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Printed in Israel 2006

NAHUM RAKOVER

PROTECTION OF PRIVACY
IN JEWISH LAW

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*This book is dedicated to
Dr. Ivan and Francesca Berkowitz
who are committed to Jewish law
and its application in modern life*

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English Summary

A. Introduction

The purpose of this book is to discuss various issues concerning privacy as they are reflected in Jewish sources. The right to privacy has become an increasingly material problem of our technological age—a problem the law has attempted to solve. Basically, the right to privacy affirms that a person is entitled to live his life and conduct his affairs without interference, and to do so out of the public gaze and without the full glare of widespread publicity. The defense of privacy involves the principle that not only the person and his physical property should be protected, but that his individuality, personality, good reputation, and intellectual possessions should be protected as well. The right to privacy includes *inter alia* preserving the secrecy of the intimate doings of the individual, his writings and letters, his conversations, and his personal way of life. From a practical viewpoint, this right is expressed in protecting the person's private life from prying, scrutiny, and investigation.

In many countries, a number of disparate statutory and other

provisions in the law of tort and in the criminal law, have afforded partial protection of privacy in the past. We may in particular note, by way of example, the rules against trespass and defamation.

In the U.S.A., the Fourth Amendment of 1791 affords only partial recognition of the right to privacy. 'The right of the people,' the amendment reads, 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' However, this Constitutional regulation has been construed broadly to include the right to privacy.

Privacy was first defined, and established as a right requiring the protection of the law, in the famous paper of Warren and Brandeis published in the *Harvard Law Review* in 1890.

Technological developments that facilitate easy intrusion upon the individual's life and affairs have forced society to grant the individual the legal tools required to protect his privacy. Today nearly all nations recognize the right to privacy, at least with regard to a person's home and the confidentiality of his correspondence and communications in their contemporary formats.

On the international scene, the matter is dealt with in human rights conventions. A certain measure of protection was adopted by the 21st session of the General Assembly of the U.N. in 1966, in the International Covenant on Civil and Political Rights. Article 17 of this Covenant states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The European Convention on Human Rights of 1950 established the right to privacy and also set forth limits on this right. Article 8 of the Convention states the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

The protection of individual privacy has been fundamentally affected by the citizen's becoming data for the computer, particularly with the ever-mounting intervention in private life of government bureaucracy and other elements. Determination of the boundaries of the right of the individual calls for abundant caution. As regards privacy, a balance needs to be struck between the rights of the individual on the one hand, and the rights of others and the public interest, on the other.

In Israel, the Protection of Privacy Law, 1981, now regulates the subject. This law embodies the main recommendations of a public committee set up by the Minister of Justice and chaired by Justice I. Kahan (former president of the Supreme Court of Israel). During this committee's deliberations and in its conclusions, due account was taken of the approach of Jewish law. The Introduction to the Bill emphasizes that, in Jewish law, privacy merited protection from early times.

In 1992, Article 7 of the Basic Law: Human Dignity and Freedom established privacy as a fundamental right in Israeli law:

- Privacy
- (1) All persons are entitled to privacy and to conduct their affairs without interference.
 - (2) It is prohibited to enter an individual's domain without that individual's consent.
 - (3) It is prohibited to conduct a search of an individual's domain, to conduct an external or internal search of his body, or to conduct a search of his possessions.
 - (4) It is prohibited to violate the confidentiality of a person's conversation, of his writings, or of his records.

The sources of Jewish law predate the technological age, and one might imagine that, for this reason, they would not offer answers to questions of our time. However, Jewish sources, in their great sensitivity to personal injury, established legal principles that prohibit injury not only

to one's person and property but also to one's personality and dignity. These fundamentals of Jewish law are equally applicable to the technological reality of our time. They establish principles aimed at protecting the individual's right to maintain the privacy of his life, as well as limits that prevent this right from being invoked wrongfully when it might violate the legitimate rights of others. Jewish thought, which stresses the value and singularity of the individual on the one hand, and his bonds and ties with the community on the other, may have some lessons for us in this matter.

Herewith we will deal with protection of the individual's secrets, the privacy of his papers and domestic way of life, and the limits on such protection that are necessary to preserve other social values, as these issues are reflected in Jewish sources.

B. Disclosure of Secret Matters

Disclosure of another person's secrets is condemned in Proverbs 11:13, where it is assimilated to tale-bearing: 'He that goes about as a tale-bearer reveals secrets, but he that is of a faithful spirit conceals'; and the severity of the offence is the same.

