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 #11: Privacy to Oneself, For Curiosity’s Sake**

[Last week](https://etzion.org.il/en/shiur-10-violating-privacy-others-curiosity%E2%80%99s-sake-part-i), we explored the possible halakhic problems involved with violating the privacy of others, even when there is no attempt to spread or use the information. We saw that it might fall under the general ban of *rekhilut* or it might be a violation of *hezeik re’iya,* if that prohibition can be expanded. We also considered several of the justifications for the *Cherem De-Rabbeinu Gershom* against reading other’s people’s mail. Those reasons, such as loving others as oneself and not “stealing” information, each raise potential issues of violating privacy. This week, we will move on to the practical implications. To do that, we first need to explore some of the exceptions to the *cherem,* which will shed light on cases when privacy is not assumed.

**Once the letter has been thrown out**

The *Be’er Ha-gola (CM* 334) writes that once a letter has been thrown out, anyone is permitted to read the letter. The assumption is that once a letter has been thrown out, the receiver of the letter no longer considers it private. In *Encyclopedia Talmudit* (“*Cherem De-Rabbeinu Gershom*,” n. 894), they present this as the law without qualification.

However, as Rav Shammai Gross (*Responsa Shevet Ha-Kehati* 1:315) and Rav Yehuda Herzl Henkin (*Responsa Benei Vanim* 3:17) note, this probably does not apply nowadays. Most people assume that there are not people rummaging through their garbage. Thus, when they throw out a letter, they assume that it will never be seen again. (Material that is particularly sensitive is sometimes shredded, but that is to prevent particularly unscrupulous people from stealing financial information and the like.) Thus, if throwing out a letter uproots the prohibition to read it, based on the assumption that the receiver no longer considers the correspondence private, this assumption would no longer hold true. In each circumstance, rather, we would have to gauge what indicates a lack of desire for confidentiality.

Rav Chayim David Ha-Levi (*Responsa Aseh Lekha Rav* 5:108) writes that in a case when a letter has been placed in *geniza,* it is obvious that the desire is that it should remain private. He also notes that people must quell their natural curiosity in order to respect the privacy of others.

**Permission from the receiver**

As the above case indicates, the assumption of the Poskim seems to be that the primary person who determines the confidential status of correspondence is the receiver of the letter. Hence, the receiver’s throwing it out lifts the *cherem* against reading it. This is true despite the fact that the sender has no say in when the letter is thrown out. Rav Ya’akov Kanievsky, the author of *Kehillat Ya’akov*, is cited (*Halichot ve-Hanhagot* p. 18) as drawing this conclusion: permission from the receiver allows a third party to read the letter. Rav Gross (above) agrees with this position, though he notes that this would only be in the case when reading the letter would cause no damage to the sender. If it would cause damage, one must assume that the material is meant to stay confidential.

However, some Poskim disagree. Rav Palagi, basing himself on the general prohibition to share information until one has been told that it is not confidential (*Yoma* 4b) writes as follows (*Responsa Chikekei Lev YD* 49):

If one sends a letter to someone else, the one who receives the letter is prohibited from showing it to another, even if there is nothing hurtful or incriminating in the letter, just as if you were told something you aren’t allowed to repeat it without permission to do so.[[1]](#footnote-1)

Furthermore, Rav Chagiz (*Responsa Halakhot Ketanot* 1:59) writes that if a note is put on the letter stating that it is “protected” by *Cherem de-Rabbeinu Gershom,* then there is certainly an assumption that the sender wants the letter to remain private. Thus, it would seem that one cannot uniformly assume that the receiver of correspondence can waive the potential prohibitions involved with reading it. In order for the correspondence to be permissible for public consumption, it must be a case in which there is no indication or reason to believe that the sender would consider it a violation of his privacy.

Rav Gross notes that in a case where the sender explicitly indicates that it is prohibited to share the information, it would be unequivocally prohibited to do so, based on the prohibition to breach confidentiality mentioned above by Rav Palagi.

