

SHO'EL SHELO MIDA'AT

Taking Your Friend's Jaguar XJ for a Spin: Is this “Just Borrowing” or is it Stealing?

Shoplifting is stealing.

Taking out a book from the library is borrowing.

But the borderline between borrowing and stealing is often blurred. Is borrowing without permission borrowing or stealing?

In this class we will explore what the Talmud, its commentators, and contemporary halachic (legal) authorities teach us about how to maneuver this gray area of our lives.

KEY QUESTIONS

- Is it permissible to borrow someone else's things without first asking permission?
- If someone **did** borrow an object without permission, what liability does he have if something happens to it?
- When **is** it permissible to borrow someone else's things without first asking permission?

CLASS OUTLINE

Section I. Borrowing without Permission

Case 1. Brian Borrows a Basketball

Case 2. Taking with Intent to Compensate – The Coworker's Coke

Section II. Is it Ever Permissible to Borrow without Explicit Permission?

Case 3. What's Considered “Getting Permission”? – Displaced by Hurricane Sandy and borrowing a Jaguar XJ without permission from someone known for generosity

Case 4. Borrowing without Permission for a Noble Purpose – The laptop for a presentation for special children

SECTION I Borrowing without Permission

Case 1. Brian Borrows a Basketball

Brian is relaxing in his apartment with three friends, and they decide to play basketball. Brian's roommate, Jerry, has a ball, but he's in class and has not answered their call or SMS asking for permission. Can Brian borrow it for an hour, then return it – and inform Jerry later?

Source 1. Mishnah and Gemara Bava Batra 87b - 88a

Mishnah: One who sends his [young, under bar mitzvah] son to a store (the father places a pundyon – worth 2 issar – in his son's hand), and asks him to buy 1 issar's worth of oil and to bring back the oil together with 1 issar change. (He also gives the son a bottle to fill with the oil.) The storeowner measures out an issar's worth of oil. [The storeowner] gives the child the issar of oil, and [the child] breaks the bottle of oil and loses the issar change. The storeowner is liable [for the damage of the bottle and loss of the oil and the issar change.] Rabbi Yehuda absolves [the storeowner for the damage to the bottle, as will be explained in the Gemara. He also absolves the storeowner for the loss of the oil and money], because the father willingly took the risk of sending them with a child.

Gemara: ... Said Rava, "I and the lion [leader] of the group explained this Mishnah." Who is the lion of the group? Rabbi Zeira. This Mishnah is dealing with a case where the storeowner took the bottle the boy had brought from home and used it for measuring for his other clients. The dispute in our Mishnah is about the status of one who borrows without permission. One opinion (Rabbi Yehuda's) is that he has the status of a normal borrower; the other (the Sages') holds that he has the status of a thief.

משנה - השולח את בנו אצל חנוני (ופנדיון בידו), ומדר לו באסר שמן ונתן לו את האסר, שבר את הצלוחית ואבד את האסר, חנוני חייב. רבי יהודה פוטר, שעל מנת כן שלחו.

גמרא – (פח). . . אמר רבא אני וארי שבחבורה תרגימונה ומנור' זירא הקא במאי עסקינן כגון שנטלה למד בזה לאחרים ובשואל שלא מדעת קא מיפלגי מר סבר שואל הוי ומר סבר גזלן הוי.

Source 2. Rashbam Bava Batra 87a “Demar Savar”

One holds – The rabbis hold that the storeowner is a thief, and effectively acquired the bottle (when he took it from the child for his personal use) making him responsible for it until it reaches the hands of the owner (the father). There is now an obligation of, “Return the stolen object,” and returning the bottle to the hands of the child is not considered returning it to the owner. Thus, we say in Bava Kamma 118a, “Someone who steals a lamb from a flock and returns it (without the owner’s knowledge), but it then dies or is stolen, is still responsible for it.” We require the thief to return the object with the knowledge of the owners. Returning it to a child’s hands is not considered “with the knowledge of the owners.”