In the *Mishnah*, this text is used as authority for one of the rules of court procedure, and it is established that a judge may not, after hearing a case, disclose which judge found for or against the defendant. The *Mishnah* in *Sanhedrin* 3:7 states: 'Whence do we know that one of the judges on leaving, must not say "I was for acquittal and my colleagues for convicting, but what could I do, for they outnumbered me?" Of such a person it is said, "He that goes about as a tale-bearer reveals secrets."' The *Talmud* cites an actual case where a student who violated this rule by revealing a secret from the academy some twenty-two years earlier was punished by expulsion. This instance is mentioned by Alfasi and by Maimonides in their codes. As we know that neither of these authorities quotes matters lacking legal significance, the case cited from the *Talmud* serves as a leading precedent for the prohibition against revealing secrets. And indeed, R. Eliyahu Ben Haim, of 16th century Turkey, cites the above case in

ruling that, if a member of the city council discloses the details of matters discussed, he should be disqualified from office.

The prohibition of revealing secrets is not limited to the deliberations of judicial or quasi-judicial bodies. The *Talmud* in *Yoma* 4b rules that, where a person says something to someone else, the latter may not repeat it without the former's permission. Certainly, the reference here is to matters whose nature, or the circumstances under which they were imparted, indicate that the person involved was interested in their not being passed on.

On the other hand, even a secret may be revealed if the affected party told it in a manner that demonstrates lack of concern that the secret may be transmitted to others.

Not only is it forbidden to reveal secrets transmitted in confidence. It is likewise forbidden to reveal any personal information that a person would not like to become known to someone else. This is apparent from Maimonides' definitions of tale bearing and gossip. The prohibition against tale bearing is broad enough to encompass a prohibition against making a person's private information known to the public, and the prohibition against gossip includes a prohibition against revealing matters about a person in a way that may cause him distress or damage.

Moreover, the prohibition against revealing secrets is interpreted such that it prohibits not only revealing another's secret to a third party but also prohibits revealing another's secret to oneself. Even one who reveals another's secret to himself is considered guilty of tale bearing, for what difference is there in revealing a secret to others and revealing a secret to oneself?

In a case where revealing the secret involves a breach of trust, the act includes an element of treachery deserving of particularly severe treatment.

In addition to the prohibitions of tale bearing and gossip, the Sages suggested additional bases for prohibiting disclosure of secrets: The fundamental biblical principle of 'You shall love your neighbor as yourself,' or, in Hillel's formulation, 'That which is hateful to you do not do to another,' served as a basis for prohibiting disclosure of secrets.

Similarly, the prohibition of deception (*geneivat da'at*—literally, theft of knowledge) was interpreted in a novel fashion, according to which it includes revealing another person's secret. Revealing another person's

secret is even more serious than deception in its classic sense, because, by revealing another person's secret, one does indeed 'steal knowledge,' knowledge of the 'inner recesses of the affected person's heart.' This approach views a person's secret as being similar to his property!

C. Eavesdropping

Eavesdropping (including all modern technological variants), though it involves no breach of trust—given that the owner of the secret had placed no trust in the listener—does involve the prohibition of deception, for the listener does indeed steal knowledge of the inner recesses of the affected person's heart. The fact that such eavesdropping is performed by means of listening devices and in secret certainly does not offer any basis for relaxing the prohibition. On the contrary, the circumstances of such technologically mediated eavesdropping show clearly that the act is aimed at discovering information that the affected party desires not to reveal.

Similarly, the broad definition of the principles that serve as the basis of a person's right to privacy enabled the halakhic authorities to derive from them a prohibition against photographing a person in compromising circumstances as well as prohibition of other acts of disclosure to which a person is sensitive.

It follows clearly from these principles that the protection of privacy also covers correspondence, since there is no essential difference between oral and written communication.

D. The *Herem* of Rabbenu Gershom

The confidence that attaches to letters that a person sends to others, received the special attention of Rabbenu Gershom, 'the Light of the Exile.' Rabbenu Gershom lived in Germany in the 10th and 11th centuries, and many regulations intended to better Jewish communal life are attributed to him. Among these are two well known ones that concern the family status of the wife: the regulation against bigamy,

and that against divorcing a woman against her will. Our concern here is with Rabbenu Gershom's regulation concerning privacy.

