

ANI HA'MEHAPECH BE'CHARARAH

Talmudic Intrigue in: Real Estate, Party Brownies, Dating and Dream Jobs

Teacher's Guide

We live in a world of finite resources, and it is inevitable that we occasionally end up at odds with others, each side vying for exclusive rights to certain resources. These disputes may be over a house, a car, employment, or even a spouse.

In the process of seeking to buy a dream home or dating a prospective spouse, we may find ourselves trying to outmaneuver others who have the same goal. This is called "competition." When two or more people compete for a single resource, one of them will ultimately achieve his goal at the cost of the others. On the one hand, the Talmud (Bava Batra 21b) generally endorses competition, in spite of the fact that somebody will end up losing out. That's life.

On the other hand, not all competition is *fair competition*; not every "that's life" *ought to be* part of life. Judaism provides a framework for what competition is considered legitimate, and which crosses the "red lines."

This *Thinking Gemara* shiur will examine a fascinating tenet of Talmudic law that addresses fair competition: the concept of *ani ha'mehapech be'chararah* (a pauper searching for bread), which implies concrete restrictions on what is considered fair competition.

KEY QUESTIONS

- When is competition considered fair, and when is it unfair?
- Are there any sanctions against unfair competing?
- Does the concept of unfair competition apply even to the acquisition of ownerless property?
- To which non-commercial fields does the concept of unfair competition apply?

CLASS OUTLINE

Section I. Ground Rules of Ani Ha'Mehapech Be'Chararah – Fair and Unfair Competition

Case 1: Negotiating to Buy the Weinstains' Home

Section II. Ani Ha'Mehapech Be'Chararah in Acquiring Ownerless Property

Case 2: Swooping in on the Last Hot Brownie at the Paris JCC

Section III. Ani Ha'Mehapech Be'Chararah in Dating

Case 3: Going out with Rachel who is Already Dating Someone Else

Section IV. Fair Competition in Finding Employment

Case 4: Applying for a Position when the Employer is Imminently Closing with Another Candidate

Note: This shiur is not intended as a source of practical *halachic* (legal) rulings. For matters of halachah, please consult a qualified *posek* (rabbi).

SECTION I Ground Rules of Ani Ha'Mehapech Be'Chararah – Fair and Unfair Competition

The classic scenario of unfair competition is a commercial setting, with two people competing to buy a single item for sale. Consider the following case:

Case 1. *The Weinstains had their house on the market for three months for an asking price of \$500,000 and several bids arrived way below range. The Schwartzes then came along, very keen to buy. They offered \$480,000, which the Weinstains didn't formally accept. After three meetings and subsequent discussions, it was clear to all that a final resolution was near, and the price was decided at \$485,000. The night before the next scheduled meeting, the Weinstains received an unqualified offer for their asking price of \$500,000 from the Goldbars, who were prepared to sign the next morning at 8AM.*

What should the Weinstains do?

- Call the Schwartzes and offer them to buy the house for the \$500,000 and if not, close with the Goldbars?
- Go ahead and sell straight away to the Goldbars?
- Ask the Goldbars to wait and see if they close the deal with the Schwartzes in line with their ongoing negotiations?

The following Talmudic episode demonstrates a classic case of unfair competition.

Source 1. Talmud Bavli, Kedushin 59a – A second buyer preempts the first one.

Rav Gidel was negotiating to buying a certain piece of land. Rabbi Abba went and bought it. Rav Gidel complained to Rabbi Zeira about what happened. Rabbi Zeira passed the complaint on to Rav Yitzchak Nafcha. Rav Yitzchak Nafcha replied, "Wait until Rabbi Abba comes to me for the holiday." When Rabbi Abba visited, Rav Yitzchak Nafcha asked him [the following case], "If one poor person is going after a piece of bread and another comes and takes it, what is the law?" Rabbi Abba replied, "He is called a 'rasha' (a wicked person)." "So why did the master [you] do such a thing?" asked Rav Yitzchak Nafcha. He answered, "I did not know [that Rav Gidel had been negotiating to buy]."

רב גידל הוה מהפּיך בַּהּהיא ארְעָא. אָזל רבי אבא וזבֵּנָה. אָזל רב גידל קבֵּלֶיהָ לְרַבִּי זִירָא. אָזל רבי זִירָא וקבֵּלֶיהָ לְרַב יִצְחָק נַפְחָא. אָמַר לִיה, "הַמֵּתֵן עַד שִׁיעֲלָה אֶצְלָנוּ לְרִגְלִי." כִּי סָלִיק אֲשָׁכְחִיהָ. אָמַר לִיה, "עֲנֵי מַהֲפִךְ בַּחֲרָרָה וּבֵא אַחֵר וְנִטְלָה הַיָּמִינוּ מֵאִי?" אָמַר לִיה, "נִקְרָא רָשָׁע." "וְאֵלָא מִרְמָא טַעֲמָא עֲבַד הָכִי?" אָמַר לִיה, "לֹא הָוָה יִדְעָנָא."

Before we understand the implications of this Gemara, let's first make sure we've got the facts straight:

1. Who was originally negotiating to buy the field? – Rav Gidel.
2. Who cut in and actually bought it? – Rabbi Abba.
3. Who chastised the buyer? – Rabbi Yitzchak Nafcha.
4. What is the analogy to the case, presented by Rav Yitzchak Nafcha? – Somebody negotiating to buy a piece of land, only to be overtaken by a second buyer, is like a poor person pursuing bread, only to have it taken away by someone else.

This passage of the Gemara establishes the basic law of ani ha'mehapech be'chararah: If someone is in the process of negotiating the purchase of a plot of land, and is about to close the deal when somebody else comes in and beats him to it, the second buyer is called a rasha (wicked).

Why should the second buyer be called a rasha? This term is an unusual reply to a question in Jewish law. Generally, the response to such a query would be whether one's action is permitted or prohibited, and if it's the latter, what type of penalty applies. So, why the use of the term "rasha"?

We will look at two opinions:

Source 2. Rashi (Rabbi Shlomo ben Yitzchak), Kedushin 59a – The second person is threatening the first person's welfare.

He is called a wicked person – a rasha – because he takes away the other's livelihood.

נִקְרָא רָשָׁע - שִׁיּוּרְד לְחַיֵּי
חֲבִירוֹ.

