

Text Immersion in *Choshen Mishpat*

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Abstract

I believe that the task of a Reform rabbi is to uncover the relevance of Jewish tradition as it applies today and to enable contemporary Jews to see its value and resonance in their lives. One of my passions is to study *halakhah* and find ways that it can inform our actions and enrich our daily lives as liberal Jews. This course of study has been particularly poignant in the current political moment, which is rife with instability, animosity, and aggression at all levels of society. For these reasons, I have studied six sections of *Choshen Mishpat*, the area of *halakhah* that outlines civil law and the creation of a just and holy society. I have also designed a curriculum for the Reform rabbi in this area of *halakhah*, specifically in *Hilkhhot Dayyaim* (“Laws of Judges”). My goal is to ensure that Reform rabbis are equipped with the fundamentals in this area of *halakhah* so that they are in a better position to provide answers from a Jewish perspective to questions like the following: How do we ensure stability and fairness in our judicial system for all members of society? How do we resolve disputes with our neighbors? How do we promote equality in our economic system? My hope is that knowledge of these texts will serve as tools for Reform rabbis in their ongoing efforts to navigate through these challenging and volatile political times.

Chapter I

Introduction: Text Immersion in *Choshen Mishpat*

Overview

According to Jacob ben Asher (1269-1343), codifier of the legal compilation entitled the *Arba'ah Turim*¹ (“Four Rows”), Jewish civil society faced a serious crisis. In his introduction to *Choshen Mishpat*, the fourth part of this legal compilation which addresses issues of civil and criminal law, he describes an idealized past where “countless courts”² meted true justice and fairness throughout the land of Israel. He then describes the sad situation in his own day where all of the righteousness of the past had been undone. He writes: “There are no justices; there are no magistrates. There are no prophets; there are no luminaries. There are no *kohanim* (priests); there are no teachers. And there is no righteous judgment.”³ His poetic list of his disappointments continues as a litany of shame.

Many rabbis today tend to preach about the ills of society: climate change; the refugee crisis; the rise of nationalism, racism and antisemitism; unstable political leadership; corruption and bias within our judicial and economic systems; and our eroding sense of responsibility to our neighbors and communities, just to name a few. When it comes to engagement in civil society and the political process, I see two related goals of 21st-century liberal Jewish leaders. The first is to provide stability, comfort, and wisdom stemming from our tradition during times of political uncertainty and chaos. The second is to serve as a moral voice in society. At times, these two goals conflict with one another as societal morals and values shift over time while our written texts remain bound to the historical contexts in which they were written. Sadly, this conflict is

¹ The *Arba'ah Turim* was written in the early 14th century.

² Jacob Ben Asher, *Arba'ah Turim*, Introduction to *Choshen Mishpat*.

³ Jacob Ben Asher, *Arba'ah Turim*, Introduction to *Choshen Mishpat*.

purposefully ignored as there are no easy answers. Nonetheless, these two goals require us to promote fairness, decency, and ethical conduct, as well as to galvanize and organize people to action.

How should we do this? Often, Reform religious leaders reach for biblical and rabbinic passages that emphasize the importance of working toward justice. Some examples of popular statements include: “All people are created in the image of God.” (Genesis 1:26). “Tzedek, Tzedek Tirdof! Justice, justice shall you seek!” (Deuteronomy 16:20). “Is this the fast I desire? A day for people to starve their bodies?...No. It is to share your bread with the hungry, and to bring the poor into your home” (Isaiah 58:5-6). “It is not up to you to complete the work, but neither are you free to desist from it” (Mishnah Pirkei Avot, 2:16).

These noble statements are at the heart of Jewish tradition and are deeply important to remember and recite. However, in order for religious leaders and communities to accomplish the two goals that I set out above, and to overcome the serious challenges that we face today, we will need to draw upon wisdom that is not easily condensed into soundbites and printed on buttons and bumper-stickers.

The content of *Choshen Mishpat* is informative in this regard. In the *Arba’ah Turim*, and in Joseph Karo’s *Beit Yosef* (1542) and *Shulkhan Arukh* (1565, with Isserles’s glosses added 1580), the legal principles of a just and fair society—as sanctioned by God and Torah—are outlined and explained.⁴ I believe that immersion in classical Jewish civil law will enable

⁴ Jacob ben Asher was a late 13th–early 14th-century legal scholar. Originally from Ashkenaz and an emigre to Spain in his early years, he combines Ashkenazic and Sephardic legal tradition in his comprehensive *halakhic* work, the *Arba’ah Turim*, sometimes simply referred to as the “*Tur*.” In it, he outlines four major areas of Jewish law, the last of which is *Choshen Mishpat* (“Breastplate of Judgment”). The other three areas are *Orakh Chayyim* (“Way of Life”), which covers daily prayer practice as well as the laws of Shabbat and festival liturgy; *Yoreh De’ah* (“He will Teach Knowledge”), which covers ritual law, vows, rules of personal relationships (including respect for elders and Torah scholars), charity, conversion, circumcision, medical ethics, and burial and mourning practices; and *Even Ha’ezer* (“Rock of Help”), which covers family law (including procreation, marriage, and divorce). Joseph Karo, 16th-century legal scholar, based his own major *halakhic* work, the *Beit Yosef* (1522), on the content and legal

Reform and other liberal rabbis to grapple with many of the challenging issues we face today from a perspective of Jewish values, legal discourse, and theology. While community-organizing and posting Bible quotes to social media can be effective tools, I believe that serious immersion in and familiarity with Jewish text and tradition will be more important as we navigate our turbulent times. While I believe that Reform rabbis should also strive for competency in the laws of ritual practice and observance as outlined in the classical *halakhah*, I also believe that our knowledge of Jewish civil law—and the values that we can learn from engaging with it—will only serve to strengthen the positions that we take on political, ethical, and moral issues that we face within the Jewish community as well as in the wider, secular context. Additionally, many Jews are unaware that Jewish law and tradition covers these seemingly secular topics. Hopefully this project will help demonstrate that ritual practice is not the only area of focus in the corpus of *halakhah*.

For this project, therefore, I decided to study six topics within *Choshen Mishpat* (“Breastplate of Judgment”), as they are discussed in the *Shulkhan Arukh* (the principle source) with reference as well to Jacob ben Asher’s *Arba’ah Turim* and Karo’s *Beit Yosef*. I chose these six topics since I believe that they address many of the questions that we currently face in our society. These topics include: *Hilkhot Dayyanim* (Laws of Judges), *Hilkhot Nizkei Shkheinim* (Laws of Damages/Injuries to Neighbors), *Hilkhot Apotiki* (Laws of Mortgages), *Hilkhot Shutfim* (Laws of Business Partnerships), *Hilkhot S’khirut Po’alim* (Laws of Hiring Labor), and *Hilkhot*

reasoning found in the *Arba’ah Turim*. Karo later summarized his *Beit Yosef* into a digest called the *Shulkhan Arukh* (1565), which continues to serve as the most authoritative Jewish legal code. While Karo mainly focused on Sephardic legal traditions in the *Shulkhan Arukh*, Polish scholar Moses Isserles (also known as the *Rema*) added glosses from the perspective of Ashkenazic legal traditions to Karo’s work; these were initially published around 1580. These glosses complete the *Shulkhan Arukh* and render it universally accessible and applicable to both Ashkenazic and Sephardic Jewish audiences.

Sha'alah (Laws of Borrowing Objects). Below is an overview of material from each of these six sections, as well as a *semikhah* curriculum for the Reform rabbi in *Hilkhot Dayyanim*.

