

Dr. Levine, Professor of Economics at Yeshiva University, discusses significant Talmudic insights and practices in the realm of economic life.

VALUE THEORY IN TALMUDIC LITERATURE

INTRODUCTION

Surveys of economic thought generally characterize pre-late 17th century economic literature as analytically sterile. Economics in its pre-analytic stage did not exist as a separate subject matter, nor were there analytical tools with which thinkers probed into economic phenomena. While the economic speculations of the ancients are largely unsystematic, theoretical nuggets and genuine insights into the workings of the market system have been culled from the writings of priests, lawgivers and philosophers. Most fruitful in the search for nascent economic analysis in the pre-analytic stages of economic thought has been the Graeco-Roman heritage and the writings of the medieval schoolmen.

One source of adumbrations of modern economic analysis is the Talmud (200 B.C.E.-500 C.E.) and the literature of its early commentators and decisors. Studies devoted to unravelling nascent economic analysis contained in talmudic thought, though increasing in number in recent years, remain scant.¹ This essay will explore insights relating to value theory found in talmudic literature.

The Talmud appreciated the distinction between subjective and objective market value. Though recognition of this dichotomy is in itself more a common sense insight than a theoretical innovation, the superstructure built around this distinction in the Talmud is elaborate and extensive. What constitutes the essence of subjective value is given careful analytical consideration. Finally, the modern analytical tool of consumer surplus is found in talmudic thought and in the writings of its early commentators.

TRADITION: *A Journal of Orthodox Thought*

The relationship between subjective and objective value is discussed in the Talmud in connection with:

1. laws dealing with price fraud;
2. the satisfaction of specific payment obligations required in religious ceremonies; and
3. laws dealing with recovery of lost property.

I

Individuals freely entering into a market transaction are presumed by talmudic law to have an approximate notion of the value of the article involved. Hence, price agreements which diverge enormously from the prevailing norm are interpreted as representing a tacit understanding between buyer and seller to treat the price differential as a voluntary gift transfer.

When the discrepancy between the sale price and the prevailing norm falls within the margin of error, the laws pertaining to *ona'ah* or price fraud become applicable. There are three degrees of *ona'ah*:

First degree ona'ah: when the discrepancy between the sale price and the market price is more than $16 \frac{2}{3}$ percent. When this occurs the sale is voidable.

Second degree ona'ah: when the sale price differs from the market price by exactly $16 \frac{2}{3}$ percent. Here the transaction remains binding and is not voidable. The injured party, however, is entitled to full restitution of the *ona'ah*.

Third degree ona'ah: when the sale price differs from the market price by less than $16 \frac{2}{3}$ percent. When this occurs not only is the sale binding but there is no legal claim to the price differential² by the injured party.

Not all transactions, however, are subject to the laws of *ona'ah*. Three of these exceptions are of particular relevance. Barter transactions, for example, are not subject to the *ona'ah* regulation. The Talmud in *Baba Metsia* 47a exegetically derives this exemption from the Biblical source of the *ona'ah* prohibition.

And if thou *sell* aught unto thy neighbor, . . . ye should not wrong one another (Leviticus 25:14).

Value Theory in Talmudic Literature

By use of the term *sell*, the verse is taken to refer solely to money transactions, not barter transactions.

R. Michael Epstein of Belorussia (1829-1908) in his work, *Arukh Hashulhan, Hoshen Hamishpat*, rationalizes the exclusion by pointing out that money transactions differ in essence from barter exchanges.^{2a} When money is the medium of exchange, the clear intent of the parties involved is to exchange equal objective values. Given this intent, the prevailing norm serves to determine whether or not the objective was realized. Barter transactions, on the other hand, are predicated on the existence of a double coincidence of wants. With neither of the articles involved in the exchange constituting a commonly accepted medium of exchange, the intent of each party is clearly to acquire something of greater subjective value to himself than what he has to offer in exchange. The laws of *ona'ah* therefore do not apply to barter exchanges.³

Nor when a householder sells his articles of personal use is he subject to price fraud claims. It is presumed that articles of personal use are particularly dear to the seller and he would not part with them unless he obtains a price above the market value. Anyone transacting with the householder is presumed to be aware that the seller subjectively values the sale object at above the prevailing norm and the buyer is precluded from setting aside the sale price on the grounds of *ona'ah*.⁴

The converse case occurs when circumstances suggest a strong probability that the buyer subjectively values the object of purchase at above the prevailing norm. In this connection the Talmud relates:

It has been taught: R. Judah said, the sale of a scroll of law too is not subject to *ona'ah* because its value is unlimited; an animal or pearl is not subject to *ona'ah* because one desires to match them. Said they (the Sages) to him, but one wishes to match up everything! And R. Judah? — these are particularly important to him (the purchaser); others are not (*Baba Metsia* 58b).

