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Dedicated in loving memory of
 HaRav Yosef Grossman zt"l



DRUG BUST: HOW HIGH A PRICE IS TOO HIGH?

Adapted from the writings of Dayan Yitzhak Grossman

Ars Technica reports:

A storm is brewing over the pricing and licensing of Merck's antiviral pill molnupiravir, which the pharmaceutical giant says can halve the risk of hospitalization and death in high-risk COVID-19 patients.

Merck's advance purchase agreement with the US government pegs the price of a five-day treatment at about \$700. But an independent analysis by public health researchers at Harvard estimated that a sustainable generic price—with a 10 percent profit margin built in—would be just \$20 per treatment. Further, rival generic manufacturers in India are already expected to offer the drug at \$15 or less for a treatment once it's authorized for use.

Given that, the \$700 price tag in the US

represents a 46-fold markup of the drug...¹

The enormous markup is reminiscent of Martin Shkreli's notorious raising of the price of the antiparasitic drug Daraprim by a factor of 56; in this article, we explore some Torah perspectives on price gouging in the specific context of drug pricing.

FAIR DRUG PRICING

The Ramban asserts:

One who has medicines that his fellow who is ill requires is prohibited to raise their price more than is appropriate.²

This ruling is codified by the Tur and Shulchan Aruch.³ The nature and source of this prohibition, however, and the definition of "more than

¹ Beth Mole. Storm brews over 46x price markup of Merck's Thor-inspired COVID pill. Ars Technica. <https://arstechnica.com/science/2021/10/mercks-thor-inspired-covid-treatment-hammered-for-700-price-a-46x-markup/>.

² Toras Ha'adam, Sha'ar Hasakanah p. 18.

³ Tur Y.D. siman 336; Shulchan Aruch ibid. se'if 3. (continued on page 2)



PARSHAS CHAYEI SARAH TIMELY PRAYER

Excerpted and adapted from a shiur by
 Dayan Yehoshua Grunwald

And Yitzchak went out to pray in the field
 toward evening...

Bereishis 24:63

According to Chazal (Brachos 26b), this *pasuk* teaches that Yitzchak instituted the practice of davening Mincha daily. The Gemara records a *machlokes* about the latest time for davening Mincha. R' Yehudah holds that one must do so before *plag* haMincha (an hour and a quarter before *shkiah*, according to *sha'os zmaniyos*), while the Chachamim hold that one may daven until nightfall.

Although the Gemara rules that one may adopt either approach on a consistent basis, the practice of most people is to follow the Chachamim (except on Shabbos, which may be more lenient). But authorities differ concerning the definition of nightfall in this context. According to Rabeinu Yonah, nightfall refers to *shkiah*, while the Magein Avraham holds it means *tzeis hakochovim* (when the stars emerge).

Later Acharonim differ as to the practical
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Q&A from the
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On the Fence

Q I hired a contractor to add a deck to my house. The workers have completed the deck surface and are ready to install the railing. Should I make the *bracha* of *la'asos ma'akeh* before they begin?

A Like most mitzvos, that of erecting a *ma'akeh* (fence) requires a *bracha*. Although some *Rishonim* maintain that *ma'akeh* requires no *bracha* because it has an associated mitzvas *lo sa'aseh*, the accepted view is that of the Rambam (*Hilchos Brachos* 11) that a *bracha* is recited (R' Akiva Eiger on Shulchan Aruch (continued on page 2))

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is appropriate,” are unclear.⁴

MESHATEH ANI BACH

The aforementioned authorities add that even if the ailing person commits to pay a high price for drugs out of desperation, he is only liable for their actual value. This is a corollary of a general rule that when someone purchases something for more than the market price out of desperation, his agreement to pay the inflated price is not binding, since he can claim that he was not serious in his commitment to pay that much (*meshateh ani bach*).

The Ritva adds that this general rule applies even if he has already paid, in which case he is entitled to a refund.⁵

The Ketzos Hachoshen objects to the Ritva’s ruling on two grounds: First, it is established halacha that one can only claim *meshateh ani bach* to avoid paying the inflated price, but not to demand a refund. Second, one can presumably only claim *meshateh ani bach* in the absence of a *kinyan* (an act that formalizes a transaction).⁶

ONA’AH

The main halacha governing pricing in general is the prohibition against *ona’ah* (overcharging or underpaying). The problem with applying this prohibition to drug pricing is that *ona’ah* is not calculated with respect to some sort of “fair” or “true” value, or to the seller’s cost, but rather with respect to the

current local market price.⁷ When a drug is only available at an exorbitant price, charging that price is by definition not *ona’ah*. Even if it is available in other countries at much cheaper prices, if in a particular country it is only available at an exorbitant price, the prohibition of *ona’ah* would still not apply.⁸