There are movements of Judaism that mandate that students pass an oral exam in certain areas of *halakhah* in order to become ordained. Likewise, I have designed a *semikhah* exam in this material for Reform rabbis; this will require those so examined to demonstrate competence in this material prior to ordination. Due to the limited parameters of this Text Immersion project, I have limited my “*semikhah* exam” to *Hilkhot Dayyanim*. While all six areas I have studied are important, I believe that *Hilkhot Dayyanim* is the best and most relevant material to outline a Jewish vision of a just society. Therefore, all Jewish clergy members—but particularly Reform ones with our focus on justice—ought to immerse themselves in *Hilkhot Dayyanim*.

Hilkhot Dayyanim (Laws of Judges)

(*Shulkhan Arukh: Simanim* 2 [and corresponding chapters of the *Beit Yosef* and *Arba'ah Turim*]; 3; 4; 7; 8 [and corresponding chapters of the *Beit Yosef* and *Arba'ah Turim*]; 13; 15; 17; 25 [and corresponding chapters of the *Beit Yosef* and *Arba'ah Turim*]⁵

This section is likely the most relevant for the purposes of this project. In it, we can understand the Jewish principles and values that shape the appointment of judges. These values, understood more broadly, can allow us to understand how we elect and appoint leaders, both within the Jewish community and in the wider world. I conceived the idea of studying this particular section of *Choshen Mishpat* during the period between the nomination of Justice Brett Kavanaugh to the United States Supreme Court and his hearing and ultimate confirmation. While our country agonized over whether the accusations of sexual assault leveled against him

⁵ The *Shulkhan Arukh* is divided into four major categories which match the divisions of the *Arba'ah Turim* (*Orakh Chayyim*, *Yoreh De'ah*, *Even Ha'Ezer*, and *Choshen Mishpat*). Each category is divided into “*simanim*” or chapters, which are further divided into “*se'ifim*” or paragraphs.

disqualified him from serving on the highest court in the land, I wondered how Jewish law might take the conduct of his pre-judicial life into account. While neither the *Tur* nor the *Shulkhan Arukh* address this particular question in the sections of *Hilkhhot Dayyanim* that I read, it is clear that a longstanding reputation for honesty, learning, and piety of judges are important factors when selecting judges to a *Beit Din* (“house of law”; a rabbinic court). In creating a *semikhah* exam on *Hilkhhot Dayyanim*, my goal is to increase Reform rabbinic engagement and fluency with these sources as they can ground liberal rabbis in the values of our tradition. This will support our work in shaping synagogue policy and influencing public opinion. The exam is provided at the end of this chapter.

Hilkhhot Apotiki (Laws of Mortgages)
(*Shulkhan Arukh: Simanim* 117-120)

In the wake of the 2008 financial crash, I became interested in the issues of fair lending practices and consumer protection. Lending money without explaining the parameters of the lending agreement invites confusion, which, as we saw in 2008, leads to economic decline and despair and even disaster for those affected. I therefore chose to include *Hilkhhot Apotiki* in this course of study to examine how the *Shulkhan Arukh* understands the mutual obligations of creditors and debtors.

I was pleased to discover that the *Shulkhan Arukh* outlines, with great specificity, how loans are to be constructed. The laws outlined in this section reflect fair and just lending practices. Borrowers know the precise expectations underlying the loan. For example, *siman* 117 outlines two types of security interests: *apotiki stam* (general security interest) and *apotiki m'forash* (specific security interest). For each of these types of loans, Karo outlines which (if any) properties a creditor can seize if the borrower does not pay back his loan. In *apotiki stam*,

there is more variety as to the assets the creditor can seize should the borrower not repay the loan. In *apotiki m'forash*, the creditor can only seize the specific property secured by the loan.⁶ This level of specificity provides transparency to the borrower which leads to a sense of fairness in the lending process.

The *siman* also outlines what to do when secured land has been sold to a third party. In his *Restatement of Rabbinic Civil Law*, Emanuel Quint explains:

If the debtor sold the secured realty, and the debtor has other property on which to make a levy, the majority opinion is that the creditor may levy on the secured realty in the hands of the purchaser or may levy on other property of the debtor...If the debtor has no other property on which to levy, then all would hold that the creditor can levy on the realty in the hands of the purchaser.⁷

In other words, Karo offers specific guidance as to when the creditor can seize sold property that had previously been secured and when the creditor may seize other assets of the borrower.

In *siman* 120, Karo clarifies the exact procedures to use in order to deliver the loan payment to the creditor. The money of the repaid loan is the responsibility of the debtor until it is in the hand of the creditor or the creditor's appointed agent.⁸ In this chapter of the *Shulkhan Arukh*, which is entitled, "*Returning the Loan by Throwing It*," Karo claims that if the creditor says to the debtor: "Throw the money to me," and the money is lost, the debtor is still liable to pay the loan. However, if the creditor says: "Throw the money to me and you will be considered to have already paid back the loan," and the money is lost, the debtor is no longer liable to pay the loan. The distinction between these two cases hinges on specific knowledge of the creditor

⁶ SA CM 117:2.

⁷ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. IV. (Northvale, NJ: Aronson, 1993), 169.

⁸ SA CM 120:1.

regarding repayment. Karo is specific about how payments should be made so as to reduce confusion on the part of the debtor.⁹

Hilkhot Nizkei Shkheinim (Laws of Damages/Injuries to Neighbors)
(*Shulkhan Arukh: Simanim* 153, 154, 156)

Negotiating relationships with neighbors has always been a fact of life, and these *halakhic* works illuminate some of the challenges of living in close quarters and sharing common spaces. *Siman* 153 deals with whether one neighbor can extend a projection (including a gutter that will allow water to flow onto the neighbor's land) into the airspace of another neighbor's property.¹⁰ It also discusses the rights of a person to use the public works (including sewers and ladders) that are found on the property of her neighbor.¹¹ *Siman* 154 primarily deals with the placement of openings (doors and windows) in shared courtyards. These openings can increase foot traffic in the neighborhood and allow one neighbor to see into the home of another.¹² *Siman* 156 discusses whether people in residential neighborhoods and shared buildings are permitted to open commercial businesses in their homes.¹³

People sharing common spaces today face very similar questions and challenges, especially in urban and suburban areas, where homes, apartment buildings, and apartment units are built in close proximity to one another. For example, should a person be able to build a gutter that allows water and detritus to flow into the yard of his neighbor? Should a person build a window that allows him to see into the bedroom of his neighbor, especially if the neighbor's window existed first? Should people be permitted to open commercial businesses in their homes?

⁹ SA CM 120:1.

¹⁰ SA CM 153:6, 8.

¹¹ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. V. (Northvale, NJ: Aronson, 1993), 106.

¹² SA CM 154:2-3.

¹³ SA CM 156:1.

Does the type of business make a difference (i.e., someone who teaches a few students at a time versus someone who runs a shop which will increase foot traffic in the building)?

The issues that the *halakhah* addresses here also have new applications. For a guide on how to use this *halakhic* material in the context of modern privacy issues, see Chapter III.

Hilkhot Shutfim (Laws of Business Partnerships)
(*Shulkhan Arukh: Siman 176*)

Relationships between business partners are always delicate, and can be fraught with tension and disagreements, especially in our litigious, adversarial culture. While two people might easily join together over a shared venture, they might not foresee that differences in opinion about certain policies—including proclivities to risk-taking, desires to invest, and length of time to remain in the partnership—may develop, creating major rifts between them. Resolving these matters can be complicated, and a consistent set of expectations and procedures about how to handle disputes is essential. According to the *Shulkhan Arukh*, the creation of fair and equal partnerships with clearly delineated rules and expectations is a pivotal Jewish value.