A letter may pass through many hands before it reaches the addressee. The intermediaries are not necessarily people trusted by the sender; thus the sender faces the risk that the letter's content may be revealed to persons from whom he desired to keep it secret. Disclosure may reveal details of his personal matters as well as his business affairs. The general prohibition against revealing secrets of another, without enforceable sanctions, is insufficient here. It was found proper to take measures of greater deterrence by imposing a *herem*, a ban of excommunication, on whoever opens another person's correspondence without permission.

It is possible that the added sanction of a ban of excommunication was imposed in order to protect commercial secrets, concerning which the general prohibition against revealing another person's secret was not deemed sufficient and therefore it was considered proper to enforce the prohibition by means of a penal sanction. This protection is similar to the protection granted today to secrets transmitted by electronic means with the purpose of ensuring an environment in which business can be conducted without fear that secrets will be revealed to those for whom they were not intended. The punishment was particularly severe for those who *used* a secret disclosed in violation of the ban. Where it involved industrial espionage and the use of confidential trade information, Jewish legal authorities also considered it theft of both property and knowledge.

Rabbenu Gershom's ban is known to us from the list of various regulations cited in the responsa of R. Meir of Rothenburg (Prague ed.), and it is later given as final law by a number of Rabbinic authorities. The ban served as a most effective means of punishing members of the Jewish community. There are various sources that may have originally motivated its imposition. R. Haim Falagi of Izmir, in the 19th century, proposed the following: 'You shall love your neighbor as yourself'; 'Do not go about tale-bearing'; the biblical prohibition of deceit; and so on.

Over the years, it became customary to endorse correspondence with the Hebrew acronym 'BHDRG' ('With the *Herem* of Rabbenu Gershom'), indicating that the letter was protected by the ban of Rabbenu Gershom. And so it has continued down to our time. The endorsement informs any person contemplating opening a letter that he

will be subject to excommunication. Although the endorsement is not necessary for that purpose, and the *herem* will apply without it, some importance attaches to the fact that the writer made the endorsement. R. Yehoshua Boaz, an Italian rabbi of the 16th century, deals, in his *Shiltei Gibborim* to *Shevuot*, with the question whether, in the absence of the above endorsement, one who disobeys the prohibition is automatically banned or only *liable* to be banned by the court. He suggests that Rashi took the first view, whereas Rabbenu Tam took the second. He continues:

‘The effect of the practice of endorsing upon letters that the *herem* of Rabbenu Gershom applies appears to be that if the person opening it knows of the *herem*..., then, even where the endorser himself was not competent to impose a ban of excommunication, and even if we say that the opener is not ‘banned’ until the *herem* is proclaimed, in any event he is under ban. Since the ban is Rabbenu Gershom’s, he is lawfully banned, and anyone can proclaim him under ban.’

R. Yaakov Hagiz, one of the sages of Jerusalem in the 17th century, deals with the case of a person who found in the street an *opened* letter on which appeared the sentence ‘He who breaks through a fence [=performs an act prohibited by the Sages], the ban of Rabbenu Gershom shall attach to him.’ R. Hagiz held that whilst the fact that the letter was opened and thrown away showed that the *addressee* did not care if strangers read the letter, it was possible that the *writer* did care. Consequently, it is forbidden.

The *herem* was not the sole sanction against people who opened letters of others. R. Haim Shabtai of Salonica, at the end of the 16th and the beginning of the 17th centuries, when presented with a case of unlawful opening and retention of a letter addressed to another, decided, after mentioning the *herem*, that the offender must have acted to obtain some benefit, and accordingly merited punishment.

Dealing with the question of damage resulting from reading the letter, he says that although it was not clear whether, in the particular case, compensation should be paid, nevertheless, the prohibition existed, and in the majority of such cases the disclosure of a person’s secrets did, in fact, cause damage, even if not monetary. The *bet din* should, therefore, chastise the offender in such manner as it thought fit in the circumstances.

A case of perusal of a letter in order to obtain confidential commercial information came before R. Yossef David, of Salonica at the beginning of the 18th century, and he awarded the plaintiff a monetary fine, holding that the offender must be treated severely, because the rule of Rabbenu Gershom applied to the mere opening of a letter, and here the offender had additionally taken advantage of the information revealed.

In this regard, the ruling of R. Abraham David of Botshatsh on use of confidential trade information should be mentioned: One partner had bought, for his own purposes, goods, the details of which he had learned from his partner, and which were needed for the purpose of the partnership. R. Abraham David ruled that there could be no greater example of disloyalty, and that it not only amounted to foul practice, but was actual fraud.

