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

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Abstract: The halakhah (Jewish law) includes legislation aiming at what might be called “social justice.” These halakhot (pl.) include the laws of ona'ah and hafta'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.

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. We will show that the laws of ona'ah and/or hafka'at she'arim / hayyei nefesh 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). 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), 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.

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 a strong argument that Judaism may not reconcilable with capitalism.

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 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. Menachem Elon summarizes the general history of Talmudic price-legislation as follows (Elon 2008):

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])
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). Ephraim Kleiman defines ona'ah as “exploitation through price deceit” (Kleiman 1987: 25). 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. 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. 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.” 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) – 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.” 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

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;

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.” 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.
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. 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., ḤM 227:21), 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

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.

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).

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.”

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[,] there 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, Hilkhot 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 [lifsoh ka-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 selo 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.”

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.”

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. 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 Economics

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. Without exaggeration, they are the only means by which a large-scale society can function. The sole alternative to prices is central planning, but ever since the unraveling of the Soviet Union, most people are properly suspicious of central planning. 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 a rightward (or upward) shift of the demand curve with a leftward (or upward) 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, enforcible 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 ejectment 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 Ereẓ 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 Ereẓ 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. ḤM 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 Ereẓ Israel (Tosef. Av. Zar. 4:1; BB 91a and Rashbam, Yad Ramah and Beit ha-Behirah ibid.; Yad, Mekhirah 14:4; Sh. Ar., ḤM 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):\textsuperscript{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.


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 plenitude 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. It might be thought that middlemen do nothing but tack on a profit without doing anything productive. According to Itamar Warhaftig
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 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? … It 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.” 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),

> 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.):

> 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.


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. 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.\(^\text{57}\) 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 \textit{lulav} on Sukkot (Feast of Tabernacles) unless the merchants selling those items would lower their prices.\(^\text{58}\) 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),

\begin{quote}
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. 
\end{quote}

Long adds (2012),

\begin{quote}
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.
\end{quote}
Furthermore, Long states (2013),

the fact that all but the hardiest deontologists generally try to show that their favoured policies will in fact have good consequences, while all but the hardiest 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. 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), “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).
to be implemented after the market price has increased such that “the price ceiling becomes the competitive norm” (Levine 2012: 107, 111). 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? 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). 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. $1/6 more than $10. Then, when $11.67 has become the new general price-level, one may charge $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 $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
agon 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):

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.

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. 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 these issues? 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.” 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 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. This analogy 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.
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).\textsuperscript{69} 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.

However, none of this would help us 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 account of the nonexistence of such a price. Luckily, 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. Meanwhile, the halakhic restrictions on speculation and middlemen would still appear to problematically possess binding legal authority.

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 haafka'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 haafka'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. The corporate Jewish community luckily appears to no longer possess the legal or political authority to exercise its power to impose wage and price controls, but we should still criticize that theoretical power in case the community ever regains its authority. Finally, the halakhic restrictions on speculation and middlemen do appear to still possess legal authority, and therefore, these laws should be criticized.

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Block 1986 is a direct reply and a “Discussion” followed in the same volume (pp. 450-461).


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 *tzedaqa*, 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

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). For a review of the different traditional Jewish approaches to science in general, see Levi (2006 [1983]).

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.


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 $+\frac{1}{5}$ to $-\frac{1}{7}$ to $\pm\frac{1}{6}$. 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).

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*.

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.


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).


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.”


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.


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
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, ḤM 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 mnemonical 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 $\pm\frac{1}{6}$.


38 Here, Maimonides seems to return to the conception of ona'ah as relating to an official price and not costs.
Citing Talmud, Bava Batra 89a, 90b; Mishneh Torah, Hilkhot 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.

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.

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).

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.

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.


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.”


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-

69 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.”