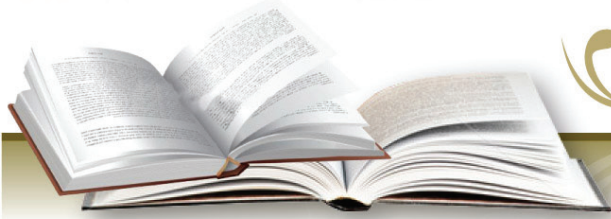




TORAH & HORAHAH



Re'eh 5771

74

This week's article begins to explore the laws of *yichud*, the prohibition of seclusion with a woman whose union is prohibited. How is the prohibition of *yichud* defined, and what are its parameters? Does the prohibition apply even where there is no concern for forbidden relations taking place? When does the leniency of a woman's husband being in town apply? These questions, among others, will be addressed in this first of a two-part series.

This week's Q & A addresses the question of using somebody else's Internet wireless connection.

Yichud: The Halachah of Seclusion

The verse in this week's *parashah* states (Devarim 13:7): "If your brother, the son of your mother, or your son, or your daughter, or the wife of your lap, or your friend that is as your own soul, entice you secretly, saying: 'Let us go and serve other gods,' which you have not known, neither you nor your fathers."

Chazal (*Kiddushin* 80b) derive from this verse a hint that there is a prohibition of *yichud* (seclusion of a man with a woman under certain circumstances): "Rabbi Yochanan said in the name of Rabbi Yishmael: 'Where is there a hint in the Torah to [the prohibition of] seclusion?' It is the verse: 'When your brother, son of your mother, tempts you'. The argument is: does the son of a mother tempt but the son of a father does not tempt? The specific phrase was chosen in order to hint that, a son may be secluded with his mother, whereas seclusion with all of the [other] prohibited unions in the Torah is forbidden."

The laws of seclusion with a woman who is an *ervah*, a woman with whom marital union is prohibited by the Torah, have many details and qualifications, and we will not be able ➤➤

Dear Reader!

This week's *parashah*, which we read on the verge of the month of Elul, opens with words of blessing and curse: "Behold, I place before you today, a blessing and a curse ... It shall be when Hashem your God brings you to the Land to which you come, to possess it, you shall place the blessing on Mount Gerizim and the curse on Mount Eibal."

The symbolism of placing blessings and curses on the mountaintops of the Holy Land is perhaps related to the concept of *din*, the Divine attribute of strict judgment. The harsh cliffs, combined with their severe climate, barely provide a dwelling place fit for man. They represent a tight boundary, an extreme of *din* in which it is hard to survive.

Yet, the blessings, as well as the curses, are placed on the mountains. Hashem created the world for the benefit of man, to bestow Divine goodness upon the elect creature. Yet, the Divine wish

is for us to earn the good He offers, and not to receive it for free.

All the recompense of the World to Come, all the good that Hashem has to offer, is given with the attribute of *din*. In the final analysis, we get precisely that which we deserve. Thus blessings and curses alike are directed on the mountaintops. Both are given with *din*.

This short lesson offers us an important insight as we enter the month of Elul. The day of Rosh Hashanah, which is the climax of the month of Elul, is the Day of Judgment. As the Day of Judgment, latent in the day is all the blessing that we are able to gain for the coming year. All that must be given in *din* is present on Yom Ha-Din.

Like earthly judgment, the Day of Divine Judgment requires preparation. From the first day of Elul, we begin to blow the Shofar, which calls upon us (as the Rambam writes) to awaken from our spiritual slumber, to inspect our deeds and to return to Hashem. These days of Elul, days on which Moshe Rabbeinu climbed upon Sinai in preparation for the Torah (as the Tur explains), provide us with the perfect opportunity for doing so.

Let us make the most of the month-long preparation, and seek to arrive at the Day of Judgment in the best possible shape.

to review all the details in this forum. However, we will discuss some of the the basic principles of this prohibition, and demonstrate how these principles are expressed in the specific laws of *yichud*.