דמר סבר - רבנן גזלן הוי
וקנייה להתיב בה עד שתבא
ליד בעלים דבעינן והשיב את
הגזלה והשבה ליד תינוק לאו
השבה היא והכי אמרי'
בהגזל ומאכיל (ב"ק דף
ק"ח) הגזל טלה מן העדר
והחזירו ומת או נגנב חייב
באחריותו דבעינן דעת בעלים
ואין זה דעת בעלים כשמוסרו
ליד תינוק:

Source 3. Rashbam Bava Batra 88a, “VeRabbi Yehuda Savar Sho'el Havei”

Rabbi Yehuda maintains that he is a borrower, and it is sufficient to return it to the place he borrowed it from. Therefore, he is absolved from responsibility for the bottle when he returns it to the child (where he borrowed it from).

ורבי יהודה סבר שואל הוי -
וכי מחזירו למקום ששאלו
משם די, והלכך משהחזירו
לתינוק פטור.

Source 4. Terumat Ha’Kri 292:1 Footnote A

The understanding of the argument over whether one who borrows (the bottle) without permission is considered a thief or not is contingent on whether one who merely steals the use of an object is considered a thief or not.

והא דנחלקו אי שואל שלא
מדעת גזלן או לא פונת מחלו
קתם אם רק גזלת קנין פירות
גם בן מקרי גזלן או לא.

Source 5. Ritva (Rabbi Yom Tov ben Avraham Asevilli) Bava Batra 88a

Because we rule in accordance with the Sages, who state here that one who borrows without permission is considered a thief, it appears that it is forbidden for a person to use someone's tefillin or to wear someone's tallit without his knowledge. However, my mentor (of blessed memory) states that a mitzvah is different, because a person is agreeable to someone using his possessions for fulfilling a mitzvah.

(The issue of borrowing mitzvah items is discussed in Case 4 below.)

כִּינּוֹן דְּקִימָא לָן כְּרַבְנָן דְּאַמְרֵי
הָכָא דְּשׁוֹאֵל שְׁלֵא מַדְעֵת גְּזֵלָן
הָוֵי, הִיא נִרְאָה שְׁאַסּוּר לְאַדָּם
לְהִנִּיחַ תְּפִילִין אוֹ לְהַתְעַטֵּף
בְּטָלִיתוֹ שֶׁל חֵבְרוֹ שְׁלֵא
מַדְעֵתוֹ. אָבֵל מוֹרֵי נֵר"ו (נִטְרִיה)
רַחֲמָנָא וּפְרָקִיה) אוֹמֵר דְּדָבָר
מִצְוָה שְׂאֵנִי, דְּנִיחָא לִיה
לְאַיִנִּישׁ דְּלִיעֵבֵד מִצְוָה בְּמֻמּוֹנוֹ.

Source 6. Shulchan Aruch Choshen Mishpat 359:5

Even one who borrows without the consent of the owners is called a thief.

אֶפִּילוּ הַלּוֹקֵחַ בְּשֹׂאֵלָה
שְׁלֵא מַדְעֵת הַבְּעָלִים נִקְרָא
גְּזֵלָן:

Source 7. Vayikra (Leviticus) 19:11,13

Do not steal. Do not deny falsely. Do not lie to one another ... Do not oppress your friend (by withholding his salary) and do not rob. Do not hold the wages of a worker overnight until the morning.

לֹא תִגְנֹבוּ וְלֹא תִכְחֲשׁוּ וְלֹא
תִשְׁקְרוּ אִישׁ בְּעַמִּיתוֹ ... י"ג. לֹא
תַעֲשֶׂק אֶת רֵעֶךָ וְלֹא תִגְזֹל לֹא
תִלֵּין פְּעֻלַּת שְׂכִיר אֶתְּךָ עַד בֹּקֶר.

Let's look at what happened next in the basketball story:

Unfortunately, Brian didn't learn the Gemara in Bava Batra or the ruling of the Shulchan Aruch, and he and three friends "borrowed" the basketball and went to the court on the edge of Blair Park near their dorm. Brian came back to the dorm, put the basketball back exactly where he found it, left the room, and locked the door.

Unfortunately, when Jerry returned to his room, his basketball was missing!!

He later confronted Brian: "Hey, where's my basketball?"

Brian assumed that somehow Jerry knew that he had used it. "I put it back exactly where I found it and locked the door."

"So you used my ball when I was away. Now it's gone. You're responsible. Pay up!"

"I didn't take it! Someone must have broken into the room."

Is Brian really responsible, or was it sufficient for him to have returned the ball to where he found it?

- If Brian thinks it is stolen, does he have to follow up with University Security?
- Does Brian have to pay for the basketball?