Interpreting R. Judah's argument, "one desires to match them," Rashi comments that the productivity of a strong, healthy work animal is adversely affected when it is teamed together with a

weak, indolent beast. Realizing this, the owner of a strong work animal seeks to harness his beast with an animal of like nature. Similarly, the owner of a precious jewel seeks to enhance its beauty by combining it in the same setting with another stone. Since the strong likelihood that the acquisition of an animal or pearl affords the purchaser this advantage, R. Judah denies plaintiff's *ona'ah* claims.

Implicit in R. Judah's reasoning is the modern analytical tool of consumer surplus. This concept is concerned with the relationship between market price and subjective value. Market price is today understood to be the result of the interplay of *aggregate* supply and demand forces. Price is determined *outside* the influence of the individual producer or consumer. The price an individual consumer would be willing to pay to obtain a given product may not coincide with this market price. When the consumer's subjective evaluation of the product falls below this price he obviously rejects the product. When his subjective evaluation of the product either coincides with or exceeds the market price, the consumer will buy the product. In the latter instance he will enjoy a windfall as well. The difference between the maximum price the consumer would willingly pay to obtain the product rather than do without it, and the actual transaction price provides a measure of this windfall or consumer surplus. Market price affords the purchaser consumer surplus when the subject commodity generates for him complementarities in consumption. Subjective equivalence is therefore realized by the purchaser at the above market price he paid for the commodity.

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

A more direct and advanced formulation of the notion of con-

sumer surplus is found in the writings of the German talmudic codifier, R. Asher ben Jehiel (1250-1328). Noting the absence of any provision for legal redress in third degree *ona'ah* cases, R. Asher speculates whether it might be permissible, in the first instance, to contract into third degree *ona'ah*. Pivotal to the resolution of this question, in his view, is the definition of market price. Is market price to be understood as a single value or is it to be defined as the *range of deviations* of less than $16 \frac{2}{3}$ percent from the sale price of the moot transaction? Adopting the single value view leads to the conclusion that knowledge of the market norm prohibits either party from contracting into a price agreement that diverges even slightly. The absence of legal redress for third degree *ona'ah* would then be explained by the presumption that when the degree of price fraud involved is a relatively small amount, the injured party waives his legal claim to restitution. This presumption follows from our inability to precisely fix the value of the article sold. While some experts would insist that *ona'ah* took place, others would just as vehemently deny it. With experts divided as to whether *ona'ah* occurred, and if it did by how much, we may safely presume that the victim of this possible *ona'ah* waives his legal right to restitution.

Adopting the range of deviations view, however, leads to the conclusion that third degree *ona'ah* is not price fraud at all. Denying legal restitution follows from the fact that the concluded price, though at variance with the prevailing norm, falls, nevertheless, within the *legal* price range. Why price should be defined as a range of values rather than by the prevailing norm is defended by R. Asher on the grounds that even both buyer and seller are fully aware of the prevailing norm, each would on occasion, to their own disadvantage, contract into a price agreement at variance with this norm. The vendor, for instance, would offer to sell his wares below the prevailing market price when the merchandise at hand represents unwanted inventory or when he has an urgent need to raise cash. Similarly, the buyer, finding a product to his keen liking would, on occasion, offer to pay for it a price above the market norm. In this situation, market price should not be properly defined as a single value, but rather as a range of deviations around the prevailing norm.

TRADITION: *A Journal of Orthodox Thought*

Though offering no definitive resolution of the above dilemma, R. Asher urged the following guideline for third degree *ona'ah* cases:

Cognizant of the prevailing norm, an individual should not enter into a price agreement that even departs slightly from this value. Should an individual, on the other hand, fall victim to a third degree *ona'ah* he should accept his loss graciously and express no complaint.⁵

Implicit in R. Asher's analysis is a clear understanding of the schedule nature of demand and the corollary insight that the existence of consumer surplus is not confined to instances where the subject commodity generates complementarities in consumption.

II

R. Yom-Tob ben Abram Ishbili (1270-1342), a Spanish talmudic scholar, held that if at the time of the sale the buyer declared that the purchase was subjectively worth the entire sum demanded, he forfeits any subsequent *ona'ah* claim. This occurs only when the declaration expresses the true and permanent subjective value the buyer attaches to the purchase. Should the declaration merely reflect *circumstantial* subjective value, the buyer retains his *ona'ah* claims against the seller.