A Torah or Rabbinic Prohibition?

Most *rishonim* maintain that the basic prohibition of *yichud* is a Torah law, as implied by the Gemara (*Avodah Zarah* 36b; see *Devar Halachah* 1, who cites the rulings of many *rishonim* who maintain this). Although the *Rambam* (*Issurei Biah* 22:1) writes that the prohibition of seclusion is derived from *divrei kaballah*, many say that even this should be understood as a Torah law, though some say that according to the *Rambam* it is a rabbinic prohibition.

To the basic prohibition of *yichud*, Chazal added rabbinic enactments. The Gemara (*Avoda Zora*) states: "In Torah law, [seclusion with] a married woman is prohibited. David then came and enacted a prohibition on seclusion with an unmarried woman; the disciples of Beis Hillel and Beis Shammai enacted a prohibition even on seclusion with a non-Jewish woman."

In Torah law (according to most *rishonim*), only seclusion with a Torah *ervah*, a woman with whom union is prohibited by Torah law, is prohibited. Chazal added to this that even seclusion with an unmarried woman (even if she isn't a *nidda*), and seclusion with a non-Jewish woman, is prohibited.

The *Binas Adam* (*Beis Ha-Nashim* 16) writes that although the Mishnah (*Kiddushin* 90b) writes that it is forbidden for one man to be in seclusion with two women, this prohibition is only rabbinic. In Torah law, the prohibition is limited to *one man and one woman*, similar to the case of a son and his mother derived by the Gemara. Where two women are present, the prohibition is only rabbinic.

Shut Chavas Ya'ir (no. 73) likewise writes that by Torah law, only "full seclusion," meaning the seclusion of one man with one woman, is prohibited. Beyond this, where one man is secluded with two women, or two men with one woman (where the men are promiscuous), the prohibition is rabbinic (see also *Shut Maharsham* Vol. 3, no. 153, who writes that even the seclusion of one man with two women is prohibited by Torah law, though the proofs he mentions are debatable; see *Divrei Sofrim Yichud* 1, *Emek Davar* 9).



Yichud: An 'Essential Prohibition'

Based on the fact that the prohibition of seclusion is mandated by the Torah, Rav Elazar Menachem Schach (Avi Ezri, *Issurei Bi'ah* 22:12) explains that according to Rashi (*Kiddushin* 81a) the prohibition is an essential prohibition. This means that the Torah does not merely wish to safeguard against the possibility of forbidden marital relations, but actually wishes to prohibit the seclusion of a man and woman whose union is forbidden, for other reasons.

He maintains that the position of Rashi is that whereas the prohibitions of the Sages were enacted solely as a fence meant to distance a person from forbidden relationships; the Torah prohibition, however, is not merely a fence, but rather prohibited in itself.

Based on this conclusion, Rav Schach explains that the Talmudic leniency waiving the prohibition when a woman's husband is situated in the same town (according to Rashi) is limited to the rabbinic additions to the laws of *yichud*. Since the prohibitions enacted by the rabbis were designed to distance a person from sin, a woman's fear of her husband is sufficient to ensure that no sin will result. With regard to the Torah prohibition this is not sufficient, because the prohibition of seclusion is of an essential nature.

This essential prohibition requires some elucidation. If there is no concern for forbidden relationships, why does the Torah prohibit seclusion itself? Rav Schach addresses this point, and suggests as a possibility that the seclusion leads to forbidden thoughts, as mentioned by the Rambam (*Issurei Be'ah* 22:20).

