

## CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



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## FACEBOOK, DATA PRIVACY, AND HALAKHAH

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Celebrations of modern interconnectedness alternate in op-ed columns with concerns about loss of privacy. In a nutshell, this is the gift and price of Facebook. What guidance can Jewish tradition give us as we try to maximize the gift and minimize the price?

I suggest that we look carefully at the halakhot of speech. These are usually conceptualized as being about preventing negative speech about others (*lashon hora*), slander (*botza'at shem ra*) and rumor-mongering. But Jewish speech laws can also be read as providing a highly relevant ethic of data privacy.

On Talmud Yoma 4b, Rabbi Menasya Rabbah states:

מניין לאומר דבר לחבירו שהוא בבל יאמר, עד שיאמר לו לך אמור - שנאמר וידבר ה' אליו מאהל מועד לאמר.

*From where in Tanakh do we learn that if someone says something to his fellow, repeating it is a violation of "Do not say", until he tells him "Go say"? Because Scripture says "[He called to Mosheh], and Hashem spoke to him from the Tent of Meeting, leimor".*

The moral is drawn directly by Meiri:

וממה שנאמר שם "לאמר", כלומר שאמר לו דברים אלו על מנת שיאמרם -

למדנו דרך ארץ למי שאומר דבר לחבירו, אף על פי שלא מסרה לו בסוד, שהוא בבל יאמר אא"כ אמר לו בעל דבר שהוא אומר לו אותן הדברים בלך אמור,

והוא ענין אומרו "נאמן רוח מנסה דבר", כלומר דבר אף על פי שאינו סוד, "והולך רכיל מגלה סוד" = אף על פי שנאמר לו בסוד:

*From it saying there "leimor", meaning that He told him these things so that he would say them -*

*We have learned derekh eretz toward someone who says something to his fellow, that even though he did not give it over to him as a secret, the recipient is bound by "Do not say", unless the original speaker tells him that he is saying these things to him in the context of "Go say" This is the intent of "One who is faithful in spirit conceals a matter", meaning even though it is not a secret, and "One who goes as a peddler reveals secrets" = even though it was said to him as a secret.*

If the presumption of privacy is true of random information that was deliberately communicated to one person, it seems reasonable to say that it is certainly true of information that has not been conveyed to anyone, and all the more so of personal data. The default setting of Jewish law is privacy.

However, this conclusion is complicated by a discussion on Talmud Arakahin 15b.

היכי דמי לישנא בישא?

(רבה אמר) [אמר רבה]: כגון דאמר: 'איכא נורא בי פלניא'. אמר ליה אבוי: מאי קא עביד? גלויי מילתא בעלמא הוא! אלא דמפיק בלישנא בישא, דאמר: 'היכא משתכח נורא אלא בי פלניא, [דאיכא בשרא וכוורין]'.  
What is an illustration of "evil speech"?

*Said Rabbah: If for example he said: "There is a (cooking) fire in X's house".*

*Abbayay said to him: But this is mere exposure?! Rather it must be that he said it in the manner of evil speech, saying "Where would there be fire except in X's house, [where there is meat and fish]."*

Rabbah apparently holds that simply sharing information about someone else is forbidden. Abbayay thinks this goes too far. He instead sets up a standard. This standard can be understood in at least three ways. It can be understood as saying that the disclosure of nominally neutral data about someone else is prohibited only with

1. malicious intent, meaning that the speaker conveys information in order to damage the subject.
2. malicious form, meaning that the speaker makes clear to the listener that they should think less of the subject because of this data
3. undesirable outcomes, meaning that regardless of the speaker's intent, the subject may be damaged in some way by the disclosure

These different understandings reflect fundamentally different, but not necessarily contradictory, conceptual frameworks for *lashon hora*.

The first is virtue ethics, under which our primary concern is the soul of the speaker. Thus the determining factor is the speaker's intent, why they want you to know that someone's house likely has a fire going.