Circumstantial subjective value, notes R. Ishbili, is illustrated when an absconding criminal offers to pay a ferryman an above market price to convey him across a river. Since the conveyance averts the fugitive's imminent capture, he certainly received subjective equivalence for his purchase. Nonetheless, if we remove his fugitive status, this same individual would presumably not value the conveyance service above market price. With his above market bid reflecting *transitory subjective* value, rather than *permanent subjective* value, the fugitive is entitled to recoup from the ferryman any amount he paid him above the competitive norm.

Another example of circumstantial subjective value occurs when an invalid agrees to pay an above market price for herbs having medicinal properties. Given his poor health, the patient

Value Theory in Talmudic Literature

certainly received subjective equivalence in the exchange. Nonetheless, absent his illness, he would presumably not value the herbs at above their market price. The market bid for the herbs reflects his circumstantial evaluation of the commodity rather than the permanent subjective esteem he attaches to it. Therefore, the invalid is entitled to recover any amount he paid above the competitive norm.⁶

That the buyer's bid merely reflects his circumstantial evaluation of the subject commodity rather than the permanent value he attaches to it does not automatically legitimize his *ona'ah* claim. This is clearly evidenced from the analysis given by the early commentators of the following talmudic text:

It has been taught, R. Judah b. Bathyria [mid-first century] said: the sale of a horse, sword, and buckler on [the field of] battle are not subject to *ona'ah*, because one's very life is dependent upon them (*Baba Metsia* 58b).

Is view of the desperate nature of an individual's need for a horse and weapon on the battlefield, the buyer certainly received subjective equivalence for whatever price he agreed to pay for these articles. This is the reasoning of R. Judah b. Bathyria. Whether this ruling represents mainstream talmudic thought is disputed. R. Hai ben Sherira of Pumbedita (939-1038)⁷ and R. Isaac ben Jacob Alfasi (1013-1103)⁸ ruled that R. Judah b. Bathyria's opinion represents a minority view and is rejected. R. Hananel b. Hushul, 11th century North African decisor, however, ruled in accordance with R. Judah ben Bathyria.⁹ The acceptability of R. Judah b. Bathyria's opinion, according to Moses Ha-Kohen of Lunel, 13th century decisor, hinges heavily upon the validity of assimilating his battlefield case with the fugitive-ferryman case.¹⁰

III

In the redemption of the first born son ceremony, the father must transfer to the priest (*kohen*) money in the sum of five selas or an object of equivalent market worth. In this regard the Talmud relates:

[If one declares,] "This calf be for my son's redemption," his declaration is invalid. "This calf, worth five selas, be for my son's redemption" . . . his son is redeemed. Now, how is the redemption meant. Shall we say that it [the article] is not worth [five selas]? Does it rest with him! . . . After all it means that it was not worth [it] but, we suppose the priest accepted it [for the full value], as in the case of R. Kahana, who accepted a turban for a son's redemption [although it was certainly not worth five selas], observing to him, [the father who redeemed the son] "To me it is worth five selas." R. Ashi said: this holds good only of e.g. [a man like] R. Kahana, who is a great man and needs a turban for his head; but not of people in general. Thus it happened that Mar, son of R. Ashi, bought a turban from the mother of Rabbah worth ten for thirteen (*Kiddushin* 8a).

What follows from the above talmudic passage is that in the event the priest subjectively evaluated the turban at five selas, though its market price falls below this value, the father satisfied his payment obligation.

R. Nissim Gerondi (1340-1380), a leading Spanish decisor, held that credibility is given to the priest's claim that the turban is subjectively worth to him the above market price of five selas only when the latter was known on other occasions to pay this above market price for the subject article. When this is not the case, no credibility is given to his assertion that the turban is subjectively worth the above market price of five selas.¹¹

R. Gerondi's viewpoint was not followed by Maimonides. This is evident by examining the following text:

[If] he [the father] gave him [the priest] a utensil that does not have a market value of five selas and the priest accepted it as worth [to him] five selas, his son's redemption is therefore effected (*Yad, Hilkhot B'koorim* XI:7).

Maimonides' conspicuous failure to cite R. Gerondi's credibility condition indicates that the priest's acceptance of the article as worth to him five selas effects redemption even if the priest was not known on other occasions to pay above the market price of five selas. Inasmuch as the above talmudic passage appears to support R. Gerondi's view, the commentators found Maimonides' position enigmatic.

