בס"ד

Talmudic Law 101

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By: Raphael Szendro

rszendro@gmail.com

The Price of PPE in China

Year one of "15 days to flatten the curve" and counting.[1] Among the many challenges we faced over the year was a potential shortage of essential medical supplies and equipment. Thankfully, the problem was quickly resolved. The Trump administration made sure of it. However, toward the beginning of the pandemic, reports came out of individuals who attempted to take advantage of the situation by hoarding truckloads of critical supplies. This raised an interesting question: According to Jewish law, would it be acceptable to acquire supplies and equipment in bulk during a global shortage, and then resell the merchandise to those in need at five-ten times the cost? Although I have been very busy this year collecting free food and starting a new girls' school together with my amazing wife, I was able to find the time to work on this question, and with much סיעתא דשמיא, I was able to come up with the following analysis:

I would suggest that there are two parts to the question: The first issue touches on a fundamental aspect of the laws of אונאה [fair pricing]. The איסור of אונאה prohibits a seller from charging above market value, and a buyer from purchasing below market value.[2] The value of any product will change from time to time, and the purchase price must reflect the current market value at the time and location of the sale.[3] Changes in supply and demand is typically the determining factor which would cause the market price to fluctuate. If there is a sudden increase in demand with a lack of supply, it would follow that one could rightfully charge a much higher price. The question is, are there any exceptions? Are there any other factors to consider when determining a fair market price as it relates to הלכות אונאה, other than the available supply and the current level of demand?

The second question is as follows: irrespective of דיני אונאה, if someone's life is in danger, and you are in possession of a product which could save their life, there would be an obligation of לא תעמד על דם רעיך. How would this affect the amount which can be charged for the product?

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[1] כמש"כ ויעבדו מצרים את בני ישראל בפרך: בפה רך [סוטה יא:] וכ' רש": משכום בדברים ובשכר עד שהרגילום לעבודה

[2] ב"מ נ"א. ש"ע ח"מ ס' רכז סע' א

[3] ב"י [ח"מ ס' רכז סע' יב]

To answer the first question, I would start by looking at בבא מציעא דף נח:, which states:

ר' יהודה בן בתירא אומר אף המוכר סוס וסייף וחטיטום במלחמה אין להם אונאה מפני שיש בהן חיי נפש

…one who sells a horse, sword, or shield during a war, is exempt from the laws of אונאה since they are necessary for the preservation of life. In our case as well, a product which is required to preserve human life would have no limit on the price one could charge. However, the vast majority of פוסקים rule against ר' יהודה בן בתירא, maintaining that דיני אונאה apply even in these cases.[4] This resolves an important aspect of the question: Does אונאה apply? And the answer is yes. But most people, including myself, are probably asking: what does that mean in practical terms?

Let's take a deeper dive into the גמרא quoted above. The case involves one who sells a horse, sword, or shield "במלחמה", which literally means "in" or "during" a war. Had רש"י not commented on this word, I likely would not be making a big deal of it. But רש"י *does* comment: "במלחמה: בתוך המלחמה" – with one word, "בתוך", I believe רש"י is telling us something critically important. רש"י is explaining that the sale took place not only during a time of war, but it literally took place on the battlefield.[5]

The ט"ז will help us understand the significance of this distinction. One who takes a loan is required to repay the lender in cash. However, there are several scenarios where the creditor would be required to accept real property or personal property as payment. When this happens, Bais Din must assess the property to determine that its value is equal to the balance of the debt. The method of assessing the property should be calculated based on a quick sale, as-is, and where-is. We need to be fair to the borrower not to assess too low, but at the same time, we don't want to give the creditor a difficult time selling the property. If we assess the property at a higher price range, requiring the creditor to spend extra time and effort to find a qualified buyer, it will deter people from lending money.[6]

The ט"ז [ח"מ ס' קט סע' ג] is discussing a situation where Bais Din is selling property of heirs to the borrower on behalf of a creditor, during an economic crisis. We said that the value must be based on a quick sale, to benefit the creditor. But we also can't force the borrower to give up the property at a drastically reduced price. The ט"ז differentiates between two cases: בשעת מלחמה – during a time of war. In this case, the ט"ז rules that we will not hesitate to sell the property as soon as the loan becomes due, even if property value is extremely low. Bais Din would not be acting negligently unless they conduct the sale during a time when there is essentially no market. But during war, although prices are low, people are still buying and selling. Nobody knows how long the

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[4] ריי"ף בשם ר' האי גאון בספר מקח וממכר, וכן כ' הרא"ש [ב"מ שם סוף ס' כא], והרמב"ם לא הביא דין דר' יהודה בן בתירא, וגם לא הביאו בש"ע ורמ"א. ואף שכ' הרי"ף בשם איכא מ"ד דפסק כוותי', נ"ל שדעת יחיד הוא ואין למוחזק טענת קים לי, ומוציאין מידו מדין אונאה. אבל יש שכ' שהמוחזק יכול לומר ק"ל כר' יהודה, וצ"ע. ע' בספר הלכות משפט [ס' רכז סע' טו ס"ק ז, וסע' ח ס"ק יא]

[5] ולא כ' רש"י "בשעת" מלחמה אלא "בתוך", משמע בתוך ממש. וכן משמע ממש"כ בשיטה שם בשם הרמ"ך שמדמה דין זה למי שבורח מבית האסורין [ב"ק קטז.] משמע שיש סכנת נפשות באותה שעה.

[6] ש"ע ח"מ ס' קא סע' ט [ע' סמ"ע וט"ז שם], וס' קג סע' א, ע"פ הרא"ש [ב"ק פ"א ס' ה] משום "נעלת דלת בפני לווין"

war will last. It can be a few days, or it can be a decade. Therefore, it wouldn't make sense for a seller to push off a sale until the market improves, since it might be several years until that happens.

