

# How Law Changes: Loopholes, Workarounds, and Legal Fiction

## A Case Study

### Nathan B. Oman, *Buying Jewish Whiskey in Lehrhaus* April 16th, 2024

In a lovely spring garden in suburban Philadelphia, I handed cash and a handkerchief to my friend's rabbi. It was the first time that I, an observant Latter-day Saint (Mormon), had ever purchased whiskey. (Latter-day Saints are prohibited from consuming alcohol, although they are permitted to own it.) For the next two weeks, however, I would own a large store of booze, along with a number of half-used boxes of breakfast cereal, and a lease on a very nice apartment in Jerusalem. At the suggestion of my friend Chaim Saiman, I had agreed to act as a friendly gentile, purchasing the unused hametz (leavened foodstuffs) and its storage locations that the members of his synagogue were prohibited from owning during Passover. At the conclusion of the holiday, I could—if I so chose—sell the whiskey back to its original owners.

### Exodus 12:19-20

For 7 days, leavening agents shall not be found in your homes, for anyone who eats a leavened substances, that soul shall be excised from the assembly of Israel- whether a stranger or a citizen of the land. **20** Ye shall eat nothing leavened; in all your habitations shall ye eat unleavened bread.'

### שמות יב:יט

שבעת ימים--שאר, לא ימצא בבתים: כי כל-אכל מחמץ, ונכרתה הנפש ההוא מעדת ישראל--בגור, ובאזרח הארץ. כ כל-מחמץ, לא תאכלו; בכל, מושבתים, תאכלו, מצות.

### Exodus 13:7

Unleavened cakes shall be eaten during the seven days, and no leaven shall be seen of yours [in your possession], and no leavening shall be seen of yours throughout all of your borders.

### שמות יג:ז

מצות, יאכל, את, שבעת הימים; ולא-יראה לך חמץ, ולא-יראה לך שאר--בכל-גבלך.

### Exodus 12:15

For seven days you shall eat unleavened cakes, but on the preceding day you shall remove (*tashbitu* - translation uncertain) all leaven from your houses, for whoever eats leaven from the first day until the seventh day that soul shall be cut off from Israel.

### שמות יב:טו

שבעת ימים מצות תאכלו אך ביום הראשון תשביתו שאר מבתיכם כי כל-אכל חמץ ונכרתה הנפש ההוא מישׂראל מיום הראשון עד-יום השבעי:

### Mishna Pesachim 2:1

For the entire time that it is permitted to eat leavened bread, one may also feed it to his domesticated animals, to non-domesticated animals, and to birds; and one may sell it to a gentile; and it is permitted to derive benefit from it. After its time passes, it is prohibited to derive benefit from it, and one may not even light an oven or a stove with leavened bread.

### פסחים פרק ב משנה א

כל שעה שמותר לאכול מאכיל לבהמה לחיה ולעופות ומוכרו לנכרי ומותר בהנאתו עבר זמנו אסור בהנאתו ולא יסיק בו תנור וכירים

### Talmud Bavli Pesachim 21a

So long as one may eat *chametz* on *erev Pesach*, one may feed it to an animal/wild animal/birds, or one may sell it to a Gentile, and one may profit from it. "one may sell it to a Gentile"- That's obvious! It is to exclude the one who taught in a braita: Beit Shammai say that one may not sell his/her *chametz* to a Gentile unless the Gentile will consume it before Pesach. And Beit Hillel say: For the entire time that it is permitted for a Jew to eat leavened bread, it is also permitted for him to sell it to a gentile.

### תלמוד בבלי מסכת פסחים דף כא עמוד א

"מוכרו לנכרי". פשיטא! - לאפוקי מהאי תנא דתניא: בית שמאי אומרים: לא ימכור אדם חמצו לנכרי, אלא אם כן יודע בו שיכלה קודם פסח. ובית הלל אומרים: כל שעה שמותר לאכול - מותר למכור.

