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The Prohibition of Buying and Selling Goods on *Chol Ha-moed*, *Davar Ha-aved* and Opportunity Costs

Opportunity costs are a basic concept in economics, and several cases of *halakhah* implicitly recognize opportunity costs. One possible case is in reference to the concept of *davar ha-aved* with regard to the prohibition of buying and selling goods on *chol ha-moed*. The question is whether potential profits from buying or selling a good on *chol ha-moed* should be considered as *davar ha-aved* or not. If the loss of the profits is considered a *davar ha-aved*, then it would be permitted to do the transaction on *chol ha-moed* and this would be a recognition of opportunity costs. Some authorities forbid a person to do a transaction on *chol ha-moed* to earn a profit unless some of the profits are used to purchase goods to enhance the celebration of the holiday and these scholars do not recognize opportunity costs with regard to *chol ha-moed*. Other authorities also allow a person to buy and sell goods to earn a profit by relatively unique opportunities, which would be a partial recognition of opportunity costs. A third group of scholars, which includes the Rama, is more expansive in allowing a business person on *chol ha-moed* to buy and sell goods to earn a profit that would be forgone if the person closed his/ her business on *chol ha-moed*. This group recognizes opportunity costs in almost all cases of buying and selling goods on *chol ha-moed*.

I. Introduction

Gregory Mankiw (2012, pp. 5,6) in his extremely popular series of economic textbooks begins with a list of ten principles of economics, and one of these

principles is opportunity costs. What are opportunity costs? Nicholson (1983, p. 692) in his textbook on intermediate microeconomics defines opportunity costs in the following manner:

The simple, though far-reaching, observation that the true cost of any action can be measured by the value of the best alternative that must be forgone when the action is taken.

This definition means that any action that a person does for which there exists an alternative action that must be forgone by the pursuit of the first action has an opportunity cost. The only cases when there are no opportunity costs are the rare cases when literally a person is limited to one course of action without any possibility of doing another action or when a person does an action, such as breathing, which does not hinder a person in any way from doing other actions.

Mankiw gives an example of opportunity costs that when a person goes to college, the cost of the college is not only the tuition but also the “largest cost of college – your time,” meaning what the person could have been doing if he/ she had not gone to college. For example, if the person would have worked instead of going to college, then the salary the person would have earned from the job would be an opportunity cost of going to college. Frank (1994, p. 8) in his textbook on intermediate economics gives an example of a person who can either work one day or go skiing. In this case, the cost of skiing is the cost of a one-day ski pass and the opportunity cost of forgoing the salary that the person could have earned from working that day.

The presence of opportunity costs does not mean that it is an incorrect decision to pursue a particular action, just that these costs should be acknowledged and that sometimes the recognition of opportunity costs would change the decision to take some action. For example, a person may choose to not work one day without realizing the opportunity cost of his/ her decision, and had the person realized the opportunity cost, then maybe the person would have worked instead of taking a day off. On the other hand, it could be that even if the person realizes the loss of forgone wages from taking a day off, the person will still decide that he/ she prefers to have a

vacation day and forgo the money he/ she could have earned. For example, a religious Jew who does not work on Shabbat is very likely to be aware of the fact that since he/ she observes the Shabbat, then he/ she loses the opportunity to earn money on the Shabbat, but still the person feels it is more important not to work on Shabbat than to earn money on Shabbat.

The existence of opportunity costs creates a difference between the fields of economics and accounting with regard to how profits are defined. In accounting, the calculation of a firm's profits does not take into account a firm's, and specifically the owner of the firm's, opportunity costs, and many times opportunity costs are labeled as a loss of financial opportunities. On the other hand, in economics, economic profit is calculated by taking into account opportunity costs, and economic profit is not how much money the firm earns, but how much the firm earns relative to other possibilities. In economics, as mentioned above, opportunity costs apply by almost every decision and action that a person makes, and this paper follows the economic perspective.

Friedrich Von Weiser (1851-1926) is generally credited as the person who introduced the concept of opportunity costs into the economic literature. However, Thornton (2008) has argued that this idea can be found earlier in the writing of Cantillon in the 18th century, though Menegatti (2016) rejects Thornton's reading of Cantillon.

Other scholars, such as Ohrenstein (1968), Levine (1975), and Kleiman (1987), have found the concept of opportunity cost being utilized in Talmudic and post-Talmudic texts. One case not mentioned by these scholars is that the last Mishnah in Hullin (12:5, Blackman, 1964) notes that when a person has to send away a mother bird to get her eggs, there is a small loss to the person, and this small loss is the opportunity forgone to have the mother bird.¹

1 Rashi in his commentary on the Torah (on Devarim 22:7, Silberman and Rosenbaum, 1985, p. 109) quotes this Mishnah, but he slightly changes the words, as he writes that there is no monetary loss to the person from sending away the mother bird. Rashi is not recognizing the opportunity cost of losing the mother bird.

