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Philosophy of Law and Halakhic Discourse: Possession Crimes and the Owning of Ḥamez

In recent decades, many Jewish legal scholars have employed tools from legal philosophy to ask broad questions about the nature of Jewish law ("philosophy of Halakhah"). Does Halakhah represent a positivistic or formalistic system of law? Does rabbinic authority rest on a realist conception of legal adjudication? What is the role of natural law?[1] Can the writings of the philosophers H.L.A. Hart and Ronald Dworkin help explain the halakhic process?

1. Broadly speaking, "natural law theory" refers to the idea that there is a necessary relation between law and morality and that the former must be rooted in the latter. Positivism maintains that law is "posited"—created, ultimately, by social convention—and is not of necessity connected to morality. Formalism believes that legal rulings derive clearly and syllogistically from the legal rules that bind judges, while realism asserts that there are many other variables that impact the outcome of judicial rulings. However, there are competing ways of making these definitions more specific, which further complicates how they may be applied in the halakhic context. For a review of some of this literature as it has been applied to halakhic discourse, see Adiel Schremer, "Toward Critical Halakhic Studies," *Tikvah Center Working Paper #4* (2010), available online at http://www.law.nyu.edu/sites/default/files/TikvahWorkingPapers Archive/WP4Schremer.pdf (accessed July 20, 2020).

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Dedicated to the memory of my father, Prof. Baruch Brody z"l,
ברוך אלתר בן הרב אליעזר זאב ז"ל

At other times, scholars who study *Mishpat Ivri* (Jewish legal studies) use other legal systems for comparative purposes. How do Jewish legal statements regarding bailees or returning a lost object relate to legal codes in America and England? Does Jewish law accept self-incriminating statements? Does it support the death penalty? Many of these cases represent natural points of comparison. To take a simple example, *hilkhot nezikin*, with all of its talmudic jargon and nuances, constitutes, at the end of the day, a particular form of tort law.

In this study, we will show how philosophical questions raised in general legal theory may be particularly illuminating when it comes to a seemingly unrelated concept within Jewish law. We will explore how a major question in contemporary criminal legal discourse can clarify significant aspects of the laws of Pesaḥ. By utilizing concepts and terms from criminal law, we will see how significant Talmudic rules and debates may be easily explained and articulated in a manner that provides great clarity to a complex area of Jewish law. In this regard, this paper suggests that general legal philosophy can help illuminate Jewish legal studies in unexpected places.[2]

Where Can *Ḥameẓ* Not Be Seen or Found? Owni*ng Ḥameẓ a*s a Possession Crime

According to widespread rabbinic interpretation accepted in contemporary Jewish law, the Torah includes two commandments for the Jewish people not to own *ḥameẓ* (leavened bread) on Pesaḥ:

> **No leaven shall be found (*lo yimmaẓe*) in your houses for seven days.** For whoever eats what is leavened, that person shall be cut off from the community of Israel, whether he is a stranger or a citizen of the country (Ex. 12:19).[3]

2. In a previous, shorter Hebrew version of this article, I discussed how Israel's "*Ḥok Ḥameẓ*" which prohibits sale of *ḥameẓ* products on Pesaḥ, is problematic because it is an inherently flawed attempt to prevent a possession-crime. That is to say, from a jurisprudential perspective, this is an untenable method of achieving a goal of limiting the possession of *ḥameẓ*. Accordingly, it serves little purpose from a purely religious perspective, which seeks to reduce the number of sins transgressed over the holiday. The only defense of the law, in turn, would be that it has symbolic or cultural significance in a Jewish state, a defense regarding which there is a reasonable amount of debate. See my "*Ḥok Ḥameẓ Lo Yakhol le-Hassig Mattarot Datiyyot*," *Bifrat u-Biklal* 3 (December 2017): 37-53.

3. Translations of verses are taken from the current JPS translation.

> Throughout the seven days unleavened bread shall be eaten; **no leaven bread shall be found (*lo yera'eh*) with you**, and no leaven shall be found **in all your territory** (ibid. 13:7).[4]

These verses were understood as a double-prohibition against owning *ḥameẓ*.[5] These commandments, known colloquially as "*bal yera'eh bal yimmaẓe*" ("you shall not see or find") were further understood as being related to the prohibition of eating *ḥameẓ*, as well as the commandment of destroying *ḥameẓ* (*tashbitu*).[6]

While widely accepted and fully normative, this legal understanding differs from an alternative reading of the Torah's text that would demand that all *ḥameẓ* be entirely eradicated during this period, including its removal from the vicinity of all homes and property. In a certain sense, it appears that the Torah addresses *ḥameẓ* on Pesaḥ much as it commands that articles related to *avodah zarah* be destroyed from the world:

> You shall consign the images of their gods to the fire. . . . You must not bring an abhorrent thing (*to'evah*) into your house, or you will be proscribed like it; you must reject it as abominable and abhorrent (Deut. 7:25-27).

R. Menaḥem Kasher has documented many parallels between the talmudic laws regarding *avodah zarah* and *ḥameẓ*, including the prohibition of owning even a miniscule amount, receiving any benefit from it, its method of disposal, and the unique method of "nullification" (*bittul*) through speech.[7] *Ḥameẓ* is also prohibited from other altar

4. Note that JPS translates *yera'eh* as "found," apparently under the influence of rabbinic interpretations, even as the more obvious translation would be "seen."

5. For a thorough discussion of these commandments in talmudic law, see the entry on *bal yera'eh bal yimmaẓe* in *Encyclopedia Talmudit*, vol. 3, 310-18. See also the discussion in *Minḥat Ḥinukh*, *miẓvah* 11 and *miẓvah* 20. For our purposes, we will assume that the two prohibitions fully overlap (more or less), even as rabbinic literature discusses whether or not this is always the case, as noted in both of these works.

6. Ex. 12:15, which also includes the prohibition of eating *ḥameẓ*.

7. See R. Menaḥem M. Kasher, *Torah Shelemah*: *Mishpatim*, vol. 19, Excursus 20 (New York, 5720), 300-302. (In the newer editions of *Torah Shelemah*, which combines various volumes into larger books, this excursus is found in vol. 5.) The essay is also reprinted in R. Kasher's *Haggadah Shelemah*, Excursus 7 (Jerusalem, 5727), 221-25. One expression of this perspective is the opinion of the sage R. Yehudah (*Pesaḥim* 21a), who believed that one fulfills the commandment of *tashbitu* only through burning one's *ḥameẓ*, just as one destroys *avodah zarah* through burning. The Sages also compare the prohibition of *ḥameẓ* to the prohibition of *notar* (leftovers from sacrifices), another food that must be consumed by a certain hour. See *Pesaḥim* 27b; *Mekhilta de-Rebbi Yishmael, Bo, Pisḥa* 8; and the discussion in Yehuda Brandes, *Madda Toratekha: Pesaḥim*, *shiur* 3, available online at http://www.bmj.org.il/files/1231373580411.pdf.

offerings besides the Pesaḥ sacrifice,[8] and in one passage in the *Talmud Yerushalmi*, leavened bread is directly connected to the temptation of *avodah zarah*.[9] The connection between *avodah zarah* and *ḥameẓ* is further noted in both the *Zohar* and in Maimonides' *The Guide for the Perplexed*,[10] and in the modern era rabbinic and academic scholars alike have associated leavened bread with idolatrous practices.[11]

Yet a perusal of halakhic literature shows that normative Jewish law, based on talmudic writings, does not demand the complete eradication of *ḥameẓ*. While it remains forbidden for Jews to "own" *ḥameẓ*, the exact parameters of the prohibited ownership remain disputed. What if the *ḥameẓ* was left with a non-Jew? What if it is found on the Jew's property, such as in a distant field, but is not in the Jew's possession? What about ownerless *ḥameẓ* or that owned by the Temple treasury? These and other questions were debated in talmudic and subsequent rabbinic literature, with the end result being a complex set of rules that clearly allow for *ḥameẓ* to remain within the midst of the Jewish people. That is to say, *ḥameẓ* can be seen or found during Pesaḥ, even without any Jew violating *bal yera'eh bal yimmaẓe*.

The clearest manifestation of this law is the talmudic *midrash* that asserts that one only violates *bal yera'eh bal yimmaẓe* for owning one's own *ḥameẓ*, but not for possession of *ḥameẓ* owned by a gentile or

8. Lev. 2:11, 6:10; Ex. 23:18. The latter verse is particularly significant because it immediately follows an additional reiteration of the commandment to eat *maẓẓah* on Pesaḥ (Ex. 23:14-15).

9. *Yerushalmi Avodah Zarah* 1:1, citing *Amos* 4:5.

10. *Zohar*, vol. 2, 182a; *Guide of the Perplexed* 3:46.

