YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**Halakha in the Age of Social Media**

**Rav Jonathan Ziring**

**Shiur #14**

**Confidentiality in the Age of Social Media 2:**

**Public Information**

**Recap**

Last week we began discussing the prohibition of violating confidentiality. The Talmud propounds that any information that is shared must, barring other considerations, be assumed to be private. This week, we will outline cases in which confidentiality is **not assumed**, either because there is reason to presume that the original speaker did not intend for the information to remain secret, or because privacy has already been breached. Obviously, the implications for social media will be vast.

In order to understand the central Talmudic passages that provide the groundwork for this discussion, we must briefly review a bit of terminology.

*Lishna bisha* in Aramaic is the literal rendering of *lashon ha-ra* in Hebrew, evil speech or evil tongue. *Chafetz Chayim*, throughout his work, accepts the definitions outlined by Rambam in the seventh chapter of *Hilkhot De’ot.* Rambam write that *lashon ha-ra (*or *lishna bisha)* refers to gossip, negative information which is true. This is distinct from *hotza’at shem ra,* which refers to defamation or slander; and from *rekhilut,* which implicates speakers in *lashon ha-ra* such that animosity is caused.

However, many Rishonim believed that *lishna bisha* refers either exclusively or additionally to the prohibition to breach confidentiality. The sources for this contention are the passages we will explore.

**Anything said before three**

The Talmud in two places states the following:

**Rabba bar Rav Huna says: Any matter that is said in the presence of three** people **is not subject to** the prohibition of *lishna bisha.* (*Bava Batra* 39a-b, *Arakhin* 15b)

In *Bava Batra,* the context of this statement is in a wider discussion of *mecha’a,* legal protest. The topic of much of the third chapter is squatters’ rights. One who squats on land for three years is assumed to be the owner of property. To prevent the squatter from being able to claim ownership by dint of his physical presence on the land, the original owner must issue a formal protest, which breaks the contiguity of the three years needed by the squatter. The Talmud presents a dispute as to how many people must witness the protest:

The Gemara relates: **Rabbi Yosei, son of Rabbi Ḥanina, encountered** the **students of Rabbi Yoḥanan** and **said to them: Did Rabbi Yoḥanan say in** the presence of **how many** people **a protest** must be lodged? **Rabbi Ḥiyya bar Abba says** that **Rabbi Yoḥanan** says: **A protest** must be lodged **in the presence of two** people. **Rabbi Abbahu said** that **Rabbi Yoḥanan** said: **A protest** must be lodged **in the presence of three** people. (*Bava Batra* 39a, Koren translation)

The Talmud then suggests that this dispute hangs on whether or not one accepts the statement of Rabba bar Rav Huna in the context of *lishna bisha*. The simplest explanation of this suggestion is that the common denominator between these two laws is that they both depend on publicity. The protest, if public, can be assumed to have reached the ears of the squatter such that he will take pains to defend his legal rights, if he has any. *Lishna bisha,* for some reason, is not a problem once the information in question is public. At this stage, the Talmud assumes that Rabbi Chiya bar Abba would argue that both the protest and the *lishna bisha* can be presumed public once two people have heard the information:

The Gemara elaborates on the suggestion that the dispute hinges upon this point: **The one who says** that a protest can be lodged **in the presence of two** people **is not of** the opinion that the ruling is in accordance with the opinion **of Rabba bar Rav Huna** and holds that even if only two people hear of a matter it will become a matter of public knowledge. Therefore, it is sufficient to protest in the presence of two witnesses. **And the one who says** that a protest must be lodged **in the presence of three** people **is of** the opinion that the ruling is in accordance with the opinion **of Rabba bar Rav Huna.**

The Gemara then launches in to several possibilities that do not depend on this equation. The assumption that three people (or two) will ensure that the squatter hears about the protest even without being present is based on a statement earlier on that page:

**We** are **not** going to **tell him personally,** but **we are** going to **tell others.** In that case, word of the protest will reach the possessor, since **your friend has a friend** whom he tells about the protest, **and your friend’s friend has a friend** whom he tells about the protest; therefore, it is a valid protest.

In other words, we rely on the grapevine to ensure the squatter is given ample opportunity to defend himself or herself.[[1]](#footnote-1)

This statement also appears in *Arakhin* 15b, in the middle of longer discussions of *lashon ha-ra*: it is permitted to say *lishna bisha* said in front of three because your friend has a friend and your friend’s friend has a friend. It is also preceded by a dispute as to whether *lishna bisha* said in front of the object of the information is prohibited.