According to Rashi, this Gemara prohibits hurting another's livelihood. If a poor man is pursuing a loaf of bread – or an investor is pursuing a property – to cut in on him is wrong. Taking the bread (by the second poor man) is not theft, because the poor man doesn't yet own the bread, and therefore no formal prohibition is involved. It certainly isn't theft to buy a property that someone else already negotiated to buy. Yet, this Gemara teaches us that to snatch the bread or to preempt the other purchaser is wrong because it takes away the other's source of livelihood. This is categorized as unfair business competition.

Let's see a second opinion:

Source 3. Tosafot, Talmud Bavli, Kedushin 59a – The second person should look for opportunities elsewhere.

Rabbeinu Tam says that this prohibition is only applicable if the poor person wants to earn money by hiring himself out or if one wants to purchase something and another preempts him and buys it, similar to the Rav Gidel episode. The second person is called wicked – for why did he go after that which the first person is working hard at attaining? He should go and earn money somewhere else.

ואמר רבינו תם דאיסור
דמהפך דנקט הכא לא שייך
אלא דוקא בשרוצה העני
להרויח בשכירות או בשרוצה
לקנות דבר אחד ויחברו
מקדים וקונה והוי דומיא
דרב גידל ומשום הכי קאמר
דנקרא רשע כי למה מחזר
על זאת שטרח בה חבירו ילף
וישפיר במקום אחר.

How, according to Rabbeinu Tam, is the first poor man trying to acquire the bread? He is either trying to hire himself out in order to buy himself bread, or else he's actually in the process of trying to buy the bread.

According to Rabbeinu Tam, looking out for one's own interests when there are limited resources doesn't deem you "evil." The prohibition this Gemara speaks about is a certain form of opportunistic cruelty. If a poor person went through the trouble of finding someone to hire him so he can earn his daily bread, or another already went through the process of negotiating a real estate purchase, others should go elsewhere. "Get someone else to hire you!" we say to the second poor man; "Buy a different field!" we say to the second purchaser. It is cruel to cut in.

According to both Rashi and Tosafot, the term rasha is applied because there is no clear law that was transgressed – there was no theft. However, one who jeopardizes another's livelihood or cuts in on the first person's negotiations is morally reprehensible, and deserves the appellation "rasha."

Now, this does not mean that all competition is bad and forbidden. In general, competition is a positive concept, and the Rema clarifies that only under specific circumstances is there room to limit it.

Source 4. Rema, Choshen Mishpat 237:1 - Ani ha'mehapech be'chararah applies when there is agreement on the essential terms of the sale.

[A person is considered a “rasha”] only when the terms have been agreed upon between the buyer and seller, and only the final act of transfer is lacking. However, if the price has not yet been agreed upon, because the seller wants a higher price and the buyer a lower price, it is permitted for someone else to buy the property.

וְכָל זֶה לֹא מֵיִירֵי אֶלָּא כְּשֶׁכָּבַר
פְּסָקוֹ הַדָּמִים שְׂפִינֵיהֶם, וְאֵין
מְחוּסְרִין אֶלָּא הַקֶּנֶן. אֲבָל
אִם מְחוּסְרִין עֲדֵיין הַפְּסִיקָה,
שֶׁהַמּוֹכֵר רוֹצֵה בְּכֶךְ וְהַקּוֹנֶה
רוֹצֵה יוֹתֵר בְּזוֹל, מוֹתֵר לְאַחֵר
לְקַנּוֹתוֹ.

The Perishah (Choshen Mishpat 237) goes so far as to rule that even if some terms are still open for negotiation (such as the precise schedule of payment), if it is almost certain that agreement will be reached, the halachah of ani ha'mehapech be'chararah applies.

These rulings may seem similar to a different Jewish (and general) legal infraction – negotiating in bad faith, i.e. carrying out exhaustive negotiations without intention to carry through. It is certainly wrong for a party to negotiate a contract until all the terms are agreed on, only to back out at the last minute and settle with someone else. Yet, in the case of ani ha'mehapech be'chararah, it is important to note that the prohibition applies specifically to other potential buyers, and not to the seller himself.

Source 5. Shut Avnei Nezer, Choshen Mishpat 17 - Ani ha'mehapech be'chararah only applies to a sale initiated by a potential second buyer.

If the seller decides not to sell to the first customer, the halachah of ani ha'mehapech be'chararah does not apply. In fact, the seller can always retract amidst negotiations with the first buyer and decide to sell to someone else, in which case it is permitted for a third party to buy from him, since the seller wishes to sell to the third party and not to the original buyer. The prohibition only applies when a third party initiates an offer to the seller while the seller still intends to close the deal with the initial buyer.

כָּל זְמַן שֶׁאֵינוֹ רוֹצֵה לְמַכְרָה
לּוֹ אֵין דִּין עֲנֵי הַמַּהְפֵּךְ
בְּחֻרְרָה. וְאִם כֵּן לְעוֹלָם יָכוֹל
הַמּוֹכֵר לְחַזּוֹר מִהֶרָאשׁוֹן
וּלְמַכּוֹר לְאַחֵר, וְהָאֲחֵר מוֹתֵר
לְקַנּוֹת מִמֶּנּוּ דְּכֵינֵן שֶׁהַמּוֹכֵר
רוֹצֵה לְמַכּוֹר לְהָאֲחֵר וְלֹא
לְלוֹקֵחַ רִאשׁוֹן, שׁוֹב אֵין
אִיסוּר לְהָאֲחֵר וְאֵין אִיסוּר כִּי
אִם הָאֲחֵר הִתְחִיל עִם הַמּוֹכֵר
בְּעוֹד שֶׁרֹצֵה לְמַכּוֹר לְהֶרָאשׁוֹן.

Why does the prohibition of ani ha'mehapech be'chararah apply only to an unsolicited offer by a second buyer, whereas it remains acceptable for the seller himself to seek alternate offers?

The issue here is an issue of competition, and competition can only take place

between two buyers, and not between a buyer and a seller. The seller owns his property, and he reserves the right to sell it to whomever he chooses. The potential buyer, however, must be wary to compete fairly.