Prohibition as a Protective Fence

The *Chazon Ish*, in his glosses to *Avi Ezri* (printed at the back), disputes this position,

and writes that the prohibition of *yichud* is not an essential prohibition, but rather means to form a protective fence around the forbidden relationships. This is implied by the wording of the Rambam (22:6, as copied by the *Shulchan Aruch*): "It is forbidden to be in seclusion with a forbidden union, *for this causes forbidden relationships.*"

The *Chazon Ish* proves his point further from the specific *halachah* of seclusion with a *niddah*. The Gemara writes that there is no prohibition of *yichud* with regard to a man and his wife. Even during the *niddah* period, it is permitted for husband and wife to be in seclusion, because "the Torah attests that ... there is no **need** for the extreme measure of *yichud* to separate between a husband and his wife who is a *niddah*."

Tosafos explain further that the reason for this is the general permission of marital relationships between husband and wife: because they are able to engage in permitted marital relations at other times, they will not come to sin when she is forbidden. This rationale does not apply in the case of a husband who has not yet consummated his marriage. When a bride is in a state of *niddah* at the time of her marriage, there is thus a prohibition of *yichud* even with her new husband (*Shulchan Aruch, Even Ha-Ezer* 22:1).

The *Chazon Ish* thus proves that the prohibition is not an essential prohibition, for as such there would be no difference between a *niddah* before the consummation of the marriage, and her status after the marriage was already consummated. Rather, this law indicates that the prohibition is a protective fence to ensure that the sin of forbidden marital relationships will not be transgressed. For a husband and wife there is no concern, provided that the marriage has been consummated.

It is important to note that even Rav ➤➤

Schach only wrote his approach (of an essential prohibition) according to Rashi. According to the position of Rambam, which is also the halachic consensus (though some authorities write that one should heed the opinion of Rashi, as will be noted below), the leniency of "her husband is in town" applies even to Torah mandated *yichud*. Furthermore, in instances where there is no concern for forbidden marital relations (as discussed below), there is room for leniency in *yichud*.

The Elderly and the Impotent

Shut Tzitz Eliezer (Vol. 6, no. 40, chap. 22, sec. 8) writes that based on the above wording of the Rambam, which implies that the prohibition of *yichud* is meant to distance a person from forbidden relationships, it follows that there is no prohibition of seclusion for somebody who suffers from impotency, or somebody so elderly that there is no concern for transgression. He continues to prove this halachah from the rulings of a number of authorities.

In a separate responsum (Vol. 7, no. 46, sec. 2), Rabbi Waldenberg quotes a letter that he received from Rav Elyashiv *shlita* on this topic, in which he disputes this position citing other opinions that maintain that seclusion is prohibited even for somebody for whom there is no concern for transgression.

Shut Igros Moshe (*Even Ha-Ezer* Vol. 4, no. 65, sec. 10) agrees in principle with this leniency, but writes that in general, *yichud* remains forbidden even for an extremely elderly person, because even the desire of the old and infirm can sometimes be awakened (as demonstrated by the Gemara, *Kiddushin* 81b). A like ruling is given in *Devar Halachah* (Appendix to *Siman* 2, no. 9) citing the *Chazon Ish*, and adding that the *Divrei Malkiel* (Vol. 4, no. 102) ruled similarly.

Only with regard to somebody who is clinically

impotent does Rav Moshe rule that there appears to be no prohibition of seclusion. However, even then the others mentioned above maintain that seclusion is forbidden.

The Leniency of a Husband in Town

A very important and pertinent leniency in *yichud*, which we have already mentioned above, is the case of a woman whose husband is in town. This leniency is stated by the Gemara (*Kiddushin*, *loc. cit.*): "Rabba stated: If her husband is in town, there is no concern for seclusion."

Rashi and *Tosafos* dispute the nature of the leniency. According to Rashi, when a woman's husband is in town, there remains a prohibition of seclusion, but it does not carry the same severity (there is no punishment of *malkos*). As noted above, the rationale of Rashi, according to Rav Schach is that even where there is no concern for forbidden relations, the prohibition of *yichud* remains in place.

Tosafos, however, understand that the leniency fully permits seclusion under these circumstances.

