YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**Halakha in the Age of Social Media**

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**Shiur #10:**

**Violating the Privacy of Others for Curiosity’s Sake, Part I**

**Introduction**

When people think about violating the privacy of others, they usually think about publicizing secrets, neutral or negative, to third parties. As we will see, Halakha seems to prohibit the breaking of confidences; moreover, conveying negative information, secret or not, falls under the prohibitions of *rekhilut* and *lashon ha-ra,* gossip. These sins are relatively well known.

Before we discuss these, however, we must focus on the lesser known and seemingly less egregious problem of violating the privacy of others for mere curiosity. Why is that wrong, and what counts as private?

In our age of digital communication, there will be new applications to this question. Can one read someone else’s email? What about reading an email sent to a listserv that one is not a member of? Is that considered secret? After all, it was sent to many people? How about using someone else’s Facebook account to access the profile of a third person? Should we assume that because that third party has not “friended” the viewer that all information found therein should be considered private, or does the knowledge that a profile can be easily accessed in this way create a presumption that the content is not truly private? If someone has an anonymous Twitter account, is it wrong to try to unmask the owner, or is the owner’s anonymity something that deserves to be shattered?

We will try to lay out the potential halakhic issues, focusing on cases where there is no intent to spread the information to others. These issues will be dealt with in coming weeks.

At the end, we will also address some more philosophical issues that may be raised of overly focusing on the lives of others. When people put their lives in the open on social media, presumably there is no legal issue with taking advantage of that to “spy” on others. However, that does not always mean that it is the wisest or most ethical thing to do.

**Potential halakhic issues**

There are several halakhic issues that must be raised.

The first is *lashon ha-ra* or *rekhilut.* While these terms generally refers to gossip, we will see that accessing illicit information may be similarly prohibited under this general category.

The second issue is *hezeik* (damage). Many Posekim have wondered whether a category known as *hezeik re’iya (*damage by vision), which prohibits people from looking into the property of others in such a way that violates their privacy and limits the use they can make of their space, may be expanded to information.

The third issue is the *cherem (*excommunication) of those who read the correspondence of others. This is classified as a *cherem* of Rabbeinu Gershom, a point we will return to. Is this a third issue, or simply a halakhic mechanism used to enforce a different prohibition? There are also a series of generic prohibitions that are raised by the Posekim in their discussions of the *cherem.*

***Rekhilut***

The Torah prohibits gossip: “Do not go as a talebearer (*rakhil*) among your people” (*Vayikra* 19:16). Colloquially, this verse is known to prohibit *lashon ha-ra*, which usually refers to conveying negative information to third parties. However, several authorities have argued that this also prohibits the initial gathering of private information.

Rashi ad loc. notes that the word *rakhil* is related to the term for spying. Based on this etymology, Rav Ya’akov Chagiz argues that the target audience does not matter. Rav Dr. Asher Meir accepts this position of Rav Chagiz, summarizing the implications as follows:

Rabbi Yaakov Hagiz, in his well-known responsum of the seventeenth century, writes that this would be a transgression of rechilut. “What difference does it make if he goes about as a spy to reveal something to someone else or to himself?” (Hilchot Ketanot 1:276). Rabbi Hagiz’s ruling relates to the outcome of the act: becoming cognizant of someone’s private information. According to Rabbi Hagiz, it is rechilut, as there is no difference between revealing something to others and revealing something to oneself.

Intuitively, this makes sense. One can “spy” on others to gather information to use against them or to provide to interested outsiders, or for voyeuristic reasons. All of these aims may be problematic.

Rav Chagiz himself, in a responsum about the *cherem* against reading the mail of others, summarizes the problem similarly: “Perhaps the sender doesn’t want his affairs to be known” (ibid. 1:59) As much as one doesn’t want his private life spread to many people, he doesn’t want it invaded by individuals.

Rav Eliezer Shenkolvsky argues that the Rambam would accept a similar argument, that listening in to the secrets of others is *avak rekhilut,* the dust of gossip.[[1]](#footnote-1)

***Hezeik re’iya***

Another potential issue is that violating one’s privacy is damage, prohibited under tort law. The basis for this emerges from a category introduced in the first chapter of *Bava Batra*, *hezeik re’iya,* damage by sight. The opening pages of the tractate discuss the circumstances under which partners who share a courtyard or garden are required to divide their properties with a wall. The Mishna and Gemara discuss the size and material of said wall. The Gemara (2b) wonders: is the context of the Mishna when the parties agree to build a wall, but in a case where they did not want to there would be no need; or is the Mishna ruling that as long as they want to divide the property, they are forced to build a wall? (Of course, if the parties want to continue to own the property jointly, they are entitled to do so.)

