

## **Abstract**

This thesis consists of an introduction, three chapters and a conclusion. The purpose is to analyze Bava Metzia, Perek Ha-Zahav and draw conclusions about the similarities and differences between the ancient and modern marketplaces. The contribution is to highlight and differentiate between the philosophical and theological positions that serve as the foundations for the ancient Jewish and modern American marketplaces. The first chapter examines **אונאה** and consists of six sugyot. The second chapter examines **אונאה ברבירים**, fraudulent advertising, and competition and consists of three sugyot. In both chapters, each sugyah is translated, outlined, analyzed, and given a modern application. The third chapter is a philosophical and theological analysis of the first two chapters. Mishnah, Tosephta, Talmud, Mishneh Torah and various reference aids were used.

**Bava Metzia, Perek Ha-Zahav:  
A Comparison of the Perspectives of the Formative  
Jewish Marketplace Law and American Markets**

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**Introduction**  
**Perek Ha-Zahav**  
**Bava Metzia**

I became interested in studying Perek Ha-Zahav in Bava Metzia because of my background in finance. Having earned an MBA in Finance and having worked in corporate finance before deciding to become a rabbi, I have a fair understanding of the modern marketplace and how it works. After changing careers and immersing myself in ancient Jewish texts, I became curious about how the rabbis viewed the ancient marketplace and whether their views were the same or different from modern assumptions about well-regulated, functioning markets. Additionally, this study allowed me to indulge in my love of Talmud.

To begin the study I first examined background material essential to understanding Perek Ha-Zahav, the fourth chapter in Tractate Bava Metzia. I began by studying Mishnah, Order Nezikin, Tractate Bava Metzia, Chapter Four, the chapter of Mishnah that corresponds to Perek Ha-Zahav, as well as selected mishnayot from Chapters Six, Seven and Nine. After gaining an initial understanding of the issues raised in the Mishnah, I sought to widen my understanding of the debate by studying the relevant sections of Tosephta that would shed light on the scope of the debate in which the rabbis engaged before turning to the Talmud. As a final preparation before studying Talmud, I studied the relevant sections of Mishneh Torah in order to see which issues became important over time and which issues were dropped from later consideration. After completing all of the above preparatory work, I began to study Perek Ha-Zahav with the goal of comparing the ancient marketplace to the modern.

To begin my study, I divided Perek Ha-Zahav into the two sections into which it naturally divides: **אונאה** and **אונאה ברברים** with a section included on fraudulent advertising and competition. I further divided these two sections into sugyot, six sugyot for the chapter dealing with **אונאה** and three sugyot for the chapter dealing with **אונאה ברברים**, fraudulent advertising, and competition. Having divided the Talmudic chapter into discrete sugyot, I was able to begin my study using a modified four-part analysis that appears in the chapters that follow.

The first step in any Talmudic analysis is for someone who is not completely fluent in Hebrew and Aramaic to directly translate the Talmud into idiomatic English. All translation is interpretation in the sense that there are always differences in connotation and nuance between two languages. Therefore, one must translate the Hebrew and Aramaic directly for oneself in order to attempt to understand as best as one can the nuances of what was written in the original text.

The second step is to parse the sugyah and create an outline of the flow of its argument. I find this step to be indispensable to the accurate understanding of what can be convoluted logic and argumentation. The third step is to analyze one's outline to explain the argumentation and to attempt to discover the underlying issues being discussed in the text. This third step is the most extensive section for the analysis of the individual sugyot. The fourth step of the analysis as I have presented it here represents my modification of the standard four-part analysis. In this fourth section I compare the issues raised through the analysis given in the third part with conditions in the modern

marketplace. It is here that we see the sharpest differences between the marketplace of the rabbis and our own.

What is normally the fourth part of a standard four-part analysis of a sugyah is contained in the third chapter of this study. Normally, the fourth section is an analysis of the philosophical, theological, or ethical reasons behind the debates in which the rabbis engaged. I have separated this section out in order to be able to examine in isolation the theology of the rabbis that drove the issues and arguments throughout the entirety of Perek Ha-Zahav. Once I reached clarity about the rabbinic and modern action of the marketplace and explained the rabbinic theological ideology of what a marketplace should be, I was able to draw conclusions about what was similar and very different between these markets.

**Chapter 1**  
**Ha-Zahav, Part I**  
**Bava Metzia 49b and following**

**Introduction**

The following sugyot begin a discussion of **תנאים** or fraudulent overcharge. It should be noted that the translation 'fraudulent overcharge' actually refers to several types of fraud including overcharge, undercharge, and verbal oppression. In this chapter **תנאים** only refers to fraudulent forms of overcharge or undercharge.

Underlying all the discussions in these sugyot is the concept that financial transactions are subject to fraudulent overcharge or undercharge at all. The underlying assumption in the ancient world is that there exists at any point in time a fair market value for products. It is not explained how the market arrives at this single theoretical value although one may presume that market values then were determined just as they are today, through the intersection of supply versus demand. Once the fair market value has been determined, however, the laws of **תנאים** begin to apply in the ancient world. That is, charging too much or too little for a product constitutes a fraudulent and invalid sale that is subject to various remedies. This concept is fairly alien to the modern marketplace where the going assumption is that one sells products for the highest price the market will bear and that vigorous competition and perfect markets keep all prices reasonably the same. Perhaps this modern assumption even works in the aggregate, but in the ancient world, where individual cases seem to carry more weight, every transaction must be clear of fraud.

That is, charging what the traffic will bear was not acceptable in the ancient marketplace. Rather, charging the fair market value was expected.

A further, somewhat alien assumption was that fraud applies to both the buyers, whom one would think could be defrauded by a more knowledgeable sellers, and the sellers, whom one would think could not be taken advantage of by less knowledgeable buyers. The ancient world, however, recognized that either a buyer or a seller might make a mistake as to the current fair market value and therefore seek a remedy. In the modern world, it is unimaginable that a seller might demand more money from a buyer because the buyer paid an asking price that turned out to be too low. Yet this is exactly the case described as fraudulent undercharge in ancient world.

The following six sugyot explore definitions, limits and logical extensions based on these two, underlying assumptions.



## Sugyah #1

**Babylonian Talmud, Tractate Bava Metzia, 49b**

### תלמוד בבלי מסכת בבא מציעא דף מט עמוד ב

משנה. האונאה ארבעה כסף מעשרים וארבעה כסף לסלע, שתות למקח. עד מתי מותר להחזיר? עד כדי שיראה לתגר או לקרובו. הורה רבי טרפון בלוד: האונאה שמונה כסף מעשרים וארבע כסף לסלע, שליש למקח, ושמחו תגרי לוד. אמר להם: כל היום מותר לחזור, אמרו לו: יניח לנו רבי טרפון במקומינו, וחזרו לדברי חכמים.

גמרא. אתמר, רב אמר: שתות מקח שנינו, ושמואל אמר: שתות מעות גמי שנינו. שוי שיתא בחמשא, שוי שיתא בשבעה - כולי עלמא לא פליגי דבתר מקח אולין, ואונאה היא. כי פליגי - שוי חמשא בשיתא, ושוי שבעה בשיתא. לשמואל דאמר בתר מעות אולין - אידי ואידי אונאה הוי, לרב דאמר בתר מקח אולין - שוי חמשא בשיתא ביטול מקח הויא, שוי שבעה בשיתא - מוזילה הויא. ושמואל אמר: כי אמרינן מוזילה וביטול מקח - היכא דליכא שתות משני צדדים, אבל היכא דאיכא שתות מצד אחד - אונאה הויא. תנן: האונאה ארבעה כסף מעשרים וארבעה כסף לסלע, שתות למקח. מאי לאו - רובין שוי עשרים בעשרין וארבעה, ושמע מינה שתות מעות גמי שנינו? - לא, רובין שוי עשרים וארבעה בעשרים. מי נתאנה - מוכר. אימא סיפא: עד מתי מותר להחזיר - בכדי שיראה לתגר או לקרובו. ואמר רב נחמן: לא שנו אלא לוקח, אבל מוכר - לעולם חזר. אלא רובין שוי עשרים וארבעה בעשרין ותמוניא. תנן: הורה רבי טרפון בלוד: האונאה שמונה כסף מעשרים וארבעה כסף לסלע, שליש למקח. מאי לאו - רובין שוי שיתסרי בעשרים וארבעה, ושמע מינה שליש מעות גמי שנינו? - לא רובין שוי עשרים וארבעה בשיתסרי, מי נתאנה - מוכר. אימא סיפא: אמר להם כל היום מותר לחזור, ואמר רב נחמן: לא שנו אלא לוקח, אבל מוכר לעולם חזר! - אלא רובין שוי עשרים וארבעה בתלתין ותרין.

### **Translation**

Mishnah: Fraudulent overcharge is defined as four silver out of 24 silver in a selah, one sixth of a purchase. How long is one able to revoke a fraudulent purchase? Until he shows the purchase to another merchant or to a relative. Rabbi Tarfon taught in Lod that fraudulent overcharge is defined as eight out of 24 silver in a selah, one

third of a purchase. The merchants of Lod were happy with the ruling until he said to them that one is able to revoke a fraudulent purchase all day. They replied to him, 'let Rabbi Tarfon leave us alone where we are,' and they returned to the ruling of the Sages.

Talmud: It was said: Rav said we were taught one sixth of a purchase, but Shmuel said we were also taught one sixth of the price (money). Whether something worth six for five or worth six for seven, everyone agrees that we follow after the purchase and it is fraudulent overcharge. Where there is disagreement is where something worth five is sold for six or something worth seven is sold for six. Shmuel said we follow after the money and both are fraud. According to Rav, who said we follow after the purchase, something worth five is sold for six nullifies the purchase while something worth seven is sold for six is pardonable. But Shmuel said that 'we say something is pardonable or nullified in a purchase where there is no sixth from either side but where there is a sixth from one side there is fraudulent overcharge.

We have learned that fraudulent overcharge is four silver ma'ot from 24 silver ma'ot in a selah, one sixth of a purchase. Is it not that one buys something worth 20 for 24 and we learned from this one sixth of the money also? No, it is where someone bought something worth 24 for 20. Who was defrauded? The seller. But what about the clause: "Until when is one permitted to revoke a sale? Until he shows it to a merchant or his relative." But Rav Nachman said, 'this was only taught about the buyer, but the seller could always retract.' Rather someone buys something worth 24 for 28.

We have learned that Rabbi Tarfon taught in Lod that fraudulent overcharge is eight silver ma'ot from 24 silver ma'ot in a selah, one third of a purchase. Is it not one buys something worth 16 for 24 and from this we have learned that it is also one third of the money too? No, that someone bought something worth 24 for 16. Who was defrauded? The seller. But what about the clause, "he said to them all day one may retract..."? But Rav Nachman said this is only taught in regard to the buyer but the seller is always able to retract. Rather someone buys something worth 24 for 32.

### **Outline of Sugyah**

#### ***Mishnah***

##### **Definitional Statement**

Fraudulent overcharge is defined as four silver out of 24 silver in a selah, one sixth of a purchase.

##### **Question**

How long is one able to revoke a fraudulent purchase?

##### **Answer**

Until he shows the purchase to another merchant or to a relative.

##### **Minority Definitional Statement**

Rabbi Tarfon taught in Lod that fraudulent overcharge is defined as eight out of 24 silver in a selah, one third of a purchase.

##### **Minority Answer**

The merchants of Lod were happy with the ruling until he said to them that one is able to revoke a fraudulent purchase all day.

##### **Halakhic Ruling**

They replied to him, 'let Rabbi Tarfon leave us alone where we are,' and they returned to the ruling of the Sages.

#### ***Talmud***

##### **Statement of Alternate Propositions**

It was said: Rav said we were taught one sixth of a purchase, but Shmuel said we were also taught one sixth of the price (money).

##### **Scope of Agreement Between Propositions**

Whether something worth six for five or worth six for seven, everyone agrees that we follow

after the purchase and it is fraudulent overcharge.

### Scope of Disagreement Between Propositions

Where there is disagreement is where something worth five is sold for six or something worth seven is sold for six.

### Proposition #2

Shmuel said we follow after the money and both are fraud.

### Proposition #1

According to Rav, who said we follow after the purchase, something worth five is sold for six nullifies the purchase while something worth seven is sold for six is pardonable.

### Refinement of Proposition #2

But Shmuel said that 'we say something is pardonable or nullified in a purchase where there is no sixth from either side but where there is a sixth from one side there is fraudulent overcharge.

### Statement

We have learned that fraudulent overcharge is four silver ma'ot from 24 silver ma'ot in a selah, one sixth of a purchase.

### Question

Is it not that one buys something worth 20 for 24 and we learned from this one sixth of the money also?

### Answer

No, it is where someone bought something worth 24 for 20.

### Question

Who was defrauded?

### Answer

The seller.

### Objection

But what about the clause: "Until when is one permitted to revoke a sale? Until he shows it to a merchant or his relative."

### Counter-argument to Objection

But Rav Nachman said, 'this was only taught about the buyer, but the seller could always retract.'

### Corrected Example

Rather someone buys something worth 24 for 28.

### Statement

We have learned that Rabbi Tarfon taught in Lod that fraudulent overcharge is eight silver ma'ot from 24 silver ma'ot in a selah, one third of a purchase.

Question	Is it not one buys something worth 16 for 24 and from this we have learned that it is also one third of the money too?
Answer	No, that someone bought something worth 24 for 16.
Question	Who was defrauded?
Answer	The seller.
Objection	But what about the clause, "he said to them all day one may retract..."?
Counter-argument to Objection	But Rav Nachman said this is only taught in regard to the buyer but the seller is always able to retract.
Corrected Example	Rather someone buys something worth 24 for 32.

### Discussion of Sugyah

One might think that this sugyah is merely a matter of mathematics. The question implied, if one thinks of this sugyah as a matter of mathematics, is how does one measure the level of overcharge to determine if it is pardonable or if it is fraudulent overcharge? How one defines the denominator will determine the percentage of overcharge and whether it will or will not meet the one-sixth threshold that delineates between pardonable and fraudulent overcharge. If, as Rav asserts in Proposition #1, one uses the fair market value of the product being sold as the denominator, then something sold for one sixth less or more than the fair market value is defined as subject to fraudulent overcharge. For example, something worth six will have the threshold for fraudulent overcharge defined as a sale price of five or less and seven or more.

Shmuel, in Proposition #2 disagrees and asserts that the appropriate denominator should be the purchase price of the merchandise. That is, if a product's fair market value is one sixth less or more than the sale price, then it is defined as subject to fraudulent overcharge. For example, something sold for six will have a threshold for fraudulent overcharge defined as a fair market value of five or less and seven or more.

Rav correctly points out a flaw in Shmuel's logic by examining Shmuel's examples from the perspective of the buyer. If a product is sold for six then the lower threshold for fraudulent overcharge is a fair market value of five. However, if the fair market value is five but it has been sold at six, a mark up of one-fifth, then the buyer has been defrauded and the sale is voided. Therefore, as a boundary to delineate between pardonable and fraudulent overcharge, Shmuel's lower boundary fails because from the buyer's perspective the sale is well within the range of invalid purchases.

The legitimate disagreement between Proposition #1 and Proposition #2 is Shmuel's upper threshold where something worth seven is sold for six. Clearly, the buyer has not been defrauded, having received a bargain price of one-seventh less than the fair market value. Further, according to Rav, the differential is only one-seventh and therefore pardonable because the differential is less than a one-sixth discrepancy. In Proposition #2 Shmuel disagrees because from the perspective of the seller, the fair market value is one-sixth greater than the price the seller received and therefore the sale is fraudulent and invalid. Shmuel does recognize Rav's legitimate critique and therefore refines his proposition to state that fraudulent overcharge is

defined as a one-sixth discrepancy between fair market value and the price paid using either value or price as the denominator.

