

States. We are not soliciting business in Connecticut. I think that is the essence of the matter.

Mr. FENSTERWALD. Suppose you were going to do a major investigation, say, in Hartford. Would you have to get some permission then—not just a single inquiry, but, say, a major investigation?

Mr. GILLEN. I doubt it, sir.

Mr. FENSTERWALD. That is all the questions I have.

Senator LONG. Mr. Waters.

Mr. WATERS. No questions.

Senator LONG. Thank you, Mr. Gillen.

Mr. GILLEN. Thank you, Senator, for the opportunity to come here.

Senator LONG. I thank you for coming down and giving us your testimony.

Our next witness this morning is Rabbi Norman Lamm.

If you do not mind being sworn, we will swear you.

Do you solemnly swear the testimony you are about to give to this committee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. LAMM. Yes, sir.

Senator LONG. Rabbi, you have a rather extensive statement here. I understand you do desire to summarize it. We would appreciate it if you would. We may have to go into session, but the entire statement will be printed in the record and will be so ordered at this time. We appreciate your statement.

TESTIMONY OF RABBI NORMAN LAMM, THE JEWISH CENTER, NEW YORK

Rabbi LAMM. Then I will summarize it as quickly as I can, skimming through it.

Let me begin by saying that I am very pleased—

Senator LONG. Rabbi, would you give us your background, your name, your address, and where you are located?

Rabbi LAMM. Yes, My name is Rabbi Norman Lamm, 27 West 86th Street, New York City. I am an associate rabbi at the Jewish Center and associate professor at Yeshiva University.

I am very pleased and honored at the opportunity to be able to sketch in some of the background of the concept of privacy as a right and as a duty in Jewish law.

Judaism is not only a religion in the general western sense, but to a very large extent is based upon the highly developed legal code known as halakah, which in turn is based upon the Bible and upon a long oral tradition which had its greatest development between 1,500 and 2,000 years ago.

Now, in our country the fourth amendment was enacted in 1791, and the problem of privacy became a reality for jurists at the end of the last century. The right has been traced back to Roman law, to the sixth century Justinian Code and to Cicero, but actually it is more ancient.

In the Bible itself we have a specific commandment safeguarding the privacy of a man's home. The Bible in Deuteronomy forbids a creditor from entering forcibly into the debtor's home to collect a pledge, and the Talmud, expanding upon this, says that even a court officer cannot come into a man's home by force to seize the pledge.

So that the basic concept of privacy of the home is already safeguarded as a full commandment or a law in the Bible itself.

In the halakah, in the development of Jewish law there is a distinction between two independent forms of invasion of privacy. One of them is intrusion and the other is disclosure.

Now, intrusion we have just discussed: the Biblical law against intruding in a man's home, even by the court.

But far more important is a more subtle kind of intrusion which the halakah refers to as visual damage. This means, essentially, that if two people buy a plot of ground in common as partners, and they each build a house on opposite sides, either one can demand of the other to share the expenses of building a wall high enough so that they do not invade each other's privacy. And the concept here is that the half of the expense of the fence that I build is not to protect my privacy as much as to prevent myself from intruding on the other fellow's privacy, so that the protection of privacy becomes a moral duty that is also legally actionable because the other man, the neighbor, can demand in court that I pay the 50 percent to prevent my spying upon him.

Mr. FENSTERWALD. Rabbi, could I interrupt and ask you if there is any similarity here to Anglo-American law, that you know of?

Mr. LAMM. I do not, but, of course, that does not mean much, because I am not an expert in Anglo-American law.

In my written statement I try to show exactly how that is performed in halakah where there are times when a man, in order not to intrude on his neighbor's privacy, must erect the entire fence by himself. In other words, the halakah insists upon the right of privacy and holds that even the nonphysical violator of another's privacy is guilty of inflicting a substantial damage. It is the responsibility of each individual not to pry into his neighbor's personal domain.

Now, this idea of visual damage covers eavesdropping as well. There is no real distinction. All forms of surveillance, whether natural, mechanical, and electronic, whether visual or aural, are included in the strictures of Jewish law against the invasion of privacy.

Furthermore, this invasion of the integrity of a man's life, which is his privacy, is primarily a moral offense and the civil law is derivative from it. So that Judaism considers privacy a moral issue, but of sufficient importance in society to make it legally actionable.

It is rather interesting that this nonphysical invasion of privacy—such as overhearing or overlooking, by bugging or by spyglass, any form of snooping—is considered as serious an invasion of privacy as physical trespass.

I believe that this is an issue between some of the leading members of the Supreme Court in their interpretation of physical trespass and the fourth amendment.

This problem was discussed by Halakah some 2,000 years ago, and the decision was fairly unequivocal that nonphysical invasion of privacy is as serious as physical trespass, and that therefore physical or aural surveillance is considered not only forbidden but also actionable.

Disclosure is also considered an invasion of privacy. As a matter of fact, according to the ethics of information in Jewish law, information received confidentially cannot be disclosed, even if it is not defamatory, as long as it has not been released by the original source. And so careful is Jewish law about the invasion of privacy—

Senator LONG. That is calling the Senate to order. It will be through in just a minute.

Mr. LAMM. I thought it was a bug that went wild—so much so, that if I confide something to a neighbor, he may not tell this or disclose this to anyone else, even if I subsequently publicize the same information, as long as I did not specifically release this particular friend.

Beyond visual and aural surveillance of the kind I have mentioned, Jewish law over a thousand years ago had already a special decree, punishable by ban, against anyone who violates the integrity of the mails.