After three meetings, and after having decided on the price, it appears that all terms between the Schwartzes and the Weinstens have been settled, and a potential competing buyer will therefore be subject to the restriction of ani ha'mehapech be'chararah. Thus, after finding out about the Schwartzes' original offer, the Goldbars should withdraw their offer and allow the original transaction to be completed. It is also wrong for the Weinstens to go along with the Goldbars' offer, because in so doing he joins their wrongful act of unfair competition with the Schwartzes (Rabbi Binyamin Zilber, *Shut Az Nidberu*, Vol. 7, no. 87). The correct option is to ask the Goldbars to wait and see if they close the deal with the Schwartzes.

Now let's assume that the Goldbars did not know the rules on unfair competition, and therefore went ahead and bought the property. The day after signing, the Goldbars receive a call from the angry Schwartzes, informing them that they had been scheduled to sign the contract that very day. After the event of buying, is there anything the buyer must do? Do you think the Goldbars should retract their purchase?

Source 6. Ritva (Rabbi Yom Tov ben Avraham Asevilli), Kiddushin 59a – There is no obligation to cancel the sale.

However, that which [Rabbeinu Tam stated elsewhere – quoted in Ramban, Bava Batra 54b] that whenever the second buyer is termed a rasha, beit din (the Jewish court) obligates him to return the money [and cancel the sale], is untrue...Rather, he is termed a rasha but is not obligated in any way to the original buyer.

מִיֵּהוּ מָה שֶׁכָּתַב הוּא
זְכוּרֵנוּ לְבִרְכָּה דְּכָל הַיָּכָא
שֶׁנִּקְרָא רָשָׁע בֵּית דִּין מְחַיֵּיבֵין
אוֹתוֹ לְהַחזִיר הַדָּמִים הָאֵלֶּ
לִיתָא ... אֶלָּא וְדַאי דְּרָשָׁע
מְקַרֵּי אַבָּל אֵינוֹ חַיִּיב בְּכֻלּוֹם
לְרֵאשׁוֹן.

According to Rabbeinu Tam, a second buyer who is termed a rasha must void the sale and allow the first buyer to complete the purchase. Apparently, Rabbeinu Tam understood that being termed a rasha implies a formal legal status, and therefore the buyer must void the sale.

The Ritva, however, who represents the majority opinion among halachic authorities, underscores the point that although unfair competition is wrong, it is not comparable to theft. Because no formal prohibition was transgressed, there is no obligation to cancel the sale and allow the first buyer to buy the purchase.

At the same time, it stands to reason that someone who intentionally and wrongly outdid the first buyer, and now wishes to repent his misdeed, should permit the first buyer to complete his purchase.

But what about somebody who bought a property inadvertently, without knowing of any original offer. Does the prohibition apply even when the competing buyer made his offer without knowing about the first buyer?

Source 7. Rabbi Yechiel Michel Epstein, Aruch Hashulchan, Choshen Mishpat 237:2 – A second buyer unaware of the first potential buyer is not deemed a rasha.

If the second buyer was not aware of the first buyer's negotiations towards purchase – and he therefore bought it – he is not termed a rasha. Nonetheless, it is considered an act of piety to permit the first buyer to buy the purchase, even in this case.

אם האחר היה שוגג שלא ידע
שהראשון מהפך בדבר זה
לקנותה, וקנה, אינו רשע,
ומדת חסידות להניחה לפני
הראשון גם בכי האי גוונא.

Rabbi Moshe Feinstein, however, writes that even if the second buyer entered the competition inadvertently, the full prohibition applies.

Source 8. Rav Moshe Feinstein, Igrot Moshe, Choshen Mishpat 1:60 – Even an inadvertent second buyer is considered a rasha.

The Shulchan Aruch makes no mention of the distinction between the second buyer knowing or not knowing about the efforts of the first buyer to buy the purchase or to hire himself out. Rather, the halachah is stated without qualification, implying that even if the second buyer was unaware, if he doesn't wish to be termed a rasha he must sell the purchase back to the first buyer, or give the job to the first person.

הנה בשלחן ערוך חושן
משפט סימן רלז לא הזכיר
חלוק בין ידע השני
שהראשון החזיר אחר הדבר
לקנותה או להשכיר
עצמו או לא ידע דסתמא
נאמר הדין, משמע שאף בלא
ידע יש עליו חיוב אם
אינו רוצה להקרא רשע
להחזיר ולמכור להראשון
ולמסור השכירות לראשון.

What is the basis for this dispute? According to Rabbi Epstein, the second buyer can only be called a rasha if he acted with intent. Barring this, he did not act wickedly, and won't be called a rasha. According to Rabbi Feinstein, however, competing unfairly is akin to theft; even if it was done inadvertently, the situation must be remedied.

Based on the lenient opinion of Rabbi Epstein, someone who inadvertently transgresses the rules of unfair competition will certainly not have to give up the

purchase. Whether or not he wishes to adopt the “pious practice” of so doing will depend on the losses involved and on personal circumstances.

KEY THEMES OF SECTION I

- In this section we discussed the basic halachah of ani ha'mehapech be'chararah. Although the Torah endorses competition, not all competition is legitimate. Where somebody else is close to completing a deal (and all terms have been agreed on), it is forbidden to enter the fray and snatch it from him.
- According to Rashi, the limitation applies to hurting another's income even in cases of limited resources, whereas according to Rabbeinu Tam the restriction does not apply to circumstances of limited resources, but only to cases of unscrupulous opportunism.
- Nonetheless, if somebody does snatch the deal, there is no formal obligation to cancel the sale – though it remains worthy practice to do so.
- Authorities dispute whether the prohibition of ani ha'mehapech applies even if the second buyer didn't know about the original buyer when he made his offer.

SECTION II Ani Ha'Mehapech Be'Chararah in Acquiring Ownerless Property

In the previous section we discussed a case of competition for the purchase of a property. As we will see in the present section, an important application of ani ha'mehapech be'chararah is for cases of acquiring ownerless property or objects.

Case 2. *The Paris JCC is holding an open house Chanukah party for university students and the Maccabee Beer has been finished off. But, there remains one steaming hot brownie with melting vanilla ice cream left over, which Daniel is making a full-steam-ahead maneuver to enjoy after a most rigorous game of spin the dreidel. He makes an Apache helicopter swoop with his right hand and just as he is about to grab the dessert, he notices someone to his immediate right who had actually started for the dessert before him, but had slower reflexes.*

What should Daniel do?