Siman 176 succinctly describes many different aspects of business partnerships. It preserves a Talmudic *makhloket*¹⁴ regarding the formation of partnerships and presents three possibilities: the first, attributed to the Rambam,¹⁵ is that partners must engage in a *kinyan* (a ritual act of sale) in order to validate the partnership.¹⁶ A *kinyan* is a symbolic gesture intended to mark the commencement of the business arrangement or other transaction. The second opinion states that if the business venture has already commenced, the two individuals are deemed to be

¹⁴ A “*makhloket*” is a dispute or difference of opinion among the Talmudic rabbis.

¹⁵ The Rambam (Maimonides) was a 12th-century scholar, legalist, and philosopher. Some of his most well-known works include the *Mishneh Torah*, in which he codifies all areas of *halakhah* so that they are accessible to most Jews, and *The Guide to the Perplexed*, which is his philosophical treatise.

¹⁶ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. VI. (Northvale, NJ: Aronson, 1993), 3-6.

partners, even without a *kinyan*. The only requirement to establish the partnership is to have two witnesses to a document describing the business venture. The third opinion states that words alone will suffice to create a valid partnership, and that no *kinyan* is necessary at any point.¹⁷

Trust is the foundation of a healthy partnership. The *siman* states that partners have a fiduciary responsibility toward each other since the decisions of one partner impact the profits or losses of the other partner.¹⁸ If one partner violates the expectations of the partnership (e.g., by selling on credit when this is not the custom), this partner must bear the responsibility if there is a financial loss. On the other hand, partners split profits equally if there is financial gain.¹⁹ Similarly, if the partnership is supposed to last for a set amount of time, neither partner can back out of the agreement until the appointed time arrives or until the business runs out of money. Finally, neither partner is permitted to withdraw any money from this particular venture until the duration of the partnership is complete.²⁰ These laws prevent capriciousness on the parts of both partners since they ensure that partners are held to their agreements. This also discourages people from entering business ventures without serious consideration and prevents partners from demanding new conditions even if their own personal financial or other life circumstances have changed.

Hilkhot S'khirut Po'alim (Laws of Hiring Labor)
(*Shulkhan Arukh: Simanim* 331-339)

The Bible begins to outline what a just and fair relationship between an employee and an employer might look like.²¹ However, the biblical rendition of this relationship is vague and

¹⁷ SA CM 176:1.

¹⁸ SA CM 176:8.

¹⁹ SA CM 176:10.

²⁰ SA CM 176:15.

²¹ See Lev. 25:55; Deut. 23:25.

aspirational in nature. The *Shulkhan Arukh*, building on the Talmud and previous halakhic works, clarifies this relationship and transforms it from a generic presentation of a notion of “fairness” into concrete directives. It is challenging to create standards to ensure both that employers receive the labor for which they pay, and that laborers are compensated fully for the work that they perform and are treated with dignity. The *Shulkhan Arukh* outlines an employers’ specific obligations to her laborers as well as the employee’s expectations of fair conditions and fair pay.

These *simanim* outline the procedures for hiring day laborers, mostly for agricultural work. While most of us in New York City do not interact with farm laborers on a daily basis, these laws could easily be used as guidelines for employing day laborers at construction sites or in maintenance roles.

The *Shulkhan Arukh* draws on the Talmud in its reliance on the biblical verse: “For to Me the children of Israel are servants; they are my servants whom I brought forth out of the land of Egypt: I am the Eternal your God” (Leviticus 25:55) when outlining labor laws.²² Karo interprets this verse to mean that a person cannot be obligated or compelled to labor at a particular task or work for a certain person because all humans are servants of God. The conditions of wage labor must be kept distinct from slavery; just because an employer is paying for labor, the laborer is not bound to serve under any and all conditions. Even the director of a construction site or the owner of a farm is ultimately a servant to a superior Master. The *Rema* adds that a worker cannot remain in the same place of employ for over three years, since that length of time begins to make the employee seem like a slave of the employer.²³

²² B. Bava Kamma 116b; SA CM 333:3.

²³ SA CM 333:3.

In order to distinguish between labor and slavery, *siman* 333 states that an employee can leave a particular job even after he has already received part of his salary.²⁴ There is an implication that freedom of choice exists in the employment context. The only exception to this rule is if the employer is relying upon the employee to complete a task that, if delayed, will cause the employer to lose money. The examples provided in *siman* 333 include when a laborer works with a material that needs immediate treatment (i.e. flax) or if a homeowner cannot run her household without her servant.²⁵

As with many of the laws outlined in the *Shulkhan Arukh*, the first *siman* (331) of *Hilkhot S'khirut Po'alim* claims that the labor practices of a particular city should prevail when hiring workers. For example, an employer should not compel workers to arrive at work earlier or to stay later than what residents of a given city are accustomed to. This is the case even if the employer is willing to increase the wages of an employee who arrives early or stays late. The *Rema* adds that workers must be allowed to leave work early on Fridays to prepare for Shabbat.²⁶ By listing these provisions for workers, the *Shulkhan Arukh* recognizes that they are necessary for humane working conditions.

Simanim 337 and 338 outline the proper working conditions for humans and animals. In the *Shulkhan Arukh*, the expectation (and obligation) that an employer will allow his workers to eat while they are in the field (Deut. 23:25-26) is paired with the expectation/obligation that a worker must not muzzle an ox while it is threshing (Deut. 25:4). This idea reflects the recognition that the employer cannot ignore the basic needs of all living beings, in this case, the need to eat while working. Deut. 23:25 claims that “When you enter another person’s vineyard,

²⁴ SA CM 333:3.

²⁵ SA CM 333:5.

²⁶ SA CM 331:1.

you may eat as many grapes as you want, until you are full, but you must not put any in your vessel.” *Siman* 337 understands this to mean that workers can eat while they are laboring in the fields, but it also places limits on their consumption.²⁷ The laborers can only eat for themselves; they cannot collect food for their families. Not even the Nazirite (who is prohibited from eating grapes) can give his share of grapes to his family members.²⁸ The laborer must also be taught not to overeat, lest she take too much produce away from her employer. Additionally, for the same reason of economy, she is only permitted to eat that produce with which she is working (i.e., if at any given moment she is working with figs, she cannot eat the employer’s grapes).²⁹

Hilkhoh Sha’alah (Laws of Borrowing Objects)
(*Shulkhan Arukh: Simanim* 340-347)

We all borrow objects, but rarely do we investigate what should happen when the borrower breaks the object or keeps it for so long that there is a question as to whom it truly belongs. The *Shulkhan Arukh* presents some important (and strict) guidelines and regulations for borrowing objects in order to clarify the relationship between the borrower and the lender in the hope of avoiding disputes. For example, *siman* 340 states that the borrower of an object is liable to pay for that object if it is lost, stolen, or destroyed, even if this destruction was unintentional or caused by what we today term an “act of God” (i.e. if a strong, unexpected gust of wind knocks over a borrowed glass and it shatters).³⁰ The only way the borrower is exempt from liability is when the object breaks during the time that he is using it for its intended purpose (i.e.,

²⁷ Quint explains that: “The Talmud (B. Bava Metzia, Ch. 7) explains that these verses (Deut. 23:25-26) apply to a worker who was hired by the owner to work in his field or on the detached produce” (Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. IX. (Northvale, NJ: Aronson, 1993), 155).

²⁸ SA CM 337:16.

²⁹ SA CM 337:9.

³⁰ SA CM 340:1.

a borrowed ox dies while it is plowing the field of the borrower or, more relevant to today, a borrowed computer charger breaks down while it is being used to charge the borrower's computer).³¹ This is because the person borrowed the object with the expectation that it could be used for its intended task. Once it breaks while being used for its intended task, it is no longer functional and thus serves no purpose to the borrower.

There are also rules about when the lender can demand the return of the object. *Siman* 341 states that if Reuven lends an object to Shimon and there is no fixed term for the borrowed object, Reuven can request the item back at any time.³² However, if there is a stated fixed term of borrowing, then Reuven cannot take back the item before the end of that term. Even if Shimon dies, his heirs can continue to use the item until the end of the term.³³ For more about the special case that arises when an employer borrows an employee's object, see Chapter II.