The Gemara suggests that this depends on whether or not we are concerned about *hezeik re’iya.* If we are, then once the parties agree to divide the property, we must build a wall to prevent them from seeing each other (easily) in their newly divided plots of land. If not, then we can allow them to divide the land, even though they will be granted no privacy.

At first glance, it seems as if the Gemara is debating whether we give value to privacy at all. However, the Gemara then argues that there is only a dispute in a courtyard and the like. Everyone agrees that extreme breaches in privacy must be stopped; in such cases, *hezeik re’iya* is considered actionable damage. Thus, the Gemara argues, one must be prevented from seeing into his neighbor’s house. As Rashi (2b s.v. *Hezeika de-vayit*) explains, in a home, people are engaged in acts that require privacy. By creating a situation where people can always see in, the inhabitants of the house are in effect losing the rightful usage of their house.

Thus, in the final assessment, the Gemara clearly rules that there are cases in which the very ability to invade the privacy of others is considering damaging and may be prevented by the courts, as would any case of physical damage. Several reasons are given for this. The Ramban (*Bava Batra* 59a) summarizes three of them:

1. By seeing what others are doing, one creates an *ayin ha-ra,* an evil eye. The exact definition of this phrase is debated. Some believe that people actually create metaphysically damaging rays from their eyes that must be avoided.[[2]](#footnote-2) Others explain that the jealousy that is caused by seeing the other person bring the Divine Court to scrutinize their actions, leading to potential damage. Alternatively, people are punished for doing things that cause others to feel jealousy. One could take a more rationalist approach and argue that jealousy often brings negative consequences, whether or not directly ordained by Heaven.[[3]](#footnote-3)
2. It causes *lashon ha-ra*, gossip and related issues.
3. It is a violation of *tzeniut*, modesty. It prevents people from engaging in normal home activities without their violation of these norms.

Whatever the rationale, the prohibitions that emerge are prohibited in standard codes of Jewish law.[[4]](#footnote-4)

These explanations break down into two kinds of answers. The first two seem to understand *hezeik re’iya* as actual damage. According to the final answer, the word damage is being used loosely. The real intent is that one is preventing his neighbor from fully utilizing his property. [[5]](#footnote-5)

It is worth noting that whether or not *hezeik re’iya* refers to breaching modesty, *Chazal* see maintaining this value as definitional to the Jewish people and being enshrined in law as well. The Mishna and Gemara later on in *Bava Batra* (60a) forbid building houses that have windows or openings that open directly into the house of a neighbor, as this is a breach of modesty. The Gemara then expounds on this, arguing that it is the insistence of Jews to avoid this practice that causes Bilam to exclaim (*Bamidbar* 24:5): “How great are your tents, Ya’akov, your dwellings, Yisrael!”

The Gemara asks: **From where are these matters,** i.e., that one may not open an entrance opposite another entrance, or a window opposite another window, derived? **Rabbi Yoḥanan says that** 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](https://www.sefaria.org/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.** (*Bava Batra* 60a, Koren translation and elucidation)

Rashba (*Responsa* 2:268) does equate this value with *hezeik re’iya,* and argues that any violations of these laws cause the Divine Presence to leave the Jewish people.[[6]](#footnote-6)

***Hezeik shemia***

If we are dealing with accessing private pictures, perhaps the above categories will be relevant, and we will return to that later. However, if we are dealing with merely accessing information, we must deal with the question raised by other authorities — namely, does the above prohibition apply to “hearing”? If one manages to hear others, is that considered damage *(hezeik shemia)*, in whatever way seeing is?

The Meiri (*Bava Batra* 2a, s.v. *U-ma*) writes that we are not worried about *hezeik shemia* at all because most people are careful about how they talk, and therefore being too close to someone’s property should limit their activities — they will know how to be sufficiently quiet. Rav Eliyahu Mizrachi (*Responsa Re’em* 8) writes more categorically: “We have not found in the entire Talmud damage of this sort.”

While one could have argued that the Meiri and Rav Mizrachi agree, many have seen them as presenting opposite opinions. Rav Ben Tziyon Nesher (*Responsa Even Pina* 167), for example, argues that according to the latter, merely hearing others’ information cannot be considered damage. For the Meiri, however, this is only the case if the person could have preventing the eavesdropping. People shouldn’t scream near their windows if they don’t want the neighbors to hear. However, if one would use a secret recorder which would prevent people from speaking freely in the privacy of their own home, that would be prohibited and considered damage. In such a case, the Meiri’s argument, that people know to avoid such things, does not apply.

