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COMPARABLE WORTH IN SOCIETY AND IN JEWISH LAW

One of the most explosive civil rights issues of the 1980's is the "equal pay for comparable worth" movement. This doctrine demands compensating work in accordance with its inherent worth. Instead of giving market forces free reign, comparable worth advocates would set relative wage rates on the basis of such criteria as skill, effort, responsibility, and working conditions. More than 150 initiatives are currently underway to force this wage policy on government in 40 states and 52 municipalities.

In this paper, we will first delineate the inroads the comparable worth movement has made thus far in the American economy and then extrapolate the perspective Halakhah takes on this issue.

COMPARABLE WORTH IN AMERICAN SOCIETY

Comparable worth finds its legislative beginning in the United States with the passage of the Equal Pay Act of 1963. This act prohibits employers from compensating women less than men when both are performing equal work on the employer's premises, except when the greater pay is justified by a widely accepted standard such as seniority, merit, or output. Title VII of the Civil Rights Act of 1964 reinforced the basic intent of the Equal Pay Act by setting forth a general ban on employment practices that discriminate on the basis of race, color, religion, sex, or national origin.

Judicial interpretation of the Equal Pay Act has developed a two-pronged standard for deciding whether two jobs are equal: they must have a substantial common core of work tasks, and secondly, they must require equivalent skill, effort, and responsibility for the work tasks they do not have in common.[1]

Court interpretation of the comparable worth dimension of the above criteria has worked to limit the operational significance of the Equal Pay Act. In Hodgson v. Brookhaven General Hospital, the court held that two jobs are not equal if one of them involves additional tasks which consume a significant amount of time of those receiving the higher pay and have economic value commensurate with the pay differential.[2]

In Hodgson v. Robert Hall Inc., the employer was paying male salespersons a higher wage than female salespersons who were performing equal work. The court ruled that the wage discrimination did not violate the Equal Pay Act. Merit was found in Robert Hall's contention that the differential was justified on the basis of the greater economic value of male salespersons. Specifically, the men's clothing department had a greater average sales volume and profit per salesperson than the women's department.[3]

In the 1980's comparable worth advocates have attempted to push this doctrine beyond its recognition in the Equal Pay Act, demanding that dissimilar work should be subject to job evaluation. Jobs scoring equal points on the basis of skill, effort, responsibility, and working conditions should be compensated equally.

Comparative worth advocates scored a major victory in the 1983 federal court case AFSCME v. State of Washington. Relying on an earlier state-sponsored study which found that jobs that tended to be filled by women systematically earned 20% less than comparable jobs held by men, the court ruled that 15,000 Washington state employees were entitled to immediate raises and back pay to remedy years of discriminatory treatment.[4] In 1985, however, a federal appeals court in San Francisco reversed the district court's decision, noting that market forces, and not government, were responsible for the wage disparities. The court ruled that the state was under no obligation to "eliminate an economic inequality which it did not create."[5]

THE EQUAL PAY ACT AND JEWISH LAW

Sex-based discrimination in employment is treated in Jewish law as part of the broader issue of wage discrimination. The ethics of paying workers unequal wages for performing the same tasks is discussed in the Talmudic literature under the rubric of *ona'ah* (price fraud).

The law of *ona'ah* prohibits an individual from knowingly concluding a transaction at a price which is more favorable to himself than the competitive norm,[6] it being objectionable to prey on the ignorance of market conditions of one's opposite number in a commercial transaction.[7] A transaction involving *ona'ah* is regarded as a

form of theft.[8] We should note that *ona'ah* applies only when the price differential is assessed by experts to fall outside a margin of error.[9] Depending on how widely the price of the subject transaction departs from the competitive norm, the injured party may have recourse to void or adjust the moot transaction. Plaintiff's right to void the transaction is recognized when the difference between the sale price and the competitive norm is more than one-sixth.[10] When the differential is exactly one-sixth, neither of the parties may subsequently void the transaction on account of the price discrepancy; plaintiff is, however, entitled to full restitution of the *ona'ah* involved.[11] Finally, third-degree *ona'ah* occurs when the sales price differs from the market price by less than one-sixth. Here, the transaction not only remains binding, but, in addition, complainant has no legal claim to the differential.[12]

Before relating the law of *ona'ah* to the labor market, we take note that Halakhah classifies an employee as either a day laborer (*po'el*) or a piece-worker (*kabbelan*). What distinguishes the *po'el* from the *kabbelan* is the provision for fixed working hours. While the *po'el*'s contract obligates him to perform work for his employer at specified hours over a given time period, no such clause is included in the *kabbelan*'s agreement.[13] Given the controlling nature of the fixed hour factor, the absence of this provision retains for an employee *kabbelan* status even when his contract calls for him to complete the project by a specified date.[14]

In his discussion of the law of *ona'ah* as it pertains to the labor market, Maimonides (1135–1204) rules that *ona'ah* applies only to a *kabbelan* and not to a *po'el*.[15] Several strands of *ona'ah* law underlie this ruling: Exegetical interpretation of the source of the *ona'ah* prohibition ("*When you sell property to your neighbor, or buy any from the hand of your neighbor . . .*" [Leviticus 25:14]) establishes that the prohibition applies only to something which is acquired [by being passed] from "hand to hand"—excluding land. Since slaves are assimilated to land, the exemption extends to transactions involving slaves as well.[16]

Another point of the law of *ona'ah* is that the prohibition applies not only to an outright permanent sale, but to rental and hire as well. The rationale for this extension is that rental and hire are in effect a "sale" for the duration of the lease.[17] Consequently whenever the law of *ona'ah* does not apply to a particular sales transaction it also does not apply to the corresponding rental transaction. Given that the status of a *po'el* is regarded halakhically in certain respects as akin to slavery, the law of *ona'ah* does not apply to the hiring of a *po'el*.[18]

Another authority who formulates the *po'el*'s *ona'ah* exemption in blanket terms is R. Israel b. Pethahiah Isserlein (1390–1460).

Advancing his own rationale, R. Isserlein avers that the *po'el* exemption is rooted in the impossibility of assigning a precise market value to his services, as the employer would pay a premium for the services of a *po'el* when the work at hand requires immediate attention, failing which a material loss (*davar ha-avud*) would result. Similarly, finding himself in economic straits, a job seeker would presumably accept a less than competitive wage.[19]

While blanket exclusion of the *po'el* from the law of *ona'ah* follows from both Maimonides and R. Isserlein, the issue is far from conclusive. Maimonides, as will be recalled, bases the *po'el*'s *ona'ah* exclusion ultimately on the assimilation of slaves to immovable property. While Maimonides holds that the immovable property *ona'ah* exclusion is absolute,[20] many other *rishonim* do not share this view. R. Eliezer b. Samuel of Metz (c. 1115–c. 1198) and others, for instance, take the position that a price variance of more than one hundred percent allows plaintiff to void the immovable property transaction.[21] R. Jacob Tam (c. 1100–1171) and others invest plaintiff with this right even if the price discrepancy is exactly one hundred percent.[22] Finally, "some authorities," quoted by R. Isaac b. Jacob Alfasi and R. Asher b. Jehiel, allow plaintiff to invalidate the agreement even when the price discrepancy is more than one-sixth.[23] Thus, if the *ona'ah* exemption of the *po'el* ultimately rests on the immovable property exclusion, blanket exclusion for the *po'el* does not obtain.

However, Nahmanides, in his discussion of the immovable property exemption, avers that the exemption pertains only to the restitution procedure normally prescribed, but not to the prohibition against knowingly contracting into *ona'ah*.[24] Now, if the *ona'ah* exemption of the *po'el* is rooted in the immovable property exclusion, both the *ona'ah* prohibition and the restitution procedure, albeit in truncated form, may very well apply to this segment of the labor market.

We should note that despite the diversity of opinion as to whether the *ona'ah* claim is to be honored in the immovable property market and, if so, to what extent, R. Shabbetai b. Meir ha-Kohen (1621–1662) rules in accordance with Maimonides.[25] The import of this ruling is to deny the plaintiff judicial remedy for an *ona'ah* claim in the *po'el* labor market as well. Judicial nonintervention in respect to *ona'ah* claims in the *po'el* labor market effectively leaves compliance to the prohibition against contracting into an *ona'ah* agreement, as formulated by Nahmanides, i.e. to a system of voluntary compliance.

Voluntary compliance may, however, prove ineffectual in preventing widespread violations of *ona'ah* in the *po'el* labor market.

Correcting the abuses of Halakhah by means of communal legislation may therefore be indicated. What follows is a brief discussion of the parameters of Jewish communal legislation.