In this paper, we will discuss how the question of working on *chol ha-moed* (henceforth CHM) and its development in Jewish law relates to the idea of opportunity costs. We will begin with a brief general discussion of the laws of CHM, discuss the law of doing business on CHM, and then discuss the specific case of doing business on CHM when a caravan comes to a town on CHM. This last case is the basis for discussing whether Jewish law recognizes opportunity costs on CHM.

II. The Laws of *Chol Ha-Moed* (CHM)

The Torah records that one is forbidden to work on the first and last days of Pesach,² on the first day of Sukkot and on Shemini Azeret (Lev. 23:7,8,35,36, and Num. 28:18,25; 29:12,35). With regard to the intermediate days of these holidays, CHM, the Torah does not record any prohibition of working, which implies that all work is permitted on these days. However, the Talmud Bavli, Chagigah 18a (Steinsaltz, 2013), quotes several Tannaim and Amoraim who derive verses from the Torah to argue that a person is forbidden to work on CHM. The derivation of biblical verses might indicate that work on CHM is forbidden from the Torah, but Tosafot (on Chagigah 18a, *cholo shel moed*) quotes Rabbenu Tam that since there are several qualifications to this prohibition of working, the prohibition must be rabbinic and all of the verses quoted in the Talmud are just *asmachtot*, support for a rabbinic prohibition.³

One of the qualifications that permit a person to work on CHM, independent of whether work on CHM is forbidden on a biblical or rabbinic level, is the concept of *davar ha-aved*, something that will be lost. This idea is that if because a person would not work on CHM, the person will suffer some loss, then the work is permitted. One example of this principle is that a person is permitted to set traps on CHM to catch moles and mice in an orchard since if the traps were not set then the moles and mice could damage the

2 In today's terminology, while in the Torah, the holiday is called the holiday of Matzot.

3 For more sources on this question see the Rambam (Laws of Yom Tov 7:1, 1955) and Biur Halakhah, OC 530:1, *u-mutar bemiksatan* (Kagan, re-print 1996).

field and the trees (Mishnah Moed Katan 1:4, Shulchan Arukh, henceforth SA, Orah Chayyim, henceforth OC, 537:13, R. Yosef Karo, re-print 2005). This case of *davar ha-aved* is to stop an actual loss from occurring since the field will decline in value if the person does not set the traps. Does the principle of *davar ha-aved* extend to opportunity costs, where the person has an opportunity to earn money on CHM if the person would work on CHM, and then by choosing not to work on CHM, the potential earnings will be forgone? We will examine the case of buying and selling goods on CHM to answer this question.

III. Buying and Selling Goods on CHM

The Talmud Bavli (Moed Katan 10b) records that Rava (280-352) said that *pragmatia*, business, i.e., buying and selling goods, is forbidden on CHM. Rava's ruling is not obvious. Buying and selling goods is not one of the 39 forbidden actions that are considered as work and forbidden on Shabbat (Mishnah Shabbat 7:2). Furthermore, while one is forbidden on Shabbat to speak of doing business after Shabbat, some types of sales are permitted on Shabbat and on the holidays (SA, OC 307:1; 323:1-6, 517:1-3). Even with regard to CHM, the Mishnah (Moed Katan 2:5) records that it is permitted to sell items that are needed for the holiday, which means that Rava's prohibition cannot refer to buying and selling items that are needed for the holiday, and that buying and selling goods *per se* is not forbidden. Why should Rava have promulgated a prohibition on CHM of buying and selling goods that are not needed for the holiday?

Five answers have been suggested to explain Rava's prohibition. One, Rabbenu Asher (comments in the back of Talmud Bavli Moed Katan on 10b, 1981) suggests that it was because of the effort involved and on CHM even when an action is being performed to stop a loss from occurring, which should make the action permitted, if a great effort is needed to do the action, then it is forbidden. (Of course, all actions require some effort, and hence it is very subjective what is considered too much of an effort.) Two, Rabbenu Asher in a responsa (23:4, 1994) adds that sometimes a business deal can

go bad that the person will lose money, which could cause the person to be upset on the holiday. Three, the Maggid Mishnah (on Mishnah Torah, Laws of Yom Tov 7:22, 1955) writes that buying and selling is only forbidden rabbinically since there is a fear that a person might write something related to the transaction.⁴ Four, the Rivash (responsa 320, 1993) quotes the Raavad who said that buying and selling goods was forbidden on CHM since it is an act associated with a regular day, *uvda de-chol*. Five, the Arukh Hashulchan (OC 539:3, Epstein, re-print 2006) suggests that the goal of the prohibition was for people to be not involved in their business affairs in order that they would have time to study Torah on CHM.

While Rava's ruling has been accepted as normative (SA, OC 539:1), later authorities limited or attempted to limit its scope. One example is that Rav Natronai Gaon (9th century) ruled that it is permissible to buy and sell goods in one's house.⁵ R. Yosef Karo quotes this idea in the Bet Yosef (OC 539, *kol sechora asura*, Arba'ah Turim, 2007), but not in the Shulchan Arukh, and the Rama (OC 539:1,12) refers to it twice.