Shut Shevet Halevi (Vol. 3, no. 180) notes that the *Chelkas Mechokek* and the *Beis Shmuel* mention the opinions of both *Rashi* and *Tosafos*, without conclusively deciding between them. Elsewhere (Vol. 5, no. 203, sec. 1), Rav Vosner writes that although the principle halachah follows the opinion of *Tosafos*, one should heed the instruction of *Rabbeinu Yerucham*, whereby "one who is modest must distance himself from *ki'ur* (an 'ugly' situation), even when her husband is in town."

Libo Gas Bah

The Gemara qualifies the leniency, explaining that it does not apply to somebody who has a warm and cordial relationship with the woman in question (*libo gas bah*). ➤➤

Examples of such relationships include:

A woman whom a man has known as a child, and with whom he has grown up.

A close family relative, such as a cousin with whom one has grown up.

A close family friend.

A co-worker, such as a partner.

A therapist.

A housekeeper or maid.

This significant qualification is ruled by the Rambam (22:12) and the *Shulchan Aruch* (22:8).

Rationale Behind the Leniency

According to Rashi (*Kiddushin* 81a), the rationale behind the leniency is that the woman fears that her husband will come in at any time. The Rambam and the *Shulchan Aruch*, however, write that the reason is that "her husband's fear is upon her." This does not imply a concrete fear that her husband will walk in, but rather that she feels a natural inhibition, in the knowledge that her husband is close by (*Shevet Halevi*, *loc. cit.*).

An important ramification of this divergence applies in large cities such as London or New York, where a husband can be 'in town,' yet his wife can know with confidence that he won't be coming for several hours. According to Rashi, in this case the leniency of a husband being in town will not apply. According to the Rambam, however, the presence of a husband in town ensures that "her husband's fear is upon her," and the leniency will apply.

For a husband at work in a distant place (albeit in town), *Shut Shevet Halevi* is not lenient, and adds that one should preferably follow the

stringency of Rashi, whereby only the concrete possibility of a husband's walking in can permit *yichud*.

Shut Igros Moshe (Even Ha-Ezer Vol. 4, no. 65, sec. 7) rules: "For those who work away from home, and spend eight hours at work, and a further two hours of travelling time, there is a prohibition of seclusion where it is not common to come home. However, for somebody who is self-employed and can return home at will, there is no prohibition of seclusion."

Halachic Details of the Leniency

The *Pischei Teshuvah* (22:7) cites a number of novel *halachos* in this matter from the *Binas Adam*:

The leniency of a husband in town applies only when the wife is at home. If the wife is away from home, the presence of her husband in town does not permit seclusion. The reason for this is that the husband is not aware of her whereabouts, and therefore she does not fear him.

Even if the husband knows the whereabouts of his wife and he gives her permission to be there, the leniency does not apply, because she does not fear him.

The previous statement is all the more true where a husband gave his wife permission to be secluded or to speak intimately with another man. In this case, the husband's fear is clearly not upon his wife.

These stringencies are based on understanding that the leniency is based on the concern that the husband will come home; if the wife is not home, there is no concern for the husband's homecoming, and the leniency does not apply. Some authorities, however, highlight the alternative rationale of the wife's fundamental fear of her husband, according to which the



wife's location and the husband's permission do not undermine the leniency.

Although the *Chazon Ish* (cited in *Devar Halachah* 7:2) was lenient in this matter, the *Chafetz Chaim* (*Nidchei Yisrael* 24:6) rules stringently, and as Rav Vosner notes (*Shevet Halevi* Vol. 5, no. 203, sec. 3), it is hard to be lenient in practice. *Shut Iggros Moshe* (65:11) is stringent with regard to the first qualification, but adds that "this is only true for a place which the wife does not regularly frequent." With regard to the last two qualifications, he concludes that although there is certainly room to dispute the final two *halachos*, one should only be lenient in difficult and extenuating circumstances.