11. See the comments of R. Meir Simḥah of Dvinsk, *Meshekh Ḥokhmah,* Ex. 23:15, and R. Ẕevi Elimelekh Shapiro, *Benei Yissoskhar: Nissan*, Excursus #8 (ed. Ẕevi Elimelekh Penet, Bnei Brak, 5765), 415-16. See also R. Yoel Bin-Nun, "*Ḥameẓ u-Maẓẓah be-Pesaḥ, Shavuot, ve-Korbanot ha-Leḥem*," *Megadim* 13 (Adar, 5751). In academic literature, see Nahum Sarna, *Exploring Exodus* (New York: Schocken, 1986), 89-91, and William H.C. Propp, *The Anchor Bible: Exodus 1-18* (New York: Doubleday, 1998), 433-34. But see as well the comments of Baruch A. Levine, *The JPS Torah Commentary: Leviticus* (Philadelphia: Jewish Publication Society, 1989), 12, who notes the "general aversion to leaven in altar offerings," yet concludes, "Until further evidence becomes available, it must be assumed that we do not clearly understand the attitudes in these prohibitions." Jacob Milgrom, *The Anchor Bible: Leviticus* 1-16 (New York: Doubleday, 1991), 188-90, explicitly rejects the connection to heathen worship and instead argues that "fermentation is equivalent to decay and corruption, and for this reason is prohibited on the altar." He, along with Sarna and Propp (and R. Shapiro, from his unique perspective), also discuss the connections made in rabbinic literature between *ḥameẓ* and the evil inclination. The common denominator to these interpretations, however, is that *ḥameẓ* represents some form of inherent or ontological evil and therefore should be out of our midst, and certainly not consumed.

the Temple.[12] These lenient developments drew the ire of at least one medieval Karaite writer, who further railed against the medieval development of *mekhirat ḥameẓ*, the legal fiction that allows Jews to sell their *ḥameẓ* to a gentile and then re-purchase it immediately after the holiday.[13] Karaite protests aside, the generally lenient phenomenon leads to many important questions about the development of these laws. In recent years, academics have speculated regarding some of these historical developments.[14]

Without getting into the details of the historical claim, I will argue that from a philosophy of law perspective, the phenomenon described within Jewish law is best understood as the Sages struggling to define the prohibitions regarding *ḥameẓ* as possession crimes. In other words, the Sages understood the Torah as prohibiting Jews from possessing *ḥameẓ*, but not having an obligation to destroy all *ḥameẓ* from the world or from within their province. Given this understanding, they labored to delineate permissible and prohibited forms of possession, a debate that continued into the medieval period and beyond. Their legalistic nuances can at times seem incredibly distant from the biblical verses. I will argue that once the prohibition became to rid *ḥameẓ* from one's ownership, these legalistic struggles became inevitable because they are

12. *Pesaḥim* 5b, discussed below.

13. See R. Eliyahu Nikomodeo, *Sefer ha-Miẓvot ha-Gadol Gan Eden* (Israel, 1972), 45, columns 3-4. The Cutheans also did not share all of the rabbinic exegesis regarding these prohibitions. As indicated in *Yerushalmi Pesaḥim* 1:1, they believed *ḥameẓ* had to be removed from the house but could be retained in courtyards.

14. Two academic scholars, Yitzchak Gilat (*Perakim be-Hishtalshelut ha-Halakhah*, 3rd edition [Ramat Gan: Bar Ilan University Press, 5761], 135-40) and David Henschke ("*Ḥameẓ Shel Aḥerim*: *Perek be-Toledot ha-Halakhah*," *Teudah* 16-17 [5761]: 155-202) have attempted to document different historical stands within the talmudic literature that indicate that early rabbinic figures held a much stricter and extensive conception of the prohibition. Gilat argues that in earlier times, the Sages mandated burning all *ḥameẓ* and did not even allow for a Jew to sell it (permanently) to a gentile, since the food might not be consumed before the holiday. The only possible exclusions to the prohibition, Gilat argues, were circumstances in which it was impossible for the Jew to physically destroy the *ḥameẓ*. In later eras, however, rabbinic hermeneutics generated various leniencies, including the dispensation for Jews to have on their property *ḥameẓ* belonging to gentiles. Henschke goes further, arguing that according to their original meaning, these dispensations only allowed for Jews to permit non-Jews within their borders to retain *ḥameẓ*; they did not permit Jews to keep *ḥameẓ* belonging to anyone in their possession. Only in the latest historical strands of the Talmud did ownership of the *ḥameẓ* become a prerequisite for violating the biblical prohibitions. The major prooftexts of Gilat and Henschke are discussed below, but I have no intention of discussing the alleged history of this prohibition, which would require further study and exploration. Instead, my analysis is focused on a philosophy of law perspective.

inherent to all laws regulating the possession of objects, as evidenced by similar debates in contemporary criminal law.

To make this point, I will document how similar debates take place in contemporary legal discourse about possession crimes, and I will contend that conceptualizing *bal yera'eh bal yimmaẓe* as a "possession sin" can help make sense of the developments and debates around these prohibitions in Jewish law. To defend this claim, we will first explore the basic literature around possession crimes and then use those concepts to analyze the halakhic debates.

Possession Crimes

A "possession crime" is a criminal offense created by statute that prohibits the possession of a certain item. These items can range from firearms and drugs to counterfeit instruments and fireworks.[15] Such offenses typically include possessing items that create a presumption of past or future problematic behavior. Possessing stolen goods or pornographic pictures of children indicates previous criminal action, such as burglary or child abuse, while owning burglary tools or carrying an unlicensed concealed weapon points to future activity.[16] In some cases, the act of ownership itself is viewed as being inherently dangerous, such as in the case of hard drugs, whereas at other times the object is objectionable only because it runs the risk of falling into the wrong hands, as in the case of wire-cutters.[17] In many Western countries, the law does not require legal ownership of the object or physical ("actual") possession. Instead, the law attributes liability to someone who has control over an object's fate, even though he might not have legal title or physical possession of the object, at least at the time of the arrest. Under the doctrine of "constructive possession," this can include, at times, cases in which a group of people are held liable for possession even though only one of them had actual possession of the prohibited article.[18]

15. For a detailed (yet incomplete) survey of different types of possession crimes, see Markus Dirk Dubber, "The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process," in *Defining Crimes: Essays on the Special Part of the Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford University Press, 2005), 96-97.

16. See Andrew Ashworth, "The Unfairness of Risk-Based Possession Offences," *Criminal Law and Philosophy* 5 (2011): 239.

17. See George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), 201.

18. The Cornell University Law School Legal Information Institute defines "construc-

While possession crimes make up a significant percentage of the charges brought in court today, they remain controversial within legal theory. Much of the controversy surrounds whether possession crimes confine to the conventional definition of criminal behavior that requires a criminal act, the *actus reus*. Broadly defined, the *actus reus* includes all elements of the crime that do not relate to the defendant's mental state. These include the behavior of the defendant as well as the circumstances and consequences of the action. Many scholars have protested that possession crimes do not include an action, because the criminal is punished simply for a state of possession.[19] These crimes are thus similar to so-called status crimes, a problematic category of offenses in which people are punished for being in a certain state of being.[20]

Aside from the problem of *actus reus,* some legal scholars maintain that that possession crimes lead to injustice by producing an overwhelming number of "ancillary crimes" that impose stiff penalties and lead to the "over-criminalization" of non-harmful behavior.[21] While

tive possession" as "The legal possession of an object, even if it was not in a person's direct physical control. . . . Generally, for a court to find that a person had constructive possession of an object, the person must have had knowledge of the object, as well as the ability to control it." See http://www.law.cornell.edu/wex/constructive_possession (accessed June 2020). Black's *Law Dictionary* defines it as "Having control of an item but not having actual possession of it. The item may not yet be delivered or paid for." For the problematic nature of defining "constructive possession," see Charles H. Whitebread and Ronald Stevens, "Constructive Possession in Narcotics Cases: To Have and Have Not," *Virginia Law Review* 58,5 (May 1972): 751-5. As evidence of the continued difficulty in defining this type of possession as well as prosecuting criminals for these offenses, see H. Lee Harrell, "That Ain't Mine: Taking Possession of Your Constructive Possession Case," *Virginia Police Legal Bulletin* 6:1 (July 2011), available online at http://www.radford.edu/content/va-chiefs/home/july-2011.html (accessed June 2020). Harrell, a deputy commonwealth attorney in Virginia, surveys recent trends in Virginia courts and advises police how to find evidence that strengthens their claims that the defendant had knowledge of the object as well as dominion and control over it.

19. See the literature cited in Markus D. Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," *The Journal of Law and Criminology* 91:4 (Summer 2001): 829-995. Almost all of the articles and books cited below address this issue in one way or another.

20. See P. R. Glazebrook, "Situational Liability," in *Reshaping the Criminal Law*, ed. P.R. Glazebrook (London, 1978), 108-109. On this basis, some scholars have even expressed skepticism regarding whether the "act requirement" truly exists within Anglo-American law, with some contending that it is honored mainly in the breach. See Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford: Oxford University Press, 1993), 1-14.

21. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008), 33-54. Some further contend that possession crimes are simply tools for the police and prosecutors to convict people when they cannot

perhaps enacted with the intention of apprehending criminals, they create criteria that do not require actual culpability and lend themselves to abuse by overzealous law enforcement officials or as a form of "discretionary social control."[22]

Defenders of the concept of possession crimes have responded to the critique that such offenses lack an action with two basic approaches: 1) possession includes an action, or 2) possession crimes are defined by a more critical element of culpability—namely, control.