An interesting attempt was made to apply Rabbenu Gershom's ban to eavesdropping. However, although the prohibitions that served as the basis for the ban do indeed apply to eavesdropping too, they cannot be used to extend the *ban* beyond the specific acts for which it was originally enacted.

Jewish legal authorities also discussed whether it is permitted to read a letter for the purpose of discovering a violation of Jewish law or preventing damage, and whether parents and educators are permitted to read a letter for educational purposes, to ascertain the nature of their child's or their student's correspondence.

Beyond the particular questions explored in the context of Rabbenu Gershom's ban, the ban presents an instructive example of how the authorities deal with social questions when the established law is not sufficient. In Rabbenu Gershom's ban, we find the authorities taking a new path in the form of an enactment accompanied by penal sanctions.

E. Limits Upon the Duty to Keep Information Secret and the Protection of Privacy

Protection of privacy is not absolute but is subordinate, rather, to a person's obligations to his fellow person and to society. A person's

privacy may not be wrongfully exploited to frustrate the establishment of law and order.

As discussed below, concerning entry to the premises of a debtor to collect a debt, Jewish law distinguishes between entry of a private person and entry of an officer of the court or governmental jurisdiction. When there is a possibility of concealment of property, a person's private domain may not serve as a haven or refuge to facilitate evasion of debt. Nor may the fact that information was transmitted secretly serve as a pretext for evading the obligation to testify. A person's letters will not be protected against disclosure where they may contain information that is damaging to others. Sometimes it is even obligatory to conceal witnesses for the purpose of bringing offenders to trial, as we shall see.

One of the limits on the duty to keep secrets of another may apply where that duty confronts the legal-moral-social duty of giving evidence. In many such cases, protection of privacy will have to give way. A 14th century precedent is found in the decision of R. Menahem of Mirsburg in the case of a person accused of defaming his wife. To deal with this matter, it was necessary to take evidence from the person before whom the defamation was uttered. R. Menahem decided that the person *must* testify as to what had been told to him in confidence.

R. Yaakov Weil of the 15th century, on the other hand, held that, in such an instance, the party concerned must give permission for the disclosure before the information is given in evidence. This ruling is cited as authoritative by *Rema* in his *Darkhei Moshe* on *Tur Hoshen Mishpat*, 28:1 and by other authorities (*Sema* and *Shakh* *ibid.*, 1 and *Be'er Hagolah* *ibid.*, 3), but there are authorities who explain the decision of R. Yaakov Weil to mean that such permission is not an absolute condition.

R. Yosef Kolon (of 15th century, Italy), went even further in a case involving information about the location of lost property. One of the regulations of Rabbenu Gershom establishes that a person who has lost property may require anyone who knows of its whereabouts to give him the necessary information. R. Yosef Kolon held that this regulation could not be evaded on the plea that the information had been acquired in confidence, and this applies even where the person concerned had been sworn to secrecy. Not only the biblical duty to give evidence, but also a duty under a rabbinical regulation or even a communal

regulation prevailed over the duty to keep the secret. Any attempt to evade or frustrate the regulation of Rabbenu Gershom by subterfuge must be condemned. This case is cited as a precedent by *Rema*.

Another instance in which privacy is not protected occurs where the right to privacy is exploited to conceal the commission of an offence or injury. R. Haim Falagi held that a letter may be inspected, where it was suspected that the writer was about to commit some wrong and this could be established by opening and reading the letter.

An interesting source concerning eavesdropping is the *Mishnah* in *Sanhedrin*, which deals with concealment of witnesses to obtain evidence of instigating idol worship. The *Mishnah* says: 'For all transgressors liable to the death penalty, no witnesses are bidden to entrap them, except in this case... witnesses are hidden behind a partition, and he [the person incited] says to him [the inciter], "Tell me your proposal in private," and the latter says...' The opening words of the passage cited can be understood to mean that it is not *forbidden* to conceal entrapping witnesses in criminal cases in general, but that there is no *obligation* to do so. Indeed, this is the view of R. Yossef Babad in his commentary on *Sefer Hahinukh*. In fact, this *Mishnah* does not deal with the violation of privacy by concealing the witnesses, but rather with the admissibility of the evidence obtained thereby. Nevertheless, it is possible to infer from this *Mishnah* that the right to privacy does not apply when the commission of a criminal act is planned.