בשעת מגפה – During a pandemic, however, the ט"ז rules that Bais Din should not conduct the sale, and if they do, the sale is void. This is because there is no market during a pandemic. Since it is expected to pass within a relatively established period, all sellers are waiting for the value to improve. Incidentally, this idea is demonstrated in recent years from various coronavirus outbreaks, each one disappearing within a year or two, like SARS (2002-2003) and MERS (2012). Similarly, many experts predict that Covid-19 is headed in the same direction as its predecessors and will vanish completely on its own within one to two years. G-d willing, they are correct. Its virulence and mortality rate have dropped significantly over the last several months. One theory is that viruses naturally adapt to become less lethal to the host to assure their own survival. But regardless of the reason, that appears to be the nature of the beast.

It would also be apropos to point out that the current pandemic is very different than the case described by the ט"ז. Back in the day, nobody did business during a pandemic. Prices dropped and the market was effectively shut down. With Covid-19, on the other hand, sales are practically unaffected. Even during the height of the disease, real estate sales remained steady. If anything, prices went up. In fact, all the essential businesses remained open, like supermarkets, bars, casinos and abortion clinics.

Also, it used to be customary to establish a day of fasting and prayer in any community that experienced a deadly pandemic. This was only done if certain conditions were met, as the *Shulchan Aruch* describes:[7] for every 500 people who live in the city, there would have to be at least 3 deaths in a 3-day period. To put that into perspective, take the city in the US with the highest death rate, NY City, thanks to the incredible leadership of its mayor and Emmy Award winning governor. The population of NYC is around 8.3 million. There would have to be 16,600 deaths in 3 days, with an average of 5,533/day. If you take the population of the entire country, there would have to be 650,000 deaths each day, G-d forbid. Thankfully, they don't make pandemics like they used to.

Getting back on topic, we see an important concept from the ט"ז. A change in supply and demand does not necessarily justify an adjustment in market value. It would depend how people react. For example, a drop in demand would normally trigger a decrease in value, but only if sellers continue selling. But if most sellers are holding off until the market improves, no market exists, and any assessment would be based on

[7] ש"ע [או"ח ס' תקעו סע' ב] ע"פ גמ' תענית דף יט. "איזהו דבר עיר שיש בה חמש מאות רגלי ויצאו ממנה ג' מתים בג' ימים זה אחר זה. . .וכן לפי חשבון זה" וכ' במ"ב שם בשם רש"י "ג' מתים: מת אחד בכל יום" אבל לא מצאתי איפה כ' זה ברש"י. וע' ש"ג דף ח. בדפי הרי"ף: "ושלשה מתים שאמרנו בריאים ולא מרועעים בחורים ולא זקנים כמו גבי בתים דאמרינן בריאים ולא מרועעים". ואף שלא הגיע מספר המתים ב"מגפה" שלנו כדי לתקן יום תענית ותפילה, אבל ממה שכ' בש"ע שם בסע' א ודאי ראוי לתקן: "כך מתענים על שאר הצרות כגון עכו"ם שבאו לערך מלחמה עם ישראל. . .או לגזר עליהם צרה אפ' במצוה קלה הרי אלו מתענין ומתריעין עד שירחמו." אם במצוה קלה אמרו, כ"ש תפילה בצבר, ת"ת בצבר, ותשב"ר.

the assumed future value when the market is expected to stabilize. The same is true when assessing property damage and theft.[8]

For standard sales, however, I think it would depend on who initiated the sale. If the seller solicited the transaction at a time or location where demand is minimal and sales don't usually occur, the sale would be valid even at a reduced price. The seller would not be able to claim that the value should be based on a future time or a nearby location where most sellers choose to do business. This seller preferred to sell during poor market conditions, creating a new market at a reduced value. However, if the buyer initiated the transaction, a discount would not be appropriate.[9] If the sale took place at a lower price, the seller could potentially force the buyer to pay the difference with a claim of אונאה, unless the discount was so great that it was clear the seller was aware of the discrepancy, and knowingly gave a discount.[10]

Rise in value is where things get challenging. The *Gemara* [ב"מ דף סא.] attempts to derive the restriction of fair pricing from the prohibitions of theft and usury, based on similarities between the three categories. The *Gemara* concludes, however, that there is a unique aspect of אונאה, not applicable to גזל and רבית, which necessitates its own separate prohibition: "דרך מקח וממכר בכך", overcharging is a routine way of doing business. *Rashi* explains, there are those who require the product and are willing to pay above market value. In other words, this argument would theoretically legalize price gouging had it been derived from גזל and רבית. Therefore, we need a separate prohibition explicitly banning price gouging, despite the fact that "there are those who require the product and are willing to pay above market value".

Before getting into the legal ramifications, I have three basic questions: 1. Why would anyone be willing to pay above market value, even if they really need it? If you can get the same thing cheaper somewhere else, why would anyone be willing to pay more? 2. The vast majority of people are not willing to pay above market value. Just because there are a few people who are, why should that justify overcharging everyone else?[11] 3. Why is this concept unique to fair pricing? The same argument can be made regarding interest payments. Most people are perfectly willing to pay a reasonable interest rate if it gives them the ability to purchase a house or invest in their business.

The following, based partially along the lines of דברות משה [ב"מ ס' נ], is how I understand it: When we say there are those who are willing to overpay, it has to be referring to a situation where the same product cannot be obtained somewhere else for less money. Otherwise, as we said, why would anyone choose to pay the higher price? But then the

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[8] נתיבות [ח"מ ס' שד ס"ק ב] בענין האוכל חמץ בפסח [פסחים דף כט.] "דא"א לו למכור כלל בפסח ואינו מחזיקו רק על אחר פסח מש"ה חייב לשלם לו כפי השעה שדרך למכרו דדמי קצת לגוזל חבירו במדבר שא"א למכרו כלל במדבר רק שמוליכו לשוק ודאי דחייב לשלם כשער שבשוק". וע' דברי יחזקאל ב"ק ס' מו

[9] נתיבות שם: "בשלמא חמץ אם היה רוצה שום אדם לקנות החמץ ולעבור על האיסור א"א לו לקנות רק בהסך ששוה אחר פסח". ובדברי יחזקאל שם כ' "וכל מי שרוצה לקנות בתשרי ג"כ צריך לשלם כשער דניסן"

[10] ש"ע [ח"מ ס' רכז סע' ט] "דידע ומחיל".