The first approach, taken by Glanville Williams[23] and Michael S. Moore,[24] asserts that possession constitutes an action because it requires an act to take possession or a decision not to rid oneself of the possession. As the Model Penal Code asserts, "Possession is an act . . . if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."[25] Consequently, the crime is not the possession per se, but rather the actions or decisions (including acts of omission) that facilitate the creation or maintenance of the possession.

The second approach, offered by Douglas Husak, asserts that the "act requirement" should be replaced with the "control requirement." For a person to deserve punishment and responsibility on a criminal level, he must have control over the state of affairs, even if he does not perform an action. For Husak, this helps justify the criminalization of acts of omission, while preventing the law from holding people responsible for a state of affairs over which they had no control.[26]

The more fundamental problem, however, remains regarding culpability. From mere ownership alone, what has a person done wrong that warrants their punishment? Defenders of the concept of possession

prove that they actually performed (or will perform) an illegal action. See Dubber, "Policing Possession."

22. Fletcher, *Rethinking Criminal Law*, 202.

23. Glanville Williams, *Criminal Law: The General Part* (2nd ed., London: Stevens, 1961), 8.

24. Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford: Oxford University Press, 1993), 21.

25. Model Penal Code 2.01(4). Note, however, that in British law, there is no formal requirement for an act or omission by the defendant, even though convictions are usually explained in these terms. See A.P. Simester, et al., *Simester and Sullivan's Criminal Law*, 4th edition (Oxford: Oxford University Press, 2010), 83.

26. Douglas Husak, "Rethinking the Act Requirement," *Cardozo Law Review* 28,6 (2007): 2437-2460, and idem, "Does Criminal Liability Require an Act?" in *Philosophy and the Criminal Law: Principle and Critique*, ed. Antony Duff (Cambridge: Cambridge University Press, 1998), 60-90.

crimes argue that these are necessary tools for capturing criminals or preventing criminal behavior, since it remains too difficult for police to actually catch a crime in the act or definitely prove afterward that the event took place. Moreover, in some cases of possession, such as child pornography or weapons, one might argue that their mere possession is inherently dangerous because of accidental misuse or the exploitation of children. Therefore, the act of possession alone is worthy of punishment, even if the owner had no intent to harm.[27] It remains more difficult, however, to make a similar claim regarding items like wirecutters. At times, one might claim that possession indicates some form of past criminal activity (e.g., possession of stolen property), but there are many circumstances in which this is not the case.[28]

George Fletcher argues that one might justify such laws under a positivist thesis: "If the law is well-defined and the individual has fair warning of conduct that this is punishable, there is no substantive objection that the individual can make against his falling under the sovereign's power to punish." Yet as Fletcher himself notes, such an approach turns criminal law into a regulatory system, as opposed to a mechanism of punishment for sinister or immoral behavior.[29] Moreover, as Michael Moore writes, "Faced openly, impatience (for future crimes) and inability to prove guilt (for past crimes) are not comfortable rationales for criminalizing conduct. . . . Most crimes of possession perhaps should not be crimes, not because there is no act, but because there is no *wrongful* act being punished."[30]

Be that as it may, possession crimes remain prominent elements of all criminal codes, with many comfortably believing that possession indicates sinister behavior and that the prohibitions remain defensible under a positivist rationale.[31]

27. Fletcher, *Rethinking Criminal Law*, 201.

28. Some scholars seek to distinguish between "blameworthiness" and "wrongdoing" or between "broad" and "narrow" culpability. See, for example, the literature cited in Douglas Husak, "Broad Culpability and the Retributivist Dream," *Ohio State Journal of Criminal Law* 9 (2012): 449-85.

29. Fletcher, *Rethinking Criminal Law*, 204.

30. Moore, *Act and Crime*, 22, emphasis in original.

31. For a summary of the various rationales (and subsequent critiques) offered by scholars like Stuart Green ("Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses," *Emory Law Journal* 46 [1997]: 1533-1546), A.P. Simester and Adreas Von Hirsch (*Crimes, Harms, and Wrongs: On the Principles of Criminalization* [Oxford: Oxford University Press, 2011]), and R.A. Duff (*Answering for Crime* [Oxford: Oxford University Press, 2007]), see

Beyond these fundamental questions, legislators and theorists debate as to how to handle cases of possession in which one can argue that the defendant clearly had no criminal or malicious intent (*mens rea*). For example, does a museum keeper have responsibility for possessing brass knuckles? What about someone who inherits them as an heirloom? Many possession crimes include strict liability provisions, which can hold someone responsible even if they do not have accompanying mental state or criminal intent.[32] This raises a very high bar for the defendant to overcome.

Yet some cases of "involuntary possession" seemingly cannot be punishable. Suppose, for example, that a person is sleeping when someone places controlled drugs in their hands. More complex and frequent cases include situations in which a person does not have full knowledge of the precise nature of the material he owns, has knowledge of the object but not full control over its fate, or has shared control or ownership of the object or property.[33] These cases highlight the complexities of defining possession crimes, even once one has overcome the difficulties in justifying them in theoretical terms.

Goals of the Possession Prohibition: Do We Want to Eradicate *Ḥameẓ* or Regulate It?

With this background in mind, we can appreciate the development of the laws of *bal yeraʾeh bal yimmaṣe*. When examining the Torah's prohibitions regarding *ḥameẓ,* the Sages were confronted with a number

Brennar M. Fissel, "Abstract Risk and the Politics of Criminal Law," *American Criminal Law Review* 51 (Summer 2014): 9-15. For alternative solutions, see Andrew Ashworth and Lucia Zedner, "Prevention and Criminalization: Justification and Limits," *New Criminal Law Review* 1:4 (Fall 2012): 542-71.

32. On strict liability, see the detailed discussion in Dennis J. Baker, *Textbook of Criminal Law* (3rd ed., London: Sweet & Maxwell, 2012), 1267-95.

33. As a sampling of these complex cases, take four examples from recent Israeli case law: 1) The defendant was sent illegal drugs by his friend from overseas through the mail, but never had the object in his hands, since he left the country and allowed his friend to forge his name to collect the object from customs. 2) A thief stole a purse, only to later find inside of it a gun. After being apprehended, he was charged with illegal possession of a weapon. 3) Police seized drugs and drug instruments in a hotel room shared by three men, with one claiming that he had purchased and brought the drugs into the room. Are the other two also liable for possession? 4) Police entered the property of one defendant and found a gun under a jerry can. Surveillance videos reveal that multiple guests knew of the gun and participated in facilitating hiding it under the jerry can.

of questions regarding this prohibition, all of which are familiar from the discourse surrounding possession crimes. The Torah demands that *ḥameẓ* be destroyed (*tashbitu*), yet adds that *ḥameẓ* should not be "seen" or "found" in the two verses in two different types of locations—"houses" and "territory." Are these qualifiers, expansions, or modifications? What is the relationship between the different verses and commandments? One could surmise that the Torah clearly does not want Jews "to have *ḥameẓ* around" during this period, but what exactly does that mean? These ambiguities are the same types of problems that haunt many possession crimes and required clarification to make these severe prohibitions feasible and knowable.

The Sages began to solve these ambiguities by answering a more fundamental question: What is the goal of this prohibition—to rid *ḥameẓ* from the world during these dates or to regulate its possession within Israelite territory or Jewish-owned property? If the goal is the former, then we should even seek to prevent gentiles from possessing *ḥameẓ* over Pesaḥ (at least within the land of Israel), much as the Bible requires with regard to *avodah zarah*.[34] The Sages ultimately rejected that option, as explicitly stated in the Tosefta:

> Initially, they said that one may not sell *ḥameẓ* to a non-Jew, nor give it to him as a gift, unless he could possibly eat it before the time at which all *ḥameẓ* must be destroyed. Until R. Akiva came and taught that one is permitted to sell and give [*ḥameẓ*] as a gift even at the time that it must be destroyed. R. Yosei said: This [the former] is the view of Beit Shammai, whereas the other is the view of Beit Hillel; R. Akiva determined that we should rule in accordance with Beit Hillel.[35]

According to the Tosefta, initially one was required to burn his *ḥameẓ*

34. Many academic scholars claim that laws regarding *avodah zarah* also underwent certain developments. See, for example, Gerald Blidstein, "Nullification of Idolatry in Rabbinic Law," *PAAJR*, 41-42 (1973-1974): 1-44; Ephraim Urbach, "*Hilkhot Avodah Zarah ve-ha-Meẓi'ut ha-Arkiyologit ve-ha-Historit ba-Me'ah ha-Sheniyyah u-ba-Me'ah ha-Shelishit*," *Me-Olamam Shel Ḥakhamim* (*2002*), 125-79; Noam Zohar, "*Avodah Zarah u-Bittulah*," *Sidra* 17 (2002): 63-77; idem, "*Meḥiẓot Saviv Merḥav Ẓibburi Meshutaf*," *Reishit* 1 (2009): 145-64; Moshe Halbertal, "Coexisting with the Enemy: Jews and Pagans in the Mishna," in *Tolerance and Intolerance in Early Judaism and Christianity*, ed. G. Stanton and G. Strounsa (Cambridge: Cambridge University Press, 1988), 158-72; and Yishai Rozen-Zvi, "'*Abbed Te'abbedun et Kol ha-Mekomot:' Ha-Pulmus al Ḥovat Hashmadat Avodah Zarah be-Sifrut ha-Tanna'it*," *Reshit* 1 (2009): 91-116. Further study is required to examine potential parallel developments with the laws of *ḥameẓ*.