R. Joseph Caro (1488-1575) found no inconsistency between

Maimonides' position and the above talmudic passage in *Kiddushin* 8a. The latter text teaches that the transfer of an object having a market value below five selas does not effect the first born son's redemption unless the receiving priest's five selas valuation of it is shared at least by one other person. Certainly that the receiving priest's valuation of the subject article is not unique occurs when the transfer object is a turban and the receiving priest is a prominent person, such as R. Kahana. Since it is a degradation for a distinguished person to be seen without a head dress such as a turban, R. Kahana's five selas above market valuation of this article is certainly shared by his peers. Maimonides' text, in R. Caro's view, can be interpreted as conveying this thought.¹²

Examination of R. Jacob b. Asher (1270-1340) of Toledo's treatment of the above subject matter places him also in apparent variance with the talmudic passage in *Kiddushin* 8a:

If he [the father] gave him [the priest] an object for five selas and the priest accepted it, the redemption of the first born son is thereby accomplished, even though the article is not worth [in the marketplace] this amount (Tur, *Yorea De'ah* 305:9).

An attempt to reconcile R. Jacob's view with the talmudic passage in *Kiddushin* 8a was advanced by R. Joel Sirkes (1561-1640), a leading Polish talmudic authority. R. Jacob refers to the circumstance where the father declares that the object of transfer, though not having a market value of five selas, is subjectively worth this amount. Here, no corroborative evidence is necessary to establish the creditability of his claim, as a householder is presumed to value his personal articles above market price. Transferring an object subjectively worth to the father five selas, though not having a market value of this amount satisfies the payment obligations required in this ceremony. Should the father fail to declare at the time of the transfer that the subject article is worth to him five selas, the redemption would be effected only if the receiving priest declared at this time that the said article is subjectively worth to him five selas. Here, no credibility is given to the priest's claim unless he was known on other occasions to have paid this above market price for the transfer object.

Maimonides' text, in R. Sirkes' view, can also be similarly interpreted.¹³

In Jewish law, betrothal (*kiddushin*) is effected when the bridegroom transfers to his bride money or its equivalent having a value of at least one perutah for the purpose of betrothal in the presence of two competent witnesses. R. Gerondi speculates whether betrothal would be effected when the market value of the object of transfer was below one perutah, but the bride considered it worth at least one perutah. Since the perutah was the smallest coin in circulation, the bride's above market evaluation of the object of transfer effectively conferred value on something that otherwise had *no objective value* at all. Perhaps, the admissibility of subjective value as satisfying specific payment requirements in a religious ceremony is confined to instances where the effect of the subjective evaluation is merely to enhance the value of something that has objective value, but not when its effect is to confer value on something that otherwise has no objective value. This dilemma is left unresolved by R. Gerondi.¹⁴

Another legal ramification proceeding from the distinction between subjective and objective value in the Talmud occurs in connection with the Biblical obligation of restoring lost property.¹⁵

The obligation to restore lost property is limited to instances where its fulfillment would not impose a financial loss on the receiver. Consequently, if one found a lost object, he need not interrupt his work to return the lost property.

Should the retriever incur an opportunity cost in the process of returning the lost property he may have a claim against the owner for his loss, depending on the circumstances. One such qualifying circumstance occurs when the owner was not present when the recovery operation was undertaken. Here, three individuals, constituting a judicial court, may act in the interest of the owner and offer the engaged bystander compensation for the successful recovery of the lost property.¹⁶

Commenting on the extent of the authority of this group of three, Tosafot, (12-14th century school of French and German Talmudic commentators) in *Baba Metsia* 31b posit that their offer may extend as high as the value of the lost article itself be-

Value Theory in Talmudic Literature

cause, it is held that even such an arrangement confers a net advantage to the owner. The net advantage consists of sparing him the nuisance of replacing his property. When the lost article is an animal, additional grounds exist for allowing the rescue fee to extend as high as its market price. Such an arrangement would confer a net advantage to the owner as the *subjective* value he attaches to his animal exceeds its market value by virtue of the fondness he attaches to it.