### Tosefta Pesachim 2:6-7

A Jew and a Gentile that were traveling on a ship and the Jew had chametz in his hand, behold, he may sell it to the Gentile, or he may give it to him as a gift and then return and buy it back from him after Passover, as long as he [initially] gave it to him as an irrevocable gift. A Jew is authorized to say to a Gentile, "Before you take this maneh (currency equivalent to one hundred shekels) [of chametz] as a gift, take two hundred and if I need it I will come and take it from you after Passover."

### Chidushei HaRitva Pesachim 21a

So it is written in the Tosefta: "One may tell a Gentile to purchase the chametz at a higher price and insinuate that s/he will re-purchase the chametz after Passover *so long as he does not employ cunning.*" This implies that if one does employ cunning, namely that one sells and re-purchases his/her chametz annually, we penalize that person by prohibiting the sold items to any and all Jews after Passover, for we treat the food as though it belongs to the Jew but is merely being guarded by the Gentile over Passover

### Beit Yosef OC 448

Rebenu Yeruchan wrote on the Tosefta in the name of the Behag, "provided he doesn't employ cunning." And I don't understand his words since it is permitted to give the non-Jew chametz as a gift and then come and take it back after Passover and there is nothing more cunning than this. Nevertheless, it's permissible only once it's left the Jew's domain entirely and it become possible that he won't use cunning...And it appears from the words of Termuat Hadeshen...That the giving of chametz to a non-Jew works only if it is a non-Jew who is not in his home.

### Bach OC 448

In this country, since the main business is selling liquor (mostly because it was one of the few businesses the Polish authorities permitted Jews to engage in) and it is impossible to remove all the liquor and equipment from the premises of the Jew; it is permitted for the non-Jew to acquire the Chametz in a room and the room itself.

### Sefer Hilchot Gedolot 11 - Laws of Passover

A Jew and a non-Jew who were on a boat and the Jew had Chametz in his possession, he should sell it to the non-jew or give it to him, and he can come back and take it from him after Pesach, so long as this isn't chicanery.

And the Jew is permitted to say to the non-Jew, "Instead of you taking 100, take 200, in case I need it and come and take it from you after Pesach

### תוספתא מסכת פסחים פרק ב הלכה ו-ז

ישראל וגוי שהיו באין בספינה וחמץ ביד ישראל הרי זה מוכרו לנכרי ונותנו במתנה וחוזר ולוקח ממנו לאחר הפסח ובלבד שיתנו לו במתנה גמורה רשיי ישראל שיאמר לנכרי עד שאתה לוקח במנה קח במאתים שמא אצטרך ואבוא ואקח ממך אחר הפסח.

### חידושי הריטב"א מסכת פסחים דף כא עמוד א

והכי איתא בתוספתא...שרשאי לומר לגוי "עד שאתה לוקח במאה קח במאתים שמא אצטרך ואקח ממך אחר הפסח ובלבד שלא יערים," אבל אם הערים והוא רגיל לעשות כן בכל שנים למכור לגוי קודם הפסח וליטול לאחר הפסח קנסינן ליה והוא אסור לו ולכל ישראל לאחר הפסח, שעשאוהו כאילו הוא חמץ של ישראל המופקד ברשות גוי

### בית יוסף אורח חיים סימן תמח

רבינו ירוחם (נ"ה ח"ה מו.) כתב על תוספתא זו בשם בה"ג ובלבד שלא יערים ואיני מבין דבריו דהא שרי ליתנו לגוי במתנה ולחזור וללקחו אחר הפסח ואין לך הערמה גדולה מזו ואפילו הכי שריא מאחר שמוציאו מרשותו לגמרי ואפשר דשלא יערים דקאמר היינו לומר שלא ימכור לו ולא יתן לו על תנאי: .... ונראה מדברי בעל תרומת הדשן ... דלא מהני נתינת חמץ לגוי אלא אם כן הוא גוי שמחוץ לבית:

### ב"ח אורח חיים סימן תמח

ובמדינה זו שרוב משא ומתן הוא ביין שרף ואי אפשר להם למכרם לגוי מחוץ לבית בפרט למחזיקים באורנד"א יש להתיר בענין זה שימכור לגוי כל החמץ שבחדר וגם החדר עצמו ימכור לגוי

### ספר הלכות גדולות סימן יא - הלכות פסח פרק

#### כל שעה

ישראל וגוי שהיו באין בספינה והיה חמץ ביד ישראל הרי זה מוכרו לנכרי או נותנו לו במתנה, וחוזר ולוקח ממנו אחר הפסח, ובלבד שלא יערים. ורשאי ישראל שיאמר לגוי עד שאתה לוקח במנה קח במאתים, שמא אצטרך ואבוא ואקח ממך אחר הפסח

## Terumat Hadeshen 120

Question:

Someone who has Chametz close to Pesach and it's too hard to burn and he wants to give it to a non-Jew outside of his house as a complete gift. And the Jew knows the non-Jew and knows that he won't touch it, and will instead guard it until after Pesach and then return it to him. Is this permitted or not?

Answer:

It appears like it is permitted, only one should make sure to give it to the non-Jew without a condition, or he could sell it to him with a real sale for a small amount of money.

## Tor OC Laws of Pesach 248

Chametz of a non-Jew that passed through pesach, is permitted to be eaten... Of a Jew, if it passed through Passover, is prohibited to derive benefit from even if he held onto it mistakenly or because he is coerced. But, if he sold it before Passover or gave it to non-Jew as a complete gift, it is permitted. And he's permitted to say to him, "Instead of taking it for 100, take it for 200 and I'll take it back from you after Passover."

## Shulkhan Arukh OC 248:3

If he sold it or gave it to a non-Jew who is outside of the house on Passover, even though the Jew sold it to a non-Jew and knows that he won't touch it and will guard it and give it back to him after Passover, he's permitted to do so so long as he gives it to him as a complete give without any condition, or that he sells it to him as a real sale for a small amount.

## Bechor shor Pesachim 21a

It appears to me that since the prohibition is only a rabbinic one since biblically it suffices to nullify one's chametz and everyone nullifies their chametz with a whole heart ... they permitted the kind of sale mentioned in the Tosefta.

## Elana Stein Hain, *Circumventing the Law*, p. 109

Frederick Schauer, in trying to understand the prevalence of legal fictions in the Common Law tradition, discusses why manipulating facts may be preferable to changing rules. In some legal systems, he argues, the idea of changing a rule is not palatable. Additionally, changing a rule will affect the entire web of the legal system in unpredictable and perhaps undesirable ways. Consequently, it is often better to keep the rules as they are but to engineer the facts of a situation for minimal disruption to the legal system....The degree to which rabbis felt authorized to change the law is subject to debate among scholars. But even where they did, it is possible that changing the law would be less palatable to practitioners. And what's more, their intervention in the law could cause unanticipated ripple effects in other situations. ... Changing a rule brings in its wake new questions and effects. Giving people a workaround, on the other hand, has fewer ripple effects.

## תרומת הדשן סימן קכ

שאלה: מי שיש בידו עניני חמץ סמוך לפסח, וקשה עליו לבערם ורוצה לתתם לנכרי חוץ לבית במתנה גמורה. ואותו נכרי הישראל מכירו ויודע בו שלא יגע בהן כלל, אלא ישמרם לו עד לאחר הפסח ויחזור ויתנה לו. שרי כה"ג או לאו?

תשובה: יראה דשרי, רק שיתנם לו במתנה גמורה בלי שום תנאי, או שימכרם לו מכירה גמורה בדבר מועט.