What do you think?

Source 8. Shulchan Aruch Choshen Mishpat 366:3

If a vessel was in the hands of the owner's son or servant, and someone took it and used it, that's considered borrowing without permission. It is thereby considered to be in the borrower's legal possession, and he becomes obligated in any damages – even those beyond his control – until he returns it to the owner. Therefore, if he returns it to the child who was holding it (not to the owners themselves) and it gets lost or damaged, he (the unauthorized borrower) is held responsible to pay.

הָיָה כְּלִי בְּיַד בְּנוֹ שֶׁל בַּעַל הַבֵּית
אוֹ בְּיַד עַבְדּוֹ, וְלָקְחוּ אֶחָד מֵהֶם
וְנִשְׁתַּמֵּשׁ בוֹ, הֲרֵי זֶה שׂוֹאֵל שְׂלֵא
מִדַּעַת, וְנִעֲשֶׂה בְּרִשּׁוֹתוֹ וְנִתְחַיֵּב
בְּאוֹנָסִין עַד שִׁיחְזִירָנוּ לְבַעֲלִים,
לְפִיכָךְ אִם הִחְזִירוֹ לְקֶטֶן שֶׁהָיָה
בְּיָדוֹ וְאָבַד מִמֶּנּוּ אוֹ נִשְׁבַּר, חַיִּיב
לְשַׁלֵּם:

Case 2. The Co-worker's Coke

Karen works in the lab of a drug company with four other workers. One night she and Marcy are working late on a project. Marcy feels a need to caffeinate herself, opens the refrigerator, and takes one of Dr. Ginzburg's two bottles of Coke. Doctor Ginzburg is on vacation for a few days and out of cellphone reach.

"What are you doing?" asks Karen. "You can't take that. It's not yours!"

Marcy responds: "I'll replace it. I don't think there's anything wrong with that."

Karen: "I do. Could you steal something from a store with the intention to later replace the item a few days later?"

Who is right – Karen or Marcy? What do you think?

Source 9. Bava Metzia 61b

What does the command "Do not steal" – that God said in the Torah – come to include? [There are other sources in the Torah that prohibit stealing.]
Answer: It comes to teach us the halachah that we learned in a Beraita: "Do not steal in order to torment someone, and do not steal [even] with intent to pay back double."

"לֹא תִגְנוֹבוּ" דִּכְתַּב רַחֲמָנָא
לְמָה לִי? לְכַדְתִּנָּא: לֹא
תִגְנוֹב עַל מְנַת לְמִיקַט, לֹא
תִגְנוֹב עַל מְנַת לְשַׁלֵּם
תְּשַׁלּוּמֵי כֶּפֶל.

Source 10. Pesikta Zutrat Shemot 24:3

The seventh [category of theft] is stealing with intent to return; and stealing in order to annoy someone.

השביעי הגנוב על מנת להחזיר,
והגנוב על מנת למיקט.

Source 11. Shulchan Aruch Choshen Mishpat 348:1

It is biblically forbidden to steal even a tiny amount. It's also forbidden to steal even as a joke, to steal even with intent to return or to pay back double, or to annoy another. All of these are prohibited so that one will avoid getting accustomed [to theft].

אסור לגנוב אפילו כל שהוא דין
תורה, ואסור לגנוב אפילו דרך
שחוק, ואפילו על מנת להחזיר
או כדי לשלם תשלומי כפל או כדי
לצער, הכל אסור כדי שלא ירגיל
עצמו בכך:

SECTION II Is it Ever Permissible to Borrow without Explicit Permission?**Case 3. Displaced by Hurricane Sandy and borrowing a Jaguar XJ from a person known for generosity.**

Matt and Barbara Heitman were forced to temporarily stay with second cousins in upstate NY after evacuating their Seagate, NY home during Hurricane Sandy in November 2012. For those two weeks the Heitmans – carless – stayed in the house most of the day while their hosts, Rob and Sari Heitman, were at work. Rob and Sara drive to work together, leaving their second car – a Jaguar XJ – at home.

One day, Matt, trying to keep up with a work deadline, needed to get a notarized document to his friend and business associate David, a lawyer in the area. David asked him, “Matt, how are you going to get it here? Your car floated away in Seagate! I am without a car today, and there are no buses or taxis in all of Dutchess County.”