The Jewish community, as a collective, is regarded by Jewish law as having the legislative status of a court of law or a king.[26] Communal enactments, properly legislated, are therefore binding on all members of the community, including minors, and even those not yet born.[27] We should note that communal legislation enjoys no *halakhic* sanction when it comes into conflict with ritual prohibitions and permissions.[28] In matters of civil and criminal law, communal enactments are, however, generally recognized even if they come into conflict with a particular rule of Halakhah.[29]

The procedural rules prescribed for qualifying legislation are not uniform, but vary according to the type of legislation being considered. Certain legislative acts are mandated on the Jewish community. Minority sponsorship of proposals falling into this category is, therefore, sufficient to confer upon them legal sanction, making them binding upon all, including the protesting maiority.[30] Qualifying legislative proposals of the non-mandated type become effective by means of the majority decision rule.[31] Falling into this latter category is price and wage legislation.[32]

Widespread violation of the *ona'ah* interdict in the *po'el* labor market points to the need for remedial legislation. But finding appropriate design of such legislation requires us to first discover the basis of the *ona'ah* claim. Toward this end, we will present R. Asher b. Jehiel's (c. 1250–1327) analysis of third-degree *ona'ah.* Emergent in his discussion, as will be demonstrated, is an opportunity cost basis of the *ona'ah* claim.

Noting the absence of any provision for legal redress in third-degree *ona'ah* cases, R. Asher speculates whether it might be permissible, in the first instance, to contract into third-degree *ona'ah.* If the legal price, for the purpose of adjudicating *ona'ah* claims, is defined as the range of deviations of less than one-sixth from the price of the moot transaction, then, posits R. Asher, third-degree *ona'ah* is not price fraud at all. Price should be defined as a range of values rather than as a single value, because even when buyer and seller are fully aware of the prevailing norm, each would, even to his own disadvantage, occasionally contract into a price agreement at variance with the norm. For example, the vendor might offer to sell his wares below the prevailing market price if he desires to liquidate his inventory at a faster rate than normal demand conditions permit. Similarly, the buyer, finding a product to his keen liking, would, on occasion, offer to pay for it a price above the market norm.

If price is, however, defined as the price of the next best market opportunity which was available to plaintiff at the time he entered into the moot transaction, knowingly contracting into third-degree *ona'ah* is prohibited. The absence of legal redress for third-degree *ona'ah* would then be explained by the presumption than when the degree of *ona'ah* involved is of such a relatively small amount, plaintiff waives his claim to restitution. The presumption follows from our inability to fix the value of the article sold. While some experts would insist that *ona'ah* took place, others would just as vehemently deny it. With the experts divided as to whether *ona'ah* occured, and if it did by how much, we may safely presume that the victim of this possible price discrimination waives his right to restitution.[33]

Though offering no definitive resolution of the above dilemma, R. Asher urges the following guidelines for third-degree *ona'ah* cases: cognizant of the prevailing norm, an individual should not contract into a price agreement that departs even slightly from this value. Should an individual fall victim to third-degree *ona'ah,* on the other hand, he should accept his loss graciously and express no complaint.[34]

Rationalizing the absence of restitution in third-degree *ona'ah* in terms of disgreement among experts naturally leads to an opportunity cost basis for the *ona'ah* claim in second and first degree cases. Experts might argue as to whether plaintiff was victimized by *ona'ah* when the price differential is less than one-sixth, but no such disagreement occurs when the price discrepancy exceeds this level. In the latter instances, plaintiff certainly incurred an opportunity cost as a result of entering into the moot transaction. Had he only known of the better market alternative available to him at that time, he surely would have either demanded modification of the asked price or withdrawn entirely.[35]

Jewish law apparently adopts R. Asher's second approach to third-degree *ona'ah,* as evidenced by the prohibition against knowingly contracting into it.[36] What follows by logical extension is the opportunity cost basis of the *ona'ah* claim.

Further supporting the opportunity cost thesis of the *ona'ah* claim is the following ruling of R. Jehiel Michel Epstein (1829–1908). Noting R. Asher's division-among-experts' rationale of the inadmissibility of third-degree *ona'ah* claim, R. Epstein posits that the claim would be fully valid if the product market were standardized. Here, despite the less than one-sixth price differential, experts would readily agree that a better alternative was available to plaintiff when he entered into the moot transaction.[37] What follows, moreover,

from R. Epstein's analysis of third-degree *ona'ah* is the generalization that the *ona'ah* claim is based on opportunity cost.

Further refinement of the opportunity cost basis of the *ona'ah* claim requires identification of the relevant product market for the purpose of adjudicating *ona'ah* cases. Implicit in R. Asher's analysis of third-degree *ona'ah,* in our view, is a narrow definition of what constitutes a product market. This narrowness follows from the fact that division among experts as to whether or not price fraud took place is only possible when the products being compared have offsetting advantages and disadvantages. Within this framework, plaintiff presumably waives his claim to the differential when the difference in price is less than one-sixth. If the difference in price is one-sixth or more, the trade-offs involved no longer justify the presumption of waiver. Differences among experts, would, however, not be expected to emerge when the subject product contains all the features of competing products, and in addition, displays a distinctive characteristic as well. Differentiation here clearly separates the subject product from the competition and confers upon the seller an element of monopoly status. Monopoly status, in turn, vitiates the *ona'ah* claim.

Thus, an *ona'ah* claim lodged against a showcase furniture store would be invalid if its basis was that the identical piece of furniture was available at that time at a lower price in a catalogue furniture store. The showcase store offers differentiation in the form of product display; its product is traded in a market separate from the product of the catalogue store. The pricing policy of the latter establishment is therefore irrelevant in assessing the merit of an *ona'ah* claim against the showcase store.

Indeed, one may well argue that within the context of the modern product world no two competing products are identical. Differentiation today has advanced considerably beyond the level of the physical properties of the product. It includes such factors as proximity to the consumer, convenience of hours, complementarities of consumption, product display, and service level. With any market purchase involving some trade-off of offsetting advantages and disadvantages, the law of *ona'ah* should have wide operational significance within the framework of the modern product market. Relating the above argument for defining a product market in broad terms to the furniture market leads to the proposition that the showcase and catalogue stores should be lumped together in a single product market. While the showcase store offers differentiation in the form of product display, the catalogue store may offer the convenience of proximity to the consumer.

The above argument, in our view, is not entirely valid. Differentiation, as it appears to us, works to erode the distinctiveness of a competing brand only when a basis exists for presuming that consumers value the differentiation involved. Pointing clearly in this direction is the determining role R. Asher assigns to the agreement or disagreement of experts in adjudicating *ona'ah* cases. Clearly, cost differences among sellers plays no direct role in judging the merits of an *ona'ah* claim. What matters is only the legitimacy of the presumption that consumers want to spend extra money for the differentiation involved. Following this line, proximity to the consumer would not be regarded as an offsetting advantage for the catalogue store in the furniture market. Since the furniture market is not a local, neighborhood market, proximity of the seller to the consumer cannot be said to generate a presumption that consumers are willing to spend extra money to acquire this advantage. In respect to the consumer non-durable market, proximity, within limits, especially in the inclement weather season, may be regarded by consumers as an advantage to which they attach a price significance. Scientific surveys could prove very helpful in identifying which aspects of differentiation consumers are willing to pay extra money to acquire. Such information would naturally add a measure of refinement to the above analysis.

Another factor working to limit the operational significance of the law of *ona'ah* in the consumer market is the multi-product character of many firms. Within a multi-product firm market structure, a particular product may often sell below the price it can theoretically command in the marketplace. Reflecting an investment stratagem, the bargain price is designed either to attract customers to complementary products offered by the same seller or to generate good will for the purpose of increasing future sales. Since the discount represents a voluntary income transfer between the seller and the buyer, that price does not serve as a measure of the objective market value of the product. Using the discount price as a measure of the market opportunity cost plaintiff incurred as a result of entering into the moot transaction is, in our view, inappropriate. What more precisely measures plaintiff's alternative market opportunity is the price the competing outlet could have commanded at that time. In contradistinction to market price, economists call the latter price the "shadow" price of the article.

The above formulation of law of *ona'ah* results in a narrow application of this interdict as it pertains to the labor market.

Because unique supply and demand factors impinge upon every labor negotiation, identification of the relevant labor market for the purpose of adjudicating an *ona'ah* claim is, at times, very elusive.

