

**On Expressing Compassion for Workers and Respecting their Choices:
Concurring In Part and Dissenting In Part by Mr. Marc Gary, Esq.**

This paper was submitted to the CJLS as a partial concurrence and partial dissent to Rabbi Jill Jacobs's responsum "Work, Workers and the Jewish Owner" The following voting members of the committee endorsed this paper: Rabbis Jerry Epstein, Baruch Frydman-Kohl, Adam Kligfeld, Paul Plotkin, Elie Spitz, Loel Weiss

Dissenting and concurring papers are not official positions of the CJLS

There is much to admire in Rabbi Jacobs' teshuvah on "Work, Workers, and the Jewish Owner," and she should be applauded for bringing important issues regarding labor relations and the plight of low income workers to the attention of our Movement. I agree with many of her conclusions, including that Jewish employers should treat their workers with dignity and respect; that they must pay their workers on time; that they must not knowingly put their employees' lives at risk; and that they should comply with federal labor laws. I also agree with her conclusion that employees are obligated to work at full capacity during their work hours and that Jewish union leaders should strive to ensure that workers uphold the halachic obligations of employees to employers. Her depiction of the ideal worker-employer relationship – "one of trusted partnership, in which each party looks out for the well-being of the other, and in which the two parties consider themselves to be working together for the perfection of the divine world" – is an inspiring goal that reflects the idealism and passion that underlie the teshuvah.

I write separately, however, to voice my dissent to certain portions and conclusions of the teshuvah that, in my judgment, are directly contrary to the halachic sources and ethical norms that purportedly form the basis of the document. In particular, I find the teshuvah's conclusions that Jewish employers should discriminate against workers who choose not to join unions and that they are required to accept "card check" elections in lieu of secret ballots (Conclusion 6, page 47) to be utterly unsupported by our tradition, politically motivated, ethically questionable, and contrary to the principle that we should protect and respect workers' choices. I also wish to express my concerns about the appropriateness of using the mode of a teshuvah and the forum of the CJLS to express support for the "living wage" concept, when there are more appropriate ways and places to do so.

Expressing our Compassion: The Role of Halacha and the CJLS

At the September 13, 2006 meeting of the CJLS, the Committee rejected an earlier version of Rabbi Jacobs' teshuvah on "Work, Workers, and the Jewish Owner" by a vote of 3 in favor, 7 opposed and 10 abstentions.¹ One of the principle differences – indeed, the key difference -- between that version and the one approved by the CJLS on May 28, 2008 relates to the conclusion regarding the "living wage." In the earlier version, Rabbi Jacobs argued that Jewish employers should be obligated to pay their employees – particularly unskilled, entry level employees -- a wage substantially above

¹ See Minutes of the Committee on Jewish Law and Standards (September 13, 2006).

the level warranted by the market and two or three (or more) times the federally mandated minimum wage. Several members of the Committee – including myself – voiced strong concern that such an obligation might threaten the financial viability of small businesses and non-profits (including synagogues and Jewish organizations) and would likely lead to a reduction in jobs and employment opportunities for unskilled workers, who comprise the most economically vulnerable portion of the labor force. In addition, I and others argued that such an obligation was unsupported by the cited sources and ran contrary to traditional notions of communal responsibility because it placed the burden of supporting the poor disproportionately on the shoulders of those least likely to be able to bear it (small business owners and nonprofit organizations).

The approved version of the teshuvah has wisely eschewed the language of obligation in its “living wage” discussion. Instead, it concludes that “Jewish employers should strive to pay workers a ‘living wage’” (Teshuvah, Conclusion 5, page 47; emphasis added). That language provides sufficient flexibility for Jewish business owners, when setting wage levels, to consider the impact on the financial viability of the business and on employees’ jobs, among other factors. While business owners and leaders of non-profit organizations “should strive” to pay their workers at the higher levels articulated in the teshuvah, neither the language nor the spirit of the teshuvah requires them to do so if it would place either their business or employees’ jobs in jeopardy.²