Following the debate between Rav and Shmuel, we find two attempts to support Shmuel's position through examples that are essentially the same. The examples only differ in that they use either one-sixth, the boundary defined by the Sages as constituting fraudulent overcharge, or one-third, the boundary defined by Rabbi Tarfon in Lod as constituting fraudulent overcharge. Either example leads to the identical conclusion. First, the examples ask if one can deduce from a situation in which the buyer has been defrauded that fraudulent overcharge applies to cases in which the purchase price is used in the denominator. As discussed above one may only deduce that fraudulent overcharge applies when purchase price is used in the denominator through cases in which the seller is defrauded. Therefore, counter-examples are cited in which the seller is defrauded. When the objections are raised referring to time periods to retract, Rav Nachman counters them saying that those time periods refer to buyers rather than sellers. Therefore, the corrected conclusions show situations in which the buyer is defrauded rather than the seller.

If one should look beyond the mathematics, however, one can see that the debate between Rav and Shmuel is predicated by two other questions. First, the debate centers on the question of what constitutes a sale. In Mishnayot, Order Nezikin, Tractate Bava Metziah, Chapter 4, Mishnah 1, the ruling about what constitutes a valid sale states: "Moveable goods acquire the coin, but the coin does not acquire the moveable goods." That is, a sale is only complete upon the exchange of the goods sold, not upon payment of the purchase price. The rationale behind such

a ruling is that both parties to a transaction must be able to examine the goods being transferred to ensure full disclosure of all terms of the sale. Analogously, as Rav would argue, both the buyer and the seller must be aware of the fair market value of the goods being sold to ensure full disclosure, creating a valid sale. Therefore, fraudulent overcharge follows the goods, which can complete a sale, and not the price, which even if paid cannot complete a sale until the goods are transferred. Both positions, that a sale is only completed upon transfer of goods and that fraudulent overcharge follows the fair market value of the goods, are meant to ensure full disclosure to both parties. Without full disclosure to both parties, the sale is not considered valid.

The second question on which the debate centers is the question of the limits to which a seller may be defrauded. That a seller may be defrauded is settled later in the Mishnah cited above, Mishnah 4: "Just as there is fraudulent overcharge for a private individual, so too there is fraudulent overcharge for a merchant." Rav agrees completely as seen in his lower boundary of something worth six sold for five, which constitutes fraud in which the seller is the victim. Shmuel, however, wishes to have both the buyer and the seller feel that they are treated equally before the law and therefore sets his boundaries such that from either perspective the one-sixth boundary is maintained. What appears to be a pardonable one-seventh undercharge from the perspective of the buyer, appears to be a one-sixth undercharge from the perspective of the seller, a level of undercharge that would void the transaction. Shmuel wishes to maintain equality before the law such that the seller will have protection against fraud at levels equal to those of the buyer.



## **Modern Application**

The marketplace described in the Talmud is an extraordinarily different place from the one in which we live today. Perhaps the largest difference between the two regards return policies in general. As described in the Talmud, returns seem to be allowed only in cases defined as fraudulent and even then there was a short time period of less than one day, in which to exercise one's rights. Comparatively, terms of sale today are much looser and favor the buyer significantly more. Purchases may be returned for any reason including price. If you get home and decide you don't like the color of the shirt you just bought, you may return it with no questions asked. Furthermore, the time period in which one may return a product is significantly greater usually ranging from seven to 30 days from the date of purchase. LL Bean goes so far as to allow a return at any time, even if years have passed, if you are not satisfied with your purchase.

In terms of prices, the market place today is again slanted in favor of the buyer. If you find that you were overcharged for an item you may return it or, as some department stores allow, ask for a price adjustment that returns the amount overcharged. Some stores, notably electronics stores, advertise low price guarantees. Under these guarantees, if the buyer finds a lower price advertised within 30 days of purchase they are entitled to a refund of 110% of the difference between the purchase price and the lower advertised price. One glaring difference to this modern bias in favor of the buyer is the automobile dealership in which the dealer attempts to extract as much profit from the buyer as possible. The only question is whether or not the dealership reaches the one-sixth threshold of fraudulent overcharge. Given an

average \$20,000 new automobile, the dealer would have to charge \$3,333 over fair market value, a scenario which does not seem likely even if the buyer were to pay sticker price for the car. Even in the case of used car dealerships, buyers recognize that fair market values give used car dealerships much higher profit levels and the fraudulent overcharge threshold is unlikely to be reached. Therefore, even in what seems to be a worst case scenario, the automobile dealership, the buyer appears to be more protected today.

This higher level of protection for the buyer extends to the drastic difference between the modern and ancient marketplace. In the ancient marketplace the seller was also able to claim fraudulent undercharge as stated in Mishnah 4: "Just as there is fraudulent overcharge for a private individual, so too there is fraudulent overcharge for a merchant." In today's markets, once a sale has been completed, the seller has no recourse even if the price paid was drastically under the fair market value. One especially sees this difference in yard sales or antique markets where the seller may not recognize the value of an antique and sell it for many times less than its true fair market value. Nevertheless, the seller has no recourse and the sale is final.

## Sugya #2

### **Babylonian Talmud, Tractate Bava Metzia, 49b (cont.)**

(תניא כוותיה דשמואל: מי שהומל עליו ידו על העליונה. כיצד? מכר לו שוה חמשה בששה, מי נתאנה - לוקח, יד לוקח על העליונה, רצה - אומר תן לי מעותי, או תן לי מה שאניתי. מכר לו

### **Babylonian Talmud, Tractate Bava Metzia, 50a**

#### תלמוד בבלי מסכת בבא מציעא דף נ עמוד א

שוה שש בחמש מי נתאנה - מוכר, יד מוכר על העליונה. רצה - אומר לו תן לי מקחי, או תן לי מה שאניתי.

איבעיא להו: פחות משתות לרבנן, לאלתר הוא מחילה או בכדי שיראה לתגר או לקרוב? ואם תמצי לומר בכדי שיראה לתגר או לקרוב, מאי איכא בין שחות לפחות משתות? - איכא, דאלו שחות - ידו על העליונה, רצה - חזר, רצה - קונה ומחזיר אונאה. ואילו פחות משתות - קנה ומחזיר אונאה. מאי? - תא שמע: חזרו לדברי חכמים.

### **Babylonian Talmud, Tractate Bava Metzia, 50b**

#### תלמוד בבלי מסכת בבא מציעא דף נ עמוד ב

הלכתא: פחות משתות - נקנה מקח, יותר על שחות - ביטול מקח. שחות - קנה ומחזיר אונאה, זה זה בכדי שיראה לתגר או לקרוב. תניא כוותיה דרבא: אונאה פחות משתות - נקנה מקח, יתר על שחות - בטל מקח. שחות - קנה ומחזיר אונאה, דברי רבי נתן. רבי יהודה הגשיא אומר: יד מוכר על העליונה, רצה - אומר לו תן לי מקחי, או תן לי מה שאניתי. זה זה בכדי שיראה לתגר או לקרוב.

### **Translation**

The one who was deceived has the upper hand. How so? He sold to him something worth five for six. Who was defrauded? The buyer. The buyer has the upper hand. He could say 'give me my money' or 'give me what you overcharged

me.' He sold him something worth six for five. Who was defrauded? The seller. The seller has the upper hand. He could say to the buyer 'give me my merchandise' or 'give me what I was defrauded.'

It was asked of the Sages: Is less than one sixth, according to the rabbis, immediately pardonable (i.e. waived) or does it wait until the purchase is shown to a merchant or a relative? And if it's found to be said that one waits to show it to a merchant or a relative, then what's the difference between one sixth and less than one sixth? Where the case is one sixth he has the upper hand: he could say 'cancel the sale' or 'I'm buying it but give me the fraudulent overcharge.' But if it's less than one sixth, he purchases it and the overcharge is returned. What's the halakhic ruling? Come and hear: "They reverted to the Sages' opinion."

...

The halakhah is less than one sixth and the purchase is valid. More than one sixth and the purchase is nullified. One sixth, the purchase is valid with the fraudulent overcharge returned. In any case, he can show the purchase to a merchant or to a relative. It is taught in accordance with Rava. Fraudulent overcharge less than one sixth and the purchase is valid; more than one sixth and the purchase is nullified; one sixth and the purchase is valid with the fraudulent overcharge returned – these are the words of Rabbi Nathan. Rabbi Judah the Prince said the seller has the upper hand. He could say give me my merchandise or give me that which I was defrauded. In either case he can show it to a merchant or to his relative.

## Outline of Sugyah

Proposition	The one who was deceived has the upper hand.
Question #1	How so?
Explanatory Example #1	He sold to him something worth five for six.
Example #1 Question	Who was defrauded?
Example #1 Answer	The buyer.
Answer to Question #1, Example #1	The buyer has the upper hand. He could say 'give me my money' or 'give me what you overcharged me.'
Explanatory Example #2	He sold him something worth six for five.
Example #2 Question	Who was defrauded?
Example #2 Answer	The seller.
Answer to Question #1, Example #2	The seller has the upper hand. He could say to the buyer 'give me my merchandise' or 'give me what I was defrauded.'
Question #2	It was asked of the Sages: Is less than one sixth, according to the rabbis, immediately pardonable (i.e. waived) or does it wait until the purchase is shown to a merchant or a relative?
Question #2, Extension	And if it's found to be said that one waits to show it to a merchant or a relative, then what's the difference between one sixth and less than one sixth?
Answer to Question #2	Where the case is one sixth he has the upper hand: he could say 'cancel the sale' or 'I'm buying it but give me the fraudulent overcharge.' But if it's less than one sixth, he purchases it and the overcharge is returned.
Question #3	What's the halakhic ruling?
Answer to Question #3	Come and hear: "They reverted to the Sages' opinion."
Clarified Answer	The halakhah is less than one sixth and the purchase is valid. More than one sixth and the purchase is nullified. One sixth, the purchase is valid with the fraudulent overcharge returned. In

any case, he can show the purchase to a merchant or to a relative. It is taught in accordance with Rava.

### Support for Answer

Fraudulent overcharge less than one sixth and the purchase is valid; more than one sixth and the purchase is nullified; one sixth and the purchase is valid with the fraudulent overcharge returned – these are the words of Rabbi Nathan.

### Minority Opinion

Rabbi Judah the Prince said the seller has the upper hand. He could say give me my merchandise or give me that which I was defrauded. In either case he can show it to a merchant or to his relative.

### Discussion of Sugyah

Previously we saw that the rabbis were concerned that complete fairness be observed in the marketplace such that full disclosure occurs before a valid sale may take place and that both the buyer and the seller should be treated equally when defining fraudulent overcharge. This sugyah debates two issues. First, it is an argument over how far equality before the law is extended. The question debated is whether a person who breaks the law loses the right to equal protection and is subject to a penalty for breaking the law or if they too maintain their rights in a disagreement over price. Second, it is an argument over whether a purchase price may legally deviate from the fair market value or not. The question debated is at what point does fraudulent overcharge need to be refunded.

In the first half of the sugyah we see that equality before the law has its limits and that breaking the law brings penalties with it. We see in the sugyah that once a party to a transaction has committed fraudulent overcharge, they are no longer equal partners in the remedy to the fraud. That is, the one who commits the fraud has no

say in what the remedy will be but rather the one who has been defrauded determines the remedy. The one defrauded may choose between canceling the sale (receiving either their money or their merchandise back) or receiving a refund of the difference between the fair market value and the purchase price. This is a significant loss of control because it can significantly affect the profit in the transaction.

For example, suppose a merchant typically sells goods at one-seventh above fair market value because of the superior service provided. Some customers are willing to pay a premium to receive premium service during a transaction and a one-seventh mark-up falls below the boundary of fraudulent overcharge. If, however, the merchant charges in a particular transaction one-fifth above the fair market value, the transaction is subject to fraudulent overcharge and the buyer has complete control over the remedy. If the buyer decides to cancel the sale, the merchant has lost the sale but may later resell the goods at the accustomed one-seventh mark-up. If, however, the buyer decides to receive the difference between the purchase price and the fair market value, then the merchant loses not only the overcharge but also the accustomed one-seventh mark-up. The loss of the accustomed one-seventh mark-up in this example would constitute a significant penalty.

Further, the first half of the sugyah asserts that there is no valid purchase price above the fair market value. If the purchase price is between fair market value and one-sixth above fair market value then the fraudulent overcharge must be returned, although the sale cannot be canceled. If the purchase price is one-sixth or more above the fair market value then the sale may be canceled or not at the buyer's discretion but the fraudulent overcharge would be refunded if the sale were not canceled.

The second half of the sugyah is the decided halakhah and differs from the arguments put forth in the first half. The second half provides more equality before the law for the defrauder than the first half provides. Under the decided halakhah of the second half, the defrauder does lose control over the remedy and may lose an accustomed mark-up in addition to the fraudulent overcharge as discussed above in the example. However, the second half of the sugyah takes the option out of the hands of the defrauded and states what the remedy will be according to the level of fraud. That is, if the fraudulent overcharge is more than one-sixth then the sale is canceled and the money must be refunded and the goods returned. If the fraudulent overcharge is precisely one-sixth then the sale is valid and the fraudulent overcharge is returned.

This ruling creates a more balanced penalty for the defrauder because in the vast majority of cases of fraudulent overcharge, the sale will be canceled and the defrauder will have the opportunity to sell the goods again at an accustomed mark-up. Continuing the example given above, say the defrauded cancels the sale and receives their money back but still wants to buy the goods. The merchant could legitimately sell the goods for the fair market value plus the accustomed one-seventh mark-up. Only in the less likely case where the fraudulent overcharge is precisely one-sixth of the fair market value would the defrauder be subject to a potential loss exactly as they would be in first half of the sugyah.

Of more consequence, the second half of the sugyah determines that the purchase price may vary from the fair market value by up to one-sixth, yet the sale will remain legitimate and final. Any variations of less than one-sixth are waived and



sales remain valid. This ruling envisions a completely different marketplace from the one envisioned in the first half of the sugyah. In the first half, the only valid sales are those concluded at the prevailing fair market value. In the second half, valid sales may include deviations from fair market value. The ruling in the second half recognizes that people make purchase decisions for more reasons than purely price and recognize that other factors may legitimately determine the final purchase price. Further, the ruling recognizes that fair market value is not one single theoretical price but rather a range of legitimate prices.

### **Modern Application**

For the most part, the modern marketplace provides superior protections for the defrauded buyer. Many transactions are governed by more liberal return policies so that a buyer who is the victim of overcharge may return the product for a full refund or, in the case of some department stores, for a price adjustment. However, in those cases where there is no liberal return policy, the operative statement is 'a contract is a contract' and little remedy is to be found. The cases of redress to the courts are usually those cases where the courts find the contracts to be legal, but that the level of profits are considered 'unconscionable' or 'shocking to the conscience of the court'. Unfortunately, the level to which profits must rise before a court will make this type of finding is often in the hundreds or even thousands percent level rather than the 17% level contemplated in the Talmud. Further, because the court is specifically setting aside an otherwise legal contract for reasons of social justice, there are few such rulings and they are imposed inconsistently across jurisdictions.

As for the seller, there are no protections contemplated in the modern marketplace as there are in the ancient marketplace.

The modern and ancient marketplaces both recognize that fair market values are ranges rather than point prices. Today we place a great deal of trust in the 'invisible hand of the market' to appropriately price products and one might assume that perfect competition arrives at a single market clearing price. One need only look at one of the most basic commodities, however, to see that there is no single fair market value for products today. Gasoline is essentially an undifferentiated commodity that does not change from station to station. While some refiners would like the consumer to believe that their brand of gasoline is inherently better, 87-octane gasoline from one station is the same as 87-octane gasoline from another. Yet there is clear evidence that prices will vary from town to town or corner to corner even in as perfect a market as gasoline where the product is an undifferentiated commodity and customers will switch for price differences as low as one penny a gallon. Even in as perfect a market as gasoline, there is no single fair market value. With far less perfect markets the Talmud also recognizes legitimate price variations from the theoretical fair market value just as we recognize legitimate price fluctuations today.