Semikhah Exam in Hilkhoh Dayyanim:

As noted above, I have created a *semikhah* exam for Reform clergy to ensure their understanding of this important material as a condition of ordination:

1. How many people on a given *beit din* must be considered experts in civil law? (*Siman* 3)
2. What happens if a defendant does not like the judges chosen by the plaintiff? (*Siman* 3)
3. If a judge is appointed by a secular power, does he have authority in the Jewish community? (*Siman* 3)
4. How does the *halakhah* ensure impartiality of judges? (*Siman* 7, 8, 13, 17)
5. If the judge is a convert, whose cases can he hear? (*Siman* 7)
6. What is the minimum age of a judge? (*Siman* 7)
7. What are the seven character traits of acceptable judges? (*Siman* 7)
8. What is the order in which cases are to be heard? (*Siman* 15)

³¹ SA CM 340:1.

³² Karo routinely illustrates the legal principles discussed in the *Shulkhan Arukh* through the use of two fictitious men, Reuven and Shimon. He chooses these particular names as they are the names of the two oldest sons of Jacob, the biblical patriarch.

³³ SA CM 341:1.

9. How should judicial errors in black-letter law and legal reasoning be addressed? (Siman 25)
10. What is the ultimate purpose of punishing another person? (Siman 2)
11. What is the overall sentiment toward non-Jewish judges? (Simanim 3, 4, 8)
12. What is the theological significance/impact of serving as a judge? (Siman 8)
13. What is the attitude of the *halakhah* to legal statements in writing on behalf of litigants? To court reporting? (Siman 13, 17)
14. What is done to ensure that the most vulnerable in society are served by the justice system? (Siman 15)
15. How is the integrity of the legal process preserved? (Siman 15, 17).

Topics for Further Discussion

As a follow-up to the ideas presented, the next two chapters will provide a more in-depth discussion of two of the six topics within *Choshen Mishpat* that I have studied. Both chapters apply the principles outlined in the *Shulkhan Arukh* to contemporary situations. Chapter II concerns *Hilkhos Sha'aloh* (Laws of Borrowing). In it, I address the relationship between borrower and lender in the special case where the borrower employs the lender. I apply this to the modern-day question of the relationship between Uber, the ride-sharing company, and its drivers.

Chapter III concerns *Hilkhos Nizkei Shkheinim* (Laws of Damages/Injuries to Neighbors). Here I address privacy concerns among neighbors. I create guidelines for how to use modern technologies which can impede privacy, including Ring (the camera-operated personal security system) and Amazon's Alexa (the computerized personal assistant).

In both of these contexts, Jewish values can be derived from the civil legal principles found in *Choshen Mishpat*. These values can help us to navigate many contemporary challenges.

Chapter II

Contemporary Application of *Hilkhot Sha'alah*, *Simanim* 340-346

Background: Leasing and Borrowing Objects

Jewish civil law imposes strict liability for people who borrow objects. People who borrow objects at no cost take on a greater responsibility for them than do people who pay to lease an object. This principle is outlined in the *Talmud* and in the *Mishneh Torah*,³⁴ which both describe the case of a person who borrows a cow for half the day and leases it for the other half.³⁵ The *Talmud* and the *Mishneh Torah* both conclude that if the object is damaged, the liability of the person is different based upon whether she leased or borrowed it. Emanuel Quint, author of *A Restatement of Rabbinic Civil Law*, discusses a case where Reuven, who was the owner of a cow, leased that cow to his neighbor, Shimon. He presents the following scenario: “The animal is struck by lightning...and dies. If the animal died while Shimon was a lessee, he is not liable for not returning the animal alive to Reuven; if he is a borrower, he is liable.”³⁶ According to the *Shulkhan Arukh*, absolute (also referred to as “strict”) liability exists when the person *borrow*s the object (in this case, a cow), but not when a person *lease*s it.

Absolute Liability of the Borrower

In outlining the responsibilities of the person who borrows the object or animal of another, The *Talmud* states that: “the borrower...pays for every outcome, whether [the object] was stolen or lost, even in a circumstance beyond his control.”³⁷ In their own legal codes, the medieval and early modern jurists Jacob ben Asher and Joseph Karo codify strict liability for

³⁴ The *Mishneh Torah*, written by the Rambam (Maimonides) in the late 12th-century, codifies all areas of *halakhah*.

³⁵ B. Bava Metzia 97a; Rambam, *Hilkhot Sha'alah* 3:3-4.

³⁶ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. IX. (Northvale, NJ: Aronson, 1993), 193.

³⁷ B. Bava Metzia 94b.

people who borrow objects. In the *Shulkhan Arukh*, Karo states that if a person borrows an animal or an object, and that animal or object dies, is lost, or is stolen while it is in the possession of the borrower, the borrower must pay its monetary value to the owner.³⁸

Even if any of the above occur due to an unforeseeable event, (e.g., a weather-related condition) the borrower is still liable to pay the owner for the untoward consequences. For example, if an unexpected hurricane hits and knocks a borrowed object off of a table, the borrower is still liable to pay the monetary value of the object even though it was destroyed through no fault of his own. In addition to paying for the object, the borrower must assess the value of the remaining pieces as they were when they were whole, and return those pieces to the owner.³⁹ However, there are two exceptions to this rule of absolute liability of the borrower.

First Exception

If the object breaks or the animal dies while being used for its intended purpose, the borrower is not liable to pay the owner.⁴⁰ This is because if a person borrows an animal to complete a certain job (i.e. someone borrows an ox to pull a particular cart), and that ox dies while it is pulling that cart, then it seems that the ox was not strong enough to complete this task. The borrower borrowed a weak ox when she intended to borrow a strong one. Additionally, the owner presumably knew the capabilities and limits of that ox, and yet lent it to the borrower despite the fact that it was incapable of completing the task.

In applying this principle to a contemporary example, imagine that a person borrows a lamp to illuminate her living room. If the internal mechanism of the lamp breaks while she is

³⁸ SA CM 340:1.

³⁹ AT CM 340; SA CM 344:2.

⁴⁰ SA CM 340:1.

using it to illuminate the room, she does not have to pay the owner of the lamp for its value. This is because she intended to borrow a working lamp. However, now that it has broken while performing its intended task, it has become a piece of unusable furniture which is not what she intended to borrow. The Talmud states it succinctly and pithily: “It is self-evident that I did not borrow it just to stow it in a canopy, [but rather in order to use it]!”⁴¹

However, this rule only applies when the borrower uses the object in an appropriate manner.⁴² If she keeps the lamp on for an entire year without ever turning it off, and the internal mechanism of the lamp finally breaks due to overuse, she *does* have to pay the monetary value of the lamp to its owner. This is because the lamp was never intended to remain illuminated for an entire year. Similarly, in the ox example provided by Karo, if the ox pulls the wagon for 24 hours straight without rest, and the ox dies, the borrower must pay its monetary value to the owner. To use an ox for a 24-hour period without allowing it to rest is not within the parameters of normal, appropriate use of the animal.⁴³

Second Exception

The liability of the borrower is not absolute when the owner of the object is in the presence of the borrower while the borrower uses the object. When this is the case, if there is any damage to the borrowed object, the borrower is *not* liable to pay its value to the owner. This injunction comes directly from the Hebrew Bible, which Karo quotes in the *Shulkhan Arukh*.⁴⁴ Exodus 22:13-14a states: “When one person borrows [an animal] from another and it dies or is injured while its owner is not with it, he must make restitution. If its owner was with it, no

⁴¹ B. Bava Metzia 96b.