***Lishna Bisha***

In the passage in *Arakhin,* the simplest understanding of the phrase *lishna bisha* is gossip, based on the broader context. However, based on the context in *Bava Batra,* many Rishonim feel otherwise. Noting that *mecha’a,* the protest against a squatter is not gossip, at least at first glance,[[2]](#footnote-2) the issue at hand seems to be simply about the presumption of whether information can and will remain secret or will travel. Thus, they understand the phrase *lishna bisha* as revealing secrets. Ritva (*Chiddushei Ha-Ritva, Bava Batra* 39b s.v. *Lit ba*), for examples, notes the opposite implications in the two passages and argues that the phrase *lishna bisha* can refer both to the breaching of confidentiality and to forbidden gossip.

It is obvious that under certain circumstances, the fact that information has been shared publicly negates any obligation to respect confidentiality. However, the exact implications the authorities draw varies. Their answers shed light on two different questions:

1. When may one assume the original speaker did not assume secrecy?
2. In what cases may one be permitted to spread information even when the original speaker would be opposed to such an act?

**Rav Achai: Presumed permission**

Rav Achai (*She’iltot* 28) equates *lashon ha-ra* with the prohibition discussed last week, from *Yoma* 4b. He understands the issue of “in front of three” as follows:

]Do we say that] since [the Talmud ruled that one cannot share information] until he tells him “Go and say”, this applies to three people as well, since he did not tell them [explicitly] “Go and say,” they cannot? Or, perhaps, that which we require him to say “Go and say” is only where he did not say it in front of three, but said it in private. However, when he said it in front of three, it is like it is public and it is if he said, “Go and say.” Let us prove it: “**Rabba bar Rav Huna says: Any matter that is said in the presence of three** people **is not subject to** the prohibition of *lishna bisha.*”

In other words, the Gemara’s question is whether confidentiality is assumed under all circumstances — even those in which the original context was not totally private — or not. For Rav Achai, the conclusion is that whenever the context implies that the information being shared is not private, in this case because it is said in public, there is presumed consent to share what has been said.

Rav Achai thus rules that one does not need explicit permission to share information; contextually implied permission is sufficient. However, he does not deal with cases in which:

1. Saying something in front of multiple people does not necessarily imply that the information is public; or
2. The original speaker speaks to three people but explicitly stipulates that the information must remain confidential.

However, his words imply that in both these cases, one would have to maintain confidentiality. The central issue for him seems to be whether or not the original speaker granted (or may be presumed to have granted) permission to share the information.

The general understanding is accepted in the *Sefer Hashlama* (*Bava Batra* 39b).

Several Rishonim seem to take this position as well, though it not absolutely clear whether they are referring to the prohibition of breaching confidentiality or gossip. Both Rashi and Rabbenu Gershom in *Arakhin*, for example, write that once the speaker has divulged the information in front of three people, it is permitted to repeat it, for the original speaker knows that it will be spread. While this sounds like the position of Rav Achai, it is hard to prove it, as these Rishonim are not as explicit as Rav Achai is in *She’iltot*. However, as we have previously noted concerning the view of the *Sedei Chemed*, Rashi seems to accept the position of Rav Achai as to the definition of *lishna bisha,* thus indicating that he would agree with the above presentation. This is further bolstered by the fact that for Rashi, it is critical that the information be said by the primary subject, indicating that the issue at hand is secrecy, not gossip.[[3]](#footnote-3)

**It is already public**

Many Rishonim, while not being as explicit as Rav Achai, seem to take a different direction, one that may hold true for either definition of *lishna bisha,* breaking confidentiality or gossip (what is more colloquially known as *lashon ha-ra*.) They understand that both of these prohibitions are aimed at preventing the speaker from damaging someone using speech. However, once information is public, they are of the opinion that it does not matter whether it is repeated.

It is quoted in the name of Rav Zalman Nechemia Goldberg that the logic is as follows:[[4]](#footnote-4) When information is conveyed in front of one or two people, those people will keep it secret. They do not want the original speaker to know that they are responsible for sharing the information. However, once information is shared in front of three people, the potential guilt can always be deflected. Once that is the case, it is inevitable that the information will not remain private. Thus, the original speaker will give up, even if unwittingly, on privacy being maintained. He bases this on a law in the Gemara which says that when an object is lost in front of three people, a finder can keep it, but not if it falls in front of two. The Gemara explains this as follows:

**Rav Naḥman says:** If one **saw a *sela*** coin **that fell from** one of **two** people, he is **obligated to return** it. **What is the reason? The** person **from whom** the *sela* **fell does not despair** of recovering it. **He says: After all, no other person was with me, only this** one who was with me, as he is unaware that the *sela* was found by a third party. He therefore thinks: **I will seize him and say to him:** It **is you who took it.**