**Postcards**

The *Arukh Ha-shulchan (YD* 334:21) raises a question concerning postcards: is there an assumption of confidentiality when the letter is written in such a way that it is always open? Rav Henkin assumes that it is permitted to disseminate the information. He derives this from the language many Poskim use to describe the *cherem,* applying it to one who “opens a letter.” The assumption seems to be that it is the sealing of a letter that indicates that the sender wants it private. When it is left open, because the sender knows how easy it is to read it, there is no problem.

Rav Gross, on the other hand, argues. He assumes that when it comes to postcards, the material is probably not sensitive; thus, the sender does not mind if the (anonymous) postman reads it. This in no way indicates that he would want people he knows, other than the intended recipient, to read it.

There seems to be a dispute between these two Poskim as to whether it is the assumption of privacy that creates the imperative to respect that privacy or all material is off-limits until one is granted personal permission to read it.

***To’elet***

As we will see, many laws of *lashon ha-ra* are waived when there is a need *(to’elet)* for the information. While one might assume that the same dispensations would apply to issues of confidentiality, the Poskim actually debate this point. The Rashba assumes that such a dispensation does apply, specifically applying it to the *cherem* against reading the mail of others.

The Rashba seems to permit precisely these cases, focusing on *Cherem De-Rabbeinu Gershom* against reading other’s mail, which we will return to soon (*Responsa Rashba* 1:557):

Rabbeinu Gershom did not make his decrees so that people might violate biblical or rabbinic Halakha because of them. Just the opposite, they were instituted only to ensure compliance with our Torah and to ensure that Jewish people act in a correct and modest manner.

Therefore, if a court, parents or educators objectively determine that in a certain situation they can only ensure compliance with our Torah by "violating the privacy" of an individual by reading their mail or diary, or by listening in on their telephone conversations, there is no doubt that Rabbeinu Gershom would agree that it would be a mitzva to do so.

Other Poskim disagree. For example, Rabbi Nissim Karelitz (*Chut Shani, Hilkhot Lashon Ha-ra* 5:1:1) argues that only in cases of danger is one permitted to divulge secrets. However, in cases where there is simply a benefit, he argues that the same dispensations due to *to’elet* do not apply. He cites the view of the Chazon Ish, who refused to share the reasons behind a person’s divorce with a potential future spouse, claiming it was a violation of the professionalism mandated by the above laws. He argues that the same would apply to a doctor. This, as we have mentioned above, is a questionable assumption. I also wonder whether the Chazon Ish would limit his claim to a judge in court, the paradigmatic case of the Gemara which many think would be the strictest category of revealing secrets.

(Rav Ya’akov Epstein, in *Responsa Chevel Nachalato* 1:83, seems to lean in this direction, as such behavior will cause a lack of trust, but he does not rule as clearly as Rav Karelitz does.)

However, these Poskim are primarily dealing with cases in which the information will be used or spread. Thus, we will return to the parameters of *to’elet* in the coming weeks when we deal with the issue of breaching confidentiality by relaying information to others, as well as *lashon ha-ra* in the classic sense of gossip.

**Modern applications, interim summary**

Moving from the theoretical to the practical, we must ask the following: how do the prohibitions and exceptions outlined in the previous unit and the first half of this unit apply to the numerous new ways of communicating that the age of social media has introduced?

As we have seen, the potential issues are

1. *Rekhilut*
2. *Hezeik Re’iya/ Hezeik Shemia*
3. *Cherem De-Rabbeinu Gershom* against reading mail, which itself may be based on other prohibitions such as:
	1. Loving one’s neighbor as oneself and avoiding actions that one would not want done to oneself
	2. *Geneivat Daat —* deception or stealing information

The exceptions to these prohibitions are:

1. Cases where it is clear that no privacy was intended originally
2. Cases where it has been made clear that privacy is no longer demanded
	1. This was derived from the case of the thrown-out letter.
		1. As noted, what qualifies in the modern era is unclear.
3. Cases where the receiver waives privacy.
	1. This is disputed, as well as conditional on the sender’s not making clear an expectation that privacy be maintained
4. *To’elet*
	1. The exact definition of benefit and its applications will be discussed in coming weeks.