With regard to polygraphs or lie detectors, an eminent contemporary scholar, who happens to have been my sainted grandfather, wrote a comprehensive discourse on the problem. His major conclusion is to discourage the use of polygraphs in the court of law. The halakah, therefore, has good reason not to encourage or even to permit its use in government or industry, except where there is independent evidence that the employee of government or industry is guilty or is under a heavy cloud of suspicion, and only when the employee consents to use it.

The polygraph is more than an invasion of one's home or speech. It is an intrusion into his thought processes, into his very mind or heart, and, therefore, in this sense, it is even more serious than the other forms of surveillance.

Insofar as the national data center or the national bank is concerned, I cannot find any technical legal objections in Jewish law to the idea, but I believe intuitively that the whole sense of Jewish law and morality would reject such a plan as abhorrent. It is a kind of automated evil tongue, institutionalized gossip computerized for instant character assassination.

Of course, the idea of the proponents of this data center is that it will contain only a special kind of nonconfidential information. But somehow, by some kind of Parkinson's law that as yet has not been discovered, if you have a machine ready to receive information, such information will be forthcoming to satisfy its insatiable appetite.

The halakah is more than a civil law. It is also a legal code, and, therefore, as I have indicated, the legal curb on the invasion of another's privacy is marked by the ethical instruction to each individual to protect his own privacy and to avoid any potential exhibitionism. The idea of living a private life is a moral duty upon individuals. The rabbis of the Talmud had a great deal of contempt for the loss of privacy, the voluntary surrender of privacy—even one's own privacy, and even before God himself.

That it should be necessary to emphasize or to exhort individual citizens to protect their own privacy might seem surprising, yet in our modern day and age with our highly developed urban culture, with people being thrown together and with all the demands on our time and our attention, privacy is a very, very, rare commodity. Because of the technological threat to our privacy, the threat to destroy it completely and forever, I believe that it is terribly important to remind ourselves of privacy as our moral duty as well as legal right.

We are, as someone said, the generation of the picture window, where we desire as much that others look in at us as we look out at them. Therefore, the psychological and moral health of our people, I believe, becomes an urgent moral duty.

The fundamental idea that informs Judaism's views on privacy is a theological one which, however, is not limited to the theological area or only to Jews. It is that God himself, as it were, has two aspects to his personality, one that is withdrawn, hidden, concealed, mysterious, or if you will, private, and the other one which communicates, goes out of isolation, reveals. Man, too, has those two poles in his own personality. He can neither be a completely private individual, because then he becomes withdrawn, neurotic; nor can he become a totally unprivate individual, because then he is a cipher and has no self left.

It is for this reason that in Jewish thought both man and God are understood to share a tension and a balance between privacy and communication, between concealment and disclosure.

It is understood that in all these instances the right of privacy, therefore, is not considered absolute. For instance, the right would be automatically suspended in the presence of a grave threat to national security.

Congress, of course, cannot legislate moral duties for people, but in the prominence that the subcommittee especially has given to various moral affronts to human dignity, it performs a vital educative function.

I should like to conclude by saying that in addition to legislation, which is the direct business of Congress, it would be good if all other sectors of our society would cooperate in this matter, which I regard as of the utmost importance.

Perhaps even the scientific community can be encouraged to use technology itself to protect us from technology, and a kind of anti-missile missile in the bugging line ought to be developed, much better and much more sophisticated than the kind of equipment we now have.

I believe American scientific talent is sufficient to find an electronic cure for an electronic ailment.

I would like to conclude with a paraphrase of a passage in which the teachers of the Mishnah counseled man on how to avoid sin, saying, "Know what is above you: a seeing eye, a hearing ear, and a book in which all of your deeds are recorded."

For moderns, in order to protect their own sanity and avoid not only sin but the entire loss of their privacy, it is important for us to know what is above us and what is below us, in front of us and in back of us: A seeing eye and a hearing ear, and that ubiquitous little tape recorder hidden from the eye on which every word is recorded. I believe that awareness and that sensitivity to the problem itself are the moral and psychological background for successful legislation. Until such adequate legislation is forthcoming, no American can safely afford to relax.

(The statement of Rabbi Norman Lamm is as follows:)

TESTIMONY BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMMITTEE BY RABBI NORMAN LAMM

The question of privacy in contemporary American society is a subtle and enormously complex legal problem, and one which also entails fundamental moral and ethical dimensions. I am therefore honored by the invitation of this Subcommittee to testify before it on the view of classical Judaism on the right of privacy, and to show that many of the problems we are now wrestling with were discussed explicitly and analytically during the last three and a half thousand years in the Jewish tradition. For Judaism comprises not only, or even primarily,

a theology and a morality expressed in general terms, but a highly developed legal code known as Halakhah. The Halakhah has two principal sources: the Written Law, or Scripture, and the Oral Law, which claims equal antiquity with and authority to the Written, and which subsequently was embodied in the Mishnah (redacted in the second century of the Common Era) and the Gemara (fifth century), both together comprising the Talmud.

In our country, the right of privacy first became a public issue in 1761, when James Otis, representing Boston merchants, appeared in the Superior Court of Massachusetts Bay to protest the application of the Collector of Customs to enter and search any premises with no safeguard against abuses. Although Otis lost his case, it was "the first blow for freedom from England."¹

The Fourth Amendment, ratified in 1791, prohibits unreasonable seizure and searches, and thus, in a measure, protects the privacy of the citizen, although the first case clearly recognizing privacy as a right in and of itself dates from the early twentieth century,² and its thorough consideration the legal profession begins with a famous law-review article by Warren and Brandeis.³

This right has been traced to Roman law. There are references to it in the sixth-century Justinian Code and, earlier, in the writings of Cicero. But actually its origins are more ancient, and go back to Biblical thought and law.

