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AFFIRMATIVE ACTION: HALAKHIC PERSPECTIVES

Few contemporary American issues have generated as much controversy as has the debate about Affirmative Action. This is not at all surprising, since few issues impinge upon as many areas of life — social, economic, educational, political, ethical and philosophical — as does Affirmative Action. Since Affirmative Action connotes a whole complex of regulations (some of them contradictory), is administered by different agencies (often in conflict with one another about legal interpretations), invokes a special terminology, and has, in fact, evolved into something quite different from its original conception, it is necessary to describe its history and main features before undertaking a halakhic analysis and evaluation of what it has become.

For the sake of clarity, this paper will be divided into four main sections: a description of the evolution and parameters of the Affirmative Action Program; a review of its possible halakhic precedents; a critical evaluation of the policy in terms of halakhic concepts; and a concluding comment.

I

The *Civil Rights Act* of 1964 (CRA) outlawed all discrimination on the basis of race, color, religion, sex and national origin. It affirmed that all individuals should be granted equal opportunity in the exercise of their political, educational, economic and social rights. Together with two other significant pieces of

legislation — the *Voting Rights Act* of 1965, and the *Immigration Act* of the same year — it had the effect of establishing the United States as a nation of individuals rather than one of politically defined ethnic groups. It thus enshrined individual rather than group rights as a dominant factor in American law.[1]

Between 1964 and 1971, as a result of the passing of the CRA, the employment, housing and educational situations of individuals who had been previously discriminated against on the basis of their color, race, religion, sex or national origins improved significantly.[2] Notwithstanding these achievements, however, many supporters of equal opportunity felt that the "cease and desist" approach of the CRA was not sufficient to undo harm already done or to prevent additional harm which had already been set in motion by past discrimination.[3] This view had already been articulated by President Lyndon B. Johnson in his Commencement Address at Howard University in June 1965, when he had said: "But freedom is not enough. You do not take a person, who for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair." On this view, the *Fourteenth Amendment* itself required more than equality of treatment to compensate for the effects of social discrimination of the disadvantaged.[4]

The term Affirmative Action came to be applied to this compensatory treatment. It had first been used in an Executive Order (10925) issued by President John F. Kennedy, directing contractors to act affirmatively in recruiting workers on a non-discriminatory basis.[5] However, in the course of a few years, the term underwent a striking metamorphosis, largely on the basis of Executive Orders and, particularly, of Guidelines issued by various federal agencies, notably the following: The Department of Health, Education and Welfare (HEW); the Department of Justice; the Office of Federal Contract Compliance (OFCC) of the Department of Labor; and the Equal Employment Opportunities Commission (EEOC). Thus, in May 1968, OFFC demanded an "affirmative action compliance program" from every major contractor and sub-contractor," identifying problem areas inherent in minority employment and in evaluating opportuni-

ties for the hiring of minority personnel." It demanded the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity. It also called for an analysis of minority group representation in all categories.[6] A subtle change was introduced in its regulations of February 1970. "Opportunity" now was defined as "result."[7] In its Guidelines of December 1971, it demanded an analysis of areas in which the contractor was deficient in the utilization of minority groups and women, and the delineation of goals and timetables to eliminate underutilization — that is, having fewer women or minorities in a particular job classification than would be reasonably expected by their availability. Clearly, "effort" and "procedure" without "result" were inadequate.[8] The Guidelines issued by EEOC in August 1970 brought the process to its logical conclusion. Testing procedures affecting hiring, promotion, transfer or any other employment or membership now constituted discrimination, unless the test had been validated as non-discriminatory or alternative procedures for hiring, etc. could be proved to be unavailable.[9]

The cumulative effect of these and similar documents was that, contrary both to the letter and spirit of CRA[10] upon which they were based, the emphasis had gradually shifted from individual to group rights, and that, far from ignoring such categories as race and ethnicity, these categories came to be of primary importance in all hiring, placement and housing procedures.[11] Most significantly, there had been a major shift in emphasis from equal opportunity in the commonly articulated sense of the term to statistical parity. Minority groups should be represented in housing, employment, education and other fields in proportion to their percentage of the general population. Although it was conceded that these "quotas," "goals," and "timetables" were themselves discriminatory, and that racial and ethnic classification might well contradict the letter of CRA, it was argued both that, in the absence of a *discriminatory purpose,* and since these measures were merely temporary,[12] pending the righting of past inequalities, the new approach to Affirmative Action was legally and morally justified.