**In** a case where the coin fell from one of **three** people, the finder **is not obligated to return** it. **What is the reason? The** person **from whom** the *sela* **fell certainly despairs** of recovering it. **He says: After all, two** other people **were with me. If I seize this** one, he will **say: I did not take it. And if I seize that** one, he will **say: I did not take it.** Since he cannot make a definitive claim, he despairs of recovering his coin. (*Bava Metzia* 26a-b, Koren translation)

A more straightforward formulation is to say that once information is public, it is public. As Meiri writes, once the information has been divulged in front of three people, “it is as if he said it in front of the entire world.”

The *Chafetz Chayim* (*Hilkhot Lashon Hara* 2:3:4) notes that this seems to be the understanding of the Rashbam in the discussion in *Bava Batra*. *Chafetz Chayim* provides an argument for this position from the *pesukim*. As we have noted before, the prohibition of gossip and/ or violating confidentiality comes from the *pasuk* that warns one not to be a *rokhel.* Literally, this means a peddler. The metaphor is used because a gossiper/ sharer of secrets takes information that would not have been available to others and brings it to them. The metaphorical *rokhel* does the same with information. However, if this is so, the *Chafetz Chayim* contends that once the information is known, the one who spreads it is not comparable to a peddler. He is not needed for his “wares”.

The *Chafetz Chayim* equates the position of the Rashbam and the Rambam, though the Rambam, as he notes, puts an important limitation on this dispensation.

**Spreading further**

While the Rambam (within the understanding that *lashon ha-ra* refers to gossip) accepts a form of the argument above, he limits it as follows:

If such evil be spoken in the presence of three persons, the matter is thereby considered public. Thus, if one of the three who heard it repeat it to others no sin of an evil tongue is found therein, provided that in re-telling it he had no intention to spread the rumor and advertise it still more. (*Hilkhot* *De’ot* 7:5, Glazer translation)

This means that in the case of gossip, the Rambam believes that it is permitted to spread information to audiences who already know it, as no damage is being added. However, if one is introducing the gossip to a new audience, it would be prohibited.

While the Rambam does not say this regarding breaching confidentiality, one could make an identical argument under that understanding of *lashon ha-ra.*

**It is universally known**

Some authorities, however, argue that there are various levels of publicity, and while there may be some limitations placed on spreading secrets and/ or gossip even when it has reached a lower level of publicity, there comes a point at which the information has become universally known, and prohibiting sharing that information would be pointless.

Rav Azriel Ariel[[5]](#footnote-5) argues as follows: the dispensation of “in front of three” provides certain permission simply because the information **will eventually get out.** However, he does not believe (unlike Meiri above), that we consider something said in front of three to be **already** **publicly known.** If this is the case, then we must be more permissive when the information is indeed **universally known.** His example is gossip (or a secret) that has been publicized by mass media. Discussing what is on the news rarely introduces people to information they have not already heard.

Rav Shlomo Aviner[[6]](#footnote-6) suggests that the Rambam’s limitation might not be relevant in these cases. Meaning, while something said in front of three may be repeated only with no intent to spread it further, something already known globally may be repeated freely. Rav Ariel notes that even the *Chafetz Chayim*, who in the end rejects the above understanding of “in front of three,” accepts the notion that there is no prohibition in sharing information that is known to all (*Hilkhot Lashon Hara* 4:10:41).

However, Rav Ariel notes that just because something is at one point so well-known that further sharing it is meaningless, this may not always be the case. He cites Rav Avraham Shapira as suggesting that once something has fallen out of the news cycle, the information becomes subject to the more limited dispensations seen above. He notes that this is particularly relevant in the modern era when people are over-inundated with information, and thus they quickly forget about the news from a few weeks ago. Mentioning news from last month may really be introducing something “novel.”

He further cites Rav Dov Lior, who notes that *Chazal* write that people forget things after twelve months (*Bava Metzia* 24a). Thus, news from a year ago, as public as it may have been, can no longer be considered “known to all.”[[7]](#footnote-7) On a practical note, Rav Lior’s argument does not always seem true. Certain scandals become so well known that one can safely assume that they are still publicly known even decades later (Watergate, for example).

I would add that Rav Betzalel Stern’s argument, which we presented last week — that even in cases where the technical prohibition against violating confidentiality does not apply, there is an ethical imperative to remain silent — may not apply in cases such as these. On the other hand, one might argue that from an ethical standpoint, repeating something that should have been secret is not ethical, even if the effect is minimal. My tendency is to rule leniently, but I cannot prove that this is the case.

