is true of *hafka'at she'arim*. Thus we can say: the laws of *ona'ah* and *hafka'at she'arim* applied only in the past, when there (allegedly) existed a uniform market price. But now that such thing certainly does not exist anymore, the law of *ona'ah* and *hafka'at she'arim* are null-and-void. The rabbinical courts could announce that “nature has changed” (cf. Student 2001, Levi 2006 [1983]: 221f.) and that while the laws of *ona'ah* and *hafka'at she'arim* used to apply to homogeneous goods, they no longer apply to a modern economy where goods are heterogeneous, not to mention where there are e.g. different methods of packaging and financing and differing qualities of storefront ambiance and customer service. As Aaron Levine says (2012: 109, 112), “What survives is not the 20% figure *per se*. This figure made sense only for the marketplace and economic conditions that existed at the time of the enactment of the ordinance.” And as we saw Warhaftig says (1988: end of sec. “C. Exceptions”) that “in most cases today it is impossible to establish a market price.” Furthermore, he states (*ibid.* s.v. “G. Contemporary Applications”) that “in a completely free market, where every merchant has his own price[, t]here is no market price, and therefore no *ona'ah*.” And as we noted, Menachem Elon argues similarly (Shilo and Elon 2008). And if the nonexistence of a “true” price nullifies the prohibition of *ona'ah*, the same ought to be true of *hafka'at she'arim* / *hayyei nefesh*.

Alternatively, it may be possible to annul the Rabbinic law of *hafka'at she'arim* by asserting that that Rabbinic law was enacted on the basis of a misunderstanding of economic science. Because *hafka'at she'arim* is acknowledged to be Rabbinic in status, it is feasible for us to simply declare that the Rabbis spoke on the basis of mistaken economic science. The limitation of profits with respect to costs is annulled because the law was created by humans (the Rabbis) on the basis of a mistaken understanding of science. This approach would be especially applicable for annulling the restrictions placed on speculators and middlemen. Because those laws do not make reference to the “true” market

price or the $\frac{1}{6}$ fraction, we cannot say that those laws were formulated for conditions of homogeneous goods and prices which no longer hold. In other words, the “nature has changed” argument does not suffice. Instead, we must say that those laws were based on a mistaken understanding of economics. The same applies to the community's power to impose wage and price controls; we must say this was simply mistaken.

And there is one more candidate for a possible means by which to circumvent *hafka'at she'arim*: according to Menachem Elon (2008), “the rules concerning profiteering were only to take effect if imposed as measures of general application to all vendors, otherwise the individual could not be obliged to adhere to the permitted maximum rate of profit.” Similarly, according to Itamar Warhaftig (1987: end of sec. “4. Profit Limitation”), “a merchant is obligated to abide by this law only if there is a supervisory mechanism to insure that all merchants conform to its provisions. If, however, the market is unregulated one does not have to sell cheaper than others.” The idea seems to be that a merchant does not have to hamstring himself by abiding by these laws if his competitors are not. If any part of the market is unregulated, then the merchants in the regulated sector are not obligated to abide by the regulations either, lest they face competitive disadvantage. But in this era of globalization, the relevant market seems to be the world market as opposed to the local or even domestic market. Therefore, it would not be enough to enforce *ona'ah* and *hafka'at she'arim* in the land of Israel, because the inhabitants of the rest of the world remain unregulated. If these laws were enforced in Israel, then domestic Israeli commerce would face international competitive disadvantage. And as long as the rest of the world is not regulated by the Talmud's laws, then the market *per se* is not regulated by the Talmud either. Since the relevant market today is the world market, then the whole world must be regulated by the Talmud's laws in order for the Talmud's economic regulations to be binding for Jews in Israel. Since the non-Jewish world does not enforce these halakhic regulations, therefore, it is possible that no Jew is obligated to abide by them either. In an era of global trade, domestic interventionist regulations are liable to backfire even worse than in a closed domestic economy. In fact, according to

some scholars, restrictions on international trade and attempts to insulate the domestic market from foreign competition were contributory causes to the outbreaks of WWI and WWII (Mises [1919] 1983, [1944] 1985: esp. chapter 3, parts 4-10; Cassel 1934).⁸⁰ Aside from this, tariffs and other forms of protectionism lead to monopoly and reduced consumer welfare. Therefore, the State of Israel should not restrict international trade. Fostering competitive international trade requires that the State of Israel and the religious Jewish courts (*batei din*) not enforce the Talmud's regulations, lest Israeli merchants face competitive disadvantage from foreigners who are not so restricted.

Finally, as for the corporate community's power to impose wage and price controls, this appears happily to be moribund and in desuetude, simply because modern Jewish communities are not constituted as they once were, to be independent politically authoritative bodies (Menachem Friedman 1982, 1986, 1993, 2004; cf. Tamari 1991: 15). Today, any given locale where Orthodox Jews live, tends to have a multiplicity of competing rabbis and rabbinical courts, and none of them has the sort of territorial monopoly on the legitimate use of force which would be necessary to impose wage and price controls. Therefore, they simply do not have the political authority necessary. Furthermore, the communities are so localized that it is likely that any attempt to impose the controls would become a self-evident failure. Imagine, for example, a synagogue in New York City attempting to dictate that every one of its congregants must pay half the going rate for food and must work for at least double the going rate of wages. This synagogue's members would immediately find themselves unable to purchase food or find employment in a competitive marketplace. Any Orthodox Jew who told the local supermarket that he is only allowed to pay half the going rate for food, or who told his employer that he must be paid double the going wage-rate for his occupation, would be laughed at, and it is unlikely that any synagogue would attempt to enforce such a decree. If the synagogue tried, the congregants would probably all vote with their feet and begin attending a synagogue which allowed them to purchase food and to find employment at the going market rates. Therefore, the communal price-controls are probably of no concern whatsoever in a modern world. Nevertheless, we should admit that once upon a time,

when the Jewish communities were authoritative, the imposition of wage and price controls was politically possible and yet economically self-defeating. The communal controls may lie in desuetude today, but we should admit that when they were effective, they were based on erroneous economic science. If it ever becomes politically feasible to enforce these communal price-controls again, we should be ready to renounce and denounce that power immediately.