NOTES

1. Roman A. Ohrenstein, "Economic Thought in Talmudic Literature in the Light of Modern Economics," *The American Journal of Economics and Sociology*, April 1968, pp. 185-196, — "Economic Self-Interest and Social Progress in Talmudic Literature: A Further Study of Ancient Economic Thought and Its Modern Significance," *The American Journal of Economics and Sociology*, Jan. 1970, 59-70. Ahron Shapiro, "Rabbinical Responsa and the Regulation of Competition," *The American Journal of Economics and Sociology*, Jan. 1970, pp. 71-76; Aaron Levine, "Opportunity Cost as Treated in Talmudic Literature," *TRADITION*, vol. 15, nos. 1-2, Spring-Summer 1975, pp. 153-173. "Equity in Taxation as Discussed in Rabbinic Literature," *Intercom*, Vol. XVI, no. 1, April, 1976, pp. 7-28. "The Free Enterprise Model—A Halakhic View," *Proceedings, Association of Orthodox Jewish Scientists* (forthcoming). "The Just Price in Judaic Law—An Economic Analysis," *Dinei Israel*, Tel Aviv Law University (forthcoming).

2. *Baba Metsia* 50b.

2a. Rabbi Epstein basis his analysis on Maimonides' treatment of the barter exemption.

3. R. Jehiel Michael Epstein, *Arukh Hashulhan*, *Hoshen Hamishpat* 227:21.

4. *Baba Metsia* 51a. In regard to the extent of the householder's exemption, Talmudic decisors disagree. R. Joseph Ibn Habib (15th century) holds that the householder's immunity extends to even first degree *ona'ah* claims while authorities quoted in *Shitah M'Kubetset*, *Baba Metsia* 51a limit the latter's exemption to second degree *ona'ah* claims.

5. *Rosh*, *Baba Metsia* IV:20. Rabbi Jehiel Michael Epstein posits that implicit in R. Asher ben Jehiel's analysis of third degree *ona'ah* is the proposition that victim's restitution claims are denied in this case only when the product market is *heterogeneous* in nature. R. Asher's explanation of why it is reasonable to assume that the victim waives his claims against the offender in third degree *ona'ah* cases convincingly forces this conclusion. The basis of this presumption, as will be recalled, is the division among experts as to whether *ona'ah* took place or not. This disagreement, however, is only comprehensible when the product

TRADITION: *A Journal of Orthodox Thought*

market involved is heterogeneous in nature. Determining whether or not price fraud took place by means of consulting is obviously unnecessary when the product market involved is standardized and homogeneous. Here, price uniformity would make the occurrence of *ona'ah* immediately apparent. With the occurrence of *ona'ah* not subject to dispute when the product market is homogeneous, the presumption that plaintiff waives his claims of restitution is not defensible regardless of the inconsequential nature of the *ona'ah* involved.

6. Novelae Ritbah, *Kiddushin* 8a.

7. Hai ben Sherira, *Ketab-al-Shira wa-al Baye*, translated into Hebrew by Isaac al Bargeloni, *Sefer haMekkah vohaMimkar*, Venice (1602).

8. Rif, *Baba Metsia* IV.

9. R. Hananel, *Baba Metsia* 58b.

10. V. Betsalel Ashkenazi, *Shitah M'Kubetset*, *Baba Metsia* 58b. Though Moses Ha-Kohen advances no specifics why assimilation should be rejected, two points of dissimilarity stand out. Firstly, whereas the demand inducing factor in the battlefield case affects all market demanders equally, causing the aggregate demand schedule for implements of war to shift upward, no such upward demand occurs in the fugitive-ferryman case. In the latter case, the demand inducing factor uniquely affects the fugitive's subjective evaluation of the ferryman's services, leaving aggregate market demand for the service unaffected. Secondly, whereas a competitive norm exists for the services of the ferryman at the time the fugitive struck up his bargain, *no competitive norm* exists at the time an individual buys implements of war in a battlefield situation. While the commercial market for horses and weapons is normally subject to a competitive norm, the market place for these articles completely collapses within the framework of the battlefield zone. The economic environment that prevails within such a scene effectively precludes the emergence of a "competitive" price for these articles. Resource mobility and knowledge of market alternatives is conspicuously absent here as the movement of market participants is severely restricted. With economic activity characteristically unorganized and sporadic, the market for these articles becomes minutely fragmented. Within this framework, price is determined by the individual bargains buyers and sellers reach. Since the *buyer's bid determines value here*, his *ona'ah* claim should be denied, notwithstanding the circumstantial nature of his demand in this case.

11. Ran, *Kiddushin* 8a.

12. Bet Yosef, *Tur*, *Yoreh De'ah*, 305.

13. Bah, *Tur*, *Yoreh De'ah* 305.

14. Ran, *Kiddushin* 8a.

15. Deuteronomy 22:1-4.

16. *Baba Metsia* 33a.