Regulating the internal labor market of a firm would therefore appear to be the primary target for legislation designed to end perceived widespread abuses of *ona'ah*. *Ona'ah* legislation, accordingly, would prohibit a firm, during a given hiring period, to engage in wage discrimination with respect to a particular job title. Coverage under the legislation would obtain when both the job title as well as the qualifications for the job are well-defined. Here, anyone hired for the position could legitimately compare himself to other people hired by the firm for the same position. If complainant was hired at a lower wage than his colleagues, the opportunity cost basis of his *ona'ah* claim would be readily apparent. Had plaintiff only known that his employer was paying someone else a higher wage for the same job title, intensive bargaining might very well have raised the employer's offer.

We should note that *ona'ah* legislation in no way constrains a firm from instituting a pay scale based on such criteria as seniority, merit, or output. Such criteria merely identify differentiation within the firm's own internal labor market. Establishing pay increments on the basis of artificial or vague criteria, however, amounts to no more than a circumvention of the law of *ona'ah*.

Basing an *ona'ah* claim on the external labor market runs into the difficulties of both defending the appropriateness of regarding the comparison job and the job at hand as belonging to the same labor market as well as proving that plaintiff incurred an opportunity cost.

Illustrating the difficulty of proving an opportunity cost when the *ona'ah* claim is based on the external labor market is the following case. Mesader, a recent law school graduate, secures a job at Emet (a small, newly established law firm) at a salary of $60,000. Subsequent to learning that the starting salary at Yatsiv (a large, well-established law firm) is $75,000, Mesader lodges an *ona'ah* claim against Emet. Emet counters that employment at Yatsiv was not a viable alternative for Mesader, as this firm hires only the top graduating students from the most prestigious law schools. Mesader's credentials, Emet contends, would not even gain him an interview with that firm.

Slightly changing the assumptions of our model provides the setting for demonstrating the difficulty of identifying the relevant labor market for the purpose of adjudicating the *ona'ah* claim. Suppose Mesader's credential qualify him to be hired at Yatsiv. Instead of applying at Yatsiv, Mesader interviews with Emet and manages to negotiate a salary higher than what Yatsiv pays for the same job title. Subsequently, Emet lodges an *ona'ah* claim against Mesader. Defendant counters that as far as the *ona'ah* claim is concerned Emet and Yatsiv should not be considered to be in the

same labor market. Given the risk aversion preference of the marketplace, Yatsiv employees would only be interested in working for Emet at the same higher salary he negotiated for himself. Yatsiv employees purposely trade off the prospect of a higher salary for the security, prestige, and possibilities for advancement that employment at Yatsiv entails.[38]

REVEALED PREFERENCE AND THE *ONA'AH* CLAIM

Within the framework of a differentiated labor market, a job seeker may find that a particular feature of an employment opportunity is so appealing that he is willing to accept the offer, forgoing the possibility of securing a higher salary elsewhere by continuing the search process. Exclaiming at a job interview that a particular feature of the employment opportunity at hand makes the salary offer well worth it may work to nullify for the job seeker a subsequent *ona'ah* claim. Analysis of the following Talmudic text at *Bava Metsia* 58b is most relevant in this regard:

> R. Judah said . . . an animal or a pearl is not subject to *ona'ah,* because one desires to match them. Said they [the Sages] to him, but one wishes to match up everything! And R. Judah?—These are particularly important to him [the purchaser]; others are not. And to what extent? Said Amemar: up to their value.

Interpreting R. Judah's argument "one desires to match them," Rashi (R. Solomon b. Isaac, 1040–1145) comments that the productivity of a strong, healthy work animal is adversely affected when it is teamed together with a weak, indolent beast. Realizing this, the owner of a strong work animal seeks to harness his beast with an animal of like nature. Similarly, the owner of a precious jewel seeks to enhance its beauty by combining it in the same setting with another stone.[39] Given the strong likelihood that the acquisition of an animal or pearl affords the purchaser this advantage, R. Judah denies plaintiff's *ona'ah* claim.

The Sages reject R. Judah's reasoning on the grounds that the purchase of any commodity may involve complementarities in consumption. Just as price fraud claims are normally not denied on the basis of possible complementarities in consumption enjoyed by the injured party, so too should the *ona'ah* claim not be discarded on these grounds when the sale object is an animal or pearl. The import of R. Judah's rejoinder is clear. Compared to other commodities, the likelihood that the purchase generated complementarities in consumption is much stronger when the sale object is an animal or pearl.

While most Talmudic decisions reject R. Judah's position in favor of the Sages' view,[40] R. Aaron Walkin (1865–1942) suggests that perhaps R. Judah's view should not be discarded entirely. What leads him to this hypothesis is R. Yom Tov Ishbili's (1270–1342) ruling that a declaration on the part of the buyer at the time he entered into the transaction that the purchase was subjectively worth to him the entire sum demanded, forfeits for him thereby any subsequent *ona'ah* claim.[41] Rather than understand R. Ishbili's view as following R. Judah's minority position,[42] R. Walkin posits that when an explicit declaration of subjective equivalence is made by the buyer at the time he enters into the transaction, everyone is in agreement that the declaration amounts to a waiver of any possible *ona'ah* claim.[43].

Reconciliation of R. Walkin's insight with the opportunity cost basis of the *ona'ah* claim is readily possible under the assumption that the declaration of subjective equivalence nullifies a subsequent *ona'ah* claim only when the product market involved is heterogeneous. Here, the declaration amounts to a statement of willingness to discontinue further market search for the item at hand out of fear that continuation of the search may result in making the exact item at hand unavailable. If the product market is homogeneous, the declaration of subjective equivalence cannot be understood as an expression of fear that further market search might jeopardize the availability of the item at hand. Rather, the declaration merely amounts to an admission on the part of the buyer that for him the purchase entails a windfall. Given the availability of the identical item elsewhere, the declaration of subjective equivalence should not nullify for the purchaser a subsequent *ona'ah* claim, as the purchase entailed for him an opportunity cost.

Let us now apply R. Walkin's insight, along the lines we suggested, to the labor market. Suppose in the course of his interview with Emet, Mesader expresses initial dissatisfaction with their $60,000 salary offer. Upon learning that professor Yashar, his former law school professor, is now a partner at Emet, Mesader changes his attitude sharply. Recalling both his brilliant academic record in professor Yashar's class as well as the close personal relationship he established with him, Mesader excitedly exclaims that working under professor Yashar makes the salary offer well worth it for him. Subsequent to accepting Emet's offer, Mesader learns that Yatsiv pays $75,000 for the same job title. While there is no denying that Mesader qualifies for the Yatsiv position, the latter's pronouncement that he attaches a monetary value to work under his former professor amounts to a declaration that this feature of the Emet position makes it worthwhile for him to end his search for a job. The possibility of

landing a higher paying job is traded off for the elimination of the risk of ending up with a job with an unpredictable work environment. The *ona'ah* claim is hence denied.

LABOR EXPLOITATION IN ECONOMIC THEORY AND HALAKHAH

In a competitive labor market, the firm has no control over the price of labor and therefore takes the wage rate of a particular labor skill as a datum. Profit maximization considerations force the firm to hire workers of a particular skill up to the point where the anticipated increase in total revenue it stands to gain by the hiring, called the marginal revenue product of that worker (MRP), is just equal to the increase in total cost the contemplated hiring entails.

Labor exploitation occurs when the worker is remunerated in accordance with his minimum wage demand rather than in accordance with the MRP of the last worker of his skill that was hired. One circumstance that produces this result is the monopsony case. Here, for the entire geographic base of the labor market only a single employer bids for the services of the workers. Given that the labor force does not benefit from the competitive bidding among employers, the wage rate gravitates to the wage demand of the last worker hired.

Monopsony power similarly occurs when employers band together into a cartel and act as a single unit in hiring a particular skill, e.g. electricians. Here, too, the wage rate the workers receive will fall below the MRP of the last worker hired.

Adopting the view that *ona'ah* is essentially an opportunity cost claim leads to the rejection from the standpoint of Jewish law of the above formulation of labor exploitation. Provided the worker did not incur an opportunity cost as a result of entering into his present employment, paying him below his MRP is not unethical *per se.* Moreover, awareness on the part of the job seeker that the salary offer was tendered out of conviction that his MRP for the firm does not exceed that figure, works, it appears to us, to invalidate an otherwise legitimate *ona'ah* claim.