A second limitation of Rava's prohibition is that Tosafot (Moed Katan 10b, *pragmatia kol shehu*) quotes that Rabbenu Tam (1110-1171, France) argued that the term business did not refer to loans (with interest), and hence he permitted a person to make loans on CHM. While this ruling was accepted by later authorities (SA, OC 539:2,13) Rava's prohibition should almost definitely have included making loans. Presumably, Rabbenu Tam gave this permission to give loans in order to help the Jews in his time who depended on this type of income. One person who seems not to have been happy with Rabbenu Tam's ruling was his nephew, the Ri (R. Yitzhak ben Shmuel, 1115-1184), as Tosafot quotes the Ri that it is forbidden on CHM

4 Writing is also forbidden work on CHM, see SA, OC 545. For a question of writing in reference to business transactions see SA 545:5, Mishnah Berurah 545:32,35 (Kagan, 1996) and Biur Halachah, 545: *va-afilu al devar pragmatia* (also Kagan, 1996) and Biur Halachah, 545: *afilu beketiva shelanu*.

5 Lewin, 1931, Massechet Maschkin (Moed Katan), p.12, also the Manhig, Rafael, 1978, p. 524, quotes this ruling from an anonymous Gaon.

to have a regular place of business (a pre-modern bank) that gives loans and changes money. This ruling of the Ri is accepted by the SA, OC 539:14.

A third limitation of Rava's ruling is that immediately after quoting Rava's statement, the Talmud (Moed Katan 10b) quotes Rebbi Yosi bar Abin who qualifies Rava's statement that if not doing business on CHM results in a loss, *davar ha-aved*, then the business is permitted. One example of this permission of *davar ha-aved* is that the Talmud quotes that Rav Ashi permitted Ravina to collect a debt on CHM since it was considered a *davar ha-aved* because maybe Ravina would not have been able to find the debtor after the holiday.

IV. The Case of a Caravan Coming to Town on CHM

The Talmud Yerushalmi, Moed Katan II:3 (re-print 1984), discusses the case of a caravan which happened to arrive in a town on CHM, which would lead to lower prices on CHM in the town. The Yerushalmi records that R. Yaakov bar Aha said in the name of R. Yose that a person is permitted to buy from merchants in the caravan because of *davar ha-aved* since if the person would not purchase the goods on CHM, then the person would have to pay higher prices after the holiday was over. This is the simple calculation of *davar ha-aved*.

The Yerushalmi then continues and discusses whether the loss of potential earnings, when a person would buy the goods to re-sell them later, is also permitted. The Yerushalmi records an argument between R. Mana and R. Yose b. R. Bun (both a little after Rava, end of 4th century, Israel) and there are two versions of the argument in the Yerushalmi. Ohrenstein and Gordon (1982, pp. 61-64) present the argument that R. Manna argued that a person can purchase goods from the caravan to re-sell the goods later at a profit, while R. Yose b. R. Bun argued that a person can purchase from the caravan to re-sell the goods later only to make a normal profit but not to make an "abnormal profit." With this reading, as pointed out by Ohrenstein and Gordon, R. Manna accepts opportunity costs as being a *davar ha-aved*, and R. Yose b. R. Bun might also accept opportunity costs as being *davar*

ha-aved depending on how one defines a normal profit. On the other hand, some Rishonim had a different version of the Yerushalmi. According to the Manhig (Rafael, 1978, p. 525) and the Rivash (responsa 320, 1993), it was R. Manna who only allowed a sale if there was going to be a loss in the value of the item, but not to make profits, and R. Yose b. R. Bun allowed one to sell to make a profit. With either reading of the Yerushalmi one of the people involved in the argument recognized opportunity costs as being a *davar ha-aved*.

This case of the caravan that happens to arrive at a town on CHM continued to be discussed in the post-Talmudic period. Lewin (1931, p. 11-13) quotes that Rav Paltai Gaon (middle of the 9th century) wrote that one can buy and sell to these travelling merchants, and that all losses are considered as being *davar ha-aved*. Lewin also quotes from Rav Hai Gaon (939-1038) that it is permitted to buy and sell goods from the caravan merchants on CHM. The Rambam (1135-1204, Mishnah Torah, Laws of Yom Tov, 7:22, 1955) and Rabbenu Asher⁶ (1250-1327) follow the rulings of the Geonim. All of these authorities are recognizing opportunity costs as a *davar ha-aved*.

Rabbenu Asher also discusses the general case of forgoing earning money on CHM and not just the relatively unique case of a caravan coming to a town on CHM. In the general case, he writes that if there is a market day on CHM, even if a person will not be able to make as large a profit after the holiday as on CHM, still one cannot buy and sell goods at the market. R. Karo (Bet Yosef, Arba'ah Turim, 2007, henceforth BY, OC, 539, *ve-ika lemidak*, and *u-mah she-katav ha-Rosh*) notes the incongruity of Rabbenu Asher's views of the passing caravan and the regular market day that in the case of the caravan he allows a person to buy and sell goods to make a profit, but he does not allow a person to buy and sell goods to make a profit on a regular market day. R. Karo suggests that the difference in the cases is because in the case of the market it is not known for sure that the person

6 Comments on Talmud Bavli, Moed Katan, 1:23, 1981, also in Tosafot ha-Rosh (on Moed Katan, p. 189, 1996) and in Responsa of Rabbenu Asher, 23:5, 1994.

will lose his/ her profits after the holiday, while in the case of the caravan the person will almost certainly lose his/ her profits if a person does not purchase or sell the goods on CHM. A different possibility is that the rarity of the arrivals of caravans on CHM led Rabbenu Asher to label the loss of profits in this case as a *davar ha-aved*, while the market day was not that rare and then he ruled that the forgone profit was not considered as *davar ha-aved*.