### Sugyah #3

#### **Babylonian Talmud, Tractate Bava Metzia, 50b (cont.)**

עד מתי מותר להחזיר כו'. אמר רב נחמן: לא שנו אלא לוקח, אבל מוכר -  
לעולם תחזר. - נימא מסייע ליה, חזרו לדברי חכמים. אי אמרת בשלמא מוכר  
לעולם תחזר -

#### **Babylonian Talmud, Tractate Bava Metzia, 51a**

#### תלמוד בבלי מסכת בבא מציעא דף נא עמוד א

משום הכי חזרו. אלא אי אמרת מוכר נמי כלוקח דמי - מאי נפקא להו מינה? כי  
הכי דעברי ליה רבנן תקנתא ללוקח הכי נמי עברי ליה רבנן תקנתא למוכר? -  
תגרי לוד לא שכיח דמעו. אושפוזכניה דרמי בר חמא זבין חמרא ומעה. אשכחיה  
דהוה עציב, אמר ליה: אמאי עציבת? - אמר ליה: זביני חמרא ומעאי. - אמר  
ליה: זיל תדר כך. - אמר ליה: הא שהאי לי יותר מבדי שאראה לתגר או לקרובי.  
שדריה לקמיה דרב נחמן. אמר ליה: לא שנו אלא לוקח, אבל מוכר - לעולם  
תחזר. מאי מעמא - לוקח מקחו בידו, כל היכא דאזיל מחוי ליה, ואמרי ליה אי  
מעה אי לא מעה. מוכר דלא נקט מקחיה בידיה, עד דמיתרמי ליה זבינחא  
מכירתיה, וידע אי מעה ואי לא מעה.

#### **Translation**

“Until when may he revoke...”

Rav Nachman said that the above mishnah was only taught with respect to the  
buyer but the seller may always retract. Let us say that the following supports Rav  
Nachman's view: “They reverted to the opinion of the Sages.” It all works out fine if  
you were to say a seller may always revoke a sale. Therefore they reverted (to the  
Sages' opinion because it shortened the time that the buyer could rescind). But, if  
you were to say that a seller is like a buyer, what practical difference does it make  
then? After all, the rabbis enacted a remedy for the buyers just as they enacted a  
remedy for the sellers. (So why should the sellers revert to the Sages' arrangement

when they could make more money?) The merchants of Lod infrequently made mistakes. (Hence, the added time for buyers to rescind on their purchases was not to their advantage. All it meant to sellers was concern about possible, though unlikely, returns for a whole day.)

The host of Rami bar Hama sold wine and erred. Rami found him to be sad and said to him: "Why are you sad?" He replied, "I sold wine and I erred." He said to him, "go and revoke the sale." He said to him, "I waited more than enough time to show it to a merchant or a relative." Rami sent him to stand before Rav Nachman, who said to him: "It was only taught about the buyer but the seller may always revoke a sale." What's the reason for this ruling? A buyer has his purchases in his hand and everywhere he goes, he shows it and they tell him if he erred or not. A seller doesn't hold the merchandise in hand and until he comes across merchandise like his merchandise he won't know if he erred or not.

### **Outline of Sugyah**

#### **Proposition**

"Until when may he revoke..."

#### **Statement**

Rav Nachman said that the above mishnah was only taught with respect to the buyer but the seller may always retract.

#### **Support for Statement**

Let us say that the following supports Rav Nachman's view: "They reverted to the opinion of the Sages."

It all works out fine if you were to say a seller may always revoke a sale. Therefore, they reverted (to the Sages' opinion because it shortened the time that the buyer could rescind).

#### **Objection to Answer**

But, if you were to say that a seller is like a buyer, what practical difference does it make then? After all, the rabbis enacted a remedy for

the buyers just as they enacted a remedy for the sellers. (So why should the sellers revert to the Sages' arrangement when they could make more money?)

**Answer**

The merchants of Lod infrequently made mistakes. (Hence, the added time for buyers to rescind on their purchases was not to their advantage. All it meant to sellers was concern about possible, though unlikely, returns for a whole day.)

**Explanatory Example**

The host of Rami bar Hama sold wine and erred. Rami found him to be sad and said to him: "Why are you sad?" He replied, "I sold wine and I erred." He said to him, "go and revoke the sale." He said to him, "I waited more than enough time to show it to a merchant or a relative." Rami sent him to stand before Rav Nachman, who said to him: "It was only taught about the buyer but the seller may always revoke a sale."

**Question**

What's the reason for this ruling?

**Answer**

A buyer has his purchases in his hand and everywhere he goes, he shows it and they tell him if he erred or not. A seller doesn't hold the merchandise in hand and until he comes across merchandise like his merchandise he won't know if he erred or not.

**Discussion of Sugyah**

To this point we have seen the rabbis attempt to maintain a fair balance between the rights of the seller and the rights of the buyer. Both interests have been served and both have remedies if they have been defrauded. In this sugyah the discussion attempts to discover the reason for what appears to be a glaring inequality between buyers and sellers. Buyers have a strictly limited time, at most a day if using Rabbi Tarfon of Lod's liberal interpretation, in which to discover fraud and seek a remedy. Sellers, on the other hand, have an unlimited time to discover fraud and seek

a remedy. It is a legitimate question to ask why this inequity is allowed when the rabbis have been so scrupulous to be fair up to this point.

First, the sugyah cites Rav Nachman's assertion that the period for remedy is limited for buyers but unlimited for sellers. Rav Nachman's view appears to have support in the example of the merchants of Lod. For these merchants the shorter discovery period for buyers as ruled by the Sages was desirable as long as their own discovery periods were unlimited. However, if both the buyer and the seller were treated equally with equivalent discovery periods, then the merchants should be indifferent to the length of the discovery period and have no reason to revert to the ruling of the Sages. The reason they did revert is that they were less likely to make a mistake in pricing. Therefore, Rabbi Tarfon's longer discovery period, which would only cause them a day's worry about unlikely or unfounded returns, was less valuable to the sellers than the buyers, and they reverted to the ruling of the Sages. Thus, it seems that Rav Nachman's notion that sellers had an unlimited right to revoke a sale is supported by the reaction of the merchants of Lod.

To settle the question an explanatory example is raised. In the example we see a merchant make a mistake in the pricing of wine but think that he had no remedy because he discovered his error beyond the time period defined by the Sages. Rav Nachman rules that the seller may always revoke the sale and is not limited, as the buyer is limited. The rationale given for the ruling is that the discovery periods are equivalent because it is more difficult for merchants to price merchandise that is no longer in their control. Buyers, however, may show the merchandise to experts at any time to discover if they have been defrauded or not. In essence, the ruling to make

different time periods for discovery is an attempt to maintain a level playing field between the buyer and the seller so that they both have reasonably the same chance of discovering fraudulent overcharge. That is, a time period that is reasonable for a buyer to discover fraudulent overcharge is unreasonable for a seller because the seller does not maintain possession of the merchandise.

### **Modern Application**

Discovery periods in modern times are significantly different than in ancient times. The first area of difference is that the seller is presumed to know about their product and therefore may not revoke a sale. That is, their discovery period is generally non-existent rather than unlimited. The second area of difference is that discovery periods for the buyer are generally negotiable depending on what is being sold. In the modern marketplace, return periods or low-price guarantee periods generally act as discovery periods and usually range from seven to 30 days. For other transactions, such as the sale of houses or the sale of businesses, the completion of the sale is usually contingent upon reasonable discovery. That is, the sale of a house is contingent on a house inspection or the sale of a business is contingent upon the audit conducted during due diligence. In both cases, the seller is assumed to know what they are selling and only the buyer is protected through a reasonable period of discovery.

#### Sugvah #4

#### **Babylonian Talmud, Tractate Bava Metzia, 51a (cont.)**

ההוא גברא דהוה נקם ורשכי לזבוגי, קרי שיתא ושויה חמשא, ואי הוו ירבי ליה חמשא ופלגא - הוה שקיל. אתא ההוא גברא ואמר: אי יחיבנא ליה חמשא ופלגא - הוויא מחילה, אתן ליה שיתא ואתבעיה לדינא. אתא לקמיה דרבא, אמר ליה: לא שנו אלא בלוקח מן התגר, אבל בלוקח מבעל הבית - אין לו עליו אונאה. ההוא גברא דהוה נקיט כיפי לזבוגי, קרי שתין ושווי חמשין, ואי הוו ירבי ליה חמשין וחמשא הוה שקיל. אתא ההוא גברא ואמר: אי יחיבנא ליה חמשין וחמשא הוויא מחילה, אתן ליה שיתין, ואתבעיה לדינא. אתא לקמיה דרב חסדא. אמר ליה: לא שנו אלא בלוקח מן התגר, אבל בלוקח מן בעל הבית - אין לו עליו אונאה. - אמר ליה רב דימי: ישר, וכן אמר רבי אלעזר. - ישר. - והא אנן תנן: כשם שאונאה לדיוט כך אונאה לתגר, מאן הדיוט - לאו בעל הבית? - אמר רב חסדא: בצדדיהא, אבל מאני תשמישתיה דיקרי עליה - לא מזבין להו אי לאו בדמי יתירי.

#### **Translation**

There was a man who held strips of silk in hand to sell. He called out 'six!' but they were only worth five. But if they were to give him five and a half, he would accept. A certain man came and said, "If I give him five and a half, it would be pardonable (i.e. waived). I will give him six and bring him to court." He came before Rava. He said to him, "This was only taught with regard to buying from a merchant, but when buying from a householder, one doesn't have fraudulent overcharge."

A certain person had jewels to sell. He called out 60, but they were only worth 50. But if they would give him 55 he would accept. A certain man came and said, "If I give him 55 it would be pardonable (i.e. waived). I will give him 60 and bring him to court." He came to stand before Rav Hisdah, who said to him, "This



was only taught with regard to one who buys from a merchant, but when buying from a householder, one doesn't have fraudulent overcharge." Rav Dimi said to him, "Correct." And thus said Rabbi Elazar, "Correct." But haven't we learned, "Just as there is fraudulent overcharge for a commoner, so too there is fraudulent overcharge for a merchant?" Who is a commoner if not a householder? Rav Hisdah said, "That's for rough clothes, but for things for personal use or that he holds valuable to him, he won't sell except at higher prices."

### **Outline of Sugyah**

#### **Explanatory Example #1**

There was a man who held strips of silk in hand to sell. He called out 'six!' but they were only worth five. But if they were to give him five and a half, he would accept. A certain man came and said, "If I give him five and a half, it would be pardonable (i.e. waived). I will give him six and bring him to court." He came before Rava.

#### **Halakhic Ruling**

He said to him, "This was only taught with regard to buying from a merchant, but when buying from a householder, one doesn't have fraudulent overcharge."

#### **Explanatory Example #2**

A certain person had jewels to sell. He called out 60, but they were only worth 50. But if they would give him 55 he would accept. A certain man came and said, "If I give him 55 it would be pardonable (i.e. waived). I will give him 60 and bring him to court."

#### **Halakhic Ruling**

He came to stand before Rav Hisdah who said to him, "This was only taught with regard to one who buys from a merchant, but when buying from a householder, one doesn't have fraudulent overcharge."

#### **Support for Halakhic Ruling**

Rav Dimi said to him, "Correct." And thus said Rabbi Elazar, "Correct."

#### **Objection**

But haven't we learned, "Just as there is fraudulent overcharge for a commoner, so too there is fraudulent overcharge for a merchant?" Who is a commoner if not a householder?

## **Counter-argument to Objection**

Rav Hisdah said, "That's for rough clothes, but for things for personal use or that he holds valuable to him, he won't sell except at higher prices."

## **Discussion of Sugyah**

This is an extremely interesting sugyah because for the first time the Talmud deliberately declares that what should be fraudulent overcharge is actually a legal sale. That is, this is the first time that the Talmud is abandoning the perspective of being scrupulously fair to all parties entering into a transaction. Both examples in this sugyah show situations in which a householder has fraudulently overcharged the buyer, yet the buyer has no recourse. In fact, neither court even tries to deny that fraudulent overcharge occurred. Rather, the courts bring in a new legal theory on which to base their ruling, a legal theory profoundly different from complete fairness and disclosure in transactions. The courts introduce the theory of necessity.

Under the theory of necessity, the courts recognize that householders will not sell personal items or items with sentimental value attached to them except at prices higher than fair market value. If there is to be a functioning market for householders as the sellers, then the courts must, by necessity, allow them to sell their goods at prices that would normally be considered fraudulent overcharge. Otherwise no sales by householders would take place and the market could collapse. This ruling implicitly recognizes that sentimental value can actually be quantified by a higher monetary value that induces the householder to sell. This ruling recognizes that not all sales or purchase decisions are made from a purely rational cost/benefit analysis.

Or rather, it recognizes the psychic benefits of sentimental value and adds a monetary value to compensate.

Still, the courts do not abandon entirely the theory of complete fairness and disclosure in transactions. They maintain that householders are still liable for fraudulent overcharge for items that would not have attached any type of sentimental value, such as rough clothes. Yet if the householder is about to sell grandmother's pearls, the buyer should expect to pay more than their fair market value to induce the householder to sell at all.

### **Modern Application**

Recognizing the emotional content in purchases and the additional price people are willing to pay for the emotional content is fundamental to the workings of the modern marketplace. It is rare that products are sold today based on price alone. Even for commodities that theoretically should compete purely on price, such as gasoline, companies attempt to differentiate themselves through other more emotional means to be able to extract a higher price. For example, BP is now advertising itself as 'Beyond Petroleum' in an effort to appear to be more environmentally conscious. It does not matter that its brand of gasoline is identical to other brands and pollutes the environment just as much when burned, through an emotional attachment to environmental awareness BP attempts to make its brand of gasoline worth more to the consumer.

Branding, in fact, is almost purely about emotional content rather than inherent value. For example, store brand oatmeal is made of rolled oats. Quaker Oats

oatmeal is made of rolled oats. Yet Quaker Oats charges a premium for its brand name. Brands almost always sell more than the product; they almost always sell emotional content in addition to functionality. Buy our brand of shirt because you will be considered stylish. Drink our brand of soda and you too will have an exciting lifestyle. Wear our brand of pants and you will be more attractive to potential sexual partners. In the modern marketplace, it seems that most products are sold for their emotional content rather than their functionality. Therefore, we see buyers' acceptance of exceptionally high mark-ups on goods relative to actual production costs and raw materials. They accept that the brand name is worth something extra in the way of cost.

## Sugyah #5

**Babylonian Talmud, Tractate Bava Metzia, 51a**

### תלמוד בבלי מסכת בבא מציעא דף נא עמוד א

איתמר, האומר לחבירו: על מנת שאין לך עלי אונאה, רב אמר: יש לו עליו אונאה, ושמואל אמר: אין לו עליו אונאה. לימא רב דאמר כרבי מאיר, ושמואל דאמר כרבי יהודה. דתניא: האומר לאשה הרי את מקודשת לי על מנת שאין לך עלי שאר כסות ועונה - הרי זו מקודשת, ותנאו בפל, דרבי רבי מאיר. רבי יהודה אומר: בדבר שבממון תנאו קיים. - אמר לך רב: אנא דאמרי - אפילו לרבי יהודה; עד כאן לא קאמר רבי יהודה התם - אלא דידעה וקא מחלה,

**Babylonian Talmud, Tractate Bava Metzia, 51b**

### תלמוד בבלי מסכת בבא מציעא דף נא עמוד ב

אבל הבא - מי ידע דמחיל? - ושמואל אמר: אנא דאמרי אפילו לרבי מאיר; עד כאן לא קאמר רבי מאיר התם - אלא דודאי קא עקר, אבל הבא - מי ימר דקא עקר מדיד? - אמר רב ענן, לדידי מפרשא לי מיניה דמר שמואל: האומר לחבירו על מנת שאין לך עלי אונאה - אין לו עליו אונאה, על מנת שאין בו אונאה - הרי יש בו אונאה.

