

Borrowing Without Permission

"שוֹאֵל שְׁלֵא מִדַּעַת"

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 session 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?*
- *If it is indeed prohibited to borrow without permission, are there any exceptions to the rule?*

1 –PRIMARY SOURCES: MISHNA & GEMARA

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

<p>Mishnah – One who sends his son to a store with a <i>pundyon</i> (a value of money, equal to 2 “<i>issar</i>”) in his hands: the storeowner measures out an <i>issar</i>'s worth of oil, gives the child the <i>issar</i> of change, and [the child] breaks the bottle of oil and loses the change – the storeowner is liable.</p> <p>Rabbi Yehuda absolves [the storeowner for the damage to the bottle, the oil and money], because the father willingly took the risk of sending them with a child.</p>	<p>משנה - השולח את בנו אצל חנוני (ופונדיון בידו), ומדד לו באסר שמן ונתן לו את האסר, שבר את הצלוחית ואבד את האסר, חנוני חייב.</p> <p>רבי יהודה פוטר, שעל מנת כן שלחו.</p>
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There are 3 things to discuss: the oil, the change, and the bottle – the first opinion in the Mishnah (the "Rabbis") holds that the storeowner is responsible for all three, and R' Yehudah holds that he's absolved of all three.

The proceeds to explain Gemara the points of contention:

<p>GEMARA: Granted, with regard to the <i>issar</i> and the oil, [one can explain that] they disagree over this matter: As the Rabbis hold [that the father] sent his son to inform [the storekeeper that he needed oil but did not intend for the storekeeper to send the oil with the boy. For this reason, if the storekeeper gave the child the oil he is liable for its loss]. And Rabbi Yehuda holds that he sent [his son so that the storekeeper would] send him [back with the oil, and therefore the storekeeper is exempt from liability].</p> <p>But if the child broke the jug, [why do the Rabbis hold that the storekeeper is responsible for it]? It is a deliberate loss [on the part of the father, as he entrusted the jug to his young son, who is not responsible enough to care for it]!</p>	<p>גמי בשלמא באיסר ושמן בהא פליגי דרבנן סברי לאודועי שדריה לחנוני שצריך לשמן שדריה האב לבנו כדי שישלח לו חנוני מה שישלח לו על ידי שלוחו פקח ורבי יהודה סבר לשדורי ליה ביד בנו שדריה [רשב"ם]</p> <p>ור' יהודה סבר לשדורי ליה שדרי' אלא שבר צלוחית אבדה מדעת היא</p>
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The opinion of R' Yehudah seems very reasonable: why should the storeowner be responsible for the jug; what did he do wrong??

How would you explain the opinion of the Rabbi's regarding this?

The Gemara eventually clarifies as follows:

<p>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 <i>for his other clients</i>. 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.</p>	<p>גמרא – (פ.ח.) . . . אָמַר רַבָּא אָנִי וְאָרִי שְׂבַחְבוּרָה תְּרַגְּמִנּוּהָ וּמְנוּ ר' זִירָא הֵקָא בְּמַאי עֲסָקִינָן כְּגוֹן שְׁנַטְלָה לְמַד בָּהּ לְאַחֵרִים וּבְשׂוֹאֵל שְׂלֵא מְדַעַת קָא מִיפְלָגִי מִר סָבֵר שׂוֹאֵל הוּי וּמִר סָבֵר גְּזֵלָן הוּי.</p>
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Rava explains that the dispute in the Mishnah concerns the question of somebody who borrows without permission: According to R’ Yehuda, he has the status of a regular **borrower**; according to the Rabbi’s, however, he has the status of a **thief**.

2 – CLARIFYING THE OPINION OF THE RABBI’S

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! What difference does it make that Rava has classified him as a ‘thief’; didn’t he given it back??

The Rashbam clarifies the rationale for the ruling:

Source 2. Rashbam Bava Batra 88a “Demar Savar” – A thief must return the stolen object directly to its owner, and is responsible for whatever happens until that point.