The Tur (R. Yaakov ben Asher, 1269-1343, Arba'ah Turim, OC 539, 2007) follows his father's (Rabbenu Asher) approach in the cases of the caravans and the regular market. We see that Rabbenu Asher and his son were only recognizing opportunity costs as being a *davar ha-aved* in the case of caravans that come to a town on CHM but not in a regular market.⁷

Possibly the first person who deals with the question of a person buying and selling goods to make a profit which would not be available after the holiday but is not related to a caravan coming to a town on CHM was Rashi. Rashi (on Moed Katan 10b, *u-be-davar ha-aved*) writes (author's translation) "that if a person suffers a loss if the person does not do the transaction, it is permitted to do the transaction, but if the person will not lose but will not profit if the person does not do the transaction, it is forbidden." *Encyclopedia Talmudit* (1979, vol. 6, p. 533, footnote 252) writes that from the words "not lose but will not profit" one can understand Rashi to mean that he would allow a transaction on CHM if the person would be able to

7 Rabbenu Asher (on Talmud Bavli, Moed Katan 1:28, 1981) also discusses a question from the Raavad that how come a person can make a profit in the case of the caravan, but one cannot take a fish that one finds on the land if one will not eat the fish on the holiday. This question can be re-interpreted to be why by the arrival of the caravans are opportunity costs recognized as *davar ha-aved* but in the case of the found fish opportunity costs are not recognized as a *davar ha-aved*? Rabbenu Asher quotes two answers. One, that the case of finding the fish involves no loss at all while the case of a person not making a sale involves a loss. This distinction is not clear because also by the fish there is the loss of the fish. The second answer is that by the fish a person would have to salt the fish to preserve the fish, which is considered an example of work and involves great work, so even if the loss of the fish is considered as being *davar ha-aved* it would still be forbidden. Yet, is salting fish more work than buying and selling goods?

profit from the transaction.⁸ With this reading, Rashi was recognizing the loss of the forgone profits as a *davar ha-aved* and as an opportunity cost. However, this writer thinks that this reading of Rashi is making too much of a deduction in Rashi's words, and has not seen any medieval authority who had this understanding of Rashi. Rashi had first written about the case where a person would lose if he/ she did not do the transaction, which makes the transaction permitted, and then Rashi moved on to the case of no loss and no gain, which Rashi writes is forbidden. The third case, where a person misses out on making a profit, is not mentioned by Rashi but this writer thinks that Rashi would have forbidden this transaction.

Regardless of how one understands Rashi, Tosafot (Moed Katan 10b, *u-bedavar ha-aved mutur*) explicitly writes that a person cannot buy an item on CHM in order to make a profit. The Mordechai (1240-1298, on Talmud Bavli, Moed Katan, first chapter, 1981) quotes that this is the opinion of Rabbenu Tam and of the Riva (early 12th century). Rabbenu Tam's view on opportunity costs can also be discerned from his permission to make loans on CHM since he argued that loans were permitted because they were not to be considered as a business transaction and not because the loss of profit from not giving the loan was a *davar ha-aved*. Similarly, the Ramban⁹ (1194-1270) only allows a person to buy goods that are cheap due to the arrival of the caravan, but forbids a person to trade for profits with the caravan merchants. The Hagahot Maimonides (13th century, on Mishnah Torah, Laws of Yom Tov, 7:22, 1955) and the Ran (14th century, Hidushei ha-Ran on Moed Katan 10b, 1993) also follow this approach, though the Hagahot Maimonides quotes the Ravyah (1140-1225) who said that his father, R. Yoel ha-Levi, allowed one to make loans on CHM not based on Rabbenu Tam's logic but because the forgoing of profit from not doing the loan would be a *davar ha-aved*. All of these authorities (except

8 Is this the understanding of the Hazon Ish? See Greeneman 1991, siman 135, p. 461.

9 Hidushei ha-Ramban on Moed Katan (1928), also quoted by the Maggid Mishnah on Mishnah Torah, Laws of Yom Tov 7:22, 1955, and by the Nimukei Yosef on the Rif, Moed Katan, p. 8, 1981.

the Ravyah) are not recognizing opportunity costs as a being a *davar ha-aved*.