⁴² SA CM 340:1.

⁴³ SA CM 340:1.

⁴⁴ SA CM 346:1.

restitution must be made.”⁴⁵ The Torah only states that the owner of the object (who is also the lender) must be present while the borrower is using the borrowed object; it does not specify the nature of the relationship between the owner/lender and the borrower.

However, the Talmudic rabbis interpret these verses to refer to one specific relationship: the borrower is the employer of the owner/lender of the object. In this case, the borrower of the object does not have to make restitution to its owner when the owner/lender is employed by the borrower.⁴⁶ The Mishnah states:

In the case of one who borrowed a cow and borrowed the services of its owner with it, or he borrowed a cow and hired its owner with it, or he borrowed the services of the owner or hired him and afterward borrowed the cow; in all such cases, if the cow died, the borrower is exempt from liability. Although a borrower is generally liable to pay if a cow he borrowed dies, here he is exempt, as it is stated: “If its owner is with him, he does not pay” (Exodus 22:14).⁴⁷

Although the rabbis do recognize that the verses do not necessarily need to be interpreted in this manner, this is how they come to be interpreted in the Jewish civil law tradition.⁴⁸

Application of Halakhic Principles to the Contemporary Question of Uber

The *Beit Yosef*, Karo’s thickly halakhic commentary on the *Arba’ah Turim* first published in 1522 (revised version published in 1542), questions whether the employer must be in the vicinity of the employee when the employer requests to borrow the item, and whether the employer must be in the vicinity of the employee should the item break down.⁴⁹ However, this

⁴⁵ SA CM 346:1.

⁴⁶ B. Bava Metzia 94a

⁴⁷ B. Bava Metzia 94a.

⁴⁸ The Talmud states the following: “The verse states: ‘And if he borrows’ (Exodus 22:13). The conjunctive ‘and’ indicates that the passage detailing the liability of a borrower is adding to the first matter, i.e., it should be seen as a continuation of the previous passage detailing the liability of a paid bailee” (B. Bava Metzia 95a). In other words, the Talmud uses this grammatical principle to justify the interpretation it outlines (that this verse applies to the employer/employee relationship).

⁴⁹ BY CM 346.

question is no longer relevant in our globalized economy. Contemporary companies can borrow objects from individuals without the owner of the object ever meeting a representative of the company. In our modern economy, people often allow companies to “borrow” their objects in order for both the company and the owner of the object to profit. A perfect example of this is Uber, the ride-sharing app.

Uber is “a transportation network company, well-known for its ride-hailing taxi app... Today, Uber is available in over 60 countries and over 400 cities worldwide.”⁵⁰ Uber’s own website traces its beginnings to “a simple idea: What if you could request a ride from your phone? But what began as just a thought quickly grew into a global brand focused on helping move you toward opportunity out in the world.”⁵¹ Uber was an overnight success and has become a household name. However, despite its success and wide reach, Uber has been plagued by scandals, including the hugely disappointing I.P.O. performance that lost “more in dollar terms than any other American initial public offering since 1975.”⁵² But perhaps the most pressing challenge for Uber today—and one that might threaten this industry—is the status of Uber drivers.

University of Chicago Law professor Omri Ben Shahr asks: “Are [Uber drivers] independent contractors each owning his or her single car business, as Uber likes to claim, or are

⁵⁰ Clark, Joe, Alexander Sword, James Nunns, Conor Reynolds, and Ed Targett. “What Is Uber?” Computer Business Review, March 27, 2017. <https://www.cbronline.com/what-is/what-is-uber-4903973/>.

⁵¹ “The History of Uber - Uber’s Timeline: Uber Newsroom US.” n.d. Uber Newsroom. Accessed January 5, 2020. <https://www.uber.com/newsroom/history/>.

⁵² Isaac, Mike, Michael J. De La Merced, and Andrew Ross Sorkin. 2019. “How the Promise of a \$120 Billion Uber I.P.O. Evaporated.” The New York Times. The New York Times. May 15, 2019. <https://www.nytimes.com/2019/05/15/technology/uber-ipo-price.html>.

they Uber’s employees, entitled to benefits, overtime pay, and collective bargaining? The answer to this challenge could dramatically reshape the sharing economy.”⁵³

Some United States courts have decided that Uber drivers should remain independent contractors, as Uber does not “control and direct” its drivers. The arguments to support the fact that Uber drivers are not employees are:

They are free to work or not to work, whenever and wherever they want, for as many or as little days or hours, and take any number of breaks... They are paid not by Uber but by customers—Uber’s sole role is to collect and distribute these payments (minus its own cut). They are free to work elsewhere, and many indeed double up for Lyft or keep their day jobs. Whereas employers typically provide workers with tools, Uber drivers use their own cars and pay for gas.⁵⁴

However, there is controversy about the issue of whether Uber drivers are their own bosses. For example, Laura Padlin, senior staff attorney with the National Employment Law Project, claims that “Uber drivers are not running their own business, which is what it means to be an independent contractor. Uber drivers do not set their own rates; they do not choose their customers. They are not making investments in a business; they are performing the core work of Uber.”⁵⁵ Though they can’t unionize, Uber drivers have organized strikes to protest their long hours, arguing that the flexibility is worthless if full-time drivers must work overtime without earning extra pay.⁵⁶ This question about the employment status of Uber drivers is still undecided in United States courts.

⁵³ Ben-Shahar, Omri. 2017. “Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy.” *Forbes*. *Forbes Magazine*. November 16, 2017. <https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#d3956e95e556>.

⁵⁴ Ben-Shahar, Omri. 2017. “Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy.” *Forbes*. *Forbes Magazine*. November 16, 2017. <https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#d3956e95e556>.

⁵⁵ Cerullo, Megan. 2019. “Uber Drivers Are Independent Contractors, Not Employees, Says National Labor Relations Board.” *CBS News*. *CBS Interactive*. May 14, 2019. <https://www.cbsnews.com/news/uber-drivers-are-independent-contractors-not-employees-says-national-labor-relations-board/>.

⁵⁶ Campbell, Alexia Fernández. 2019. “The Worldwide Uber Strike Is a Key Test for the Gig Economy.” *Vox*. *Vox*. May 8, 2019. <https://www.vox.com/2019/5/8/18535367/uber-drivers-strike-2019-cities>.

This paper is not intended to provide a definitive resolution to the question of whether or not Uber drivers are employees of the company according to Jewish civil law. Rather, this is intended to be a brief study of *halakhic* methodology using Uber to test the application of classical principles of Jewish civil law to this pressing contemporary issue. However, it is worth noting that the Talmud sets a low bar when considering whether one person is employed by another. Rava, the fourth-generation *Amora*,⁵⁷ claims:

With regard to one who wants to borrow something from another and be exempt from liability, let him say to the lender at the time of borrowing: Pour me water. He will thereby be exempt, as it is then a case of borrowing an item and borrowing or hiring the services of its owner with it.⁵⁸

In other words, a person told to pour water for another is considered to be employed by the person who asks for the water. Therefore, the “employer” is not liable for the object he borrows from the one who pours the water. Based upon this minimum threshold for employment, it would seem that, according to the standards Jewish law, Uber drivers are employees of the company, not by virtue of their presence with their employers, but because of the control that their employers exert over their daily business activities. However, according to the company itself, Uber drivers are not considered employees of the company.

In the case of borrowing objects, Karo holds that employees who own objects that their employers borrow have a different set of entitlements than do people who are not employees of those who borrow their objects. In this context, for the purposes of this argument, rather than as a legal doctrine, I posit that Uber is a borrower of the car driven by its drivers. Employees who lend objects to their employers cannot expect remuneration in the case of damages (unless the object was used in a manner for which it was not intended), while this is something they can

⁵⁷ “Ancient Jewish History.” n.d. Amoraim. Accessed January 5, 2020.
<https://www.jewishvirtuallibrary.org/amoraim>.