35. *Tosefta Pesaḥim* 1:7 (Lieberman ed.).

and could not sell it to a non-Jew as the Pesaḥ eve deadline approached. Similarly, one could not give it to a non-Jew as a gift if the food would not be consumed before the prohibition kicked in. This opinion was attributed to Beit Shammai, who sought to eradicate *ḥameẓ* from the world.[36] The law, under the influence of R. Akiva, came to follow the opinion of Beit Hillel, who ruled that *ḥameẓ* can be sold even at the time required for burning *ḥameẓ*. As such, the commandment demands ridding *ḥameẓ* from Jewish possession, but does not have a problem with that *ḥameẓ* going into the hands of non-Jewish neighbors for the duration of Pesaḥ. In other words, *bal yera'eh bal yimmaẓe* serves to regulate the presence of *ḥameẓ* among Jews during the Pesaḥ holiday, but not to destroy it entirely from the world.

Why did the Sages make this decision? We can only speculate. Although the term *tashbitu* might indicate a requirement to burn *ḥameẓ*, it is a sufficiently ambiguous term that can lend itself to other interpretations, including a more moderate requirement of ridding it from one's possession by any means.[37] In light of our framing of *bal yera'eh bal yimmaẓe* as a possession crime, we might speculate that the rationale behind Beit Hillel's ruling is that since the prohibition only lasts for seven days, it is irrational or unreasonable to eradicate something that is permissible (and sometimes mandated for use) both before and after the holiday. From this perspective, the prohibition of *ḥameẓ* is similar to certain possession crimes that apply only during certain times or areas, such as public festivals or school zones. In those cases, the goal clearly remains to regulate the object, not to rid it from the world.

Additionally, clarifying the goal of a possession crime is always critical because it helps delineate what type of behavior we are seeking to prevent. Perhaps the connection between *ḥameẓ* and *avodah zarah* or the *yeẓer ha-ra* had become somewhat lost, thereby dulling the nefarious impact of *ḥameẓ*. The goal of these commandments became clarified to focus on preventing another prohibition—namely, that of eating *ḥameẓ*.[38] Once the prohibition was defined as a means of preventing

36. See Rashi, *Pesaḥim* 21a, s.v. *ve-lav*; Meiri, *Pesaḥim* 21a, s.v. *u-mukhraḥ*; *Ḥasdei David* to *Tosefta Pesaḥim* 1:7. See also Shama Friedman, *Tosefta Atikta: Pesaḥ Rishon* (Ramat Gan: Bar Ilan University Press, 5763), 138.

37. See Friedman, *Tosefta Atiqta,* 348-51. For parallel discussion regarding *avodah zarah* and the legal process of *bittul*, see Amit Gvaryahu, "A New Reading of the Three Dialogues in Mishnah *Avodah Zarah*," *Jewish Studies Quarterly* 19 (2012): 207-29, p. 221 n. 50.

38. For a discussion of biblical commandments that are understood in rabbinic literature as intended to prevent the violation of other biblical commandments, see R. Yosef

eating *ḥameẓ*, it made sense to exclude *ḥameẓ* that belonged to non-Jews, because there would be no great temptation to eat it.[39] Moreover, pragmatically speaking, the possibility of eliminating all *ḥameẓ* from the entire territory would be a particularly onerous and confrontational task. Once that was not the mission, it was not necessary to prohibit selling Jewish-owned *ḥameẓ* to gentiles before the holiday, which also created an important method for Jews to rid themselves of *ḥameẓ* without the financial loss of destroying it.

Whatever the motivation or rationale, this ruling fundamentally shifted *bal yera'eh bal yimmaẓe* into a "possession sin" for Jews, calling for the regulation of its existence over Pesaḥ. There was no blanket mandate to destroy all *ḥameẓ* within Jewish territory. This naturally raised the question of which *ḥameẓ* could not be "found or seen" during this time period.

The Sages answered this question by addressing various discrepancies between the two verses, including the difference between "seen" and "found," as well as the location of the prohibited *ḥameẓ*. As R. Yehuda Brandes notes, from the plain reading of the text, one might have concluded that *ḥameẓ* must be eradicated from Jewish homes so that it is entirely not found, whether it is visible or otherwise (12:15,19), but can be found in other areas within Jewish territory so long as it is not visible (13:7).[40] The Sages, however, did not accept this possibility, which would further create overly broad distinctions between one's home and national territory and leave open complex cases such as caves, pits, ditches, vaults, and other private or enclosed areas within one's property.[41] Consequently, for most practical purposes, they equated the territory or property on which one cannot see or find *ḥameẓ*.

Engel, *Lekaḥ Tov, Kelal* #8, and R. Chaim Medini, *Sedei Ḥemed, Kelalim Ma'arekhet Aleph, Kelal* #121, and *Pe'at Sadeh, Kelal* #36.

39. This would also indicate that *ḥameẓ* was not seen as representing some ontological evil, but instead was a prohibition based on formal or social rationales. On the broader distinction, see Menachem Kellner, *Maimonides' Confrontation with Mysticism* (Oxford: Littman Library, 2006), and several recent essays of Yair Lorberbaum, including his "Halakhic Realism," *Dinei Israel* 30 (2015): 9-77.

40. Yehuda Brandes, *Madda Toratekha: Pesaḥim*, *Shiur* #6, available online at http://www.bmj.org.il/files/1401374727464.pdf.

41. These in-between locations are explicitly discussed in the key Talmudic passage on *Pesaḥim* 5b. Note as well that in *Beiẓah* 7b, the Sages equated *ḥameẓ* with *se'or* (the two food types prohibited in the Torah), thereby creating one uniform standard for the prohibited food. Despite this hermeneutical move, however, later decisors continued to debate the identity of different forms of *ḥameẓ*—similar to the continued debates regarding ownership, discussed below. For a basic survey of the different positions regarding *ḥameẓ*, see the entry "*Ḥameẓ*" in *Encyclopedia Talmudit*, vol. 16, 57-106.

Defining the Problematic Possession: "Control and Dominion" or "Legal Title"

Through different hermeneutical methods in reconciling these verses, the Sages also offered two different models as to how to understand the prohibition. These two models may be clearly understood by utilizing models from the world of possession crimes. The first model, offered in the *Mekhilta de-Rabbi Yishmael*, prohibits *ḥameẓ* that is in the "control and dominion" of a Jew:

> Why does the verse specify "[no leaven shall be found] in your houses"? Since the [other] verse refers to "in all your territory," I might have thought to understand it literally. The verse therefore specifies, "in your houses"—just as that in your house is in your possession, so too [the prohibition to have *ḥameẓ*] in your territory refers only to that which is in your possession. This excludes the *ḥameẓ* of a Jew that is in the possession of a non-Jew; **although he could burn it, it is not in his domain.** It [also] excludes the *ḥameẓ* of a non-Jew that is in the domain of a Jew and *ḥameẓ* upon which rocks fell; **even though it is in his [the Jew's] domain, he cannot burn it.**[42]

According to the *Mekhilta*, one violates the prohibition only if he has the *ḥameẓ* in his domain (*reshut*) and can control its fate, thereby allowing one to burn it. If Jewish-owned *ḥameẓ* is in the hands of a gentile (i.e., not in the Jew's domain) or is under a pile of rocks (i.e., not within his ability to burn it), or if the *ḥameẓ* is in the domain of a Jew but is owned by a gentile, the Jew is not liable for that *ḥameẓ*.

As we saw in our discussion about possession crimes, the key criterion is not just legal title or actual possession of the bread.[43] Instead, through an act of "constructive possession," one becomes liable for the *ḥameẓ* that one could destroy, as evidenced by it falling within one's control and dominion.[44]

42. *Mekhilta de-Rebbi Yishmael*, *Parashat Bo*, *Massekhta de-Pisḥa*, *Parashah* 10.

43. This point—emphasized by Henschke, "*Ḥameẓ Shel Aḥerim*," throughout his article—was already made by R. Naftali Ẕvi Yehudah Berlin (*Neẓiv*) in his *Haʿamek Sheʾelah* to *Sefer Sheiltot de-Rav Aḥai Gaon*, vol. 2, *Sheʾilta* 78, p. 71. See also his *Haʿamek Davar, Shemot* 12:19, s.v. *lo*. As *Neẓiv* notes, the *Mekhilta*, while oft-quoted by medieval authorities, did not agree with the *Bavli* regarding the nature of the prohibition.