## שור אורח חיים הלכות פסח סימן תמח

חמץ של עכו"ם שעבר עליו הפסח מותר אפילו באכילה... ושל ישראל שעבר עליו הפסח אסור בהנאה אפילו הניחו שוגג או אנוס ואם מכרו או נתנו לעכו"ם קודם הפסח מותר ובלבד שיתננו לו במתנה גמורה ורשאי לומר לו עד שאתה לוקח במנה קח במאתים שאקחנו ממך אחר הפסח

## שולחן ערוך אורח חיים סימן תמח סעיף ג

ואם מכרו או נתנו לאינו יהודי שמחוץ לבית קודם הפסח, אע"פ שהישראל מכרו לאינו יהודי ויודע בו שלא יגע בו כלל אלא ישמרנו לו עד לאחר הפסח ויחזור וית

## בכור שור פסחים כא.

אלא נ"ל כיון דהאיסור מדרבנן הוא דמדאורייתא בביטול בעלמא סגי וכל אחד מבטל חמצו בלב שלם ... והם אמרו להתיר מכירה זו כמו שכתב בתוספתא

### **Ibid p. 117**

Each judge is akin to an author writing the next chapter of a novel that has been cowritten by earlier authors. The new “novelist” must ensure that the narrative remains coherent, able to have been authored by one person, though in truth it is authored by many: this means that the novelist will be bound to the previous chapters while having their own perspective about the general principles and ideology that run through the story. This is necessarily an interpretive process because each novelist in the chain will have an opinion about what does and should animate the novel, and yet these ideas must adequately explain earlier chapters. The ideas that animate the novel are the principles, and the degree to which these principles emerge from the law or are imposed as organizing principles of the law is ambiguous.

### **Ibi p 119**

[T]he rabbis manifest concern not only with technicalities of the law but with principles that matter to the legal system as a whole: for example, not losing money due to religious obligation, not cheating the Temple treasury, avoiding transgression, celebrating the festivals with food and drink, not cheating other people, not undermining people’s respect for the law. Whether in cases where ha’aramah is permitted because of its value-laden aims or where it is disallowed, there are significant general legal principles at play. Rather than understanding ha’aramah as a narrow interpretation of the statute being circumvented, the rabbis introduce an expansive view of the legal system as a whole.

### **Farber, Daniel A. and Gould, Jonathan and Stephenson, Matthew Caleb, *Workarounds in American Public Law* (August 29, 2023). Harvard Public Law Working Paper No. 23-35**

[T]he anti-workaround presumption should give way when the obstacle that the challenged workaround would sidestep is itself inconsistent with the larger purposes of the rule system. The question should not be whether the alleged workaround, viewed in isolation, is inconsistent with the purposes of the relevant rules, but whether the combination of obstacle and workaround, considered together, is more inconsistent with the purposes of those rules than the obstacle standing alone.

### **Nathan B. Oman, *Buying Jewish Whiskey in Lehrhaus* April 16th, 2024**

Jewish law provides a marvelous example of this dynamic. Every legal system creates an imaginary world. The common law, for example, imagines a world divided by clear lines of property and planted thick with the obligations of tort and contract. The world in which we actually live never quite corresponds to the law’s imagined reality. Legal remedies strive mightily to bring the two into alignment, but good lawyers understand that this effort will always fail in the end. There will always be a gap between legal entitlement and what the legal system can actually deliver as a practical matter...The great 19th-century jurist and historian Henry Sumner Maine claimed that legal systems change in one of three ways: by legislation, by equity, or by fiction. Legislation is an idea familiar to laypersons, but equity and fiction in the legal context have specific meanings. Equity refers to a loose interpretation of a rule in order to achieve substantial justice. Fiction refers to the process of adapting legal rules by agreeing to pretend that their conditions have been met when in fact they have not.

### **Ibid**

In my mind, it is the double-mindedness of the legal fiction that is brilliant. Sitting in the suburban garden in Philadelphia, it was impossible not to feel the authority of Jewish law. Indeed, several members of the synagogue were there to witness the transaction with their children for precisely that reason. The forms and signatures literally had no other purpose than to comply with the demands laid down in Exodus.