[11] אפשר לת' ע"פ מש"כ בכ"מ על הרמב"ם [הל' בכורים פי"א ה"ז] וכן פסק בש"ע [יו"ד ס' שה סע' ה] וע' ש"ך שם וצ"ע

question is, if this is the best price available, why is it “above market value”? The answer is based on what we said previously. Normally, a decrease in demand would trigger a decrease in value, but it depends how sellers react. Similarly, a decrease in supply, which would normally warrant a price increase, would depend on how most buyers react. For example, there is currently a shortage, but the supply is expected to replenish within a specific time frame. If buyers continue to purchase, unwilling to wait for retailers to restock, then the current market value has increased. But if most buyers are holding off, the current market value doesn’t change.

For example, there are three places in town to purchase the ד' מינים. It’s one week before the holiday, and Reuven is shopping before his flight leaves that evening. He goes to store A, but the owner tells him that unfortunately he just sold out and won’t be receiving a new shipment until tomorrow morning. He goes to store B, but the door is locked. He calls the phone number posted on the door, and the owner explains that the health department shut him down for two weeks because his uncle’s neighbor’s cat was exposed to someone who attended a maskless wedding. Luckily, the contact tracer discovered that the cat was wearing a mask, so they allowed him to open the next day. However, he had to remain closed for the remainder of that day. Reuven anxiously moved on to store C. Thankfully, it was open and well stocked. Reuven explained to the store owner what had happened. The seller decided to take advantage of Reuven and told him that all his prices suddenly went up 50%. Reuven begrudgingly picked out his *esrog*, paid the inflated price, and went to the airport to catch his flight.

This is an example where *Rashi* would say that some people are “willing to pay above market value”. Technically, there is a lack of supply, which gave store C a temporary monopoly. If the seller tried raising the price, almost all customers would wait for the competition to open back up the next day. Therefore, the market value never went up. But because Reuven has a specific need, he is willing to pay above the market value.

This answers the first question. To answer the other two questions, we need to see another case. The *Gemara* [ב"מ נח:] quotes the opinion of רבי יהודה that אונאה does not apply to the sale of an animal or a pearl or precious stone. The reason given is because "אדם רוצה לזווגן": a buyer wants to find a match. Meaning, someone who owns an animal for plowing, and wants to get another animal to plow together with the first one, needs to find one which is the same size and weight. Someone who owns a pearl and wants another one to make a pair of earrings, would need to find one which is the same size and color. Since it is difficult to find an exact match, these individuals are willing to pay more than the average customer. Therefore, since there are some buyers who have a specific need and are willing to pay more, רבי יהודה maintains that אונאה does not apply to these items. The obvious question is from the *Gemara* on דף סא. quoted earlier, concluding that the prohibition of אונאה applies even though some buyers may have a specific need and are willing to pay more. רבי יהודה appears to be giving an example of a specific need, saying that אונאה does *not* apply since there are those who are willing to pay more. Does the *Gemara* disagree with רבי יהודה? Another question

we need to address is the following: when a customer shows up to purchase the animal or the pearl, we don't know what their intentions are. רבי יהודה says that since they might be trying to find a match, the rules of אונאה do not apply. The חכמים disagree, which is how we rule according to the final *Halacha*.[12] But what if we knew what the buyer was thinking? Either the buyer stated explicitly, or the circumstances made it clear that the buyer wanted to find a match, would the חכמים agree to רבי יהודה that it would be permissible to charge above market value?

To answer the last question, there is a dispute. First, let's discuss the opinion of the נחלת שבעה who says that when we know for certain the buyer is purchasing in order to create a pair (רוצה לזווגן), everyone agrees אונאה doesn't apply.[13] A similar ruling is formulated by the ריטב"א, which I believe may be the source of the נחלת שבעה: A buyer purchased a product for $6, but the market value is $5. If we know for certain that the buyer considers it to be worth $6, the buyer forfeits a claim of אונאה.[14] There are countless reasons a buyer might attribute a greater value to a particular product. Any reason would qualify, with one exception, as we will discuss shortly. The only requirement the ריטב"א states is that we are certain that this particular buyer considers it to be worth $6.

There appears to be ambiguity as to the case in which the ריטב"א intended this *Halacha* to apply: Some explain that it only applies where the buyer is aware that the same product is available from other sellers for $5, while others understand it to apply even if the buyer is completely unaware of the current market value?[15] The rationale for the first interpretation is the following: if a buyer is unaware of the correct market value, and thinks everyone charges $6, why should the buyer forfeit a claim of אונאה? Even if the buyer personally believes the product is worth $6, why can't he claim that had he known it was available at other stores for $5, he wouldn't have paid $6? The buyer intended on doing business based on the current market value, not based on his own personal needs or beliefs. Rather, the ריטב"א must be discussing a case where the buyer was aware that the same product was available at other stores for less money. Why did he agree to pay more? You would have to give a similar explanation as we said earlier with the case of the *esrog*: from the perspective of the buyer, the seller has a monopoly. Although most buyers can afford to wait, or go to a different store to get a

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[12] ש"ע [ח"מ ס' רכז סע' טו]

[13] שו"ת נחלת שבעה ס' ח אות ו וז"ל: "וכעין סברא זו מצינו עוד בח"מ ס' רכז לענין אונאה דפסקו הפוסקים דאין הלכה כר"י דאמר אין אונאה לבהמה ס"ת ומרגליות מפני שאדם רוצה לזווגן. היינו מטעם דלא אמרינן אומדנא. אבל אי הוי ידעינן בודאי שדעתו היה לזווגן בזה גם חכמים מודים דאזלינן בתר דעתו."