- Enjoy the dessert by himself?
- Share it with the other guest?
- Give it to the other guest?
- Return the dessert to where he found it?

What do you say?

To address this case we will return to Source 1, and specifically to the case presented by Rabbi Yitzchak Nafcha: “If one poor person is pursuing a piece of bread and another comes and takes it, what is the law?” Rabbi Abba states that the second

person who takes the bread ahead of the first person is termed a rasha, indicating – assuming that the bread is ownerless – that the halachah of unfair competition applies even to ownerless property.

Source 9. Rashi, Kedushin 59a – The ownerless bread.

A poor person going after bread – he is either trying to acquire something ownerless or trying to get someone to give it to him as a donation.

עני המהפך בתורה - מחזיר
אחריו לזכות בה מן ההפקר
או שיתנה לו בעל הבית.

Notice how Rashi understood the facts of the case:

How, according to Rashi, is the first poor man trying to acquire the cake?

1. He's trying to get something that's ownerless.
2. He's trying to get a present from a donor.

Rashi interprets the passage of the Talmud as referring even to an ownerless piece of bread – which is the simple rendition of the passage. Thus, we learn that the halachah of ani ha'mehapech be'chararah applies not only to cases of owned property, but even to cases of making acquisitions of ownerless property. Tosafot, however, dispute this understanding:

Source 10. Tosafot, Talmud Bavli, Kedushin 59a – The prohibition doesn't apply to ownerless property.

Rabbeinu Tam says that this prohibition is only applicable if the poor person wants to earn money by hiring himself out or if one wants to purchase something and another preempts him and buys, as in the Rav Gidel episode. He's therefore called a wicked person – for why did he go after that which the other person is working hard at attaining? He should go and earn money somewhere else. But if the bread was ownerless there is no prohibition, for if he doesn't acquire this one he will be unable to find another.

ואמר רבינו תם דאיסור
דמהפך דנקט הכא לא שייך
אלא דוקא כשרוצה העני
להרויח בשכירות או כשרוצה
לקנות דבר אחד ונחברו מקדים
וקונה והוי דומיא דרב גידל
ומשום הכי קאמר דנקרא רשע
כי למה מחזיר על זאת שטרח
בה חבירו ילך וישתפר במקום
אחר אבל אם היתה התורה
דהפקר ליכא איסור שאם לא
זכה בזאת לא ימצא אחרת.

Tosafot understands that the passage cannot be referring to ownerless bread, for the prohibition cannot apply to ownerless property.

What are the rationales behind the two sides of the dispute?

Source 11. Sema, Choshen Mishpat 237:2 – Explanation of the Dispute Between Rashi and Tosafot.

According to Tosafot, the restriction on unfair competition applies only where the item can be purchased elsewhere, even if this entails making an effort. Those who argue [Rashi] maintain that even with regard to a gift and to acquiring ownerless property [which cannot be gained elsewhere] he is called a rasha, because another person is trying to acquire it, and it is considered as though the second person is taking it from the first.

מה שאין בן כְּשָׁבָא לְקִנּוּת דְּבָר
דִּיכּוֹל לְהַשְׁתַּדֵּל לְקִנּוּתוֹ גַּם
בְּמָקוֹם אַחֵר אִם שִׁיחָהּ לוֹ
טָרְחָא בְּזוּה. וְהַחֲלִיקִים סְבִירָא
לְהוּ דְּאִם בְּמַתְנָה וְהִפְקֵר נִקְרָא
רָשָׁע דִּכְיוּן דְּזוּה כְּבָר בָּא לְקַחְנוּ
וּלְקַבֵּלָהּ הִרִי זֶה הַשְׁנִי כְּנוּטִל
בְּמָה שֶׁכְּבָר זָכָה בּוֹ הָרִאשׁוֹן.

As we have already noted above, Tosafot considers it fair practice to jump in ahead of somebody else to gain something that cannot be gained elsewhere. The limitation thus applies only to something that can be attained elsewhere, be it a job or a purchase, but not to something – such as an unclaimed (free) ownerless object – that has no parallel. There is no other place that the same free found object can be acquired.

Rashi, however, maintains that even where the desired result (of obtaining an ownerless object) cannot be achieved elsewhere, it remains unfair and forbidden practice to jump in ahead of others.

It thus emerges that according to Tosafot, Daniel does not have to be concerned about snatching the last brownie, even at the expense of his friend. Under the circumstances, there is nowhere else to gain such a brownie, and therefore the principle of ani ha'mehapech be'chararah does not apply. According to Rashi, however, the principle can still apply.

What is the halachic ruling on this question?

Source 12. Shulchan Aruch, Choshen Mishpat 237:1 – Halachic ruling concerning the question of ownerless property.

Some say [Tosafot] that if a person wishes to make an acquisition of an ownerless item, or to receive a gift from somebody, and another person comes and beats him to it, he is not called a rasha, because the item is not available elsewhere. The same principle applies to something that is being sold inexpensively, and cannot be obtained for the same price elsewhere; this is similar to an ownerless object, and it is permitted to buy it until it is actually purchased by a buyer. And some say [Rashi] that this does not make a difference. [The Rema adds:] **The first opinion is the principle halachic ruling in this matter.**

ויש אומרים שאם בא לזכות
בהפקר או לקבל מתנה מאחר,
ובא אחר וקדמו, אינו נקרא
רשע, כיון שאינו דבר המצוי לו
במקום אחר. [...] וכן אם קונה
דבר אחד ובא חבירו ויוכל
לקנותו בזול שאינו מוצא
לקנותו כך במקום אחר, הרי
כמו מציאה ויכול לקנותו כל
זמן שלא זכה בו הקונה. ויש
אומרים דלא שניא: הגה -
וסבא הראשונה נראת עיקר.

According to the ruling of the Rema, whose rulings were broadly accepted by Ashkenazi Jewry, it thus appears that for ownerless property, or for an item that cannot be otherwise obtained, the restriction of “unfair competition” (ani ha'mehapech be'chararah) does not apply. This is the ruling given by the consensus of Ashkenazi authorities (Chatam Sofer, Choshen Mishpat 79; Shulchan Aruch Harav, Hefker 10; Aruch Hashulchan, Choshen Mishpat 237:1).

