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 #13: Confidentiality in the Age of Social Media**

**Part 1**

**Introduction**

In the last several *shiurim*, we discussed the potential halakhic and hashkafic issues that arise when one violates the privacy of others to satisfy one’s own curiosity. However, once one is accessing information with the intent to use or spread it, the potential problems multiply. In the age of social media, the implications are vast.

This came to the fore during the 2016 US presidential campaign. Public debates arose after it was revealed that campaign of Donald Trump had used the company Cambridge Analytica to gather information from Facebook and to target specific kinds of political ads to individuals or demographic groups to influence them.[[1]](#footnote-1) We will spend the next several weeks discussed the halakhic categories that will shed light on these issues. We will discuss Halakha’s perspective on confidentiality, and then move from there to the laws of *lashon ha-ra*, gossip.

**Taking a picture without permission**

Before we deal the prohibition to spread information or pictures of others, there is one more halakhic issue that some Poskim raise: may one take a picture of someone without permission?

There are many Poskim who forbid taking photographs of people. Some prohibit this for halakhic reasons based on issues related to *avoda* *zara* (idolatry), and many others think there are mystical reasons to be concerned with such activity.

Let us assume that we accept the majority halakhic position that there is no such prohibition. If someone does not want his picture taken, can he prevent others from taking it? This question is posed to Rav Yosef Chaim Sonnenfeld (*Responsa Salmat Chayim* 2:19). The questioner suggests that a person should be allowed to stop others from taking his picture for these reasons. Additionally, he notes that we rule that we must listen to someone when he requests that he not be eulogized (*YD* 344:10). From this, he extrapolates that it is forbidden to use that someone’s picture or any other representation of him without permission.

Rav Sonnenfeld rejects this, arguing that as we do not accept these positions, there can be no prohibition in taking a picture. Rav Betzalel Stern (*Responsa Be-tzel Ha-chokhma* 4:85) clarifies that while a person may own himself, that does not imply that he owns all replications of his image.[[2]](#footnote-2)

On the other extreme, Rav Menasheh Klein (*Responsa Mishneh Halakhot* 7:114) disagrees. He contends that:

1. People have the right to be stringent even if the accepted view is to be lenient. Others must respect their wishes and refrain from taking pictures.
2. Even those who do not have a halakhic issue with having their picture taken may object to others taking their picture, and this is for two reasons.
	1. This may be a form of damage.
	2. It may be a form of theft, taking someone’s image without permission.

Rav Shelomo Aviner (*Piskei Shelomo*, Vol. 3, pp. 146-148) takes issue with Rav Klein’s ruling, arguing that one’s image is not “real enough” to be stolen, and this cannot be considered damage. In his parenthetical comments, Rav Aviner cites the discussions of several rabbis asked whether people could take or even sell pictures of others without permission.

Rav Aviner’s conclusion, however, should guide much halakhic discussion in this area. He notes that while there may not be any of the formal prohibitions above, the universal obligation to love others as we love ourselves requires us to respect people’s desire to not be photographed. After all, all people would want the same. In the words of the Hillel to the convert who wanted the summary of the entire Torah while standing on one foot (*Shabbat* 31a): “That which is hateful to you do not do to another; that is the entire Torah, and the rest is its interpretation. Go study.”

As Rav Gil Student notes, before we outline the more specific prohibition that may be violated by posting or sharing information without permission, this basic obligation must remain in the background of all discussions of the legal issues:

This applies with even greater force to posting someone else’s picture online. Do not do to others what you would not want them to do to you. And if you have a uniquely free spirit and want every unguarded moment of yours memorialized in eternal online images, you must still act considerately to others.[[3]](#footnote-3)

**The prohibition to reveal secrets**

*Mishlei* criticizes he who reveals secrets. “A gossiper reveals secrets, but a trustworthy person hides things,” or “a trustworthy person keeps a confidence.” (11:13; see also 20:19). The Talmud specifically writes that there is a presumption of confidence whenever someone is told something. One can only spread information after being given explicit permission:

The verse says: **“And He called unto Moses, and** the Lord **spoke** unto him from within the Tent of Meeting, saying” ([**Leviticus 1:1**](https://www.sefaria.org/Leviticus.1.1)). **Why** does the verse mention **calling before speaking,** and God did not speak to him at the outset? **The Torah is teaching etiquette: A person** should **not say anything to another unless he calls him** first. This **supports** the opinion of **Rabbi Ḥanina, as Rabbi Ḥanina said: A person should not say anything to another unless he calls him** first. With regard to the term concluding the verse: **“Saying,” Rabbi Musya, grandson of Rabbi Masya, said in the name of Rabbi Musya the Great: From where** is it derived with regard **to one who tells another** some **matter, that** it is incumbent upon the latter **not** to **say it** to others **until** the former explicitly **says to him: Go and tell others? As it is stated: “And the Lord spoke to him from** within **the Tent of Meeting, saying [*lemor*].”** *Lemor* is a contraction of *lo emor*, meaning: Do not say. One must be given permission before transmitting information. (*Yoma* 4b, Koren translation)

The context of this passage is that God, when speaking to Moshe, explicitly tells him that he is supposed to convey the message to the Jewish people. Had God not done so, Moshe would have assumed it was prohibited. This is striking, as there is presumably nothing negative or embarrassing about the prophecies Moshe receives. After all, it is God telling him his commandments. Nevertheless, secrecy is assumed until Moshe is told otherwise. From this, the Gemara derives that one must always assume that anything he or she is told is meant to be in confidence, unless told that this is not the case. (See *Chafetz Chayim, Hilkhot Lashon Ha-ra* 2:13:27; see below for further discussion of his position.)

The Gemara records a similar prohibition in the context of a court, forbidding a judge from exposing which judge has ruled in favor or against a particular defendant. When someone is found to have violated this norm, the Talmud is quite harsh towards him:

The mishna teaches: **And from where** is it derived that **when** the judge **leaves** the courtroom, he should 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)). **The Sages taught** in a *baraita*: **From where** is it derived that **when** the judge **leaves he should 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? **The verse states: “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”** ([**Proverbs 11:13**](https://www.sefaria.org/Proverbs.11.13)).

The Gemara relates: There was **a certain student, about whom a rumor emerged that he revealed a statement that was stated in the study hall** and should have been kept secret, and the rumor emerged **twenty-two years after** the time the statement was revealed. **Rav Ami removed him from the study hall** as a punishment. Rav Ami **said: This is a revealer of secrets** and he cannot be trusted. (*Sanhedrin* 31a, Koren translation)

This last source, however, as Rambam suggests in his commentary to the Mishna, may be limited to courts, as there is particular value in ensuring that people continue to have a good relationship with the judicial system.

What is the nature of this prohibition? Is it biblical, rabbinic, or simply an ethical thing to do? Meiri (*Yoma* 4b s.v. *Mi-ma*) writes that it is *derekh eretz,* the right thing to do. Indeed, this halakha is not found in *Shulchan Arukh,* which may indicate that this is not formal law. Nevertheless, it seems that no one would dispute that violating confidence would be a violation of *Ve’ahavta le-rei’akha kamokha.* Additionally, the Poskim who do identify specific prohibitions will accept that this underlying issue is always a potential concern. Rav Azarya Ariel uses this as his introduction to this topic.[[4]](#footnote-4)

Many Rishonim and Acharonim, unlike the above authorities, do take this as a specific biblical law.[[5]](#footnote-5) *Magen Avraham (OC* 156) includes this in his list of laws that are not mentioned in *Shulchan Arukh*. Many Rishonim, in fact, think that when the Gemara discusses *lishna bisha* or *lashon ha-ra,* this does not refer to gossip, as is commonly assumed (based on Rambam and Chafetz Chayim), but rather to the prohibition of betraying confidence. Rav Achai Gaon (*She’iltot* 28) seems to think that *lashon ha-ra* refers exclusively to this violation, while Ritva (*Chiddushei Ha-Ritva, Bava Batra* 29b, s.v. *Lit ba*) thinks that it equally refers to gossip and revealing secrets.[[6]](#footnote-6) The definition of revealing secrets seems to be explicitly used by the Talmud, as noted in *Sedei Chemed*.[[7]](#footnote-7) Rambam seems to take this position (*Hilkhot De’ot* 7:2), as does Meiri (*Chiddushei Ha-Meiri, Shabbat* 31a).