Matt said, “Don’t worry. My hosts have a car. I’ll use theirs.”

Dave: “This does not sound kosher. Isn’t using someone else’s car without permission tantamount to stealing?”

Matt replied, “You don’t know about the Heitman family tradition. I’m staying with my cousin Rob, who is also a Heitman. I don’t know exactly when it started, but our families always vacationed together, and it became understood in the family that it’s okay to use the other family’s cars, bicycles, clothing, and whatnot.”

Matt tried to double-check by calling both Heitmans on their cellphones and leaving

messages that he is going to borrow the Jaguar. He sends them both emails, but there is no response.

Do you think it is permissible for Matt to borrow the car even if he doesn't get explicit permission from his cousins? Is the Heitman family tradition legitimate according to the halachah?

Source 12. Tosefta Bava Kamma 11:2

A son who was eating of his father's food, and similarly a servant who was eating of his master's, can give a portion to the son, daughter, or servant of his [father's or master's] friend. He need not worry about theft from the owner, because this was the common custom.

הבן שהיה אוכל ממשל אביו וכן
העבד שהיה אוכל ממשל רבו קוצה
ונותן פרוסה לבנו ובתו ולעבדו
של אוהבו ואינו חושש משום גזלו
של בעל הבית שכן נהגו.

Source 13. Bava Metzia 22a

Amemar, Mar Zutra, and Rav Ashi visited Mari bar Isak's orchard. His sharecropper brought them dates and pomegranates. Amemar and Rav Ashi ate, but Mar Zutra did not eat.

אמימר ומר זוטרא ורב אשי אקלעו לב
וסתנא דמרי בר איסק, אייתי אריסיה
תמרי ורימוגי. אמימר ורב אשי אכלי,
מר זוטרא לא אכיל.

Source 14. Mishnah Bava Kamma 10:9

One should not buy wool, milk, and kids from shepherds; nor should one buy wood or fruit from fruit watchmen.

אין לוקחין מן הרועים צמר וחלב
וגדיים, ולא משומרי פרות עצים
ופרות.

Source 15. Rambam's Commentary on the Mishnah Bava Kamma 10:9

All of these things are prohibited to purchase because we can assume that they are stolen.

אלו הדברים שהזהיר שלא לקנותן,
לפי שחזקתן גניבה בידם:

Source 16. Rashba, quoted in Ran, Bava Metzia 22

The Rashba of blessed memory answered that even if the sharecropper owned no share of the fruit it was still permitted [for the two rabbis to eat], because it was a legitimate assumption that the owner of the orchard would not object to this, and this was customary. This is similar to what we say in the Tosefta in the last chapter of Bava Kamma that a son who was eating of his father's food, and similarly a servant who was eating of his master's, can give a portion of food to the son, daughter, or servant of his [father's] friend. He need not worry about theft from the owner, for that was common custom.

הַרְשֵׁב "א ז"ל תִּירֵץ דְּאֶפִּילוּ לִית לִיה
חֹלְקָא בְּפִירֵי שְׂרִי לְפִי שְׂאוּמָדָן
הַדְּעַת הוּא שְׂאִין בְּעַל הַפְּרָדָס
מִקְפִּיד בְּכֶךְ וְכֶךְ נִהְגוּ. דְּמָא לְמֵאִי
דְּאִמְרִינֵן בְּתוֹסְפָתָא דְּפָרָק בְּתָרָא
דְּבָבָא קָמָא, "הֵבֵן שְׁהִיָּה אוֹכֵל מִשְׁל
אָבִיו וְכֵן עֶבֶד שְׁהִיָּה אֹכֵל מִשְׁל רַבּוֹ
קוֹצֶה וְנוֹתֵן פְּרוּסָה לְבָנוֹ וְלַעֲבָדוֹ שֶׁל
אוֹהֲבֵוֹ וְאֵינוֹ חוֹשֵׁשׁ מִשּׁוּם גְּזֵלוֹ שֶׁל
בְּעַל הַבַּיִת שֶׁכֶּכֶךְ נִהְגוּ."