Supportive of the above line is an exemption case of the law of *ona'ah,* called selling on trust (*nosé be-emunah*). Selling on trust is identified as occurring when the vendor divulges to his prospective buyer both his cost price and his proposed profit margin. Should the buyer agree to these terms and consummate the transaction with a *kinyan,* a subsequent finding that the final price involved *ona'ah* does not allow plaintiff to modify the original transaction in any man-

ner.[44] Agreeing to allow the vendor a specified profit margin demonstrates on the part of the buyer a lack of concern with the objective value of the commodity. Since realization of the agreed-upon profit rate required the sale to be concluded at the stipulated price, subsequent *ona'ah* claims are denied.[45]

The analogue of the above case in the labor market entails the following elements: Mesader, our promising recent law school graduate, interviews with Emet, the smaller law firm. While praising his credentials, Emet points out that it will not be able to bill clients for more than $50 an hour for Mesader's services. Charging a fee above this figure runs the risk of pricing themselves out of the market. This fee is then used as a basis for making a $60,000 salary offer to Mesader. Subsequent to accepting the offer, Mesader learns that Yatsiv, the larger, prestigious law firm, offers $75,000 for the same job title. Mesader lodges an *ona'ah* claim against Emet. While not denying that Mesader's credentials qualify him for employment at Yatsiv, Emet counters that Yatsiv bills clients at $75 an hour for the type of legal work Mesader does. Since Mesader's MRP is higher at Yatsiv than it is at Emet, the *ona'ah* claim should be denied, despite the opportunity cost the latter incurred by entering into employment with Emet.

CLASS DISCRIMINATION AND JEWISH LAW

A variant of the cases discussed above occurs when wage discrimination for a particular job title is not sporadic but rather reflects a systematic bias against a particular class of people. To illustrate, suppose accounting firms are found to systematically pay blacks lower salaries than whites for the same job title. Since blacks are systematically discriminated against, the *ona'ah* cannot be viewed as an opportunity cost claim, even in respect to the intrafirm case. Barring wage discrimination by class by means of legislative edict can therefore not find its inspirational source in the law of *ona'ah*. While elimination of this practice falls within the price-wage legislative prerogative of the Jewish community, a case must be made that halakhic norms demand such legislation.

Voting on legislative proposals, according to Halakhah, must not be dictated by self-interest, but rather should be guided by one's perception of what is in the public's interest.[46] Public interest entails both equity and efficiency considerations. Toward the end of building an halakhic case for legislation designed to eliminate wage discrimination by class, we will present both an equity and an efficiency-supporting argument.

CLASS DISCRIMINATION AND THE *DARKHEI NO'AM* PRINCIPLE

Systematic wage discrimination for equal work against a particular group rooted in some irrelevant personal character such as race or national origin generates strong feelings of frustration, bitterness, and resentment among those victimized by the practice. Failure to ban the practice legitimizes exploitative economic relations. Indeed, before the passage of the EPA, as Fogel notes, some union-employer contracts provided for a dual wage structure between men and women for equal work. These arrangements were the result of both union willingness to permit only limited employment of women at a lower wage and employer willingness to guarantee a certain amount or proportion of employment of males.[47]

Allowing exploitation to exist in the economic sphere may allow the behavior to spill over into many other areas of interpersonal relations. Societal toleration of economic exploitation hence ultimately assaults humaneness, generosity, and compassion.

Promotion of a harmonious social order is one of the ultimate aims of the precepts and commands of the Torah. This goal, according to Rav Joseph (4th cen.) is expressed in the verse: *Derakheha darkhei no'am*—"Her ways are ways of pleasantness" (*Proverbs* 3:17).[48] Many ordinances introduced by the Sages were motivated by a desire to either defuse or prevent the emergence of dissension in society.[49]

One enactment, particularly analogous to the matter at hand, involves the rights of a fisherman, operating in the public domain, to the fish caught on his fishing line. Fish caught on the line do not become the automatic possession of the owner, as an individual's implements do not acquire possesion for him unless they can be classified as a receptable. Since the line does not acquire for the fisherman, snatching away the catch before the fisherman takes physical possession cannot be regarded as robbery. Nonetheless, such action assaults society's notion of fairness. Accordingly, the Sages branded such action as robbery by dint of rabbinical law.[50]

WAGE DISCRIMINATION AND ECONOMIC EFFICIENCY

Economic efficiency also points to the desirability of banning wage discrimination. Let us assume an initial condition of wage discrimination in the carpentry profession. Whites are compensated at $25 an hour, a wage rate equal to their MRP. While the MRP of blacks is equal to that of their white counterparts, blacks receive only $15 an

hour. Discrimination has the effect of driving blacks to enter related fields, such as masonry, where their incomes will be higher than their expected earnings in carpentry.

Within the framework of a competitive marketplace this dual wage rate cannot persist for long. It will be quickly learned that maintaining a prejudice is an expensive proposition. Profit-maximizing behavior will drive firms to substitute black for white carpenters. This substitution will continue until the MRP of black carpenters is no more than the firm pays them. As the above adjustment process unfolds, the relative scarcity of the different categories of labor changes. With the profit motive driving employers more and more to view black and white carpenters interchangeably, the relative scarcity of carpenters diminishes and the $25 wage rate for this category of labor is driven below its initial level. Simultaneously, the exit of blacks from the masonry industry increases the relative scarcity of workers in that industry and should result in a higher wage there.

Notwithstanding the above change in relative wages, the primary source of the increased income for black carpenters is not the reduced income of white carpenters. Rather, the extra income for black workers primarily comes from the extra output that their higher productivity in their new employment brings compared with the lower productivity enforced by discrimination. Society as a whole hence benefits from the elimination of wage discrimination. Banning wage discrimination for equal work, accordingly, merely accelerates the disappearance of a practice which economic self-interest would have in any case worked to eliminate.

STATISTICAL GENERALIZATION AND WAGE DISCRIMINATION

Systematic discrimination against a class of people is, however, not always rooted in bigotry and erroneous belief. Statistical sex discrimination provides a case in point. This occurs when hiring decisions are based on differences between male and female averages on predictions of productivity. If women, for example, have higher turnover rates than men, employers will hesitate to hire women in jobs in which they will provide expensive training, screening out even those women who would have stayed for decades. Since men and women have overlapping distributions on virtually all characteristics, using sex-group means to estimate applicants' productivities results in mistaken predictions for individuals above or below the mean for their sex.

Notwithstanding the mistaken predictions that result from statistical generalizations, use of this method, as Englard points out, is

an efficient approach of hiring for the firm. How is an employer to predict how long an applicant will stay with the firm, or how successful a managerial style he or she has? Because of this uncertainty and the cost of information, basing predictions on averages for easily recognizable groups may save more in screening costs than is lost by the non-optimal work force that results.[51]

When unequal pay for equal work is rooted in statistical generalizations, banning the practice works to bias employers against candidates whom they perceive to have a lower MRP than the general pool of applicants they face. Ironically, for workers suffering under the bias, wage discrimination may be preferable.

Under the EPA, consistent differences in the employment costs, productivity, and training participation of men and women constitute justifiable grounds for paying unequal wages for what appears, on the surface, to be equal work. Statistical sex discrimination does not, however, qualify as an exception, as the courts have held that the higher cost or lower productivity must be shown for each individual female employee.[52]

While an equal pay act gives the impression of worsening the marketability of below-average MRP candidates for a particular job, the plight of these workers, as it appears to us, does not necessarily deteriorate under this legislation. Profit maximization considerations in any case drives the firm to substitute cheaper labor for more expensive labor. If the law prohibits a dual wage rate within the framework of a single job title, the firm has every incentive to redefine job titles. To illustrate, if statistical generalization tells the firm that women are less attached to the labor force than men, the various duties of the subject job title would be analyzed in terms of job attachment. Such an analysis might indicate the appropriateness of creating a new job title. The new job title would retain only components of the old job title whose performance would not suffer appreciably on account of intermittency. Should the surviving contents prove too meager to justify a job title additional duties could be found by reorganizing other jobs in the work scene.

Under the EPA, the courts have ruled that the requirement of equal pay extends even to jobs that are only substantially the same. In Wetzel v. Liberty Mutual Insurance Company, for instance, the court ruled that the difference in working conditions between claim adjustors (men) and claim representatives (women) was insignificant and therefore did not justify "unequal" pay. Men typically used their cars to examine claims in various locations while women handled claims from an office building.[53]

In his critique of the EPA, Fogel contends that the operation of the law now limits the ability of firms to create variations of old job

titles with the result that the goal of minimizing labor costs has been hampered. A case in point is Shultz v. Wheaton Glass Company.[54] Wheaton is a large manufacturer of glass containers. The operation in question involved the inspection and packaging of glass bottles manufactured in the company's plant. This job was performed by "selector-packers" who picked glass containers by hand from a conveyor belt, visually inspecting them, and packed those accepted into adjacent cardboard cartons. In late 1967, 230 of the selector-packers were women, employed at $2.14 an hour; 276 were males, employed at $2.35 an hour. The males had sixteen additional duties not required of females (according to the trial court's opinion). The additional duties included lifting of cartons in excess of 35 pounds, mechanical adjustments to equipment, and other miscellaneous tasks. The differentiation of male and female jobs was the result of a collective bargaining agreement.