⁵⁸ B. Bava Metzia 97a.

expect if there is no employee/employer relationship between the borrower of an object and its owner. In this case, having the status of “employee” might be a detriment to the owner of the object, while in the case of the Uber driver under American law, the status of “employee” might be a great benefit.

Theoretical Case Study: Damage to a Vehicle

The cars used to transport for-hire passengers are owned by the drivers who are engaged by Uber. Uber provides the technological platform to connect drivers and passengers. Since Uber does not own or lease the vehicles that are used to carry the passengers, I am positing that Uber is essentially borrowing the vehicle from the driver so that both Uber and the driver can profit.

Imagine that an Uber driver has been in an accident while transporting a for-hire passenger. There was property damage to the car in the accident. According to Jewish civil law, is Uber responsible for paying the cost of the damage? The question at hand (whether Uber must pay for damages that occur to a vehicle while an Uber passenger is being transported) hinges on the issue of whether Uber drivers are considered employees of the company.

At first, one might think that the answer to this question is “no,” without even needing to invoke the special relationship that exists between the employer who borrows the object of an employee. This is because, as stated above, there are two cases in which absolute liability of borrowed objects does not apply. The first case is when someone borrows an object and it dies or breaks down in the course of its normal use. When this happens, the borrower is not responsible for paying the owner of the object. In applying this principle to the situation of the accident to the vehicle, one might think that because the borrowed car was damaged while it was being used

for its intended purpose (driving a passenger), Uber (the borrower) need not pay the owner (the driver) for the damages.

However, this conclusion does not take into account the fact that the owner/lender is actually lending his services of driving which inevitably extends to his car, without which he could not fulfill the task for which he is being paid. Moreover, he drives his own car entirely based on Uber's protocols and instructions. In other words, while the owner purportedly lends the car to the borrower (Uber), it is the owner of the car who shuttles the passengers to their destinations at the behest of Uber. Therefore, when the vehicle is damaged, assuming that it was being used in accordance with Uber's mandate, under Jewish civil law, Uber would be obligated to pay for the property damage to this vehicle, since neither of the exceptions apply.

Conclusion

Based on the principle that an employer is not required to pay for a damaged object belonging to her employee, if Uber drivers are considered employees, the inevitable conclusion would be that Uber *does not* have to pay for the damage incurred while the driver transports passengers. If, on the other hand, as we assume here, Uber drivers are not employees of Uber, then the company *does* have to pay for damages incurred while the driver is transporting an Uber passenger, regardless of the fact that the employer/borrower (Uber) is not in the presence of the employee/lender.

Chapter III

Contemporary Application of *Hilkhoh Nizkei Shkheinim*, *Siman* 154

Contemporary Challenges to Privacy

It is no surprise that with the advent of the internet and social media, and their instant accessibility on personal computers and cell phones, the definition of privacy is in flux. Lack of privacy in the age of the internet can impact people's personal and professional lives, as well as national security issues and election outcomes, as we saw with the Cambridge Analytica data breach during the 2016 United States presidential election.⁵⁹

A recent Pew Study on attitudes regarding social media and privacy concerns outlines it most succinctly: "On one hand, the rapid growth of the [social media] platforms is testimony to their appeal to online Americans. On the other, this widespread use has been accompanied by rising user concerns about privacy and social media firms' capacity to protect their data." These concerns about privacy are serious. The 2014 study claims that 91% of Americans believe that we have lost control over how our information is used by various companies.⁶⁰

With the emphasis on personal privacy outlined in the Talmud and in later *halakhic* literature, I believe that Jewish law should be deployed to address growing privacy concerns. It would be my ultimate goal to create guides for social media privacy based on Jewish civil law. These guides would be intended both for users of social media, as well as for the companies who design the software and maintain enormous responsibility for collecting and controlling this data.

⁵⁹ Granville, Kevin. 2018. "Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens." The New York Times. The New York Times. March 19, 2018. <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

⁶⁰ Rainie, Lee. 2018. "How Americans Feel about Social Media and Privacy." Pew Research Center. Pew Research Center. March 27, 2018. <https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/>.

This would be a project too large for the scope of this paper, and I am certainly not an expert in internet privacy policies and law. However, maintaining personal privacy among neighbors sharing physical space still remains a challenge, especially with the addition of so many new technologies.

Overview of the Codes

Just as contemporary issues of privacy are of utmost importance, similar challenges have always existed and were addressed in *Choshen Mishpat* with regard to sharing common space. Issues of equal access to public space, as well as the maintenance of privacy, have always been delicate matters when it comes to sustaining relationships among neighbors. *Siman* 154 of the *Arba'ah Turim*, *Beit Yosef*, and *Shulkhan Arukh* discuss issues that remain increasingly relevant today: how multiple people who share a common space can and cannot use their own property so that needs of both occupants are met. While the *siman* discusses many topics, Emanuel Quint, author of *A Restatement of Rabbinic Civil Law*, distills three broad prohibitions addressed in the codes: 1) Increasing the number of people using the courtyard. 2) Blocking the light and/or air of a neighbor by blocking a window or an opening. 3) Creating an opening so that one neighbor can see into another neighbor's home (violating the *halakhic* principle of *hezek re'iah*, or “damages through seeing,” i.e. violating someone's privacy. Quint refers to this as “overviewing.”)⁶¹

Increased Foot Traffic in a Shared Courtyard

What are the entitlements of one neighbor when the other causes an increase in foot traffic in a shared courtyard? According to the *Shulkhan Arukh*, one neighbor (Reuven) can

⁶¹ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. V. (Northvale, NJ: Aronson, 1993), 112.

complain when another neighbor (Shimon) allows his friends, relatives, and acquaintances to move into his house with him.⁶² When more people move into the home, there will be more people using the courtyard. This decreases Reuven's access to the space, as well as his privacy.⁶³

The *Tur* goes so far as to teach that a person cannot increase the size of his home, lest it encourage him to increase the number of people living in his house. He cannot even create a new entrance to his home, as this might increase the foot traffic in the shared courtyard.⁶⁴ The *Shulkhan Arukh* claims that even adding a courtyard-facing upper story to the back of one's home can increase the number of people coming into and going out of the courtyard. In Karo's words, this creates a scenario where: "a person who had one neighbor now has many."⁶⁵ The *Tur* and the *Shulkhan Arukh* derive this principle of minimizing the number of people who use a given courtyard from the Talmud, which teaches that:

If one purchased a house in another, adjacent courtyard, he may not open the house into a courtyard belonging to partners...What is the reason for this? Because by adding residents to the courtyard it increases their traffic, and the residents of the courtyard do not wish to be disturbed by additional people passing through.⁶⁶

The Talmud is also aware of the disruption that can be caused when someone runs a business out of her home. The Mishnah claims that: "If a resident wants to open a store in his courtyard, his neighbor can protest to prevent him from doing so and say to him: I am unable to sleep due to the sound of people entering the store and the sound of people exiting."⁶⁷ Karo also claims that a store located in someone's home might transform the shared courtyard from a

⁶² SA CM 154:2.

⁶³ Rambam, *Hilkhot Shkheirim* 5:9

⁶⁴ AT CM 154.

⁶⁵ SA CM 154:1.

⁶⁶ B. Bava Batra 60a.