Rav Nesher further argues that these two formulations depend on the above discussion regarding *hezeik re’iya*. If *hezeik re’iya* is considered damage, then hearing someone’s secret, which has no explicit source to be defined as damage, should not be included. If, however, the real issue is that violations of privacy prevent people from safely using their own space, eavesdropping is no less effective if it violates people’s property than peering into their homes.

This argument is also advanced by Rav Eliezer Shenkolvsky.[[7]](#footnote-7) However, he is hesitant to accept the implications of the Meiri’s view, as he finds no other Rishon or Acharon who explicitly articulates such a position. On the other hand, Rav Dr. Asher Meir argues that this extension of the prohibition of *hezeik re’iya* is natural and should be accepted. As he writes:

A protracted discussion in the first chapter of tractate Bava Batra concludes that hezek reiah—defined as being in a position to scrutinize the private activities of a neighbor—is considered a kind of damage or tort, which the offending neighbor must take steps to prevent. The gemara (Bava Batra 6b) objects that an offending neighbor could claim that passersby are ultimately able to see the same kind of activities that he is required to take steps to avoid seeing. The gemara answers with the justification of the protected neighbor, among them: “Passersby see me only if they look carefully; you see me in any case.” On this basis, the halachic authorities draw a distinction between casual seeing—which is not considered harmful—and scrutinizing or actively looking.

For example, the Rema (CM 144) writes explicitly that one must take precautions not to look (le-histakel) into his neighbor’s house; it is understood that occasionally he will see what goes on there. The hezeik re’iya approach focuses on the process — snooping around in someone’s private domain — irrespective of the outcome.

We will return to the implications that Rav Meir draws from this analysis later.

***Cherem***

The third area of Halakha which forbids violating the privacy is of others is the *cherem* against reading other’s mail. This *cherem* is first mentioned in the responsa of Rabbi Meir (Maharam) of Rothenburg, writing in the thirteenth century (*Responsa* 1022). It is part of a list of early decrees from Ashkenazic scholars, including the 10th-11th century scholar, Rabbeinu Gershom ben Yehuda, or Rabbeinu Gershom *Meor Ha-gola*, the Light of the Exile. Other decrees there include the prohibition against polygamy.

Most scholars assume that the decree against reading other’s mail is also by Rabbeinu Gershom. However, Rabbi Yehuda Herzl Henkin (*Responsa Benei Vanim* 3:17) has argued that a close reading of the above responsum does not indicate that this is true; rather, it is an unattributed early decree. Either way, we are dealing with an early Ashkenazic decree.

A *cherem* carries many different social and economic punishments. In some cases, these punishments must be instituted by a court; in other cases, they are automatic. Which punishments take effect when one read’s someone else’s letter without permission and how they take effect are discussed at length by Rabbi Henkin in above responsum, but they are not relevant to our discussion.

A more central question is whether the *cherem* was creating a new prohibition or enforcing an existing one. In the case of prohibiting polygamy, for example, it is clear that the *cherem* was introducing a new prohibition. On a biblical level, it is permitted for a man to marry multiple wives. However, when it comes to this *cherem,* many Acharonim believe that Rabbeinu Gershom only instituted the **sanctions,** but the **prohibition is biblical.** The *cherem* was protecting the prohibition with added levels of stricture.

This may related to another issue: does the *cherem* expire? Maharik (*Responsa* 101) is cited by the *Beit Yosef (EH* 1) as saying that technically, the *cherem* against polygamy was only until the end of the fifth millennium, meaning the Hebrew year 5000. Additionally, many assume that the decree was not accepted by all communities; perhaps, it was never formally accepted by any communities but the Ashkenazic ones. (This is despite the fact that all Jewish communities now accept it, regardless of whom and when it was originally limited to.)[[8]](#footnote-8)

However, that limitation may only make sense for a *cherem* that was introducing a new prohibition, not one that was protecting a biblical one. Thus, similar limitations may not apply to the *cherem* against reading other’s mail.[[9]](#footnote-9)

What prohibition is being violated? As we have already seen, Rav Chagiz argues that it is a violation of *rekhilut,* of going as a talebearer. Rav Chayim Shabbetai (*Responsa Torat Chayim* 33) argues that as the person is usually accessing the information to use it in some way, and the information is owned by the writer and receiver of the letter, reading the letter is a form of theft — specifically borrowing without permission, which is a subsection of theft. (Based on this, he argues that it is prohibited to read someone’s letter even for a mitzva purpose.)