The SeMaG (R. Moshe of Coucy, first half of 13th century, Sefer Mitzvot Hagadol, Negative commandment 75, 1991) writes that one cannot sell a good for a profit on CHM even when a caravan happens to come to the town on CHM. However, he adds a new source for allowing a person to buy and sell goods for a profit on CHM, as he writes that if a person who earns profits from a transaction uses the money earned to enhance the celebration of the holiday by buying other goods, then the transaction is allowed. This allowance is not based on opportunity costs being viewed as a *davar ha-aved*. The Mishnah Berurah (539:16, Kagan, 1996) notes that a person need not spend all of the profits on goods for the holiday, just some of the profits. It is not clear if this ability to purchase more goods for the holiday is just a fictitious cover to allow a person to make profits on CHM or to genuinely increase the person's happiness on the holiday. Regardless of the intent of the person buying the extra goods for the holiday, this ruling has been accepted by all later authorities, although it was slightly modified by R. Yosef Karo (see below).

The Ritva (1260-1320, Spain, Hidushei ha-Ritva, 1995, pp. 80,81) suggests a compromise between the different views. He writes that if a person already has an item, then the person can sell the item for a profit on CHM, but he argues that a person cannot buy an item to sell at a profit because this will lead to all types of businesses operating on CHM since all business people buy goods to sell later at a profit. This suggestion was not quoted by the SA or the Rama.

There were also medieval authorities who were more permissive than Rabbenu Asher and the Tur. The Meiri (1249-1306, 1968, pp. 52,43) allows a person to earn a profit in the case of the caravan and argues that this permissibility applies to all cases where there is a unique opportunity to make a profit. Furthermore, he writes that if the same business opportunity is available after the holiday, then a person should be stringent and wait. This line is surprising since it implies that even if the profit would not be

forgone on CHM, still technically it is permitted to make the sale. Most likely, the idea is that the time value of making the transaction would be considered as a *davar ha-aved*.

The Maggid Mishnah (14th century, on Mishnah Torah, Laws of Yom Tov 7:22, 1955) writes that the Raavad also held that forgone earnings are considered *davar ha-aved*, but it is not clear to this writer if the Raavad was just referring to the case of caravans that arrived on CHM or to all cases of forgone profits. The Maggid Mishnah also makes a deduction in the words of the Rambam to argue that by all goods, except for homes, slaves and animals, a person can make a transaction to make a profit on CHM.

Accordingly, for the medieval period, we can divide the various scholars into three different groups with regard to their attitude concerning the permissibility of buying and selling goods on CHM to make a profit. The least permissive authorities were the SeMaG, probably the Baalei Tosafot, the Ramban, Hagahot Maimonides, and the Ran. The middle group consisted of Rabbenu Asher, the Tur, and maybe the Rambam, and these authorities allowed a person to make a profit by transactions which were considered unique opportunities. The third group, the most permissive group, consisted of the Meiri and the Maggid Mishnah, and they allowed even many regular transactions on CHM if the person would lose the opportunity to make the same level of profits after the holiday was over.

V. The Rulings of R. Yosef Karo in the Bet Yosef and the Shulchan Arukh

R. Yosef Karo (1488-1575) in his rulings in the Bet Yosef and the SA partially recognizes the concept of opportunity costs in reference to CHM. On SA, OC 537:1, he rules that a person can water an irrigated field if it had been watered at least once prior to the holiday since if one would stop watering the field there would be damage to the field, but one cannot water a field that is not irrigated since the watering is just to improve the field. This phrase “just to improve the field” means that the watering would improve the field, and then the inability of a person to water this type of field means that the

person is losing out on the gain in the value of the field, an opportunity cost. In this ruling, R. Karo is following the idea that opportunity costs are not considered *davar ha-aved* since if the loss in the improvement in the field would be considered *davar ha-aved*, then it would be permissible to water the non-irrigated field.

A second ruling by R. Karo which does not recognize opportunity costs as *davar ha-aved* is that he ruled (SA, OC 539:6) in a case of a river that overflowed on CHM and the water led to fish being present on the banks of the river that a person cannot collect the fish unless one would eat the fish on the holiday. The Mishnah Berurah (OC 539:24, Kagan, 1996) notes that this ruling is even though the fish will not be present after the holiday since either the fish will have become rotten or other people (non-Jews) will have taken them. The inability to collect the fish is an opportunity cost since the person had the potential to acquire the fish and when the person cannot collect the fish the person has suffered a loss. R. Yosef Karo is then ruling that the forgoing of a gain (here the fish) is not considered a *davar ha-aved* and an opportunity cost.

One case where R. Karo recognizes opportunity costs is that he follows the middle group of medieval authorities in permitting a person to earn a profit when a caravan or a ship comes to a town on CHM, and when there is a trade fair on CHM (SA, OC 539:5).

R. Karo (BY 539, *mah she-katav rabbenu metsia*) tries to explain why in the case of the caravans a person can sell a good to earn a profit but one cannot collect fish on CHM that happened to be on land. He suggests that the distinction is that in the case of the caravans a person thinks about these transactions a lot since this is one's livelihood, so the case is considered a *davar ha-aved*, but with regard to finding a fish on land, nobody thinks of this possibility, so it is not considered a *davar ha-aved*.