⁶⁷ B. Bava Batra 20b.

private, residential space into a public, commercial one. If people are constantly entering and exiting the home, which doubles as a store, the surrounding neighbors are also deprived of their privacy since various shoppers can peer into their homes throughout the business day. In Karo's own words, the store is a "fixed entity, and members of the public can look inside the homes [of other residents]. Therefore, the doors and windows must be far from those of other residents so that no one can look inside their homes."⁶⁸

Blocking Natural Light

People are also prohibited from blocking the natural light to which their neighbors have access. Even in a place where residents are allowed to build balconies and to hang items from protrusions, one neighbor cannot block the light of the balcony for her own use. In the language of the *Shulkhan Arukh*, the light is not *hefker* or "ownerless." Instead, the light belongs to all residents of the courtyard.⁶⁹ Later in the *siman*, Karo discusses the case when a non-Jew sells his home to a Jew and there is a dispute between the new owner (a Jew) and his neighbor (who is also a Jew) over the sharing of the natural light.⁷⁰ However, the small scope of this paper does not permit a more detailed exploration of the business relations among Jewish and non-Jewish neighbors who share a courtyard.⁷¹

⁶⁸ SA CM 154:3.

⁶⁹ SA CM 154:15.

⁷⁰ SA CM 154:18.

⁷¹ Given the involvement of the non-Jewish neighbors, considerations other than Jewish civil law principles will apply.

Maintaining Privacy

Of all of the issues that could arise among neighbors, the Talmudic rabbis, as well as the Rambam, the *Tur*, and the *Shulkhan Arukh*, seem especially concerned about maintaining the privacy of each household in a shared courtyard. This is unsurprising, given that Talmud emphasizes the importance of privacy.⁷² The Mishnah teaches:

A person may not open an entrance opposite another entrance or a window opposite another window toward a courtyard belonging to partners, so as to ensure that the residents will enjoy a measure of privacy. If there was a small entrance he may not enlarge it. If there was one entrance he may not fashion it into two.⁷³

When certain *Amoraim* (rabbis of the Talmud) ask why this issue is so important to the *Tannaim* (rabbis of the Mishnah), Rabbi Yochanan, replies:

The verse states: “And Balaam lifted up his eyes, and he saw Israel dwelling tribe by tribe; and the spirit of God came upon him” (Numbers 24:2). The Gemara explains: What was it that Balaam saw that so inspired him? He saw that the entrances of their tents were not aligned with each other, ensuring that each family enjoyed a measure of privacy. And he said: If this is the case, these people are worthy of having the Divine Presence rest on them.⁷⁴

The maintenance of privacy is so important to the rabbis that they attribute Balaam’s admiration of Israel to the arrangement of their homes. Most of *Siman* 154 of the *Shulkhan Arukh* is dedicated to issues of the placement of doors and windows so that a person cannot look into (or even have the potential to look into) the home of his neighbor and commit *hezek re’iah* (“damages through seeing”), which constitutes a violation of the neighbor’s privacy.

Karo discusses the case where Reuven requests that a window be created in his home. Shimon, his neighbor, already has a window in his home. Shimon can complain about Reuven’s new window since it might allow Reuven to see into his home. If Reuven builds the window

⁷² B. Bava Batra 59b; 60a.

⁷³ B. Bava Batra 60a.

⁷⁴ B. Bava Batra 60a.

against the Shimon's wishes, Shimon is permitted to block the window. However, even if Shimon *does* give Reuven permission to create the window, it cannot be directly aligned with that of Shimon. It must be built at least slightly off center so that Reuven cannot see into Shimon's home and cause *hezek re'iah*. If Reuven wants to build a door or window that looks out onto a different courtyard (not the one he shares with Shimon), he can do so provided that the residents of that courtyard give him permission, and that his new door or window does not directly align with those belonging to the existing residents.⁷⁵

The Rambam begins this section of the *Mishneh Torah* by describing a scene where a courtyard is being built in the vicinity of an already-existing home. Though the window of the home might later become an issue for future residents of other homes sharing this courtyard, the person building the courtyard cannot tell the homeowner to close up her window as her window existed before the courtyard was built. Therefore, she is entitled to keep it in place.⁷⁶

Because these scenarios require the builder to obtain permission of the other residents, Karo discusses what it means for a neighbor to acquiesce to the building of a new window that looks out over his shared courtyard. He claims that if a person does not complain about the building of a window that looks out on his courtyard, he has tacitly given permission for the building of that window. He likely derives this notion of implied consent from the following passage in the Talmud, which describes the opposite scenario:

And to seal, i.e., if one sealed another's window in his presence, there is an acquired privilege established immediately to keep the window sealed, as it is not common behavior for a person to have his source of light sealed in his presence and remain silent. The fact that he did not immediately protest indicates that the one who sealed the window had the legal right to do so unilaterally, or that the owner of the window agreed.⁷⁷

⁷⁵ SA CM 154:3.

⁷⁶ Rambam, *Hilkhot Shkheinin* 7:1.

⁷⁷ B. Bava Batra 60a.

In this case, the Talmud is referring to the case of a dispute where one neighbor actively covered the window, denying its owner access to light and view. If the neighbor whose window was covered did not complain about the fact that his neighbor covered the window, the Talmud has extrapolated that the owner has acquiesced to having his window sealed. This also implies that the owner had a duty to complain during the course of the covering of his window. His failure to do so waived his opportunity to complain at a later date.

The *Mishneh Torah* and the *Shulkhan Arukh* also assert the principle that silence is a form of acquiescence. They both describe a case in which Reuven builds a window and Shimon does not complain. In this scenario, Reuven has implicitly obtained Shimon's permission to build the window.⁷⁸ Shimon's silence, despite his knowledge, constitutes his acquiescence. Regardless of the circumstance, silence and the failure to assert a complaint on the part of the allegedly aggrieved party indicate his consent to the action.

If a neighbor wants a pre-existing window to be covered in order afford him greater privacy, does *halakhah* require the owner, Reuven, to comply? The answer depends on the size of the window, as explained in the *Shulkhan Arukh*. According to Karo, if the window is large enough for a man's head to pass through, or if it is less than four *amot* (cubits) off the ground, it is Reuven's prerogative to maintain the window as it is; no other person can build a wall or any sort of structure to block it. If the window does not meet these criteria, then a neighbor may block it.⁷⁹

Below are two case studies in which Jewish values, derived from the laws of *Nizkei Shkheinim*, serve as helpful guides. These refer to contemporary challenges that arise with the advent of new technologies.

⁷⁸ Rambam, *Hilkhos Shkheinim* 7:6; SA CM 154:12.

⁷⁹ Quint, Emanuel B. *A Restatement of Rabbinic Civil Law*. Vol. V. (Northvale, NJ: Aronson, 1993), 119.

Case Study: Security Systems in Residential Homes

While Karo does not discuss this fact, windows were likely used for security purposes in addition to providing natural light. A person's window was the most reliable way to determine who was outside her home and whether she felt safe. Today, from security cameras to in-home alarm systems, security technologies have evolved well beyond the ability to peer out the window. While cameras have been standard in public places and are commonly stationed outside of businesses, banks, and grocery stores, Ring is an internet doorbell system that brings advanced security technology into private residences. Ring allows a person to install cameras outside her home and to use the internet to monitor her property not only while she is in her home, but also while she is outside of her home, as long as she has an internet connection. It even permits her to monitor to her home while traveling internationally. According to its Frequently Asked Questions page, Ring Doorbell works by:

[Connecting] to your home Wi-Fi network and [sending] real-time notifications to your smart phone or tablet when someone is at your door. Using our...Ring App...you can see an HD Video stream of the person at your door and speak to them using two-way audio communication. Ring Doorbell can alert you when someone presses the button on your doorbell or when motion is detected.⁸⁰

The express purpose of Ring is to “reduce crime in neighborhoods” by allowing residents to monitor the activity on their property.⁸¹ The company also offers a “Neighbors App” that allows residents of a particular geographical area to alert one another to suspicious and criminal activity in real time. There are certainly advantages to using this technology. Because it enables people to monitor their homes at all times, it allows them to feel secure, both when they are in their homes and when they are away.