[14] ריטב"א [קידושין דף ח. ד"ה לעולם], וכן פסק בחידושי רעק"א [ח"מ ס' רכז סע' ב]

[15] כ' הנתיבות [ח"מ ס' רסד ס"ק ח] "פסק ג"כ הריטב"א שם דאי שוה לדידיה דאין בו אונאה והיינו בידע" [ובספרים שלנו כ' "והיינו בידו" אבל נראה שט"ס הוא] ובמחנ"א [דיני אונאה ס' כ] נראה שהבין הציור בשיטת הריטב"א אפ' אם לא ידע הלוקח שיש אונאה. ויש להביא ראיה מהריטב"א [ב"מ נא: ד"ה ושמואל] כמש"כ המחנ"א שכוונת הריטב"א אפ' אם לא ידע, דאיתא בגמ' שם "אבל הכא מי ידע דמחיל", וכ' רש"י "מי ידע דאיכא אונאה הוא סבור דאין בו אונאה". ועל ציור זה אמר שמואל "אבל הכא מי יימר דקא עקר מידי" וכ' הריטב"א "מי יימר דעקר, כלו' אולי אין בו אונאה לגבי לוקח זה, דלדידיה שוה ליה דמי מקח." וכן מדייק בהגה על הריטב"א שם. וע' בספר הלכות משפט [ס' רכז סע' ב ענינים נוספים אות ב]

better price, but because of the buyer's specific needs, it's as if this seller is the only one available.

The problem I have with that argument is the following: if the buyer knew the market value was $5, but agreed to pay $6, what was he planning to do about it? There are three options: If he was planning on filing a claim and told two witnesses before making the purchase that he intends on collecting the difference from the seller, then you have the same problem. If the buyer's explicit intention was to purchase based on the going market value, why shouldn't he have a right to do that? If we know for sure that he was *not* planning on filing a claim against the seller, then of course he forfeits his rights. If any buyer knowingly overpays, and explicitly says they do not intend to file a claim, it's a מחילה. There isn't anything unique about someone who personally believes the product is worth $6.[16] The third option is that we don't know the buyer's intentions. With most people, we would say that if they knowingly paid $6 when the market value is $5, they can still collect the difference. We believe them when they tell us their intention was to file a claim all along, and there was no מחילה.[17] But for someone who believes the product is worth $6, we don't believe them that they were planning on filing a claim. Why don't we believe them? And even if we don't, it seems like a stretch to say that this is the case the ריטב"א was referring to.

The other way to interpret the ריטב"א is that it includes a case where the buyer is unaware of the market value. But either way you understand the ריטב"א, he is telling us something extraordinary: market value is not the determining factor when it comes to אונאה, at least not when it conflicts with one's personal subjective value. The question was, what difference does it make if the buyer personally thinks it's worth $6? Why can't the buyer claim he intended on doing business based on market value, which is $5? The answer is that according to the ריטב"א, the prohibition of אונאה doesn't necessarily demand that we follow market value. It demands that we don't cause the other party to suffer a loss. Value is subjective, and if a buyer has a personal belief that the product is worth $6, no harm was done. It's irrelevant that the buyer would like to do business based on market value. That isn't how we determine loss. The other way to understand it, for those who might disagree with the ריטב"א which we will discuss shortly, is that the personal value of the buyer is irrelevant. The only factor we look at to determine loss is market value.

If the ריטב"א is talking about a case where the buyer didn't know the market value, which I think is the correct way to understand it, then we can take it a step further and explain the dispute as follows: those who disagree with the ריטב"א believe loss is measured by looking at how much lower the buyer could have gotten the same item somewhere

[16] אפשר לת' שאם הוא בדרך מחילה, צריך לידע כמה אונאה יש בו כדי שימחול [ש"ע ח"מ ס' רכז סע' כא] משא"כ אם לדידי' שוה ו' ויודע שאינו שוה ו' בשוק, אף שאינו יודע שאינו שוה אלא ה', אפשר דמהני לפי שיטה זו.

[17] רמ"א [ח"מ ס' רכז סע' ז]

else.[18] If the buyer underpaid, we would say the opposite. How much higher could the seller have sold it to a different buyer? Whereas the ריטב"א would say that the value of the item is what we use to measure a potential loss. Often, the two methods will produce the same result. But as we have seen, that isn't always the case.

We can now "circle back" and resolve some of the unanswered questions:

To explain ב"מ דף סא. (page 4), first let's read the *Gemara* the way the ריטב"א would understand it. We initially tried to derive אונאה from גזל and רבית. *Rashi* explains that the common denominator which would allow us to derive one from the other is the fact that each prohibition causes a monetary loss to the other party.[19] But the *Gemara* concludes that we can't derive אונאה since some people have a more urgent need and are willing to pay above market value. I think the ריטב"א would understand this statement to be saying that for those individuals, there is no loss. And if there's no loss, there is no prohibition. That answers the third question. We aren't just stating a factual difference. The same statement can be made with רבית. It's even a stronger argument with רבית since most people, not just a small minority, are perfectly happy to pay a reasonable interest rate. Rather, we are saying that for those who have a greater need for the product relative to most buyers, a fair price was paid and no loss was taken since they personally believe it is worth more. But when it comes to the "loss" of paying interest, the fact that people are willing to pay doesn't change the fact that interest payments are being made.

To answer the 2nd question: how does this justify overcharging everyone else? There is a basic rule: אין הולכין בממון אחר הרוב. We don't use a majority to extract money from a defendant. If we were to follow that rule in this case, we would never collect on any claim of אונאה. Every time a buyer complains that they paid too much, the seller can claim that perhaps this buyer is one of those individuals who believe the value is higher. Even though most buyers don't, but since there are some who do, the seller would have a valid claim. The burden of proof would be on the buyer to prove that they are part of the majority. This is why fair pricing requires its own prohibition, to teach us that when it comes to אונאה, we don't follow the regular rules of monetary law. Rather, every claim of אונאה needs to be honored, and the seller must pay back the loss to the buyer unless the seller can prove that the buyer is part of the minority.[20]

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[18] דלפי הפשט בכוונת הריטב"א שהוא רק בציור שידע, והטעם ששילם יותר מן השער משום שלא היה יכול לקנות ממוכרים אחרים, א"כ אין לפרש שהחולקים על הריטב"א ס"ל שהכל תלוי אם יכול לקנות במקום אחר בפחות, דבציור זה לא היה יכול לקנות במקום אחר מאיזה טעם שיהיה ואין כאן מח', מש"ה צריך לפ' בענין אחר. אבל לאחר העיון נראה שאינו מוכרח לומר דמה ששילם יותר מן השער הוא משום שאינו יכול להמתין לקנות מאחרים, שיש ציורים שרוצה לשלם יותר מטעמים אחרים כמו שמצינו בב"מ דף נא. "אתא ההוא גברא ואמר אי יהיבנא ליה חמשא ופלגא הויא מחילה אתן ליה שיתא ואתבעיה לדינא". ואפ' בציור זה יפסוק הריטב"א שאין לו טענת אונאה אם לדידי' שו"ל יותר, והחולקים ס"ל שיש לו תביעת אונאה משום שיכול לקנות בפחות במקום אחר. ואה"נ אם ידעינן שלא היה יכול להמתין לקנות ממוכרים אחרים, אין לו טענת אונאה לכ"ע, וצ"ע.