## **Translation**

It is said: The one who says to his friend, "(This sale is made) on the condition that you don't claim fraudulent overcharge from me." Rav says there is still the possibility of a claim of fraudulent overcharge against him, but Shmuel says there is no possibility of a fraudulent overcharge claim against him. Should we say that Rav agreed with Rabbi Meir and Shmuel with Rabbi Yehudah? It was taught: "The one who says to a woman, 'Behold you are married to me on the condition that you have no claim upon me for sustenance, clothing, or periodic marital relations,' behold, he is married, but his condition is voided." These are the words of Rabbi Meir. Rabbi

Yehudah says that with respect to monetary issues, his condition is established. Rav could say to you, "What I say could even be according to Rabbi Yehuda." Up to this point, Rabbi Yehuda only said about that case (of marriage that monetary conditions hold) because she was aware (of what was being withheld) and waived (her rights). But in this case, who is aware (of whether there is or is not fraudulent overcharge) that he (knowingly) is able to waive his rights? And Shmuel could say, "What I say could even be according to Rabbi Meir." Up to this point, Rabbi Meir only said about that case (of marriage that the groom's conditions are null) because of course it comes to uproot (the law of the Torah). But in this case, who can say that he uprooted anything (since no one knows yet whether there is fraudulent overcharge involved or not)? Rav Anan said, "It was explained to me by Mar Shmuel. The one who says to his friend, 'on the condition that you don't claim fraudulent overcharge from me,' there is no claim of fraudulent overcharge from him. (But if he were to say,) '(The purchase) shall be exempt (from the rule) of fraudulent overcharge,' then it is subject to a claim of fraudulent overcharge."

### Outline of Sugyah

#### Statement

It is said: The one who says to his friend, "(This sale is made) on the condition that you don't claim fraudulent overcharge from me."

#### Proposition #1

Rav says there is still the possibility of a claim of fraudulent overcharge against him,

#### Proposition #2

but Shmuel says there is no possibility of a fraudulent overcharge claim against him.

#### Question

Should we say that Rav agreed with Rabbi Meir and Shmuel with Rabbi Yehudah?

### **Support for Proposition #1**

It was taught: "The one who says to a woman, 'Behold you are married to me on the condition that you have no claim upon me for sustenance, clothing, or periodic marital relations,' behold, he is married, but his condition is voided." These are the words of Rabbi Meir.

### **Support for Proposition #2**

Rabbi Yehudah says that with respect to monetary issues, his condition is established.

### **Objection to Proposition #2**

Rav could say to you, "What I say could even be according to Rabbi Yehuda." Up to this point, Rabbi Yehuda only said about that case (of marriage that monetary conditions hold) because she was aware (of what was being withheld) and waived (her rights). But in this case, who is aware (of whether there is or is not fraudulent overcharge) that he (knowingly) is able to waive his rights?

### **Objection to Proposition #1**

And Shmuel could say, "What I say could even be according to Rabbi Meir." Up to this point, Rabbi Meir only said about that case (of marriage that the groom's conditions was null) because of course it comes to uproot (the law of the Torah). But in this case, who can say that he uprooted anything (since no one knows yet whether there is fraudulent overcharge involved or not)?

### **Harmonization of Rulings**

Rav Anan said, "It was explained to me by Mar Shmuel. The one who says to his friend, 'on the condition that you don't claim fraudulent overcharge from me,' there is no claim of fraudulent overcharge from him. (But if he were to say,) '(The purchase) shall be exempt (from the rule) of fraudulent overcharge,' then it is subject to a claim of fraudulent overcharge."

### **Discussion of Sugyah**

This complex sugyah is a debate on the limits of contract law. It begins with the proposition that two parties are conducting business together. Party A enters the sale with the stipulation that party B will not hold him accountable for fraudulent overcharge. The debate is joined over the question of whether the hypothetical,

conditional sales contract is valid or invalid. Rav, in Proposition #1, asserts that a conditional sales contract of this sort is invalid while Shmuel, in Proposition #2, asserts that a conditional sales contract of this kind is valid.

The Talmud proceeds to cite a more settled dispute and uses that dispute to shed light on which proposition is the correct one and on the rationales behind both propositions. The scenario for the more settled dispute is as follows. A man marries a woman while stating that the marriage is conditional on his having none of the obligations of a husband for a wife (sustenance, clothing and periodic marital relations). The dispute is whether this is a binding marriage or not and whether the conditions are valid or not. Both sides in the dispute agree that the marriage is binding, that is the marriage contract as a whole is valid. The disagreement between Rabbi Meir and Rabbi Yehudah concerns the conditions to the marriage contract. Rabbi Meir rules that illegal stipulations to a contract are void and therefore the conditions the man placed upon the marriage are invalid. Rabbi Yehudah rules that illegal stipulations to a contract are void but severable. Therefore, those conditions that the man placed upon the marriage which are illegal are invalid; those that are legal are severed from the illegal conditions and remain valid. Furthermore, Rabbi Yehudah rules that the legal stipulations remain valid only because the woman was aware of her rights and waived her rights prior to entering the marriage contract. To summarize, Meir rules that (1) conditions are not severable, (2) illegal conditions are voided, and (3) the contract less the conditions remains valid. Yehudah rules that (1) conditions are severable, (2) illegal conditions are voided, (3) legal conditions are



valid only with prior knowledge and consent, and (4) the contract less illegal conditions (but including legal conditions) remains valid.

The Talmud proposes that Rav might be associated with Rabbi Meir and rules that the condition on which the sale is based is invalid and fraudulent overcharge applies. The Talmud then associates Shmuel with Rabbi Yehudah and rules that the condition on which the sale is based is valid because of prior consent and fraudulent overcharge does not apply. To make a difficult argument even more confusing, the Talmud argues that Rav can also be associated with Yehudah because Yehudah requires prior knowledge and consent before a waiver can be given but the second party is not aware if there is fraud involved or not. Therefore, even by Yehudah's rules Rav could argue that the sale is invalid. Similarly, Shmuel can also be associated with Meir because Meir says that illegal conditions are those that uproot Torah based laws, and they are invalid. Waiving the right to claim fraudulent overcharge does not necessarily uproot a Torah based law, because at the point of sale the buyer does not know whether the price paid violates the rule of fraudulent overcharge. Therefore, the sale can be valid.

In the Harmonization of Rulings as given by Rav Anan, we can see that these large questions of contract law are settled through the harmonization. If the condition is 'you do not claim fraudulent overcharge against me', implicit in the condition is the statement 'maybe there is overcharge involved and maybe there isn't, but you won't pursue a claim against me in either case'. This condition is valid and there can be no claim of fraudulent overcharge. The condition is valid because (1) it is not illegally overturning fraud statutes, (2) it is severable from any illegal claim that fraud statutes

don't apply, and (3) it is made with the prior knowledge and consent of both parties. If, however, the condition is 'there is no law of fraudulent overcharge attached to the purchase', then the condition is invalid and claims of fraud may proceed. The condition is invalid because (1) claiming there are no fraud statutes related to a sale runs counter to Torah law and (2) there is no prior knowledge and consent that any potential fraudulent overcharge will be waived.

In summary, the sugyah settles contract laws as follows: A valid contract made with stipulations remains valid, even if the stipulations are found to be invalid. Stipulations that overturn law are illegal and invalid. Valid stipulations are severable from invalid stipulations. A stipulation that waives one's rights can only be valid if made with prior knowledge and consent.

### **Modern Application**

I am not an attorney and therefore feel unqualified to explain modern contract law. In my business dealings, however, I have learned the following. An illegal contract is not enforceable, a position identical to Rabbi Meir's position that conditions overturning law are invalid. I do not know if illegal sections of a contract are severable from legal sections, making the contract enforceable minus the illegal parts. I have seen sections of contracts, specifically the lease on my apartment, which state "if a term in this Lease is illegal, the rest of this lease remains in full force." I suspect the implication is that the normal assumption in contract law is that illegal conditions are not severable without stating explicitly that they are severable. Rights can only be waived with prior knowledge and consent, which is why it is so important

to read all the fine print, especially on broker agreements in which the consumer usually waives the right to sue and is forced instead into arbitration.

## Sugyah #6

Babylonian Talmud, Tractate Bava Metzia, 52b

תלמוד בבלי מסכת בבא מציעא דף נב עמוד ב

עד מתי מותר להחזיר, בכרכים עד שיראה לשולחני, בכפרים עד ערבי שבתות.  
מאי שנא בסלע דמפלג, ומאי שנא במלית דלא מפלג? - אמר אביי: כי חנן נמי  
מתניתין במלית בכרכין חנן. רבא אמר: מלית - כל איניש קים ליה בגוה. פלע,  
כיון דלאו כל איניש קים ליה בגוה אלא שולחני, הלכך, בכרכים דאיכא שולחני  
- עד שיראה לשולחני, בכפרים דליכא שולחני - עד ערבי שבתות דסלקין  
לשוקא.

### Translation

"Until when may he return (a defective coin)? In cities until he can show it to a moneychanger. In villages until Erev Shabbat."

What is the difference between a selah where there is a divergence (between city and village) and a tallit (i.e., a garment) where there is no divergence? Abaye said, 'because when the Mishnah also taught about a tallit, it taught about the cities.' Rava said, 'about a tallit, everybody knows; about a selah not everybody knows except for a moneychanger.' Therefore, in the cities where there are moneychangers, "until he can show it to a moneychanger." In the villages where there are no moneychangers, "until Erev Shabbat" when they go up to the market.

### Outline of Sugyah

#### Proposition

"Until when may he return (a defective coin)? In cities until he can show it to a moneychanger. In villages until Erev Shabbat."

### **Question**

What is the difference between a selah where there is a divergence (between city and village) and a tallit (i.e., a garment) where there is no divergence?

### **Answer #1**

Abaye said, 'because when the Mishnah also taught about a tallit, it taught about the cities.'

### **Answer #2**

Rava said, 'about a tallit, everybody knows; about a selah not everybody knows except for a moneychanger.' Therefore, in the cities where there are moneychangers, "until he can show it to a moneychanger." In the villages where there are no moneychangers, "until Erev Shabbat" when they go up to the market.

### **Discussion of Sugyah**

The rabbis have been primarily concerned with fairness and equal treatment between the buyer and the seller when discussing fraudulent overcharge. At first blush this sugyah appears to diverge into a discussion of the differences between objects, but actually the discussion of the difference between objects ultimately is grounded in the fundamental concern with fairness between buyer and seller.

The debate centers on why, in a village, a defective coin should have a longer time period in which it may be returned than a tallit. Abaye, in the first answer, sidesteps the question entirely by asserting that the return period defined for a tallit referred only to cities but was silent on villages. Abaye implies that there is no difference at all and that the return period for a tallit in villages would also be until Erev Shabbat. It seems, however, to be a false implication.

Rava, in the second answer, addresses the underlying question of fairness and equal treatment that seems to consistently guide the rabbis when discussing

fraudulent overcharge. Rava asserts that determining whether a coin is defective requires the expertise of a moneychanger. Therefore the recipient of a defective coin, who is not presumed to have such expertise, is given the time needed to bring the defective coin to a moneychanger for confirmation. In cities one merely brings it to the local moneychanger, but in villages one needs to wait for a market day, held at least by Erev Shabbat, to find someone with the expertise to confirm the coin's validity. The difference between a defective coin and a tallit is that everyone is presumed to have the expertise needed to assess a tallit and therefore no extra time is needed other than the standard time to show the tallit to a merchant or a relative.

Rava's answer is also consistent with Rav Nachman's ruling that a seller may always revoke a sale, as discussed above. We saw in that sugyah that equal treatment sometimes requires unequal discovery periods. In the previous case, unequal discovery periods were required because the seller no longer had the merchandise to be able to compare it in the marketplace and therefore needed more time to determine fraud. In this case, someone who receives a potentially defective coin needs more time in a village to find an expert who can determine fraud. In both cases, what appears to be unequal treatment is actually a remedy to ensure that both the buyer and the seller have adequate time in which to determine if they have been defrauded or not.

### **Modern Application**

In the modern marketplace there are no provisions to guarantee that a buyer or seller consult the appropriate expert to determine if fraud is involved. For example,

people buy jewelry all the time without actually having the expertise to determine the fair market value, yet there are no special provisions to protect them. Even more drastically, people who buy houses – the largest single purchase most people ever make – are not required to have an expert inspection. True, they often are encouraged to have a house inspection, but if they want to buy the house 'as is', they are allowed to do so. In the modern marketplace, the active motto is too often 'buyer beware' and adequate expertise is not required.

**Chapter 2**  
**Ha-Zahav, Part II**  
**Bava Metzia 58b and following**

**Introduction**

The previous section of Bava Metzia concerned אונאה or fraudulent overcharge. The sugyot in this section of Bava Metzia begin a discussion about unfair and deceptive practices. The first sugyah relates to אונאה בדברים or verbal oppression. אונאה בדברים can be seen as either a deceptive practice with monetary implications or as verbal oppression as will be discussed below. The second sugyah relates to practices that fall under the category of truth in advertising. The third sugyah relates to fair competition in the marketplace. The thread that binds all three of these topics together is the attempt to eliminate unfair or deceptive practices from society and the marketplace.



## Sugyah #1

Babylonian Talmud, Tractate Bava Metzia, 58b

### תלמוד בבלי מסכת בבא מציעא דף נח עמוד ב

משנה. כשם שאונאה במקח וממכר כך אונאה בדברים. לא יאמר לו בכמה חפץ זה והוא אינו רוצה ליקח. אם היה בעל תשובה לא יאמר לו זכור מעשך הראשונים, אם הוא בן גרים לא יאמר לו זכור מעשה אבותיך, שנאמר וגר לא תונה ולא תלחצנו.

גמרא. תנו רבנן: לא תונו איש את עמיתו - באונאת דברים הכתוב מדבר. אתה אומר באונאת דברים, או אינו אלא באונאת ממון? כשהוא אומר וכי תמכרו ממכר לעמיתך או קנה מיד עמיתך - הרי אונאת ממון אמור, הא מה אני מקיים לא תונו איש את עמיתו - באונאת דברים. הא כיצד? אם היה בעל תשובה אל יאמר לו זכור מעשך הראשונים, אם היה בן גרים אל יאמר לו זכור מעשה אבותיך, אם היה גר וכא ללמוד תורה אל יאמר לו פה שאכל גבילות ושריפות, שקצים ורמשים בא ללמוד תורה שנאמר מפי הבורה. אם היו יסודין באין עליו, אם היו חלאים באין עליו, או שהיה מקבר את בניו, אל יאמר לו כדרך שאמרו לו חביריו לאיוב. הלא ידעתך כסלתך תקותך ותם דרכך זכר נא מי הוא נק אבד. אם היו חמרים מבקשין תבואה ממנו, לא יאמר להם לכו אצל פלוני שהוא מוכר תבואה - וידע בו שלא מכר מעולם. רבי יהודה אומר: אף לא יתלה עיניו על המקח בשעה שאין לו דמים, שהרי הדבר מסור ללב, וכל דבר המסור ללב נאמר בו ויראת מאלהך. אמר רבי יוחנן משום רבי שמעון בן יוחאי: גדול אונאת דברים מאונאת ממון, שזה נאמר בו ויראת מאלהך וזה לא נאמר בו ויראת מאלהך. ורבי אלעזר אומר: זה בגופו וזה בממונו. רבי שמואל בר נחמני אמר: זה - ניתן להישכון, וזה - לא ניתן להישכון. - תני תנא קמיה דרב נחמן בר יצחק: כל המלבין פני חבירו בדברים כאילו שופך דמים. - אמר ליה: שפיר קא אמרת, דחוינא ליה דאזיל סומקא ואתי חורא.

### Translation

Mishnah: Just as there is fraud (אונאה) in buying and selling, so too is there fraud in words. One should not say to another, "How much is this thing (I'm holding)?" if he doesn't want to buy it. If he were a penitent, one should not say to him, "Remember your prior deeds." If he was the son of converts, one should not say

to him, "Remember the deeds of your fathers." As it is said, "You shall not wrong or oppress a stranger." [Exodus 22:20]

Talmud: The rabbis taught: Scripture is speaking about verbal oppression when it says, "a man shall not wrong his neighbor." [Leviticus 25:17] You say that it is about verbal oppression, but rather, isn't it about monetary fraud? When Scripture says (earlier), "when you sell property to your neighbor, or buy any from your neighbor..." [Leviticus 25:14] it was talking about monetary fraud. Then how do I interpret Leviticus 25:17, "a man shall not wrong his neighbor?" As verbal oppression.

