SHO'EL SHELO MIDA'AT

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

Teacher's Guide

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

Note: This shiur is not intended as a source of practical *halachic* (legal) rulings.
For matters of halachah, please consult a qualified *posek* (rabbi).

This is how Bava Batra 87b looks in the classic editions of the Talmud.


פז: המוכר את הספינה פרק חמישי בבא בתרא

והתנן הרכינה ומיצה הרי זו תרומה א״ל הא איתמר עלה אמר רבי אבהו משום יאוש בעלים נגעו בה: והחנווני אינו חייב להטיף וכו׳: איבעיא להו רבי יהודה ארישא קאי ולקולא או דלמא אסיפא קאי ולחומרא ת״ש דתניא רבי יהודה אומר ערב שבת עם חשכה חנווני פטור מפני שחנווני טרוד:

מתני׳ השולח את בנו אצל חנווני ופונדיון בידו ומדד לו באיסר שמן ונתן לו את האיסר שבר את הצלוחית ואבד את האיסר חנווני חייב רבי יהודה פוטר שעל מנת כן שלחו ומודים חכמים לר׳ יהודה בזמן שהצלוחית ביד התינוק ומדד חנווני לתוכה שחנווני פטור:

גמ׳ בשלמא באיסר ושמן בהא פליגי דרבנן סברי לאודועי שדריה ור׳ יהודה סבר לשדורי ליה שדריה אלא שבר צלוחית אבדה מדעת היא אמר רב הושעיא הכא בבעל הבית מוכר צלוחיות עסקינן ובגון שנטלה חנווני על מנת לבקרה ובדשמואל דאמר שמואל הנוטל כלי מן האומן על מנת לבקרו ונאנס בידו חייב לימא דשמואל תנאי היא אלא רבה ורב יוסף דאמרי תרווייהו הכא בחנווני מוכר צלוחיות עסקינן ואזדא רבי יהודה לטעמיה ורבנן לטעמייהו אי הכי אימא סיפא מודים חכמים לר׳ יהודה בזמן שהצלוחית ביד התינוק ומדד חנווני לתוכה שחנווני פטור והא אמרת לאודועי שדריה אלא אביי בר אבין ור׳ חנינא בר אבין דאמרי תרווייהו הכא במאי עסקינן כגון

SECTION I Borrowing without Permission

We will now examine two cases to clarify if it is permissible to "borrow" other people's possessions without permission and the Jewish legal consequences of such use.

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?

This is a classic case of what the Gemara refers to as sho'el shelo mida'at – borrowing without consent of the owner.

Would you call this borrowing, or is it closer to stealing? What do you say?

Classification of such usage is the subject of a dispute in the following Mishnah and Gemara.

Source 1. Mishnah and Gemara Bava Batra 87b - 88a – A storeowner uses a client's container without permission.

משנה - הַשּׁוֹלֵחַ אֶת בְּנוֹ אֵצֶל חֲנָוָנִי (וּפַנְדְּיוֹן בְּיָדוֹ), וּמָדַד לוֹ בְּאִסָּר שֶׁמֶן וְנָתַן לוֹ אֶת הָאִסָּר, שָׁבַר אֶת הַצְּלוֹחִית וְאִבֵּד אֶת הָאִסָּר, חֲנָוָנִי חַיָּב. רַבִּי יְהוּדָה פּוֹטֵר, שֶׁעַל מְנָת כֵּן שְׁלָחוֹ.

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.

גמרא – (פח.) . . . אָמַר רָבָא אֲנִי וַאֲרִי שֶׁבַּחֲבוּרָה תַּרְגִּימְנוּהָ וּמַנּוּ ר׳ זֵירָא הָכָא בְּמַאי עַסְקִינַן כְּגוֹן שֶׁנְּטָלָהּ לְמֹד בָּהּ לַאֲחֵרִים וּבְשׁוֹאֵל שֶׁלֹּא מִדַּעַת קָא מִיפַּלְגֵי מַר סָבַר שׁוֹאֵל הַוֵי וּמַר סָבַר גַּזְלָן הַוֵי.

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.

Based on the Talmudic interpretation, the dispute in the Mishnah thus concerns the question of somebody who borrows without permission. According to Rabbi Yehuda, he has the status of a regular borrower; according to the first opinion in the Mishnah (the "rabbis"), however, he has the status of a thief.

At first glance, the ruling of the rabbis makes no sense – why should the storeowner be liable for the customer (the boy) breaking the bottle of oil!