[19] רש"י שם ד"ה למה לי לאו ברבית לאו בגזל כו'. וז"ל "ילמדו זה מזה שבכולן חסרון ממון שמחסר את חבירו"

[20] כ' בנתיבות [ח"מ ס' ס ס"ק ד] "והרמב"ם ס"ל דמום ג"כ בכלל לא תונו הוא". וא"כ צריך לבאר מה שפסק בש"ע [ח"מ ס' רלב סע' כג] שהמוכר שור ונמצא נגחן במקום ספק אם לקח לחרישה או לשחיטה "אינו מקח טעות שיכול לו' לשחיטה מכרתיו,

How do we answer these two questions according to those who disagree with the ריטב"א? I think you would have to answer them the same way. Meaning, during the initial stage of the *Gemara*, when we are trying to derive אונאה from גזל and רבית, everyone would agree with the idea that some people inherently believe the product is worth more than market value, and for those people, there would be nothing wrong to charge a higher price since they aren't suffering a loss. And the same argument can be made against every buyer, using the rule אין הולכין בממון אחר הרוב. However, once we have a separate prohibition of אונאה, that's where they disagree. What we learn from the new prohibition isn't that we should deviate from the regular rules, as the ריטב"א understands. Rather, what we learn is a completely new understanding of "fair pricing" and how to determine loss. It should be determined the same way for everyone, based on market value. Even if it is proven that the buyer believes the product has a higher value, it would be irrelevant.

According to the ריטב"א, we can answer the questions we had on the opinion of ר' יהודה regarding the sale of [ב"מ נח:] בהמה ומרגלית (pages 5-6). אונאה applies to practically every product that exists.[21] The *Gemara* [ב"מ סא.] said that with every single product, there is always a possibility you will find someone with a greater than average need who is willing to pay above market value. It's difficult to quantify the exact ratio, but I assume it is a very small minority of people. For argument's sake, let's call it 1%. One out of 100 buyers has some sort of urgent need for any given product on the market. Normally, even with a probability that small, the seller could claim that perhaps the buyer is part of the 1%. But the prohibition of אונאה mandates that we ignore the regular rules, and the seller must make a payment despite the 1% chance he is not actually liable. I believe ר' יהודה agrees with this premise, but he is making the following argument: all we can extrapolate from here is that we will ignore a 1% probability, based on the rule אין בו אלא חידושו. But if we have good cause, an אומדנא to say there is a 10% chance the seller isn't liable, that would not be included in the restriction, and we would revert to the standard rule: אין הולכין בממון אחר הרוב. Since we know that when it comes to בהמה ומרגלית there is a significant percentage of buyers who are רוצה לזווגן and are willing to pay more, ר' יהודה maintains that a claim of אונאה cannot be enforced.

The חכמים disagree with ר' יהודה. But an important distinction to make, according to the נחלת שבעה (page 6), is that they only disagree when it comes to a higher ratio. For some reason, אין בו אלא חידושו isn't a problem, and they believe the exact level of doubt is not relevant. However, the requirement for the seller to pay is only in a situation of

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אע"פ שהרוב קונים לחרישה ולא אזלינן בתר רובא להוציא מיד המוכר". ולפמש"כ שחייב המוכר לשלם דמי אונאה במקום ספק אם הלוקח מן המיעוט דלדידי' שו"ל יותר, משום שגזה"כ הוא באונאה שהולכין אחר הרוב להוציא ממון, א"כ במום לפי הרמב"ם שהוא בכלל איסור אונאה למה לא יתחייב המוכר במקום ספק. וי"ל שיש לחלק דדוקא באונאה בדמי המקח אמרי' "יש בני אדם שצריכין לחפץ וקונין ביותר משוויו" [רש"י ב"מ דף סא. ד"ה שכן] ומש"ה אין ללמד האיסור מגזל ורבית וצריך לגזה"כ לחייבו אפ' במקום ספק. משא"כ במום במקח דאמרינן "כל הלוקח סתם אינו לוקח אלא הדבר שלם מכל מום" [ש"ע ח"מ ס' רלב סע' ז] וא"כ יכול ללמד האיסור מגזל ורבית ואינו בכלל גזיה"כ, ומותר במקום ספק. ומצינו שיש ציורים שהם בכלל הלימוד מגזל ורבית, כמש"כ בח' רעק"א [ב"מ דף סא. ד"ה לכובש ש"ש] ובדברות משה [ב"מ ס' נ ענף ג]

[21] ש"ע [ח"מ ס' רכז סע' טו] "בכל מטלטלים שייך אונאה"

doubt. But if the buyer is definitely among those who believe the product is worth more, the חכמים would agree that no claim of אונאה can be made.[22]

The ערך ש"י[23] disagrees with the נחלת שבעה, expressing two contentions:

1. The חכמים seem to argue in all cases, even if we know the buyer is רוצה לזווגן. And nobody makes any mention of a distinction. I would respond by saying that it is clear from the context that they are only dealing with a case where we are uncertain of the buyer's intention. Also, we do have someone who makes this distinction: the ריטב"א. It is based on the same concept. If we know that the buyer has a specific need and would be willing to pay more, there is no violation of אונאה.

