



May I Smoke if I Sell My Lungs to a Non-Jew?

When I first learned about the sale of *chametz*, it sounded to me like an attempt to trick G-d. Why get rid of my *chametz*, if I can simply scribble my name on a paper, and behold! – it is no longer mine, it now magically belongs to a non-Jew. Come on!

Let's take a deeper look at *halacha's* view on similar cases.

Driving in slow traffic, you are late to an important meeting. As you approach the final stretch, Murphy's Law stops you at the longest red light. You quickly count the cars in front of you, and realize you won't make the next light either. Frustrated, you quickly merge into the right lane and make a (legal) right turn, then a (legal) U-turn, and finally another (legal) right turn to resume your original course, smiling inwardly at your clever trick – using a legal norm to bypass a law that got in your way.

While in some countries this is widely accepted and practiced, in other countries it is frowned upon, and in others it is illegal and subject to a fine. The same applies to shortcutting through a corner gas station at a no-turn-on-red junction instead of waiting at the red light.

But re-calculating my route while driving, or freely entering/exiting gas stations, are perfectly legal. Where's the problem?

Modern law differentiates between tax evasion (always illegal) and tax avoidance (sometimes legal). Rambam¹ calls

the former *מְרָמָה* – cheating; the latter *הַעֲרָמָה* – a clever trick.

The difference between the two depends on several parameters: the intent behind the action (do I derive a benefit from the deceitful action, other than avoiding the consequences of breaking another law); is there a negative outcome (are others harmed or deprived of their rights); is the act itself valid (done in a way that fulfills the criteria of similar recognized acts)?

Accordingly, our Sages allow, and sometimes even recommend, such halachic loopholes. I may deceptively give my grown-up child money to redeem my *ma'aser sheni* fruit for themselves, avoiding the fine imposed on me if I redeem my own.² If I vowed not to derive benefit from you, and I'm hungry and you have food, you may deceptively give food to a third party and I'm then permitted to eat it – without technically breaking my vow.³ Rabbi Tarfon, who was a *Kohen*, 'deceptively' betrothed 300 women during a famine, so they could exercise the right to share in the tithes.⁴ Hillel the Elder introduced the *pruzbul* to bypass the *Shemittah* year nullifying all monetary loans, while preserving Torah law⁵ (before the *Shemittah* year I appoint the court to collect debts owed to me, and immediately after the *Shemittah* year the court re-appoints me to do so), and modern-day Jerusalem's Biblical Zoo animals all belong by contract to a *Kohen*, allowing them to enjoy the produce given to the zoo by the Tnuva Food Co-op as tithes.

Other examples – though somewhat controversial – include the *Shemittah* year's *heter mechira*, allowing temporary sale of land to gentiles, circumventing the prohibition of farming by Jewish owners, and the bank's *heter iska*, designed to avoid the prohibition of paying or collecting interest.

But our Sages criticize such actions: they admonish those bringing their fields' produce into their homes through a window/chimney rather than through the door – bypassing the requirement to give its tithes.⁶ The various tithes total 12% of the produce (22% during the 3rd and 6th years of the *Shmitta* cycle) – a large slice of the farmer's annual profit – yet those who *legally* avoid giving them are criticized!

Based on what we know by now, this makes sense. Sneaking the produce into the home through the window has no real legal meaning other than avoiding the need to give tithes. Indeed, one's intent is to keep as much of the tithes for oneself – at the expense of the *Kohanim* and the *Levi'im*. When there is a negative intent or result, or where the act constitutes no legal norm – like with the joke mentioned in the title – *halacha* negates such deceptive (albeit legal) solutions.

However, *halacha* encourages (indeed, regulates!) deceptive actions done with a positive intent in mind, as in the five examples mentioned above, respectively: having *Ma'aser Sheni* eaten in purity in Yerushalayim even if one can't afford to pay its fine; making

peace between people; assisting the poor during a famine; encouraging the giving of loans even as the *Shemittah* year approaches, and saving the zoo money while saving tons of produce, as today tithes go to waste.

So, what is our intent when we sell our *chametz*?

In the 15th century, selling *chametz* to a trustworthy gentile – who removed it from one’s premises with no plans to use it, with a mutual understanding that the Jew will buy it back from him after Pesach – was permitted as a means to help European Jews from going bankrupt when unable to reclaim their breweries from hostile gentiles who purchased them only eight days earlier and have since doubled the price. According to Rabbi Yosef Karo, “there is no greater deceit than this, yet it is permitted, since one removes the *chametz* from their ownership.”⁷ In the 17th century, the Bach and the Magen Avraham allowed for the sale of *chametz* by contract (which removed one’s legal ownership from it) while leaving it physically within one’s property, on condition that one sells or rents out, along with the *chametz*, the actual room where the *chametz* is kept. Later, the requirement narrowed to specifying the location of the *chametz* within the house. This became a widespread practice whenever a significant loss was at hand, and was eventually extended and accepted in many communities even when dealing with insignificant amounts of *chametz* and without a pressing need.

In any event, there are two obvious positive intentions here: to prevent unnecessary monetary loss and to avoid a loss of food (*bal tashchit*), and at nobody’s expense.

It also seems that the Torah enabled this possibility with the words *לֹא יִרְצֶה לְךָ חֵמֶץ*. The Talmud derived from the word *לְךָ* – that we transgress the prohibition only if we have in our possession *chametz* that belongs to us, but not if it belongs to others.⁸

A story is told of a witty Jewish merchant who, during the British Mandate in post-WWII Palestine, had brought a carload of onions by train from Cairo to Jaffa. Arrested for not paying the taxes required by law, he decided to represent himself in the British court. Citing from the British Empire’s book of law, he read to the judge that “all produce imported into Great Britain by sea or by air, will be subject to taxing” – and then claimed that since he had imported the onions by *land* – he had not violated any law. The humored judge immediately released him.

This cute anecdote can happen with man-made law, which is prone to display such accidental loopholes or oversights, to the dismay of the obvious legislature’s intent (Great Britain is an island and therefore has no land border with other countries; but this was not the case with some of its territories). But the same cannot be said of G-d’s words in His Divine Torah, where no word or letter is unintentional. Therefore, we understand the intentional additional usage of the word *לְךָ* as a hint at the legal loophole upon which we rely when selling our *chametz*, to this very day.

That said, let us aspire to live up to Rav Kook’s⁹ beautiful insight relating to deceptions permitted by Halacha. He views these opportunities as litmus paper by which we gauge our own spiritual situation:

“The difference that exists between one who knows the value of the *mitzvot* and

their sublime purpose, and truly desires them, and between one whose worship of G-d is only a rote habit – can be seen in Torah commandments in which we find ways, under Torah law, to expropriate the charge from oneself. However, it is precisely here that the integrity of the wholesome person who worships out of love becomes known: he is permitted to exempt himself – yet knowing the value and sanctity of the *mitzvah* – he fully commits himself to it.”

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- 1 Commentary on the Mishna, Tmura 5:1.
 - 2 Mishna, Ma’aser Sheni 4:4; Bava Metzia 45 and Rashi there.
 - 3 Mishna, Nedarim 5:6.
 - 4 Yerushalmi, Yevamot 29.
 - 5 Gittin 36.
 - 6 Gittin 81.
 - 7 Beit Yosef, OC 448.
 - 8 Pesachim 5.
 - 9 Ein Aya, Brachot 2, p.174.

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