Source 17. Tosafot, Bava Metzia 22a

It cannot be suggested that [Ameimar and Rav Ashi ate from the fruit in Source #12 because] they relied on the fact that Mari bar Isak will consent after he hears about it. The halachah follows Abaye [who maintains that an implied state of mind does not carry halachic significance, until the state of mind is conscious and explicit], and therefore even though he will consent later, he did not give his initial consent [and the later consent does not help retroactively].

דְּאִין לומר שְׁהִיָּה סוּמָךְ שְׂתִירָצָה
מְרִי בַר אִיִּסַּק בְּשִׁידַע דְּהִלְכָּה כְּאַבְיִי,
וְאָף עַל גַּב דְּהִשְׁתָּא נִיחָא לִיה,
מַעֲיָקָרָא לֹא הוּא נִיחָא לִיה:

Source 18. Shach, Choshen Mishpat 358:1

If I would not fear, I would say that it is permitted. He knows that the owner will consent, and therefore now, too, it comes into his hands with permission, for we can assume that he is not particular about this.

וְאִי לֹא דְּמִסְתַּפִּינָא הִיִּתִּי אומר
שְׁמוּתָר, כִּינֵן שְׂדִירֵעַ שְׂתִירָצָה, אִם
כֵּן הִשְׁתָּא נָמִי, בְּהִתִּירָא אֲתִי לִידֵיָּה,
דְּמִסְתַּמָּא אֵינוֹ מִקְפִּיד עַל זֶה.

Case 4. The Laptop for Special Kids

Shira is a counselor at this year's Camp Gila, a camp for special children with various degrees of handicap. As part of her job, she worked hard to prepare a PowerPoint presentation, perfectly suited for the level of the kids under her charge. Unfortunately, as she turns on her computer just ten minutes before the session is due to begin, she finds that Windows has become corrupted, and will not start. As Shira frantically contemplates what to do, she sees Elena's graceful Dell laptop on a nearby desk. Elena is also a counselor at the camp, and she and Shira are roommates – though they didn't know each other before. She is presently running an exercise class for a group of kids, and (of course) she can't be contacted. Shira is sure that Elena would consent for her to use her laptop – in particular for the good cause of teaching the class. What should Shira do?

**Can Shira rely on her assumption and take the laptop?
Is it forbidden for her to use it, in light of Tosafot's stringent ruling in Source # 16?**

Source 19. Pesachim 4a

The rabbis asked the following question: If someone rents out a house to his friend (right before Pesach/Passover) under the assumption that it has already been checked for chametz (leavened bread, whose possession and consumption is prohibited on Pesach), and it turns out that it was not checked: can this be considered a transaction made under false pretenses [and therefore void]?

Let us answer this by citing a statement by Abaye. (Background information: In some places people used to check their own houses for chametz before Pesach; and in other places people used to pay someone to do it for them.) Abaye said [that in both places, when a renter finds that the rental unit was not yet checked for chametz the transaction is not void. In his words,] "This applies not only in places where people do not pay others to check their houses, but do it themselves, because people like to do a mitzvah themselves [and therefore did not make the rental agreement conditional on whether the house was pre-checked for chametz.] It applies even in a place where people pay to have their houses checked. [Even in these places] people [we can assume] like to do a mitzvah with their money. [Therefore, a rental agreement where there was an understanding that the unit was already checked for chametz, but in actuality it wasn't, is still valid.]

איבעיא להו:
המשכיר בית
לחבירו בחזקת
כדוק ומצאו שאינו
כדוק מהו מי הוי
במקח טעות או
לא?

תא שמע: דאמר
אביי, "לא מבעיא
באתרא דלא יהבי
אגרא ובדקו דניחא
ליה לאיניש לקיו
מי מצנה בגופיה
אלא אפילו באתרא
דיהבי אגרא
ובדקו דניחא ליה
לאיניש לקיומי
מצנה במקומיה."

Source 20. Commentary of the Rosh, Chullin 8:26

The custom became to allow a person to use a friend's tallit even without his prior knowledge and to make a blessing over it. They relied on the principle: "A person is comfortable with [and will give consent to] having a mitzvah performed with his money." If he found it folded, [when he returns it] he should leave it folded as before, for otherwise people are not happy with [others using their tallit].