Why do you think the storeowner could be responsible? The Rashbam clarifies the rationale for the ruling:

Source 2. Rashbam Bava Batra 87a "Demar Savar" – A thief must return the stolen object directly to its owner, and is responsible for whatever happens until that point.

דְּמַר סָבַר - רַבָּנָן גַּזְלָן הָוֵי וְקָנְיֵיהּ לְהִתְחַיֵּב בָּהּ עַד שֶׁתָּבֹא לְיַד בְּעָלִים דְּבְעִינַן וְהֵשִׁיב אֶת הַגְּזֵלָה וְהַשָּׁבָה לְיַד תִּינוֹק לַאו הַשָּׁבָה הִיא וְהָכִי אָמְרִי׳ בְּהַגּוֹזֵל וּמַאֲכִיל (ב״ק דַּף קיח) הַגּוֹנֵב טָלֶה מִן הָעֶדֶר וְהֶחֱזִירוֹ וָמֵת אוֹ נִגְנַב חַיָּיב בְּאַחֲרָיוּתוֹ דְּבְעִינַן דַּעַת בְּעָלִים וְאֵין זֶה דַּעַת בְּעָלִים כְּשֶׁמּוֹסְרוֹ לְיַד תִּינוֹק:

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."

According to the rabbis, the storeowner is considered a thief, and therefore has a mitzvah to return the bottle to the child's father (and not to the son). Even though it was the child who actually broke it, the storeowner (the thief) is responsible for all damages that occur to the object until he gets it back to the father.

What then explains Rabbi Yehuda's position that the storeowner is not obligated to pay for the broken bottle?

Source 3. Rashbam Bava Batra 88a, "VeRabbi Yehuda Savar Sho'el Havei" – A borrower can return the object to where he borrowed it from.

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).	וְרַבִּי יְהוּדָה סָבַר שׁוֹאֵל הַוֵי - וְכִי מַחֲזִירוֹ לְמָקוֹם שֶׁשָּׁאֲלוֹ מִשָּׁם דַּי, וְהִלְכָךְ מִשֶּׁהֶחֱזִירוֹ לַתִּינוֹק פָּטוּר.

According to Rabbi Yehuda the storeowner is a regular **borrower**, and is therefore absolved from responsibility once he returns it to the child. Even if it breaks before reaching the father/owner, the storeowner is not responsible, for his borrowing status ends when he replaces it in the child's hands.

Rabbi Yehuda and the rabbis thus engage in a fundamental disagreement about the halachic nature of somebody who borrows something without permission.

Source 4. Terumat Ha'Kri 292:1 Footnote A – What is the core of the dispute about borrowing without permission?

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.	וְהָא דְּנָחְלְקוּ אִי שׁוֹאֵל שֶׁלֹּא מִדַּעַת גַּזְלָן אוֹ לֹא כַּוָּנַת מַחְלוֹקֶת אִם רַק גְּזֵלַת קְנְיַן פֵּירוֹת גַּם כֵּן מִקְרֵי גַּזְלָן אוֹ לֹא.

Meaning, there is a possible distinction between stealing an **object itself** – the classic thief or robber – and stealing the **use of the object**. What is the status of one who just steals the **utilization** of an object – he used it without permission – without stealing **the object itself**? That is the debate between Rabbi Yehuda and the other Sages: The rabbis call this stealing (and one who steals has responsibility over the object until it reaches the hands of the owner), whereas Rabbi Yehuda defines it as borrowing, limiting his responsibility to the point where he returns it to the place he borrowed it from.

It is important to note that even according to Rabbi Yehuda, who classifies use without permission as "borrowing," borrowing without permission is not necessarily *permitted.* The Rashbam (*Bava Batra* 88a), for instance, writes explicitly that even according to Rabbi Yehuda, borrowing without permission is not permitted, although it is not defined as theft.

However, the Ritva writes as follows:

Source 5. Ritva (Rabbi Yom Tov ben Avraham Asevilli) Bava Batra 88a – Borrowing without permission is forbidden and is considered theft (in accordance with the rabbis).