But ultimately, what is important for our present purposes is not *how* the halakhic price-controls may be circumvented, but only whether they *should* be circumvented. Once it is admitted that the *halakhah* and science in general may contradict, and that halakhic price-controls may conflict with economic theory in particular, then it follows that *any* legitimate means of altering the *halakhah* should be used. This present essay does not aim at definitively establishing what are the halakhically legitimate means of bringing *halakhah* into reconciliation with science, for that is a matter best left with scholars of the *halakhah*. Instead, this essay wishes only to reveal that the conflict exists and point out the desideratum for *some* means of reconciliation, whatever it may be. As a model, we might take the example of how *halakhah* has dealt with the Biblical prohibition of charging interest. When the Biblical prohibition of charging interest became too much of an impediment to the needs of modern commerce, the rabbis formulated the *heter iska* to circumvent that prohibition (Epstein 1962: 43f.). What concerns us here is not *how* the *heter iska* works (see Tamari 1987:159-208, Tamari 1991: 103-127), but only that it *does* work, and that the *heter iska* was devised consciously as a means of adapting the *halakhah* when it conflicted with the needs of life. The rabbis knew that enforcing the Biblical ban on interest would prove disastrous to economic life and welfare, and so they found a halakhically legitimate means of circumventing that ban. The same could be said of the *prozbul*, invented by the rabbi Hillel to circumvent the annulment of debts during the *shemittah* (Sabbatical) year. With the coming of the year of the annulment of debts, Hillel was afraid that the poor would find no one to loan to them, and he considered it better that they be required to repay their loans than that they find themselves without any loans at all, and therefore, he invented the means by which the annulment of

debts is itself prevented (Epstein 1962: vii; Lew 1985: 45-47). Once again, it does not matter for our purposes *how* the *prozbul* works, only that it *does*, and that it was definitely motivated by the perception of a conflict between the *halakhah* and the economic needs of modern life. This essay proposes that the various halakhic economic regulations should be approached similarly to the matter of interest, and that these various halakhic economic regulations be circumvented in a manner similar to the *heter iska* and the *prozbul*.

Of course, it is possible that after all, the Talmudic economic regulations really are effective and efficient, and it is modern economic science that is in error. But the religious Jewish community should at least admit the possibility that enforcement of these *halakhot* would be self-defeating. Just as they say that the Talmudic rabbis received their knowledge of medical science from their own empirical study and from the studies of their gentile neighbors, and not from Sinaitic tradition, so too, they should admit at least the *theoretical possibility* that the same is true of Talmudic economic science. They should prepare contingency plans for each case: if the *halakhah* is correct and modern economic theory is wrong, then nothing need be done. But if economic theory is correct and the *halakhah* is wrong, they should be prepared to say that economic science was not received at Sinai, and that therefore, the *halakhah* should be changed in whatever manner is halakhically legitimate. Once they have accounted for both of these two possibilities, then they need no longer fear what the outcome of scientific studies will be, because either way, they will have already formulated a religiously legitimate response. This procedure was advocated by Rabbi Avraham Yitzhaq Kook, the late Chief Rabbi of Mandate Palestine, who wrote (*Igrot* 134, trans. in Feldman 1986: 11f, 14.),

When we accept this view, we no longer have any particular need to fight against the descriptions that have gained fame among the new researchers, and having become unbiased in the matter we will be able to judge fairly, and now we will be able to refute peacefully their conclusions as much as truth will show the way. ... And in general, this is an important rule in the struggle of ideas: we should not immediately refute any idea

which comes to contradict anything in the Torah, but rather, we should build the palace of Torah above it; in doing so we are exalted by the Torah, and through this exaltation the ideas are revealed, and thereafter, when we are not pressured by anything, we can confidently also struggle against it.

By preparing two contingency plans, one for in case the Talmud is right and one in case it is wrong, the religious Jewish community can be dispassionate in its studies for it need no longer fear that scientific study will upset religious faith.

XII. Conclusion

Thus, we have seen that the *halakhah's* economic regulations, like all forms of price-control, would tend to be inefficient if enforced and would tend to accomplish the very opposite of their intention. While *ona'ah* may have only been intended to protect against asymmetric information, the *hafka'at she'arim / hayyei nefesh* ordinance definitely constitutes a price-control on essential foodstuffs. Furthermore, there appears to be nobody who argues that the Talmud's condemnation and restriction of middlemen and speculators were anything other than what they appear to be. And the community's power to impose wage and price controls cannot be explained anyway as being anything else.

But it may be the case that the laws of *ona'ah* and *hafka'at she'arim / hayyei nefesh* are no longer applicable to a modern marketplace, and therefore, they are no cause for concern. If so, then the matter may rest there. But furthermore, traditional Orthodox Jews should have the courage to admit that the Talmudic rabbis did not receive science – including economic theory – at Sinai and that these Talmudic economic regulations may conflict with modern economic theory and the needs of modern life. Orthodox Jews today should have the courage to apply to the Talmudic price-controls what Maimonides said in his “Letter on Astrology” about the Talmud's expressions of belief in astrology (Maimonides 1972: 472):

I know that you may search and find sayings of some individual sages in the Talmud and

Midrashim whose words appear to maintain that at the moment of a man's birth, the stars will cause such and such to happen to him. Do not regard this as a difficulty, for it is ... not proper to abandon matters of reason that have already been verified by proofs, shake loose of them, and depend on the words of a single one of the sages from whom possibly the matter was hidden. ... A man should never cast his reason behind him, for the eyes are set in front, not in back.

Furthermore, the Orthodox Jew should be prepared to admit – if necessary – that these laws ought to be somehow circumvented in roughly the same way that the *iska* permitted taking interest and the *prozbul* prevented the nullification of debts in the *shemittah* (Sabbatical) year.

At the very least, Orthodox Jews should prepare this sort of response which we have proposed and reconcile themselves to it as an acceptable possibility in case this response ever becomes necessary. By preparing such a contingency plan – what Rav Kook called “building a palace of Torah” – the Orthodox Jew is prepared for all eventualities. Whatever the conclusions of critical analysis and scientific study may be, he has a religiously acceptable response prepared. He no longer need fear the results of critical research and he will not feel compelled to respond in a knee-jerk fashion to findings which appear to contradict his religion. If the science is wrong, then his religion is fine; but if the science turns out to be correct, he has already prepared a religiously acceptable response in advance, just in case. Even if it should happily turn out that the Talmud's economic legislation is perfectly sound, the Orthodox Jew will already have been comfortably prepared for the contrary contingency.

And we have provided another example of the possibility of distinguishing between the core of an ethical theory and the non-essential scientific assumptions presumed by that theory. Just as it was possible to reconcile Aristotelian virtue ethics (eudaimonism) with business by abandoning Aristotle's non-essential views on economic theory (Miller 2013), so too, we will have distinguished between what was received at Sinai and the science with the Talmudic rabbis learned through their own personal study as human beings. Meanwhile, we have shown that the possibility of conflict between religion and

science exists not only in the fields of cosmology and biology/evolution (Slifkin 2006), but also in the field of economics. Such conflicts in matters of the economy should be dealt with in the same manner as conflicts between science and the first chapter of Genesis. Finally, it is not enough to state that a given religion is generally in favor of a given economic system; one must instead subject the laws and regulations of that religion to detailed individual analysis.