### **Chaim Saiman's forward to Nathan B. Oman, *Buying Jewish Whiskey in Lehrhaus* April 16th, 2024**

The sale of hametz transforms into a ritual act where virtually every formality known to both Halakhah and American law is invoked. In recent years, rabbis have even added a ceremonial component, inviting their communities to witness the transaction, using it as an educational opportunity to explain the laws of Pesah as they relate to the sale of hametz.

## Babylonian Talmud Pesachim 2a

Mishnah. On the evening of the fourteenth [of Nisan] a search is made for leaven by the light of a lamp

### Rashi on Pesachim 2a

"A search is made" - In order not to violate the transgression of owning Chametz (on Passover)

### Talmud Bavli Pesachim 4b

According to the Biblical requirements, nullifying one's chametz is sufficient (i.e., searching for, and burning chametz, is only a rabbinic injunction).

### Tosfot ad loc

According to R"Y, the reason that nullifying one's chametz suffices on a Biblical level is because once a person nullifies his/her chametz, the chametz is *hefker* (*ownerless*), and it is no longer within his possession

### Ran in the pages of the Rif Pesachim 1a

When the Torah says, "tashbitu" it means that it can be accomplished in one of two ways: Either one nullifies all Chametz that is in one's possession and mentally releases it from their possessions... or... one should search for Chametz in every place in which it is likely to be found... However, because nullification is dependent on the thoughts of people, and people's intentional abilities aren't equal and it's possible that some people will err in this matter and won't fully release their Chametz in their hearts, the sages decided to be strict and require searching and burning in addition to nullification.

### Or Zarua Hilchot Pesach 246

One is permitted to make their chametz ownerless prior to the 7th hour (on the even or Passover) in order to then reacquire it after Passover and even eat it then... And this is as explained in the Jerusalem Talmud where it says "one who makes their chametz ownerless on the 13th (of Nisan) what is rule regarding this chametz after Passover? Rabbi Yochanan says it is forbidden and Rabbi Shimon Ben Lakish says it is permitted... this should not be explained as a case of chicanery, that Rabbi Yochanan is concerned that one is making their chametz ownerless in order to later required it. Rather he is concerned that one won't actually make their chametz ownerless at all.

## תלמוד בבלי מסכת פסחים דף ב עמוד א

משנה. אור לארבעה עשר בודקין את החמץ לאור הנר.

### רש"י מסכת פסחים דף ב עמוד א

בודקין - שלא יעבור עליו בבל יראה ובבל ימצא.

### פסחים ד:

מדאורייתא בביטול בעלמא סגי ליה

### תוספות שם

ואומר ר"י דמדאורייתא בביטול בעלמא סגי מטעם דמאחר שביטלו הוי הפקר ויצא מרשותו ומותר

### רן פדפי הרי"ף א.

זה שאמרה תורה תשביתו יכול להתקיים בא' מב' דרכים, או שיבטל בליבו כל חמץ שיש ברשותו ויוציאו במחשבתו מרשותו... או... שיבדוק אחריו בכל מקום שהוא רגיל להמצא שם... אלא מפני שביטול זה תלוי במחשבתו של בני אדם ואין דעותיהן שוות ואפשר שיקלו בכך ולא יוציאוהו מליבן לגמרי ראו חכמים להחמיר שלא יספיק ביטול והצריכוהו בדיקה וביעור

### ספר אור זרוע ח"ב - הלכות פסחים סימן רמו

מותר להפקיר חמץ קודם שעה שביעית ע"מ לזכות בו אחר הפסח ושרי אפ"ל באכילה... וההיא דפ' כל שעה ירושלמי דאמר הפקיר חמצו בשלשה עשר לאחר הפסח מהו? ר' יוחנן אמר אסור רשב"ל אמר מותר... אין לפרש דהערמה דר' יוחנן חייש לה דהיינו שיפקיר ע"מ לזכות בו אלא דחייש שמא לא יפקיר כלל