Yet, this does not mean that snatching an unclaimed ownerless item ahead of somebody else will necessarily be proper practice. Imagine a poor person, who, much to his delight, finds a ten-dollar bill on the floor. As he bends over to pick it up, a wind blows the bill out of his reach, and it falls at the feet of a young and wealthy entrepreneur. As the young man bends over to pick it up, he notices a clearly poor man, running to catch his find. How should he act?

The difference between a poor and rich person is mentioned by the Rema, who states that even according to the opinion upholding the principle of ani ha'mehapech be'chararah for ownerless items, the halachah applies “specifically to a poor person, and not to somebody rich.” The Sema explains as follows:

Source 13. Sema, Choshen Mishpat 237:6 – Distinction Between the Rich and the Poor.

This means to say that even the latter opinion [meaning Rashi], which maintains that he is called a rasha even for ownerless items, agrees that if the person originally trying to acquire the item is rich, and another person comes to take it ahead of him – whether the item is ownerless or it is given as a gift – he is not considered a rasha, because [the rich person] will be able to attain the item elsewhere, though he might have to spend money on it. This is not significant, because he is wealthy – unless the item cannot be gained even for money, in which case the rich and the poor are equal.

פירוש לסברא זו האחרונה
דסבירא ליה דאפלו במציאה
והפקר וכיוצא בזה נקרא רשע
מודים דאם זה הבא לזכות
או לקנות תחלה הוי עשיר
ובא אחר ליטול מלפניו הן דבר
הפקר או שאר דברים הנקנים
במתנה אינו נקרא רשע בכך
כיון דעדין לא זכה בה לגמרי
ויכול להשתדל ענין כזה
ממקום אחר אלא שצריך
להוציא עליה דמים אין בכך
כלום כיון דעשיר הוא אם לא
שהוא דבר שאין העשיר
יכול להשתדל אפילו בדמים
דבזה העשיר שוה לעני.

Based on this distinction, some authorities write that even if a rich person can reach an unclaimed ownerless item before the poor person chasing after it, it remains pious and proper practice to leave it for the poor person (Shulchan Aruch Harav, Hefker 10). Although the strict halachah is that the restriction of ani ha'mehapech be'chararah does not apply to ownerless items, it is proper for a rich person (*who can obtain the item elsewhere*) to allow the poor person to complete his acquisition.

By analogy, if the person vying for the brownie is “poor” – meaning, especially hungry or otherwise needy of the brownie – it will be commendable practice for Daniel to graciously give up the brownie. Yet, this will only be true if Daniel himself is “rich,” meaning that he can obtain another brownie elsewhere, or that he doesn’t really want or need the brownie.

**KEY
THEMES
OF
SECTION
II**

- In this section we learned of an important dispute between halachic authorities concerning ani ha'mehapech for the acquisition of ownerless property. According to the principal halachic ruling, the restriction of unfair competition does not apply to acquiring an ownerless item.
- We further saw a possible distinction between rich and poor people: although it is permitted to snatch an ownerless object before someone else, if the other person is poor it is proper to leave it for him.
- As we will see in following sections, the idea of “ownerless property” is not limited to items that are actually ownerless, but applies to anything that cannot

be gained without too much trouble by alternative means.

- The classic instance is a gift: If somebody is offering a gift, Tosafot and the Rema will maintain that the restriction of ani ha'mehapech will not apply to parties competing over it, because gifts cannot be obtained elsewhere. The same will apply to unique items (such as antiques) that are hard to find, and so on.

SECTION III Ani Ha'Mehapech Be'Chararah in Dating

The concept of ani ha'mehapech be'chararah goes beyond the ordinary concept of property, and applies to all forms of competition. In this section we will see how the idea is applied to the realm of *shidduchim* – dating for marriage. Observant Jews meet prospective spouses through arranged dates, in which they meet someone to determine if they have found their soul mate. The question arising from Ani Ha'Mehapech Be'Chararah is whether it is permitted to date someone who is currently dating someone else...

Case 3. *Several people independently had approached David over the past few months suggesting that he date Rachel. They all praised her and described her as having the attributes he has been searching for in a wife. David decided to go for it, but then heard back that Rachel is presently dating someone else. In fact, he heard that the relationship has been moving forward nicely over the past couple of weeks. A few days later, David received an email inviting him to the Mostein's, coincidentally cousins of Rachel, for Shabbat. They would like the couple to meet informally during Friday night dinner, and perhaps take a walk after dessert. David is in a quandary. He would like to meet Rachel, but is it appropriate under the circumstances, knowing she is dating someone else?*

What should David do?

- Make a decision about meeting Rachel after she either becomes engaged or stops seeing the other fellow?
- Go ahead and meet Rachel anyway?

What do you say?

To begin our resolution of this dilemma, let's analyze a law in Rambam's Mishneh Torah.

Source 14. Rambam (Rabbi Moshe ben Maimon), Mishneh Torah, Hilchot Ishut 9:17 – Case of an envoy who marries a woman he was sent to betroth on behalf of someone else.

If someone appoints an envoy to betroth a wife on his behalf, and the envoy goes ahead and becomes engaged to the woman himself, she is betrothed to the envoy. Yet, it is forbidden to do so, and whoever does so, or a similar action in the realm of commerce, is termed a rasha.

העושה שליח לקדש לו אשה
והלך וקדשה לעצמו, הרי זו
מקודשת לשליח - ואסור
לעשות כן, וכל העושה דבר זה
וכיוצא בו בשאר דברי מקח
וממכר נקרא רשע.

This law refers to a case where a person was sent as an envoy to perform a marriage ceremony for his friend. Having been sent to arrange for a woman to marry his friend, it is forbidden to wed her himself. In ruling this halachah the Rambam draws a parallel between dating and making a purchase.

It might follow that just as it is forbidden to compete unfairly for a purchase, it is likewise forbidden to compete unfairly for a date.

Yet, unlike an ordinary purchase, each person is unique, and cannot be “obtained elsewhere.” Therefore, a date can be compared to unclaimed ownerless objects, rather than a purchase. For this reason, authorities who don’t apply the prohibition of ani ha’mehapech be’chararah to ownerless objects, also refrain from applying it to dating.