Accordingly, sanctions were applied to employers and institu-

tions which could not prove results — thus presuming their guilt — and "affected groups" were delineated for compensatory discrimination. These groups were defined as being — in addition to women — Negroes, Spanish-surnamed Americans, Native Americans and Orientals.[13]

II

The notion of compensating an individual for the effects of past deprivation is also part of the Jewish religious tradition. In the case of a Hebrew bondsman, the Torah decrees: "And when thou sendest him out free from thee, thou shalt not let him go away empty. Thou shalt make him a lavish gift out of thy flock, and out of thy threshing floor, and out of thy winepress: of that which the Lord Thy God has blessed thee thou shalt give him, and Thou shalt remember that thou wast a bondsman in the land of Egypt and the Lord Thy God redeemed thee: therefore I command thee this thing this day."[14]

The lavish gift must be concrete and visible,[15] and its purpose is to requite past deprivation with the possibility of present and future benefit.[16] Although Maimonides discusses this imperative of *ha'anik ta'anik* in the context of charity,[17] it is, notwithstanding, a binding legal obligation, and is included in the standard enumerations both of positive commands[18] and of prohibitions.[19] The formulation of *Sefer ha'Hinukh* is instructive.

> The purpose of this *mitsvah* is that we acquire lofty, precious and desirable virtues in our souls, and that we merit goodness in virtue of our lofty and precious soul, so that the good Lord will be pleased with us and reward us with goodness. Our pride and glory consist in our having mercy upon one who has served us. We should give him of our possessions out of loving kindness — quite apart from what we contracted to give him in payment for his services. This is self-evident and requires no further elaboration . . . This mitsvah applied to both male and female during Temple times, for the law of the Hebrew bondsman obtained only as long as the law of the Jubilee obtained. Nevertheless, even in these days the wise should take heed and act with additional moral insight. Should he hire a Jewish servant for an extended or even for a short period, he should bestow liberal gifts upon him when he leaves his service from what God, may He be blessed, has blessed him.[20]

Just as both male and female benefit from this law, so are masters of both sexes obligated by it.[21] Indeed, should the master die before he has met his obligation personally, some authorities hold that the obligation passes to his heirs, who stand in *loco parentis* in this context — even if their father has left them no inheritance.[22] Although the liberated servant may refuse the gift,[23] the employer may not refuse to give it. Extreme pressure may be exerted upon him by the courts, and some authorities go so far as maintaining that his property may be confiscated in settlement of his obligation.[24]

The rights of the beneficiary, when he is legitimately granted his freedom — whether through the death of his employer, an act of manumission, after six years or in the Jubilee[25] are immediate[26] and unconditional.[27] But should the employer's obligation not be met immediately, the obligation remains in force permanently,[28] and the employee's heirs become the new beneficiaries.[29] The largess, moreover, is inalienable. The beneficiary's creditors have no direct claim on his gift.[30]

Clearly, however, *ha'anik ta'anik* is not an exact parallel to Affirmative Action. Four problems have to be considered before it can be applied as a precedent justifying an Affirmative Action program on halakhic grounds:

The first question relates to the contemporary validity of the *ha'anik ta'anik* obligation. The *Minhat Hinukh* disputes its contemporary validity, since one who "sells himself" on the labor market is not considered a beneficiary of *ha'anik ta'anik,* and since the authority of the courts to effect the sale of a Jew into slavery has long ago ceased.[31] This question is resolved by the *Minhat Hinukh* himself, who, while raising the question, concedes that the *Sefer ha-Hinukh* can be relied upon to reflect the authoritative view of Maimonides. It can thus be argued that the law still applies.[32]