**When public is not public**

The *Chafetz Chayim* (*Hilkhot Lashon Hara* 2:5) notes that there may be cases where saying something in front of a group of people does not automatically indicate that it is public. For example, if one shares something in front of group of his loved ones, family or friends, there may still be an assumption that the information as meant to stay in that group, even if it is larger than three. The *Chafetz Chayim* goes further, arguing that if something is said in front of three people, but one of the audience is known as God-fearing to the point where no one expects him to share it, there are no longer three people who would share it, so it is as if it was said in front of only two, and the allowances do not apply. Even if one does not accept this application, the general point that something said in front of three does not always grant a *carte* *blanche* is compelling.

I remember seeing a modern commentator, I believe Rav Shalom Rosner in *Ali Be’er* on *Chafetz Chayim*, suggest that the Gemara limits its dispensation to information said **“in front of** three**.”** However, when information is said **“among”** people, it is **still presumed private.** Thus, a law firm, doctor’s office, or school that has an internal meeting about clients, patients, and students can demand privacy, even if there are more than three people present at the meeting. **The context makes it clear that secrecy is expected and reasonable.** This point seems irrefutable, based on the Mishna we have seen regarding courts. The Mishna, based on the verse about *rekhilut/ lashon ha-ra,* forbids sharing the internal discussions of a court after a verdict is issued:

After the judges **finish the matter** and reach a decision, **they bring in** the litigants. **The greatest of the judges says: So-and-so, you are exempt** from paying; or: **So-and-so, you are liable** to pay.

**And from where** is it derived that **when** the judge **leaves** the courtroom **he may not say: I deemed** you **exempt and my colleagues deemed** you **liable, but what can I do, as my colleagues outnumbered me** and consequently you were deemed liable? **About this it is stated: “You shall not go as a talebearer among your people”** ([**Leviticus 19:16**](https://www.sefaria.org/Leviticus.19.16)), **and it says: “One who goes about as a talebearer reveals secrets,** but one who is of a faithful spirit conceals a matter” ([**Proverbs 11:13**](https://www.sefaria.org/Proverbs.11.13)). (Mishna *Sanhedrin* 3:6-7, *Sanhedrin* 29a, Koren translation)

In such a case, there are at least three judges, but divulging what happened behind closed doors is forbidden. This is true even in court cases that have more than three judges as well. The reason seems to be that information which is said **within a professional group** is considered private.

Next week, we will spell out the implications for social media.

1. This principle is also introduced in *Ketubot* 109a-110a and *Bava Batra* 28a-b. [↑](#footnote-ref-1)
2. We will return to the positions according to which, in both cases, the phrase can be understood as gossip or the equivalent. The Rashbam cites and rejects a position which defines *mecha’a* as gossip, and *Yad Rama (Bava Batra* 2:101) accepts this argument as correct. [↑](#footnote-ref-2)
3. This seems to be a more accurate understanding of the view of Rashi than the one presented in *Din Davar Ha-ne’emar Bifnei Shelosha Ein Bo Mishum Lashon Hara?!* by Neria Rut and Chaggai Mizaki, available here: <https://asif.co.il/download/kitvey-et/mimaayan/mimaayan11/1%20(2).pdf>. They assume that Rashi interprets *lashon ha-ra* as gossip; therefore, he is providing a very limited dispensation for when gossip can be shared, meaning only when someone badmouths himself or herself in public. However, it is more reasonable to assume that Rashi understands the issue at hand to be secrecy. This does not require that someone speak badly about himself or herself. Rather, Rashi meant that when someone shares neutral or positive information about himself or herself in a somewhat public matter, the speaker waives any rights to privacy, either because of implied permission or because expecting confidentiality would be unreasonable. [↑](#footnote-ref-3)
4. See citation here: https://daf-yomi.com/DYItemDetails.aspx?itemId=31820. [↑](#footnote-ref-4)
5. *Lashon Hara Be-tzibbur Democratit* (1), available: <http://asif.co.il/download/kitvey-et/zor/zhr%205/zhr%205%202.pdf>. He notes that Ari Shvat raises this point as well in *Yeisha Yemino,* Vol. 45, pp. 39-41. See Rav Ariel, n. 9. [↑](#footnote-ref-5)
6. *Itturei Khohanim,* Vol. 82, p. 16. Cited by Rav Ariel, n. 9 [↑](#footnote-ref-6)
7. See note 11. [↑](#footnote-ref-7)