Rav Chayim Palagi (*Responsa Chikekei Lev, YD* 49) similarly argues it is like a guardian who violates his stewardship, which is another subcategory of theft. Rav Palagi also offers several more generic prohibitions. First, he suggests that this is a violation of loving one’s fellow as oneself (*Vayikra* 19:18). As Hillel famously formulates it, “Don’t do to your friend what you would not want done to you” (*Shabbat* 31a). As most people don’t want their private communication accessed by outsiders, one should not do it to others. He also suggests that it is *geneivat da’at,* which usually refers to deceit, but literally means to steal knowledge.[[10]](#footnote-10)

Some Posekim[[11]](#footnote-11) assume that this *cherem* is violated even if the letter is opened, without reading the text. This would seem to indicate that while aspects of the *cherem* might be covered by other prohibitions, the *cherem* expanded them.

However, the possibility that *cherem* enforces pre-existing prohibitions opens the possibility that the severity of the *cherem* would be limited to very specific circumstances. Rav Shenkolvsky, for example, argues that while all the above prohibitions might apply to eavesdropping on a secret, the *cherem* would be limited to reading written material, as that is all that is explicitly covered in all versions of the *cherem.*

The Posekim[[12]](#footnote-12) suggest, for example, that if the *cherem* protects the obligation to love others, that would be limited to reading the letters of Jews, as only they are “your fellow.” If, however, the prohibition is *geneivat da’at,* it might apply to the letters of non-Jews as well, as it is prohibited to deceive any people (*Chullin* 94a). If it is theft, it would similarly be universally prohibited.

However, Rav Yitzchak Zilberstein cites Rav Yosef Shalom Elyashiv’s view that this may not be the case. Even if reading someone’s letter is a kind of theft, it may not be equivalent in all respects to theft. Thus, it may be that this heightened sensitivity would be limited to Jews.

The Posekim also debate whether this prohibition may be waived for the purpose of a mitzva. However, we will return to these discussions later when we deal with spreading the information gathered. We are limiting ourselves here to the violation of gathering information per se.

**Interim Summary**

So far, we have established that there are several possible prohibitions involved in illicitly reading the correspondence or violating the privacy of others.

Next week will deal with some exceptions to these principles and the implications for emails, Facebook and other types of media.

1. See his article, “*Ha’azanat Seter,*” in *Ha-ma’ayan,* Volume 37. [↑](#footnote-ref-1)
2. See, for example, Maharal in *Netivot Olam, Netiv Ayin 1. Levush CM* 157 even argues that it is a direct damage, “like his arrow.” [↑](#footnote-ref-2)
3. For discussions of many of these possibilities, see *Ayin Ha-ra Be-ein Ha-Yahadut.* For a brief summary, see: http://olamot.net/shiur/%D7%A2%D7%99%D7%9F-%D7%94%D7%A8%D7%A2 [↑](#footnote-ref-3)
4. See *Shulchan Arukh, CM* 154, 155, 159, 160. [↑](#footnote-ref-4)
5. Seemingly, this prevention of use is indirect damage, and therefore should not be considered damage according the normal principles of Jewish law. See *Even Ha-azel, Hilkhot Shekhenim* 2, who deals with this problem. See also *Kehillat Ya’akov*, *Bava Batra* 5. [↑](#footnote-ref-5)
6. See also *Shulchan Arukh Ha-rav*, *CM, Hilkhot Nizkei Mammon* 12. [↑](#footnote-ref-6)
7. See his article cited above. [↑](#footnote-ref-7)
8. See *Pitchei Teshuva, EH* 1:19, at length. [↑](#footnote-ref-8)
9. See discussion in the footnotes in the *Tur Yerushalayim*, note 18. [↑](#footnote-ref-9)
10. These answered are summarized in the *Encyclopedia Talmudit*, *Cherem De-Rabbeinu Gershom,* as well as by Rav Henkin, above. [↑](#footnote-ref-10)
11. *Responsa Beit David, YD 158*, cited in *Encyclopedia Talmudit*. [↑](#footnote-ref-11)
12. See *Chikekei Lev* above, as well as the summary in Rav Shenkolvsky ’s article and the entry in *Encyclopedia Talmudit.* [↑](#footnote-ref-12)