All of these prohibitions apply regardless of whether the information is being passed on. These cases many include various prohibitions that we have mentioned, but not expanded upon.

**Emails, texts, WhatsApps**

It seems obvious that reading an email not addressed to one is prohibited and covered by the *Cherem De-Rabbeinu Gershom* and all prohibitions implied by it. This is especially the case if the text of the email indicates that it is confidential. For example, some emails will include a disclaimer that the email is meant only for the recipient, and if it has been received by mistake, the sender should be made aware of the error. In such a case, all Poskim would agree that it is prohibited to read someone else’s email.

If the intended recipient wants to share an email, it would depend on the dispute above. For an innocuous email, the above discussion would determine whether the recipient has the right to share the email. If it is damaging, or there is an explicit indication that it is meant for the recipient only, it should not be shared. These restrictions would apply to forwarding emails, texts or WhatsApp messages.

What about a listserv? In most cases, it would seem that one may not read an email from a listserv of which one is not a member, as the very notion of membership seems to indicate that the material is presumed to be private and reserved only for the members. Thus, even though some Poskim give the recipients of letters the right to share the information, they all agree that this is not the case when there is reason to believe that the senders did not have this expectation. This also violates the prohibition of breaching confidentiality, to which we will return.

**Snapchats**

Snapchat differs from other forms of messaging in one crucial respect. As the official website says:

Chat off the record, just like in person

Texts sent in Chat are deleted, by default. But you can always save something important (or hilarious) with one tap, or a screenshot.[[2]](#footnote-2)

With this being the case, it would seem to be problematic for one to look at a Snapchat intended for someone else. Since the default procedure is that the message will be deleted, this seems to imply a desire for secrecy on behalf of the sender. This would seem to exacerbate the problem of saving a Snapchat to show.

**Cyberspying**

Rav Dr. Asher Meir takes several of the sources, specifically the position of Rav Chagiz that *rekhilut* applies even when one merely accesses private information but does not share it, plus an expanded understanding of *hezeik re’iya,* and forbids what he refers to as “cyberspying.” Under this category, he subsumes such actions as attempting to uncover the author of an anonymous blog. He argues that many other attempts to access the identity or information of others may be similarly prohibited. However, he argues that the use of casual technology is permitted and not considered spying, as opposed to methods that require effort and expertise. Here is how he formulates the problem:

The case discussed by Rabbi Hagiz is essentially identical to that of reading someone’s diary, so clearly he would view it as forbidden. I think it is obvious that scrutinizing someone’s diary would likewise cross the line from casual “seeing” to “looking.” What about the cyberspying example cited above? According to Rabbi Hagiz, it is clear that the outcome is revealing a person’s private information and would therefore be forbidden.

What about the process? I think it makes sense to distinguish between a routine Google search or visit to a person’s Facebook page and a determined, sophisticated use of powerful online tools which cross the line from casual “seeing” to “looking” online and would therefore be forbidden.

The example I used is an extreme one of utilizing seemingly public information and powerful online tools to disclose the identity of a blogger who has taken pains to maintain his privacy. But my belief is that there are many lesser examples where legitimate curiosity can easily cross the line into unwitting cyber-transgression.

Rav Dr. Meir is particularly harsh in his formulation, as he considers these violations of halakhic tort law. However, as we have seen, there are many Poskim who did not accept the notion of *hezeik shemia.* Accessing mere information would seem to fall in that category. Thus, it may be prohibited under *rekhilut*, but not considered damage.

However, one could argue that using these methods to access **pictures** would be more similar to *hezeik re’iya.* Just as it is prohibited to arrange to peer into another’s property and prevent the owners from using their property privately, it could be that knowing people are accessing pictures they should not limits the kinds of activities they engage in, or at least those they memorialize with pictures. On the other hand, it seems that this is much less direct than the classic cases of *hezeik re’iya.*

Thus, it seems to this author that those Poskim who do not accept *hezeik shemia* would probably reject the application of the laws of damages to such cases.