PROFITEERING

A halacha that is more relevant to drug pricing is the prohibition against profiteering: It is forbidden to charge arbitrarily high prices for essential foodstuffs, such as wine, oil, and flour, on which one may only make a profit of one sixth, i.e., twenty percent of his costs, including all expenses and the value of his work (making the profit 1/6 of the sale price).⁹ While this rule is limited to essential foodstuffs, it could perhaps be argued that crucially important drugs, particularly lifesaving ones, are also included,¹⁰ although a major complicating factor is that for a drug development model to be economically viable and fair to the developer, the pricing of successful drugs must take into account the unrecoverable cost of developing a multitude of failed drugs.¹¹

HAFKA’AS SHE’ARIM

Another halacha that may be relevant to drug pricing is the prohibition against unreasonably raising prices (*hafka’as she’arim*).¹² It is unclear, however, what exactly this prohibition

7 See R’ Aaron Levine, Case Studies in Jewish Business Ethics, pp. 158-60.

8 See Piskei HaRosh Kidushin perek 1 siman 17; Toldos Adam VeChavah nesiv 19 cheilek 1 p. 167a column 1 and Maysharim nesiv 9 cheilek 3 pg. 31b column 1.

9 Shulchan Aruch C.M. 231:20 and Sma ibid.; Pis’chei Choshen, Hilchos Geneivah V’ona’ah 14:11-12. Cf. R’ Itamar Warhaftig, Consumer Protection: Price and Wage Levels, B.4.

10 See Warhaftig ibid. C.1.

11 See Wikipedia contributors. Drug development. In Wikipedia, The Free Encyclopedia. https://en.wikipedia.org/w/index.php?title=Drug_development&oldid=1046582485; Wikipedia contributors. Cost of drug development. In Wikipedia, The Free Encyclopedia. https://en.wikipedia.org/w/index.php?title=Cost_of_drug_development&oldid=1032049654.

12 Shulchan Aruch ibid. se’ipim 21 and 25.

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C.M. 427). The wording of the *bracha* is “*asher kideshanu...la’asos ma’akeh*.”

If the fence is constructed by someone other than the homeowner, the builder makes the *bracha*, because he is the one performing the mitzvah. In that case, the text of the *bracha* is “*asher kideshanu...al asiyas ma’akeh*.”

Obviously, this applies only if the worker is Jewish; if he isn’t, some *Acharonim* rule that the homeowner recites the *bracha*, because by paying the worker for his labor it is like he constructed the fence himself (Machanei Efrayim *Hilchos Shlichus* 11). But this notion is a matter of great controversy among the *Acharonim*. The *poskim* therefore advise that the homeowner physically complete the construction by drilling in the final screw, before which he should recite the *bracha*.

Whether a deck is even subject to *ma’akeh* is a matter of debate: The Chazon Ish writes that a porch is not required to be surrounded with a *ma’akeh* because the *pasuk* restricts the mitzvah to a roof, which means a surface atop a dwelling (C.M. Likutim 18:6; see there for a more detailed explanation). But others, including the Steipler Gaon in a responsum, maintain that any raised surface that is frequently used, similar to the flat roof of a home, is included in the mitzvah. In practice, you should construct a *ma’akeh* for a deck or porch, but with regard to making a *bracha*, ask your *rav* or follow your *minhag*.

entails, and how it extends beyond the prohibitions against *ona’ah* and profiteering.¹³

13 See Pis’chei Choshen ibid. n. 31 (and cf. ibid. Chapter 10 end of n. 1 p. 298).

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RAV ARYEH FINKEL

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argue that *shkiah* is the latest time for Mincha. The Divrei Yatziv (the Klausenberger Rebbe) says that one may daven Mincha until *tzeis hakochavim*. The Mishnah Brurah rules that one should daven Mincha before

halacha. The Gra (Ma’aseh Rav) and Aruch Hashulchan strongly

shkiah, but *bedi’aved*, if *shkiah* has passed, he may still daven. He cites opinions that recommend making a *tenai* (stipulation) that if it is too late for Mincha, one’s *tefilah* should count for Ma’ariv instead, and his Ma’ariv later will serve as *tashlumin*. Rav Elyashiv is cited as ruling that such a *tenai* should be made even if one davens immediately after *shkiah*, while others do not require one even when davening long after *shkiah*.

Today, different communities’ *minhagim* vary widely, and one’s approach in this issue should depend upon the practice of his community and his Rabbinic authority.

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