44. Henschke, ibid., argues that many talmudic passages take a similar approach, explicit or otherwise. Accordingly, the key factor is whether a person can control the destiny of the *ḥameẓ* in order to burn it. It should be noted that there is no reason to assume that this ruling disagrees with the opinion in the *Tosefta* (1:7) regarding sell-

In contrast, building off the biblical word "yours" (*lekha*), the *Bavli* requires legal ownership over the *ḥameẓ* in order to violate the prohibition:

> The Sages taught: "No leaven shall be found in your houses for seven days"—What does this teach us? Did not the verse already state, "No leaven bread shall be found with you, and no leaven shall be found in all your territory"? Because when the verse states, "No leaven bread shall be seen with you (*lekha*)," it teaches that you may not see your own, but you may see that of others or that of the sanctuary. [45]

According to this approach, the sin cannot be violated unless one has legal possession of the *ḥameẓ*. As such, *ḥameẓ* that belongs to a non-Jew[46] or the sanctuary cannot generate a violation of the law.[47] In the *Bavli*, the Sages reject the model of "dominion and control" and require legal ownership for this prohibition, thereby raising the bar for violating this possession sin. This became the dominant position within normative Jewish law, although as we shall see, the *Mekhilta*'s position remained under consideration by some later scholars.

Accordingly, Jewish law developed in a more lenient direction regarding these prohibitions, asserting that one has no liability for *ḥameẓ* owned by a non-Jew and that a Jew can violate the prohi-

ing *ḥameẓ* to a non-Jew before the prohibition takes effect. In that case, the *Tosefta* is permitting one to get rid of liability by selling the *ḥameẓ* and giving full ownership and control to the non-Jew. In the case of the *Mekhilta*, the non-Jew has placed the *ḥameẓ* in the Jew's domain, thereby imposing responsibility on the Jew to get rid of it (even though he doesn't own it), unless the Jew cannot control the *ḥameẓ*'s fate because it is under the avalanche.

45. *Pesaḥim* 5b, emphasis added.

46. See Haim Y. Levine, *Meḥkarim bi-Mekhilta u-be-Mishnah Pesaḥim u-Bava Kamma* (Tel Aviv: Dvir, 1987), 76-101.

47. If ownership is required to violate these prohibitions, then maintaining ownerless (*hefker*) *ḥameẓ* in one's possession would seemingly not be prohibited. This is asserted by Tosafot, *Pesaḥim* 4b, s.v. *de-oraita*, and is seemingly assumed to be true by many medieval scholars who maintained that the concept of *bittul ḥameẓ* makes one's *ḥameẓ* officially ownerless. See, for example, Tosafot, *Pesaḥim* 2a, s.v. *mi-de-oraita*, and the entry on *bittul ḥameẓ* in the *Enẓiklopedyah Talmudit*. This would also seem to be the position stated in the *Yerushalmi Pesaḥim* 2:2, but see the arguments of Henschke, "*Ḥameẓ Shel Aḥerim*," 183-88. It should be noted that *Neẓiv* (*Haʿamek Davar,* Ex. 12:19, s.v. *ki*) also believes that this is the law, even as he expresses bewilderment that this should be the case given that the Torah seemingly states that the prohibition of ownership is meant to prevent consumption. As such, unlike *ḥameẓ* owned by non-Jews or the *Mikdash*, ownerless *ḥameẓ* should be prohibited because someone could be easily tempted to eat it. Nonetheless, he states that this is a case in which "accepted tradition" trumps the stated rationale of the law.

bition only if he owns the *ḥameẓ*. Why did the law develop in this direction? It is nearly impossible to give a definitive explanation.[48] In light of our analysis of possession crimes, however, one may suggest that these changes, in effect if not in intent, helped remove some of the over-reaching implications of possession crimes that make them problematic to many contemporary critics. If Jews were to have responsibility to destroy *ḥameẓ* that they do not own, this would lead to an incredibly low standard for culpability. These changes helped make the prohibitions more limited and more objective. Moreover, the model of legal ownership favored in the *Bavli* is much easier to define than "control and dominion" or forms of liability that stem from "constructive possession."[49]

That said, it remains clear that even with these important developments, the prohibitions of *bal yera'eh bal yimmaẓe* still required delineation. As with possession crimes, many questions emerge in ambiguous or multi-faceted cases of ownership. Some of these complex cases appear in talmudic literature, while others are discussed by medieval commentators. Furthermore, under the influence of the *Mekhilta* and the desire to harmonize the different sources, many medieval scholars discussed whether "control and dominion" might still be relevant to violating these commandments. In retrospect, these debates can be seen as practically inevitable in light of the status of *bal yera'eh bal yimmaẓe* as a possession sin. As noted above, possession crimes inevitably raise difficult questions of definition that require clear elucidation to avoid unfair expectations, and as we shall see, Jewish law was full of debates that aimed to define the parameters of the prohibition in a clear manner.

48. Gilat (*Perakim be-Hishtalshelut ha-Halakhah*, 140, n. 21), following a statement of Ephraim Urbach, speculates that this was necessary for socio-economic reasons, as Jews had greater interaction with gentiles in the Tannaitic period. Henschke ("*Ḥameẓ Shel Aḥerim*," 202, n. 143) rejects this interpretation, in part because he believes the shift in law took place at a later date. Ultimately, however, it is difficult to answer such questions.

49. It should be noted, however, that by adopting the ownership model, Jewish law created many situations in which *ḥameẓ* could be prohibited even though there was no fear of consuming it. For example, a Jew living in Israel is culpable for the *ḥameẓ* being used in his factory in China, even though he has absolutely no access to it. Conversely, as noted by *Neẓiv* (n. 42 above), Halakhah also allows for Jews to retain "ownerless" (*hefker*) *ḥameẓ*, even though one could easily eat such food.

"Possessory Liability of *Ḥameẓ*": Gentile-Owned *Ḥameẓ* Deposited with a Jew

One important question, already posed in the Talmud, is whether a Jew has any responsibility for *ḥameẓ* deposited with him by a gentile. On the one hand, in the case, the Jew has no legal title over the object; on the other hand, the object was knowingly placed in his domain.[50] This problem, as discussed above, is a classic question when it comes to possession crimes, as in cases of drugs or contraband belonging to a friend who enters one's property with one's knowledge or hides the prohibited items on one's premises.

The Talmud answers that *ḥameẓ* in the gentile's hand on a Jew's property does not make the Jew liable, but culpability can occur if the Jew accepts financial responsibility or liability (*aḥarayut*) as a guardian or bailee for the *ḥameẓ*. If the Jew accepted liability, this is sufficient to achieve "possessory liability," and he violates the prohibitions; if not, he bears no culpability for the *ḥameẓ*, even though it remains on his property. The Talmud adds that this position is even held by those who generally maintain that legal responsibility to compensate for losses does not give the bailee the status as an owner, since the verse with regard to *ḥameẓ*, "And it shall not be found" (*"lo yimmaẓe*"), generates stricter standards to create "possessory liability." As such, the fact that a non-Jew has brought *ḥameẓ* onto a Jew's property does not make the Jew liable for this prohibition, removing one concern regularly leveled against possession crimes. However, a person can be liable if he has financial responsibilities for the *ḥameẓ*.[51]

50. See below for a discussion regarding *ḥameẓ* that a person is not aware is on his property.

51. Medieval commentators debated what standard of legal responsibility for a non-Jew's *ḥameẓ* is necessary to violate *bal yera'eh bal yimmaẓe*. (The various opinions are all recorded in *Meiri, Bet ha-Beḥirah, Pesaḥim* 5b, s.v. *ve-yesh mi*.) Some argued that one must have full responsibility for any loss, even in the case of an unavoidable accident (*ones*), as is the case when one borrows an object (*sho'el*). This argument seems to contend that once the person has this level of responsibility, it is the equivalent to his becoming the owner of the object (*Tosafot, Bava Meẓi'a* 82b, s.v. *eimur*). In contrast, a second position asserts that one has sufficient responsibility to violate the prohibition of *ḥameẓ* as long as he has the basic responsibility of an unpaid guardian (*shomer ḥinam*), who is only liable to recompense the owner in case of negligence. This approach asserts that as long as one has a minimal legal connection to the object, he bears responsibility for it, and would therefore only be exempt from punishment if the non-Jewish owner remained on the premises with the *ḥameẓ*. This approach would

As noted above, scholars debate the appropriateness of deeming citizens culpable for "strict" liability, with many arguing that one cannot hold someone liable for a crime that he had no intent to commit.[52] This debate takes place in halakhic sources as well. Maimonides rules that even if the gentile forcibly placed the *ḥameẓ* on the Jew's property and would make the Jew compensate him if it were to be lost or stolen, the Jew would still violate *bal yera'eh bal yimmaẓe*.[53] In other words, despite the fact that one had no desire to have this *ḥameẓ* on his property or assume financial liability, he is nonetheless culpable. Maimonides seemingly draws this conclusion from the talmudic tale regarding the town of Maḥoza, in which non-Jewish soldiers deposited *ḥameẓ* in the homes of Jewish residents. The sage Rava made the Jews remove the *ḥameẓ* from their homes, since they would pay if the objects were lost or stolen. As he asserted: "Since if it becomes stolen or lost, it is [considered] in your possession and you would need to pay, as if it was yours; therefore it is forbidden [to keep it in your homes]."[54] This position was ultimately adopted in Jewish law by R. Yosef Karo.[55]