The second problem relates to the type of compensation provided by the *ha'anik ta'anik* obligation. Both the amount and type are clearly defined.[33] The law does not appear to cover such future benefits as may derive, say, from educational opportunities. This problem is also soluble. Although none of the *Codes* includes this type of benefit, a *barayta* which is *not* cited by later

halakhic authorities states: "Largess may include anything but the gift of slaves, documents of legal tender and immovable property."[34]

The third problem is more serious. The sources cited so far give the impression that the law of *ha'anik ta'anik* provides for individual compensation, whereas Affirmative Action deals with group rights. For example, only employees who meet certain requirements may benefit from *ha'anik ta'anik*. Only individuals who have been sold into slavery by order of the court may claim compensatory largess. Those individuals who buy their freedom are excluded from its benefits.[35] If a bondsman dies before his release, his heirs receive no benefits.[36] In dealing with this problem, it should be recalled that the Torah places the obligation of compensatory largess within the context of the *collective* Jewish experience of slavery in Egypt. The classical commentaries point out that God Himself exacted collective compensatory largess from the Egyptians on behalf of the Jews.[37] A fascinating Talmudic account reinforces the principle of the admissibility of collective compensation. During the reign of Alexander of Macedon, the Egyptians demanded collective compensation from their Jewish contemporaries for the largess exacted by God so many centuries before. Interestingly, the Jews do not dispute the claim in principle. They merely insist that what God had given their forebears was in payment for services rendered, rather than additional largess.[38] Accordingly, the possibility of a claim on heirs, on a collective basis is tacitly accepted.

The fourth problem is the most serious, and only partially resolved in the same way as the third. According to the sources previously cited, the law of *ha'anik ta'anik* rules for the largess owed by a Jewish employer to his Jewish employee. Indeed, only a Jew bound to observe the *mitsvot* is obligated to his employee. If, for example, he were a deaf mute at the time of his employee's release, neither he nor his heirs are obligated—even if he were to recover his full facilities later.[39] Moreover, in these sources there is no explicit reference to compensatory largess owed by a Jewish employer to his Gentile employee. Maimonides, for example, omits the law of *ha'anik ta'anik* from his discussion of the treatment of Gentile bondsmen.[40]

To be sure, it has been mentioned that God had extracted compensatory largess from Gentile employers. Moreover, the Talmudic source cited to establish the principle of collective beneficiaries also establishes the right of *Gentiles* to compensation. However, since this source is *aggadic* in nature, it is still necessary to establish whether Gentiles have a valid *halakhic* claim to compensation.

According to biblical law, a Jew who causes injury to the person or to the property of a Gentile may not be halakhically culpable.[41] However, Issi ben Akiva had noted with great religious sensitivity: "Before the giving of the Torah we were prohibited from shedding blood. Now, after we have accepted more stringent standards generally, shall we be lenient in *this* regard!? [Surely not!] We may be free from human retribution but we are certainly guilty in the eyes of God.[42] Interestingly, the Talmud accounts for the absence of halakhic culpability in terms of the Gentile rejection of the Noahide Code.[43] According to Meiri, however, "this applies only to those people undisciplined by religious cultures. Those who observe the Noahide Code are to be treated exactly as we treat ourselves. We are to show ourselves no unfair legal advantage. Accordingly, this obviously applies to people belonging to religious faiths and cultures."[44] Meiri applies similar logic to the question of returning the lost property of a Gentile. Although we are not obligated to return such articles unless the knowledge that they are in our possession will cause a desecration of the Divine Name,[45] if the original owner is of a people which follows a religious faith and serves God in any manner at all — even though their faith is far from ours, this rule does not apply to them at all. On the contrary, they are to be treated in the same way as a Jew in these matters . . . without any difference whatsoever."[46]

Quite apart from Meiri's point of view and apart from the consideration of the Consecration or Desecration of the Divine Name to which allusion has been made, the halakhic principle of *mipenei darkhei shalom* is also applicable. Although this principle sometimes reflects enlightened self-interest,[47] its fundamental motivation is disinterested sensitivity.[48] Thus, in the Sabbatical year, the shofar is sounded in the absence of rain, lest the livelihood

of gentiles be endangered.[49] Jews, moreover, are required to fast if a calamity befalls Gentiles — even though Jews do not themselves suffer.[50] For the same reasons we feed and clothe the Gentile poor with the Jewish poor. Indeed, even if the Jewish poor suffer as a result, the Gentile poor are to be helped.[51]