IN THE BIBLE

At the very beginning of the Biblical account of man, we are informed of the association of the feeling of shame, the reaction to the violation of privacy, with man's moral nature. Adam and Eve ate of the fruit of the tree of knowledge of good and evil, after which "the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves girdles."⁴ The need to decide between good and evil gave man self-consciousness and a sense of privacy which was affronted by his exposure.

The respect for physical privacy is again alluded to in the story of Noah and Ham.⁵ The abhorrence of exposure of what should remain concealed is evidenced in the Biblical idiom for illicit sexual relations: *giluy arayot*, literally, "the uncovering of nakedness." Rabbinic tradition discovers the virtue of privacy in the blessing uttered over Israel by the gentile prophet Balaam, "And Balaam lifted up his eyes and he saw Israel dwelling tribe by tribe."⁶ What is it that he saw that so inspired him? The tradition answers: he saw that the entrances to their tents were not directly opposite each other, so that one family did not visually intrude upon the privacy of the other.⁷

Even more to the point is a specific commandment in the Bible which declares a man's home a sanctuary which may not be violated by his creditors: "When thou dost lend thy neighbor any manner of loan, thou shalt not go into his house to fetch his pledge. Thou shalt stand without, and the man to whom thou didst lend shall bring forth the pledge without to thee."⁸ "Thou shalt stand without" is the Biblical way of saying, "do not violate the privacy of his home."⁹

IN THE HALAKHAH

The Halakhah differentiates between two forms of invasion of privacy; intrusion and disclosure.¹⁰

The first case of intrusion concerns the Biblical law just mentioned, that of the creditor desiring to seize collateral from the home of the debtor. The Talmud records two opinions as to whether this prohibition applies only to ordinary citizens acting on their own or also to the representative of the court; it decides that even the court officer may not invade the premises of the borrower to seize

¹ Senator Edward V. Long, *The Intruders: The Invasion of Privacy by Government & Industry* (New York: Praeger, 1967), p. 26.

² *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

³ Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

⁴ Gen. 3: 7.

⁵ Gen 9:20-27. See Milton R. Konvitz, *Privacy and The Law: A Philosophical Prelude*, 31 Law & Contemp. Problems 272 (1966).

⁶ Numbers 24:2.

⁷ *Talmud, Baba Batra* 60a. Thus, the end of the verse, "and the spirit of God came upon him" (Nu. 24:2) refers to Israel, not Balaam.

⁸ Deut. 24:10, 11. However, this holds true only for civil cases. In criminal cases there is no sanctuary; thus Ex. 21:14.

⁹ "For by entering (by force) and viewing the interior of his home, he will feel humbled and ashamed"—R. Joseph Bekhor Shor, commentary to this verse.

¹⁰ These are two of the four categories within the concept of privacy as analyzed by Dean Prosser, *Privacy* 48 Calif. L. R. 383 (1963).

collateral.¹¹ The courts are thus not permitted any invasion of privacy denied to private citizens; the only difference between them is that only by court order may the borrower's possessions be seized forcibly outside his home.¹²

The most important contribution of the Halakhah to privacy law, however, is not the problem of physical trespass but that of a more subtle form of intrusion; visible penetration of a neighbor's domain. This is termed *hezek re'iyah*, damage incurred by viewing or prying.

"VISUAL DAMAGE"

That such non-physical invasion of privacy is proscribed we learn from the Mishnah which prohibits installing windows facing the courtyard of a neighbor.¹³ The question, however, is whether this prohibition is more than a moral exhortation, and is legally actionable. Two contradictory opinions are recorded in the Talmud. One maintains that *hezek re'iyah* is not considered a substantial damage. The other opinion is that visual surveillance is considered a substantial damage. It is this second opinion, that holds visual penetration of privacy as tortious as actual trespass, that is accepted by the Halakhah as authoritative.¹⁴ Basically this means that even in advance of the privacy invasion, action may be brought to prevent such invasion from occurring. Thus, if two partners jointly acquired or inherited a tract of land, and decide to divide it and thus dissolve their partnership, each has the right to demand that the other share the expense of erecting a fence at least four cubits high, i.e., high enough to prevent each from spying on the other and thus violating his privacy.

Interestingly, the Halakhah does not simply permit one of the erstwhile partners to build a fence for his own protection, and then require his neighbor to share the expense because he too is a beneficiary, but demands the construction of the wall so that each one prevents *himself* from spying on his neighbor. Thus, R. Nachman said in the name of Samuel that if a man's roof adjoins his neighbor's courtyard—i.e., the two properties are on an incline, so that the roof of one is approximately on level with the yard of the other—the owner of the roof must construct a parapet four cubits high.¹⁵

In those days, most activity took place in the courtyard, whereas the roof was seldom used. Hence, without the obstruction between them, the owner of the roof could see all that occurs in his neighbor's courtyard and thus deprive him of his privacy. This viewing is regarded as substantial damage as if he had physically invaded his premises. Therefore, it is incumbent upon the owner of the roof to construct the wall and bear all the expenses, and so avoid damaging his neighbor by denying him his privacy. It is thus not the potentially aggrieved party, who would benefit from the wall, who has to pay for it, but the one who threatens to perform the intrusion.