Yet many medieval scholars strongly object to any notion of forced liability. They assert that culpability for the *ḥameẓ* can only occur when one freely accepted legal responsibilities for the objects in their home. To address the case of Maḥoza, Rabad of Posquieres interprets the story as being a case of willful guardianship, in which the Jews could easily return the *ḥameẓ* to the soldiers before Pesaḥ.[56] R. Menachem ha-Meiri offers a fascinating alternative explanation.[57] He posits that the situation was a case in which local law required Jews to provide food to the soldiers. Since the Jews would need to provide their quota even if

weaken the requirement of legal ownership, but still fall short of creating "constructive possession." A third position contends that the Jew is responsible only if he has the liabilities shared by a paid bailee (*shomer sakhar*), who pays for damages in cases of theft or loss. Accordingly, we do not construct legal possession unless a person has accepted significant responsibility. The last two positions are quoted in Rosh, *Pesaḥim* 1:4. The position requiring liability in case of loss or theft (*shomer sakhar*) might find support in the story regarding Meḥoza, discussed below. Although the decisors disagreed regarding the exact standard, they continued to affirm that one requires financial responsibility in order to create "possessory liability." For further discussion, see R. Elḥanan Wasserman, *Koveẓ Shi'urim* (Jerusalem: n.p., 5719), vol. 1, *Pesaḥim*, 11-14.

52. This issue is discussed further in our discussion below regarding "mere possession."

53. *Mishneh Torah*, *Hilkhot Ḥameẓ u-Maẓẓah* 4:4.

54. *Pesaḥim* 5b.

55. *Shulḥan Arukh,* O*Ḥ* 440:1.

56. Glosses to *Mishneh Torah, Hilkhot Ḥameẓ u-Maẓẓah* 4:4.

57. *Beit ha-Beḥirah*, *Pesaḥim* 5b, s.v. *kabbalat*.

the *ḥameẓ* were lost or stolen, the *ḥameẓ* remained under the legal possession of the Jews, and they therefore had to act accordingly before Pesaḥ. According to Meiri, we must distinguish between two different types of compulsion—that imposed by physical force and that mandated by local law. In the latter case, one bears culpability for *bal yera'eh bal yimmaẓe* even though his possession (i.e., financial liability) was imposed against his will.[58] Meiri thus endorses something similar to the positivist approach later suggested by George Fletcher regarding possession crimes: If the regulation is clear and well-known, one is culpable for not following the law.

Significantly, scholars debated whether to allow for certain leniencies in "disposing" of *ḥameẓ* for which one bears financial liability. Meiri, for example, suggests that one could simply remove that *ḥameẓ* from inside his home and then return it after the holiday.[59] While this suggestion did not receive much traction in halakhic literature, other authorities debate whether we might allow someone to perform the *bittul* ("nullification") rite to prevent any liability for *ḥameẓ*.[60] Many authorities demur, contending that this rite requires full legal title over the object; the "possession liability" created by legal responsibility might create culpability for *ḥameẓ* possession, but does not empower one to nullify the *ḥameẓ*. Others, however, argue that if we create culpability for *ḥameẓ* ownership through financial connection, we must then also afford the same leniencies of ownership, including the ability to perform *bittul*.[61] Clearly, rabbinic scholars struggled with this category, recognizing the complexity of imposing legal responsibility for possession

58. This position was adopted by later authorities; see *Sha'ar ha-Ẓiyyun* 440:22.

59. *Beit ha-Beḥirah, Pesaḥim* 5b, s.v. *kabbalat*.

60. *Bittul* is a form of legal renunciation that eliminates legal culpability by declaring the *ḥameẓ* to be ownerless or like the dust of the earth. See the entry on *bittul ḥameẓ* in *Encyclopedia Talmudit*, vol. 3, 83-86. The unique role of *bittul ḥameẓ* to avoid these violations requires further thought in light of our understanding of *bal yera'eh bal yimmaẓe* as a possession sin. For one perspective on the development of this concept, see R. David Bigman, "*Hashbatat Ḥameẓ—Bittul ba-Lev* or *Bi'ur ba-Esh*?," *Ma'agalim* 4 (5765): 10-26.

61. There is a similar discussion with regard to the traditional fine imposed by Sages that forbids consumption of *ḥameẓ* illegally owned over the holiday (*ḥameẓ she-avar alav ha-Pesaḥ*). Some decisors contend that since a person had culpability for *ḥameẓ* for which they had financial responsibility, we must impose the fine in this case as well. Others, however, maintain that this fine was never imposed on *ḥameẓ* that is not completely owned (i.e., legal title) by a Jew. See the discussion in *Mishnah Berurah* 440:5 and the sources cited in *Sha'ar ha-Ẓiyun* 440:12. This is especially true in the case of possession imposed by physical force.

of *ḥameẓ* that a person does not truly own. As with possession crimes, the stricter standards of *ḥameẓ* ownership created by "possession liability" create complex legal dilemmas regarding the outlets we create for potential transgressors to avoid these violations.

Can One Receive Punishment for Violating *Bal Yera'eh Bal Yimmaẓe*?

As noted above, legal scholars question how a person may be punished for possession crimes if he has not committed an action. This question, in fact, also animated the Sages and subsequent halakhists, albeit not exclusively around *bal yera'eh bal yimmaẓe*. The Sages debate whether one could receive lashes for a *lav she-ein bo ma'aseh*, a prohibition that does not include any action, with the majority opinion contending that we do not punish someone if he did not perform an action.[62] Accordingly, the *Tosefta* notes that a person who keeps previously-possessed *ḥameẓ* in his control over the holiday does not receive lashes, as he has not performed any action.[63] As both Maimonides[64] and R. Yonatan Eybeschutz[65] argue, the apparent reason for not punishing a person for such crimes is that the damage done is minimal, making them insufficiently culpable for punishment. This reasoning, of course, recalls the claims of many thinkers who contend that in many cases, people who violate possession crimes have not done a sufficiently wrongful act worthy of punishment. Nonetheless, it should be noted that Maimonides does claim that if one actively purchases *ḥameẓ* during Pesaḥ, he has committed a forbidden action and does receive lashes. Moreover, he further claims that even in cases of merely retaining *ḥameẓ*, the violator would still receive a disciplinary flogging administered under Rabbinic authority

62. *Temurah* 3a, 4b; see also *Makkot* 16a and *Shevuot* 21a. As noted in these passages, there are a few exceptions to this rule.
63. *Tosefta Makkot* 4:5.
64. Maimonides writes in *The Guide for the Perplexed* (3:41) that we do not administer punishments in these cases, because transgressions "in which there is no action can only result in little damage, and it is also impossible not to commit them, for they consist in words only. If their perpetrators were punished, people would have their backs flogged all the time. Moreover, a warning with regard to them cannot be conceived." See *The Guide of the Perplexed*, vol. 2, trans. Shlomo Pines (Chicago: University of Chicago Press, 1963), 561. Admittedly, the focus of Maimonides is on transgression committed via verbal statements, but the category and some of the rationales would also extend to our case.
65. *Tumim*, ḤM 34:1.

(*makkot mardut*).[66] The topic of *lav she-ein bo maʿaseh* is beyond the scope of this paper, but it clearly invokes parallel discourse regarding *actus reus* and possession crimes and requires further study.[67]

Does a Jew Have Liability for Possession of *Ḥameẓ* of Another Jew?

As noted above, according to the *Mekhilta*, the key criterion for culpability is that the *ḥameẓ* is found within the "control and domain" of a Jew. This criterion is seemingly rejected by the *Bavli*, which requires ownership for culpability. Nonetheless, a number of *Geʾonim* contend that "control and dominion" remains a mitigating factor for violating *bal yeraʾeh bal yimmaẓe*.[68] That is to say, if a Jew owns *ḥameẓ*, yet deposits

66. *Mishneh Torah*, *Hilkhot Ḥameẓ u-Maẓẓah* 1:3. See also the glosses of Rabbenu Manoaḥ. The notion of applying *makkot mardut* in such cases seemingly comes from *Ḥullin* 141b. Regarding *makkot mardut* in general, see *Ḥiddushei ha-Ritva*, *Ketubot* 45b, s.v. *lokeh makkot mardut*; *Mishneh Torah*, *Hilkhot Sanhedrin* 26:5; and R. Yosef ben Meir Teumim (author of *Peri Megadim*), *Shoshanat ha-Amakim*, *Kelal* #9, pp. 61-63.