<p>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 (i.e. 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’. This concept is conveyed 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.” The thief is required 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.”</p>	<p>דְּמַר סָבֵר - רַבָּנָן גְּזֵלָן הוּי וְקָנִייהָ לְהַתְּחִיב בָּהּ עַד שֶׁתֵּבֵא לְיַד בְּעָלִים דְּבָעִינָן וְהַשִּׁיב אֶת הַגְּזֵלָה וְהַשְׁבָּה לְיַד תֵּינּוּק לֹאֵו הַשְׁבָּה הִיא וְהָכִי אָמְרִי בְּהַגְזֵל וּמֵאֲכִיל (ב"ק דף ק"ח) הַגּוֹנֵב טֹלָה מִן הָעֵדֶר וְהִחְזִירוּ וְמֵת אִו גָּנַב חַיִּיב בְּאַחֲרֵיָוִתוֹ דְּבָעִינָן דַּעַת בְּעָלִים וְאִין זֶה דַּעַת בְּעָלִים כְּשִׁמוּסָרוֹ לְיַד תֵּינּוּק:</p>
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According to the Rabbis, since the storeowner is considered a thief, he 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!

3 – CLARIFYING THE OPINION OF R' YEHUDAH

What then explains R' 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.

“R' 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 הוּא - וְכִי
מִתְחַזְרֵר לְמָקוֹם שֶׁשָּׁאָלוּ מִשָּׁם דִּי,
וְהִלְכָהּ מִשְׁהַתְחַזְרֵירוֹ לְתֵינוּק פְּטוּר.

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.

R' Yehuda and the Rabbis thus engage in a fundamental disagreement about the halachic nature of somebody who borrows something without permission: is he a borrower, or a thief?

What lies at the root of this argument? What is the core of the dispute about borrowing without permission?

4 – THE ROOT OF THE DISAGREEMENT

Source 4. R' Yehuda Heller-Kahane (1743 – 1819): Terumas Ha’Kri 292:1 Footnote A

<p>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.</p>	<p>וְהָא דְנִחְלְקוּ אִי שׁוֹאֵל שְׁלֵא מִדְּעַת גְזֵלָן אִו לֹא כְּנִנְתּ מִחֲלוּקְתָם אִם רַק גְזֵלַת קִנְיָן פִּירוֹת גַּם כִּן מְקַרִי גְזֵלָן אִו לֹא.</p>
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Let’s elaborate:

→ Taking an object *without* permission, with no intention of giving it back, is ‘theft’.¹

→ Taking an object *with* permission, with intention to give it back, is ‘borrowing’.

But, now, there is a possible distinction between taking an **object itself** and taking the **use of the object**:

*What is the status of one who just takes the **use** of an object without permission, with full intention to return **the object itself**?*

This is the debate between R’ Yehuda and the Rabbi’s:

The Rabbi’s 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 (thereby limiting his responsibility to the point where he returns it to the place he borrowed it from).

One step deeper: we’ve just clarified *what* the point of contention is (i.e. whether stealing ‘usage’ is considered theft), let’s now clarify *why* each opinion holds as they do:

R’ Yehuda draws a fundamental line 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 item², such as using a hammer to bang a nail into the wall.

The Rabbi’s, however, understood that usage is an essential part of ownership³, and using another person’s property without his knowledge is therefore theft.

¹ This is not to suggest that taking an object without permission with intention to return it is allowed; that may very well be prohibited for other reasons [עיין מנחת חינוך מצוה רכ"ד לגבי הגונב על מנת לשלם ולמיקט]

² Or prevent the owner from using the item at that time – “זה נהנה וזה חסר”

³ This touches on an even more foundational issue of what it means to “own” something: it could be argued that “ownership” (בעלות) really boils down to one’s ability to use the object. For example, “חזקת ג’ שנים” – once one has used a property for 3 years, without objection from the previous owner, this illustrates to us conclusively that he in fact is the owner!

One More Note...

It is important to note that even according to R' Yehuda, who classifies use without permission as "borrowing," we should clarify: does this mean to say that its allowed outright (לכתחילה)?? Perhaps R' Yehudah only meant that it's not theft?

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).

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.

כִּינּוֹן דְּקַיָּמָא לִּי כְּרַבָּנָן דְּאַמְרֵי הִכָּא דְּשׂוֹאֵל
שְׁלֵא מִדְּעַת גְּזֵלָן הֵנִי, הִזְהָ נִרְאָה שְׂאָסוּר לְאָדָם
לְהַנִּיחַ תְּפִלִּין אוֹ לְהַתְעַטֵּף בְּטִלְתּוֹ שֶׁל חֵבְרוֹ
שְׁלֵא מִדְּעַתּוֹ. אֲבָל מוֹרֵי נר"ו (נִטְרִיה רַחֲמָנָא
וּפְרָקִיה) אוֹמֵר דְּדָבָר מִצְוָה שְׂאֵנִי, דְּנִיחָא לִיה
לְאִינִישׁ דְּלִיעָבֵד מִצְוָה בְּמִמוֹנּוֹ.