Thus, the Halakhah insists upon the responsibility of each individual not to put himself into a position where he can pry into his neighbor's personal domain, and this responsibility can be enforced by the courts.¹⁶

It should be added that while the discussion in the Talmud concerns visual access to a neighbor's domain, the principle may be expanded to cover eavesdropping as well. Thus, one prominent medieval commentator, R. Menahem Meiri,¹⁷ decides that while we must guard against *hezek re'iyah*, visual surveillance, we need not worry about *hezek shemiyah*, aural surveillance. Hence, the wall the partners can demand of each other must be solid enough to prevent *overlooking* each other's affairs, but need not be so strong that it prevents *overhearing* each other's conversations. But the reason Meiri gives is not that eavesdropping is any less heinous than spying as an invasion of privacy, but that people normally speak softly when they think they will be overheard. Where this reason does

¹¹ *Talmud, B. Mezia* 113 a,b. Maimonides, *Laws of Creditor & Debtor*, 3:4. This prohibition applies to the case of a lender who failed to secure collateral at the time of the loan but seeks it now before the time of the loan has expired as security. When, however, the money is owed not because of a loan, but as wages or rental, entry is permitted; Baraita in *B.M.* 115a, as against Sifre, Maimonides *ib.*, 3:7. The latter category includes the return of stolen articles; commentaries to *Shulhan Aruch, Hosh. M.* 97:14. The difference is this: a loan was meant to be spent by the borrower, and hence forced entry to secure collateral is an illegitimate invasion of the privacy of his home. But articles that are stolen or wages that are withheld do not belong even temporarily to the one now in possession and entry and seizure in such a case, therefore, outweigh the concern for and respect of privacy.

¹² Maimonides, *ibid.*, 3:4.

¹³ *Talmud, B. Batra* 3:7. The Mishnah speaks only of the courtyard of partners, but its intention is to prohibit opening windows *even* into a partner's courtyard, certainly that of a stranger; so in the Gemara, *B.B.*, 59b.

¹⁴ *Talmud, B.B.* 2b, 3a, *et passim*. Maimonides, *Laws of Neighbors*, 2:14.

¹⁵ *Talmud, B.B.*, 6b.

¹⁶ On the moral background of this law as an outgrowth of the rabbinic concept of the sanctity of the individual, see Samuel Belkin, *In His Image* (London, N.Y., Toronto: Abelard-Schuman), pp. 126-128.

¹⁷ *Bet Ha-behira to B.B.*, ed. Sofer, p. 6.

not apply, such as in wiretapping or electronic "bugging," then obviously *hezek shemiyah* is as serious a violation and a damage as *hezek re'iyah*. All forms of surveillance—natural, mechanical, and electronic, visual or aural—are included in the Halakhah's strictures on *hezek re'iyah*.

The gravity of non-physical intrusion is only partially evident from the fact that the Halakhah regards it as tortious, in that prevention of such intrusion is legally enforceable. More important is the fact that such surveillance is considered not only as a violation of civil law, but, what is more serious in the context of Judaism, it is considered as *issur*, a religious transgression. Visual or aural invasion of privacy is thus primarily a moral offense, and the civil law and its requirement of monetary compensation is derivative from it.¹⁸

It is instructive, therefore, that the controversy recorded in the Talmud on *hezek re'iyah* prefigured by many centuries—indeed, almost two millennia—the two conflicting interpretations of the Fourth Amendment to the U.S. Constitution. The theory that visual penetration cannot be considered the equivalent of physical trespass finds its spokesman in Mr. Justice Black who, in his strict interpretation of the Constitution in his dissent in *Griswold v. Connecticut*,¹⁹ fails to uncover anything in the Fourth Amendment forbidding the passage of any law abridging the privacy of individuals. The opposite point of view, which considers *hezek re'iyah* as substantial damage, was expressed by Justice Brandeis²⁰ and, in our days, by Mr. Justice Douglas²¹ and others. The decision of the Halakhah resolving the dispute in the Talmud in favor of holding non-physical violation of privacy to be an actionable damage, i.e., equivalent to actual trespass, has not yet been fully adopted by the Supreme Court, which has to a large extent let the majority decision in *Olmstead* remain as the interpretation of the Fourth Amendment, while considering most questions of privacy, such as wiretapping, under Section 605 of the Federal Communications Act of 1934.²² The Court does seem to be tending more and more to the conclusion that no physical trespass is necessary to be in violation of the Fourth Amendment,²³ but as of now the *Olmstead* decision is controlling. American law has not yet developed and accepted a right of privacy as clearly and unequivocally as has ancient Jewish law.

DISCLOSURE

The Halakhah considers intrusion and disclosure as two separate instances of the violation of privacy. Interestingly, the Biblical commandment concerning forced entry by the creditor into the debtor's home to secure a pledge—a case of intrusion—is immediately preceded by the commandment to remember the plague that afflicted Miriam who was thus punished for speaking ill of Moses to their mutual brother, Aaron—a case of disclosure.²⁴ The law against disclosure is usually divided into three separate parts: slander (i.e., false and defamatory information), talebearing, and gossip. The last term refers to the circulation of reports which are true; the "evil tongue" is nevertheless forbidden because it is socially disruptive, since it puts the victim in an unfavorable light. However, in its broadest and deepest sense disclosure is not so much an act of instigating social disharmony as the invasion of personal privacy. Thus, the Mishnah teaches that after a trial presided over by more than one judge, each of them is forbidden to reveal which of the judges voted for acquittal and which for conviction.²⁵ The

¹⁸ *Nimukei Yosef* to B.B., ch. III (60a). At least one commentator has attempted to distinguish legally between the moral and monetary aspects of the offense. Thus one author (quoted in *Likkutim* to Mishnah B.B., 3:7, interpreting RaSHBaM) differentiates between *hezek re'iyah* as a tort and *tzeniut*, modesty, as a moral principle. In the case of the former, if the plaintiff had not complained for a period of three years during which there obtained a condition of the violation of his privacy, we assume that he has waived his rights and his claim is dismissed; thus the law of viewing a neighbor's courtyard, where he may carry on his business. In the latter case, since we are dealing with a moral rather than a civil or proprietary right, no presumption of waiver is ever established, no matter how much time has elapsed since the protest could have been made but was not; thus the law of installing a window with direct access to the window of a neighbor.