In bringing this case, the U.S. Department of Labor alleged that the male and female selector-packers performed equal work and that the occasional performance of additional tasks by males was merely incidental to the total job cycle and did not make the male and female jobs unequal. The district court rejected these contentions, finding instead that Wheaton had proven the jobs to be unequal by showing that "men are required to exert additional effort, to possess additional skill, and to have additional responsibility." The decision of the district court was reversed by the Court of Appeals. Cited among the various reasons for the reversal were: (1) the district court had made no finding that all male selector-packers performed many or all of the additional tasks; (2) the additional duties performed by male selector-packers were also carried out by 37 "snap up" boys who did these heavy duties exclusively and were paid only $2.16 an hour for doing so, just two cents more than the rate paid females; and (3) the motive for the creation of two jobs from the original single one "clearly appears to have been to keep women in a subordinate role."

Critical on all three counts, Fogel regards the first reason for the reversal as far too restrictive. What made the male and female jobs different and unequal in Wheaton Glass is that the male job required the capacity to perform the extra duties and this capacity had to be paid for, regardless of variation in its actual use by job incumbents.

The second reason for reversing the Wheaton trial court, in Fogel's view, was also faulty. First, in deciding whether a pay differential between two job titles violates EPA, the only relevant comparison is between the subject job titles. Bringing into play the duties of a third, unassociated job stretches the coverage of the Act beyond its intent. Moreover, Wheaton may very well have regarded

the part of a worker for a wage higher than the current scale amounts to a demand for a clear-cut "premium" wage. Just as the law of preference does not require the seller to confer a clear-cut discount to a preferred customer, it likewise does not demand of an employer to give a worker a clear-cut premium wage.

Economic expansion will also produce instability in the wage rate. Reversing the scenario described above, an increase in aggregate spending will result in a multiple expansion of income. Wage rates will not, however, instantaneously adjust upward, as the initial response of firms to the increased demand they face will be to increase the number of labor hours they require rather than to hire more workers.

Given the instability of the wage rate in economic expansion, the law of preference should be operative with respect to its employment preference requirement. Moreover, given the upward pressure the wage rate is under, the job seeker's request for a wage above the current scale cannot be equated with a demand for a clear-cut premium wage. Both the employment and the favorable wage treatment aspects of the law of preference should therefore be operative in the above case.

Several caveats should, however, be noted. (1) To avoid internal dissension, an employer generally cannot practice wage discrimination. Acceding to the job seeker's demand for a wage increment even slightly above the current scale requires him to adjust the entire payroll upward. What appears on the surface to be but a "small" differential amounts to a substantial cost for the employer. Since the law of preference operates only to require a small loss for the requested party, the demand for the differential wage is invalid.

(2) Economic expansion is a macroeconomic phenomenon. Within this expansionary environment, particular firms may be contracting. If the economic expansion has not yet impacted on the firm faced with the job seeker's demand for the premium wage, the request is invalid. Supporting the firm's defense, in our view, would be documentation showing that in the immediate recent period the average work week did not increase.

Let us now turn to the operation of the law of preference in a monopsony market structure. Monopsony market structure dichotomizes into the discriminatory and non-discriminatory cases.

In the non-discriminatory case, the monopsonist sets the wage rate at the minimum wage demand of the last worker he wants to hire. Since the firm will be hiring the number of workers who want to work at that wage rate, the wage rate the monopsonist sets should not only be described as well-defined but as an equilibrium one as

well. Suspension of the law of preference entirely is therefore indicated in this case.

In the discriminatory case, the monopsonist's objective is to minimize his wage bill. Instead of paying all workers the minimum wage demand of the last worker hired, the monopsonist attempts to pay each worker individually according to his minimum wage demand. Since the wage rate here is not well-defined, the law of preference in all its aspects should be operative.

COMPARABLE WORTH AND JEWISH LAW

We now turn our attention to Judaism's attitude toward the comparable worth issue.

Given that the proposal entails the comparison of essentially dissimilar jobs, the law of *ona'ah* is entirely irrelevant in evaluating the merits of this issue from the standpoint of Jewish law.

The comparable worth proposal does, however, fall squarely within the legislative purview of the Jewish community. Legislative proposals in Jewish society, as will be recalled, must be considered on the basis of their impact on society's welfare rather than from the perspective of self-interest. Aspects of the comparable worth proposal relevant to Halakhah include the equity issue, its effect on employment and its impact on the institution of marriage. Economic analysis is helpful in elucidating each of these issues.

COMPARABLE WORTH AND EQUITY

Pay equity, according to comparable worth advocates, demands that dissimilar jobs of equivalent worth be paid the same wages. If this is not done, the occupant of the lower-paying job is justified in claiming that he or she is a victim of illegal discrimination. One of the most important findings of the evaluation tests of dissimilar jobs is that women employed in female-dominated occupations are significantly underpaid as against men in male-dominated occupations. Applying the pay equity criterion of comparable worth leads therefore to the conclusion that widespread illegal sex discrimination exists in the United States today.

Economic theory resoundly rejects the above condemnation of the male-female earnings gap. Rather than reflecting a systematic bias on the part of employers, the gap is rationalized on the basis of free choice on the part of labor force participants. Occupational choice results in women being crowded into certain jobs. Relative

abundance of the particular skills women have is hence what ultimately accounts for their lower earnings relative to men.

Women's occupational choices vary from men's because expected lifetime labor force commitment varies. Men expect to remain in the labor force their entire working lives. Women, on the other hand, expect that their patterns of labor force participation will be characterized by intermittency due to childbearing responsibilities and other familial obligations.

Because women generally regard their labor force commitment as intermittent, they choose occupations which are most compatible with child rearing and familial obligations. Most attractive to them therefore are occupations characterized by such features as easy entry and exit and availability of flexible hours and part-time work. Women hence crowd into such professions as nursing, elementary school teaching, operative and sales work, and household work.

Adding refinement to the above insight is Polachek's analysis of the phenomenon of occupational depreciation and appreciation. Occupational depreciation refers to the rate at which the skills a job requires depreciate when not in use. Occupational appreciation refers to the rate at which new skills are learned on the job. Those occupations with low appreciation rates, i.e., jobs which allow for very little or no skill advancement, have relatively flat earnings curves. Wages rise very little as one's experience in that occupation increases. Those occupations with high appreciation rates have steep earnings curves. Because of the costs associated with training, wages are relatively low at the beginning of the work experience. Skills are enhanced with experience, and wages respond accordingly.

Because women often regard their attachment to the labor force as intermittent, they naturally are drawn to occupations with low depreciation rates and those with the highest starting salaries, whose payoff comes quickly, not at some future date when they likely will be out of the labor force.

Extending the above line of reasoning, women do not find it optimal to invest in as much on-the-job training as men or in as much quality of schooling.[62]

What follows from Polachek's theory is that it is erroneous to attribute low wages in women's occupations to discrimination when it is really women themselves who, by their rational behavior, are bloating supply and keeping their own wages low.

Another consideration for the equity question in the comparable worth issue is William's finding that the earnings gap between the sexes is in reality a marriage gap rather than a gender gap. Men and women who are equally attached to the labor force do receive equal pay for comparable work. Women who have never married show

much stronger labor market attachment than women who are married and living with their husbands. To be specific, never-married women with a college education spend 88.9% of their working years in the labor force, while married women with the same education spend only 36.4% of their working years in the labor force. Among men and women who have never married, women earn 99% as much as men, where among people who are married and have never been divorced, women earn only a third as much as men.[63]

In comparing male and female incomes in the Canadian economy, Block also found that marital status almost entirely accounted for the earnings gap. That is, marriage increases male earnings and reduces female earnings.

Research has brought to light a variety of reasons for this occurrence. Wives, more often than husbands, take on a higher and disproportionate share of child care and homemaking. A woman is more likely to give up her job if her husband receives a better job elsewhere, to interrupt her career for domestic reasons, to place her home and family ahead of her job or profession, and even purposefully to keep her earnings below that of her spouse's. While it is impossible to quantify the effects of such phenomena in increasing disparity between married male and female incomes, there can be little doubt that their influence is substantial.[64]

The above findings call into question the proposition that employers discriminate against all women simply because some married women pull down women's average degree of labor market attachment. Instead, it appears that never-married men and never-married women, whose degree of labor market attachment is about equal, earn about equal pay.