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- 1 Cf. *Mishnah, Pirkei Avot* 4:26-27; thanks to Sarah Skwire for the title.
- 2 However, there are certainly those rabbis and Judaic scholars who have held a contrary opinion. For example, in an apologetic statement, Isidore Epstein (1962 via Brill 2012a) praises the Rabbis of the Talmud for their social legislation while criticizing the immorality of the more free-market Romans (Epstein 1962: iv, s.v. “The Rabbis, actuated”). Eliyahu Fink (2012) summarizes Epstein and concludes, “Chazal [i.e. the Talmudic Rabbis] endorsed a pretty severe form of socialism [and] ... the most traditional form of economic policy in orthodox Judaism is pretty close to socialism.” Meanwhile, Leff (2011) adduces laws such as *ona'ah* and the Talmudic denunciations of middlemen and speculators, in favor of the opinion that Judaism supports price-controls on essentials (but not luxuries). For an even more extreme example of the opinion that Judaism is anti-market, see Joseph (Hans) Heinemann's *Torah and Social Order* (1944) via Alan Brill (2012b). Heinemann argues for reconciling the Orthodox Jewish interpretation of the Torah with full-blown, orthodox socialism. The existence of this tract stands in contrast to Seymour Siegel's tentative statement (Block, Brennan, and Elzinga 1985: 451) that “no religious Jew that I know of, that is loyal to his or her religious community, was ever a socialist.”
- 3 Lifshitz (2012) is to be recognized for containing the most thorough analysis – known to this author – of whether or not *tzedaka*, charity ought to be assessed as a compulsory tax on all members of the community. Lifshitz shows at great length that there is a dispute running through the traditional Jewish literature, and that authorities may be found on either side. One school holds that those who refuse to pay the charity-tax may be physically coerced and their property expropriated, as with most systems of taxation. But the other school holds that those who refuse to pay may merely have the benefits of membership in the community limited or revoked but that their property may *not* be confiscated. The second view (that the tax is not compulsory) is seemingly ignored in nearly every work on the subject save Lifshitz's. For example, both Aaron Levine (1995: 392, 1985b: 447) and Meir Tamari (2010: 472: 1991, 21, 37; 1987: 5, 52; 1986: 401) take it for granted that physical

coercion is used to enforce the obligation to give charity and they do not recognize that any contrary opinion exists. The dispute – revealed by Lifshitz – amounts to a question of whether the Jewish community *qua* provider of welfare to the poor, is a territorial monopoly on the legitimate use of violence (i.e. a state) or merely a private association or club with voluntary membership. According to the first view, Judaism could support a compulsory welfare state, but according to the second view, it could not. (Whether the Jewish community is a state or a private club in the realm of punishment of torts and crimes is an entirely separate matter unrelated to the provision of welfare.)

The distinction is crucial, for as Joseph Schumpeter reminds us (1942: 128), “The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social sciences is from scientific habits of mind.” If the Jewish community provides welfare as a state, then the taxes may be collected with violence and compulsion. But if only as a private club or association, then welfare funds are collected not as compulsory taxes but as voluntary membership dues, and those who refuse to pay may only have their membership revoked (*herem* – excommunication) and their benefits denied (e.g. the right to use communal infrastructure such as the synagogue), but they cannot have their property expropriated nor may they be forced to physically relocate. The members of the community in good standing may be forbidden to socially interact with the one who has been excommunicated, and the one who is excommunicated may be denied services for which he has refused to pay, but the one excommunicated is in no way directly harmed himself. The distinction between enforcement of welfare by violence versus excommunication is crucial, and it is impossible to accurately determine the Jewish perspective on the welfare-state without realizing this dispute exists. And while we are on the subject of Jewish attitude towards the welfare state, we should note that Isidore Epstein (1962) appears to have had an advanced and sophisticated knowledge of the economics welfare and poverty relief, recognizing the danger of moral hazard (perverse incentives) and perhaps presaging Charles Murray's *Losing Ground* (1984) by forty years. Meir Tamari (1986: 403f.) recognized the threat of

moral hazard in the provision of welfare as well. By contrast, Aaron Levine (1995: 393) is far too sanguine about the Jewish welfare bureau's competence to prevent abuses and unintended consequences, in his response to Peter J. Hill's argument (1995: 376-8) that public welfare is liable to create moral hazard. On moral hazard in the provision of charity, see also Gordon Tullock ([1971] 2004, 1998, 2003: 6-7).

- 4 See also Walter Block's positive-economic criticism (Block and Hexham 1986: 432f.) of Meir Tamari's exposition of the Jewish laws pertaining to advertising (Tamari 1986: 400f.); Arthur Shenfield's positive-economic criticism (Block and Hexham 1986: 457f.) of Meir Tamari's exposition of the Jewish rejection of *caveat emptor* (Tamari 1986: 401); and Walter Block's positive-economic criticism (Block and Hexham 1986: 437f.) of Meir Tamari's exposition of the Jewish law of *bar metzrah* (Tamari 1986: 402).
- 5 While the name “*ona'ah*” for the one set of laws is quite standardized, there seems to be less standardization concerning whether to call the other set of laws “*hafka'at she'arim*” or “*hayyei nefesh*.” Therefore, we use both names for the second set of laws.
- 6 Warhaftig (1988: note 2) makes the baffling statement that “There is no parallel to the halachic laws of fraud in any ancient legal system in Biblical times.” On the contrary, price-controls possibly similar to the Talmud's are found at least as long ago as the Code of Hammurabi (Schuettinger and Butler 1979: 11). Similarly, Meir Tamari makes the odd statement (1987: 87) that “Despite certain Talmudic sayings to the contrary, no anticommercial tradition existed in Judaism as existed in Christian social thought.” Is Tamari saying that these Talmudic sayings are not part of Jewish tradition?
- 7 For a comprehensive review of Jewish responses to this conflict, see Slifkin (2006).
- 8 For a summary of the different sources of Jewish law, see Kleiman (1987: 23-25) and Tamari (1987: 11-24). In brief: first there was the *Mishnah* of circa 200 AD, which was incorporated into the Talmud of circa 500 AD. Alongside the *Mishnah* were the *Tosefta* – a sort of appendix enlarging on

the *Mishnah* – and the *baraitot*, stray comments from Mishnaic-era rabbis quoted in the Talmud.