The second is about politeness. Speech should not be weaponized. People can and should decide on their own how the facts affect their view of someone else; negative "spin" is forbidden. So I'm entitled to know that someone's chimney is always smoking. But I don't need to know your opinion that this reflects gluttony, or indifference to the suffering of others, or that their wealth must have been gained on the backs of the poor.

The third sees speech ethics as a subcategory of tort law. The effect of making it known that someone always has a fire going may be that everyone who wants a hot meal congregates there. The household may be overwhelmed, or impoverished, or forced to change its presently hospitable ways.

This third framework seems most parallel to the rule in Yoma. But Abbayay's rejection of Rabbah means that we were overhasty in extending the absolute presumption of privacy from communications to data. Perhaps there is a public interest in allowing truth to be known, and therefore the presumption of privacy can be overcome if disclosure causes no harm.

The discussion in Arakhin is followed by citation and discussion of three further principles.

אמר רבה: כל מילתא דמיתאמרא באפי מרה - לית בה משום לישנא בישא.

אמר ליה: כל שכן חוצפא ולישנא בישא!

אמר ליה: אנא כרבי יוסי סבירא לי, דאמר רבי יוסי: מימי לא אמרתי דבר וחזרתי לאחר.

אמר רבה בר רב הונא: כל מילתא דמיתאמרא באפי תלתא - לית בה משום לישנא בישא.

מ"ט? חברך חברא אית ליה, וחברא דחברך חברא אית ליה. כי אתא רב דימי אמר: מאי דכתיב: מברך רעהו בקול גדול בבוך השכם קללה תחשב לו? כגון דמיקלע לאושפיזא וטרוח קמיה שפיר, למחר נפיק יתיב בשוקא ואמר: 'רחמנא ניברכיה לפלניא דהכי טרח קמאי', ושמעין אינשי ואזלין ואנסין ליה.

*Said Rabbah: Anything said in front of its subject is not a violation of lashon hora.*

*Abbayay said to him: All the more so – it is both chutzpah and lashon hora!?*

*Rabbah replied: I hold like Rabbi Yose, for Rabbi Yose said: In all my life I have never said anything and then looked round.*

*Said Rabbah bar Rav Huna: Anything said in front of three people is not a violation of lashon hora.*

*Why? Your friend has a friend, and your friend's friend has a friend. When Rav Dimi came he said: What is the meaning of the verse "One who blesses his fellow in a loud voice early in the morning, it will be considered a curse for him"? For example, if he comes to a host and they put forth an excellent effort for him, and next morning he goes out and sits in the marketplace and says 'May the Merciful bless X who made such an effort for me', so that people hear and go overwhelm the host.*

In reverse order:

The ban on excessive public praise teaches us that we are responsible not only for our intent, but also for consequences that a reasonable person could anticipate

The exception for statements that the other person has already made public teaches that privacy can be waived

The exception for statements made in the subject's presence means that transparency is both important and a reasonable defense against a claim of privacy violation.

Plugging all these rules into the Facebook issue yields a policy in which even the most innocuous data is presumed private. This presumption can be waived, and in some cases can be overcome if the subject is completely aware of what is being done.

The near-absolute presumption of **data** privacy, and not just act-privacy, and the recognition that breach of privacy can be reasonably expected to cause damage in a wide variety of manners, may be valuable contributions to contemporary discourse.

I need to make clear that I am not arguing that halakhah was prescient about the web, or that the framework I have set out represents a normative halakhic consensus. Far from it! As with all genuinely new issues, a serious halakhic response requires creativity. For example, even if one accepted all the readings offered above, application to social media would require a complete reformulation of the "three people" standard. We should make clear that we are seeking not to pasken but rather to influence; psak may or may not follow in the wake of influence, but should not precede it. Halakhists should also carefully follow trends and outcomes in other legal systems and carefully incorporate the lessons of their experiences.