F. The Right to Privacy vs. Human Life

It is clear that the right to privacy is superseded by the value of human life. When concealing information might endanger human life, life must be protected even at the expense of privacy.

So, for instance, if someone knows of a driver afflicted with some physical handicap that might endanger others on the road, or, for that matter, of an AIDS victim who might infect others, he is not only permitted to reveal the information but is obligated to do so. Such a violation of privacy is mandated by the biblical imperative (Leviticus 19:16) '...Do not stand idly by the blood of your neighbor,' which prohibits ignoring danger to another and enjoins active assistance.

Moreover, the right to privacy is suspended not only by the obligation to save the life of a third party (as in the above examples), but also by the obligation to save the life of the person whose privacy is being violated. An interesting question in this regard arose in an Israeli court in the trial of a man accused of possessing an illegal substance. The person claimed that evidence of possession was obtained illegally. The person in question was arrested after a police pursuit during which he was seen swallowing something. An abdominal x-ray confirmed the existence of a foreign body in the man's digestive tract, and the attending physician expressed the opinion that if the package did indeed contain a drug and if it would open or dissolve while still within the man's body, the result would probably be immediate death. Accordingly, to save the man's life, it would be necessary to remove the package surgically. The suspect objected, and the police department appealed to the court, receiving permission to operate on the man despite his objection. As a result of the operation, the police recovered a package containing an illegal substance.

In the subsequent trial, the accused claimed that the evidence against him had been obtained illegally. The court was thus forced to decide whether it is permitted to violate an individual's privacy in order to save his life, a question with which Israeli law did not deal.

One of the Supreme Court Justices cited American precedents, according to which it is not permitted to operate on an individual against his will, even when the surgery is necessary to prevent that person's death, although he upheld use of the evidence on other grounds. Supreme Court Justice Beisky, however, cited Jewish law, according to which all commandments are suspended when life is imperiled, and ruled that the value of life takes precedence over the individual's right to privacy.

G. Professional Secrets

How should a physician or any other professional behave when the ethical norms of his profession oblige him to maintain the confidentiality of information, whereas according to Jewish law he is

obliged to disclose the information in order to protect someone who might be injured as a consequence of not knowing it?

On the one hand, protecting such secrets is essential to the profession—without such protection patients might not reveal to the physician all the information necessary for the proper treatment, from fear that personal information would be made public. On the other hand, there may be very weighty considerations in favor of divulging even a professional secret, considerations such as a violation of law or a planned violation of law, an illness that endangers others, information that may protect others from damage, and so forth. In all these cases, the question is whether the interest of the person who might be injured by lack of information concerning the professional secret will sway the balance in favor of revealing the secret; or, on the other hand, whether the prohibitions usually involved with revealing secrets—prohibitions that apply with even greater force to professional secrets—will sway the balance in favor of protecting the secret.

It appears that, as long as no regulation (recognized according to the principles of Jewish law) has been enacted to exempt a professional from the duty of disclosure, he is obliged to disclose the information when failure to do so would constitute a violation of ‘Do not stand idly by the blood of your neighbor.’

It should be noted that some authorities opine that the commandment ‘Do not stand idly by the blood of your neighbor’ applies not only to life and death situations but also to rescue of another person’s property and rescue from other types of injury. According to this approach, there may be a duty to disclose a secret under various other circumstances notwithstanding the right to privacy: for example, disclosure for the sake of rescuing a person from employing an individual who might cause damage to the prospective employer’s business, or for the sake of rescuing a person who is about to marry without knowing about serious defects in his prospective spouse’s health or character.

Is a professional obliged to disclose sensitive information in order to prevent injury even when, by doing so, he risks the loss of his license to practice because of violating the ethics of his profession? Some authorities hold that, because not disclosing information does not involve any action, a professional is not obliged to disclose the information if doing so might cause the loss of his license.

H. Domestic Privacy

The last verse of the Book of Exodus states that ‘Moses was not able to enter the tent of meeting because the cloud abode thereon.’ This is followed by the Book of Leviticus, which opens with the verse, ‘And the Lord called unto Moses and spoke to him out of the tent of meeting.’ From these two verses, the rabbis inferred that a person may not enter his neighbor’s home without invitation. The rule extends even to a person’s own family. Thus Rabbi Akiva instructed his son Yehoshua: ‘Do not enter your own house suddenly (that is, without announcing yourself), *a fortiori* your neighbor’s house’.