² It seems obvious that if an employer has to pay dramatically higher labor costs (e.g., \$40,000 for a busboy in Miami), particularly in a business with low margins (such as the restaurant business) or no margins (such as many non-profit organizations), he or she may not be able to stay in business. It seems equally obvious that if employers were compelled to pay unskilled workers dramatically more than their work is worth in the marketplace, they will hire less such workers. In an appendix that is not part of the approved teshuvah, Rabbi Jacobs tries to argue to the contrary by citing studies on the impact of “living wage” legislation passed by some states or municipalities. She ignores or attempts to discredit a large number of studies that, in fact, find that such legislation has reduced jobs and employment opportunities, particularly for unskilled workers. See, e.g., C. Horowitz, Keeping the Poor Poor: The Dark Side of the Living Wage” in Policy Analysis (Oct. 21, 2003) (“Decades of research have shown that the minimum wage harms the least-skilled workers from poor families while heavily benefiting young workers from middle-income households. Several studies critical of the living wage come to similar conclusions.”); T. Sowell, “Living Wage Kills Jobs” <http://www.townhall.com/opinion/columns/tomassowell/2003> (“The new Cato Institute study cites data showing job losses in places where living wage laws have been imposed. This should not be the least bit surprising. Making anything more expensive almost invariably leads to few purchases. That includes labor.”); David Neumark, “How Living Wage Laws Affect Low-Wage Workers and Low-Income Families,” Public Policy Institute of California (2002) (concluding that living wage laws in 20 cities raise the wages of low-wage earners, but at the cost of reduced employment; “These disemployment effects counter the positive effect of living wage laws on the wages of low-wage workers, pointing to the tradeoff between wages and employment that economic theory would predict.”); S. Adams and D. Neumark, National Bureau of Economic Research Paper No. 11342 (issued May 2005) (“We find that living wage laws raise wages of lo-wage workers but reduce employment among the least skilled, especially when the laws cover business assistance recipients or are accompanied by similar laws in nearby cities).

In any event, studies of living wage ordinances – whether pro or con – are not particularly relevant here for two reasons. First, none of the living wage ordinances have raised minimum wages by the dramatic degree reflected in several of the methodologies posited by the teshuvah. Even the principal advocate for living wage legislation – economist Robert Pollin – has stated that raising the “minimum wage too high or too rapidly probably would discourage business from hiring low-wage workers, as many critics contend.” (LA Times (Feb. 8, 2007).

Even in its final form, however, the teshuvah's failure to emphasize or even acknowledge the community's shared responsibility to insure that the basic needs of low-wage workers are met remains a distressing deficiency. As the teshuvah repeatedly points out, the traditional rabbinic model does not provide for a minimum wage or a "living wage," but rather relies upon market forces to establish the appropriate wages.³ The teshuvah attributes this omission of a "living wage" standard from the halachic sources to the rabbis' lack of familiarity with workers unable to afford the necessities of life (Teshuvah, page 24), but that assertion cannot withstand a moment's scrutiny. While Jews throughout history have been spiritually rich, many of them have lived in extreme poverty. We are not the first generation of Jews to confront the "working poor." Indeed, Nachmanides (Teshuvah, page 22) is well aware of employees in dire economic straits as is the Tosefta, which refers to an employee who is unable to feed both himself and his children on his meager wages (t. Bava Metzia 8:2). It seems more reasonable to conclude that the rabbis did not argue for an above-market wage because they feared its impact on both Jewish employers and employment opportunities for poor workers. Instead, they created elaborate laws regarding tzedakah and communal responsibility to insure that the poor would have the necessities of life. In other words, the rabbis placed the responsibility for insuring that basic needs of poor families were met on the community as a whole rather than singling out Jewish business owners alone for that responsibility. It is that insistence on shared communal responsibility that is missing from the teshuvah.

