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 #24:**

**The Unique Challenges of the Digital Age -**

**Transfer of Information, but No Audience**

**The Problem**

Over the course of the last several months, we have explored various potential prohibitions that relate to the transfer of information, from breaching confidentiality to gossip to public humiliation, et cetera. In classic halakhic literature, all these cases assume an audience, admittedly of various sizes, and for good reason. It would be meaningless to gossip to, or share a secret with, no one. However, the digital age has introduced a new problem — the sharing of information, with real-world consequences, but with no audience.

Companies like Facebook and Google acquire information, though no person may ever see it. Information gathered from people’s searches and posts enable advertisers to provide targeted content, a fact that most people know, and many are okay with or even happy about. However, as the Cambridge Analytica case revealed, much more is at stake.

The information that is harvested may affect the political ads that are directed at people, shaping the contours of political debate and affecting the results of elections, as evidenced in the election of Donald Trump in the United States and the decision of the United Kingdom to leave the EU (Brexit). In some countries, with less strict data-privacy laws, the information gathered from texts and emails can be used to determine who is eligible for a loan.[[1]](#footnote-1)

As a friend recently noted to me, the classic halakhic literature does not address these cases. In most of the above cases, there is no person who knows the information being transferred. Rather, the data is fed into computer systems and algorithms determine how the information is used. Sometimes, actual people will interact with the data, though all of the identifying markers have been stripped out. The results deeply affect the lives of all of us. What language does Halakha have for “gossip” or secrets revealed only to a computer or anonymously? Alternatively, as Professor Nachum Rackover presents the question in his book *Ha-hagana al Tzinat Ha-perat* (*Protecting the Privacy of the Individual*), does Halakha recognize a right of privacy? If we could establish that it does, then violations of privacy, even in the ways outlined above, would presumably be prohibited.

For our purposes, we will avoid the issues of legality. Obviously, in a country where the collection of certain data is forbidden by law, one must contend with the halakhic principle of “*dina de-malkhuta dina,” “*the law of the land is binding.” Much of the debate has been about what **should** be legal, and in some cases, whether data has been collected illegally. Our goal is to explore what values Halakha may add to the conversation which is currently at the crux of legal and ethical debates worldwide.

We will have to relate to the question of consent as well. In many cases, legal issues may be avoided by apps requesting consent before download. However, while this may solve the legal problems, it may not always be sufficient legally or halakhically, if it is clear that those consenting do not have a full grasp of the extent to which they are permitting their data to be used. Thus, we must ask whether a formal acceptance would be sufficient, assuming that without consent the collection of data would be prohibited.

**Speech Ethics**

If the issues of *lashon ha-ra* and the like are about speech ethics, it would seem that these categories would have little relevance for our conversation. Take, for example, the mystical comments presented by Rav Yisrael Meir Kagan, the *Chafetz Chayim:*

It is written ([*Mishlei* 21:23](https://www.sefaria.org/Proverbs.21.23)), "One who keeps an eye on his mouth and tongue protects his life from troubles.”

It is known that every man has 248 physical organs and 365 physical sinews, as it is written ([*Iyov* 10:11](https://www.sefaria.org/Job.10.11)): "With skin and flesh did You clothe me and with bones and sinews did You cover me…” Now, every organ of the soul is clothed from above with a bodily organ which corresponds to that organ as a garment to the body.

Corresponding to this, the Holy One Blessed be He gave us 248 positive commandments and 365 negative commandments, which are also distributed among the organs; for there is a mitzva depending on the hand and a mitzva depending on the foot. The same is true of all the other organs, as stated in *Sefer Charedim*.

Now, when a man fulfills a mitzva in this world with a certain organ, in the World to Come, the light of the Lord reposes on that organ, and it is that light which vivifies that organ; and so, with each and every mitzva. It emerges, then, that when a man fulfills the 248 positive commandments, then he is the "complete man," who is sanctified to the Lord with all of his organs….