Our concern is not, however, with matters of propriety and good manners but with the *legal* protection of personal privacy. Scripture indeed grants such protection: ‘When you lend your neighbor any manner of loan, you shall not go into his house to fetch his pledge. You shall stand outside, and the man to whom you lend shall bring forth the pledge outside to you’ (Deut. 24:10-11). Though this passage does not in general prohibit entry into another person’s house, it may be regarded as recognizing the principle of observing the privacy of persons even if they are one’s debtors. Jewish law is not satisfied with a mere *moral* precept, in such a case, but establishes a *legal* right against invasion of privacy.

An instructive limitation of this prohibition of entry into a debtor’s house, emerged in the Tannaitic period, 2000 years ago, making a distinction between the creditor and an officer of the court. The latter, who acts on behalf of the authorities, may enter the debtor’s house to execute the creditor’s rights against the debtor. The prohibition does not apply to him. As one early text puts it, ‘When a creditor comes to take his pledge, he shall not enter the debtor’s house but must stand outside whilst the debtor enters and brings him out the pledge, since it is written “You shall stand outside.” But when the court officer comes to fetch the pledge, he may enter the house and take it’ (*Baba Metzia* 113b). This distinction, however, is not accepted by all the authorities. Even in the *Mishnah* there is an opposing view which, in the end, was adopted as the law, as codified by Maimonides and the *Shulhan Arukh*.

Maimonides summarizes the rule in the following terms: ‘The rule of the Torah is that when a creditor claims his debt, if the debtor has

any property, necessities are set apart for him, and the remainder is given to the creditor.... If no property belonging to the debtor can be found, or if only such property is found as is to be set apart for his necessities, the debtor goes free. He is not to be imprisoned, nor told “Produce proof that you are poor,” or to be subjected to an oath, as the gentiles adjudge; for it is written “You shall not be to him as a creditor.” ... Even if the creditor contends that the debtor has property which he is concealing and that it is in his house, it is not permissible for either the creditor or the court officer to enter his house, since the Torah has been strict in this regard, stating “You shall stand outside.””

Nevertheless, this is not the end of the matter. This far-reaching protection of the debtor could clearly be exploited unfairly by debtors. To guard against such a possibility, the prohibition against entry was construed in a manner that was not unreasonable and would not lead to defeating the legal rights of the creditor. *Rabbenu Tam*, in the 12th century, interpreted the prohibition as being limited to instances where the creditor sought to take a security *before* the due date of payment of the debt; where the debt was already due, the creditor himself was permitted to enter to collect it. Rabbenu Tam was followed by subsequent authorities, including the *Shulhan Arukh*, with the proviso that this exception applied to the court officer alone.

R. Meir Halevi Abulafia (Spain, at the beginning of the 13th century) also saw the danger that an unrestricted prohibition of entry might frustrate the creditor’s rights. Consequently, he interpreted the prohibition as being applicable to the court officer only where the creditor had other means of collecting his debt, but where no alternative presented itself, and the creditor contended—even dubiously—that the debtor possessed chattels in his home, the bailiff might enter to search for them. R. Abulafia notes that, though this interpretation is not found expressly in the *Talmud*, or in the writings of his predecessors, he found it necessary to introduce such a view.

The privacy of a person’s home is entitled to legal protection, but it is not so extensive that it can be exploited to defeat the rights of others and frustrate the rule of law and justice.

I. Injury By Overlooking Premises

In Jewish law, the notion of protecting privacy has more far reaching ramifications: Just as the law protects a person's premises from unwanted physical entry, so does the law protect premises from unwanted *observation*. Thus, privacy is invaded not only by actual entry, but also by *looking* into it. Jewish law has a special term for this form of damage caused by observation of another: 'overlooking damage' (*hezek re'iyah*)

'Balaam lifted up his eyes, and he saw Israel dwelling tribe by tribe,' and then he blessed them, saying 'How goodly are your tents, O Jacob, your dwelling places, O Israel' (Num. 24:2-5). The Talmud comments on the above verse as follows: 'What did Balaam see? He saw that the tent openings did not face each other; that is to say, the tent openings were placed in a position that ensured the privacy of the dwellers. Thereupon he said, "Worthy are those upon whom the Divine Presence rests"' (*Baba Batra* 60a).