R. Karo (BY, OC 539, *avel yoter me-kedi*) also discusses the situation where there is a large supply of wine in the harvest time by CHM of Sukkot which causes the price of wine to fall. The Tur ruled that a person can only purchase the wine on CHM for personal use, and not to re-sell after CHM.

R. Karo notes that this ruling by the Tur means that one cannot purchase the wine to make a profit, but he writes that this bountiful supply of wine is like the case of the caravan traders coming to a town on CHM since both events cause prices to fall, and then one should be able to buy and sell wine on CHM to earn a profit just like it is permitted to buy and sell from the caravan merchants. In SA, OC 539:9, R. Karo does not follow his comments in the BY and instead he follows the Tur that a person can only buy the cheap wine on CHM for personal use. This means that in the end he is not recognizing opportunity costs by the forgone earnings from buying the wine when there is excess supply.

One other ruling of R. Karo indicates that he was not happy with allowing a person to buy and sell goods on CHM. On SA, OC 539:4, he writes that only a person who has a limited amount of money can buy and sell goods on CHM based on the claim that the profits from the transactions on CHM will be used for buying goods for the holiday, but not a rich person. Presumably this ruling is to reduce the chance that the buying of goods is a fictitious cover to allow the person to make profits on CHM.

It is interesting that this same concept of *davar ha-aved* by CHM also applies to a whether a mourner can work during the seven days of mourning. R. Karo (SA, Yoreh Deah 380:2-6) rules that it is forbidden for a mourner to work during the first three days of mourning, while afterwards it is only permitted privately if the person has no food to eat. Even if the work is to stop a *davar ha-aved* from occurring, still the mourner is forbidden to do the work. However, the work can be done by other people (not family members) by the case of *davar ha-aved* if the loss of earning money is due to the appearance of a caravan or of a ship during the seven-day period of mourning, but if the case is by regular business transactions, then the other people working for the mourner can only do transactions to stop an actual loss and not to earn profits. This ruling is consistent with R. Karo's rulings on CHM.

VI. The Rulings of the Rama

The Rama (Krakow, 1520-1572), both by his rulings in reference to the mourner and on CHM, is more permissible than R. Karo in allowing a person to work. With regard to the mourner (Yoreh Deah 380:5, SA, 2005), he rules that the mourner himself can work after the first three days of mourning if the work is to stop a *davar ha-aved*, and within the first three days of mourning the mourner can also work to prevent a large loss.

With regard to CHM, the Rama in the *Darkei Moshe* (on Tur OC 539, *Arba'ah Turim*, 2007), quotes from the *Agur* (Jacob ben Judah Landau, 15th century) that the custom was to allow people to earn profits from the caravans, but a person who refrains from these actions should be blessed. The Rama also writes that any special trading day is like the case of the caravan coming to town, and that a person can also travel to other towns for special trading days. Furthermore, he quotes the *Kal Bo* (Siman 60, 14th century?) that a business person who regularly buys and sells goods can do so on CHM. This allowance of the business person to do transactions to earn profits even when there are no special prices on CHM is following the logic by the allowance of all people to earn profits from caravan merchants. Once the forgone profits, opportunity costs, are recognized as being a *davar ha-aved* in the case of a caravan that comes to a town on CHM and the trade is permitted, then logically forgone profits should be allowed in all situations, and a business person loses the opportunity to earn money on all days when the person's business is closed.

In his commentary on the *Shulchan Arukh*, the Rama records several rulings which allow a person to buy and sell goods on CHM. First (on OC 539:1), even if no caravan has come to a town, he allows any person to buy and sell goods to make a profit on CHM if the sale is not done publicly, there are great profits from the transaction and some of the money is spent on purchasing goods for the holiday. (Again, the term great is very subjective.) Two, as he wrote in the *Darkei Moshe*, the Rama (539:5) allows the business person to do any transaction with no restrictions even for profit since for this person every business day is considered as being similar to the caravan

coming to a town. Three, he (539:9) allows a person to buy cheap wine on CHM that he/she will not drink, but to re-sell to other people for a profit.

We see that the Rama was willing to extend the idea that forgone profits are *davar ha-aved* to almost all transactions, and he was following the third and most permissive group of the medieval authorities. This approach is more consistent than the middle group of the medieval authorities and R. Karo since once forgone profits are recognized as being *davar ha-aved* when a caravan comes to a town, then all cases of forgone profits should be allowed.¹⁰ However, the Rama did not allow for opportunity costs to be considered as *davar ha-aved* by non-business cases since he did not write that a person could take a fish that is found on the banks of the river on CHM for use after the holiday.