Given the crucial role marital status plays in explaining the earnings gap, the gap could very well reflect society's tendency to pay a price, as it were, to maintain the traditional role differentiation between men and women. Drawing upon the economic literature that theorizes that societal perceptions of fairness influence relative wages, Sorensen suggests that the current advantage employers enjoy with respect to women's work reflects the cultural bias against women participating in the labor market as equals with men. Accordingly, the earnings gap would be totally in accord with societal notions of fairness.[65]

COMPARABLE WORTH AND EMPLOYMENT

Raising the relative pay of low-paid jobs held predominantly by women may very well represent a mixed blessing for the target group.

While the welfare of those hired at the higher wage would improve, employers, in all probability, would reduce their demand for such jobs. Take the case of nurses. With nurses' pay higher, other things being equal, hospitals would have less incentive than before to substitute nurses' work for doctors'. At the same time, they would have more incentive to substitute the work of nurses' aides and orderlies for that of nurses. They would also buy more automatic equipment to allow each nurse to handle more patients. Fewer nurses would be hired, and some already on the job might be laid off. Presumably, those who kept their jobs would tend to be those from the best nursing schools or perhaps those with the most experience. Thus, implementation of comparable worth would be most helpful to those who least need the help.

Another likely effect of comparable worth would be to attract men into occupations such as nursing and secretarial work now dominated by women. Under the new, more competitive conditions, some women would prosper. These would be women with the best educations, the strongest job skills, and the fewest distracting family commitments.

Finally, as comparable worth raised pay in women's occupations and attracted men into them, the characteristics of those occupations that attracted women into them in the first place would change. Many American women work to help their families, which are their chief concerns. This motive steers women into work with such features as easy entry and exit and availability of flexible hours and part-time work. But if jobs such as nursing and secretarial work paid more, employers would have less incentive to tailor jobs to suit the needs of such women. They would begin to insist on stronger job attachment, just as they have in occupations dominated by men. Experience and training would begin to count for more. With fewer positions open and people of both sexes applying for the jobs, employers would be more likely to pass over women who wanted to work just to help their family.[66]

COMPARABLE WORTH AND THE INSTITUTION OF MARRIAGE

One final factor in considering the merits of the comparable worth proposal, from the perspective of Jewish law, is its impact on the institution of marriage. In Jewish teaching, marriage and family life are regarded as integral parts of the divine plan.[67] All human beings are necessarily incomplete without a mate, and it is through marriage that completion is achieved.[68] Notwithstanding that women, unlike

men,[69] are not commanded to marry,[70] Judaism regards marriage as the ideal lifestyle for both sexes.

Rabbi Samson R. Hirsch (1808–1888) derives the above dictum from the following biblical verse: "And God said: it is not good that man shall be alone; I shall make him a helpmate unto him" (Genesis 2:18). Take note, R. Hirsch points out, that the Torah does not say that it was not good for man to be alone, but rather: "This is not good, Man being alone." As long as Man stands alone it is already not yet good; the goal of perfection which the world is to attain through him will never be reached as long as he stands alone.[71]

On a most basic level, marriage is an ideal even for women who are not commanded to marry, because it is within this relationship that *hesed,* i.e., loving-kindness, can achieve its highest form. *Hesed* is the basis of all Jewish ethics and is the character trait that must underlie all interpersonal relationships. Realization of the ideal of *hesed* obtains when an individual gives to another out of a sense of closeness and identification with that other's needs. One who gives out of *hesed* does so because the other's need is as real to him as his own. Marriage realizes *hesed* in its highest form when the relationship becomes to the partners a oneness in the form of existential commitment and a metaphysical fusion of souls.[72]

Marriage is an ideal for women from another standpoint as well. The command of passing the Torah on to the following generations, according to Nahmanides[73] and R. Bahya b. Asher[74] (d. c. 1340), includes passing on the experience of revelation, as symbolized by the fire of Sinai, and the content of revelation as symbolized by the voice from Sinai. The former task, R. Bahya posits, is more important, for "if one forgets the experience he will end up by denying the content."[75] In connection with the obligation to transmit the Torah, Moshe Rabbeinu was instructed: "Thus shall you say to the house of Jacob and tell the children of Israel" (Exodus 19:13). The rabbis take "the house of Jacob" to refer to the women and "the children of Israel" to refer to the men. Given the inclusion of both men and women in the the transmission obligation, Rabbi Aaron Soloveichik posits that the primary task of women is to pass on the experience of revelation, while the primary task of men is to pass on the content of the revelation.[76]

What effect would the comparable worth proposal have on the institution of marriage? Economic analysis, as presented earlier, indicates a negative impact. Under comparable worth, substantially less women will find jobs compatible with child rearing and family responsibilities. This follows from the various substitutions employers will put into effect in response to the higher wage rate they must pay for jobs currently dominated by women. Other factors that

would tend to work to crowd out women from their traditional jobs, as will be recalled, include the increased competition with men for those jobs as well as the expected unwillingness on the part of employers under the new competitive conditions to tailor-make these jobs for women with family responsibilities.

DARKHEI NO'AM AND COMPARABLE WORTH

Both the intensity and the momentum of the comparable worth movement reflect a widespread social outrage against the wage treatment of women today. Does the *Darkhei No'am* principle discussed earlier require the legislative body of the halakhic society to at least partially accommodate the demands of this movement as a means of quieting dissension and ill-feeling? Analysis of the nature of the dissatisfaction behind the comparable worth movement indicates, however, only a need to address the root cause of the dissension but not to follow the prescription of comparable worth.

The pay gap between men and women existed long before the comparable worth movement gained its current popularity. Coincidental with the growth of the comparable worth movement has been the dramatic increase in the rate of participation of women in the labor market. In 1950, 70% of the American households were headed by men whose income was the sole source of family income. In 1984, less than 15% of families fit this traditional mold.[77] Some of the stridency for the comparable worth proposal comes from the ranks of women who have voluntarily and involuntarily adopted the singles lifestyle or who believe that this lifestyle should be available as a viable option for women. Since financial independence and career fulfillment is made difficult by the relatively low wages of women in female-dominated occupations, the enthusiasm of this group for the comparable worth proposal is understandable.

Participation of women in the labor force on a full-time basis is, however, not the norm. In 1984, only about 46% of married women held down full-time jobs.[78] The motivation of most women in entering the labor force is merely to help out their families financially.[79] The current stridency for the comparable worth proposal is therefore symptomatic of a financial strain in the institution of marriage.

The *Darkhei No'am* principle, as it appears to us, does not require the Jewish legislative body to meet the demands of every embittered group just for the sake of ending dissension. Rather, the principle merely requires the legislative body to address the root cause of the dissension and take remedial action. Since directly

meeting the demands of comparable worth proponents both encourages a lifestyle antithetical to the Torah ideal and works to weaken the institution of marriage, rejection of the proposal is indicated. The underlying financial strain the institution of marriage is suffering under must, however, be addressed. Remedial action to strengthen the institution of marriage is indicated. Revamping the tax system in the form of calling for more generous deductions for dependents as well as tax credits for tuition payments represents one approach to the problem.

Economic analysis is not only helpful in pointing to the weakness of the equity argument for comparable worth, but, in addition, can demonstrate that the very group the proposal is designed to help will fare worse. At the same time, the analysis indicates that the proposal would both exert a negative impact on the institution of marriage and encourage lifestyles antithetical to Jewish values. All considerations therefore point to Jewish law's rejection of the comparable worth proposal.