כֵּיוָן דְּקַיְימָא לָן כְּרַבָּנָן דְּאָמְרֵי הָכָא דְּשׁוֹאֵל שֶׁלֹּא מִדַּעַת גַּזְלָן הֲוֵי, הָיָה נִרְאֶה שֶׁאָסוּר לְאָדָם לְהָנִיחַ תְּפִילִּין אוֹ לְהִתְעַטֵּף בְּטַלִּיתוֹ שֶׁל חֲבֵרוֹ שֶׁלֹּא מִדַּעְתּוֹ. אֲבָל מוֹרִי נר״ו (נַטְרֵיהּ רַחֲמָנָא וּפַרְקֵיהּ) אוֹמֵר דְּדָבָר מִצְוָה שַׁאנִי, דְּנִיחָא לֵיהּ לְאִינִישׁ דְּלִיעֲבֵד מִצְוָה בְּמָמוֹנוֹ.

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.)

The Ritva thus understood the following: only according to the Sages who argue with Rabbi Yehuda is it forbidden to use another's property without his knowledge and consent; according to Rabbi Yehuda, there is no constriction on doing so.

Why would Rabbi Yehuda permit using other people's property without permission?

It appears that Rabbi Yehuda makes a fundamental distinction between possessing and using. It is forbidden to take possession of another's item, and this constitutes theft. However, it is permitted to make use of somebody else's property, provided the use does not consume the item, such as using a hammer to bang a nail into the wall. The Sages, however, with whom later authorities side, understood that usage (even non-consuming) is an essential part of ownership, and using another person's property without his knowledge is therefore theft.

Back to our basketball: Is borrowing Jerry's basketball any different from a storeowner borrowing a parent's bottle? No – both involve using someone else's property without permission. We should get the answer to Brian's question by finding out how we rule in the case of our Mishnah.

Source 6. Shulchan Aruch Choshen Mishpat 359:5 – Borrowing without permission is considered theft (in accordance with the rabbis).

אֲפִילּוּ הַלּוֹקֵחַ בְּשְׁאֵלָה שֶׁלֹּא מִדַּעַת הַבְּעָלִים נִקְרָא גַּזְלָן:

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

What are the ramifications of being called a thief?
The most obvious one is that one who steals is performing a prohibited action! The Torah forbids stealing.

Source 7. Vayikra (Leviticus) 19:11,13 – Theft is biblically prohibited.

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 תְכַחֲשׁוּ וְלֹא תְשַׁקְּרוּ אִישׁ בַּעֲמִיתוֹ ... י״ג. לֹא תַעֲשֹׁק אֶת רֵעֲךָ וְלֹא תִגְזֹל לֹא תָלִין פְּעֻלַּת שָׂכִיר אִתְּךָ עַד בֹּקֶר.

There are also practical consequences of being defined as a thief as illustrated through the following scenario.

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?

The halachah tells us an important practical ramification of being considered a thief and not merely a borrower. If a "borrower without permission" is considered a thief, he has a mitzvah to return the object he stole directly to its owner, and he's also liable for anything that happens to the object until the point that he returns it to the owner. In contrast, if he is considered a borrower (like Rabbi Yehuda says) he just has to return the object to where he found it.

The Shulchan Aruch rules according to the Rabbis in our Mishnah:

Source 8. Shulchan Aruch Choshen Mishpat 366:3 – One who borrows without permission is liable until he returns the object to the owner.

הָיָה כְּלִי בְּיַד בְּנוֹ שֶׁל בַּעַל הַבַּיִת אוֹ בְּיַד עַבְדּוֹ, וְלָקַח אֶחָד מֵהֶם וְנִשְׁתַּמֵּשׁ בּוֹ, הֲרֵי זֶה שׁוֹאֵל שֶׁלֹּא מִדַּעַת, וְנַעֲשָׂה בִּרְשׁוּתוֹ וְנִתְחַיֵּיב בְּאוֹנְסִין עַד שֶׁיַּחֲזִירֶנּוּ לַבְּעָלִים, לְפִיכָךְ אִם הֶחֱזִירוֹ לַקָּטָן שֶׁהָיָה בְּיָדוֹ וְאָבַד מִמֶּנּוּ אוֹ נִשְׁבָּר, חַיָּיב לְשַׁלֵּם:

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.

Therefore, even if the basketball was stolen **after** Brian replaced it, Brian must compensate Jerry.

We've spoken until now about borrowing and then returning the same item without permission. But what about taking and depleting something that is consumable, and then replacing what you took? Let's see in the next case...

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?

The Gemara quotes a Beraita that speaks about two related cases:

Source 9. Bava Metzia 61b – Stealing to torment and stealing with intent to compensate are prohibited.