The positioning of the tent opening was mentioned here only as a matter of social virtue. But in the Mishnaic period the principle was formulated as a vested legal right that enabled a person to enjoin his neighbor against creating doors and windows in a manner that would injure his privacy. 'A person should not open a door facing another person's door, nor a window facing another person's window,' rules the *Mishnah* in *Baba Batra*, and this ruling was codified by Maimonides: 'If one of two partners in a courtyard wishes to create for himself a window looking from his house into the courtyard, the other can prevent him, because [the window] enables the owner of the window to look through it into the courtyard. If he created [such a window], he must wall it up. Similarly, one of the partners in the courtyard may not create a door directly opposite the other's door or a window directly opposite the other's window.'

The *Shulhan Arukh* adds that a person may not create a door opposite another person's door even where the partners granted him permission to create a door into the courtyard: 'If the partners granted him permission to create a window or a door, it is permitted—provided that the door does not face another door and the window does not face

another window.... The new door or window must be created at a slight distance [such that it is not precisely opposite another door or window]. If the owners of a courtyard grant a stranger [a person who is not a partner in the courtyard] permission to create a door or a window facing their courtyard, the person must create it in a manner that he cannot look at all from his door or window into any other door or window.'

Thus, not only is the house of the individual protected, but his courtyard and garden are protected as well. The *Mishnah* just cited also provides that 'a person should not open windows overlooking the courtyard he shares with others' because, in consequence, the others would be obliged to take steps to preserve their privacy. And the *Talmud* points out that, if such is the case with a joint courtyard, it applies with even greater force to a person who is not a partner in the courtyard.

Although the Talmud also mentions an opinion that overlooking does not constitute injury, this opinion merely *restricts* the protection of privacy from overlooking—it does not abolish such protection altogether. So, for instance, this opinion would not protect privacy within a courtyard, whereas privacy within one's own home would be protected. This is because people behave in their own homes in a manner that necessitates privacy.

The rules of 'overlooking damage' are numerous and whoever is concerned with town planning would certainly find them of much interest. The principle of overlooking damage involves the concept that not only is the actual observation of the property of another person prohibited, but one must also prevent the *possibility* of such observation occurring. The reason for this is that such a possibility alone is enough to prevent a person from acting as he wishes in his own property. Accordingly, where a person's privacy is invaded by a window that his neighbor made overlooking the former's property, he is entitled not only to obtain an injunction against his neighbor in order to prevent the invasion of his privacy, but also to demand that his neighbor restore the status quo—in this case, by closing up the window.

What are the rights of a person whose privacy is thus affected if there was no protest on his part when the window was first opened? This question is disputed in the Talmud. According to one view, the

person who made the window acquires an easement against the owner of the courtyard. The contrary view is that the injured party retains his right to claim restoration of the status quo, so that his privacy will not be prejudiced. The difference of opinion is set out in the Talmud in the following manner:

‘A person made windows opening onto a courtyard which he shared with others [presumably without their objection]. He was summoned before R. Ishmael son of R. Jose, who said to him “My son, you have established your right.” He was then summoned before R. Hiya, who said to him, “As you have taken the trouble to open them, so you must take the trouble to close them”’.

In the Jerusalem Talmud, the second view appears in the following form: ‘He who opens a window in the wall of his courtyard in the presence of his neighbor—he opens it with his left hand and closes it with his right hand,’ meaning he must immediately block it up.

Later authorities take different sides (Maimonides, *Shulhan Arukh* and *Rema*).

The observations of Nahmanides in the 13th century are especially instructive for us. Nahmanides gives his reasons for denying the tortfeasor the option to acquire an easement against the injured party. A tortfeasor, he says, can acquire a right by continued use only where what is involved is merely monetary damage, but not where the victim suffers physical or psychological damage and is thereby aggrieved in his own person. Further, it is not possible to assess in advance the measure of injury, where overlooking damage is concerned, and therefore no renunciation or waiver of the right can have effect. Moreover, since it is certainly forbidden to injure another person in this particular manner, and no one can be so mindful as to close his eyes whenever he stands at the window, it must inevitably follow that, even though there is a waiver on the part of the other, we must tell the offender ‘Close up your window and do not continue in your wrongful behavior.’

Thus, the severity of the damage on the one hand and the impossibility of foreseeing the extent of the damage on the other, combine to create the presumption that the injured party does not excuse the injury. Moreover, even if the injured party has excused the injury, the injurer will not be permitted to look from his property into

the private property of his neighbor even though the injurer was not ordered to restore the status quo (in which such observation was not possible). This is because there exists a religious prohibition against gazing into another person's domain.