Rabbenu Yona (*Sha’arei* *Teshuva* 3:225), on the other hand, distinguishes between the two categories, though he still understands this an obligation. Thus, he writes that it is forbidden to reveal secrets even if the information does not constitute *rekhilut.*

A particularly harsh assessment of this prohibition is found in the ethical work *Pele Yo’etz* by Rabbi Eliezer Papo. He contends that one who reveals secrets is like an idol worshiper![[8]](#footnote-8)

Why is it prohibited or unethical to reveal secrets? Rabbenu Yona offers two explanations. The first is that revealing secrets can cause real damage to the person whose information is exposed. The second is that it is a breach of *tzeniut,* propriety, to divulge things said privately. He further notes that even if a given piece of information is not negative gossip, the kind of person who does not respect privacy on neutral matters will end up spreading negative information as well. Rav Ya’akov Epstein (*Responsa* *Chevel* *Nachalato* 1:83) adds that breaching confidence prevents necessary information from being told in the future. People often convey things to those they trust when they deem it necessary and they are confident that the information will not be spread without their permission. Without that confidence, people will be reticent to tell things to other people, even when it is critical to do so.

The potential damage that this kind of activity can cause is illustrated by the Talmud’s record of why Rabbi Shimon bar Yochai ends up in hiding for over a decade: due to Rabbi Yehuda ben Gerim (son of converts), who relays a conversation that put Rabbi Shimon bar Yochai in danger:

In this *baraita* Rabbi Yehuda is described as head of the speakers in every place. The Gemara asks: **And why did they call him head of the speakers in every place?** The Gemara relates that this resulted due to an incident that took place **when Rabbi Yehuda and Rabbi Yosei and Rabbi Shimon were sitting, and Yehuda, son of converts, sat beside them. Rabbi Yehuda opened and said: How pleasant are the actions of this nation,** the Romans, as **they established marketplaces, established bridges,** and **established bathhouses. Rabbi Yosei was silent. Rabbi Shimon ben Yoḥai responded and said: Everything that they established, they established only for their own purposes. They established marketplaces, to place prostitutes in them; bathhouses, to pamper themselves;** and **bridges, to collect taxes from** all who pass over **them. Yehuda, son of converts, went and related their statements** to his household, **and** those statements continued to spread until **they were heard by the monarchy. They** ruled and **said: Yehuda, who elevated** the Roman regime, **shall be elevated** and appointed as head of the Sages, the head of the speakers in every place. **Yosei, who remained silent, shall be exiled** from his home in Judea as punishment, and sent **to** the city of **Tzippori** in the Galilee. **And Shimon, who denounced** the government, **shall be killed.** Rabbi Shimon bar Yoḥai **and his son,** Rabbi Elazar, **went** and **hid in the study hall….** (*Shabbat* 33b, Koren translation)

This anecdote also illustrates the fine line between violating confidence and spreading gossip, further supporting the Rishonim who combine the two. As *Sedei Chemed* notes, Rashi on this passage seems to agree with this assessment.[[9]](#footnote-9)

In *Shut Le-Chafetz Chayim* (8), the author suggests that the *Chafetz Chayim* believes that simply revealing secrets is not a good character trait, revealing somewhat negative information is prohibited by dint of the verse in *Mishlei*, and revealing damaging information is included under the biblical prohibition of *rekhilut,* as the line between the two is non-existent.

Rabbi Yitzchak Zilberstein *(Chashukei Chemed*, *Bava Metzia* 29b) suggests that one also violates the prohibition of *geneivat da’at,* deception, which is detailed in the Talmud (*Chullin* 94). Presumably this is because when someone says something in confidence, the implied assumption is that his privacy will be kept.

There are many Midrashic sources that emphasize the severity of the prohibition, but we will suffice with these for now.