References to the *Mishnah* and *Tosefta* are by chapter and paragraph; to the *Talmud*, by folio. Then there are several important Medieval codes of Jewish law, especially the *Mishneh Torah* or *Yad ha-Hazaqa* by the Rambam (Maimonides) (c. 1135-1204), the *Shulhan Arukh* by Rabbi Joseph Karo (1488-1575), and the *Arukh ha-Shulhan* by Rabbi Yehiel Michel Epstein (1829-1908). The laws of *ona'ah* are discussed by Maimonides in *Mishneh Torah, Hilkhot Mekhira* chap. 12-14, available in the original Hebrew at <<http://www.mechon-mamre.org/i/c112n.htm>> and in English translation by Eliyahu Touger at <http://www.chabad.org/library/article_cdo/aid/1363941/jewish/Mechirah-Chapter-Twelve.htm>.

9 Epstein (1962: v) and Warhaftig (1987: end of section 1, “Profiteering”) tell the same story. See also the historical narrative according to Kleiman (1987: 34). In Kleiman's telling, the rabbis of the *Mishnah* fixed only weights and measures, not prices, but by the third century, perhaps under the influence of the same inflationary conditions which motivated Diocletian, he says, the rabbis of the *Talmud* became more interventionist and anti-market. However, Kleiman argues that in the end, the *Talmud* was still more pro-market than otherwise.

10 For all references to Shilo and Elon (2008), cf. the similar treatment by the *Jewish Encyclopedia* (1906) nearly a century earlier.

11 Kleiman's definition presages his own interpretation of *ona'ah*, which is that it is meant to protect the ignorant against informational asymmetry, not to establish a fixed, “just” price.

12 *Hil. Mekhira* 12:2-4; Shilo and Elon (2008); Epstein (1962: iv); Lew (1985: 42f.); Warhaftig (1988 *s.v.* “A. Definition”); Tamari (1987: 97, 1991: 79); Levine (2012: 53).

13 According to Aaron Levine (2012: 93, 112 n. 2), the one-sixth measurement is calculated by what is called an “outside sixth” or an “inside fifth,” meaning that if the price is \$10, the forbidden deviation is a fifth of \$10 (“inside”), i.e. \$2, with the \$2 discrepancy being one-sixth of the resulting \$12 (“outside”). So too Warhaftig (1987: sec. 4, “Profit Limitation”). However, Meir Tamari's examples

(1991: 79) show that he regards the one-sixth as being “inside” not “outside.” Kleiman (1987: 31) is uncertain which standard to apply. *Eretz Hemdah* (2009) says that the Talmud presents both possibilities, that the sixth is “inside” or “outside,” and that the post-Talmudic commentators discuss when to apply which. In *Hil. Mekhira* 12:2, Maimonides appears to shift from one fraction to another silently, with his examples of prohibited *ona'ah* varying from $+1/5$ to $-1/7$ to $\pm 1/6$. But none of this affects the substance of the argument of this article.

14 That the two laws – *ona'ah* and *hafka'at she'arim / hayyei nefesh* – are related, is apparent from Maimonides's organization of *Hil. Mekhira*. In *Hil. Mekhira* chaps. 12 and 13, Maimonides discusses *ona'ah*. In the first two paragraphs of chap. 14, he turns to *hafka'at she'arim*. Then in 14: 3-11, Maimonides discusses speculation, middlemen, hoarding, communal price-controls, and guilds. In the final paragraphs of chap. 14, i.e. par. 12-18, Maimonides returns to the topic of *ona'ah*. In other words, *hafka'at she'arim* is sandwiched in between two discussions of *ona'ah*, showing they are related. Meir Tamari's 1991 presentation is similar to Maimonides's in this regard; Tamari (1991: 68-72) first discusses *hafka'at she'arim*, then he turns (1991: 87) to *ona'ah*, and then he returns to *hafka'at she'arim* again (1991: 87f.), which this time he refers to – not entirely accurately – as “cost-related *ona'ah*.” Finally, he concludes with ordinary *ona'ah* again (1991: 88-91). Elsewhere, Tamari (1987) seems to draw a sharper distinction, separating *hafka'at she'arim* (1987: 88-96) and *ona'ah* (1987: 96-100) into two separate sections. But even then, Tamari (1987) briefly lumps *ona'ah* and *hafka'at she'arim* together into one single statement, saying (1987: 88), “the forms of price control discussed here all refer to basic commodities or their ingredients [i.e., *hafka'at she'arim*], with investment goods (such as land, slaves, or monetary instruments) excluded [i.e. *ona'ah*].” Meyer S. Lew does not clearly distinguish between *hafka'at she'arim* and *ona'ah*, shifting seamlessly from discussing the former (Lew 1985: 42) to the latter (Lew 1985: 43) without clearly distinguishing them. Warhaftig (1987) is mostly concerned with *hafka'at she'arim* while Warhaftig (1988) is mostly concerned with *ona'ah*, although the latter (Warhaftig 1988) returns to

hafka'at she'arim near its conclusion (s.v. “F. Fraud, Profit Limitation, and Unfair Pressure”).

Although Kleiman (1987) is predominately concerned with *ona'ah*, his brief allusion to *hafka'at she'arim* shows their close relationship: “The rather general, contrasting statement to the effect that profits (from trade?) should not exceed one-sixth (*TB BB* 90a), seems to have represented an attempt to interpret the *ona'ah* rules in an all-embracing manner” (Kleiman 1987: 36 n. 23).

15 Similarly, Warhaftig (1988: sec. “F. Fraud...”) says “Profit limitation is a rabbinic ordinance, whereas *ona'ah* is of Torah status,” and by “profit limitation” he means “the statute of Shmuel (*BB* 90a) limiting profits to one sixth above costs.” Warhaftig continues (1988: sec. “F. Fraud...”), “Profit limitation is an obligation not subject to change through stipulation or waiver, unlike *ona'ah*.” Kleiman (Kleiman 1987: 36 n. 23) makes an opaque distinction between *ona'ah* and *hafka'at she'arim*.

16 In general, there are two types of laws in Judaism: Torah law (*mi'de'oraita*) and Rabbinic law (*mi'de'rabanan*). Rabbinic laws are created by the Rabbis as explicit acts of legislation and therefore they have lesser legal authority than Torah laws. Torah laws are passed down by tradition as part of the Oral Law – the *Torah She'be'al Pe* – from Sinai, which was delivered by Moses alongside the written Torah – the *Torah She'bikhtav*. The present author would like to suggest that *ona'ah* may be an example of a very special type of Torah law: the *din muflah* (“exceptional law”) (Faur 1979-80: 230; cf. Maimonides's *Introduction to the Mishnah* and *Introduction to the Mishneh Torah*). As we said, there are two types of law in Judaism, Torah and Rabbinic. However, *dinim mufla'im* (pl. of *din muflah*) fall in between: *dinim mufla'im* are created by Biblical exegesis – *midrash halakhah* – whenever the Rabbis interpreted the Torah's text on their own. Such laws are created by the Rabbis and do not derive from Sinaitic tradition, but they have the legal authority of Torah law because they are based on textual reading of the Torah. As *ona'ah* is based on Lev. 25:19, we suggest that it may be an example of *din muflah*. If this is true, what it would mean is that the law of *ona'ah* was created by the Rabbis but that it has the legal status of a law found in the Torah itself. Meanwhile, *hafka'at*