[This holds true] especially in the area of guarding one's tongue. For if he permits, God forbid, his soul to be in the category of speakers of *lashon ha-ra* in this world, and, as a matter of course, does not prevent his ears, too, from always hearing *lashon ha-ra* and *rekhilut* and accepting it… then he will have damaged his faculties of speech and hearing, and will certainly be punished in his soul, correspondingly, in the World to Come, in these two faculties themselves, speech and hearing…

For in the prohibition of speaking *lashon ha-ra* and *rekhilut* that he speaks with his mouth, he transgresses "You shall not go talebearing among your people," most of which inheres in the mouth. Similarly, in hearing *lashon ha-ra* and accepting it, he infringes on the transgression of (*Shemot* 23:1): "You shall not bear a false report…

Now, it is known that these [speaking and hearing] are the major faculties of the "form" of man and of his perfection, even in this world. (*Sefer Shemirat Ha-lashon,* Introduction[[2]](#footnote-2))

While the *Chafetz Chayim* discusses different rationales for the prohibitions elsewhere, this aspect clearly does not speak to the unique modern reality. The ethics of speaking and listening are almost irrelevant when dealing with nameless data-sharing.

***Cherem De-Rabbeinu Gershom***

Without reiterating our full discussion about this decree, I would assume that it does not apply in a case when no human being actually sees the information. The focus of the decree seems to be upon actually reading someone’s mail, which does not happen when the data is utilized by machines; even if it is accessed by people, it is without identifying markers. However, as we noted in our previous *shiurim*, the decree may have been instituted to protect one from violating other prohibitions, which may indeed be relevant for our discussion.

***“Ve’ahavta le-rei’akha kamokha”***

As we noted many times in our previous *shiurim*, in addition to any specific violations that may be involved in sharing information, an overarching concern that must guide our behavior is the general obligation to love others as ourselves and treat them as we would want to be treated. This general perspective, while it may not provide pointed prescriptions in any given circumstance, obviously must remain in the background of our discussions. The same may be true for those who understand the prohibition against breaching confidentiality as an expansive ethical mandate. Our focus here will be on whether there are specific prohibitions that are violated in these cases.

***Hezeik Re’iya* and *Hezeik Shemia***

We explored the debate about the parameters of *hezeik re’iya* and whether it could be expanded to *hezeik shemia.* Several authorities contend that in any case in which eavesdropping or the like would prevent people from living their normal lives, it would be prohibited to access their information as an extension of this category.

This kind of expansion can be relevant in this context. For many people, the knowledge that their information is being used to created targeted advertisement for them does not in any way hinder their use of Google, Facebook or the like. In fact, for many people, they would prefer that they only get targeted ads. Hence, Facebook asks its users which advertisements they do not want to see in order to better provide advertisements which they do want to see.

On the other hand, many people, if they knew that their information was being used to sway whom they would vote for in a political election, would probably be more careful. While much of the outrage around the Cambridge Analytica case hangs on whether they gathered the information legitimately, part of it is because people are genuinely upset about how their data was being used. If people knew that the messages they send could determine what loans they may be approved for, I would assume it would limit the way they use their computers and smartphones. If so, a potential way of framing the halakhic perspective based on an expanded notion of *hezeik re’iya* would be the following: if the data collection means that the subject, had he or she known that such data was being collected, would have limited the way he or she lived his or her life and used his or her technological devices, such collection may be a violation of Jewish law. We will return to the question of whether consent may obviate this concern.

***Lashon Ha-ra* and Revealing Secrets**

Is there any way to argue that someone who transfers data without an audience might be considered to have gossiped or revealed a secret? As noted above, if the focus of these prohibitions is ethical speech, then we would assume that this is not the case.

However, as many commentaries note, the primary reason *lashon ha-ra* is prohibited may be the damage it causes. They derive this from the prohibition that is juxtaposed to the prohibition of *lashon ha-ra* in *Vayikra* 19:16, namely, “Do not stand idly by as your fellow’s blood is spilled.” If this rationale for the mitzva indicates its nature (without focusing on the question of *darshinan tama de-kra,* whether the philosophical rationale for a mitzva can affect its juridical application), then perhaps any transfer of information that may cause damage should be prohibited, whether there is an audience or not. For example, Rambam begins his discussion of *lashon ha-ra* with a focus on the potential harm it might cause:

He who bears tales against his fellow violates a prohibitive commandment, saying: “You shall not go talebearing among your people," (*Vayikra* 19:16); and although the punishment of flogging is not inflicted for violating this charge, it is a gross iniquity. Moreover, a great deal of blood has been shed as a result of this sin, as indicated by the verse’s conclusion, “Do not stand idly by as your fellow’s blood is spilled.” Now, go and learn of that which happened due to Do’eg the Edomite. (*Hilkhot De’ot* 7:1)

However, there is an even more striking possibility that hangs on a more literal interpretation of the verse. The Torah refers to the prohibition of *lashon ha-ra,* whether that refers to gossip and its related prohibitions or to the prohibition against breaching confidentiality, as “You shall not go talebearing (*rakhil).”* What is *rakhil?* In the nominative form, a *rokhel* is peddler. Why is one who a gossipmonger referred to a peddler?