67. This study would initially distinguish between the different types of transgressions included in a *lav she-ein bo maʿaseh*, including speech acts, internal thoughts, and other possession crimes. The two closest possession crimes that I have identified are possessing idols in one's property and possession of defective weights and measures. For the former, see Maimonides, *Book of Commandments*, Negative Commandment #3. For the latter, see Deut. 25:13-14; *Tosefta Bava Batra* 5:8; *Bava Batra* 89b; Maimonides, *Mishneh Torah*, *Hilkhot Geneivah* 7:3; and *Shulḥan Arukh*, ḤM 231:3. For further discussion, see Nachum Rakover, *Ha-Mishor be-Mishpat ha-Ivri* (Jerusalem, 1987), 23-24 and 45-49. Regarding all three examples, see the discussion in R. Yeḥezkel Abramsky, *Tosefta Ḥazon Yeḥezkel: Nezikin*, vol. 2 (Jerusalem, 5746), commentary to *Makkot* 4:5, pp. 51-54. Other examples of possession crimes discussed in Talmudic law, albeit of a slightly different nature, include retaining sham promissory notes (*shetar amanah*), paid-up loan documents (*shetar parua*), and a Torah scroll that has writing errors (*sefer she-eino mugah*). These cases are discussed in *Ketubbot* 19b; *Shulḥan Arukh*, ḤM 57:1, and *Shulḥan Arukh,* YD 279:1.

68. Cited in Rosh*, Pesaḥim* 1:4. R. Ḥezekiah de Silva, *Peri Ḥadash*, OḤ 440:4, asserts that the *Geʾonim* believe this to be true only in a case in which the holder of the *ḥameẓ* has accepted legal responsibility, as indicated in the text of the Rosh. He asserts that this is because the guardian has, as it were, accepted ownership for purposes of culpability for *bal yeraʾeh bal yimmaẓe*. R. Aryeh Leib Ginzburg, *Shuʾt Shaʾagat Aryeh* #83, however, contends that these *Geʾonim* believe that the owner loses culpability once the object is out of his control, even if the holder did not accept *aḥarayut*. Accordingly, these *Geʾonim* would assert that ownership is an insufficient criterion for culpability; one must have both ownership and control. R. Yaakov Lorberbaum of Lissa, in his *Mekor Ḥayyim*, OḤ 440:5, asserts that according to this position, in the case of a non-Jewish holder, there is no need for legal responsibility; in the case of a Jewish holder, culpability would be contingent on the holder accepting financial liability.

it under the guardianship (i.e., with financial responsibility) of a Jew or non-Jew, he then loses any culpability for *bal yera'eh bal yimmaẓe*. The vast majority of commentators, however, reject this opinion and argue that the Jew with legal title over the *ḥameẓ* retains full culpability for this *ḥameẓ*, at least under the rules of rabbinic decree.[69]

But what is the responsibility of the Jew who has the *ḥameẓ* of another Jew within his property or control? We previously discussed the case of a Jew having in his possession the *ḥameẓ* of a non-Jew. What about if he controls the *ḥameẓ* of fellow Jew? If he accepted financial liability (*acharayut*), we could certainly understand how he could violate *bal yera'eh bal yimmaẓe*, as we saw in the previous section.[70] But what about a case in which he did not accept any responsibility? In such a case, he has neither legal title nor any financial responsibility, and it therefore seems particularly difficult to impose any culpability. This, in fact, is the position of R. Yoel Sirkes and R. Avraham Gombiner:[71] The deposit holder (*ha-nifkad*) should get rid of the *ḥameẓ* to prevent

69. See the opinions of Rabbenu Asher and Rabbenu Yonah cited in Rosh, *Pesaḥim* 1:4. See also *Tosafot ha-Rid, Pesaḥim* 6a, s.v. *u-le-meimera*. This is also seemingly the opinion of Rambam, *Mishneh Torah*, *Hilkhot Ḥameẓ u-Maẓẓah* 4:2, as noted by *Maggid Mishnah* 4:1 and Rabbenu Nissim (cited below), and the normative ruling found in *Shulḥan Arukh,* OḤ 440:4. Significantly, Ramban (Commentary to Torah, Ex. 12:19), Rabbenu Nissim (*Ḥiddushei ha-Ran, Pesaḥim* 6a, s.v. *u-mihu*), Meiri (*Bet ha-Beḥirah* 4a, s.v. *ve-kol*), and Maharam Ḥalva (*Pesaḥim* 6a) all believe that this is only according to rabbinic decree. This is significant because according to them, Torah law adopts the standards of both the *Mekhilta* and the *Bavli*—i.e., a person must hold legal title *and* have the *ḥameẓ* under his "control and dominion" in order to violate *bal year'eh bal yimmaẓe*. Yet they contend that the Sages asserted that legal title is sufficient to require the person to get rid of the *ḥameẓ*. Ultimately, however, the resulting law is the same. See *Arukh ha-Shulḥan,* OḤ 440:7.

70. See the text of the *Shulḥan Arukh* found in the *Be'er ha-Golah* to OḤ 440:4 and the comments of R. Yeḥezkel Landau, *Tzelaḥ, Pesaḥim* 5b, s.v. *ve-hineh im ha-mafkid*. This is also the ruling in the *Mishnah Berurah* 443:20, citing a series of scholars. It should be noted that R. Mordekhai Jaffe (*Levush,* OḤ 440:4) maintains that the holder is not liable in the case of a Jewish owner, even if he has accepted financial liability. He seemingly believes that since the owner had the primary responsibility to destroy the *ḥameẓ*, the deposit holder cannot bear any culpability. However, in the case of a non-Jewish owner of the *ḥameẓ,* the deposit holder takes on primary responsibility (since the gentile has no obligation) and therefore can be culpable for violating *bal yera'eh bal yimmaẓe*. Nonetheless, R. Jaffe agrees that even in the case of a Jewish owner, the deposit holder should sell the *ḥameẓ* to prevent his fellow Jew from a financial loss or from violating the prohibition; see *Levush*, OḤ 443:2. The position of R. Jaffe was challenged by R. Landau and others.

71. *Baḥ*, OḤ 443:5; *Magen Avraham,* OḤ 443:5. *Mishnah Berurah* 443:14 cites this opinion approvingly, even as he also cites the opinion of the Vilna Gaon noted below.

the owner from violating the law, but he himself has no culpability for violating *bal yera'eh bal yimmaẓe*. Interestingly, however, the Vilna Gaon contends that even the deposit holder is responsible.[72] As noted by R. Yehoshua Falk, this position seemingly adopts the approach of the *Mekhilta* that a Jew who has "control and dominion" over Jewish-owned *ḥameẓ* must seek to destroy it, even if he does not have any ownership or legal responsibility for that property.[73]

How can we explain these conflicting trends? On the one hand, it seems clear that the dominant position within normative Jewish law affirms that legal ownership is required to violate these prohibitions, even though that definition is expanded to include financial responsibility ("possession liability"). At the same time, under the influence of the *Mekhilta*, it is not surprising that a few scholars attempted to expand these prohibitions to include "dominion and control" over Jewish-owned *ḥameẓ*. Given the nature of possession crimes and the tendency to make people liable for objects to which they do not have actual possession, the continued presence of this strand of thought makes perfect sense. That said, it remains clear that legal ownership remains the gold standard to violate these prohibitions. This criterion, however, leads to several ambiguous circumstances that are also disputed within legal discussions of possession crimes.

Undesired Possession of *Ḥameẓ*

"*Mere Possession:*"[74] How aware must the defendant be of possessing something illegal? This question is a major issue in legal theory regarding cases in which one doesn't know what he possesses. The British House of Lords, for example, has asserted that to be convicted of a possession crime, one must have some basic awareness of the object.

72. *Be'ur ha-GRA* 443:11.

73. *Penei Yehoshua, Pesaḥim* 5b, s.v. *be-ferush Rashi* and *lefi she-ne'emar*. This opinion is based on a questionable interpretation of a statement by Rashi. Yet independent of Rashi's actual opinion, this position might be shared by many other medieval figures; see Henschke, "*Ḥameẓ Shel Aḥerim*," 164, nn.25-26. To be clear, according to all opinions, the owner of the property should try to get rid of the *ḥameẓ*, but it remains significant whether failure to do so is a violation of possessing *ḥameẓ*, or just the general law that mandates helping a fellow Jew from avoiding sin (*lifnei iver*).

74. For use of this term, see Joel Samaha, *Criminal Law*, 11th edition (Belmont, CA: Wadsworth, 2014), 116. He gives the example of agreeing to hold your friend's backpack without knowing that it contains stolen money.

This is in consonance with the general principle of *animus possidendi*, the intention to possess, which asserts there must be a mental element involved in the act of possession. Yet as many have noted, this awareness can be extremely tenuous, such as simply knowing that one has taken possession of "something," without even knowing the identity of the object. Jurists further debate whether or not one is liable if he should have suspected some illegal substance might be there. For example, in an Irish case, *The People v. Boyle*, the court convicted the defendant for the use of drugs by others within his property, even though there was no evidence he had actual possession or control of the drugs, because it was apparent to the court that the drugs "could not have come and remained there without his knowledge and at least tacit, in the sense of passive, consent."[75] In contrast, in a British case, *R v. Lewis*, a tenant of a house where drugs were found was acquitted because there was no reason for the defendant to suspect that someone might have put drugs in his house.[76] The court ruled we cannot hold him liable for not looking for drugs that he has no reason to suspect exist.