Nevertheless, as an expression of our compassion for poor workers, it is hard to argue with the conclusion that we "should strive" to pay employees a living wage.⁴ But the larger question is whether such a precatory aspiration should form the basis for a P'sak Din of a teshuvah. While it is true, as the teshuvah maintains, that halacha should reflect our values, that statement does not mean that each of our values needs expression in its own teshuvah. As one member of the CJLS pointed out, Judaism provides numerous alternative ways to express our values outside of the halachic process. If we try to shoehorn every aspirational goal into the form and language of a teshuvah (e.g., Jews "should strive" to buy gas-efficient cars because we value protection of the

Second, and perhaps more importantly, unlike living wage ordinances which apply to all similarly situated workers, the teshuvah applies only to observant Jewish business owners who have to compete with others to whom the teshuvah has no application (e.g., non-Jews). The economic impact is therefore disparate, placing the Jewish business owner and his or her employees in a particularly precarious situation.

³ See, e.g., Teshuvah, page 16 ("From this story [y. Bava Metzia 7:1] we can infer that market forces are the only factor governing working conditions and that employers may demand any conditions that workers will accept."); page 15 ("The major contemporary writers on Judaism and business ethics have understood the principle of minhag hamakom as evidence of halachic support for a controlled free market system."); page 14 ("Most Jewish employment law revolves around the concept of minhag hamakom – that the custom of the place determines worker's salaries as well as other working conditions.")

⁴ In an attempt to foster a compromise in 2006, I suggested a conclusion that included the statement that "Jewish employers should endeavor to pay their full-time workers a wage that will enable the workers to support themselves and their immediate families, provided that the payment of such a wage does not threaten other employees with the loss of their jobs or threaten the business owner with the loss of his or her business." Rabbi Jacobs rejected this proposal. See Minutes of the September 13, 2006 Meeting of the Committee on Jewish Law and Standards, p. 5.

environment, or Jews “should strive” to participate in Habitat for Humanity because we value the elimination of homelessness), we risk deflating the directive power of our halachic rulings and relegating the CJLS to the role of the Movement’s nanny instead of its authoritative provider of legal guidance.

I recognize, of course, that there are numerous theories of Jewish law and some of them might embrace teshuvot that exhort rather than mandate, permit, or forbid.⁵ But there are alternative methods and forums – resolutions at an RA or USCJ convention, for instance, or pastoral letters – that will often times be more appropriate for aspirational expressions, precatory pronouncements, and statements of our values than a teshuvah issued by the CJLS. That is especially true where there are competing policy issues and political overtones. I believe that the Committee erred by not giving more fulsome consideration of those alternatives with respect to this teshuvah.

Respecting Workers’ Choices

As the Teshuvah recognizes (page 3, note 2), only 12% of workers join unions (less than half the number of 30 years ago) and less than 8% of workers in the private sector join unions. The Teshuvah attributes this low and declining number to pervasive and rampant violations of law, arguing (without citation) that “in more than 90% of cases, employers do interfere with union organizing drives.” (Teshuvah, page 42). Since there is no reason to believe that Jewish employers are not proportionately represented among these alleged violators, this assertion is a blanket indictment of a large segment of our congregations and communities. I categorically reject it.

No one would deny that unfair labor practices do, in fact, occur during the course of labor organizing campaigns. A fair and balanced discussion of the issue, however, would include the fact that such practices occur on both sides, management and labor. The National Labor Relations Board reports literally thousands of allegations of wrongdoing by unions each year, the majority of which are filed by individuals. Most of the charges allege that the unions engaged in illegal restraint and coercion of employees. (Source: National Labor Relations Board’s Case Activity Tracking Database).

Moreover, a dispassionate analysis of the state of today’s labor movement might also consider the possibility that the low numbers reflected in union membership could be attributed to factors other than employers’ unlawful interference in organizing campaigns. It is conceivable that employees choose not to join unions because unions have been associated in the past with corruption, racism, sexism, and xenophobia. Others may choose not to join because unions support political candidates or causes (overwhelmingly Democratic) that certain workers choose not to support. Still others would rather not be forced to pay union dues. And others may simply believe that unions are ineffective on the matters they care about most, such as the preservation of jobs.

⁵ See generally, Elliot N. Dorff, The Unfolding Tradition: Jewish Law After Sinai (New York: Aviv Press 2005)

Even if we accept at face value the studies cited in the teshuvah, less than half of workers even want unions. The Freeman and Rogers study quoted at page 42 found that only “45 percent of employees want a strongly independent workplace organization” which the teshuvah interprets as a union.⁶ That number is astonishingly low given the fact that the respondents were not being asked whether they want to join a specific union (e.g. the Teamsters) or whether they would be willing to pay dues to such a union. The 45 percent figure would undoubtedly drop further if respondents were asked to express a preference, not for an ideal construct, but for a real option.