she'arim is purely Rabbinic. This interpretation of *ona'ah* as a *din muflah* would lend context to Seth Winslow Weissman's argument (1998: 136-141) that the original Biblical law of *ona'ah* in Lev. 25: 19 was related to the law of the Jubilee, and that *ona'ah* banned abuse of unequal bargaining power in sales of land. Weissman argues that it was only later Rabbinic interpretation which transformed *ona'ah* from a law originally concerning bargaining power and land, into a law about asymmetric information and movable property. A simple reading of Weissman would suggest that *ona'ah* possesses merely Rabbinic authority because of its divergence from the Biblical text. But if *ona'ah* is a *din muflah*, a law created by the Rabbis through Biblical exegesis, then the law would possess Biblical authority because it was not ordained as an act of Rabbinic legislation, but it was based on the Rabbinic interpretation of the Bible, giving it Biblical authority. The fact that the Rabbinic interpretation of the Bible differs from what we might consider the “correct” interpretation does not detract from its authority.

17 Shilo and Elon (2008) and Warhaftig (1988: sec. “C. Exceptions”) cite *Talmud*, *BM* 56b; Lew (1995: 43) and Kleiman (1987: 30) cite *Mishnah*, *BM* 4:9; Tamari (1991: 76) quotes *SA HM* 228:6.

18 Aaron Levine (2012: 95) notes three different views on which specific types of foodstuffs are price-regulated. Cf. Warhaftig (1987: s.v. “2. Products Included”).

19 Warhaftig (1987, s.v. “5. The Market Price”) citing the Rashbam's commentary to *Talmud*, *BB* 89a-90b. Cf. Levine (2012: 99-101). Tamari (1987: 94, 1991: 87) argues that Maimonides too believes *ona'ah* applies not only with respect to price but also cost.

20 Block (2002: 724-725) argues against the interpretation that *ona'ah* forbids excess profit with respect to costs incurred but without citing the Rashbam.

21 Kleiman (1987: 33) further points to the Talmudic laws of interest as they apply to futures contracts, arguing that these laws show the Talmud was aware that prices could fluctuate, especially due to supply shocks. Therefore, he says *ona'ah* did not presume “prices fixed by decree. and stable over a long period”, and he rejects the comparison of *ona'ah* to Diocletian's edict of 301 AD. Once again,

however, we should remember that Kleiman is concerned with the historical meaning of the *Talmud*, not with ongoing Jewish law as a unity (Kleiman 1987: 25 n. 2).

22 Citing *Hil. Mekhirah* 14: 1-2, *Tur HM* 231: 20, *SA HM* 231: 20, *Arukh ha-Shulhan HM* 231: 20.

23 In Kleiman's words (1987: 34 n. 19), "It should be also pointed out that had price inspectors been available, much of the discussion reported here" concerning the time in which one has to consult with other merchants or one's friends in order to discover the proper price "would have been redundant, and an inspector, rather than 'a merchant or ... a kinsman,'" would have been the authority referred to."

24 Tamari 1987: 149 cites *Tosefta BM* 11:23 as well.

25 It is not clear whether Isidore Epstein had *ona'ah* or corporate-communal price-regulation in mind when he wrote (1962: vi) that "Property did not give owners the right to hire workers on their own terms. The wages were fixed with a view to safeguarding the workers' standard of life by the authorities, who drew up regulations as to the wages and hours of labour and other rights of the workers."

26 Aaron Levine adumbrates an interpretation like this (1985a: 423; 1985b: 448), but he does not elaborate or explain, only saying laconically that the law of *ona'ah* is based on the absence of perfect knowledge in the marketplace.

27 Tamari (1991: 89f.) quotes *SA HM* 227:21 in English at length.

28 I thank Seth Winslow Weissman for personally providing me his paper.

29 Cf. Warhaftig (1987: sec. "A. Preface"): "In short, the danger exists that the manufacturer and the retailer will exploit the inexperience and ignorance of the individual consumer, who has neither the time nor the knowledge to adequately protect his own interests." Cf. also Zvi Weiss as quoted in Block (2002: 767f. n. 8).

30 For similar reasons, we should doubt the justice and efficiency of laws against insider-trading; see Manne (1966a, b, 2002), and McGee and Block (1989).

- 31 In the “Discussion” (Block and Hexham 1986: 450-461) following Walter Block's criticism (1986) of Meir Tamari (1986), Tamari neglected to reply to any of Block's observations concerning *ona'ah*, speculation, or middlemen. Nor do Tamari's later works on the subject (1987, 1991) reply to those works of Block's which Tamari could have seen by the time of publication (Block 1986, 1990 but not 2002).
- 32 Warhaftig argues (1988: sec. “C. Exceptions”) about land and real-estate that “its price depends to a certain extent on its location. Hence, there is no standard market price for land.” Elsewhere, Warhaftig (1987: sec. “C. Summation and Application”) adds: “One factor relevant to the regulation [under *ona'ah*] of these products is the fact that often, especially in the case of clothing, it is difficult to establish a uniform standard.” But as we shall see shortly, Warhaftig himself noted that this is basically true of *all* goods. Cf. *Arukh ha-Shulḥan*, *HM* 227:34, quoted in Shilo and Elon (2008), which explains that the Talmud exempted certain goods from *ona'ah* because their valuation is subjective or because they have no fixed market price. But the exact same arguments could be made about literally any other good whatsoever. However, as Kleiman points out (1987: 39) in the Talmud, subjective “utility was recognized as playing a role in determining the prices of individual transactions, and in their departure from the going market price in particular, but not in the determination of that price itself.”
- 33 Peter J. Hill (1995: 376) criticizes Aaron Levine's attempt to apply *ona'ah* in a modern society, arguing that because of modern product differentiation and heterogeneity, “the application of *ona'ah*, price fraud involving selling above or below the competitive norm, is also based on far more information than is easily obtainable in modern society.” Levine's reply to Hill (Levine 1995) does not respond to this specific critique by Hill.
- 34 So only in the absence of a free-market can there be *ona'ah*. But if the market is not free, why make matters worse by further intervention? Would it not make more sense to say that when the market is not free, it should be made free? Some economists may object that the government should

internalize externalities and provide public goods. But this has nothing to do with price-controls contemplated by Warhaftig. Even orthodox welfare economists should be able to agree that when the fundamental pricing mechanism is disrupted by government intervention, the solution is less intervention, not more.