Source 15. Aruch Hashulchan, Even Ha-Ezer 35:29 – The principle of unfair competition doesn’t apply to dating.

The Tur and the Shulchan Aruch do not write that he is called a rasha, because they maintain that for gifts and finds he is not called a rasha, and marriage is no worse than this. The Rambam, however, maintains that he is called a rasha for all matters [of unfair competition]... If he did not appoint him as an envoy, but only told him that when you go there [for your own reasons] betroth a certain woman on my behalf, and he went and betrothed her for himself, this remains deception, because he relied on him... yet it seems to me that in this case where he did not appoint him as an envoy, even the Rambam will concede that he is not termed a rasha, and only a fraud.

והטור והשלחן ערוך לא
כתבו דנקרא רשע דאזלו
לשיטתיהו בחושן משפט סימן
רלז דבמתנה ומציאה לא נקרא
רשע, עיין שם, וקדושין לא גרע
מזה. והרמב"ם סבירא
ליה דבכל ענין מקרי רשע ...
אם לא עשא שליח אלא אמר
לו בשתלך לשם קדש לי אשה
פלוגית והלך וקדשה לעצמו
סוף סוף הרי זה מנהג רמאות
בינן שנה סמך עליו והוא רמה
אותו ... ויראה לי דבכי האי
גונא גם לדעת הרמב"ם לא
נקרא רשע אלא רמאי.

The principle that distinguishes between an unclaimed ownerless object and a purchase is that a purchase can be obtained elsewhere, while an unclaimed ownerless object cannot. Purchases are available at stores, whereas such “finds” are not. Based on this principle, a date is comparable to an unclaimed ownerless object, because each person is unique, and although another date is available elsewhere, this particular person is not.

The Aruch Hashulchan further postulates that the Rambam's ruling that the prohibition of unfair competing applies even to dating, is limited to a case where a person was sent as an envoy to wed a woman for somebody else. An envoy is sent on trust, and betraying that trust is an act of wickedness. However, when the person is not sent as an envoy, he is not called wicked for getting in ahead of somebody else.

Source 16. Yam Shel Shlomo, Kiddushin Chap. 3, no. 1 – Marriage is different, and even Rashi concedes that the second person is not a rasha.

Even according to Rashi, who explains that the bread is ownerless – even so we can distinguish and say that concerning betrothal there is no restriction, because of [the mitzvah] of [getting married for the purpose of] reproduction.

וְאֶפִּילוּ לְרֵשׁ"י, שֶׁפָּרַשׁ חֲרָרָה
שֶׁל הַפֶּקֶר, אֶפִּילוּ הָכִי נוֹכַל
לְחַלֵּק, דְּבִקְדָּשָׁה שְׂרִי, מִשּׁוּם
פְּרִיָּה וְרִבְיָה.

With regard to matters of marriage, the Yam Shel Shlomo posits that even Rashi (who maintains that the prohibition applies even to finds) agrees that the restriction of ani ha'mehapech be'chararah does not apply. The reason for this is that marriage not only fulfills a personal want, but even a religious duty.

However, Rav Moshe Feinstein rules that the general principles of ani ha'mehapech be'chararah do apply to matters of shidduchim (dating), and that if the two sides have already agreed to become engaged, the concept of unfair competition will apply.

Source 17. Rav Moshe Feinstein, Igrot Moshe, Even Ha-Ezer 1:91 – The principles of unfair competition apply to dating.

But if they have already decided to complete the shidduch, yet have not yet gone through the formal procedures with which the shidduch is completed, the halachah will depend on the law of ownerless property and gifts...It is proper for a God-fearing person to heed the last opinion, which is the opinion of Rashi.

If the acquisition or the writing of the *tena'im* [a formal declaration of betrothal] was made, it is forbidden for the sides to retract [without legitimate cause], and it is certainly forbidden for others to court her.

אבל אם כבר החליטו לגמור
השדוך, אף שעדיין לא נעשה
הקנין שנוהגין לעשות בגמר
שידוכין וכדומה, תלוי זה בדין
הפקדון ומתנה ... מן הראוי ליהרא
ה' להחמיר לחוש לסברא
אחרונה שהיא שיטת רש"י.
ואם כבר עשו קנין או כתיבת
תנאים ... כבר חל החכם שלא
לחזור ואסור לאחרים להשתדף
לה.

But what if a couple is serious about one another, but have not formally agreed to become engaged? Based on this ruling, it is improper, though not entirely forbidden, for a person to “compete” in dating matters, and the principles elucidated above (Section I) will apply.

Ani ha'mehapech be'chararah will apply only if a shidduch is virtually closed, meaning that the prospective couple has already met a number of times, and it seems nearly certain that the shidduch will reach completion. If, however, a prospective shidduch has not yet reached its final stages, it is not prohibited for someone else to meet the young woman or man on a date.

Returning to the case at hand, we can thus say that if Rachel has not reached the final stages of her present shidduch, it will be permitted for David to meet her at the Mosteins. If, however, Rachel's present shidduch has reached its closing stages, and is only waiting for a formal declaration of engagement, David should not meet her until the present shidduch is resolved.

**KEY
THEMES
OF
SECTION
III**

- The full restriction of ani ha'mehapech be'chararah does not apply to dating, because each date is a unique individual, and one can't assume that a similar person will be found elsewhere. Nonetheless, one should act stringent and refrain from “snatching a date” from somebody else, which is considered improper conduct.
- After somebody closes a shidduch, it is certainly forbidden to approach one of the parties with another proposal – because it is forbidden on their part to break the shidduch without legitimate cause.
- It is likewise forbidden to act deceptively in the realm of dating, just as in the realm of commerce.

SECTION IV Fair Competition in Finding Employment

A common application of the laws of ani ha'mehapech be'chararah relates to finding employment. The question of actually taking away somebody else's employment or source of income is dealt with by a separate halachic concept, known as *yored le-umnut chavero*. This concept will not be discussed in this class but will be saved for separate discussion.

However, the principle of ani ha'mehapech be'chararah is important in the question of competition over an employment position, as the following case demonstrates.