The Yerushalmi in *Pei’a* (1:1) explains that the metaphor is as follows: a peddler buys merchandise and circulates around until finding someone to buy it. The same is true of a gossipmonger, who collects information and looks around for someone who will listen to it. In the parable, information is referred to as a commodity.

Rashi (*Vayikra* 19:16) expands on this as follows:

Similarly, the peddler is one who goes around and searches for (spies out) all kinds of merchandise, and so also the seller of perfumes which women use to make themselves pleasant; because he constantly goes about in the villages, he is called *rokhel*, which has the same meaning as *rogel (*spy)….

[Based on the comments of Targum:] It seems to me that people had the custom to eat a little snack in the house of him who listened to their slanderous words, and this served as the final confirmation that his (the slanderer's) statements were well founded and that he would maintain the truth of them…

[I]t is the manner of all who go about slandering to wink with their eyes and to suggest their slanderous statements by innuendos in order that others who happen to hear them should not understand them.

Rashi understands that the gossipmonger acts like a peddler. The focus is not on what the speaker says, but the way the speaker peddles information. Many other commentaries accept the position of the Yerushalmi.

The modern world seems to open the possibility of a return towards the literal understanding of the metaphor. Now data is literally a commodity, **even when no audience hears or sees it!** Indeed, the companies that sell the information are literally peddlers of information, of data.

The *Or Ha-chayim* (ad loc.) seems to take this literal understanding as the most straightforward application of the *halakha* as well:

I believe the plain meaning of the Torah is a warning to each individual not to become a vehicle for potential defamatory information about others. How does one prevent this? By not revealing any information, even innocent information, in the hearing of anyone who might use this information or part of it and turn it into something defamatory. If that were to happen then the person who merely related the original, harmless-sounding story would share part of the guilt. The Torah purposely writes, "among your people," referring to people close to one who are indiscreet and blabber about any confidence they have heard or overheard. God adds: "I am the Lord," i.e. I am going to track down whence the defamatory remarks originated.[[3]](#footnote-3)

A recent article explains how the techniques used by companies like Google and Facebook are essentially a return to this literal peddling of information:

It is the strangely conspiratorial truth of the surveillance society we inhabit that there are unknown entities gathering our data for unknown purposes.

Companies and governments dip into the data streams of our lives in increasingly innovative ways, tracking what we do, who we know and where we go. The methods and purposes of data collection keep expanding, with seemingly no end or limit in sight.

These range from irritating infringements, including WhatsApp sharing your name and phone number with Facebook so businesses can advertise to you, or a startup that uses your phone’s battery status as a “fingerprint” to track you online, to major intrusions such as Baltimore police secretly using aerial surveillance systems to continuously watch and record the city. Or like the data brokers that create massive personalized profiles about each of us, which are then sold and used to circumvent consumer protections meant to limit predatory and discriminatory practices.

These instances of data harvesting are connected by a shared compulsion – a data imperative – that drives many corporations and governments. This imperative demands the extraction of all data, from all sources, in whatever ways possible. It has created an arms race for data, fueling the impulse to create surveillance technologies that infiltrate all aspects of life and society. **And the reason for creating these massive reserves of data is the value it can or might generate…**

German tech firm Siemens echoes this capitalist sentiment: “We need to understand that data is everywhere, and it is generated every second of the day. **We need to understand data as an asset — and turn it into a value.**”[[4]](#footnote-4)

Thus, if we accept this return towards *peshat* (the simple meaning of the verse), perhaps such sharing of information would be *lashon ha-ra* or *rekhilut,* understood either as damaging gossip or breaching confidentiality.

Of course, as this is not how Halakha has classically understood this prohibition, this approach does assume that we are able to derive new applications of *halakhot* based on how we understand the words of the Torah and the ways they are understood by *Chazal.* This is not quite deriving new laws straight from the Torah, which is subject to an extensive debate among the Poskim, but it is clearly a radically new application.[[5]](#footnote-5)

Rav Shimshon Refael Hirsch seems to entertain this possibility most explicitly:

Based on this, a *rokhel* is a “news peddler” who goes from person to person and from house to house, prying into the affairs of one person and telling of them to another. Of such a person, the Torah says: “"You shall not go talebearing among your people.” Do not tell things about your brother unless you know he is comfortable with it…

This prohibition perceives national society as "peoples" — as closed circles, as households and as families. Family members discuss their affairs within the boundaries determined by natural training, and things will not pass on their own "from people to people,” from group to group. The people of one group give their trust to each other, and on the basis of this they speak and act. One who passes this information to another group is going as a *rokhel* among his or her people. Therefore, we are commanded to protect the dignity of every person and to respect his or her private affairs. It our obligation to be careful in our words, when we speak about others. If one tells over someone else’s private affairs, there is no knowing where the information will reach!