How so? If he were a penitent, one should not say to him, "Remember your prior deeds." If he was the son of converts, one should not say to him, "Remember the deeds of your fathers." If he was a convert and he came to study Torah, one should not say to him, "The mouth that ate carrion, torn animals, abominations, and creeping things is coming to study the Torah that was spoken from the mouth of the Almighty?" If trials came upon him or if illness came upon him, or if he was burying his children, one should not speak to him in the way that Job's friends spoke to him: "Is not your piety your confidence, your integrity your hope? Think now, what innocent man ever perished?" [Job 4:6-7] If there were donkey-drivers asking for grain from someone, one shouldn't say to them, "Go to so-and-so's place because he is selling grain," but you know about him that he has never sold grain.

Rabbi Yehudah says, he shouldn't even look at the merchandise at a time when he doesn't have any money. And this matter (of verbal oppression) is entrusted

to the heart. And about all matters entrusted to the heart it is said: "You shall fear your God." [Five possible citations in Leviticus—19:14, 19:32, 25:17, 25:36, 25:43] Rabbi Yochanan said in the name of Rabbi Shimon ben Yochai, verbal oppression is a greater (sin) than monetary fraud because regarding this (verbal oppression) it is said, "You shall fear your God." Regarding that (monetary fraud) it is not said, "You shall fear your God." Rabbi Eliezar said, this (verbal oppression), however, affects one's body, but that (monetary fraud) affects only his money. Rabbi Shmuel bar Nachmani said, this (monetary fraud) is subject to restitution, but that (verbal oppression) is not subject to restitution.

A Tanna taught before Rav Nachman bar Yitzhak, "Anyone who whitens the face of his friend in public (embarrasses him), it is as if he sheds blood." He (Rav Nachman) said to him, "You said well because we see that redness goes and whiteness comes."

## Outline

### *Mishnah*

#### Proposition

Just as there is fraud (רמאות) in buying and selling, so too is there fraud in words.

#### Defining Example #1

One should not say to another, "How much is this thing (I'm holding)?" if he doesn't want to buy it.

#### Defining Example #2

If he were a penitent, one should not say to him, "Remember your prior deeds."

#### Defining Example #3

If he was the son of converts, one should not say to him, "Remember the deeds of your fathers."

#### Proof for Example #3

As it is said, "You shall not wrong or oppress a stranger." [Exodus 22:20]

## *Talmud*

### Statement

The rabbis taught: Scripture is speaking about verbal oppression when it says, "a man shall not wrong his neighbor." [Leviticus 25:17]

### Question

You say that it is about verbal oppression, but rather, isn't it about monetary fraud?

### Answer

When Scripture says (earlier), "when you sell property to your neighbor, or buy any from your neighbor..." [Leviticus 25:14] it was talking about monetary fraud. Then how do I interpret Leviticus 25:17, "a man shall not wrong his neighbor?" As verbal oppression.

### Defining Question

How so?

### Defining Answer #1

If he were a penitent, one should not say to him, "Remember your prior deeds."

### Defining Answer #2

If he was the son of converts, one should not say to him, "Remember the deeds of your fathers."

### Defining Answer #3

If he was a convert and he came to study Torah, one should not say to him, "The mouth that ate carrion, torn animals, abominations, and creeping things is coming to study the Torah that was spoken from the mouth of the Almighty?"

### Defining Answer #4

If trials came upon him or if illness came upon him, or if he was burying his children, one should not speak to him in the way that Job's friends spoke to him: "Is not your piety your confidence, your integrity your hope? Think now, what innocent man ever perished?" [Job 4:6-7]

### Defining Answer #5

If there were donkey-drivers asking for grain from someone, one shouldn't say to them, "Go to so and so's place because he is selling grain," but you know about him that he has never sold grain.

### Defining Answer #6

Rabbi Yehudah says, he shouldn't even look at the merchandise at a time when he doesn't have any money.

### Clarification for Answers #5 & 6

And this matter (of verbal oppression) is entrusted to the heart. And about all matters entrusted to the heart it is said: "You shall fear your God." [Five possible citations in Leviticus—19:14, 19:32, 25:17, 25:36, 25:43]

**Proposition**

Rabbi Yochanan said in the name of Rabbi Shimon ben Yochai, verbal oppression is a greater (sin) than monetary fraud

**Support #1 for Proposition**

because regarding this (verbal oppression) it is said, "You shall fear your God." But regarding that (monetary fraud) it is not said, "You shall fear your God."

**Support #2 for Proposition**

Rabbi Eliezar said, this (verbal oppression), however, affects his body but that (monetary fraud) affects only his money.

**Support #3 for Proposition**

Rabbi Shmuel bar Nachmani said, this (monetary fraud) is subject to restitution but that (verbal oppression) is not subject to restitution.

**Proposition**

A Tanna taught before Rav Nachman bar Yitzhak, "Anyone who whitens the face of his friend in public (embarrasses him), it is as if he sheds blood."

**Support for Proposition**

He (Rav Nachman) said to him, "You said well because we see him that redness goes and whiteness comes."

**Discussion of Sugyah**

Previously we have seen definitions of and discussions about monetary fraud.

Here we see the definition and discussion of **אונאה בדברים**, verbal oppression, beginning with a discussion of the biblical grounding for the rule of verbal oppression. That is, the Talmud questions whether the Torah was contemplating verbal oppression rather than monetary fraud at all. In order to prove that Torah contemplates both monetary fraud and verbal oppression, the Talmud uses two separate proof texts from Leviticus to prove the existence of verbal oppression. That is, since Leviticus 25:14 is shown to prohibit monetary fraud, Leviticus 25:17 cannot also prohibit monetary fraud and must instead prohibit verbal oppression.

This proof is based on a hermeneutic called ריבוי. It regards any redundancy or inclusive wording in the Torah as indicative of more halakhic details. Since both Leviticus 25:14 and 25:17 prohibit oppression or fraud (אונאה), they appear to be redundant. Because the divine editor would not include such a redundancy in the Torah and since Leviticus 25:14 speaks of selling and acquisitions, its framework is monetary fraud. Since Leviticus 25:17 only prohibits oppression without a specific context, it is held to be a prohibition against verbal oppression. Therefore, there is no redundancy between Leviticus 25:14 and 25:17. Indeed, in the case of verbal abuse, often only God knows the speaker's intention, hence the added phrase, "and you shall fear your God," also hints at the kind of oppression only God would know of.

Having proven that the Torah prohibits both monetary fraud and verbal oppression, the Talmud then turns to defining what verbal oppression is through a series of examples. Each of the examples reveals a more general concern for fairness, a concern that the rabbis continuously raise. The first three examples are all related to giving chastisement where none is warranted. Defining Answer #1 shows a concern that once penitents have done תשובה, the penitents should not be constantly reminded of their past misdeeds. The rabbis recognize that once people have made amends and suffered their punishment, then constantly reminding them of their sins is additional unwarranted punishment or verbal oppression. Similarly, it is verbal oppression to chastise someone for acts their parents or ancestors committed but that they themselves have had nothing to do with, as in Defining Answer #2. Rather, we are all

responsible for our own behavior and the sins of the father do not carry over to the son. Finally, in Defining Answer #3, we see that once a person has converted they are not to be treated as a second class Jew or as if they had some kind of legal disability and were not allowed to participate fully in the community. In all three of these defining examples, we see that the rabbis want to ensure that once people have stopped sinning and made amends, or indeed never sinned at all, they will not be subject to further and unfair verbal chastisement.

The fourth defining answer may be interpreted in two ways. First and most obviously, this example forbids as verbal oppression egregiously insensitive behavior towards those who are in mourning or who are injured. Second and more importantly, this example forbids as verbal oppression the implication that the injured person or the deceased were sinners. Asking, "What innocent man ever perished?" clearly implies that the deceased was not innocent at all or perhaps the injured person deserved their injury. In either case, such an implication without any proof is forbidden. One should note that the sugyah is silent about the case where proof of sin is available. That is, even if the deceased were a proven sinner or the injured caused their own injury, this sugyah seems to imply that pointing out these facts would still be egregiously insensitive behavior and therefore verbal oppression.

The fifth and sixth defining answers make up a third category of verbal oppression in which one falsely raises the hopes of another person. One may falsely raise the hopes of another person directly through a lie as seen in the fifth defining answer. In this case one deliberately lies, telling someone that they may find what they need in a place where one knows they will not find it. Alternately, one may

falsely raise the hopes of another person indirectly by appearing to intend something of benefit for another without actually having that intention. This case is seen in the sixth defining answer. In this case, one indirectly raises someone's hopes by appearing to be a paying customer when in fact one has no money to buy anything at all. The first case is a sin of commission, lying directly. The second case is a sin of omission, appearing to be what one is not. In either case, the rabbis define this type of verbal oppression as "a matter entrusted to the heart." That is, the person committing the verbal oppression may always say that their intent was not to deceive, but rather their intent was honest. The person giving false directions could say that they honestly thought so-and-so was now selling grain and was merely mistaken. The person looking at merchandise could always say that they were intending to look at the merchandise in preparation of buying it later. No human court can judge such a case because it is a matter of intent, and the rabbis recognize that only God may judge intent. Thus they point to the Torah's admonition, "You shall fear your God."

The sugyah now turns to examining the relative severity of verbal oppression. The first proposal is that verbal oppression is worse than monetary fraud. The first support for verbal oppression being worse than monetary fraud appears to be weak because the phrase upon which the support hinges ('you shall fear your God') is actually used as an acknowledgment that only God and not human courts may judge intent. Further, one would think that the fear of God should prevent one from any sin and not just from certain enumerated sins. The second support is similarly weak if one were to look at it in isolation. That is, stating that verbal oppression affects the body while monetary fraud affects one's money is true but says nothing about their



relative severity. However, when linked to the third support, there is a valid argument for the greater severity of verbal oppression as compared to monetary fraud. Verbal oppression, which affects the body, is not subject to restitution while monetary fraud, which affects money, can be restored. Thus, verbal oppression is more severe than monetary fraud.

The second proposal is that verbal oppression through publicly embarrassing someone is the equivalent of shedding that person's blood. The proof for this proposal uses the physical effects of embarrassment, blanching or having one's face whiten, to show that the effects of verbal oppression are felt physically and cannot be truly retracted. Once pain is felt that pain cannot be taken back no matter how profusely a person apologizes. In the rabbis eyes', the person who existed before being publicly shamed ceased to exist after the public shaming because the memory of that pain, of that embarrassment, will continue to be felt. Thus, to publicly embarrass someone is the equivalent of shedding his or her blood.

### **Modern Application**

Not surprisingly, the issues the rabbis tried to deal with in the Talmud, we continue to try to deal with today. We saw in the first three definitions of verbal oppression an attempt to deal with unfair and excessive verbal chastisement. Today, a similar problem is currently working its way through the legal system as the constitutionality of so-called Megan's Law is debated. Megan's Law is named after a young girl who was sexually assaulted and murdered by a convicted sex-offender who was released back into society after serving his criminal sentence and who was

living next door to Megan. Under Megan's Law, convicted sex-offenders must notify the local police when they are moving into a neighborhood for the rest of their lives. The rationale for this law is that sex-offenders have exceedingly high rates of recidivism and that people have a right to know if one is living next door simply out of self-defense.

The argument against Megan's Law is that a sex-offender has served his sentence in prison. Now notifying the local police and the neighbors that he is a convicted sex-offender amounts to additional, unconstitutional punishment. The similarity breaks down, however, when one compares the sex-offender with the penitent who the rabbis were attempting to protect. The penitent is sorry for having committed a sin, done תשובה, and resolved never to sin that way again. The sex-offender, on the other hand, may have only served his prison sentence and may in fact be eager to continue in his criminal path. One cannot say that the rabbis, having prohibited verbal oppression would also have prohibited Megan's Law today. One can say that the issues are similar.

Another area of law where the issues are similar relates to the fifth and sixth definitions of verbal oppression, those deemed to be "entrusted to the heart," or matters of intent. The rabbis determined that misleading someone either through a direct lie or indirectly raising their hopes constitutes verbal oppression. However, they argue, since the one who commits this type of verbal oppression can always claim not to have intended to deceive anyone, human courts cannot judge the offender. Rather, the matter is left for Divine judgment. A similar law in today's

court systems is also being debated and having its constitutionality questioned. The laws in question increase the penalties for those convicted of hate crimes. That is, if a person assaults a man, then the penalties for assault and battery apply. However, in some states if it is determined that the assault was motivated by hatred, e.g., a person assaulted a man simply because he was gay, then additional penalties apply. In this case, the courts are expected to determine the intent of the criminal, to determine what the criminal was thinking at the time of the assault. The argument against the constitutionality of these hate crime laws is identical to the argument of the rabbis: How can one fairly determine what another person was thinking at the time that they committed the crime? It will be interesting to see if our American Judicial System comes to the same conclusion as that of the rabbis, that the criminals' actions are bad, but that their thoughts are not punishable by human courts.

A final area of similarity between Talmudic rulings and modern law can be found in the third support for the proposition that verbal oppression is worse than monetary fraud. In that support we see that verbal oppression is worse than monetary fraud because it affects the body and the body cannot be given restitution. Modern law courts recognize and attempt to address the inability to give pure restitution to a body by the awarding of pain and suffering damages. That is, after monetary damages have been awarded, say lost wages or lost future income, the courts continue on and award compensation for pain and suffering, or non-monetary damages that the victim suffered. Today's courts recognize that bodily injury cannot be compensated for through strictly monetary restitution, just as the rabbis did. But where the rabbis

stop, the courts continue to attempt to provide compensation through pain and suffering awards.

## Sugyah #2

Babylonian Talmud, Tractate Bava Metzia, 59b

### תלמוד בבלי מסכת בבא מציעא דף נ"ט עמוד ב

משנה. אין מערבין פירות בפירות אפילו חדשים בחדשים.

Babylonian Talmud, Tractate Bava Metzia, 60a

### תלמוד בבלי מסכת בבא מציעא דף ס עמוד א

ואין צריך לומר חדשים בימינו. באמת אמרו: בין התירו לערב קשה בך, מפני שהוא משביחו. אין מערבין שמרי יין בין, אבל נותן לו את שמריו. מי שנתערב מים ביינו לא ימכרנו בחנות, אלא אם כן הודיעו. ולא לתגר אף על פי שחוריעו, שאינו אלא לרמות בו. מקום שנהגו להפיל מים בין - ימילו. התגר נוטל מחמש גרנות ונותן לתוך מגורה אחת, מחמש גתות ונותן לתוך פיטום אחד, ובלבר שלא יהא מתכוין לערב.

גמרא. תנו רבנן: אין צריך לומר חדשות מארבע וישנות משלש דאין מערבין, אלא אפילו חדשות משלש וישנות מארבע - אין מערבין, מפני שארם רתה לישנן. באמת אמרו: בין התירו לערב קשה בך מפני שהוא משביחו (וכו'). אמר רבי אלעזר: עדיא אמרה כל באמת אמרו - הלכה היא. אמר רב נחמן: ובין הגיתות שנו. - והאידנא רקא מערבי שלא בין הגיתות? - אמר רב פפא: דידעי וקא מחלי. רב אחא בריה דרב איקא אמר: הא מני - רבי אחא היא. דתניא: רבי אחא מתיר בדבר הנמנע. ואין מערבין שמרי יין בין אבל נותן לו את שמריו (וכו'). והא אמרת רישא אין מערבין כלל? וכי תימא מאי נותן לו את שמריו - רקא מודע ליה, הא מדקתני סיפא לא ימכרנו בחנות אלא אם כן מודיעו, ולא לתגר אף על פי שמודיעו - מכלל דרישא אף על גב דלא מודע ליה? - אמר רב יהודה: הכי קאמר: אין מערבין שמרים של אמש בשל יום, ולא של יום בשל אמש, אבל נותן לו את שמריו. תניא נמי הכי: רבי יהודה אומר: השופה יין לתבירו - הרי זה לא יערב של אמש בשל יום, ולא של יום בשל אמש. אבל מערב של אמש בשל אמש, ושל יום בשל יום. מי שנתערב מים ביינו הרי זה לא ימכרנו בחנות אלא אם כן מודיעו וכו'. רבא אייתו ליה חמרא מתנותא, מזגיה, מעמיה, לא הוה בסימ, שדריה לתנותא. - אמר ליה אביי: והא אגן תנן: ולא לתגר אף על פי שהודיעו? - אמר ליה: מונא דידי מידע דיע. וכי תימא דמפי ומחיליה ומזבין ליה - אם כן אין לדבר סוף. מקום שנהגו להפיל מים בין ימילו וכו'. תנא: למחצה לשליש ולרביע. אמר רב: ובין הגיתות שנו.