Significantly, in discussing the treatment of a Gentile slave, Maimonides also réfers to the common humanity of master and slave, and expects the Jew to go beyond the strict letter of the law in his treatment of his slave. By showing him mercy, he is in *imitatio dei*.[52] It is noteworthy that Maimonides bases this view upon the Scriptural verse: "His mercies extend to all his creatures" (Ps. 148:5) — and that most early authorities cite the same verse in their discussions of the principle *mipenei darkhei shalom*.[52a]

Accordingly, in terms of *darkhei shalom and kiddush ha-Shem* on the one view, and according to the contemporary absence of halakhic distinction between Jew and Gentile in matters of ownership and livelihood on the view of the Meiri, and granted that a Gentile is the legitimate heir of this father,[53] it may well be argued that compensatory largess to Gentiles, individually and collectively,[54] is in keeping with the *halakhah*.

Accordingly, it may be concluded the law of *ha'anik ta'anik* may serve as a halakhic precedent of Affirmative Action.

III

However, the *halakhah* does not operate in a theoretical vacuum. A *theoretical* case for the extension of the obligation of *ha'anik ta'anik* to Gentiles does not exhaust all halakhic perspectives on Affirmative Action. Such perspectives would be meaningless unless they were to take cognizance of Affirmative Action as it is currently applied in the United States. This, in turn, demands a critical analysis of Affirmative Action in terms of its objectives, results, effects upon the groups it seeks to help, and upon those who are called upon to compensate them.

Affirmative Action has been well designated as Compensatory or Reverse Discrimination. To compensate for past discrimination, a given group or groups are granted unearned benefits. But

the group (and the individuals in it) whose guilt for past deprivation is assumed, is inevitably discriminated *against.*

Glazer has convincingly argued the arbitrariness of the selection of "affected" minorities, pointing out that some other groups might have a greater claim to Affirmative Action than those selected by the Department of Labor.[55] The arbitrariness of selection for special treatment raises the halakhic problem of *Hasma de-Malkhuta* in relation to those groups and individuals who are not thus selected.[56]

Moreover, special housing privileges, political gerrymandering (with the explicit purpose of giving Blacks and Puerto Ricans more voting strength,[57] employment and educational privileges[58] — all of which may have deliterious effects upon the life styles and even upon the social survival of other groups — raise the halakhic issue of the limits of self-sacrifice.[59] Undoubtedly the ruling of Rabbi Akiva in the case of Ben Patura, that one's own survival takes precedence, is normative *halakhah.*[60] Indeed, according to some authorities at least, even the principle of *darkhei shalom* becomes inoperative if the Jewish poor are *excluded* from charitable benefits, for whatever reason.[61] Nor would the principle of *mipenei eivah*[62] justify arbitrary, unequal treatment of some groups at the expense of others, since it could be argued that the *effect* of reverse discrimination is to *produce* hatred.[63]

Perhaps the most immediate effect of Affirmative Action in practice is the curtailment of the opportunities of individuals in non-affected groups. The attempted exclusion of Allan Bakke from the Medical School of the University of California's Davis campus is the best known case[64] but it is too early to determine what effect, if any, the decision will have.

Applicants from "affected" groups would have been considered even if their rating on the College Admission Test were less than 2.5 out of a possible 4, the cut-off point for "non-affected" applicants. Bakke, a "non-affected" applicant was excluded, although his rating was 3.51, so that sixteen places could remain open for less qualified "affected" applicants. Since Bakke's chosen livelihood is at stake, one wonders whether the charge of *rodef* could not be levelled against the authorities. Clearly, Bakke is the innocent victim of the Affirmative Action policy.

Equally disturbing is the related question of the effect of such policies upon the standard of services provided for society as a whole. If most standard college entrance and employment suitability tests are nullified,[65] if the passing grade of bar exams, for example, is lowered to admit more members of "affected groups,"[66] if qualified applicants are excluded from positions in favor of individuals "qualified to train" in order to achieve predetermined racial proportional representation,[67] if calling for biographies which reveal criminal background is considered discriminatory,[68] vital services may well deteriorate, and those who require those services may suffer.