2. If the נחלת שבעה is correct, and the חכמים agree that a claim can't be made where we know the buyer's intentions, then practically speaking, a buyer could never claim אונאה. The seller can always claim that perhaps the buyer's intention is to create a pair, and we should say אין הולכין בממון אחר הרוב. By this point, the answer to this question should be clear: The גזיה"כ of אונאה establishes this exact point: even if there are those to whom אונאה was not violated, the seller still has to pay, and is unable to make the claim אין הולכין בממון אחר הרוב.[24]

The ערך ש"י appears to be going with the understanding that there is no such thing as using a buyer's personal opinion of value as a factor in דיני אונאה. I think he would explain the ריטב"א in the same manner as the נתיבות, that he is only dealing with a case where the buyer knew the true market value. Otherwise, the buyer would always have a right to claim that had he known, he would have purchased it cheaper somewhere else. Personal value never plays a role. Rather, loss is measured based on whether it could have been purchased somewhere else for less money.[25]

I mentioned earlier (page 6) that there was one exception where the ריטב"א agrees that אונאה would apply even if the buyer appears to attribute a greater value to the product. To paraphrase, if the buyer is between a rock and a hard place and feels compelled to pay a higher price [קציצה מתוך הדחק], it does not indicate that the buyer truly believes it

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[22] לפ"ז יש לת' ק' המחנ"א [דיני אונאה ס' כ] על הריטב"א מרש"י ב"מ דף סא.

[23] אבן העזר ס' נ ד"ה עו"כ וכעין סברא זו

[24] ע' בספר הלכות משפט [ס' רכז סע' טו במקור משפט אות ד] ולפ"ז יש להסביר מש"כ הערוה"ש [ח"מ ס' רכז סע' ז] על דברי הרא"ש [ב"מ פ"ד ס' כ] שיש ספק אם יש איסור בפחות משתות, וכ' הרא"ש בצד א' שבעצם יש איסור אבל דרך הכל למחל משום שא"א לצמצם, ע"ש. ובצד ב' כ': "או שמא כיון דדרך מקח וממכר בכך דלפעמים הלוקח חפץ במקח זה ומוסיף עליו דמים יותר מכדי שויו...הלכך עד שתות הוי בכלל דמי מקח ואין כאן שם אונאה כלל וצ"ע, וירא שמים יצא ידי כולם." וכ' הערוה"ש "וגם בספיקו נ"ל מדבריו שהספק אינו אלא במקום שיש עילה להמוכר לתלות שהלוקח יודע המקח אלא שחפץ במקח זה אבל במקום שהמוכר מבין שמהלוקח נעלם המקח והמוכר יודע שיש בזה אונאה פרוטה אסור לו להונות אם לא שיגלה לו". ולכאו' ק' דבצד זה ברא"ש אין כאן איסור כלל, שהרי כ' שהוא "בכלל דמי מקח ואין כאן שם אונאה כלל". ואיך ראה מזה שיש צד איסור? י"ל דזהו הפשט בצד ב' בספיקו של הרא"ש, דדוקא אונאת שתות ולמעלה ילפינן מלא תונו שיש איסור אפ' במקום ספק, אף שדרך מקח וממכר בכך ויש בנ"א וכו' אבל פחות משתות אינו בכלל לא תונו אלא נשאר בכלל הלימוד מגזל ורבית, והטעם להתיר הוא משום ספק ואמרינן אין הולכין בממון אחר הרוב. ודוקא במקום ספק יש היתר, אבל אם יודע שודאי אינו מן המעיוט, אסור להונות אפ' בפחות משתות. ומה שכ' הרא"ש שהוא "בכלל דמי המקח", כלומר לאותם אנשים ששווים אצלם יותר מן השער שבשוק.

[25] ונראה שהערך ש"י לשיטתו במש"כ בח"מ ס' רט סע' א "דכל שיודע דאפשר ליקחנו אצל אחר בפחות מאנהו ואסור", ע"ש.

to be worth that amount, and a claim of אונאה can still be made.[26] The ריטב"א gives a few examples:

1. A woman's husband died, and she needed to do יבום or חליצה with his brother. He wanted to do יבום, but she didn't feel it was a proper שידוך for her. She offered him 200 *zuz* if he would do חליצה, and he agreed. רב פפא ruled that the חליצה is valid, and she does not have to pay the 200 *zuz*. [יבמות דף קו.]

2. A man was escaping from prison, and came to a riverbank where he found a ferry and its driver waiting for more passengers. The convict wanted him to help him cross right away, and offered an exorbitant amount of money. The driver agreed and took him across. The ברייתא rules that the fugitive is only liable for the regular fare, not the amount they agreed on. [יבמות שם, ב"ק דף קטז.]

3. The following case is similar, based on ב"ק דף קטו:, although the ריטב"א does not quote it directly: a man was walking with a pitcher of honey, and someone else was walking with an empty container. The pitcher of honey cracked, and the honey was going to spill out onto the ground. The owner of the container said he would catch the honey if the owner of the honey agreed to pay him half its value. He agreed to pay, the honey was saved, but he only has to pay a fair wage for his time, not the full amount which was agreed upon. [ש"ע ח"מ ס' רסד סע' ו]

None of these rulings are directly related to אונאה. However, the ריטב"א is proving that in contract law, we see that if either party is compelled or coerced, the agreement can be cancelled. If payment was paid in full, however, there would be no refund unless אונאה was violated. But before payment is made, the one who was compelled to enter the agreement can essentially claim they were just kidding. If the agreement is invalid, we certainly can't use it to prove the buyer's personal opinion of value. The ריטב"א concludes with one additional case showing that this idea not only applies to שכירות פועלים, but also to מקח וממכר:

Someone purchases medicine that they need for a bad illness at an exorbitant price. The buyer can take the medicine, and would only be liable for the fair market value, since the only reason they agreed was because of the illness. [ש"ע יו"ד ס' שלו סע' ג]

We have four examples where a buyer or an employer entered into an agreement, and because of their motivation, can claim that the agreement was insincere and invalid. In those types of situations, the ריטב"א would say that if אונאה was violated, a refund would be due. But there are other situations where the motivation of the buyer proves that the personal value is higher and אונאה cannot be claimed. How do we differentiate between the cases?