35 But even though Warhaftig considers *ona'ah* to be inapplicable in a modern marketplace, he nevertheless concludes that, “application of *ona'ah* laws today requires careful definition of the market price, product standardization including packaging, consumer knowledge, and the size of the local market.” It is not clear why we should attempt to implement a law that has already been judged inapplicable.

36 The precise figure of $\frac{1}{6}$ is also dubious. What is so holy about that fraction? Why not couch the law of price fraud in terms of a deviation of one-fifth or one-seventh? Warhaftig (1988: n. 3) attempts an answer, but all of his suggestions are somewhat mnemonic or homiletical; none has any real scientific significance. Levine (2012: 109, 112) argues that the one-sixth figure made sense once-upon-a-time but not anymore. However, Levine does not explain why the precise figure of one-sixth ever made sense in the past. Kleiman (1987: 29-32) argues that the one-sixth margin was meant to cover normal variation among prices. However, there is no reason to believe that the normal statistical variance of prices from the mean is precisely one-sixth. If *ona'ah* has any application or relevance today, it should be rewritten to ban transactions whose prices are a certain number of standard deviations from the mean, not necessarily $\pm\frac{1}{6}$.

37 Here, Maimonides appears to be basing *ona'ah* not on an officially promulgated price, but rather on costs (Tamari 1987: 94, 1991: 87), similar to the Rashbam's interpretation of *ona'ah* (Warhaftig 1987, s.v. “5. The Market Price”; Levine 2012: 99-101).

38 Here, Maimonides seems to return to the conception of *ona'ah* as relating to an official price and not costs.

39 Citing *Talmud, Bava Batra* 89a, 90b; *Mishneh Torah, Hilkhoh Mekhirah* 14:6; *Shulkhan Arukh*,

Hoshen Mishpat 231:25. The citations show that Lew is considering *hafka'at she'arim / hayyei nefesh*, not *ona'ah*.

40 Citing *Mishneh Torah*, *Hilkhot Mekhirah* 14:1-2; *Shulkhan Arukh*, *Hoshen Mishpat* 231:28. The citations and the reference to “basic goods” show that Tamari is discussing *hafka'at she'arim / hayyei nefesh*, not *ona'ah*.

41 Kleiman seems to admit that *hafka'at she'arim / hayyei nefesh* imposes price-controls, albeit rather opaquely. In his words (1987: 29),

Thus, the injunction against overcharging [i.e. *ona'ah*] did not aim at preventing abnormal profits as such. Although, as will be shown later, excessive profits were occasionally exhorted against in the Talmud, they are not referred to in the present context of rules regarding overcharging. The proscription of the latter [i.e. *ona'ah*] seems to have been intended only to prevent sharp dealers from taking advantage of the customers' lack of information concerning the current market price.

Later, Kleiman notes (1987: 36 n. 23),

The rather general, contrasting statement to the effect that profits (from trade?) should not exceed one-sixth (*TB BB* 90a), seems to have represented an attempt to interpret the *ona'ah* rules in an all-embracing manner.

Thus, Kleiman appears to brush away any indications that *ona'ah* was meant as profit-limitation, in order to confirm his interpretation that *ona'ah* is meant only as a protection against ignorance. This allows him to conclude that *ona'ah* is not similar to the Medieval just price legislation after all.

Perhaps part of the reason he may do this is because his purpose is to analyze Talmudic statements in their individual, isolated historical contexts rather than interpret Jewish law as an ongoing, integrated whole (Kleiman 1987: 25 n. 2).

42 For analysis and critique of price-controls in general, see Coyne and Coyne (2015a), Schuettinger and Butler (1979), Morton (2001), Rockoff (2008), and Levine (2012: 94).

43 For the following, cf. Aaron Levine's admirable treatment of the negative effects of price-controls (2012: 93-95).

44 Most modern economies are of course “mixed,” in that some prices are controlled and others are not.

45 For earlier critics of Soviet-style economies, see Bauer and Yamey (1957), Boettke (1993), and Mises ((1975) [1933], (1981) [1969]).

46 Interestingly, the Talmud itself seems to have momentarily realized that price-controls and other such interventions will produce unfortunate consequences contrary to their intentions. According to Shmuel Shilo, “The law of overreaching [i.e. *ona'ah*] does not apply to the sale of apparel because the owner would not sell such articles except if he received the price he demanded” (Shilo and Elon 2008, citing *Talmud*, *BM* 51a). Here the Talmud understands that a price-control or otherwise mandated price below market-clearing will produce shortages as otherwise-willing sellers leave the market. If the seller wishes to ask a certain price but he is forbidden, then he will be liable to leave the market and withhold his product, making buyers as frustrated as himself. What remains to be answered is why the Talmud did not apply this same thinking to every other price in the market and thus produce a systematic account of the futility of price-controls consistent with modern economic theory. Similarly, according to Warhaftig (1988: sec. “A. Definition”), the Medieval *Sefer ha-Hinukh* “(337) states that it is permissible to charge up to one sixth more than the market price, 'so that the necessities of men will be available.’” The *Hinukh* recognizes that prices must be allowed to deviate up to one-sixth so that supply and demand will tend towards equilibrium. So why not allow the price to deviate by *more* than one-sixth if *that* is what is necessary to bring supply and demand towards equilibrium?

47 Citing *Talmud*, *BB* 91a.

48 Citing *Talmud*, *BB* 91a and *Sh. Ar. HM* 231:20.

49 Citing *Mishneh Torah*, *Hilkhot Mekhira* 14:4 and *Talmud*, *BB* 90b. See Tamari (1986: 406) and

(1987: 92) for nearly identical formulations. Likewise Warhaftig (1987: sec. “3”): “This ordinance seems to require every farmer to deliver his produce personally to the market.”

50 How ironic that the Talmud would condemn an occupation in which Jews were particularly prominent in the coming centuries.

51 Emphasis in original. The source, Sowell (1975: 68f.) is quoted more completely at greater length in Block (1986: 447f. n. 19).

52 Sharfman apparently intends *ona'ah* because he says that “the sixteen percent rule ... affects all commodities” (2006: 192). Therefore, he has to answer with difficulty why the anti-hoarding and anti-speculation measures apply only to foodstuffs (2006: 192f.). But as we have shown, *ona'ah* is not a price-control after all. Instead, we should point to *hafka'at she'arim / hayyei nefesh*, which is a price-control applying to the very same foodstuffs as the anti-hoarding and anti-speculation measures in question. In other words, insofar as Sharfman is correct that the queues and shortages created by “sixteen percent rule” can be used to justify the Talmud's restrictions on speculation, the relevant “sixteen percent rule” is not *ona'ah* – as Sharfman argues – but rather *hafka'at she'arim / hayyei nefesh*.

53 Cf. Warhaftig (1988: sec. “E. *Ona'ah* as an Independent Category”).

54 Citing Talmud *BB* 90b. The reference to “essential goods” suggests Goldstein is discussing *hafka'at she'arim*, not *ona'ah*.