"לֹא תִגְנֹבוּ" דְּכָתַב רַחֲמָנָא לָמָּה לִי? לְכִדְתַנְיָא: לֹא תִגְנוֹב עַל מְנַת לְמֵיקַט, לֹא תִגְנוֹב עַל מְנַת לְשַׁלֵּם תַּשְׁלוּמֵי כֶּפֶל.	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."

The Gemara mentions two related cases, stealing to torment and stealing with intent to compensate. In both cases, the intention is not to actually "steal" in the sense of taking and keeping another's item; rather, the item will be returned, either after the victim suffers a little, or doubled (Rashi explains that somebody who steals with intention of paying back double does so for altruistic reasons).

A Midrash listing seven types of thieves mentions another related case – one who steals with intent to return the object itself.

Source 10. Pesikta Zutrati Shemot 24:3 – Stealing with intent to return is prohibited.

הַשְּׁבִיעִי הַגּוֹנֵב עַל מְנָת לְהַחֲזִיר, וְהַגּוֹנֵב עַל מְנָת לְמֵיקַט.	The seventh [category of theft] is stealing with intent to return; and stealing in order to annoy someone.

Sources #9 and #10 teach us that taking someone else's property is considered stealing, regardless of the taker's intentions to borrow. Therefore, in the Co-worker's Coke Case, it is clearly forbidden for Marcy to "borrow" Coke with intention to compensate, either with money or with another Coke. If stealing with intent to return the object itself (Source #9) is prohibited, certainly stealing with intent to compensate with another Coke would be prohibited.

This law is codified by the Rambam (Maimonides) in his Mishneh Torah, Laws of Theft 1:2, and his ruling is echoed by the Shulchan Aruch:

Source 11. Shulchan Aruch Choshen Mishpat 348:1 – Stealing with intent to return is prohibited.

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].	אָסוּר לִגְנוֹב אֲפִילוּ כָּל שֶׁהוּא דִּין תּוֹרָה, וְאָסוּר לִגְנוֹב אֲפִילוּ דֶּרֶךְ שְׂחוֹק, וַאֲפִילוּ עַל מְנָת לְהַחֲזִיר אוֹ כְּדֵי לְשַׁלֵּם תַּשְׁלוּמֵי כֶּפֶל אוֹ כְּדֵי לְצַעֲרוֹ, הַכֹּל אָסוּר כְּדֵי שֶׁלֹּא יַרְגִּיל עַצְמוֹ בְּכָךְ:

Note: This last line ("All of these are prohibited so that one will avoid getting accustomed [to theft]") is a citation from the Rambam, and is the subject of dispute among later commentators. The Lechem Mishneh (Laws of Theft 1:2) states that stealing as a joke and stealing with intent to return or compensate are rabbinic fences added to protect people from transgressing biblical theft – taking someone else's property with intent to possess it. However, the Sefer Hachinuch, assumes that these cases are also included in the biblical prohibition of theft. No one, for whatever reason, should take liberties with other people's objects.

These sources support Karen's position in the Co-worker's Coke Case Controversy – it is forbidden to take the Coke even if one intends to compensate with another Coke.

KEY THEMES OF SECTION I

- **In general, it is prohibited to borrow without permission.**
- **Moreover, borrowing without permission – where it is forbidden to do so (see below) – is considered theft.**
- **The "borrower" becomes liable for all damages or loss, even those beyond his control, until he returns the object directly to the owner.**
- **It is prohibited to take someone else's property and consume it, even with intent to replace it or compensate for it.**

SECTION II

Is it Ever Permissible to Borrow without Explicit Permission?

So far we have concluded that it is forbidden to use other people's possessions without their permission. Are there ever situations or mitigating circumstances that enable one to borrow things without permission? Let's look at two cases: 1) borrowing a car without permission from someone with a reputation for being generous and 2) borrowing without permission for a good purpose – a case of a laptop in a camp for children with special needs.

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?

It is wonderful when a generous and friendly owner of an object **explicitly** gives his roommates, family members, co-workers, or friends, permission to use his things whenever they wish to use them.

It is also often clear that a person **objects** to others using his possessions, in which case borrowing without permission is prohibited without question. Some people are worried their things will get ruined; others have had negative experiences in the past when they lent to others; still others are stingy.

But how should we deal with Matt's case – can we assume **implicit** permission?

To answer this question we have to determine when according to the halachah it is legitimate to **assume** that the owner of an object gives permission to use it. To build towards the answer, let's start with an early Tannaitic source, a Tosefta in tractate Bava Kamma.