In halakhic terms, an inadequately qualified attorney may be guilty of *mipenei ivver,* an inadequately qualified accountant (and those entrusted with the money of others and whose previous criminal records have been concealed) of *safek geneivah,* and, although there is no evidence that this has yet happened, an inadequately qualified physician of at least *safek shefikhat damin.*

These shortcomings of the program notwithstanding, Affirmative Action is recognized by its supporters as the best and least unethical solution of a grievous social problem and is thus morally justified. In halakhic terms, therefore, the final analysis of Affirmative Action is a question of ends and means.

The *halakhah,* to be sure, does recognize that worthwhile ends do sometimes temporarily justify unacceptable means. Rashi, for example, justifies David's hanging of certain individuals for an extended period of time[69] to the abuse of proselytes.[70] Maimonides proclaims that a king may temporarily suspend and even brutally violate individual rights for a redeeming social purpose — the maintenance of public order.[71]

In the context of Affirmative Action, the vital question is thus whether its ends, in fact *do* temporarily justify unacceptable means — ignoring the problem of how long is temporary.[72] The evaluation of the ends, requires answers to three important questions:

1. *Has Affirmative Action worked?* Published evaluations of the program have demonstrated that, for various reasons, "affected groups" made far more progress after the passing of the CRA

and *before* the introduction of the Affirmative Action program in its present form than after.[73]

2. *Can Affirmative Action work?* The same studies show that exact proportional representation is an unattainable goal. If every black person with a Ph.D., both living and dead, were to be employed in colleges and universities, there would be no more than three in every institution of higher learning.[74] Women, admittedly, constitute no more than 39% of the labor force. Should 52% of all jobs be reserved for them, since they are 52% of the total population, totally ignoring their necessary pre-occupation with home and family? Jews constitute about 3% of the U.S. population and, nevertheless, constitute more than 25% of all U.S. Nobel prize winners. Can it be suggested that Jews have prevented Gentiles from winning prizes in proportion to their percentage of the total U.S. population? Clearly, too many variables prevent the attainment of the statistical goal of Affirmative Action.

3. *Should Affirmative Action work?* Even in the absence of these practical considerations, it can be argued that the goals of Affirmative Action do not justify the questionable ends employed in their hoped-for-attainment. It is unreasonable, for example, to expect proportional representation in employment and in housing. People opt for careers for widely differing reasons, and the fact that members of given groups tend to be concentrated in different fields simply reflects the history, culture and ideals of their groups.[75] Housing patterns, too, tend to reflect different group norms and aspirations. Orthodox Jews, for example, will live together, within reasonable walking distance of a synagogue, on account of their religious beliefs, rather than be spread throughout the general population in proportion to their percentage of that population. Other groups may also, for varying reasons, prefer to live among their own. Some, for example, may perceive political advantages in the development of ethnic enclaves.

Clearly, moreover, the philosophical underpinning of the Affirmative Action program is patently absurd. One cannot simply presume the collective guilt of the "unaffected" for prior discrimination against the "affected groups." Some of these "affected

groups" — Cuban and other Spanish-surnamed Americans, for example — were not yet in the U.S.A., when the discrimination is alleged to have occurred. Nor were the forbears of some of the "unaffected groups" — Eastern European Jews, for example, here at the time.

Finally, it is not at all clear whether the whole program is constitutional.[76] It contradicts the letter and spirit of the CRA by introducing racial and ethnic "quotas," by discriminating against individuals, and by producing racial tensions.[77] The opinion of a black law professor regarding the possible outcome of the Bakke case in the Supreme Court is significant. She admits that the legal grounds of the defendants are not fool-proof, and, citing a colleague, she sums up the issue as follows: "Bakke boiled down to 'whether you are for us or against us.' "[78] In the end, she makes it quite clear, the question is blatantly racial.