55 In the context, Lew is discussing foodstuffs, and his citations suggest the references are to *hafka'at she'arim*, not *ona'ah*.

56 Aaron Levine (2012: vii, 15, 28) argues that Judaism's ethics are deontological. But David Hazony (2006) has argued that Jewish ethics are concerned more with consequences than with good intentions. According to Hazony (2001: 37f.; rpt. Berkovits 2002: xxi), the late philosopher, Rabbi Dr. Eliezer Berkovits “understood [Judaism] to be addressing the actual achievement of good, as opposed to one's intentions” and that Judaism, according to Berkovits, is “concerned primarily with

the bringing about of a just state of affairs, rather than possessing 'just' intentions or adhering to 'just' maxims." But even if we were to concede that Levine is correct that Judaism is generally deontological, contra Hazony, this does not appear to be true of the Jewish economic regulations, which appear to intend beneficial consequences, not intentions. Moreover, there is reason to doubt whether Levine's claim of Judaism's generally deontological nature is consistent with the evidence that Levine himself cited. Levine illustrates Judaism's deontological stance by exploring the Jewish laws concerning lying and telling falsehoods. Judaism generally forbids telling any lies (Levine 2012: 15), but lying is sometimes permissible when lying will prevent conflict and discord (Levine 2012: 15f., 33f.). Already at this point, we should doubt whether Judaism is deontological, for Kant famously held that one must tell the truth even to a murderer. The very essence of a deontological ethic is that it has no exceptions, not even when violating the ethic would have positive consequences. To permit lying in order to promote peace is somewhat consequentialist. Moreover, Levine speaks (2012: 33) of how the prohibition of lying "must be reconciled with" the duty to promote peace. The idea of two virtues apparently conflicting until they are reconciled, resembles the eudaimonistic concept of the virtues being mutually-determining, with the definition of every virtue being a function of the definitions of every other virtue. (Perhaps eudaimonism may be modeled with a system of simultaneous equations?) Therefore, contra Levine, Judaism is apparently not deontological because it has consequentialist elements, and Judaism may in fact be eudaimonistic. In particular, Berkovits's essay "A Jewish Sexual Ethics" (2002) has an eudaimonistic character; Berkovits argues that Judaism outlaws premarital and extramarital sex because Judaism seeks to sanctify the mundane and humanize the animalistic; therefore, he says, sex should be engaged in only in the context of a committed, psychologically and emotionally intimate relationship. In other words, it appears that human sexuality should be worthy of a rational human being and that psychological and emotional intimacy is a necessary component of the "good life". (By the way, according to Shalom Carmy (2004: 203), "the perspicuity of his [Berkovits's] essay on

sexual morality has not been surpassed.”) But whether Judaism is eudaimonistic or not, it certainly has consequentialist elements, as Hazony argues and as a close-reading of Levine demonstrates (contrary to Levine's explicit argument). And the *halakhah's* economic regulations specifically certainly appear to have a strong consequentialist intention, regardless of the nature of the rest of Judaism. And insofar as *ona'ah* is intended for even partially consequentialist reasons, it is vulnerable to positive economic arguments about efficiency and - as we shall show shortly - susceptible to Derek Parfit's criticism of “self-defeating morality.”

57 Elon (2008), citing *Talmud, Keritut* 8a; Lew (1985: 183), Warhaftig (1987: sec. 7 “Ritual Items”), Tamari (1987: 93, 1991: 72), and Eliezer Berkovits (2002: 58f.), all citing *Talmud, Keritut* 1:7.

58 Epstein (1962: v) and Warhaftig (1987: sec. 7 “Ritual Items”), both citing *Talmud, Pesahim* 30a and *Sukkah* 34b; Lew (1985: 184), citing *Pesahim* 30a.

59 Thus, if Aaron Levine is correct that Judaism's ethic is deontological, then Talmudic price-controls could never be “substantively self-defeating” in Parfit's sense, but only “formally self-defeating.” But we showed that contra Levine, Judaism is somewhat consequentialist and perhaps eudaimonistic. Both consequentialistic and eudaimonistic systems are vulnerable to Parfit's criticism of “self-defeating” morality.

60 Concerning *ona'ah*, Levine adumbrates (1985a: 423; 1985b: 448) an interpretation like the one we have discussed, that *ona'ah* is only meant to promote the dissemination of information, but he does not elaborate or explain.

61 The same statement occurs verbatim twice.

62 The same statement occurs verbatim twice.

63 The same statement occurs verbatim twice.

64 The same difficulty exists in this statement by Meir Tamari (1987: 95): “the seller is bound by these fixed prices as long as they are operative. Should prices rise ... the seller is free to charge whatever he wishes...”. And likewise, this statement by Warhaftig (1987: end of sec. “4. Profit Limitation”):

“The law applies only if the present market price is unchanged. If the price has risen, he may sell at the prevailing price even though he will thereby profit more than a sixth.”

65 Meanwhile, Tamari and Warhaftig would say that once the market price rises beyond \$10, sellers may sell for whatever price they want (see previous note).

66 The same identical passage occurs on both pp. 109 and 112.

67 Cf. Levine 1985a: 423: “the constraint amounts to nothing more than a restraint on economic rent” and Levine 1985b: 448: “what it amounts to is really a restraint on economic rent.”

68 For a criticism of the Neoclassical static-equilibrium theory of monopoly, see Leoni (2009 [1965]). That it would be impossible to rationally rate-regulate a monopoly due to the Misesian impossibility of economic calculation under socialism, see Cornell and Webbink (1985: 44 n. 16). And according to Israel Kirzner's theory of the market as a “process” (following Mises), the dynamic market process is itself the solution to so-called market failures, including monopoly and excess profits (Kirzner 1997, Littlechild 2009 [1978], DiLorenzo 1988: 321f., Pasour 1987: 124-126). Furthermore, monopoly is typically a consequence of government regulation and intervention, not the operation of the free-market (Hayek [2007] 1944 ch. 4 [“The Inevitability of Planning”]; McGee 1958; Kolko 1963: ch. 1-2; Leoni 2009 [1965]; Stigler 1971; Posner 1974; Folsom 2010 [1987]; Armentano [1972, 1982, 1991], Boudreaux and DiLorenzo [1992], DiLorenzo [1997]). Therefore, Levine should have said that the modern equivalent of *hafka'at she'arim* is not to tax the excess profits of a monopolist, but rather to repeal the government intervention which creates the monopoly. If monopolies are actually a consequence of government intervention, then it would make more sense to interpret *hafka'at she'arim* instead as a ban on rent-seeking (Tullock 1967, Krueger 1974) and government regulations which insulate corporations from competition (Stigler 1971, Posner 1974), allowing them to earn monopoly rents. That above-normal returns to entrepreneurship are sometimes wrongfully diagnosed as monopoly rents obtained through rent-seeking, see DiLorenzo (1988: 321f.) and Pasour (1987: 124-126); cf. Ricketts (1987).