Source 12. Tosefta Bava Kamma 11:2 – A son can sometimes give away his father's bread.

הַבֵּן שֶׁהָיָה אוֹכֵל מִשֶּׁל אָבִיו וְכֵן הָעֶבֶד שֶׁהָיָה אוֹכֵל מִשֶּׁל רַבּוֹ קוֹצֶה וְנוֹתֵן פְּרוּסָה לִבְנוֹ וּבִתּוֹ וּלְעַבְדּוֹ שֶׁל אוֹהֲבוֹ וְאֵינוֹ חוֹשֵׁשׁ מִשּׁוּם גְּזֵלוֹ שֶׁל בַּעַל הַבַּיִת שֶׁכָּךְ נָהֲגוּ.	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.

The Rashba (Rabbi Shlomo ben Aderet, one of the greatest Spanish Talmudic scholars of the Middle Ages) quotes this Tosefta to explain the following Talmudic anecdote:

Source 13. Bava Metzia 22a – Two rabbis ate, one did not.

אֲמֵימָר וּמַר זוּטְרָא וְרַב אַשִׁי אִקְּלְעוּ לְבֵי וִסְתְּנָא דְּמָרֵי בַּר אִיסַק, אַיְיתִי אַרְיסֵיהּ תְּמָרֵי וְרִימּוֹנֵי. אֲמֵימָר וְרַב אַשִׁי אֲכְלֵי, מַר זוּטְרָא לֹא אָכִיל.	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.

Why didn't Mar Zutra enjoy some dates and pomegranates? Mar Zutra did not eat the fruit based on an explicit Mishnah that forbids it:

Source 14. Mishnah Bava Kamma 10:9 – It is forbidden to buy fruit from fruit watchmen.

אֵין לוֹקְחִין מִן הָרוֹעִים צֶמֶר וְחָלָב וּגְדָיִים, וְלֹא מִשּׁוֹמְרֵי פֵּרוֹת עֵצִים וּפֵרוֹת.	One should not buy wool, milk, and kids from shepherds; nor should one buy wood or fruit from fruit watchmen.

Why should one refrain from buying fruit from the watchmen?

Source 15. Rambam's Commentary on the Mishnah Bava Kamma 10:9 – We assume that fruit was stolen.

All of these things are prohibited to purchase because we can assume that they are stolen.	אֵלּוּ הַדְּבָרִים שֶׁהַזְּהִיר שֶׁלֹּא לִקְנוֹתָן, לְפִי שֶׁחֶזְקָתָן גְּנֵיבָה בְּיָדָם:

Thus, a number of commentators ask why Amemar and Rav Ashi thought it was **permissible** to eat. The Rashba explains as follows.

Source 16. Rashba, quoted in Ran, Bava Metzia 22 – Why did the two rabbis eat the fruit?

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.	הָרַשְׁבָּ"א ז"ל תֵּירֵץ דְּאֲפִילּוּ לֵית לֵיהּ חוּלְקָא בְּפֵירֵי שָׁרֵי לְפִי שֶׁאוּמְדָן הַדַּעַת הוּא שֶׁאֵין בַּעַל הַפַּרְדֵּס מַקְפִּיד בְּכָךְ וְכָךְ נָהֲגוּ. דַּמְיָא לְמַאי דְּאַמְרִינַן בְּתוֹסֶפְתָּא דְּפֶרֶק בַּתְרָא דְּבָבָא קַמָּא, "הַבֵּן שֶׁהָיָה אוֹכֵל מִשֶּׁל אָבִיו וְכֵן עֶבֶד שֶׁהָיָה אוֹכֵל מִשֶּׁל רַבּוֹ קוֹצֶה וְנוֹתֵן פְּרוּסָה לִבְנוֹ וּלְעַבְדּוֹ שֶׁל אוֹהֲבוֹ וְאֵינוֹ חוֹשֵׁשׁ מִשּׁוּם גְּזֵלוֹ שֶׁל בַּעַל הַבַּיִת שֶׁכָּךְ נָהֲגוּ."׃

This ruling is incorporated into halachic codes. For instance, it appears in the Shulchan Aruch, Yoreh De'ah 248:6, in the Shulchan Aruch Harav, Laws of Lost Objects 5, and in the Kitzur Shulchan Aruch 182:14.