Case 4. *Nathan has been searching for a job for almost a year, without success. He recently saw an advertisement for a computer programming position at a large international company, and submitted his application. The company replied that he has called at the very last moment, because they were planning to close with another applicant that same night – but there's still time to come over for an interview, and the company is interested in seeing as many applicants as possible before closing. Nathan wants to know what to do: Is it permitted for him to apply for the job, knowing that the company is about to close with somebody else?*

Source 18. Shulchan Aruch, Choshen Mishpat 237:2 – Offering one's services for an already taken position.

It is forbidden for a teacher to hire his services to an employer who already has another teacher in his home, unless the person tells him: I do not wish to continue to engage the teacher.

אסור למלמד להשכיר עצמו
לבעל הבית שיש לו מלמד אחר
בביתו, אם לא שיאמר בעל הבית:
אין רצוני לעבב המלמד שלי.

As noted, **this halachah, which applies to any job or occupation**, is known as *yored le-umnut chavero*: It is forbidden to cause a person to lose his job by offering one's services as an alternative. This prohibition is more severe than the restriction of ani ha'mehapech be'chararah, and somebody who transgresses it might even be obligated to cancel his contract (Pitchei Choshen, Theft, Ch. 9, note 23).

The Shulchan Aruch HaRav extends the prohibition to a case of competition over a vacant position.

Source 19. Shulchan Aruch HaRav, Hefker 12 – Competition over a vacant position.

The same ruling applies for an employer who has not yet engaged a teacher, but another teacher has already offered his services. This is like the case of ani ha'mehapech be'chararah, and therefore it is forbidden to take the job from him.

הוא הדין אם אין המלמד
בביתו של בעל הבית אלא
קשקש בקש מבעל הבית
תחלה אף שצדיק לא
הבטיחו הרי זה כעני המהפך
בחררה שאסור לאחר לטלה
ממנו.

Even before an employer has signed on an employee, it is forbidden to offer one's services, knowing that another candidate is imminently closing, and all terms (or almost all terms) have already been settled. Based on this principle, it will apparently be forbidden for Nathan to come for an interview. Yet, this is not so simple, as we will see from a principle derived from what is considered fair business competition.

Source 20. Sema, Choshen Mishpat 386:10 – Taking over another's contract.

A non-Jew made a business deal with a Jew to buy from him a certain amount of whiskey for a specified price. The deal was struck, and as a sign of its completion, they shook hands as customary. Following this, the non-Jew went to another Jew who lives in the same neighborhood, and asked him to make the same deal, without revealing that he had already spoken with the first Jew. The non-Jew's intention was that if the second Jew should offer a cheaper price, he would take the deal and retract from his original agreement.

The first Jew understood that something was afoot, and therefore sent a message to the second Jew, requesting that he not sell the non-Jew any whiskey, because he had already come to an agreement with him. The second Jew took no notice, and went ahead with the sale, at which the non-Jew retracted his agreement with the first Jew.

It appears clear that if the judges see no deception in the matter [on the part of the Jew], then the second Jew is not punished for his actions. This is because even if there is a prohibition against usurping another's business, this applies only to a non-Jew who is a regular client of a Jew, and the second Jew makes an effort to steal away the first Jew's client. Even though the first Jew sent the second Jew a message to refrain from selling whiskey to the non-Jew, the first Jew does not have the right to do so.

מעשה אירע שבא עכו"ם וצעה
מקח עם ישראל לקח ממנו כף
וכף מדות יין שרוף, כל מדה
בכף וכף, ונגמר המקח ביניהן
כדין התגרים שמכים כף אל
כף. אחר כך הלך העכו"ם אל
ישראל אחר הדר בשכונתו של
ישראל הראשון, ורצה
לעשות עמו גם כן מקח, ולא
גילה שבכר דבר עם ישראל
הראשון - והיה כונתו שאם
יוזיל לו ישראל השני המקח,
שיקח ממנו, ויגיד הראשון.
וישראל הראשון הרגיש בדבר,
שלכך הלך בבית ישראל השני,
ושלח אל ישראל זה ובקש
ממנו שלא ימכור לו יין
שרוף, כי כבר עשה עמו מקח.
ולא השגיח ישראל השני על
זה, וצעה מקח עם העכו"ם,
ולקח העכו"ם מידו היין
שרוף - ומכר זה לא קנה
העכו"ם מישראל הראשון.
נראה פשוט דאם אין ערמה
בדבר לפי ראות הדנים, דאין
עונשין לישראל השני על זה,
מאחר שהעכו"ם מעצמו בא
אליו לקח ממנו יין שרוף, דאף
למאן דאמר דאסור לקח
מערופא של חבירו היינו דוקא
בעכו"ם הרגיל להיות עסק
עמו וישראל השני מהדר אחר
העכו"ם שישראל הראשון עסק
עמו והשתדלהו לעסוק עמו.
ואף ששלח אליו יהודי
הראשון ובקש ממנו שלא
יעשה עמו מקח לאו כל כמיניה
לעשות לנפשו חזק עבדו.

The principle stated by the Sema is that although it is forbidden for a Jew to steal the clients and customers of another merchant, the prohibition does not apply where the customers come to the Jewish merchant on their own volition.

How do you think we can apply this principle to competition in employment?

Although it is forbidden for a prospective employee to proactively seek to replace a candidate offered a position, if the employer initiates the solicitation [in a lawful manner] no prohibition will apply. [This principle is parallel to the idea presented in Section I, Source 5.]

Based on this idea, it seems that Nathan can go to the interview. Although somebody else is close to signing a contract, the employer has invited him to try his luck, and it appears that no prohibition will therefore apply.

There is also another reason for leniency in our case:

Source 21. Rabbi Yosef Fleischman, Alon Ha-Mishpat no. 13 – The restriction does not apply to somebody who cannot find another job.

A worker who is unable to find another job in the city is permitted, according to the majority of authorities, to offer an employer his services, even when the employer has already made up with another worker.

The reason for this is that the work, under such circumstances, is considered as ownerless property, which cannot be obtained elsewhere. According to most authorities the prohibition of ani ha'mehapech be'chararah therefore does not apply.

עובד שאינו יכול למצוא
עבודה אחרת בעיר, לדעת רוב
הפוסקים מותר לו להציע את
עצמו לעבודה אף אצל מעביד
שקבר סכס עם עובד אחר.
כיון שבאופן זה נחשבת
העבודה כדבר הפקר שאי
אפשר למצוא אחר, ודעת רוב
הפוסקים שאין בזה איסור של
עני המהפך בהררה.