69 *Otzar ha-Geonim*, *Gittin* 68, par. 376, quoted in Levi (2006 [1983]: 223); quoted in slightly different translation in Student (2001). Interestingly, Slifkin (2006) does not deal at all with the issue of Talmudic law conflicting with science; all of his cases concern rather contradictions between the Biblical text and science.

70 Quoted in Levi (2006 [1983]: 223f.) and in Hirsch (n.d.: 21); cited in Angel (2008: 16).

71 *Moreh Nevukhim*, pt. 3, end of ch. 14, quoted in Levi (2006 [1983]: 223); quoted in slightly different translation in Student (2001).

72 This essay by Rabbi Avraham ben ha-Rambam is most famous for expressing the opinion that the *aggadot* (philosophy and theology expressed through homilies) of the Talmud are not necessarily to be taken literally, but that many were intended by the Talmud only allegorically. Furthermore, that the *aggadot* are not dogmas, and that the religious Jew has no obligation to believe any of the *aggadot* – whether literally or allegorically – and that one may simply reject their authority altogether. Dana Cohen (n.d.) has compiled an English-translation primary source reader for Medieval-era expressions of this opinion. Important modern expressions of this view include Samson Raphael Hirsch (n.d.), Marc D. Angel (2008: 19-22, 1990: 22-26), Chaim Eisen (2004), Leo Jung (1926, quoted in Shapiro 2009) citing David Zvi Hoffman, J. H. Hertz (1934, quoted in Shapiro 2009), and Shelomoh Danziger (1996b: 62) quoting Rabbis Sherira and Hai Gaon.

73 Levi (2006 [1983]: 225) freely translating Breuer (1975); transl. slightly differently in Hirsch (n.d.: 19).

74 One prominent advocate of the “closed Talmud” argument was Rabbi Moshe Shmuel Glasner, the *Dor Revi'i*, whose view (1921) is cited by Schachter (2014: 50). Gil Student (2001) illustrates the same “closed Talmud” view by instead citing *Yad Yehuda* (30:3) following Maimonides, *Hilkhot Shekhitah* 10:12-13. In fact, Glasner too was following the very same view of Maimonides. The subject under discussion was what to do when the laws of *tereifot*, unkosher meat, appear to contradict veterinary science. According to the laws of *tereifot*, an animal possessing a fatal wound

is not kosher for human consumption. However, certain wounds which the Talmud declared to be fatal, were later decided to not be fatal at all. The answer of Maimonides was that the Talmud is sealed and that those wounds enumerated by the Talmud make an animal legally unkosher even if the contrary scientific opinion of contemporary veterinarians is correct after all. Schachter (2014: 50) says “I don't think this approach makes sense. Wrong is wrong!”, and he advocates changing the *halakhah* if it is based on erroneous science.

75 Concerning the very same issue of *tereifot* and veterinary science (mentioned in the previous note), the Rashba and Rivash declared that contemporary science was not reliable, and that the Talmud should be trusted above all (Student 2001, Buchman 2007). Glasner (1921) cites Rashba and declares that he wishes for us to deny the reality that is before our very eyes, that science is indeed reliable. This dispute between Maimonides on the one hand and Rashba and Rivash on the other, concerning the contradiction between the Talmudic laws of *tereifot* (fatal wounds) and contemporary veterinary science, is covered at length in Buchman (2007). As Buchman points out (2007: 132 n. 42), a large part of their disagreement can be explained by a dispute over just which specific laws were given explicitly at Sinai and which were instead deduced by the Rabbis of the Talmud from general Sinaitic principles:

In general, the attitude of Rivash and Rashba [that where the Talmud and veterinary science contradict, the latter is mistaken and the Talmud should be trusted above all] is related to the belief that the *mesora* [receipt of revelation] from Sinai was very detailed. The Rambam [Maimonides]'s position, that all issues on which there is disagreement [amongst authorities within the Talmud itself] are not part of the *mesorah* from Sinai, makes quite clear his belief that the original *mesorah* was not that detailed and much was left to the Rabbis to decide. ... Rambam ... belie[ved] that the bulk of the details of Torah law were deduced by the Rabbis and not part of the *mesora* from Sinai.

Gil Student (2014) has recently reviewed a new book which advocates the view that science is not reliable or trustworthy. Reviewing *Torah, Chazal and Science* by Moshe Meiselman, Student (2014) notes that Meiselman is forced to reject many traditional Orthodox Jewish opinions, even going so far as to doubt the authenticity of the letter by Rabbi Avraham ben ha-Rambam, a move which Student demonstrates is questionable (2014: 52).

76 Hershel Schachter (2014: 50) cites two examples of this, the laws of consuming worms found in fish and killing lice on Shabbat. He argues that these two laws preexisted the outmoded scientific notions of spontaneous generation by which the Talmud justified them.

77 Square-bracketed [] text is in the original.

78 Student (2014) provides an interesting illustration of Schachter's caution. Reviewing *New Heavens and a New Earth: The Jewish Reception of Copernican Thought* by Jeremy Brown, Student (2014) shows that some rabbis rejected Copernican cosmology not because they believed that science could never be wrong or that science could never trump the Talmud, but rather because they were skeptical of the specific theory of Copernicus's, on scientific, not theological grounds. For example, Student says, Rabbi David Gans rejected Copernican theory because he studied under one of Copernicus's contemporaries, Tycho Brahe. Meanwhile, Rabbi Yosef Delmedigo sided with Copernicus after studying under Galileo. But another rabbi who studied under Galileo, Tuviah Cohen, rejected the Copernican revolution. The point is that not every rabbi or Orthodox Jew who rejects the findings of modern science necessarily does so for theological reasons; sometimes one may disagree with scientists on scientific grounds. Those rabbis who were roughly Copernicus's contemporaries, could without embarrassment endorse those astronomers, contemporaries of Copernicus, who rejected the Copernican revolution on scientific, not theological grounds. Student (2014: 55 n. 29) notes that when Rabbi Yehuda Levi rejects evolution, he “explicitly states that this is for scientific and not religious reasons.”

79 Square-bracketed [] text is in the original, while curly-bracketed {} text is added by the present

author.

80 For example, Germany implemented its policy of *Lebensraum*, acquiring “living space” by conquest, because its policy of autarky, economic self-sufficiency, dictated that Germany must possess all necessary natural resources within its own borders, precluding the possibility of importing foreign goods. As the Manchester economists noted, “where goods do not cross borders, armies will.”