## Translation

Mishnah: One does not mix fruit with fruit, not even new with new. It goes without saying not new with old. In truth they said, "With respect to wine, they permitted mixing of strong with weak wine because that improves it." One does not mix the sediment of wine with wine, but he gives to him (i.e., the buyer) its sediment. Anyone who mixed water with his wine can only sell it in a store if he makes it known. But (he may not sell it) to a merchant even if he makes it known, for he only deceives through it. In a place where the custom is to pour water in wine, they pour. The merchant takes from five granaries and puts the produce into one storage bin, (or he takes) from five winepresses and puts it into one large cask, but only if he doesn't intend to mix (and nevertheless claim that the fruit or wine came from a specific orchard or vineyard.)

Talmud: The Rabbis taught, it goes without saying new from four and old from three, one doesn't mix. But even if new from three and old from four, one doesn't mix because a person might want to age them.

"In truth they said: with respect to wine, they permitted mixing of strong with weak wine because that improves it, etc." Rabbi Elazar said, this means that every instance of 'in truth they said...' is the halakhah. Rav Nachman said, and between the winepresses they taught (that one may mix. I.e., between one pressing and another pressing.) But how about today when they mix, but not between the winepresses? Rav Papa said everyone knows it, and they waive it. Rav Akha son of Rav Ika said,

whose opinion is this? It is Rabbi Akha's opinion. That it is taught, Rabbi Akha permits things that can be tasted.

"One does not mix the sediment of wine with wine, but he gives to him its sediment..." But you said at first that one doesn't mix at all! And if you should say, what is meant by 'he gives to him its sediment'? (It means he gives it to him) when he makes it known to him. The second clause that teaches, "he can only sell it in a store if he makes it known, but not to a merchant even if he makes it known" implies that the first clause (about giving sediment) discusses even if one did not make it (the mixing) known to him. (Hence, we are left with a contradiction between one section and another of the Mishnah.) Rav Yehudah said: It (the Mishnah) really means this, "One does not mix yesterday's sediment with today's, nor today's with yesterday's, but rather one gives to him its sediment (unmixed)."<sup>1</sup> It was also taught in a *baraita* this way, "Rabbi Yehudah said of the one who pours wine for his friend that he should not mix yesterday's (sediment) with today's (wine) nor today's (sediment) with yesterday's (wine) but he may mix yesterday's (sediment) with yesterday's (wine) and today's (sediment) with today's (wine)."

"Anyone who mixed water with his wine, he can only sell it in a store if he makes it known etc." They brought Rava wine from the store. He mixed it and tasted it, but it wasn't pleasant. He sent it (back) to the shop. Abaye said to him: "But didn't we learn, 'but (we don't sell watered wine) to a merchant even if we make it known'?" He said to him, "My mixing is well known." And if you should say that

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<sup>1</sup> Therefore, there is no mixing of wines as the Mishnah has ruled.

he (the merchant) would add (wine) and make it stronger and sell it, then there is no end to it.<sup>2</sup>

"In a place where the custom is to pour water in wine, they pour etc." It was taught, "to a half, to a third or to a fourth." Rav said, between the winepresses they taught (i.e., only when the wine is being pressed, not after it has aged).

## Outline

### *Mishnah*

#### Proposition #1

One does not mix fruit with fruit, not even new with new. It goes without saying not new with old.

#### Exception #1 to Proposition #1

In truth they said, "With respect to wine, they permitted mixing of strong with weak wine because that improves it."

#### Proposition #2

One does not mix the sediment of wine with wine, but he gives to him (i.e., the buyer) its sediment.

#### Proposition #3

Anyone who mixed water with his wine can only sell it in a store if he makes it known.

#### Exception to Proposition #3

But (he may not sell it) to a merchant even if he makes it known, for he only deceives through it.

#### Proposition #4

In a place where the custom is to pour water in wine, they pour.

#### Exception #2 to Proposition #1

The merchant takes from five granaries and puts the produce into one storage bin, (or he takes) from five winepresses and puts it into one large cask, but only if he doesn't intend to mix (and nevertheless claim that the fruit or wine came from a specific orchard or vineyard.)

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<sup>2</sup> I.e., one could not even sell water to a merchant for fear of his diluting wine. Rather, the prohibition on sale to a merchant affects only those products immediately usable in defrauding the customer.



## *Talmud*

### Explanation of Proposition #1

The Rabbis taught, it goes without saying new from four and old from three, one doesn't mix. But even if new from three and old from four, one doesn't mix, because a person might want to age them.

### Quotation

"In truth they said: with respect to wine, they permitted mixing of strong with weak wine because that improves it, etc."

### Halakhic Ruling

Rabbi Elazar said, this means that every instance of 'in truth they said...' is the halakhah.

### Restriction on Quotation

Rav Nachman said, and between the winepresses they taught (that one may mix. I.e., between one pressing and another pressing.)

### Question

But how about today when they mix, but not between the winepresses?

### Answer

Rav Papa said everyone knows it, and they waive it.

### Question

Rav Akha son of Rav Ika said, whose opinion is this?

### Answer

It is Rabbi Akha's opinion. That it is taught, Rabbi Akha permits things that can be tasted.

### Quotation

"One does not mix the sediment of wine with wine, but he gives to him its sediment..."

### Objection

But you said at first that one doesn't mix at all!

### Possible Answer

And if you should say, what is meant by 'he gives to him its sediment'? (It means he gives it to him) when he makes it known to him.

### Objection to Possible Answer

The second clause that teaches: "he can only sell it in a store if he makes it known. But not to a merchant even if he makes it known" implies that the first clause (about giving sediment) discusses even if one did not make it (the mixing) known to him. (Hence, we are left with a contradiction between one section and another of the Mishnah.)

### Correct Answer to Objection

Rav Yehudah said: It (the Mishnah) really means this, "One does not mix yesterday's sediment with today's, nor today's with yesterday's, but

rather one gives to him its sediment (unmixed)."  
(Therefore there is no mixing of wines as the Mishnah has ruled.)

#### Support for Correct Answer

It was also taught in a *baraita* this way, "Rabbi Yehudah said of the one who pours wine for his friend that he should not mix yesterday's (sediment) with today's (wine) nor today's (sediment) with yesterday's (wine) but he may mix yesterday's (sediment) with yesterday's (wine) and today's (sediment) with today's (wine)."

#### Quotation

"Anyone who mixed water with his wine, he can only sell it in a store if he makes it known etc."

#### Explanatory Example

They brought Rava wine from the store. He mixed it and tasted it, but it wasn't pleasant. He sent it (back) to the shop.

#### Question

Abaye said to him: "But didn't we learn, 'but (we don't sell watered wine) to a merchant even if we make it known'?"

#### Answer

He said to him, "My mixing is well known."

#### Answer to Anticipated Objection

And if you should say that he (the merchant) would add (wine) and make it stronger and sell it, then there is no end to it. (I.e., one could not even sell water to a merchant for fear of his diluting wine. Rather, the prohibition on sale to a merchant affects only those products immediately usable in defrauding the customer.)

#### Quotation

"In a place where the custom is to pour water in wine, they pour etc."

#### Limitation on Quotation

It was taught, "to a half, to a third or to a fourth."

#### Further Limitation

Rav said, between the winepresses they taught (i.e., only when the wine is being pressed, not after it has aged).

#### Discussion of Sugyah

When discussing fraudulent overcharge, we have seen that the rabbis were significantly concerned that fair transactions take place in the market place. In this sugyah, we see an extension of the concern with monetary fairness extend to what we

would call today truth in advertising. That is, we now see that the rabbis want to extend fairness protections into transactions that may not be fraudulent in terms of the value of the goods, but are deceptive in terms of the quality of goods sold. The Mishnah approaches truth in advertising through the subject of mixing products.

The mixing of produce is forbidden as a matter of ensuring that the buyer receives what they believe they are paying for. The injunction against mixing new produce with older produce that is closer to spoiling is clearly a protection for the buyer. The injunction against mixing new produce with new produce is only understandable as a protection if one realizes that the produce from different fields or growers will be of different quality depending on local conditions. It might be well known, for example, that Farmer X grows the best onions because of the care he takes and perhaps because of some quirk of the quality of his soil. If a merchant were to mix Farmer X's onions with onions from inferior fields, even if they were harvested at the same time, then a buyer could be deceived into thinking they were buying a bag made up entirely of the superior Farmer X onions.

Yet mixing is not forbidden only to prevent the mixing of inferior with superior quality produce. Suppose Farmer X raises onions that are especially sweet while Farmer Y raises equally good quality onions that are especially sharp. The buyer expecting a sharp onion would not want produce from Farmer X, nor would a buyer expecting a sweet onion want produce from Farmer Y. Therefore, the Mishnah also forbids the mixing of produce so that buyers will know both the quality of the produce they are buying and the characteristics of the produce they are buying.

The Mishnah makes two exceptions to this rule forbidding the mixing of produce. First, strong and weak wines may be mixed in order to improve them. That is, neither the strong wine alone nor the weak wine alone is as good or as valuable as the two mixed together. Therefore, since mixing the two wines together only can improve the wine and give the buyer better value, mixing is allowed. Second, the rabbis recognize that merchants will have more than one supplier for any one type of produce and want to store the same type of produce in one large storage area. Therefore, merchants are allowed to mix grains from multiple fields into one storage bin or to mix wines from various presses into one large storage cask. However, if the merchant is mixing produce not for the convenience of storage but with the intent to deceive, then mixing is forbidden. He might have accomplished the deception by advertising the mixed produce or wine as coming from a single well-known, high quality source.

The Mishnah's second through fourth propositions are extensions of the rule of giving the buyer exactly what the buyer expects. When buying wine one must expect to find some sediment mixed in, and buyers will not be surprised to find sediment in wine. Therefore, in proposition two the Mishnah prohibits the mixing of the sediment from one wine with another wine, which might affect the wine's taste. It allows, however, the mixing of sediment with the wine that produced it. In proposition three, watered wine is allowed if it is sold with full disclosure. However, where full disclosure is not expected, e.g., in the sale of watered wine to a merchant, one is forbidden to sell watered wine. In proposition four, one is allowed to pour water into wine where it is the custom to do so because the buyer expects it to be

watered. Underlying all three of these propositions, including the one exception, is the principle that sellers should not deceive buyers by making them think they are buying something they are not. This means strict truth in advertising applies.

The Talmud proceeds to explain what seem to be contradictions or difficulties in each of the four propositions in the Mishnah text. The first question addressed is the reasoning behind prohibiting the mixing of produce if the buyer does not suffer for it. In the example used, new and presumably fresher produce is mixed with a larger quantity of older and presumably less valuable produce and sold at the price of the older, less valuable produce. One would think that a buyer would be happy to be getting a bargain on the newer produce added into the mix. The reason given for prohibiting mixing even in this case is that a person may have a specific purpose in mind, e.g., aging the produce, and need only the older produce. While the newer produce may have a higher value on the open market, for the purposes the buyer intends it might very well be less valuable. In a more concrete example, suppose someone needs to make banana bread today and goes to the supermarket. They have the choice of buying new green bananas that will age over time and are priced at the normal price. On the clearance table are bananas that are almost completely brown and priced at a significant discount. The buyer who needs to bake banana bread today will choose the fully ripe less expensive bananas but have no use for the green bananas that are still priced at the normal market value. To the baker in the example, the older produce is more valuable than the newer produce. Therefore, the rabbis prohibit the mixing of produce, even if it seems to be to the advantage of the buyer,

because only the buyer knows what the buyer needs and mixing produce can mislead the buyer.

The second question arises from the exception to proposition #1, an exception that allows the mixing of wines because mixing improves the wine. The Talmud affirms that the exception is the accepted halakhah but restricts the exception to the time period 'between the winepresses', which means before the wine has been put into containers. The restriction, however, leads to the matter of actual practice in which mixing occurred both before being placed into containers and after being placed into containers. This practice became permitted because buyers were aware of the mixing and waived the restriction since they had full knowledge of what they were buying. That is, wine, once mixed, becomes uniform in flavor and characteristics, unlike produce that retains its individual characteristics even when mixed together. Therefore, the rabbis allow the mixing of wine because it will be tasted before sale, and the buyer will have full disclosure of the qualities of the wine and whether they please him.

Proposition #2 appears to contradict proposition #1 and the Talmud questions the apparent contradiction. If mixing is not allowed at all, then how can one be permitted to mix the sediment of wine with wine? At first the Talmud puts forward the possible answer of full disclosure, but quickly dismisses that straw man argument. The counter argument runs as follows: Under the permission for selling watered wine, permission is only granted through the explicit statement that full disclosure must take place. Since no such requirement is explicitly stated for the permission to mix the sediment of wine with wine, by implication one is allowed to sell the

sediment of wine mixed with wine without full disclosure. As discussed above, the reason for allowing sediment to be mixed with wine is the buyer's expectation that a certain amount of sediment will be mixed in with wine, and the buyer is therefore not deceived. The correct answer to the apparent contradiction is that one cannot mix the sediment of one wine with a different wine. The buyer correctly assumes that a bit of a wine's own sediment must be mixed in when buying wine, but would not assume that a seller adds additional sediment from another wine, especially when that might affect taste. To mix the sediment from one wine with another wine would be deceptive and is therefore prohibited.

The Talmud now turns to Rava's apparent violation of the third proposition that one may not sell watered wine to a merchant for resale. Rava defends his action by stating that his mixing of wine is so well known that anyone tasting the wine would immediately know that it had been mixed with water. That is, Rava defends his action by saying that his mixing of water with wine comes with an inherent full disclosure. Anticipating further objections, the Talmud then states that the merchant could try to fortify the mixed wine and sell it as undiluted wine, but that argument leads to a prohibition against selling any wine to a merchant because the merchant can always adulterate the wine before sale. The conclusion from Rava's justification is that one may not sell diluted wine to a merchant unless it is so obviously diluted that future buyers would not be deceived.

Finally, the Talmud limits the permission to dilute wine with water according to local custom. The maximum dilution allowed is 50% though other proportions are also suggested – 33% and 25%. Further, the wine may only be diluted at the source

of production, 'between the winepresses', before it has been placed into containers. Again, we see that the expectation of the local buyer is that wine when produced will be diluted and therefore is not deceived when sold watered wine.

### **Modern Application**

In the modern marketplace, there is very little direct application of the ancient concern about mixing simply because of the realities of the marketplace. For example, we rarely buy locally grown produce in the modern age and wouldn't be familiar with which fields the produce was grown in even if it were locally grown. We will often see the country or state of origin, but that is often the most specific identification we can get. Florida oranges, Georgia peaches, Chilean grapes – none of these help us to determine whether these products are of higher quality because they come from particular fields, as was possible in the ancient world. Further, green grocers stock their shelves constantly today and will add newer produce to older produce. Often they place the newer produce towards the back of the shelf so that the older produce will sell faster, but today we can make no assumptions whatsoever about the relative freshness of the produce shown in a large display.

As for the mixing of wine, that too has completely changed and is no longer applicable because in today's market wine is only sold in sealed bottles and is never mixed after production. Further, one can assume that the sediment one finds at the bottom of a bottle of wine has settled out of the wine itself, if indeed one can ever find sediment in bottled wine, rather than having it been added from another wine.



Therefore, the area of wines is also not applicable to today's market because of the physical reality of the market.

Where we do see direct applicability from the ancient world to the modern world is the more general concern with deceptive advertising. We have the same concerns today that products sold should be as advertised and have laws to protect the consumer. However, in practical terms, it is rare that we are able to stop deceptive practices unless they are on such a wide scale that the public prosecutors find it worth their time to prosecute or otherwise pursue the case. An obvious case in point is that of all-natural diet drugs that appear in the marketplace making extravagant claims to efficacy. It takes an extraordinary amount of time and effort to get these falsely advertised products off the shelves. And even more frustrating, as soon as one formulation is taken from the shelves, another takes its place to begin the cycle all over again.