This, in many ways, captures the modern reality.

***Sho’el She-lo Mi-da’at***

A position that combines several of the above notions, both that of *hezeik re’iya* and treating information as a commodity, is that of the *Torat Chayim*. According to this position, using someone’s information without permission is theft under the category of *she’eila she-lo mi-da’at,* borrowing without permission. Rav Dovid Lichtenstein presents how this would apply to personal data as follows:

Another possible basis for such a prohibition is the notion that a person “owns” his private information. According to many halachic authorities, *halacha* recognizes the concept of legal ownership over one's intellectual property. Perhaps one is similarly considered the legal owner of his private information. As such, peering into a person’s home, viewing medical records, or reading his personal correspondence would be forbidden on the grounds of *sho’el she-lo mi-da’at — “*borrowing" someone's property without his permission, which *halacha* equates with theft.

This theory is advanced by Rav Chayim Shabbetai of Salonika (Maharchash), the *Torat Chayim* (3:47), in reference to reading someone else's personal correspondence. He writes that reading someone's letter without his consent is *she’eila she-lo mi-da’at,* as the writer has legal ownership over the letter, stipulating that it be read by a particular individual. Some have suggested applying the approach of the *Torat Chayim* to all situations of accessing private information, claiming that a person has legal ownership over all of one’s private information and therefore obtaining such information without the "owner's" consent would constitute theft.

The concept that violating someone's privacy constitutes theft may be reflected in the *Siach Yitzchak* commentary to the *Siddur*, which asserts that when we confess *“Gazalnu,”* "We have stolen," in the *Vidui* prayer, this includes *“Chatanu be-hezeik re’iya,”* “We have sinned by damaging others by looking at their personal property.” Classifying privacy violations under the category of theft might mean that this prohibition stems from the unauthorized “use” of a person’s “property.”[[6]](#footnote-6)

Rav Lichtenstein notes that while this argument was put forth by Rav Avraham Sherman in a decision of the Tel Aviv Rabbinical Court, both Professor Nachum Rackover[[7]](#footnote-7) and Rav J. David Bleich[[8]](#footnote-8) reject this implication. They argue that the focus of the Maharchash is on the use of the letter, not the information contained within. Thus, these sources are insufficient to establish a right to privacy that would obtain even when there is no audience for the breach of secrecy.

***Geneivat Da’at***

Rav Chaim Palagi (*Responsa* *Chikekei Levi, YD* 1:49) argues that breaching confidentiality is forbidden because it is *geneivat da’at,* which normally refers to deception. However, Rav Palagi notes that in this case, “he steals that which is hidden in his heart.” This formulation also points in the direction of understanding information as a commodity that can be sold, as well as illicitly taken and transferred.

**Next Week**

Next week, we will explore more aspects of this question, as well as the possibility that people have implicitly granted permission to companies to share their data by using the programs and applications made by these companies.

1. From my private conversation with a friend who deals with issues of data security. [↑](#footnote-ref-1)
2. Translation modified from Sefaria Community Translation, *Shmirath Halashon* by Rabbi Shraga Silverstein. [↑](#footnote-ref-2)
3. Translation modified from Sefaria. [↑](#footnote-ref-3)
4. Available at: https://www.theguardian.com/technology/2016/aug/31/personal-data-corporate-use-google-amazon. [↑](#footnote-ref-4)
5. For more on this, see my *shiur*: https://www.yutorah.org/sidebar/lecture.cfm/848986/rabbi-jonathan-ziring/are-we-rabbinic-or-biblical-jews-do-we-still-derive-new-laws-from-pesukim-/. [↑](#footnote-ref-5)
6. *Headlines: Halachic Debates of Current Events,* Volume 2 (OU Press, 2017). [↑](#footnote-ref-6)
7. *Ha-hagana al Tzinat Ha-perat*, pp. 114-115. [↑](#footnote-ref-7)
8. *Bioethical Dilemmas*, Vol. 1, p. 176. [↑](#footnote-ref-8)