It is important to note that the leniency of

a husband in town does not apply to the converse—a husband whose wife is in town. Although the Mishnah (*Kiddushin* 90b) rules that there is a leniency of "his wife guards him," this applies only when the wife is together with her husband (as stated by *Shut Iggros Moshe* 65:6), and not for a wife who is in town.

We have yet to address a broad range of issues in the laws of *yichud*, including: the leniency of a door facing the public domain, the question of what defines seclusion, the laws of guards (*shomrim*), the time-frame of *yichud* (e.g. seclusion in an elevator), questions of *yichud* among family members, the age from which the prohibition applies, and others. Please G-d, we will discuss these issues in the next article.

❧ Halachic Responsa ❧

to Questions that have been asked on our website dinonline.org



Question:

Is there a problem with using a neighbors wireless internet? To my knowledge the usage doesn't affect the neighbors internet in any way or form. What about when the neighbor doesn't permit others to use the connection?



Answer:

It is permitted to use a neighbor's connection.

If the neighbor states that he does not consent to its use, it is nonetheless permitted to use the connection when it is not in use by the neighbor, for instance when he is out, asleep, or on holiday. Moreover, it is possible that a person cannot prohibit the use of an unprotected connection at all, and it remains permitted to use at all times.



Sources:

If a neighbor does not place a password protection on his connection, it is generally permitted to use his connection. Anybody who has an unsecured wireless connection knows that neighbors or passers-by will be able to utilize it, and their leaving the connection unsecured implies a tacit granting of permission for doing so.



Even if a neighbor states that he does not grant permission to others to use the wireless connection, it is possible that he does not have the right to prohibit its use. The reason for this is that while the neighbor is away or asleep, others' use of the connection causes him no loss (in the speed of his own internet surfing), and it is therefore a case of *zeh neheneh vezeh lo chaser*.

Although *Shulchan Aruch* (*Choshen Mishpat* 363:6) rules that a person has the right to forbid others from taking benefit from his property, *Rema* writes that this applies only to cases in which the owner has some way of deriving benefit or income from his property. Somebody who is sleeping or out of town has no way of deriving benefit from his internet connection, and according to *Rema*, he would therefore not be within his rights to prohibit its use.

According to *noda Biyhuda* (*tinyana* 24), *Shulchan Aruch* does not concur with this ruling. However, in cases where others' use of the property in no way violates the owner's ownership (unlike living in somebody else's house, which violates his ownership), it is possible that all agree that the owner cannot prevent others from benefiting (see Rav Shimon Shkop, *Bava Kama* no. 19).

The rationale above applies for times in which the owner is not using the internet, and therefore loses nothing from others' use of the connection. However, there is room to argue that the owner cannot prevent others from using the connection at any time. The reasoning for this is that a person cannot place his painting on the street, and forbid people from looking at it, thereby forcing all pedestrians to cross the road.

A person's self-made prohibitions cannot force others to take positive action to avoid 'transgressing' the prohibition.

[This idea fits well with the Talmudic principle stating that there is no *me'ilah* concerning voice, appearance, and scent. The benefit derived from these intangibles concepts cannot be prohibited, so that a person can never cause others to take positive action to avoid transgressing.]

The same might possibly be applicable to a wireless connection. A person can own his stereo system, but he cannot prohibit others from hearing the music that can be heard on the street. In a similar sense, although a person owns his router, he cannot prohibit others from benefiting from the wireless connection. [This might also fall under the category of *kol*, *mareh*, and *re'ach*.]

By forbidding you to use his connection, the neighbor is effectively forcing you to turn off the internet function on your computer, or to turn off the automatic detection function that finds wireless connection. It can be argued that this is not within his rights. Once you are connected, it can further be argued that he cannot prevent you from using the connection to surf or to download from the internet.

The argument is strengthened by the fact that if he wishes to, the neighbor is able to secure his connection, and prevent others from using it. However, the final argument (permitting use of his connection even against the owner's wishes, at all times) requires further scrutiny.