Then again, we see a phenomenon in the modern world that did not exist in the ancient world. Today we see truthful advertising that is nevertheless deceptive. For example, we see product advertisements with extraordinary prices but when we arrive at the store we discover that only a limited quantity was for sale and those were already sold out. Or we see advertising with caveats in fine print that virtually negate the thrust of the advertising, a practice that has given rise to the ironic saying, "What the bold print giveth, the fine print taketh away." In today's world we need be careful not only of advertising that lies, but also advertising that is technically truthful.

It appears that our modern world is very similar to the ancient world with respect to truth in advertising. In the ancient world, one could not sell watered wine to a merchant because "he only deceives through it," yet they do not mention any attempt to punish the merchant. Similarly today, deceptive practices are illegal but rarely prosecuted. It is as if the expectation for both the ancient and modern worlds is that merchants will deceive and, practically speaking, there is nothing the buyer can do about it.

### Sugyah #3

**Babylonian Talmud, Tractate Bava Metzia, 60a (cont.)**

#### תלמוד בבלי מסכת בבא מציעא דף ס עמוד א

משנת רבי יהודה אומר: לא יחלק החנוני קליות ואגוזין לתינוקות, מפני שהוא מרגילן לבא אצלו. וחכמים מתירין. ולא יפחות את השער, וחכמים אומרים: זכור לטוב. לא יכור את הגריסין, דברי אבא שאול, וחכמים מתירין. ומודים שלא יכור מעל פי מצודה, שאינו אלא כגונב את העין. אין מפרכסין לא את הארם ולא את הבהמה ולא את הכלים.

גמרא. מאי מעמיידו דרבנן? - דאמר ליה: אנא מפליגנא אמגוזי, ואת פליג שיסקי. ולא יפחות את השער וחכמים אומרים: זכור לטוב וכו'. מאי מעמא דרבנן?

**Babylonian Talmud, Tractate Bava Metzia, 60b**

#### תלמוד בבלי מסכת בבא מציעא דף ס עמוד ב

משום דקא מרווח לתרעא. ולא יכור את הגריסין דברי אבא שאול, וחכמים מתירין וכו'. מאן חכמים - רבי אחא, דתניא: רבי אחא מתיר בדבר הנראה. אין מפרכסין לא את הארם וכו' ולא את הכלים. תנו רבנן: אין משרכסין את הבהמה, ואין נופחין בקרביים, ואין שורין את הבשר במים. - מאי אין משרכסין? הבא תרגמו: מיה דחזרא, זעירי אמר רב כהנא: מקפתא. - שמואל שרא למרמא תומי לסרבלא. רבי יהודה שרא לכסכוס קרמי. רבא שרא למידק צרדי. רבא שרא לצלומי גירי. רב פפא בר שמואל שרא לצלומי דיקולי. - והא אגן חנן: אין מפרכסין לא את הארם ולא את הבהמה ולא את הכלים! - לא קשיא, הא - בחרתי, הא - בעתיקי.

#### **Translation**

Mishnah: Rabbi Yehudah says that the shopkeeper shall not distribute parched grains or nuts to children because he habituates them (and through them, their parents) to come to his place, but the Sages permit it. And he shall not lower his market price, but the Sages say, "His memory should be blessed." One should not sift pounded beans according to Abba Shaul, but the Sages permit it. But they both agree

that one should not sift only the mouth of the storage bin because that is only to deceive the eye. One should not paint either a man, or an animal, or a utensil.

Talmud: What is the reasoning of the Rabbis? One merchant can always say to another, "I am distributing nuts, you distribute plums."

"And he shall not lower his market price, but the Sages say, "His memory should be blessed, etc." What is the reasoning of the Rabbis? Because his change is to ease (prices). "One should not sift pounded beans according to Abba Shaul, but the Sages permit it etc." Who were the Sages? Rabbi Akha, about whom it was taught, "Rabbi Akha permits with respect to visible things."

"One should not paint either a man etc., or a utensil." The Rabbis taught, "He shall neither stiffen the animal, nor swell up the intestines, nor soak the meat in water." (What is meant by 'stiffening'? Here) they translated it as (feeding the animal) 'bran broth'. Z'eirei said in the name of Rav Kahanah, "to comb up (the animal's hair)." Shmuel permitted decorating the ends of fringes on a cloak. Rav Yehudah permitted scouring fine cloth. Rabbah permitted beating rough cloth. Rava permitted painting arrows. Rav Pappa bar Shmuel permitted painting baskets.

But didn't we learn, "One should not paint either a man, or an animal, or a utensil?" There is no contradiction. The one (permission) applies to new ones; the other (prohibition) applies to old ones.

## Outline

### *Mishnah*

#### Proposition #1

Rabbi Yehudah says that the shopkeeper shall not distribute parched grains or nuts to children because he habituates them (and through them, their parents) to come to his place,

#### Contradictory Halakhic Ruling

but the Sages permit it.

#### Proposition #2

And he shall not lower his market price,

#### Contradictory Halakhic Ruling

but the Sages say, "His memory should be blessed."

#### Proposition #3

One should not sift pounded beans according to Abba Shaul,

#### Contradictory Halakhic Ruling

but the Sages permit it.

#### Agreed Halakhic Ruling

But they both agree that one should not sift only the mouth of the storage bin because that is only to deceive the eye.

#### Proposition #4

One should not paint either a man, or an animal, or a utensil.

### *Talmud*

#### Question about merchant distributing nuts

What is the reasoning of the Rabbis?

#### Answer

One merchant can always say to another, 'I am distributing nuts, you distribute plums.'

#### Quotation

"And he shall not lower his market price, but the Sages say, "His memory should be blessed, etc."

#### Question

What is the reasoning of the Rabbis?

#### Answer

Because his change is to ease (prices).

#### Quotation

"One should not sift pounded beans according to Abba Shaul, but the Sages permit it etc."

#### Question

Who were the Sages?

#### Answer

Rabbi Akha,

Answer to Implied Question	about whom it was taught, "Rabbi Akha permits with respect to visible things."
Quotation	"One should not paint either a man etc., or a utensil."
Extension of Quotation	The Rabbis taught, "He shall neither stiffen the animal, nor swell up the intestines, nor soak the meat in water."
Question	(What is meant by 'stiffening'?)
Answer	(Here) they translated it as (feeding the animal) 'bran broth'.
Answer	Z'eirei said in the name of Rav Kahanah, 'to comb up (the animal's hair).'
Exceptions to Quotation	Shmuel permitted decorating the ends of fringes on a cloak. Rav Yehudah permitted scouring fine cloth. Rabbah permitted beating rough cloth. Rava permitted painting arrows. Rav Pappa bar Shmuel permitted painting baskets.
Question	But didn't we learn, "One should not paint either a man, or an animal, or a utensil?"
Answer	There is no contradiction. The one (permission) applies to new ones; the other (prohibition) applies to old ones.

### Discussion of Sugyah

In this sugyah the Mishnah and Talmud need to be read together in parallel rather than in succession because the Mishnah consists of a series of propositions and halakhic rulings while the Talmud provides the rationales behind the halakhic rulings. The first proposition states that one should not give small treats to children to build a brand loyalty for your store over other stores. The reasoning for the proposition is that children will be easily influenced by inexpensive treats to patronize your store and, probably, to bring their parents to that store over all other stores thereby creating an unfair competitive advantage. That is, if children are used to patronizing your

store because of the treats then they or their parents won't make purchase decisions only on the merits of the products but also based on brand loyalty to the store. The halakhic ruling states that this is an acceptable business practice because other merchants have the same ability to hand out small treats and build their own store loyalty.

The second proposition is that one should not lower one's prices to attract business. The only rationale for this ruling is an adherence to a theory of inherent value for products rather than a fair market value. The halakhic ruling again overturns this proposition under the rationale that fair competition includes competition on price and lower prices benefit the general public.

The third proposition is that merchants cannot sift pounded beans, providing an additional service for the customer. Again, the halakhic ruling sees nothing wrong with providing an additional service to the customer, even if it costs the customer extra, as long as the customer recognizes that they are paying for the additional service. Where the sifting of pounded beans is forbidden, and where there is no disagreement, is in the case where the merchant sifts only the visible product, thereby fooling the customer into thinking the entire container has been sifted. This case is an understandable extension of the prohibition against deceptive advertising.

The fourth proposition is expanded upon at length in the Talmud. The proposition states that one should not paint people, animals or items. To make them look artificially better than they are is a deceptive practice. The Talmud then cites examples of this principle related to animals and animal products. For example, one

should not feed bran broth to animals because bran broth will swell up their intestines and make them look artificially heavier than they are. Nor should one fluff up (comb) an animal's hair to make it appear bigger than it is either. The exception to this rule is making new items appear their best, examples of which would include putting fringes on a cloak or painting baskets. There is no contradiction in allowing a new basket to be painted because that is simply a part of the final product and it is not done to deceive the buyer. However, if one were to paint an old basket to make it appear new, that would be a deceptive practice and it would be prohibited.

### **Modern Application**

It is astonishing how similar the ancient and modern marketplaces are with respect to competitive business practices. The halakhic ruling for the ancient marketplace is that merchants may distribute small treats to children so they develop a brand or store loyalty. Today, fast food chains distribute 'happy meals' with a toy inside. McDonald's, Burger King, Wendy's – they all have their own version of the 'happy meal' to ensure that children will drag their parents into their stores. Several of my friends say that their kids don't even like the food and will only pick at it, but they become very excited about the 'free' toy included. And just as the rabbis predicted, having toys in a 'happy meal' doesn't give any one chain an unfair competitive advantage because they can all give toys away.

The rabbis also permit additional services to be provided even if the service costs the customer more money. The same is true today and in fact is quite widespread. Today one may purchase pre-cut, washed and mixed salad at a



premium, of course. One may buy chickens that are cleaned and cut into quarters. One may buy frozen prepared dinners. In all these cases, the buyer could buy the raw ingredients and process the food themselves for less money. But they knowingly spend more money on the prepared foods for the sake of the convenience these prepared foods offer.

The difference between the modern and ancient marketplaces comes in the prohibition on deceptive appearances. Certainly, in today's market if a store sold a box of berries that were good on the visible top but moldy on the hidden bottom, then the store would take that produce back. The difference arises in the area of disclaimed, but nevertheless deceptive appearances. For example, boxes of cereal are sold by weight not volume and even state this fact on the box. Yet, the boxes in which dry cereal is sold are significantly bigger than required, fooling the consumer into thinking that they are receiving more than they actually are. Worse offenders are those companies that pack small products in large containers specifically to deceive the customer. On the back page of Consumer Reports Magazine is a section called "Selling It", a page which often documents these types of deceptions. For example, in the September 2002 issue, Consumer Reports Magazine documents how *Andes Crème de Menthe Thins* actually take up only 2/3 of the actual package, even though the consumer can only find this out after the package has been opened. One would think that the rabbis would prohibit this perfectly legal modern practice.

Just as the rabbis were concerned with making sure that used or old products were not sold as new, so too is the modern marketplace concerned that old products not be sold as new. Today we have protections to ensure that products advertised as

new are in fact new. Mattresses, for example, must have tags that state the date of manufacture. Cars must have odometers and there are severe penalties for tampering with the odometer. In today's marketplace there is no prohibition on repainting a car or detailing the car so that it 'looks new'. This system works, however, and the rabbis would approve of it because the odometer attests to the car's actual age and the buyer would not be deceived.

The one area with a glaring difference between the modern and ancient marketplace is in the area of pricing. The rabbis seem to permit any type of price competition while certain types of price competition are illegal and vigorously prosecuted in today's marketplace. Unfair, predatory price competition is so vigorously opposed today that it has its own name, trust busting. We have found in the modern marketplace that large competitors will lower prices below cost in an effort to drive smaller competitors into bankruptcy. Just as the rabbis predict, this is good for the consumer while it lasts. However, once the competition has been driven away, the monopolist raises prices above the level at which a truly fair market would clear, and the consumer is deeply hurt. The rabbis and the modern market both allow prices to fall as a natural part of market competition. However, the modern marketplace also recognizes the possibility of predatory pricing, outlaws it, and vigorously pursues violators. The rabbis did not seem to be able to envision price wars leading to the formation of monopolies.

**Chapter #3**  
**Ha-Zahav**  
**Philosophical / Theological Analysis**

Throughout the analysis of Bava Metzia we have seen that the rabbis are extremely concerned about fairness in business dealings and in human relations. While such a concern is admirable and one could be satisfied merely with the concern for fairness alone, one can see an underlying theologically inspired philosophy motivating the rabbis to take their strong stand in favor of fairness. Ultimately, the rabbis believe in radical equality between human beings. Radical, in its primary definition according to the Random House Dictionary of the English Language, is defined as "of or going to the root of origin; fundamental"<sup>1</sup>. For the rabbis the origin of humanity is described in the story of creation. Genesis 1:26-27 states in part: "And God said, 'Let us make man in our image after our likeness...' And God created man in His image, in the image of God He created him; male and female He created them."<sup>2</sup> This teaches us that men and women were both created in God's image and since all of humanity descends from Adam and Eve, those first two humans, all of humanity is created in God's image. Further, because all humanity is created in God's image, all humanity is radically equal. That is, all of humanity is equal at its origin. This is not, in fact, an unusual conclusion. Rather, it is a basic assumption in the founding of the United States as stated in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal..."

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<sup>1</sup> Flexner, Stuart (Editor-in-Chief). The Random House Dictionary of the English Language – Second Edition Unabridged. New York: Random House, 1987. Page 1592.

<sup>2</sup> The translation of all Biblical quotations cited comes from the Jewish Publication Society Hebrew-English Tanach.

For the rabbis, however, equal creation and radical equality have further implications that color their world-view and guide their halakhic rulings. In the first instance we see the rabbis are also influenced by the prophet Malachi, who declared, "Have we not all one Father? Did not one God create us? Why do we break faith with one another, profaning the covenant of our ancestors?" [Malachi 2:10] This exhortation may be interpreted as a call to fairness in our dealings with one another. Because we all have one Creator, because we are all radically equal, we all should keep faith with one another and deal fairly with one another. The implication for material transactions is to mandate equal protection under the law and to conduct transactions at fair prices for both the buyer and the seller.

We also see the rabbis' theology that human beings are created in the image of God influencing the rules for human interactions. The rabbis, seeing that all human beings are created in God's image, forbid humiliating a person in public and equate public shaming with murder. Their philosophy is that to shame a person in public is to degrade and diminish their reputation and image. That is, a publicly shamed person has had their humanity degraded and diminished. But since all human beings are created in God's image, degrading and diminishing a person's humanity also degrades and diminishes God's image, a result that cannot be allowed on theological if not humanitarian grounds.

The rabbis also forbid deceiving another person for a similar reason. Surely, deception that leads to a monetary loss is forbidden under the previous philosophy of radical equality. By definition deceptive dealings break faith with the deceived and subvert the equality between buyer and seller. But the rabbis go further in their

injunctions against deceptive business practices. They also forbid casual deceptions that may not have any monetary implications at all. The rabbis forbid these types of non-monetary deceptions because they violate the injunction against degrading and diminishing another human being. To deceive another human being diminishes them and degrades them in their own eyes. They begin to see themselves as gullible fools, as less astute than others, and this diminution of self diminishes the image of God. All this leads to even worse results. People who have been deceived begin to lose their faith in the essential goodness of humanity that is rooted in having been created in the image of God. Having lost their faith in the essential goodness of humanity, it is only a small step to doubting the essential goodness of God who, after all, declared the creation of humanity to be 'very good'. Doubting God's essential goodness is, for the rabbis, a theologically untenable position and therefore the rabbis are moved to forbid any action that leads to this doubt.