VII. Rulings of Authorities after the Rama

The Rama's approach represents the high-water mark of the recognition of opportunity costs as being considered a *davar ha-aved* since many later authorities limited his rulings.¹¹ The Bach (1561-1640, Poland, on Tur OC 539, *avel yoterme-kedi*, Arba'ah Turim, 2007) writes that it is only permitted to purchase the cheap wine on CHM to make a profit if there exists a large profit from re-selling it, while the Rama did not limit the permissibility to there being a large profit. Similarly, the Hayyei Adam (Avraham Danzig, 1748-1820, 112:4, 1988) writes that one can only buy the cheap wine on CHM to make a profit after CHM, if there would be no profit at all if the person purchased the wine after CHM, but if there exist some profits when the person would purchase the wine after CHM, though not as great as

10 This allowance to help people economically corresponds to other rulings of the Rama to help people financially, see Sperber, 1995, pp. 50-59.

11 One question that is beyond the scope of this article is whether the changing views on the permissibility of doing business on CHM relate to economic developments in Europe. For instance, Epstein (1994) notes that there was a large increase in trade fairs in Europe starting in the middle of the 14th century, which might correspond with the more expansive permission of the rabbinic authorities of the late Middle Ages to allow people to buy and sell goods on CHM.

compared to if the wine was purchased on CHM, then it should be forbidden to buy the wine on CHM. On the other hand, Elyah Rabbah (Elijah Spira, Prague, 1660-1712, OC 539:16, 1999) writes that if a person is not able to purchase the cheap wine after the holiday, then he/she can purchase the cheap wine on CHM to make a profit from selling the wine afterwards. In this case, he follows the Rama, but in the case of the businessperson buying and selling on CHM, he (Elyah Rabbah 539:14) and his teacher, the Magen Avraham (1635-1682, OC 539:8, SA, 2005) rule that it is only permitted when the store is partially hidden, which is not what the Rama wrote.

The Mishnah Berurah (OC 539:22, Kagan, 1996) quotes this limitation of the Elyah Rabbah and Magen Avraham on the Rama's ruling by the businessperson. In reference to the case of buying the cheap wine on CHM, in his "regular comments," the Mishnah Berurah (OC 539:32) quotes just the opinions of the Bach and the Hayyei Adam, and only in the Biur Halachah (539, *ve-im hu davar sheno*) he quotes the Elyah Rabbah's more permissive opinion. This decision who to quote indicates his "uneasiness" with the Rama's opinion. Also, in Biur Halachah 545: *afilu baketiva shelanu*, this "uneasiness" is present since the Mishnah Berurah writes that on CHM a person should not write in a non-expert manner for a transaction that is to make a profit even though he allows writing in a non-expert manner for almost any reason. Furthermore, with regard to the laws concerning work on Tisha B'av, the Mishnah Berurah (OC 554:48) writes that even though R. Karo ruled that the principle of *davar ha-aved* on CHM is applicable to Tisha B'av, which would mean that a person could buy and sell goods on Tisha B'av when a caravan comes to a town, he only allows a non-Jew to work for a Jew when the caravan comes to a town on Tisha B'av.

The Arukh Hashulchan (539:15,18, Epstein, 2006) follows the Rama in the case of the cheap wine on CHM, but in reference to business people selling goods for a profit on CHM, he is upset that in his time all the stores stayed open and conducted business as usual on CHM.¹² The Arukh

12 Sperber, 1995, p. 55, footnote #41, quotes a source that in Tripoli, Libya, all the Jewish

Hashulchan first writes that there is no justification for having the businesses open, which is surprising since this is the Rama's opinion, which he himself noted in the previous *halakhah*, 539:14. However, he then writes that the only prohibition to sell on CHM is for a person who does not sell items regularly since this person can wait until after the holiday, but a business person can keep his/her business open on CHM. This ruling follows the Rama, though the Arukh Hashulchan adds a limitation that the owner of the store should keep only one door open if the store is located in the public. This limitation differs from the Rama, who writes (Darkei Moshe, OC 539) that by the case of *davar ha-aved* one can act publicly and the permission for the businessperson to buy and sell goods is due to the transactions being viewed as *davar ha-aved*. One other ruling of the Arukh Hashulchan (539:11) in this context is in reference to a regular person who uses the profits to buy goods for the enjoyment of the holiday, and here he argues with R. Karo since he claims, following the Taz (OC 539:2, SA 2005), that this action was permitted for all people except for a person who was fabulously rich.

R. Yehoshua Neuwirth (1989) continues the retreat from the Rama's position allowing people to buy and sell goods on CHM to earn profits that will be forgone after CHM. First, R. Neuwirth (67:19) writes that if by not working on CHM a person will lose the ability to make money, then a person can only do work that is forbidden rabbinically, and some of the profits need to be used for the celebration of the holiday. However, he conditions this permission that if a person has enough money to spend on the holiday, then the person is not allowed to do business transactions on CHM even though the loss of profits will limit the person's spending on the holiday. In these rulings, he is basically following R. Karo's ruling in SA, OC 539:4, though R. Karo made no mention of work being forbidden only rabbinically, probably since buying and selling goods is only a rabbinic prohibition. R.

stores were closed on CHM. This was a Sefardi community that most likely followed the SA and not the Rama.

Neuwirth is also rejecting the Taz and the Arukh Hashulchan's ruling that only a person who is fabulously wealthy cannot do business on CHM by using the profits to buy goods for the holiday.