**It was not secret, but it shouldn’t be spread**

Rav Betzalel Stern (*Responsa Be-tzel Ha-chokhma*) suggests that there are instances in which spreading secrets constitutes a formal violation of the law, and cases where it is merely a violation of *derekh eretz*. As we will explore, the prohibition does not apply when the information was never intended to be secret. According to many opinions, there are circumstances in which the information can be spread freely even when the person who originally conveyed it would not want it spread, simply because it is assumed to be public. Rav Stern argues that in cases such as these, maintaining confidentiality is merely a righteous thing to do. However, in cases where the information is clearly intended to be private, violating that confidence would constitute a formal violation. Maharsha (*Chiddushei Aggadot, Yoma* 4b, s.v. *She-hu be-val yomar*) develops a similar theory based on an analysis of the context of the verses used by the Talmud to ground this prohibition.

*Chafetz Chayim* (*Hilkhot Lashon Ha*-*ra* 2:13:27) makes a slightly different distinction. As noted before, *Chafetz Chayim* proves that the problem of divulging secrets includes cases that could cause no damage, as God could not be hurt or embarrassed by Moshe teaching his Torah. However, *Chafetz Chayim* contends that in such cases, breaching confidentiality is merely a *midda tova,* an expression of good character traits. However, when not respecting privacy will harm the person whose information is being shared, the spreading of that information would constitute *lashon ha-ra,* forbidden gossip.

**The exceptions**

Next week, we will discuss the potential exceptions to these rules. Specifically, we must discuss:

1. Cases in which secrecy is not assumed by the original speaker.
2. Cases in which secrecy may have been assumed, but it was not reasonable to expect it. In other words, once information has reached a certain level of publicity, can it ever be prohibited to spread it further?
3. Cases in which there is benefit that can be achieved (only) by spreading the information.
1. A simplified summary of what happened can be found here: <https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram>. [↑](#footnote-ref-1)
2. The question of whether people own themselves has become a central part of modern debates about informed consent in medical contexts. See Rav S. Y. Zevin in *Mishpat Shylock Le-or Ha-Halakhah* (Tel Aviv: Zioni Publishing, 1957), pp. 318-335, Rav Shaul Yisraeli, “*Takrit Qibya Le-or Ha-halakha*,” Ha-Torah Ve-hamedina 5-6 (1953-1954), Rav Dr. Avraham Steinberg, “Informed Consent: Ethical and Halakhic Considerations,” *The Jewish Law Annual,* Vol. XII, 137; and Rav Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, p. 555. [↑](#footnote-ref-2)
3. Available at: <https://www.torahmusings.com/2014/11/instagram-and-jewish-law/> and in greater detail in Rav Student’s book, *Search Engine: Finding Meaning in Jewish Texts, Volume 1: Jewish Life*, (Kodesh Press: 2018), pp. 284-287. I thank Rav Student for his help in finding these sources and for making his book available to me. [↑](#footnote-ref-3)
4. Available at: https://www.yeshiva.org.il/ask/104573. [↑](#footnote-ref-4)
5. It is worth noting that *Chafetz Chayim* contradicts himself on this point, ruling in two places that this involves a formal prohibition (*Hilkhot Lashon Ha-ra* 9:6 and *Hilkhot Rekhilut* 8:5), and elsewhere that avoiding such behavior is just *midda tova,* a good character trait (*Hilkhot Lashon Ha-ra* 2:13:27). [↑](#footnote-ref-5)
6. See also *Sefer Hashlama* to *Bava Batra* 39b, *Semag* 9. [↑](#footnote-ref-6)
7. See *Shabbat* 33a-b, Rashi 33b s.v. *Peh gomer* (first), as pointed out in *Sedei* *Chemed*, *Lashon Ha-ra,* as well as Rashi, *Arakhin* 15b, s.v. *Lishna.* See also *Chayei Adam* 143. See, however, *Sota* 42a, which distinguishes between the sinners who speak *lashon ha-ra* and those who lie, indicating that *lashon ha-ra* refers primarily to true gossip rather than false slander. This is used by *Chafetz Chayim* to support his terminology. [↑](#footnote-ref-7)
8. *Pele Yo’etz, s.v. Ha-megaleh.*  [↑](#footnote-ref-8)
9. See above. [↑](#footnote-ref-9)