[26] וז"ל הריטב"א "מיהו בדשוי' לזבונא שיתא כי אורחיה, אבל אי לדידיה לא שוי' אלא מפני שהוא דחוק בדבר, הא ודאי קציצה מתוך הדחק לא שמה קציצה"

There seems to be a common denominator in all four cases: something negative is about to happen, and the buyer or employer would like to stop that event from taking place. The woman wants to prevent a marriage with a man she doesn't like, the fugitive doesn't want to be brought back to prison, the guy carrying the honey doesn't want to lose his honey, and the sick person doesn't want to die from the disease. When someone feels pressured because they are about to lose something or something negative is about to happen to them, they don't have the mindset to enter into a rational and fair agreement. Due to the feeling of desperation, they will agree to almost anything. However, if the buyer is trying to accomplish something, the agreement is valid and the price can potentially be above market value.

Fannie Mae provides a definition of market value which appraisers use when assessing the value of residential real estate:

Market value is the most probable price that a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- *buyer and seller are typically motivated;*

- *both parties are well informed or well advised, and each acting in what he or she considers his/her own best interest;*

- *a reasonable time is allowed for exposure in the open market;*

The checklist continues with a couple more requirements. But the first requirement, *buyer and seller are typically motivated*, is what I want to focus on. Motivation of the buyer and seller is a critical aspect of a fair deal. If either party is pressured to enter the agreement in order to avoid some type of catastrophe, that would be problematic. This is consistent with the ריטב"א, who says that קציצה מתוך הדחק is not a valid agreement. It's nice to see that Fannie Mae got it right. I believe their intention is also to exclude those who have a unique need or desire, לדידי שוה לי. They are trying to define market value, which is "*the most probable price that a property should bring in a competitive and open market*". There is a possibility you will find a customer who is willing to pay more, but it is not probable or expected. The ריטב"א agrees that someone who says לדידי שוה לי is paying *above* market value. Therefore, if you wanted to measure market value, you would have to exclude those individuals from the equation.

Getting back to a practical level, here is how I would resolve the original questions:

In every situation, you have to look at three categories: those who are "typically motivated", לדידי שוה לי, and קציצה מתוך הדחק. The case of the horse and sword (page 2), which *Rashi* explained took place "בתוך המלחמה", I would explain as follows: ר' יהודה בן בתירא says you can charge as much as you want. On the surface, he appears to disagree with the ריטב"א. A customer on the battlefield presumably needs it urgently

to protect their life. It could be that he does disagree, but I would prefer not to assume that since there are several sources throughout ש"ס which support the opinion of the ריטב"א. Rather, I think ר' יהודה בן בתירא is making the following point: although in general an agreement which is a קציצה מתוך הדחק can be cancelled, but in the case of סוס וסייף וחטיטום במלחמה, since every customer in that location is willing to pay more, that becomes a new market of its own. As we said, we do not rule like ר' יהודה בן בתירא in the final *Halacha*. Therefore, even if you have a situation where all customers are desperate for their life to make the purchase and willing to pay more, every one of those agreements can be voided and אונאה could theoretically be collected.

However, if you take the middle category of לדידי שוה לי, I would say the opposite. If you have a significant number of buyers who fit into that category, it will change the market value. For example, the case of בהמה ומרגלית, I estimated (page 9) that there was a 10% probability that any given buyer is רוצה לזווגן. It's difficult to give an exact number, but once you reach a point where you can expect to find a customer for a higher price, that price becomes the market value. For example, if the majority of customers are trying to find a pair for their animal or jewel, and are willing to pay a premium, the "most probable" price you can get is the higher amount. "לדידי שוה לי" does not refer to the specific motivation of the buyer, as much as it refers to the ratio of how many people share the same motivation relative to everyone else. As long as the transaction isn't disqualified due to the fact that it was a קציצה מתוך הדחק, any other motivation can be included in the market value as long as it is a price which is likely and probable to be obtained.[27]

Getting back to the war zone, since the final *Halacha* is that אונאה does apply, not like the opinion of ר' יהודה בן בתירא, how is a fair price calculated? Also, what would be the *Halacha* during a time of war, but not in the middle of battle? You would use the same method in both cases, and in theory, the result could come out the same. For market value, you would only look at the first category, those who are "typically motivated", and you would ignore the other two. You have to assess how much would a typical buyer pay. Any sale that takes place because the buyer is scared for their life should be ignored. If a buyer has a unique need for the product and is willing to pay more than everyone else, if it is a rare occurrence, that price should also be ignored.

For דיני אונאה, you would also take the second category into account. If we know for sure that the buyer has a greater need and is willing to pay more, as long as that need does not include escaping from a catastrophe, it is considered a fair price for that buyer. If the buyer already paid, they would not be able to collect a refund. If the buyer took possession of the product but did not yet pay, I would suggest that the buyer can be forced to pay the full amount which was agreed upon.[28]

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[27] ולפ"ז ק' על לשון הערך ש"י דמשמע שלומד הציור בר' יהודה שיש רוב בנ"א שרוצים לזווגן, א"כ זהו עיקר השוויות לכ"ע.

[28] נראה פשוט שיכול המוכר לומר קים לי כשיטת הריטב"א לא להחזיר האונאה. אבל אם כבר לא שילם, ורוצה הלוקח לומר קים לי דלא כהריטב"א, נ"ל שאין זה טענה. שהרי שיטת הריטב"א מפורש, וגם הביאו רעק"א כמש"כ למעלה. ואין שום פוסק

When it comes to medical supplies and protective equipment you would use the same formula. If a buyer is scared for their life if they don't get a box of face masks and a case of hand sanitizer, and they are willing to pay ten times the pre-pandemic rate, they are entitled to a refund for the difference. But they would have to make the claim very soon after the purchase took place.[29] The seller would have to pay back the difference for any supplies that were already used during that short period. But if the buyer still has unused supplies, and asks for a refund of the difference, the seller has the right to demand that the buyer give them back for a full refund.[30]

Again, the correct market value would be based on the price a typical customer who is not scared for their life would be willing to pay. It likely would be higher than it was before the pandemic. But it would have to be within reason. If the price is too high, a typical buyer will wait until the market stabilizes.