¹⁹ 381 U.S. 479, 507 (1965).

²⁰ In his law review article, *Supra*, 3, and in his dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928). "What was truly creative was their (Warren-Brandeis) insistence that privacy—the right to be let alone—was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests" (William M. Beaney, *The Right to Privacy & American Law*, 31 Law & Contemporary Problems, 257). In the case of visual and aural violation of privacy, as we have seen, the Halakhah had already established this right as non-derivative; on other forms of intrusion, see later.

²¹ *Griswold v. Connecticut*, 381 U.S., 483-85, *et passim*.

²² Yet according to the interpretation of Attorney General Jackson, in a letter to Congress in 1941, Sec. 605 does not forbid wiretapping as such, but only the divulging of the contents of such eavesdropping. This doctrine is still held by the Justice Department to this day.

²³ Alan F. Westin, *Science, Privacy & Freedom: Issues & Proposals for the 1970's*, 66 Colum. L.R. 1239-1247 (1966).

²⁴ Deut. 24:8-9, referring to Nu. 12:1-15. Rabbinic tradition thus associates the ailment of *tza'arat* (mis-translated as leprosy) with slander and gossip.

²⁵ *Talmud, Sanhedrin* 37.

Talmud relates that the famed teacher R. Ami expelled a scholar from the academy because he revealed a report he had heard confidentially twenty-two years earlier.²⁶ Information received confidentially may not be disclosed even if it is not damaging or derogatory as long as the original source has not expressly released it.²⁷

Even if the original source subsequently revealed this information publicly, the first listener is still bound by the confidence until released²⁸—a remarkable example of the ethics of information. Unauthorized disclosure, whether the original information was received by complete consent or by illegal intrusion, whether ethically or unethically remains prohibited by the Halakhah.

PROTECTION OF THE MAIL

We have discussed so far two kinds of intrusion, visual and aural. But the Peeping Tom and the eavesdropper are not the only kind of practitioners of this "dirty business," as Justice Oliver Wendall Holmes called it, with which the Halakhah is concerned. Another form of invasion of privacy is reading another's mail. Letters sent through the mail are protected by the Fourth Amendment, according to a Supreme Court ruling in 1877—although a special bill had to be passed by Congress in 1965 specifically exempting the mail from the levy power of the Internal Revenue Service. In Halakhah, a law protecting the privacy of mail was enacted a thousand years earlier, by R. Gershom, "The Light of the Exile"; the decree might well be older than that.²⁹

POLYGRAPHS

The polygraph, or lie-detector is not accepted by most courts in either criminal or civil proceedings, yet about 200,000 to 300,000 tests are conducted annually by government and business.³⁰

Although one would not normally expect so modern an invention to be treated by the Halakhah, an eminent contemporary scholar Rabbi O. Baumol (d. 1948), has written a comprehensive responsum on the problem.³¹ He points to an ancient Jewish legend which speaks of a kind of lie detector device that was used in King Solomon's court.³² He concludes that the polygraph may not be used to determine the credibility of witnesses in criminal cases, and may be utilized on witnesses in civil cases only where the court has good reason to suspect them of lying. According to this scholar, the defendant himself can never be subject to the polygraph in criminal cases, since the Halakhah does not accept even voluntary confessions;³³ however, in certain special civil cases the machine may have limited validity, but only where it is requested by the defendant. The question turns on the concept of *hosmin*—unwarranted belligerence by the judges towards the witnesses, which results in intimidating them, and the use of the polygraph representing such intimidation.³⁴ The Halakhah thus offers support for the hesitation of most American judges in using this device, and there is good reason not to encourage or even permit its use in government or industry, except where the employee is brought up on specific charges and where he requests its use. Under all conditions, provisions ought to be made to avoid any inference of guilt of employees who refuse to take the lie detector test, for this is then a form of coerced self-incrimination.³⁵ But even under the best of conditions and with all safeguards now available, one can sympathize with Senator Long's reference to the polygraph as a "psychological blackjack" and a "dubious instrument of Inquisition."³⁶ This is more than an invasion of one's home or speech; it is an intrusion into his very heart and mind.

NATIONAL DATA CENTER

One cannot, I believe, find any technical legal objection to the proposed National Data Center; but the whole sense of Jewish law and universal morality must reject such a plan as abhorrent. What we are confronted with is an automated

²⁶ Talmud, Sanhedrin 31a. Cf. Mahatzit ha-Shekel to Sh. A. Orah Hayyim 156.

²⁷ Talmud, Yoma 4b.

²⁸ Magen Aravah to Sh. A. Or. H. 156:2, Hafez Hayyim 10:6.

²⁹ Louis Finkelstein, *Jewish Self-Government in the Middle Ages*, pp. 171 ff., 178, 189.

³⁰ Long, *op. cit.*, p. 159.

³¹ *Emek Halakhah* (New York: 1948), II, No. 14. A responsum (*teshuvah*) is a reply by a halakic scholar to a legal query directed to him, usually by another scholar.

³² *Yalkut Shimoni* to Esther, 1:1046.

³³ See my "Fifth Amendment and its Equivalent in the Halakhah," *Judaism* (Winter 1956), and reprinted in *The Decalogue Journal* (1967).

³⁴ Talmud, Sanhedrin 32 a,b.