The Heitman family tradition sounds halachically similar to the ancient "common custom" of giving food to the children of family friends – in which case it would be fine for Matt to use his cousins' car, although attempting to check with them was appropriate.

It's true that the family car happens to be a Jaguar, and most people might be particular about taking out the Jag for a spin – but if the family tradition applies even to the car, it will be permitted to drive the car without asking.

What happens if we assume that there is no "family tradition," yet Matt knows that Mr. Heitman will certainly agree for him to use the car: Is this sufficient to permit the use of somebody's property without his knowledge?

Tosafot writes the following:

Source 17. Tosafot, Bava Metzia 22a – Why did the two rabbis eat the fruit?

דְּאֵין לוֹמַר שֶׁהָיָה סוֹמֵךְ שֶׁיִּתְרַצֶּה מָרִי בַּר אִיסַק כְּשֶׁיֵּדַע דְּהַלָכָה כְּאַבַּיֵי, וְאַף עַל גַּב דְּהַשְׁתָּא נִיחָא לֵיהּ, מֵעִיקָּרָא לֹא הַוָּה נִיחָא לֵיהּ:

It cannot be suggested that [Amemar 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].

According to Tosafot, assumed consent is not sufficient to permit taking something without permission.

However, the Shach [Rabbi Shabbatai ben Meir ha-Kohen, a leading 17th century authority] gives the following ruling:

Source 18. Shach, Choshen Mishpat 358:1 – The Shach takes a lenient view.

וְאִי לָאו דְּמִסְתָּפִינָא הָיִיתִי אוֹמֵר שֶׁמּוּתָּר, כֵּיוָן שֶׁיָּדוּעַ שֶׁיִּתְרַצֶּה, אִם כֵּן הַשְׁתָּא נַמִי, בְּהֶתֵּירָא אָתֵי לְיָדֵיהּ, דְּמִסְתָּמָא אֵינוֹ מַקְפִּיד עַל זֶה.

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.

In spite of the introductory "if I would not fear," the words of the Shach are accepted as presenting an alternative ruling, and later authorities are divided over the practical halachic decision: Whereas many rely on the ruling of the Shach, some are stringent on account of the Tosafot's ruling. In light of this dispute, it is better to avoid using another's property "on assumption of consent." However, under extenuating circumstances it is permitted to rely on the lenient opinions, and to rely on the assumption that the owner won't mind.

There are cases, however, where the "assumption of consent" is strengthened, even for someone you don't know personally. What would be the ruling then?

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 do to, 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?

In order to find an answer to this question we open with a Talmudic principle based on an assumption about people's character.

Source 19. Pesachim 4a – People like to do mitzvot.

אִיבָּעְיָא לְהוּ: הַמַּשְׁכִּיר בַּיִת לַחֲבֵירוֹ בְּחֶזְקַת בָּדוּק וּמְצָאוֹ שֶׁאֵינוֹ בָּדוּק מַהוּ מִי חֲזֵי כְּמֶקַח טָעוּת אוֹ לֹא?

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]?

תָּא שְׁמַע: דְּאָמַר אַבַּיֵי, "לֹא מִבָּעְיָא בְּאַתְרָא דְּלֹא יְהָבֵי אַגְרָא וּבָדְקוּ דְּנִיחָא לֵיהּ לְאִינִישׁ לְקִיּוּמֵי מִצְוָה בְּגוּפֵיהּ אֶלָּא אֲפִילּוּ בְּאַתְרָא דְּיְהָבֵי אַגְרָא וּבָדְקוּ דְּנִיחָא לֵיהּ לְאִינִישׁ לְקִיּוּמֵי מִצְוָה בְּמָמוֹנֵיהּ."

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.]

Two principles emerge from this Gemara:

1) people enjoy and wish to perform mitzvot on their own;

2) people like and wish to have mitzvot performed by means of their money.

A legal ramification of these principles is that a renter cannot back out of a lease he agreed on because the house he expected to be pre-checked for chametz was not yet checked. It is halachically legitimate to assume that a renter will want to either check for chametz on his own or spend his own money to have his rental unit checked for chametz, and therefore the rental is not considered to have been made under false pretenses.

Principle #2 is applied by the Rosh (Rabbeinu Asher ben Yechiel) to mitzvah possessions – people are agreeable to others using their mitzvah items for performing a mitzvah – and was the basis of his generation's custom to consider it legitimate to borrow someone else's tallit without asking permission.