Accordingly, from the perspective of the *halakhah,* neither the ends of Affirmative Action, nor the means employed to attain those ends, are tenable. Moreover, the fact that this case has been argued in a specifically American context, in which the "affected groups" are *not* Jewish, is halakhically irrelevant. Obviously, the American context was selected because Affirmative Action is a uniquely American program. Were the same debate to arise in Israel, in the context, say of Ashkenazi "non-affected groups" and Sefardi "affected groups," the halakhic judgment would be no different. From the perspective of the *halakhah,* Affirmative Action is an inadmissible solution to the problem of past deprivation.

IV

A final comment remains. American society *is* bedevilled by the effects of past deprivation and discrimination upon some of its citizens. Sensitive and fair-minded people cannot simply wish the problem away. Perhaps that is why they balk at honest criticism of the Affirmative Action program. Since it appears to be the only program aimed at redressing past injustice, its critics are placed on the moral defensive, afraid, themselves, of being designated racist and immoral. Hopefully, the foregoing analysis will

offset the silencing of critics through imputed guilt, by having demonstrated its inherent unfairness, racism, arbitrariness and unattainable goals.

It is imperative that all Americans be granted equal opportunity. The Jewish ethic demands this right for all men.[78] But Affirmative Action with its discrimination against the innocent, its bureaucratic chaos, its confusion and the resentment which it engenders is not the solution of the American problem. There are other solutions, slower perhaps, but not immoral. The studies cited demonstrate decisively that the passage of CRA, with its "cease and desist" policy, *did* significantly ameliorate the lot of the previously discriminated against. Diligently applied, adequately enforced, *and coupled with a vast remedial program,* the CRA will itself help guarantee the American dream of equality of opportunity in a true merit system — and, at the same time, satisfy halakhic requirements for decency and fairness.

NOTES

1. See, Nathan Glazer, *Affirmative Discrimination: Ethnic In Equality and Public Policy* (New York: Basic Books, 1975), pp. 3-5. Also see, John H. Bunzel, "Bakke vs. University of California," *Commentary* (March, 1977), p. 62.

2. Thomas Sewell, "Affirmative Action Reconsidered," *The Public Interest,* 42, (Winter, 1976), 53-55; Thomas Sewell, "A Black 'Conservative' Dissents," *New York Times Magazine* (August 8, 1976), p. 42. Cf. Glazer, *passim.*

3. Sewell, "Affirmative Action," pp. 48.-49. Also see, Theodore St. Antoine, *New York Times,* 26 Nov. 1976.

4. Sewell, "Affirmative Action," pp. 48-49.

5. Glazer, p. 46.

6. Title 41, C.F.R.: 60-1.40, cited by Glazer, p. 46.

7. Glazer, p. 47.

8. Title 41, C.F.R. 60-2.11, cited by Glazer, pp. 48-49.

9. Glazer, pp. 49-52.

10. See, particularly, the statements of Senators Clark ("Quotas are themselves discriminatory"), Humphrey ("The proponents of the bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work-force by giving preferential treatment to any individual or group") and Williams [Section 703 (j) would] "specifically prohibit the Attorney General, or any agency of the government from requiring

employment to be on the basis of racial or religious quotas"). Cited by Glazer, p. 45, and p. 4.

11. See Bunzel, p. 61, and *New York Times,* 17 June 1977 (D 12), citing the most recent Supreme Court decision on related issues.

12. Glazer, p. 4.

13. Buckley, *Congressional Record,* 22 May, 1973.

14. Deut. 15:13-16.

15. See Rashi and Ibn Ezra, *ad. loc.*

16. Basing himself upon the *Targum Yonatan, ad. loc.,* Rabbi Mecklenberg in *Ha-ketav ve-ha-Kabbalah, ad. loc.* suggests that the letter ק of ענק is interchangeable with the letter ג, and that ענק can be read as ענג. Thus the *Mitsvah* is תענגנו ותשמחנו.

17. In *Seer ha-Mitsvot* (196). See aslo *Shakh,* Y.D. 96:3.

18. Maimonides, *loc. cit.,* 283; *Smag,* 84; *Chinukh,* 482.

19. Maimonides, *loc. cit.,* 233; *Smag,* 178; *Behag* enumerates the prohibition in terms of Deut. 15:18.

20. *Sefer ha-Chinukh,* 482.