Does this halachah rule in accordance with Rashi or Tosafot? Nathan has been searching for a job for almost a year, and it is therefore clear that jobs – or at least the kind of jobs that Nathan is interested in – are not easy to come by. Therefore, finding employment will be considered similar to acquiring ownerless property, and according to most authorities (who rule like Tosafot, and not like Rashi) the prohibition of ani ha'mehapech be'chararah will not apply.

Although in the previous section (concerning dating) we saw that Rav Moshe Feinstein writes that one should nonetheless try to act stringently, in the case of Nathan, where the employer asked him to come, he can certainly be lenient and go for the interview.

The sources above discuss the issue of finding employment – but what about the issue of an employer who wants to hire good workers? Is it permitted for an employer to compete with another employer in finding quality labor?

Source 22. Shulchan Aruch and Sema, Choshen Mishpat 237:2 – The restrictions on competition do not apply to finding workers.

Shulchan Aruch: However, if an employer employed a teacher, it is permitted for a different employer to hire the same teacher [by making him a better offer].

אָבֵל אַם שָׂכַר בַּעַל הַבַּיִת מִלָּמֶד
אַחַד, יָכוֹל בַּעַל הַבַּיִת אַחֵר
לְשַׁכּוֹר אוֹתוֹ מִלָּמֶד עֲצָמוֹ.

Commentary of Sema: This is not similar to the cases of a [purchase or] rental, because for matters of renting a house or item all are the same, whereas in education, each teacher is different, and therefore is considered as something that is uncommon.

סמ"ע: אֵינוֹ דּוֹמֶה לְשִׁכְרוּת
הַנֶּ"ל דֵּלְעִיל בְּשִׁכְרוּת בָּתִּים
אוֹ כְּלִים כּוֹלֵם שְׁוִיָּה הֵן מָה
שָׂאִין בֵּן בְּהַסְבֶּרֶת הַלָּמוּד
וְעִיּוּנוֹ אֵין מִלְּמָדִים שְׁוִיָּה וְהִנֵּה
לִיָּה כְּדָבָר שְׂאֵינוֹ מְצוּי הַנִּזְכָּר
לְעִיל וְקַל לְהַבִּין.

In ordinary cases of purchases, the item can be purchased elsewhere – it is not unique – and therefore the principle of unfair competing (ani ha'mehapech be'chararah) applies. For things that are unique, the principle, as we have seen (according to Tosafot) does not apply, and this is the case for finding teachers, each of whom is unique in his personality and abilities.

Note that this ruling might not apply to every job, for in some cases a job might not require unique qualities.

**KEY
THEMES
OF
SECTION
IV**

- The principles of ani ha'mehapech apply to finding a job just as to finding a purchase. However, many jobs are hard to come by, and therefore finding employment can be compared to ownerless property or a gift (which isn't available elsewhere).
- Moreover, if the employer is looking for applicants, it is certainly permitted to give in one's application.
- The restriction of ani ha'mehapech will not fully apply to finding workers – in skilled employment such as teaching – because each person is different, and one worker cannot be compared to another. Finding workers is also analogous in this sense to acquiring ownerless property.

**CLASS
SUMMARY****Integrity in Competition**

The first question a person is asked when upon reaching the “World of Truth” is: *Did you conduct your business dealings with integrity?* (Shabbat 31) We live in a competitive world, and must of course play by its rules. Nonetheless, we are bound to acting with honesty and integrity, and the Torah Sages delineate a number of principles by which we are to abide. This class outlined the principle of ani ha'mehapech be'chararah, which is one of the most basic principles applying to many variant forms of competition.

Now let us return to the questions we asked at the outset.

When is competition considered fair, and when is it unfair?

Are there any sanctions against unfair competing?

Making an Offer

- When a person has almost completed a purchase, such that all terms of the acquisition have been agreed upon, it is considered unfair competition for somebody to then make a new offer to the seller. If a second prospective buyer does make such an offer, he is called a rasha.
- The restriction on unfair competition applies specifically to an alternative buyer; it does not apply to a seller. In spite of this, there are other halachot that can possibly restrict the seller from retracting.
- Even if the offer was made unknowingly – the prospective buyer was unaware of competition – it should be withdrawn (Rav Moshe Feinstein). However, after the sale is completed with the second buyer, he is not obligated to cancel the sale.

Does unfair competition apply even to ownerless property?

Ownerless Property

- Halachic authorities dispute whether or not the principle of unfair competition applies even to ownerless property. The reason for the dispute is that ownerless property cannot be obtained elsewhere, and therefore there is room to suggest – as Rabbeinu Tam maintains – that all competition is legitimate (and the restriction applies only to unfair opportunism).
- The same dispute applies to gifts, to special sales (prices that can't be obtained elsewhere), and to unique items (such as a unique house).

- Where the other party vying for making the acquisition is needy, it is certainly proper and pious practice to allow him to complete his acquisition.

To which non-commercial fields does the concept of unfair competition apply?

Dating

- The concept of unfair competition applies beyond the world of commerce, and can be implemented in all instances of competition. One such field is dating: a person should not “snatch” a date from somebody else.
- A date is of course something unique, and no two human beings are the same, parallel to an ownerless item that cannot be obtained elsewhere. Nonetheless, one should still be stringent in the matter.
- Yet, as with regular commerce, the restriction only applies where the parties are nearly ready to become engaged.

Employment

- A final area we discussed is employment. Just as with regular purchases, a person seeking employment must ensure that he does not tread on anybody else's feet in doing so.
- Yet, if the employer continues to search for an employee, and desires as many applications as possible to choose from, it is permitted to apply for a job, even if an apparently suitable candidate has already been found.
- Moreover, if other jobs are not readily available (which is often the case), finding a job will be comparable to acquiring an ownerless item, so that the full stringency of the restriction will not apply.

RECOM- MENDED ADDITIONAL READING

Rabbi Ari Marburger, A Practical Halachic Guide To Modern Business, ArtScroll Publications

www.businesshalacha.com/chaburos/interference-ani-mihapech-bicharara