³⁵ Cf. *Garrity v. New Jersey*, 17 L. Ed. 2nd 562 (1967).

³⁶ Long, *op. cit.*, p. 220.

"evil tongue," institutionalized gossip computerized for instant character assassination. Perhaps in the beginning, as some of its well-intentioned advocates have suggested, no confidential information will be fed into this data bank. But if the mechanism exists then we may be sure that by some as yet undiscovered law that issues from the depths of human and social perversity, all kinds of information will be forthcoming in an attempt to satisfy its insatiable appetite for more and more facts regardless of their relevance, need, or accuracy. Certainly the desire for efficiency and technological novelty ought not to force us to create a monster that can be put to the most sinister use and that may constitute a threat to every citizen of this country.

PRIVACY AS A DUTY

The Halakhah's civil law thus protects privacy even against visual and aural surveillance and other forms of non-physical trespass, and implies the legal obligation of the citizen, at his own expense, to curb his curiosity from violating his neighbor's domain of privacy. But the Halakhah comprises more than civil law; it includes a sublime moral code. And its legal limit on voyeurism is matched by its ethical curb on the citizen's potential exhibitionism.

It regards privacy not only as a *legal right* but also as a *moral duty*. We are bidden to protect our own privacy from the eyes and ears of our neighbors. The Talmud³⁷ quotes Rav as pointing out a contradiction between two verses. David says, "Happy is he whose transgression is concealed, whose sin is covered,"³⁸ whereas Solomon states, "He that covereth his transgressions shall not prosper."³⁹ One of the two solutions offered by the Talmud is that David discourages the revealing of sins not publicly known; here the atonement should be pursued privately only between man and God. Solomon, however, encourages the public acknowledgment of sins that are already widely known. What is not known to others I may not reveal about myself. A man has the moral duty to protect his own privacy, to safeguard his own intimacies from the inquisitiveness of his neighbors.⁴⁰ The Talmud records an opinion that once a man has confessed his sins to God on the Day of Atonement (Yom Kippur), he should not confess them again on the following Yom Kippur—and applies to one who does so the verse, "as a dog that returneth to his vomit."⁴¹ These are strong words, and reveal to us the contempt of the Rabbis of the Talmud for the indignity inherent in the loss of privacy—even one's own privacy, and even before his Maker only.

That it should be necessary to exhort people to protect their own privacy may seem astounding, yet never was it more relevant than today. For as contemporary society becomes more complex, as people become more intertwined with each other, and with increasing urbanization, privacy becomes more and more precarious.⁴² Electronic intrusionism has now been developed to a high art, and constitutes a grave menace to society. Technologically, man now has the ability to destroy privacy completely and forever. Yet despite this danger, which this Sub-committee has done so much to expose, the public does not seem to be overly exercised. There does not seem to be enough indignation over the fact that even the President and Senators and other leaders of the nation feel that their offices are being "bugged," and that surveillance technology now threatens to strip every potential victim of his very self-hood without even a psychological fig leaf to cover his moral nakedness. We seem to have become conditioned by the psychiatrist's couch to accept the baring of our souls to anyone who is interested in us. We are, as someone once put it, the Generation of the Picture Window, who desire as much that others look into us as that we look out at them. It is thus imperative that the concept of privacy as an urgent moral duty be brought home to our people.

THEOLOGICAL BACKGROUND

The Halakhah's legal and moral doctrines of privacy can be shown to be based upon certain fundamental theological considerations. The Bible teaches that man was created in the Image of God,⁴³ by which is meant that the creature in some measure resembles the Creator, and which implies the need by man to imitate God: "as He is compassionate and gracious, so must you be compassionate

³⁷ Talmud, Yoma 86b.

³⁸ Psalms 32:1, according to Rabbinic interpretation.

³⁹ Proverbs 28:13.

⁴⁰ Talmud, Yoma 86b.

⁴¹ Proverbs 26:11.

⁴² Perceptive observers have seen in the characteristic impersonality and anonymity of apartment house dwellers in our great urban centers a vital defense mechanism against the encroachments on their privacy. See, for instance, the discussion in Harvey Cox, *The Secular City*, pp. 29-46.

⁴³ Gen. 1:26, 27.

and gracious." "Now both the Jewish philosophic and mystical traditions speak of two aspects of the Divinity: one is the relatedness by God to man, His knowability; and second, His Essence and absoluteness in which He infinitely transcends and remains forever unknown to man. These two areas of "light" and "darkness," the two zones of disclosure and concealment, of revelation and mystery, coexist within God without contradiction.⁴⁵ Now this unknowable Essence or Absoluteness is the inner boundary of His privacy. In His resistance to and limitation of man's theological curiosity and metaphysical incursions,⁴⁶ God asserts His exclusive divine privacy. Even Moses may not gaze upon the Source of the voice that addresses him.⁴⁷ The Mishnah declares that one who is disrespectful of the divine dignity by seeking to penetrate into divine mysteries beyond his ken, it were better had he not been born.⁴⁸ "Dignity" (*kavod*) is thus a correlative of privacy.

But if this is true of the Creator, it is true of His human creature as well. As God reveals and conceals, so man discloses and withholds. As concealment is an aspect of divine privacy, so is it the expression of human privacy: the desire to remain unknown, puzzling, enigmatic, a mystery. Judaism does not absolutize privacy; taken to an extreme, it results in the total isolation of man and transforms him into a closed monad. Without any communication or self-revelation, he must suffer veritable social, psychological, and spiritual death. But the other extreme, unlimited communication and the end of privacy, leave man totally depleted of self—again death.⁴⁹ For both God and man, therefore, in that they share the phenomenon of personality, there must be a tension and balance between privacy and communication, between concealment and disclosure, between self-revelation and self-restraint.