Source 20. Commentary of the Rosh, Chullin 8:26 – When is it permissible to use another's tallit without asking?

וְנָהֲגוּ לְהִתְעַטֵּף בְּטַלִּיתוֹ שֶׁל חֲבֵרוֹ אֲפִילוּ בְּלֹא יְדִיעָה וּמְבָרֵךְ וְסָמְכוּ עַל זֶה הִנִּיחָא לֵיהּ לְאִינִישׁ דְּלִיעֲבִיד מִצְוָה בְּמָמוֹנֵיהּ. וְאִם מְצָאָהּ מְקֻפֶּלֶת יַחֲזוֹר וִיקַפְּלֶנָּה כְּבָרִאשׁוֹנָה. דְּאִי לָאו הָכִי לֹא נִיחָא לֵיהּ:

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].

This custom recorded by the Rosh became the basis for the Shulchan Aruch's ruling. Yet, note the additional comment by the Rema about books!

Source 21. Shulchan Aruch and Rema, Orach Chaim 14:4 – When is it permissible to use another's mitzvah objects?

מוּתָּר לִטּוֹל טַלִּית חֲבֵירוֹ וּלְבָרֵךְ עָלֶיהָ וּבִלְבַד שֶׁיְקַפֵּל אוֹתָהּ אִם מְצָאָהּ מְקֻפֶּלֶת: הגה וְהוּא הַדִּין בִּתְפִלִּין (נמוקי יוסף פרק הספינה) אֲבָל אָסוּר לִלְמוֹד מִסְפָּרִים שֶׁל חֲבֵרוֹ בְּלֹא דַּעְתּוֹ דְּחַיְישִׁינַן שֶׁמָּא יִקְרַע אוֹתָם בִּלְמוּדוֹ (נמוקי יוסף הלכות קטנות):

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.

In the generation of the Rema (in the 1600s), people were worried about others using their books, because of the fear that the books would get torn. Books of those days were still expensive, rare, and fragile. The Mishnah Berurah [Rabbi Yisrael Meir Kagan], a leading halachic authority of the early twentieth century, thus criticizes the custom of using others' books.

Source 22. Mishnah Berurah Orach Chaim 14:16 – Using other people's siddurim (prayer books) is not justified.

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)	וְהָעוֹלָם נוֹהֲגִין כְּשֶׁמּוֹצְאִין סִדּוּר תְּפִלָּה אוֹ מַחֲזוֹר בְּבֵית הַכְּנֶסֶת שֶׁלּוֹקְחִין אוֹתוֹ כְּדֵי לְהִתְפַּלֵּל בּוֹ. וְאֵינִי יוֹדֵעַ הֶתֵּר לָזֶה, דְּמַאי שְׁנָא סִדּוּר מִסְּפָרִים? [פמ"ג]:

However, it is possible that the change in the nature of books from the 20th century onward (i.e. books having become much more prevalent and less expensive) would allow someone to use someone's siddur without permission. A contemporary of the Mishnah Berurah, Rabbi Yechiel Michel Epstein, in his Aruch Hashulchan, affirms a lenient custom.

Source 23 . Aruch Hashulchan Orach Chaim 14: 13 – Using other people's siddurim is usually permissible.

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 מָקוֹם לְעַיֵּן בְּעַלְמָא נוֹהֲגִין הֶתֵּר וְכֵן לִקַּח סִדּוּר וּמַחֲזוֹר בְּלֹא יְדִיעַת הַבְּעָלִים, דִּרוּבָּא דְּעַלְמָא אֵינָם מַקְפִּידִים בָּזֶה.

This is certainly common practice today. (See text and footnotes of "Using a Siddur or Sefer Without Permission," prepared by R. Moishe Dovid Lebowitz based on Rabbi Yisrael Belsky's rulings.)

So what about our case of using the laptop for the PowerPoint presentation?

An important distinction is that although a laptop can be used for positive purposes, it isn't a bona fide mitzvah item. The Shach rules as follows:

Source 24. Shach, Choshen Mishpat 72:8 – The principle is limited to mitzvah items.

אֶלָּא וַדַּאי דַּוְקָא תְּפִילִין שֶׁהֵרֵי עֲשׂוּיִין לְמִצְוָתָן וְלָמָּה יִהְיוּ מֻנָּחִים בְּקֻפְסָה בְּחִנָּם וְנִיחָא לֵיהּ לְאִינִישׁ דְּלִיתְעֲבֵד מִצְוָה בְּמָמוֹנֵיהּ.