21. See, *Minchat Chinukh,* 42.

22. See *Ketzot ha-Choshen* 39:1, and *Minchat Chinukh,* 482. However, *Tos. Kid.* 16b disagree.

23. Rashba, *Responsa* 1:18.

24. *Gidulei Terumah* 51:5 and *Mishneh le-Melekhon Avadim* 3:14: כופין אותו עד יציאת נשמתו. Those who hold confiscation of property in settlement of a charitable obligation (See Maimonides, *Hil. Matnot Aniyim* 7:10) would apply this ruling in our case. The *Mishneh le-Melekh, loc. cit.* maintains that the right of confiscation derives not from צדקה but from דין חיוב.

25. See, especially, *Sefer ha-Chinukh,* 482 and the *Minchat Chinukh, ad. loc.* See also Maimonides, *Hil. Avadim,* 3:14. On manumission, see *Chazon Ish, Kid.* 47:27.

26. *Sifra* on Lev. 25-40; *Mishneh le-Melekh* 3:15.

27. Maimonides, *Hil Avadim* 3:14, *Minchat Chinukh,* 482. See however, *Mishneh le-Melekh* on *Hil. Avadim* 3:12, Re-employment reactivates the rights — *Sifrei,* 119.

28. *Mishneh le-Melekh* on *Hil. Avadim* 3:14.

29. See *Pnei Yehoshua* on *Kid.,* 16b. See also, Rashi and Meiri on *Kid.,* 15a. The *Sifrei* who regards the largess as charity, disagrees. Maimonides omits this feature of the law, because, according to *Minchat Chinukh* it is obvious that the heirs should benefit. The *Meshekh Ćhokhmah* makes the inheritance of the largess conditional.

30. *Kid.,* 16b; Maimonides, *Hil. Avadim,* 3:15.

31. Maimonides, *Hil. Avadim,* 3:12, based upon *Kid.,* 14b.

32. *Minchat Chinukh,* 482.

33. *Ibid.*

34. *Masekhet Avadim,* 2:4: בכל מניקיים — חוץ מעבדים שטרות וקרקעות.

35. *Minchat Chinukh,* 482.

36. *Kid.,* 16b; Maimonides, *Hil. Avadim,* 3:14, accepts the view of R. Judah

that the minimum obligation is 30 sela'im. The total financial settlement is important rather than the source (the kind of property) from which this derives. Clearly, however, a concrete gift must be made. See *Kesef Mishneh, ad. loc.*, and Meiri on *Kid.*, 17a.

37. *Sifrei,* 119, cited by Rashi on Deut. 15:15. Also see *Rashbam* and *Ba'al ha Turim, ad. loc.*

38. *Sanhedrin,* 91a. However, see *Pesachim,* 87b. *Midrash Eileh Ezkerah*: On the same theme, see *Kohelet Rabbah,* 2:1, in particular.

39. *Minchat Chinukh,* 482, based on Maimonides, *Hil. Avadim,* 3:12-14.

40. *Hil. Avadim,* 9:6; *Minchat Chinukh,* 482.

41. Maimonides, *Hil. Rotzeach,* 2:1.

42. *Mekhilta* (on Ex. 21:14), *Massekhta de Nezikin,* IV (ed. Horowitz-Rabin), p. 263.

43. *Bava Kama,* 38a. However, see Maimonides, *Hil. Gezeilah ve-Aveida,* 8:5, for different reasoning. Also see Ch. Z. Reines, "Yachas Ha-Yehudim le-*Nokhrim, Sura* IV (Jerusalem, 1964), p. 216, n. 77, indicating that the apparent halakhic insensitivity was reciprocal.

44. Meiri, *Bet-ha-Bechirah* on *Bava Kama,* 38a (ed. Kalman Schlesinger), p. 122.

45. Cf. *J.T., Bava Metzia* 2:8. See Maimonides, *Hil. Gezeilah ve-Aveidah,* 11:3.

46. Meiri, *Bet-haBechirah, Bava Kama,* 113 b, p. 330.

47. See, *Kohelet Rabbah,* 2:1.

48. Reines, p. 220. See, however, Sol Roth, *The Jewish Idea of Community,* (New York, 1977), pp. 67-69, citing Tosafot, *Avodah Zarah,* 20a.