This sense of privacy may be referred to the ethical quality of *tzeniut*, which usually is translated as "modesty." But *tzeniut* means more than modesty in the moral or sexual sense. By extension, the term comprehends respect for the inviolability of the personal privacy of an individual, whether oneself or another, which is another way of saying respect for the integrity of the self. Man is fundamentally inscrutable, in that, according to Judaism, he is more than just *natura* but also *persona*; he is possessed of a mysterious, vital center of personality which transcends the sum of his natural physiological and psychological properties. But not only is he mysterious, he also *should* be, and the extension of this free and undetermined center of personality constitutes the boundaries of his self-hood and hence his privacy. It is this privacy which we are called upon to acknowledge as an act of *tzeniut*.

"It hath been told thee, O man," says the prophet Micah,⁵⁰ "what is good and what the Lord doth require of thee: only to do justly, and to love mercy, and to walk humbly with thy God." The Hebrew for "walk humbly" is *hatzneia lekhet*, the first word deriving from the same root as *tzeniut*. Man must tread the path of reverent privacy "with thy God"—for it is from Him that we learn this form of conduct and Whom we imitate in practicing it.

So sacred is this center of privacy in man that even God does not permit Himself to tamper with it; that is the meaning of the freedom of the will, the moral autonomy of man. And that is why God's "hardening of Pharaoh's heart"⁵¹ became an ethical and philosophic problem for Rabbinic exegesis of the Bible. Certainly, then, it is criminal for man to attempt such thought-control, even if benevolent.

CONCLUSION

In sum, we have seen that Judaism asserts that man, in imitation of God, possesses an inviolate core of personality, and that privacy constitutes the protection of this personality core from the inroads of society and the state. The earliest legislation on privacy goes back to the Bible. In the Halakhah, which underwent its most creative development between 2000 and 1500 years ago, the right of privacy was legally secured in a manner more advanced than that which

⁴⁴ Mekhilta to Beshalah, 3; *Sab*. 133b. Most of Jewish ethics is predicated on this idea of *imitatio dei*.

⁴⁵ Thus *Talmud*, *Hag*. 12b, 13a, reconciling Ps. 18:12 and Dan. 2:22.

⁴⁶ "In what is wondrous for thee thou shalt not inquire, and in what is hidden from thee thou shalt not seek"—Ben Sira.

⁴⁷ Ex. 33b.

⁴⁸ *Hag*. 2:1, according to Jerusalem Talmud (*Hag*. 2:1—8b) which considers the two items in the Mishnah theosophic overreaching and offense against the dignity of God, as one.

⁴⁹ The same holds true, *mutatis mutandis*, of our conception of God. Denial of either of these poles results in a denial of personality to God. Belief in an uncommunicative, deistic God is, as Schopenhauer put it, a polite atheism. And the assertion of a God who has dispossessed Himself of His transcendence, who has exhausted and dissipated His privacy, is a rather impolite atheism—the atheology of those who proclaim that His lie has come to an end.

⁵⁰ Micah 6:8.

⁵¹ Ex. 4:21, 7:3, *et passim*.

prevails in contemporary Constitutional law: non-physical intrusion was considered the equivalent of actual trespass.

The Halakhah's concept of privacy covers both intrusion and disclosure, visual and aural surveillance, tampering with the mails, and, to the largest extent, the use of the polygraph. The spirit of Jewish law rejects the idea of a national data bank. It is understood that in all these instances, the right to privacy is not absolute;⁵² for instance, such rights would automatically be suspended where there exists a grave threat to national security.⁵³ But privacy is more than a legal right; there is also a moral duty for man to protect his own privacy.

The legislation which this Sub-committee has been considering not only promises significantly to advance the law safeguarding privacy from the threat of constant attrition and encroachment, but the hearings themselves contribute to the education of Americans in their moral responsibility to defend the integrity of their privacy. Congress, of course, cannot legislate moral duties. But in the prominence it gives to the various immoral affronts to human dignity it performs a vital educative function.

It would be desirable that in addition to legislation, which is the direct business of Congress, other significant sectors of the population would evince greater concern for privacy. The press, the clergy, and the teachers of our country have the obligation to provide the moral climate out of which meaningful legislation issues. And perhaps the scientific community can be encouraged to use technology itself to protect us from the consequences of technology. Part of the same brainpower that has gone into the creation of anti-missile missiles might help us achieve an anti-gadget gadget that will provide us with an electronic cure for an electronic ailment.

In a famous passage, the teachers of the Mishnah counselled man on how to avoid sin. They said, "Know what is above you: a seeing eye, a hearing ear, and a book in which all your deeds are recorded."⁵⁴ For moderns, who have become the easy victims of both the sinister designs of the professionals of intrusion and the frivolous self-indulgence of the amateurs, that sage advice should be paraphrased to counsel us on how to avoid the breakdown of our privacy: "Know at all times what is above you and below you, in front of you and in back of you: a seeing eye and a hearing ear—not of God, but of man's electronic gadgets—and a magnetic tape on which all your words are recorded." That awareness and that sensitivity are the moral and psychological background for successful legislation.

Until such adequate legislation is forthcoming, no American can safely afford to relax.

Senator LONG. Rabbi, thank you very much for a most profound presentation. It has been a very interesting statement and will be very helpful, too.

It is interesting to us all, I am sure, that this is a problem that existed centuries back. Incidentally, I had dinner in Tel Aviv a few months ago with Mr. Hausner, a very distinguished lawyer there and with two or three judges, I believe they call them, of their Supreme Court. We were discussing this problem, and they tell me there are some practical matters involving wiretapping and bugging in the country there; that they had some cases pending before the high court involving the problems that we have here.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I just have really one comment to make, Mr. Chairman.