It appears from the Ritva's words that only according to the Rabbis who argue with R' Yehuda is it forbidden to use another's property without his knowledge and consent; according to R' Yehuda, there is no constriction on doing so!

5 – THE PRACTICAL HALACHA & ITS' RAMIFICATIONS

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

Even one who borrows without the consent of the owners is called a thief.	אִפִּילוּ הַלֹּקֵחַ בְּשֵׂאלָה שְׁלֵא מִדַּעַת הַבְּעָלִים נִקְרָא גַזְלָן:
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We should add that one of the other ramifications of being called a thief is that one who steals is performing a Biblically-prohibited action! The Torah forbids stealing:

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

<p>Do not steal. Do not deny falsely. Do not lie to one another ...</p> <p>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.</p>	<p>י"א. לא תגנבו ולא תכחשו ולא תשקרו איש בעמיתו ...</p> <p>י"ג. לא תעשק את רעהך ולא תגזל לא תלין פעלת שקיר אתה עד בקר.</p>
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The practical ramification, of course, is as we've said: one is not allowed to borrow another object without permission. 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.

<p>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.</p>	<p>הִיָּה פְּלִי בֵּיד בְּנוֹ שֶׁל בַּעַל הַבַּיִת אוֹ בֵּיד עֶבְדוֹ, וְלִקְחוּ אֶחָד מֵהֶם וְנִשְׁתַּמֵּשׁ בוֹ, הֲרֵי זֶה שׂוֹאֵל שְׁלֵא מִדַּעַת, וְנִעְשָׂה בְּרִשׁוֹתוֹ וְנִתְחַיֵּב בְּאוֹנְסִין עַד שְׁיִחְזִירוּנוּ לַבְּעָלִים, לְפִיכָף אִם הִחְזִירוּ לְקִטְוֹן שֶׁהִיָּה בְּיָדוֹ וְאָבַד מִמֶּנּוּ אוֹ נִשְׁבַּר, חַיֵּיב לְשַׁלְּמוֹ:</p>
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Lastly, we'll briefly note the issue that was raised by the Ritva in source 5: what about borrowing an object for the sake of doing a mitzvah? This issue is brought explicitly in the Shulchan Aruch:

Source 9. Shulchan Aruch, Or Chaim 14:4

<p>Shulchan Aruch - One is allowed to borrow his fellows <i>tallis</i> and make a blessing on it, so long as he folds it afterwards if he had found it folded.</p> <p>Rema – The same applies to <i>tefillin</i>. However, it is forbidden to learn from another's books without his knowledge, for we're concerned that he may come to rip it during his learning.</p>	<p>מותר ליטול טלית חבירו⁴ ולברך עליה ובלבד שיקפל אותה אם מצאה מקופלת : הגה וה"ה בתפילין (נ"י פרק הספינה) אבל אסור ללמוד מספרים של חבירו בלא דעתו דחיישינן שמא יקרע אותם בלמודו נ"י הלכות קטנות:</p>
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⁴ ביאור הגר"א – כמ"ש בפסחים דף ב' ובבכורות י"ח דניחא ליה לאינש דתתעביד מצוה בממוניה

Practical Questions

1. While at work one day, you need a pen to jot something down. You notice a nice, blue, Parker-pen lying on a desk that belongs to your co-worker: *Can you 'borrow' it?*
2. While at shul one morning, and out-of-town guest comes in for davening, and tells you that he's forgotten his T&T (tallis & teffilin) back in New York...can you led him your friend David's T&T, (since David usually comes really late for davening anyways)?
3. After sitting down to learn with your chavrusa one evening, you realize you've forgotten your *sefer* (a Gemara, or any other such type of study-book)...but you see another one lying on the table with the name "Shloimy Sprinklesteinberg", who happens to be away on vacation...can you use it?
4. *"Mommy! Can I use Rachel's roller-blades that she left on her porch?? Please!!"*
What should mommy tell her?
5. It's one of those beautiful spring days that just seems to scream out "time to mow the lawn!" When you arrive at your neighbors door to borrow the lawnmower, their 8-year-old son Jacob answers, and says "Sure, you can take it!" Are you really in the clear?
6. It's the 1st day of Sukkos, and you've accidentally forgotten your Lulav and Esrog at home. Can you just go ahead and use your friends without using permission?