Not surprisingly, a similar discussion takes place within halakhic literature regarding the requisite knowledge necessary to violate *bal yera'eh bal yimmaẓe*. Some scholars assert that one cannot be held liable if he doesn't know where the *ḥameẓ* is currently found; others distinguish between cases in which one knew of its existence but forgot and cases in which one never realized he ever had the *ḥameẓ* in his home. A third position maintains that since one should have performed *bittul ḥameẓ*, his failure to do so makes him liable for any *ḥameẓ*, even that which he didn't know about. A fourth position contends that it depends whether one checked his house for *ḥameẓ* before the holiday began. If he was negligent and did not, he is held liable for all *ḥameẓ*, even that which he knew nothing about.[77] In short, Jewish decisors were greatly divided over the requisite knowledge necessary to violate *bal yera'eh bal yimmaẓe*, just as we find regarding possession crimes.

75. [2010] 1 I.R. 787.

76. (1988) 87 Cr. App. R. 270. These cases are discussed in Dennis J. Baker, *Glanville Williams' Textbook of Criminal Law*, 3rd Edition (London: Sweet & Maxwell, 2012), 1291-92.

77. For relevant sources, see *Tosafot, Pesaḥim* 21a, s.v. *ve-i*; Rambam, *Mishneh Torah, Hilkhot Ḥameẓ u-Maẓẓah* 3:8; *Magen Avraham*, OḤ 434:5; *Taz,* OḤ 434:3; *Shulḥan Arukh ha-Rav*, OḤ, *Kuntres Aḥaron* 433:3. The sources are summarized in *Enẓiklopedyah Talmudit*, 3:311.

"Fleeting Possession" Exception:[78] If one comes into possession of a contraband object, does he have a reasonable amount of time to purge himself of the object? Many legal systems allow for one to rid himself of the prohibited object within a very short time frame. In *People v. Mijares*, for example, the California Supreme Court overturned a conviction of a defendant who had briefly grabbed heroin out of the pockets of an unconscious friend and threw it out of the window before driving him to a hospital. In this case, the court ruled that it was wrong to convict possession that was taken solely for the purpose of disposal. According to the British *Misuse of Drugs Act* 1971, a defendant can be acquitted of possession if he "took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person."[79] Fleeting possession exceptions contend that brief possession with no intent to keep the object should not be punishable.

Two interesting parallels exist within the laws of *ḥameẓ*. The first relates to the scenario of one who finds *ḥameẓ* during the course of the holiday.[80] Jewish law instructs him to remove or destroy it immediately; if he delays, he could be held liable for possession.[81] If the incident occurs on *Yom Tov* and he cannot burn or handle the *ḥameẓ*, then he must at least cover it with a utensil. The "fleeting possession" exemption, however, is only maintained if he quickly acts to destroy the *ḥameẓ*. Otherwise, he can violate the prohibition in those brief moments, even if he later decides to destroy it.[82]

A second fascinating case is discussed in the Mishnah.[83] A person is preparing dough on Pesaḥ, which normally would have a portion (*ḥallah*) removed to be given to the *Kohanim* (priests). For various reasons related to the complex laws of ritual impurity (*tumʾah*) and cooking on festivals, one can find oneself in a situation in which she cannot give the

78. For use of this term, see Matthew Lippman, *Contemporary Criminal Law* (3rd ed., Thousand Oaks, CA: SAGE Publications, 2013), 130.
79. Section 5(4).
80. The case is discussed in *Pesaḥim* 6a and *Tur/Shulḥan Arukh,* OḤ 446:1.
81. For *ḥameẓ* found that was previously his, he might also avoid culpability if he had performed *bittul ḥameẓ* beforehand. This, in fact, is a primary reason given by some medieval authorities for why *bittul* is mandated even when one's property has been searched for *ḥameẓ* (*bedikat ḥameẓ*).
82. See *Pesaḥim* 6b; Rashi ad loc., s.v. *ve-daʿato aleha*; Ran, *Pesaḥim* 1a in Rif's pages, s.v. *ela*; *Mishnah Berurah* 434:6.
83. *Pesaḥim* 46b.

portion to a *Kohen*, bake it to prevent it from becoming *ḥameẓ*, or burn it. What should she do in such a scenario? According to R. Eliezer and Benei Beteirah, she must take certain preventative measures to prevent the dough from becoming *ḥameẓ*. According to R. Yehuda, however, she simply sets it aside until the holiday has finished. As he states: "This is not the *ḥameẓ* concerning which we are warned, 'It should not be seen' and 'It shall not be found.' Rather, she separates it and sets it aside until the evening—and if it leavens, it leavens." The Talmud,[84] as well as a parallel text in the Tosefta,[85] base this disagreement on complex rules relating to whether one has financial ownership of such *ḥallah* or if one has responsibility for *ḥameẓ* that one is legally prevented from destroying. Without getting into the complexities of the case, it is a fascinating example of a situation in which one would like to make this a "fleeting possession," but is legally prevented from doing so.[86] Should the person still be held liable?

Other Cases of Parallel Discussions

There are many other interesting parallel cases between possession crimes and *ḥameẓ*. While beyond the scope of this paper, it is worthwhile to note some of these cases.

1) *Inheritance*: Regarding possession crimes, the problem of inheriting firearms is a complex matter, particularly in cases in which the deceased did not have a proper gun license and/or the inheritor is not licensed to own that type of gun.[87] Regarding *ḥameẓ,* two prominent eighteenth-century scholars, R. Yeḥezkel Landau and R. Yaakov Lorberbaum,[88] passionately disagree regarding whether a person could violate *bal yera'eh bal yimmaẓe* if he inherited (illegally-owned) *ḥameẓ* during the course of Pesaḥ.

84. Ibid. 48a.
85. *Pesaḥim* 3:7 (Lieberman ed.).
86. For a unique interpretation of this passage, see Henschke, "*Ḥameẓ Shel Aḥerim*," 158-64.
87. See, for example, the regulations and warnings of the Royal Canadian Mountain Police, "Inherited Firearms," available online at http://www.rcmp-grc.gc.ca/cfp-pcaf/faq/inh-her-eng.htm (accessed July 20, 2020).
88. See Landau, *Shu"t Noda bi-Yehudah, Kamma,* OḤ 20; Lorberbaum, *Mekor Ḥayyim*, *Be'urim,* OḤ 448:9. R. Landau and R. Lorberbaum also disagree regarding whether someone who has had his *ḥameẓ* stolen from him is still liable for *bal yera'eh bal yimmaẓe* if he has not despaired of having the *ḥameẓ* returned to them.

2) *Possession of Stolen Property*: Similar discussions exist regarding stolen property, albeit under the different paradigms of "financial liability" and "dominion and control." Western courts regularly find thieves liable for possessing stolen contraband or drugs, since they control the fate of these objects. Jewish law also holds thieves culpable for stealing *ḥameẓ*, since they have financial liability for the stolen property.[89]

3) *Shared Ownership or Responsibility*: Because "dominion and control" is such a dominant element of possession crimes, the problem of shared possession is particularly complex, as it remains difficult to determine who truly has control over an object's fate.[90] Since Jewish law has adopted an approach of legal title or financial responsibility for *ḥameẓ*, cases of partnerships are somewhat easier to clarify, even as a rich literature exists on the topics of partnerships with non-Jews, owning stocks in companies that possess *ḥameẓ*, and Jewish-owned insurance companies that provide coverage for *ḥameẓ* property.[91]

Methodological Conclusions

In this paper, we have suggested that talmudic and subsequent legal discussions regarding *bal yera'eh bal yimmaẓe* may be best understood under the analytical framework provided in possession crime literature. With these tools, we have understood how the Sages turned these prohibitions into a possession sin and then struggled with how to define the nature and scope of these violations. The parallels within the world of criminal law have further provided a framework for understanding the complex debates that take place regarding the details of these laws.

As one of the few "possession sins" in Jewish law, *bal yera'eh bal yimmaẓe* presents unique conceptual challenges, but by borrowing terms and concepts from criminal law, we can shed new light on these prominent prohibitions. In this regard, the paper also presents a new direction in using concepts from the general world of legal philosophy and applying them to halakhic research in unexpected places.

89. See, for example, *Shu"t Noda bi-Yehudah, Kamma,* OḤ 20; R. Ḥezekiah de Silva, *Peri Ḥadash* 448. More sources are cited in *Enẓiklopedyah Talmudit* 3:310.

90. See the discussion in S.Z. Fuller, *Yesodot Dinei Oneshin* (Jerusalem: Hebrew University Law School, 1992), 3: 121-40.

91. For a summary of the relevant responsa, see R. Simḥah Rabinowitz, *Sefer Piskei Teshuvot*, vol. 5 (Jerusalem, 5755), 22-24. See also Asher Meir, "Owning Stock in a Company which Possesses *Ḥameẓ* During Pesach," *Virtual Beit Midrash*, accessible online at https://www.etzion.org.il/en/owning-stock-company-which-possesses (accessed on July 20, 2020).