49. *J. T. Ta'anit,* 3:1.

50. *Tosafot, Ta'anit,* 21b, s.v. *"Amru"; Shulchan Arukh, O.* Ch., 576:3.

51. *Tosefta, Gittin* 3; *Gittin,* 61a, Maimonides, *Hil. Matnot Aniyim,* 7:7; *Shulchan Arukh,* Y.D. 251:1; *Perishah, Choshen Mishpat,* 149:2.

52. Maimonides, *Hil. Avadim,* 9:8; See *Encyclopedia Talmudit,* Vol. 7, p. 722. *s.v. Darkei Shalom,* on *Ps.* 148:5 as the basis of *darkei shalom* in all the *Rishonim.*

53. *Kid.,* 18a.

54. See above p. 6.

55. Glazer, pp. 172-74; 202.

56. Maimonides, *Hil. Gezeilah ve-Aveidah,* 5:14. The king may rightfully collect taxes only "if his laws are decreed for all." Nahmanides is even more stringent in his requirement for *Dina de-Malkhuta.* See *Novellae* on *Bava Batra* 55b. Also see, Aaron Rakefet-Rothkoff, "The Law of the land in Halakhic Perspective," *TRADITION,* Vol. 13, no. 2 (Fall, 1972), 5-23.

57. Anthony Lewis, "Benign Discrimination," *New York Times,* 13 March 1977. Chief Justice Burger in his sole dissenting opinion condemned mechanical racial gerrymandering as a retreat from the ideal of the "American Melting Pot."

58. See Glazer, p. 61. "At one Ivy League University, representatives of the regional HEW demanded an explanation of why there were no women or minority students in the Graduate Department of Religious Studies? They were told that a reading knowledge of Hebrew and Greek was pre-supposed. Where-

upon the representatives of HEW advised orally: "Then end these old fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages."

59. See Jakob Petuchowski, "The limits of Self-Sacrifice." *Modern Jewish Ethics,* ed. Marvin Fox, (Ohio State University Press, 1975), pp. 103-118.

60. On the *barayta*: מפרנסים ומכלכלים עניי עכויים עם עניי ישראל, Rashba and Ritva on *Gittin,* 61a, say עם = — בשם ש. The *Hagahot Mordekhai, Gittin,* 464, and Radvaz on *Matnot Aniyim,* 1:9 are explicit. Gentiles benefit *mipnei darkei shalom* only *together* with Jews. Also see Reines, p. 220 in this regard. Cf. *Tos.* Fl.2., 20a.

62. See, *Encyclopedia Talmudit,* vol. 1, p. 229, s.v. *Eivah.*

63. See Glazer, p. 200. Cf. Sewell, "Affirmative Action," p. 63.

64. See Bunzel, pp. 59-64.

65. Glazer, pp. 52-53; 57.

66. Bunzel, p. 66.

67. Sewell, p. 60.

68. Glazer, p. 56.

69. 2 Samuel, 21:6.

70. Rashi on *San., s.v. "Va-tikach Ritzpah."*

71. *Hil. Melakhim* 3:10. See Rakefet-Rothkoff, pp. 18-19.

72. See Sewell, pp. 54-48; Glazer, p. 70.

73. Sewell, p. 58. Also see Glazer, pp. 158-203.

74. Glazer, pp. 63, 159.

75. See Howard Sherain, "The Questionable Legality of Affirmative Action," *Journal of Urban Law,* Vol. 51, No. 1 (August, 1973). Sewell, p. 53, notes that in general (although there are notable exceptions) the courts have rejected the notion that a person can be hired simply because he was formerly the subject of discrimination or a member of a minority group. Most recently, see *New York Times,* 17 June, 1977 D. 12.

76. Sheila Rush, "Race and Legal Doctrine," *New York Times,* 16 June, 1977. A. 23.

77. See, for example, *Sanhedrin,* 37a, and *inter alia,* Salo Rappaport, *Rabbinic Thoughts on Race* (Johannesburg, 1951).