**Facebook**

The use of Facebook raises several possible applications of the above discussion. For example, creating a fake account to trick others into acceping friendship in order to view their profiles would seem to be prohibited under many of the above prohibitions. This is especially the case when the information might be used to the detriment of the persons being spied on. Thus, an employer or potenital employer using this method to determine who deserves to keep or get a job, or a school administrator doing so to determine whom to punish at school, would violate this. However, as noted above, a full discussion of this issue requires the exploration of *to’elet,* which we will return to in the coming weeks.

What about using a mutual friend’s account to “spy”? On the one hand, one could argue that the fact that Facebook offers a variety of privacy settings which allow one to share certain information with friends, certain information with friends of friends, and certain informatio with the public would indicate that people really want to hide information from those not in the proper category.

On the other hand, there may not really be such an expectation. It is somewhat common for people to casually view the profile of others using the account of a mutual friend. In some cases, it is to be expected. For example, I imagine that most people are aware that spouses or siblings of their friends may causally use their account. In other cases, when one actively looks for a mutual aquaintance to gain information, it may be less expected.

Another factor, which we will return to in our *shiurim* on *lashon ha-ra,* is the possibility that information that is considered public may no longer have any limitations on whom it can be shared with, and *a fortiori* who may access it. This is based on a engimatic line in the Gemara, which rules that “Anything which is said in front of three people is not subject to [the prohibition of] evil speech” (*Arakhin* 16a). For some Poskim, as we will see, this means that not only is *lashon ha-ra* no longer a concern, but confidentiality and the like may also be waived once the information is considered public enough.

However, as we will see, this may be true only in cases in which the speaker, having stated the original information in a public group, presumes that it will be spread. In cases in which the situation is different, such as ten lawyers at a practice who are internally sharing confidential information about a client, there is no such permission.

When it comes to Facebook, an unofficial poll at a *shiur* on the topic yielded a variety of opinions. Some people felt that anything they post on Facebook is assumed to be for public consumpiton. Others, however, felt differently, especially when they imagined specific people whom they would not want to access their profiles (e.g. when school principals view pictures of their students.)

Regarding closed and secret groups, it would seem that there is a strong assumption of privacy. The fact that the group is intentionally closed, or in some cases only visible to, a select group of people makes this case more similar to the case of the law firm above. Although it is a relatively large group, confidentiality is still to be assumed.

**The Complexity**

At a *shiur* in Toronto, one attendee noted that the amount of signficance given in this area to what people expect seem to run afoul of the tedency in Halakha for uniformity. However, what emerges from the sources is that these kinds of laws do not lend themselves to uniformity. The central principle often comes down to what people’s expectations and assumptions are, and these may change over time, based on demographic factors and a host of other considerations. As we saw above, for example, the dispute as to whether the *cherem* applies to postcards rests mostly on whether people care about privacy in messages conveyed via postcard. Thus, the best we can do is to outline the general princples.

**Metaprincples**

Another attendee of that *shiur* in Toronto noted that much of this discussion assumes the more formal approaches to these laws. However, if, as some Poskim argue, *Cherem De-Rabbeinu Gershom* is merely protecting some vague rules derived from the biblcial directive of *“Ve-ahavta le-reacha kamocha,”* these laws would be further-reaching and harder to define. General princples like “Don’t do to others what you would not want done to yourself” are, on the one hand, applicable in almost every area of life. For our purposes, that really might prohibit one from accessing information about others even when a technical problem is difficult to pinpoint. On the other hand, as seen above, such overarching principles are almost impossible to quantify and define.

**Conclusion**

Unlike some of the topics we have seen in previous weeks, in which the interactions and implications of certains laws with the reality of social media are unexpected, the notion that privacy has been affected by these modes of communication is obvious and has been written about in a variety of modern publications. However, the extent to which these realities have changed the way we relate to these laws is still being digested.

Hopefully, these sources have at least opened the discussion, though more work will have to be done to pin down all the implications, especially as new technologies develop and change our assumptions once more.

1. Translation by Rabbi Josh Strulowitz. [↑](#footnote-ref-1)
2. Https://whatis.snapchat.com/. [↑](#footnote-ref-2)