Secondly, R. Neuwirth writes (67:20) that if a person is missing out on large profits by not working on CHM, then the person is permitted to do business transactions if the work is only forbidden rabbinically, if the sale is done somewhat secretly and some of the money is used for buying goods for the holiday. This ruling is following the Rama's ruling in 539:1, though again with the exception that the Rama did not mention that the work is only forbidden rabbinically, and it remains subjective what is considered a large or small profit that would distinguish this ruling from his previous ruling in 67:19.

Thirdly, with regard to the case when the profit opportunity is uncommon like the case of the caravan or a fair, R. Neuwirth (67:21) writes that one can only do work that is forbidden rabbinically, and the money earned need not be used for the celebration of the holiday. In this ruling he follows R. Karo's ruling in SA, 539:5 though again R. Karo made no mention of the work only being forbidden rabbinically. This ruling contradicts the previous two rulings (67:19,20) which required that some of the profits be used for the celebration of the holiday and R. Neuwirth tries to explain why this case is different.

Fourthly, in reference to the businessperson buying and selling goods on CHM, R. Neuwirth (67:29) only allows these transactions in reference to non-Jewish customers and if there is potential for large profits.¹³ This differs from the Rama who allowed the transactions for all customers and did not limit the ability to do the transactions only when there were potential for large profits. We see that R. Neuwirth has a limited acknowledgment of opportunity costs as being considered *davar ha-aved*, less than the Rama.

13 In 67:29, Neuwirth states this allowance without specifying that only work that is forbidden rabbinically is forbidden, but presumably he is relying on what he wrote in 67:21.

VIII. Conclusion

While in the Torah there are no limitations on working on CHM, at some point there developed a rabbinic prohibition to work on CHM. In the fourth century this prohibition was expanded by Rava to include buying and selling goods not for use on CHM. This prohibition was limited to cases where there was no loss to the person from waiting until after the holiday was over, *davar ha-aved*. Thus, all authorities permit a person to purchase a good on CHM if the good will be more expensive after the holiday is over and the good is for personal use.

If the good is not for personal use, then the person is buying or selling a good to make a profit. The cases are either where a person has an opportunity to sell a good at a higher price on CHM than after the holiday or the person wants to purchase the good on CHM for a lower price than is possible after the holiday and then sell the good at a later period, either on CHM or after the holiday is over, for a profit. In these cases, all authorities since the time of the SeMaG, allow some people, with some differences depending on the level of wealth of the person, to buy and sell goods for profits on CHM if some of the profits are used to buy goods to enhance the celebration of the holiday. This permission is not based on the principle of opportunity costs.

The question of opportunity costs arises if the person has an opportunity to make money from buying and selling goods on CHM and the profits are not going to be used to purchase other goods to enhance the celebration of the holiday. In this case, there are three different approaches to the permissibility of buying and selling.

One approach, the SeMaG, probably the Baalei Tosafot, the Ramban, Hagahot Maimonides, and the Ran, is that the loss of profits is never considered a loss, which means that opportunity costs are not considered as being a *davar ha-aved*. The proponents of this approach prohibit a person to buy and sell goods on CHM to earn profits even in the case where there was a special opportunity on CHM to make profits, as for example the case of a caravan coming to a town on CHM. This approach was not followed by authorities who lived after the medieval period.

A second approach, Rabbenu Asher, maybe the Rambam, the Tur, R. Yosef Karo, and R. Neuwirth, is that in unique cases such as a caravan or a ship coming to a town or a special trade fair on CHM, then forgone profits are considered a *davar ha-aved* and it is permitted for a person to buy and sell goods to earn money on CHM in these cases. However, with regard to regular business opportunities forgone profits are not considered a loss. This is a partial acceptance of opportunity costs being considered as *davar ha-aved*. The first and second approaches do not distinguish between business people and non-business people in their rulings.

The third approach, the Meiri, the Maggid Mishnah, the Kal Bo, the Rama, and, reluctantly with a minor limitation, the Arukh Hashulchan, is that for business people all cases of buying and selling goods for profits are considered *davar ha-aved* and permitted and for everybody any special opportunity to make a profit from buying and selling is also called *davar ha-aved* and is permitted. It is interesting that the proponents of the third approach lived starting from the middle of the 13th century, and that the popularity of this approach after the Rama, from the end of the 16th century, began to wane.

The third approach is the most expansive view of recognizing opportunity costs as a *davar ha-aved*, and more logical than the second approach, but even this view does not always recognize all opportunity costs as being a *davar ha-aved*. For example, the Rama would not permit a non-businessperson to sell goods on CHM if the opportunity is not unique, even if there would be a loss of profits, unless the person sold the goods somewhat secretly, used some of the money for buying goods to enhance the joy of the holiday, and had large profits, though it is not clear what is considered large profits. Furthermore, no authority permits on CHM the watering of a field which does not need irrigation, or the taking of a found item, such as a fish on the banks of the river, if it will not be used on CHM. We see that even according to the third approach, on CHM, opportunity costs are sometimes considered as being a loss, a *davar ha-aved*, and sometimes not.

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