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.

We can assume consent for the use of a mitzvah item, which is designated specifically for mitzvot – but not for a non-mitzvah item.

Thus, a person's consent can be assumed when the item in question is a prayer book, a shofar, an *etrog* (citron fruit used on the Sukkot holiday), and so on. With regard to non-mitzvah items, however, the use of the item for the purpose of a mitzvah is not sufficient to assume consent.

Returning to the laptop, giving the session is surely a mitzvah. It is a matter of doing a kind deed (the counselors at Camp Gila don't even get paid!) for the sake of special needs children, and without a computer the kids will miss out.

However, the laptop isn't a prayer book or an etrog – it isn't a mitzvah item. Therefore, using the laptop for purposes of a mitzvah will not be sufficient to assume Elena's consent.

Another consideration is that the use of the laptop involves taking it out of the room, whereas the cases above all refer to using somebody else's mitzvah item without moving it elsewhere. For taking items out of their location, a number of halachic authorities (Magen Avraham 14:7; Chayei Adam 11:22; Kitzur Shulchan Aruch 9:11) write that one must be stringent, because of the concern that the owner will be particular about this.

For both of these reasons, it follows that Shira will only be permitted to use the laptop for her presentation if she can make a concrete assumption, based on her knowledge of her roommate, that Elena will consent to this use. Given such an assumption, the halachah will depend on the dispute among authorities (based on Tosafot and the Shach in Sources 17 & 18) discussed above. Under the extenuating circumstances of having to give the presentation in ten minutes' time, Shira can be lenient.

If Shira can't make a concrete assumption about Elana's consent (she doesn't know how forthcoming Elena is about using her laptop, about taking it out of the room, and so on), the mitzvah use of the laptop won't be sufficient to permit Shira to borrow it.

KEY THEMES OF SECTION II

- **Borrowing without explicit prior permission is not always considered theft.**
- **Based on the "giving bread to your father's friend's son" case, where there is a custom to use or even give out another person's property, it is considered as if the owner had previously given explicit permission.**
- **This possibly applies even where there is no "custom," but there is a clear assumption that the owner of the property won't mind one's using his item. Halachic authorities dispute the halachah under such circumstances.**
- **For instance, this dispute will apply even to the case (Case I) of borrowing the basketball, if one can assume that its owner will agree to borrowing it (under extenuating circumstances – I'm desperate for a game of ball – one can be lenient).**
- **Based on the Gemara's principle, "People like to have a mitzvah performed with their money," you can sometimes borrow objects for mitzvah purposes without asking.**
- **This leniency has its limitations: It only applies to mitzvah items – items that are designated specifically for the purpose of performing mitzvot. Moreover, the principle applies only where there is no special concern that the item will be ruined, and in a similar vein it generally applies only for use in the same place.**
- **The Mishnah Berurah adds that the principle should only be relied on infrequently (for the owner will probably object to someone making frequent use of his property without permission). In addition, the owner should be consulted wherever possible.**

CLASS SUMMARY

Is it permissible to borrow someone else's things without first asking permission?

- Borrowing without permission is the subject of a Talmudic debate about the definition of theft. The halachah concludes that use of property without permission **is** considered theft.
- This means that borrowing without permission is prohibited.
- Taking with intention to compensate is, similarly, considered theft. Whether both of these are considered rabbinic or biblical level prohibitions is the subject of some debate.

If someone did borrow an object without permission, what liability does he have if something happens to it?

- If a person borrowed without permission, the item must be returned to the owner in person, and the borrower is liable for any damages that take place up to that point.

When is it permissible to borrow someone else's things without first asking permission?

- Even without first getting explicit permission, it is sometimes permissible to borrow without asking. One instance of this is where there is a recognized custom to borrow or give without asking. The owner is then understood as having given consent.
- Where there is no clear custom, but one can safely assume the owner's consent (he's a nice guy; I'm his best friend; the item is not worth much – and so on), halachic authorities dispute whether or not it is permitted to use the item.
- Borrowing mitzvah objects is cautiously permitted, but one must be sure that the owner is not worried about it getting ruined. Moreover, it is generally permitted only in the place it is found, and only on a non-permanent basis. Even in those cases where borrowing without permission is permitted, one should try to obtain the owner's explicit permission. The principle only applies for bona fide mitzvah items, and not for general items taken for the purpose of fulfilling a mitzvah.

RECOMMENDED 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.