### **Ha-Zahav, Part I**

The first half of *Ha-Zahav* deals primarily with fair business dealings and therefore has as its main theological underpinnings in the philosophy of radical equality. The first sugyah discussed above explored two areas of fair business practices: full disclosure and the limits of fraud. Mandating full disclosure is one method to ensure equality in the marketplace. If one party to a transaction has hidden market information then the other party is at a disadvantage. In the modern marketplace this type of hidden market information might be called insider information and is considered illegal because it interferes with the fair and efficient workings of the marketplace. That is, if some parties consistently trade on insider

information the other parties will assume themselves to be at a disadvantage and perhaps refuse to participate possibly leading to a market breakdown. However, the modern marketplace does not mandate that every buyer and seller be equally informed as long as both parties have reasonable access to the information. That is, if one party to a transaction chooses not to investigate the transaction fully, but all the information is readily available, then the transaction is still valid. In contrast, the rabbis mandated stricter disclosure for the ancient marketplace because they were concerned with more than merely the fair and efficient workings of the marketplace. Recognizing that insider information that puts one party at a disadvantage also diminishes that party, the rabbis rule that full disclosure is a prerequisite to maintaining good faith in transactions. For the rabbis, maintaining good faith in transactions isn't a matter of maintaining an efficient marketplace, but maintaining respect between human beings because all human beings are radically equal having been created in God's image.

Similarly, the rabbis debated the limits of monetary fraud based on radical equality. Shmuel insists on maintaining the same levels defining monetary fraud from the perspective of either the buyer or the seller. One might think that sellers are at an inherent advantage being experts in their particular market and therefore should be subject to stricter standards. However, Shmuel recognizes that all human beings are equal and therefore sellers too must be protected equally under the law.

The second sugyah discussed above addresses two other aspects of equality before the law. The first aspect is a debate over the penalties one suffers for breaking the laws prohibiting monetary fraud. As in our modern judicial system, when one

breaks the law one also forfeits a certain amount of equality before the law through penalties. The debate between the rabbis is the extent to which one forfeits equality before the law. Both sides in the debate agree that one who has defrauded deserves a penalty but disagree on who decides what the penalty will be. One side of the debate argues for the defrauded to choose the penalty within certain guidelines. The other side, the side according to which the halakhah was decided, takes the choice of penalty out of the hands of the defrauded and sets standard penalties according to the level of the fraud. The difference between the two sides is whether justice includes revenge or is simply a remedy for the wrong committed. By giving the defrauded the power to choose the penalty as the first side argues, the defrauded is given the power to choose revenge through a heavier penalty than is warranted. Further, because vengeance is personal and variable, two people who commit fraud of equal degree may be punished differently, one more heavily than the other. Therefore, the rabbis in the second half of the sugyah rule against including an element of vengeance in legal remedies and rule for equal treatment for equivalent offenses.

The second aspect in the debate between the rabbis is the extent to which equality leads to identical outcomes. The first half of the sugyah argues that the philosophical adherence to strict equality dictates that all transactions occur at a single prevailing fair market value. The second half of the sugyah argues that variations of up to one-sixth of the fair market value are acceptable and a normal part of the functioning marketplace. Thus, two different people with different skills and temperaments should be treated equally and have equal opportunities, but they may not achieve equal results. For example, suppose one person likes to get the cheapest

price possible no matter what, while another person is willing to pay more for the identical item in order to have the psychological satisfaction of shopping in a fancy store. The first half of the sugyah would argue that the second person who paid more was defrauded, while the second half would argue that they both were treated equally but made their individual choices for personal reasons. Both sides in the debate argue that all human beings are equal in terms of rights and responsibilities, but the halakhah recognizes that all human beings are not identical and therefore variations in the marketplace are, up to a point, natural and legitimate. The halakhah recognizes that human individuality is also rooted in the idea that humanity is created in God's image, for God is singular and unique.

The third sugyah discussed above presents an apparent divergence from the rabbis' philosophical adherence to radical equality. In this sugyah we see that there are significantly different discovery periods for buyers and sellers. Sellers enjoy an unlimited discovery period while buyers have a strictly limited discovery period. This ruling appears to set up an inequality between buyers and sellers, but in reality attempts to rebalance a pre-existent inequality between buyers and sellers. Buyers, having possession of the goods, have an easy time determining the fair market value. Sellers, having given up possession of an item, need more time to be able to discover a fraudulent transaction. Therefore, in order to balance the opportunity for discovery, sellers are given more time in order to maintain equality.

In contrast, the fourth sugyah is a deliberate deviation from the philosophy of radical equality. In this particular case, householders are given permission to commit monetary fraud when they sell personal items or items with sentimental value



attached to them. The reasoning behind this permission is a theory of necessity. Without additional compensation, householders might not be willing to sell items of personal value, and the market in which householders sell personal items could collapse. Yet this appears to completely negate the rabbis' driving philosophy of radical equality by giving householders undue consideration. Perhaps the rabbis give their permission in this case because the very fact that a householder is selling personal items constitutes disclosure that the pricing may be higher than the prevailing fair market value. Anyone who wants to buy personal items from a householder should know as a matter of course that the goods are overpriced and take that into consideration when deciding whether to buy them. Perhaps the buyer attaches some value greater than fair market value to the items the householder has to sell, just as the householder attaches an additional sentimental value to the items. The rabbis do not give any other hint for their reasoning, and if a householder selling personal items does not constitute in and of itself full disclosure, then it is puzzling why the rabbis would abandon their theologically based sense of radical equality in this particular case.

The fifth sugyah is decided on a completely different basis from the previous sugyot that we have seen. The question debated in this complex sugyah is not a matter of equality or deceptive practices but rather is based on entirely different philosophical reasoning. In this case, the question arises whether a contract can contravene established law and remain legally binding. That is, if a contract has clauses that are ruled illegal is the contract still valid or is it voided in its entirety. First, the rabbis establish an order of precedence for legal rulings and declare that

laws based in Torah, having been given by God, take precedence over laws created by human beings, the rabbis themselves. Theologically, God comes first and humans may not directly overturn God's law. Therefore, any clauses that seek to overturn God's law are void. Second, the rabbis rule that once the illegal clauses are removed, the contract remains valid even though a person is waiving his rights.

This second ruling is important philosophically speaking. It gives people permission to engage in binding transactions that might be considered fraudulent at some later date on condition that 1) disclosure takes place; and 2) both parties waive their rights with full knowledge. That is, human autonomy can in the circumstances of full disclosure overrule the philosophy of radical equality. There is an implied hierarchy among the philosophical positions at play in this sugyah. First, God's law takes precedence over human law. Second, human autonomy, which allocates god-like will to an individual, allows people to waive their rights as long as there is full disclosure. Third, human beings are radically equal and fair dealings between people are therefore mandated.

The sixth sugyah is similar to the third sugyah in that it too appears to treat two classes differently and unfairly. That is, there are different discovery periods for those who dwell in a city versus those who dwell in a village. Just as in the third sugyah, however, we see that the different discovery periods are in fact an attempt to address the lack of readily available expertise in villages and maintain fairness in the system. Therefore, this sugyah too is based on radical equality.

## **Ha-Zahav, Part II**

The second half of Ha-Zahav deals primarily with verbal oppression and deceptive practices. Therefore it has as its main philosophical substructure the notion that one may not diminish another human being either in public or in their own eyes. In the first sugyah we see six defining examples of what verbal oppression is. In the first four of those examples, we see a prohibition against shaming other human beings through various direct and implicit statements. These are all forbidden because they publicly diminish the victim's humanity and thereby diminish the honor of God as well. The fifth and sixth examples show types of verbal deceptions that are also prohibited because they diminish the victim's self-image and lead them into doubting themselves, humanity and God's goodness.

All six examples show what is perhaps the major point of the sugyah, the relative severity of verbal oppression as compared to monetary fraud. Verbal oppression is shown to be worse than monetary fraud because monetary fraud can be compensated while the effects of verbal oppression cannot. Acts of verbal oppression permanently affect the victim. It is possible to apologize and even pay penalties to assuage the person who was wronged. However, words cannot be unsaid and if verbal oppression leads to doubting one's worth as a child of God, then it is a serious infraction indeed.

The second sugyah deals with deceptive business practices that are very similar in nature to monetary fraud. Just as in monetary fraud, the mixing of fruit is forbidden because it violates full disclosure and the buyer is not fully aware of the

terms of the transaction. One who buys mixed fruit will most likely not be personally diminished as we saw in the previous cases of verbal oppression, but they nevertheless do not receive what they are expecting and potentially suffer a loss as a result. Throughout this sugyah we see the rabbis are concerned that buyers receive what they expect to receive. Mixing is either prohibited, as in the case of fruit, or permitted, as in the case of wine, based on whether the buyers will know in advance what they are receiving. Thus, we see that the majority of the second sugyah uses the same philosophical underpinning as Part I, fair business dealings based on radical equality. One area of the second sugyah that does not use the same theological basis is the prohibition against selling adulterated wine to a merchant. The reasoning here is the same as that for verbal oppression. Deceptive practices make the victims feel diminished in their own eyes, leading them to doubt themselves, humanity and ultimately God. Therefore, one may not sell adulterated wine to a merchant because wandering merchants are assumed to deceive their customers.

The third sugyah in this section deals with various practices whose legitimacy is debated. For the most part, Rabbi Yehuda argues for strict regulations based on the theological grounds that one does not diminish another human being. For example, he argues that giving small gifts to children deprives them of a certain degree of autonomy. They become accustomed to shopping at a particular store and are manipulated into dragging their parents with them, without regard to whether the store provides the best goods or services. The Sages, however, overrule Rabbi Yehuda several times because they do not see the practices as deceptive or as conveying an unfair advantage to one particular merchant. Rather, all merchants

could engage in the same behavior, compete equally in the marketplace, and provide additional benefit to the customers. Yet the Sages are not completely happy in circumstances that stay just on the legitimate side of deceptive practice. In the cases where children are manipulated or pounded beans are sifted, the Sages recognize that these practices can easily tip over the line into deceptive practice and only tolerate the practices, permitting them to occur. But in the case where there is no manipulation, where a merchant lowers his prices, the Sages praise that merchant. Rabbi Yehuda, on the other hand, does not consider how customers benefit in potential price wars, but rather only sees the unhappiness a price war could bring to the merchants.

Where the Sages, Rabbi Yehuda, and Abba Shaul agree is in the case where truly deceptive practices take place, for example sifting only the top of a container of pounded beans or artificially making an animal look better. In cases of deceptive practices, once again we see the rationale that one may not deceive the eye, making the customer feel diminished if he is fooled. The exception to the rule is in the case of a new product. In that case, actions that appear to deceive the eye are actually only cosmetic changes made on new products in order to enhance them. It is understood that people will pay more for a beautiful object because God has created us with an aesthetic sense. When similar cosmetic changes are made on old objects, they are made to deceive the customer. Again, radical equality is undermined since the customer may not realize that cosmetic changes disguise old or damaged goods. Having been fooled by this deceptive practice, the customer is diminished in his own eyes. Either way, the notion that people have been created in God's image is

damaged. It is this damage to either radical equality or to a person's sense of self-worth that guides most of the discussions in Perek Ha-Zahav.

**Conclusion**  
**Perek Ha-Zahav**  
**Bava Metzia**

The modified four-part analysis that I used above consists of the following steps. First, I translated the Talmudic material in order to better understand the nuances in the text. Second, I outlined the material in order to follow better the logic and argumentation of the rabbis. Third, I analyzed the texts to examine the underlying issues the rabbis were debating. Fourth, I compared the issues as raised by the rabbis to conditions in the modern marketplace. Finally, in Chapter Three, I explored the philosophical / theological reasons motivating the rabbis in their debates. Having completed this analysis I believe we may see clearly the similarities and differences between the ancient marketplace and the modern marketplace.

The similarities appear to be far fewer than the differences and also appear to be of lesser consequence than the differences. In both marketplaces fair market values are recognized to consist of ranges rather than single prices. Both marketplaces recognize the emotional content of sales. In the ancient marketplace, householders were allowed to sell their personal items at what could be considered inflated prices. If the emotional attachment to these articles had not been figured as part of the price, then householders would not have been willing to sell at all thereby closing off that market. In the modern marketplace, brand names and other intangibles become reasons for extracting higher prices for what is otherwise the same product, as we saw in the cases of gasoline and oatmeal. In both markets illegal contracts are not enforceable. Finally, the rabbis treat verbal oppression in ways that are similar to the way the modern world deals with verbal

oppression. Today we debate over whether reminding people of a criminal's past crimes is legal or illegal. Similarly, we debate over whether additional punishment is warranted for hate crimes or if it is actually possible to judge another person's intentions. We recognize emotional injuries by payment of pain and suffering damages just as the rabbis recognized that embarrassing someone in public caused hurt that cannot be taken back. These similarities are important, but they are far outnumbered by the differences between the two marketplace systems.

The first major difference between the two markets is that a sale in the ancient world is only completed upon the delivery of the goods sold, not upon the exchange of money. Directly opposite in the modern world, a sale is completed upon the exchange of consideration, i.e., payment. The rabbis made this arrangement because they wanted to ensure that both parties to a transaction saw the goods being presented for sale. Therefore, they ruled as they did.

In the pursuit of efficient markets today, we don't require the exchange of goods, but rather we provide quality grades to help those in the market know what they are buying and selling. In fact, the commodities futures markets never actually physically deliver goods, but sell commodities constantly, even before they have been harvested or produced.

The second major difference concerns return policies. In the ancient world, the ability to return goods was based on fairness and the radical equality between buyer and seller. Today, return policies are generated to ease a buyer's concern and improve sales. A return policy could easily be "all sales final," but most often this is not the case in



order to ensure the efficiency of the market and to increase sales volume. Regarding the issue of return policies in Jewish practice, the ancient Jewish world provided limited discovery periods and tried to give both sellers and buyers equality before the law through fairly adjusted discovery periods. In the modern period, buyers are given discovery periods equal to the return period for the sake of efficiency and increased sales, while sellers are given no consideration at all.

While we have seen that illegal contracts are unenforceable in both the ancient and modern marketplace, there is a significant difference between the two when it comes to waiving one's rights. The rabbis argue that one may knowingly waive one's right, and then the waiver would be valid. However, a conscious waiver is a must for a flawed contract to survive. Today, we often waive our rights without knowing that we are doing so because of the fine print appended to so many contracts, especially brokerage and credit card agreements. Though we may not realize it, we are waiving our rights and the terms are nevertheless legally enforceable.

In the ancient world, mixing produce, what we would consider an analogy to truth in advertising, was forbidden as a matter of fairness based in the principle of radical equality. Today, we also require truth in advertising, but for the purpose of maintaining free and efficient markets. Therefore, we see that the rabbis may tolerate behavior that is manipulative but not quite illegal, but they are not happy with it. In contemporary Western and especially American markets, manipulation is the staple in trade of advertising today.

Finally, in the ancient world, the rabbis strictly forbade fooling someone or belittling them and making them feel foolish. Today, such behavior is put on television as entertainment and we seem to take pleasure in other people's pain. Indeed, the presentation of literal pain or the prospect thereof has entered into advertising as a means of catching the viewer's attention and maintaining interest in the advertisement.

Having examined the similarities and differences between the philosophy / theology of the rabbis as expressed throughout Perek Ha-Zahav compared to the modern period, we see a stark difference between the ancient and modern world. In some cases, the modern consumer is far better off because of significantly more liberal policies. This true, for example, in the customer's right to returns and discovery. Yet, the ancient world appears to be far more interested in creating a more just society than we are today. The rabbis understood God's involvement in human transactions and humanity's creation in the image of God as the philosophical and theological foundations for legislating the rules of the marketplace. Because human beings are radically equal and created in the image of God, the rabbis ruled that we are bound to create a just marketplace. Comparatively, the modern world has set up free and efficient marketplaces as their god and the rules of the marketplace are set up to maintain efficiency even at the occasional expense of fairness. Fortunately for us, fair markets happen to be efficient markets, but it seems that for the modern world, that is only a happy consequence of our constant drive towards efficiency. Therefore, we see that the consumer happens to be better off because of many aspects within the modern marketplace, but the ancient marketplace was far more concerned with creating a fair and just society, of which the marketplace was a part.

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