וְנִהְיָ לְהַתְעִיף בְּטָלִיתוֹ שֶׁל חֵבֵרוֹ אֲפִילוּ בְּלֹא יְדִיעָה וּמִכְרָךְ וְסִמְכוֹ עַל זֶה דְּנִיחָא לִיָּה לְאִינִישׁ דְּלִיעָבִיד מִצְוָה בְּמִמוּנִיהָ. וְאִם מִצְוָה מְקַפֶּלֶת יִחְזוֹר וְיִקְפֹּלָנָה כְּכֹרֵאשׁוּנָה. דָּאִי לָאוּ הָכִי לֹא נִיחָא לִיָּה :

Source 21. Shulchan Aruch and Rema, Orach Chaim 14:4

Shulchan Aruch: It is permissible to take a friend's tallit and make a blessing over it, as long as he refolds it if he found it originally folded.

Note of Rema: The same is true for tefillin; but it is prohibited to learn from his friend's books without his prior consent, for people are worried that he might tear them during learning.

מוֹתָר לְטוֹל טָלִית חֵבֵרוֹ וּלְכַרְךָ עָלֶיהָ וּבְלִבֵּד שְׂקִיפָל אוֹתָהּ אִם מִצְוָה מְקַפֶּלֶת: הֵגֵה וְהוּא הֵדִין בְּתַפְלִין (נִמּוּקֵי יוֹסֵף פֶּרֶק הַסְפִּינָה) אֲבָל אֲסוּר לְלַמּוֹד מִסְפָּרִים שֶׁל חֵבֵרוֹ בְּלֹא דַעְתּוֹ דְּחִי'שִׁינָן שְׂמָא יִקְרַע אוֹתָם בְּלִמּוּדוֹ (נִמּוּקֵי יוֹסֵף הַלְכוֹת קִטְנוֹת) :

Source 22. Mishnah Berurah Orach Chaim 14:16

It is common practice that when people find another's siddur or machzor (holiday prayer book) in the synagogue they take it to pray with, and I don't know the basis of this leniency, for why is it any different than Torah books (that the Rema says should not be used)? (Peri Megadim)

וְהַעוֹלָם נוֹהֲגִין כְּשִׁמוּצָאִין סְדוּר תַּפְלָה אוּ מַחְזוֹר בְּבֵית הַכְּנֶסֶת שְׁלֹקְחִין אוֹתוֹ כְּדִי לְהַתְפַּלֵּל בּוֹ. וְאִינִי יוֹדֵעַ הֵתֵר לָזֶה, דְּמֵאִי שָׁנָא סְדוּר מִסְפָּרִים ? [פ"מ"ג] :

Source 23 . Aruch Hashulchan Orach Chaim 14: 13

Nevertheless, merely looking [through a book] is treated as permissible. Similarly, using a siddur or a machzor without the owner's explicit consent is treated as permissible, because most people are not particular about this.

וּמִכָּל מְקוֹם לְעִיִּין בְּעֵלְמָא נוֹהֲגִין הֵתֵר וְכֵן לִקְחַ סְדוּר וּמַחְזוֹר בְּלֹא יְדִיעַת הַבְּעָלִים, דְּרוּבָא דְּעֵלְמָא אֵינָם מְקַפִּידִים בָּזֶה.

Source 24. Shach, Choshen Mishpat 72:8

Rather, the principle is certainly limited to tefillin, which are made entirely for the purpose of performing a mitzvah, and why should they be left in their box for no reason? – Therefore, a person wants a mitzvah to be performed with his possessions.

אֵלָא וְדַאי דְּנֻקָּא תְּפִילִין שְׁהֲרִי
עֲשׂוּיִין לְמִצְוֹתֵן וְלָמָּה יִהְיוּ
מְנַחִים בְּקַפְסָה בְּחִנָּם וְנִיחָא
לִיה לְאִינִישׁ דְּלִיתָּעֲבֵד מִצְוָה
בְּמַמּוּנִיהָ.

**RECOM-
MENDED
ADDITIONAL
READING**

Two additional related topics:

1. Exchanging coats, tallitot, and laundry – Rabbi Yirmiyahu Kaganoff
<http://rabbikaganoff.com/archives/1638>

2. Borrowing from the Tzedakah Box - Rabbi Yirmiyahu Kaganoff
<http://rabbikaganoff.com/archives/1802>

Excellent chapter in a very detailed and practical book

Halachos of Other People's Money, by Rabbi Yisroel Pinchas Bodner, has a chapter on borrowing without permission – pp. 53-68.