He was talking about missiles and antimissiles and anti-anti-missiles. Unfortunately, the technology of this business—the missile business—is running way ahead of the antimissile business.

For example, laser beams which will be widely used for bugging purposes and eavesdropping purposes are so sophisticated and dynamic that there is really no way to protect against them. And they also involve this whole idea of no physical trespass. It is a light beam

⁵² On the rights of privacy versus the claims of history, see my "The Private Lives of Public Figures," *Jewish Life* (Jan.-Feb., 1967), pp. 7-10, 15, 16.

⁵³ See, for instance, Maimonides, *Laws of Sanhedrin*, 18:6; *Laws of Kings*, 3:8,10; 4:1, *et passim*.

⁵⁴ *Avot* 2:1.

which is bounced over your window and then received back. But as I understand it, this would have been taken care of by Jewish law a thousand years ago, too, although we are having great difficulty wrestling with it today.

The one question I had would involve any comment that you would wish to make on George Orwell's book "1984."

Do you see us turning in that direction and do you have any advice for us?

Rabbi LAMM. I certainly do think we are tending in that direction, and if our technology continues to grow we might beat Orwell to it; 1984 may come in 1978. I think that book is a piece of modern prophecy, and it is a fantastic guide that we have on the things to avoid. I believe that as time goes on we tend more and more toward this kind of life, not only technologically, but in our whole value structure. Our values have begun to change with regard to human beings as not being ends in themselves, but as means toward other ends, with a body and mind which are presumably instruments and functions for use by other people.

Well, this is even more important than the technology because the technology works toward that end.

Mr. FENSTERWALD. Technologically we are already past 1984. I am not sure that psychologically or politically we have approached it yet.

I think Mr. Kass had one question.

Senator LONG. Mr. Kass?

Mr. KASS. Yes. I do have one comment first.

Rabbi Lamm suggested he is not an expert in Anglo-American law, and yet I think any lawyer, let alone rabbi, who is cited by Chief Justice Warren in the *Miranda* decision and by Justice Douglas in *Garrity v. New Jersey* can consider himself an expert in Anglo-American law.

Rabbi, in your statement, although you did not mention it publicly today, you discussed the problem that this may be in fact a moral rather than a legal problem, and you suggest that perhaps we cannot in fact legislate morality. I wonder if you could explore that just a bit.

Rabbi LAMM. I would like to modify the question in answering it.

When I say that it is a moral issue, I do not mean to exclude the legal aspect of it. The distinction between law and morality is not that easily come by. It is true that most judges in this country will try to steer clear of the moral issue if they possibly can and rely upon the formalities of law.

But there are times when even the Supreme Court Justices will have no choice but to base their decisions explicitly on moral value judgments. But even if they do not, there is—not always but frequently—a moral issue that has to be decided.

In Judaism you have a similar situation where the problem is discussed in a purely conventional, formal, legal sense. But when there is an additional moral issue, then it is considered over and above the legal problem.

In the *Halakhah's* case, for instance, practicing secret surveillance of a man's business will be a legally actionable deed; whereas if it is a moral offense—if I simply want to practice some illicit voyeurism, becoming a Peeping Tom—it may even be more stringent legally, because the violation was not only formally civil; it was moral. So

that the distinction is not that clear. While the moral issue is more important to me religiously, let us say, than with you, the civil aspect of the case remains legally actionable. In this case, the moral issue is both legally actionable, and as well, a moral violation.

Mr. KASS. So then the old adage, in fact, that you cannot legislate morality does not apply when we are talking about the right of privacy act that the Senator is introducing?

Rabbi LAMM. Not legally.

Mr. KASS. Not legally.

Senator LONG. Thank you, Mr. Kass.

Thank you, Rabbi Lamm. We are grateful to you for coming. It has been very helpful.

Rabbi LAMM. It has been a pleasure and an honor.

Senator LONG. Our next witness is Prof. Herman Schwartz.

Professor, will you be sworn.

Do you solemnly swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Professor SCHWARTZ. I do.

Senator LONG. Professor Schwartz, we are grateful to you for being here. I saw you coming in a minute ago. I didn't think you were going to get here.

Professor SCHWARTZ. I am sorry. Pardon me?

Senator LONG. I say I didn't think you were going to come, but I did see you come in a few minutes ago so your timing is rather good this morning.

Mr. FENSTERWALD. Mr. Chairman, I think we should also point out that he used to sit on the other side of the table as a staff member of the Antitrust Subcommittee, so we have got him just where we want him after many years of trying.

Senator LONG. I always wondered what it would be like to get you out there under oath.

Mr. FENSTERWALD. Don't ever try it on me.

Senator LONG. We will see as it goes along.

Professor, you have a 13-page statement, and having served on this side of the table, you know how grateful we would be if you will summarize it for us, and the entire statement will be placed in the record at this time.

Will you give us your name and official position and proceed with your statement?

STATEMENT OF HERMAN SCHWARTZ, PROFESSOR, STATE UNIVERSITY OF NEW YORK LAW SCHOOL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Professor SCHWARTZ. My name is Herman Schwartz, and I am a law professor at the State University of New York Law School in Buffalo. I am here representing the American Civil Liberties Union.

I do not think I have to describe the union. I am sure its interests and operations are well known to this committee.

The first thing I would like to do is to indicate the very, very deep obligation that all of us who are interested in civil liberties owe to this committee, to Senator Long, to Mr. Fensterwald and to all the members of this committee, like Senators Hart and Burdick, who