NOTES

1. Walter Fogel, *The Equal Pay Act* (New York: Praeger, 1984), p. 59.
2. Hodgson v. Brookhaven General Hospital (436 F2d 719, CA 5, 1970).
3. Hodgson v. Robert Hall Inc. (473 F2d 589, CA 3, 1973).
4. AFSCME v. State of Washington (no. C82–465 T, E.D. Washington, 1983).
5. AFSCME v. Washington (1985, CA 9 Washington, 1983).
6. *Baraita, Bava Metsia* 51a; R. Isaac b. Jacob Alfasi (Rif; 1012–1103) *ad locum;* Maimonides (1135–1204), *Mishneh Torah, Hilkhot Mekhirah* XII:1; R. Asher b. Jehiel (Rosh; 1250–1327), *Bava Metsia* IV:17; R. Jacob b. Asher (1270–1343), *Tur, Hoshen Mishpat* (henceforth: *H. M.*) 227:1; R. Joseph Caro (1488–1575), *Shulhan Arukh* (henceforth: *Sh. Ar.*), *Hoshen Mishpat* 227:1; R. Jehiel Michel Epstein (1829–1908), *Arukh ha-Shulhan* (henceforth: *Ar. ha-Sh.*) *Hoshen Mishpat* 227:1.
7. For a development of this thesis, see Aaron Levine, *Free Enterprise and Jewish Law* (New York: KTAV, Yeshiva University Press, 1980), pp. 105–109.
8. *Bava Metsia* 61a; *Tur, H. M.* 227:1; R. Joshua ha-Kohen Falk (1555–1614), *Sema, Sh. Ar., H. M.* 227 note 1.
9. *Bava Batra* 78a and R. Solomon b. Isaac (Rashi; 1040–1105) *ad locum;* Rif *ad locum;* Maimonides, *op. cit.,* XXVII:5; Rosh, *Bava Batra* V:7; *Tur, op. cit.,* 220:5; *Sh. Ar., op. cit.,* 220:8; *Ar. ha-Sh., op. cit.,* 220:7.
10. *Bava Metsia* 50b; Rif, *ad locum;* Maimonides, *op. cit.,* XII:4; Rosh, *Bava Metsia* IV:15; *Tur, op. cit.,* 227:6; *Sh. Ar., op. cit.,* 227:4; *Ar. ha-Sh., op. cit.,* 227:3.
11. *Bava Metsia* 50b; Rif *ad locum;* Maimonides, *op. cit.,* XII:2; Rosh, *op. cit.,* IV:15; *Tur, op. cit.,* 227:3; *Sh. Ar., op. cit.,* 227:2; *Ar. ha-Sh., loc. cit.*
12. *Bava Metsia* 50b; Rif, *ad locum;* Mamonides, *op. cit.,* XII:3; *Tur, op. cit.,* 227:4; *Sh. Ar., loc. cit.; Ar. ha-Sh., loc. cit.*
13. R. Meir b. Baruch of Rothenburg (1215–1293), *Responsa Maharam* 477; R. Isaac b. Moses of Vienna (c.1180–c.1250), *Or Zaru'a* III: *Bava Metsia, piska* 242; R. Meir ha-Kohen (end of 13th cen.), *Haggahot Maimuniyyot, Sekhirut* IX:4.
14. R. Jekuthiel Asher Zalman Zausmir (d. 1858), *Responsa Mahariaz, siman* 15 *amud* 14 *tur* 1.
15. Maimonides, *op. cit.,* VIII:15.
16. *Baraita, Bava Metsia* 56b.

17. *Ibid.*
18. *Sema, Sh. Ar., H. M.* 277 note 59.
19. R. Israel b. Pethaiah Isserlein, *Terumat Ha-Deshen* 318.
20. Maimonides, *op. cit.*, XIII:8.
21. R. Eliezer b. Samuel of Metz, *Sefer Yere'im* 127; Shabbetai b. Meir ha-Kohen's interpretation of R. Moses Isserles (*Siftei Kohen, Sh. Ar., H. M.* 227 note 17).
22. R. Jacob Tam, quoted in *Responsa Rosh, kelal* 102 and in *Tur, H. M.* 227:40; *Sema*'s interpretation of R. Moses Isserles (*Sema, Sh. Ar., op. cit.*, 227, note 49).
23. "Some authorities" quoted in Rif, *Bava Metsia* 56b and in Rosh, *Bava Metsia* IV:21.
24. Nahmanides at Leviticus 25:14.
25. *Siftei Kohen, loc. cit.*
26. R. Solomon b. Abraham Adret (Rashba; 1235–1310), *Responsa Rashba,* vol. 1, no. 729; vol. 3, no. 411; vol. 5, no. 126.
27. *Responsa Rashba,* vol. 3, no. 411; R. Isaac b. Sheshet Perfet (Ribash; 1326–1408), *Responsa Ribash,* no. 399; R. Shimon b. Zemah Duran (1361–1444), *Tashbez* 2:132; R. Moses b. Isaac Alashkar (1466–1542), *Responsa Maharam Alashkar,* no. 49.
28. *Responsa Rashba, loc. cit.; Tashbez, loc. cit.*
29. R. Gershom b. Judah (c.960–1028), *Responsa R. Gershom Me'or ha-Golah,* ed. Eidelberg, no. 67; R. Joseph b. Samuel Bonfils (11th cen.) quoted in *Responsa Maharam of Rothenburg* 423; *Responsa Rashba,* vol. 4, no. 311; R. Asher b. Jehiel, *Responsa Rosh* 101:1; R. Zemah b. Solomon Duran (15th cen.), *Yakhin u-Bo'az* pt. 2, no. 20.
30. For a description and analysis of the mandated functions of the Jewish community, see Levine, *Free Enterprise and Jewish Law,* pp. 131–160.
31. R. Isaac b. Jacob Alfasi, *Responsa Rif,* ed. Leiter, no. 13; R. Joseph b. Samuel Bonfils, quoted by R. Meir b. Baruch of Rothenburg, *Responsa Maharam* 423; R. Hayyim (Eliezer) b. Isaac (13th cen.), *Responsa Hayyim Or Zaru'a* no. 222; R. Eliezer b. Joel ha-Levi, quoted by R. Mordecai b. Hillel (1240–1298), *Mordecai, Bava Batra* I–482; Nahmanides, *Teshuvot ha-Rashba ha-Meyuhasot le-ha-Ramban,* 280; *Responsa Rashba* vol. 2, no. 279; vol. 5, nos. 126, 242, 270.

    The nature of the "majority decision" rule is disputed among Talmudic decisors. Within the framework of this decision rule, all voters, according to R. Meir of Rothenburg (quoted in *Mordecai, Bava Batra* 1:482), are weighted equally. A legislative proposal, hence, becomes effective by means of a simple majority vote. R. Asher b. Jehiel (*Responsa Rosh* VI:5, 7), according to the interpretation of *Sema* (*Sh. Ar., H. M.* 163, note 13), however, advances a different view of the majority decision rule. In his formulation, a "double majority" is required. This consists of both a majority of those eligible to vote and, in addition, a majority based on a system of weighting the votes of each member according to his projected assessment in defraying the expenditures (*rov minyan ve-rov binyan*).

    A dissenting minority view regarding the decision rule governing communal legislation is held by R. Jacob Tam (c.1100–1171). In his view, communal legislation becomes effective only by means of unanimous consent (see *Mordecai, Bava Batra* 1:481).
32. *Baraita, Bava Batra* 8a.
33. Adopting R. Asher's second approach to third-degree *ona'ah, Sema* (*Sh. Ar., op. cit.*, 227 note 14) regards the presumption of waiver as being universally descriptive of human nature. Accordingly, *Sema* rules that even if plaintiff had not yet made payment, consummation of the transaction by means of *kinyan* obligates him to make payment in full, including the *ona'ah* component of the sale price. Plaintiff's protest that he does not waive his claim against third-degree *ona'ah* is received incredulously, as everyone is presumed to waive his claims against third degree *ona'ah* (*batelah da'ato etsel kol adam*).

    The above presumption is viewed in a different light by R. Ephraim Nabon (*Mahaneh Efrayim, Hilkhot Ona'ah* 13). In his view the presumption is merely descriptive of majority behavior. Viewing the presumption in this attenuated form effectively places claimant at a disadvantage. Hence, in the event that payment had already been made, plaintiff's demand for the restoration of the third-degree *ona'ah* is denied, as we presume he is of the majority that waives such claims. On the other hand, in the event that payment was not yet made, the buyer is under no obligation to pay the *ona'ah* component of the purchase price, as he may insist that he is of the minority that does not waive such claims.
34. Rosh, *Bava Metsia* IV:20.
35. For an elaboration of the opportunity cost thesis of the *ona'ah* claim, see Levine, *Free Enterprise and Jewish Law,* pp. 105–109.

36. Nahmanides at Leviticus 25:14; R. Ezra Basri, *Dinei Mamonot,* vol. 2 (Jerusalem: Succoth David, 1976), p. 160. For a variant view, see *Sefer ha-Hinnukh, mitsvah* 337. Both *Sema* and *Mahaneh Efrayim,* whose views are in footnote 27, adopt the waiver approach to third-degree *ona'ah.*
37. *Ar. ha-Sh., op. cit.,* 227:21.
38. We should note that in respect to one segment of the *internal* labor market Halakhah specifically mandates a discriminatory wage scale. Compensation for a religious functionary hired by the community must be in accordance with his need. Need takes into account both family size and the cost of living. See *Ketubbot* 105a, 106a; Maimonides, *Shekalim* IV:7; R. Mosheh Sofer (Hungary, 1762–1839), Responsa *Hatam Sofer, Hoshen Mishpat* 166; R. Leopold Winkler (Hungary b. 1844), *Levushei Mordekhai, Hoshen Mishpat* 15.