There is another aspect which could make a difference. On 3/23/20, the governor of Maryland signed an order stating that retailers cannot charge more than a 10% increase for numerous items, including medical supplies and equipment. Other states may have issued similar orders. It is questionable if דינא דמלכותא will affect דיני אונאה, especially if most people are ignoring, or aren't even aware of the order.[31] However, the discussion of דינא דמלכותא is primarily dealing with cases where the law is being more lenient, to say that there is no limit on fair pricing and אונאה should not apply at all. Even if we were to say that anyone who does business, does so in accordance with the מנהג המקום, that can't be better than explicitly stipulating the condition. And if the buyer and seller stipulate that אונאה does not apply to their transaction, the stipulation is meaningless.[32] But the goal of this law is to be more stringent. It is saying that even if a much higher price can be justified based on דיני אונאה, retailers are prohibited from raising their prices more than 10%. Would we say there is an assumed condition that אונאה will be based on the מנהג המקום? I don't know the answer. But again, it's worse in a situation where many people aren't aware the law exists, and especially if the law is not being enforced.

שחולק עליו לדינא. ומה שהק' הקצות [ס' רכז ס"ק א] על הריטב"א מהא דמרגליות, הגם שהק' עליו אבל לא רצה הקצות לפסוק כנגדו לדינא, ולכאו' אין יכול לומר קים לי אם לא שודאי פוסק כן להלכה. וגם במחנ"א [דיני אונאה ס' כ] לא פסק כנגדו, רק הביא ב' הדעות. א"כ אין לומר קים לי כהמחנ"א כיון שלא הכריע לשום צד לדינא. וגם שיטת רש"י שהביא שם כ' "נראה" שחולק על הריטב"א. אבל כבר כתבתי למעלה שיש ללמד דברי רש"י כמו שיטת הריטב"א. ואף שאין לי מקור לדבר, אבל נ"ל שאם יש ללמד דברי הראשון בב' דרכים אין שייך טענת קים לי. שטענת קי"ל הוא אם היה הפוסק עומד כאן לפנינו היה ודאי פוסק כמוני, ואין יכול לומר זה אם שייך לפ' דבריו בדרך אחר. דומה למש"כ הערוה"ש [ח"מ ס' כה סע' יג] ע"ש. מיהו אפשר שיש סברא לומר רק בשתות שייך פסק הריטב"א ורעק"א, אבל לא ביותר משתות. והגם שאפשר שכוונתם היתה גם ליתר משתות, אבל כיון שכ' הציור שלוקח ה' בו', אפשר שאין להוציא ממון אם הוא יותר משתות. דומה למש"כ הב"ח [ח"מ ס' רכז סע' כז] בענין לוקח מבעה"ב דלשיטת ר"י הוא רק בשתות אבל יותר משתות הוא כאיניש דעלמא וכ' הב"ח "וטעמו משום דהני עובדי דורשכי וכיפי הכי הוה באונאה בשתות...אבל ביתר משתות לא אשכחן דמחלק תלמודא בהכי ואמרינן הבו דלא לוסיף עלה שתות גופיה חידוש הוא אין לך בו אלא חידושו." וא"כ אפשר שחייב לשלם עד שתות אבל לא יותר, וצ"ע.

[29] ש"ע [ח"מ ס' רכז סע' ז] שאם שהה יותר מכדי שיראה לתגר "אינו יכול לחזר ולא לתבוע אונאתו"

[30] ש"ע [שם סע' ד]

[31] ע' בספר הלכות משפט [ס' רכז סע' כה ס"ק יט-כב] שהביא שו"ת תשורת ש"י [ח"א ס' תנו]

[32] ש"ע [ח"מ ס' רכז סע' כא]

We also mentioned the prohibition of לא תעמד על דם רעיך (page 1) which includes a requirement to spend money to save someone's life. Therefore, if you are in possession of a product, but the one who needs it doesn't have any money, you would be required to give it to them for free. If they do have money, they are required to pay for it.[33] But you can only charge based on the fair market value.[34] All of this is true even if אונאה was explicitly forgiven, or if for any reason אונאה didn't apply.

This could occur if there is a shortage of gowns or masks, and the hospital won't do a surgery without the proper equipment. But when you had people running around last year trying to buy masks and hand sanitizer thinking they would die if they didn't have it, that would not necessarily be included. Just because someone thinks their life is in danger does not necessarily mean it is. If to your best understanding their life is not in danger, none of this would apply. However, regarding דיני אונאה, the buyer's understanding is all that matters. If the buyer thinks his life is in danger, even if in reality it is not, it would still be a קציצה מתוך הדחק.

Another example could be with ventilators. If you had an extra one, you would be required to offer it to anyone who needed it. However, at a certain point, the ER doctors started reporting that the ventilators were being used improperly, and in many cases, were killing the patients. Eventually people started to catch on, but it was a very controversial matter in the beginning. If to the best of your understanding, the doctors who are saying that the ventilators are killing the patients are correct, not only would you not be required to give it to someone who wants it, לא תעמד על דם רעיך would forbid you from giving it to them.

This gets into a different discussion: When you have different opinions among doctors, which experts are we supposed to follow? It is an important and complex question. There are numerous guidelines in *Halacha* which address this issue. Unfortunately, we can't get into all the details right now. I will have to save that for a different thesis. But for now, I will offer one free tip: if you have a doctor who contradicted himself at least 12 times over the last 12 months, who publicly stated that he thinks NY did an absolutely superb job in the way they handled Covid, that is not an "expert" to whom we should be focusing too much of our attention, if any.

I hope this helped clarify things.

רפאל מנחם סנדרו

[33] סמ"ע [ח"מ ס' תכו ס"ק א] ולענין אם לא היה לו ממון בשעת הצלה ולאח"כ היה לו, ע' בספר פתחי חושן [הל' נזיקין פרק יב אות ה ס"ק יא]

[34] ש"ך [יו"ד ס' שלו ס"ק ד]