⁸⁰ “FAQ.” n.d. Ring Team. Accessed January 5, 2020. <https://shop.ring.com/pages/faq>.

⁸¹ “About.” n.d. Ring Team. Accessed January 5, 2020. <https://shop.ring.com/pages/about>.

However, this technology can also cause intrusions into privacy, similar to the ones outlined in the codes. Though not their intended purpose, these cameras record activities taking place in neighboring homes, causing *hezek re'iah*. Due to the premium placed on privacy in the Talmud and in the classical *halakhah*, it seems that this is an appropriate contemporary topic for Jewish law to address. Based on the review of the material in *Nizkei Shkheinim* outlined above, below is a list of *halakhic* guidelines for the appropriate use of an internet security system, such as Ring, in the context of a residential neighborhood:

1. Cameras and/or other Ring equipment cannot block views and/or natural light of another neighbor.⁸²
2. All residents of the neighborhood must be informed that this device is being used by the residents living at the particular address.⁸³
3. If one resident of the neighborhood complains about the camera, it must be removed. If the owner refuses to remove it, the neighbor can file an injunction to have the camera forcibly removed.⁸⁴
4. A person can keep her Ring camera if she installs it before other homes were built near her property. The person building homes in her area cannot force her to take down the camera.⁸⁵
5. Even if all the neighbors acquiesce to the use of the camera, cameras must not be placed where they can see into the homes of other residents.⁸⁶
6. If a neighbor does not complain about the camera (given the fact that she has been informed about its existence) she is considered to have acquiesced to its existence in her area. She cannot later petition for it to be removed.⁸⁷

⁸² SA CM 154:15.

⁸³ Karo does not discuss the case of hidden windows, probably because it was challenging to hide a window that looked out over a courtyard. However, in the case of Ring, it could be very easy to place the product surreptitiously, where neighbors cannot see it, leaving them unaware that their homes are under video surveillance. That is why this guideline must be included.

⁸⁴ SA CM 154:3.

⁸⁵ Rambam, *Hilkhot Shkheinim* 7:1.

⁸⁶ SA CM 154:3.

⁸⁷ Rambam, *Hilkhot Shkheinim* 7:6; SA CM 154:12.

Case Study: Amazon Alexa

“Alexa, what’s the weather tomorrow?” “Alexa, turn the light off.” These are common phrases heard in many homes across the world, even those with no household member named “Alexa.” Often, these interactions (and other similar questions and requests) are directed at Amazon’s Alexa, a “voice-controlled Amazon assistant that turns words into actions.”⁸⁸ In order to perform her tasks, Alexa needs to be activated using a “wake word” which, in most cases, is simply the name “Alexa.”

It is easy to see Alexa’s appeal. Alexa can help people accomplish a diverse array of tasks, which include monitoring the temperature of a home, playing music, and ordering products online, quickly and efficiently. A new feature of the product, Alexa Guard, is designed to: “use the device’s integrated far-field microphones to continuously listen for glass breaks and alarms from a smoke or carbon monoxide detectors [*sic*] to protect your office, no wake word required.”⁸⁹

It should come as no surprise that while Alexa might streamline daily tasks and provide fast access to information, the product presents enormous privacy concerns. There are many unresolved questions about the extent to which these devices are always “listening” to people in their vicinity. Though Alexa only begins to record the sounds she hears upon being alerted by the wake word, she is always “listening.”⁹⁰ One technology analyst writes:

The fact that Alexa is always listening to her surroundings is easily explained by the technology that Amazon chose to implement for its smart speakers: The...technology giant uses cloud computing to process every spoken word captured by its smart speakers. What it means...is that every word you say to Alexa is sent to Amazon’s cloud service to

⁸⁸ “What Is Alexa? (And What’s the Best Alexa Speaker for 2020?).” n.d. Wirecutter. Accessed January 5, 2020. <https://thewirecutter.com/reviews/what-is-alexa-what-is-the-amazon-echo-and-should-you-get-one/>.

⁸⁹ Su, Jean Baptiste. 2019. “Why Amazon Alexa Is Always Listening To Your Conversations: Analysis.” *Forbes*. *Forbes Magazine*. July 30, 2019. <https://www.forbes.com/sites/jeanbaptiste/2019/05/16/why-amazon-alexa-is-always-listening-to-your-conversations-analysis/#27bebfda2378>.

⁹⁰ Lerner, Carley. 2019. “Is Alexa Really Always Listening?” *Reader's Digest*. August 1, 2019. <https://www.rd.com/home/is-alexa-really-always-listening/>.

be automatically transcribed before it can respond to your request including basic commands...Amazon has...hired a team of people around the world to analyze snippets of conversations that [these] devices secretly record and upload—without the user's consent or knowledge—to the cloud, claiming it will improve Alexa's "customer experience."⁹¹

Bloomberg confirms this discovery and reports that Amazon has hired "thousands of employees and contractors around the world, including in Boston, Costa Rica, India and Romania to review, transcribe, mark up and then feed back the information into its software to improve Alexa's grasp of language and voice commands."⁹² While most of these recordings are innocuous, Amazon employees can often hear recordings of "upsetting...possibly criminal" activity.⁹³

This constant "listening" and recording can present a problem for people sharing close quarters. While the person who purchased Alexa might consent to being overheard and recorded in her home,⁹⁴ a roommate or a guest might not. I believe that the presence of Alexa and similar devices in homes create concerns that could constitute a new *halakhic* category: *hezek shmi'ah*, or "damages through listening." This concept is parallel to the Talmudic one of *hezek re'iah*, which is the *halakhic* principle that prohibits a person from even having the potential to see into his neighbor's home.

When Alexa listens to, and sometimes records, the speech of a person in its vicinity, it violates that person's privacy. The owner of the device, as well as Amazon employees, can

⁹¹ Su, Jean Baptiste. 2019. "Why Amazon Alexa Is Always Listening To Your Conversations: Analysis." Forbes. Forbes Magazine. July 30, 2019. <https://www.forbes.com/sites/jeanbaptiste/2019/05/16/why-amazon-alexa-is-always-listening-to-your-conversations-analysis/#27bebfda2378>.

⁹² Yoon, Soo. n.d. "Alexa Is Always Listening — and so Are Amazon Workers." ABC News. ABC News Network. Accessed January 5, 2020. <https://abcnews.go.com/Technology/alexa-listening-amazon-workers/story?id=62331191>.

⁹³ Yoon, Soo. n.d. "Alexa Is Always Listening — and so Are Amazon Workers." ABC News. ABC News Network. Accessed January 5, 2020. <https://abcnews.go.com/Technology/alexa-listening-amazon-workers/story?id=62331191>.

⁹⁴ According to Jewish law, there is a question of whether or not a person can consent to being overheard or recorded in her own home. While fascinating, this question is beyond the scope of this paper.

potentially hear the conversations of others without their consent or knowledge. The damage caused by the placement of a device capable of overhearing conversation is similar to that caused by the placement of Ring outside the home or of a new window overlooking a shared courtyard. Therefore, the *halakhic* privacy guidelines for the use of Alexa would parallel those for Ring.

Conclusion

Modern privacy concerns have become much broader and more complicated than those of the Talmudic rabbis and the medieval and early-modern codifiers. While their chief concerns were about window and door openings, ours include personal security systems and computerized assistants who “listen” to every conversation. Because the codifiers discussed in this paper devoted so much discussion and attention to clarifying the rules of privacy among neighbors, it is our job to ensure that these rules are interpreted and properly applied in order to address our contemporary concerns. We learn from *halakhah* that the maintenance of privacy is a Jewish value. And while privacy becomes harder to maintain due to evolving technology, it is our responsibility as Jews to ensure that we do all that we can to preserve it.