Regardless of how many employees would choose to join a union, the teshuvah is correct in asserting that Jewish law protects the rights of workers to unionize and that it forbids interfering with that choice. But the teshuvah goes seriously astray from both halachic principles and ethical norms by concluding (at page 47, Conclusion 6), that Jewish employers should discriminate against workers who choose not to join unions by “striv[ing] to hire unionized workers when possible.” That conclusion seems to run counter to the entire theme of the teshuvah: respect for workers. If we truly respect workers, we should respect their choice to join a union or to refuse to join a union. We should not inhibit a worker’s job opportunities because he or she made (in the teshuvah’s view) the “wrong choice” (i.e., not to join a union) by mandating a hiring preference for only those who make the “right choice” (i.e., to join a union).⁷

Finally, the teshuvah – without any discussion, analysis, or reasoning whatsoever – concludes (at page 47, Conclusion 6), that halacha should prohibit employers from “refusing workers the option for ‘card check’ elections.” In making that bald assertion, the teshuvah places the weight of halacha and the influence of the CJLS on one side of a bitterly partisan political controversy. Under present law, a union can only be certified as the collective bargaining unit for a workplace through a federally supervised secret ballot election. Secret elections have been deemed to be critical to protecting the rights of both workers and employers.⁸ Proponents of card check elections (generally, organized labor) seek to dispense with secret ballot elections in favor of open solicitation of authorization cards by union organizers. Critics of card check elections claim that – precisely because they are not secret – employees can be subjected to pressure and even coercion. As a federal court of appeals observed, “It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a ‘card check’ unless it were an

⁶ The study also found that another “43 percent want an organization with more limited independence from management” which would certainly not describe a union but rather something more akin to a workers’ advisory council or an affinity group.

⁷ In 2006, I suggested to Rabbi Jacobs that she alter the conclusion on unions to read, in pertinent part, “Jewish employers should respect the decision of their employees whether or not to join a union or unionize a workplace and should not discriminate or retaliate against them based upon their choice.” Rabbi Jacobs rejected this suggestion. See Minutes of the September 13, 2006 Meeting of the Committee on Jewish Law and Standards, p. 5.

⁸ See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969), in which the United States Supreme Court states that “Secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support.”

employer's request for an open show of hands. The one is no more reliable than the other.”⁹

The top legislative priority of organized labor is passage of the so-called “Employee Free Choice Act” which would dispense with the requirement of secret ballots if labor organizers could solicit signed authorization cards from a majority of employees. The political debate surrounding this bill and card checks in general tends to split along party lines. In the absence of passage of this legislation, labor organizers sometimes resort to corporate campaigns to try to influence or pressure employers to “voluntarily” recognize a union that has gathered a majority of authorization cards. By approving the teshuvah, the CJLS has sided with organized labor in this partisan political fight and against those who wish to preserve the federally supervised secret ballot procedure. Not a single source is cited in support of this position, nor is any halachic argumentation put forward. It is a purely political statement, which should have no place at the CJLS.

Conclusion

I concur with Conclusions 2, 3, 4, 7, and 8 of the teshuvah.

I dissent from Conclusion 1 because it rests on the faulty premise that the free market wage system reflected in rabbinic sources was based on the rabbis' lack of awareness of poor workers who could not support their families and it ignores the importance of shared communal responsibility in providing for such poor workers.

While I do not disagree in principle with Conclusion 5 that Jewish employers “should strive” to pay workers a living wage, the CJLS should have declined to cloak that aspirational statement with the mantle of halacha (particularly given its political context) and referred consideration of the issue to a more appropriate body of the RA.

I dissent from the portion of Conclusion 6 that urges Jewish employers to discriminate against workers who choose not to join unions and the portion that endorses – without any halachic reasoning or argumentation -- the politically-charged “card check” procedure in lieu of secret ballot elections.

⁹ NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967).