The principles of such injurious observation may therefore be summed up as follows: Invasion of privacy occurs not only when one enters physically upon another's property, but also when one looks into another's property; not only *observation* constitutes an invasion, but also the creation of a situation that *enables* observation; the invasion also contains an element of religious proscription; the injured party has a legal right to prevent it, including a claim for injunction and restoration of the status quo.

Injury to privacy differs considerably from monetary damage in a number of respects. Because of its seriousness, there is no way that the right to privacy can be waived or relinquished; non-waiver may be presumed from the difficulty of foreseeing the measure of the injury involved; even if there is a waiver, the invader is under religious precept to restore the situation and avoid causing further damage.

J. Conclusion

We have sketched the general outlines of the legal nature of the right to privacy, the broad applicability of this right, and the protection of this right by means of effective sanctions both in criminal and civil law. At the same time, we also showed how Jewish law endeavors to protect society against wrongful exploitation of this right.

It is apparent that a number of the basic elements of the right to privacy are as ancient as Jewish law itself. The roots are found already in the Bible. In the course of time, the right crystallized into a manifest vested legal right, with various types of sanctions. This development follows the pattern of development of Jewish law in general, where, by means of an interpretive process, as well as by means of legislation, the rabbis found it necessary and proper to reinforce and perfect legal institutions.

Protection of privacy has its expression in control of the passing-on

of information by one person to another, and in the steps taken to preserve the secrecy of correspondence. The wrongful use of secrets imparted in confidence is treated as the most serious form of breach of trust. Revelation of a secret by a person in a judicial or quasi-judicial capacity received severe sanctions even going as far as disqualification for serving in such a capacity.

But protection of privacy was not confined to protecting a person's secrets. The invasion of privacy includes the unauthorized entry upon another's domain, and even the creation of conditions that *enable* privacy to be invaded. It is quite clear that use of technological devices that make possible highly sophisticated surveillance, even though such devices are not attached to the property of the person concerned, falls within the complex of acts, prejudicial of privacy, which are prohibited under Jewish law.

Since, however, protection of privacy may be exploited and used to frustrate the rule of law, a distinction was made with regard to entry upon private domain by court officers—and, by necessary extension, one may suggest, by other duly authorized persons—where there is reason to suspect the concealment of goods or, again by necessary extension, of information. Here a person's home will not serve as a refuge for avoiding the payment of debts or the fulfillment of obligations. Furthermore, the fact that a matter has been imparted in confidence is not sufficient reason to prevent its disclosure in legal testimony. A person's correspondence does not enjoy immunity where there is reason to suspect that it contains injurious matter. Similarly, the right to privacy is suspended when confronted by the higher value of preserving life.

Owing to the sensitivity of personal privacy, the limits upon its protection were imposed with great care. Not every protection of another party's interest justifies a violation of privacy. There is a difference between violating the privacy of someone who is about to injure another person's interest and violating the privacy of a person who is not responsible for the injury but whose privacy must be violated in order to prevent the injury.

Protection of individual privacy is expressed also in the protection afforded to a person's conduct of his personal affairs. One aspect of protection of privacy is the concern that a person's privacy not be

disturbed not only by someone who physically enters his domain but also not by someone observing him from outside his domain.

The rules concerning protection of privacy are not rigid; they are relevant in every age, not only in the period in which they were enacted. On the contrary, both the prohibitions and their exceptions were established on the basis of fundamental principles related to human dignity and protection of a person's good name. This approach facilitates flexibility of the principles and their adaptation to changing circumstances in accordance with the changing sensitivities of people in various periods.

The right to privacy, we conclude, is a legal right that can be defended by a variety of means—injunction, an order for restitution of the status quo, and a claim for payment of damages. Moreover, interference with this right bears a criminal character, and may be dealt with by penal sanctions. In general terms, the legal nature of the right consists, on the one hand, of a broadly based right of the individual enforced with effective sanctions, and on the other hand, of protection of society from wrongful utilization of the right.

The right to privacy, recognized in recent times as worthy of legal protection in modern law in general and in Israeli law in particular, is based on a *weltanschauung* not generally accepted in the past, namely, that just as a person's body and property are deemed worthy of protection, his personality and way of life are no less worthy of protection.

The Jewish outlook that a person is not merely 'flesh and blood,' but rather a creation suffused with the image of God, explains the fact that a matter novel to other legal systems has existed in Jewish law from its inception. That very outlook is the moving force behind establishment of legal principles that protect not only man's material values but man's spiritual values as well.

תקציר באנגלית