    Rabbeinu Tam (*Tosafot, Ketubbot* 105a), however, limits the operational significance of this imperative. In his view, it applies only when the arrangement calls for the hiree to devote his time exclusively to the communal religious duties.
39. Implicit in R. Judah's reasoning is the modern analytical tool of consumer surplus. This concept is concerned with the relationship between market price and subjective value. Market price is today understood to be the result of the interplay of aggregate supply and demand forces. Price is determined outside the influence of the individual producer or consumer. The price an individual consumer would be willing to pay to obtain a given product may not coincide with this market price. When the consumer's subjective evaluation of the product falls below this price he obviously rejects the product. When his subjective evaluation of the product either coincides with or exceeds the market price, the consumer will buy the product. In the latter instance, he will enjoy a windfall as well. The difference between the maximum price the consumer would willingly pay to obtain the product rather than do without it and the actual transaction price provides a measure of this windfall or consumer surplus. Market price affords the purchaser consumer surplus when the subject commodity generates for him complementarities in consumption. Subjective equivalence is therefore realized by the purchaser at the above-market price he paid for the commodity.
40. Decisors ruling in accordance with the Sages' view include: R. Hai b. Sherira of Pumbedita (939–1038), quoted in Rif, *Bava Metsia* 58b and in Rosh, *Bava Metsia* IV:21; Maimonides, *op. cit.,* XIII:13; *Tur, op. cit.,* 227:15; *Sh. Ar., op. cit.,* 227:15; *Ar. ha-Sh., op. cit.,* 227:16. R. Hananel b. Hushi'el (11th cen.), *Bava Metsia* 59b, and *Sefer Yere'im* 259 follow R. Judah's view.
41. R. Yom Tov Ishbili (Ritva), *Kiddushin* 8a.
42. See R. Aryeh Loeb b. Joseph ha-Kohen, *Ketsot ha-Hoshen, Hoshen Mishpat* 227 note 1.
43. R. Aaron Walkin, *Zer Saviv li-Yere'av, Sefer Yere'im* 259, note 4.
44. R. Samuel b. Meir (Rashbam; c.1060–c.1130), *Bava Metsia* 51b; Maimonides, *op. cit.,* XIII:5; *Tur, op. cit.,* 227:37; *Sh. Ar., op. cit.,* 227:27; *Ar. ha-Sh., op. cit.,* 227:28. For a variant view of what constitutes selling on trust, see R. Israel of Krems (c.1375), *Haggahot Asheri, Bava Metsia* IV:17. This view is quoted in *Tur, loc. cit.*
45. *Ar. ha-Sh., loc. cit.*
46. R. Moses Isserles, *Rema, Sh. Ar., H. M.* 163:1.
47. Fogel, *op. cit.,* p. 10.
48. *Gittin* 59b.
49. Cf. Mishnah *Gittin* 5:8.
50. *Tanna kamma, Gittin* 61a; Rif, *ad locum;* Maimonides, *Zekhiya u-Mattanah* I:3; Rosh, *Gittin* V:21; *Tur, op. cit.,* 370:4; *Sh. Ar., op. cit.,* 370:4; *Ar. ha-Sh., op cit.,* 370:7.
51. Paula Englard, "The Sex Gap in Work and Wages," *Society* (July/August, 1985), pp. 70–71.
52. Fogel, *op. cit.,* p. 12.
53. Wetzel v. Liberty Mutual Insurance Company, 449 F Supp. 397 (W.D. Pa. 1978).
54. Shultz v. Wheaton Glass Co., 421 F2d 259 (CA 3 1970).
55. Fogel, *op. cit.,* pp. 42–48.
56. *Midrash Torat Kohanim, Behar* 25:14; R. Moses Isserles *Responsa Rema* 10; *Tashbez* 3:151; R. Moshe Schick (Hungary, 1807–1879), *Responsa Maharam Schick, Hoshen Mishpat* 31; R. Israel Meir ha-Kohen Kagan (1838–1933), *Ahavat Hesed* V:6–7.
57. Inter-Jewish loans may not call for an interest premium. Loan preference for the Jew applies even if the loan to the gentile would earn interest for the lender (see *Bava Metsia*

71a). One caveat should, however, be noted. If the Jew's livelihood is derived from lending money to non-Jews the financier is under no obligation to confer on a Jew an interest-free business loan at the expense of lending the money at interest to a non-Jew. Nonetheless, if the Jew needs the loan to achieve subsistence, his request must be given precedence, despite the opportunity cost involved (*Ahavat Hesed* V:3).

58. In the summer of 1934, the Histadrut Labor Federation in Palestine set up pickets around the orchards of Sharon to force Jewish proprietors to hire Jewish workers over Arabs. In Kefar Sava, the pickets included members of Poalei Agudath Israel, the Agudah workers' party.

    In a series of "open letters" to leaders of the Poalei Agudath Israel in Erets Yisrael, R. Elhanan Wasserman (1875–1941), protested against Histadrut's position as infringing upon the legitimate rights of the growers. Torah law, pointed out R. Wasserman, prohibits anyone from taking the law into his own hands. Moreover, while the Torah requires the Jew to give preference in hiring to his fellow Jew, this applies only when the wage difference is small. When the differential is, however, substantial, Halakhah does not demand the sacrifice. Finally, even when the law of preference is operative it constitutes only an ethical obligation for the employer rather than a legal right for the workers. As such, the power of enforcement is in the hands of the Jewish court, which has the sole power to compel the performance of ethical duties and positive commandments. Consequently, the unions have no authority to enforce their wishes upon the growers. (See Aaron Sorasky, *Reb Elchonon,* adapted from the Hebrew biography, *Or Elhanan* [New York: Mesorah publication, Ltd., 1982], pp. 271–277).
59. See footnote 55.
60. Tosafot, *Avodah Zorah* 20a; *Responsa Rema* 10; *Responsa Maharam Schick, loc. cit.; Ahavat Hesed,* V:7. Positing a minority view, R. Isaac b. Eliezer de Leon (17th cen.), maintains that the law of preference is operative even when the differential involved is substantial (*Megillat Ester* to *Sefer ha-Mitsvot* of Maimonides, *shoresh* 6).
61. *Netiv ha-Hesed, Dinei Mitsvat Halva'ah* 5:7 note 12.
62. Solomon Polachek, "Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure," *Review of Economics and Statistics* 58 (1981).
63. Edward G. Dolan and John C. Goodman, *Economics of Public Policy* (New York: West Publishing Co.), 1985, third ed. p. 152.
64. Walter Block, "Economic Intervention, Discrimination and Unforeseen Consequences," in W.E. Block and M.A. Walker, eds., *Discrimination, Affirmative Action and Equal Opportunity* (Vancouver, B.C.: Fraser Institute, 1982), pp. 105–113.
65. Elaine Sorensen, "Equal Pay for Comparable Worth: A Policy for Eliminating the Undervaluation of Women's Work," in *Journal of Economic Issues* (XVIII no. 2, June 1984), pp. 465–471.
66. Dolan and Goodman, *op. cit.,* pp. 153–157.
67. R. Abraham b. David of Posquières (c.1120–c.1197), introduction to his *Ba'alei ha-Nefesh* (Jerusalem: Mosad HaRav Kook, 1964).
68. *Yevamot* 63a; *Sanhedrin* 22b.
69. Mishnah, *Yevamot* VI:6; Rif, *Yevamot* 65b; Maimonides, *Ishut* XV:2; Rosh, *Yevamot* VI:20; *Tur, Even ha-Ezer* 1:1; *Sh.Ar., Even ha-Ezer,* 1:1; *Ar. ha-Sh., Even ha-Ezer* 1:1.
70. *Tanna kamma,* Mishnah, *Yevamot* VI:6; Rif, *loc. cit.;* Maimonides, *loc. cit.;* Rosh, *loc. cit.; Tur, op. cit.,* 1:13; *Sh.Ar., op. cit.,* 1:13; *Ar. ha-Sh., op. cit.,* 1:2.
71. R. Samson R. Hirsch, *The Pentateuch* (Gateshead, Judaica Press, LTS., 1982), commentary at Genesis 2:18.
72. See R. Moshe Meiselman, *Jewish Woman in Jewish Law* (New York: KTAV Publishing House Inc., Yeshiva University Press, 1978), pp. 22–25.
73. Nahmanides, commentary at Deuteronomy 4:12.
74. R. Bahya b. Asher, commentary at Deuteronomy 4:12.
75. *Ibid.*
76. See, Meiselman, *op. cit.,* pp. 26–33.
77. Ray Marshall and Beth Paulin, "The Wages of Women's Work," in *Society* (July/August, 1985), p. 28.
78. Brigitte Berger, "At Odds with American Reality," in *Society* (July/August 1985), p. 77.
79. Goodman and Dolan, *op. cit.,* p. 155.