The Fourth Amendment And Its Equivalent In the Halachah

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. The social and political implications of the new surveillance technology and the enormity of the threat it poses to the dignity and liberty of the American citizen have been aptly described in *The Intruders,* by Senator Edward V. Long, who heads the Senate Sub-Committee which has been investigating its abuses. The book's exposé of the sophisticated, cheap, and easily accessible gadgets designed to destroy personal and corporate privacy should leave no doubts in our minds as to the magnitude of the problem. It is as a result of this gradual erosion of privacy, to a large extent by law-enforcement agencies, that the entire question of the legal and philosophical dimensions of privacy has entered the public forum.

As a contribution to this discussion, we shall here analyze the view of classical Judaism on privacy and show that many of the problems we are now wrestling with were treated explicitly and analytically during the last three and a half thousand years in the Jewish tradition. Our major reference shall be to Judaism's highly developed legal code, the Halachah, which was first systematized and redacted in the Mishnah (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]

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

NORMAN LAMM *is Jakob and Erna Michael professor of Jewish philosophy at Yeshiva University. The present article is based on testimony that he recently gave before the Sub-Committee on Administrative Practice and Procedure of the Senate Judiciary Committee. A previous article by Rabbi Lamm, "The Fifth Amendment and Its Equivalent in the Halachah," which appeared in our Winter 1956 issue, was subsequently quoted in two different Supreme Court decisions.*

It is the Fourth Amendment, ratified in 1791, that is usually considered the constitutional source for the protection of privacy. The amendment reads:

> The right of the people 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.

The Fourth Amendment thus touches on the rights to 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 by 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]

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.

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 Halachah

The Halachah 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 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 Halachah to privacy law, however, is not the problem of physical trespass but that of a more subtle form of intrusion: visual 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 court-

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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 (1960).

11. Talmud, *B. Mezia* 113 a, b. Maimonides, "Laws of Creditor and 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 as security now before the time of the loan has expired. 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, *ibid.*, 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.

yard 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 Halachah as authoritative.[14] Basically, this means that even in advance of actual 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 Halachah 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 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 Halachah 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]

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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.

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 over*looking* each other's affairs, but need not be so strong that it prevents over*hearing* 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 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 Halachah's strictures on *hezek re'iyah*.

The gravity of non-physical intrusion is only partially evident from the fact that the Halachah 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 millenia—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

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

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 waiving 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).

the privacy of individuals. The opposite point of view, which considers *hezek re'iyah* as substantial damage, was expressed by Justice Brandeis[20] and, in our days, by Mr. Justice Douglas[21] and others. The decision of the Halachah 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 Halachah 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 in-

20. In his law review article, *supra*, n. 3, and 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 and American Law*, 31 Law & Contemporary Problems, 257). In the case of visual and aural violation of privacy, as we have seen, the Halachah had already established this right as non-derivative; on other forms of intrusion, see later.

21. Groswold 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 *tzaraat* (mistranslated as leprosy) with slander and gossip.

stigating 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 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 released[28]—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 Halachah.

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 practicioners of this "dirty business," as Justice Oliver Wendell Holmes called it, with which the Halachah 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 Halachah, 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 Halachah, an eminent contemporary scholar, my sainted grandfather, Rabbi O. Baumol (d. 1948), has written a comprehensive responsum on the problem.[31] He points to an ancient Jewish legend which speaks

25. Talmud, *Sanhedrin* 3:7.
26. Talmud, *Sanhedrin* 31a. Cf. *Mahatzit ha-Shekkel* to *Sh. A., Orah Hayyim* 156.
27. Talmud, *Yoma,* 4b.
28. *Magen Avraham* to *Sh. A., Or. H.* 156:2; *Hafetz 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.

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. (The defendant himself can never be subject to the polygraph in criminal cases, since the Halachah 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 Halachah 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 the very heart and mind.

National Data Center

Certain government officials have proposed a computerized data bank which will contain all the vital data on all citizens of this country. One cannot, I believe, find any technical legal objection to this 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 "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

32. *Yalkut Shimoni* to *Esther*, 1:1046.
33. See my "Fifth Amendment and Its Equivalent in the Halachah," JUDAISM (Winter, 1956), 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.

more and more facts, regardless of their relevance, need, or accuracy. Certainly the desire for bureaucratic 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 Halachah'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 Halachah 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 Talmud[37] 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 acknowledgement 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, 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 they 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 intrusion-

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

ism 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 the Sub-committee on Administrative Practice and Procedure of the Senate Judiciary 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 selfhood 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 Halachah'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 and gracious."[44] Now both the Jewish philosophic and mystical traditions speak of two aspects of the Divinity: one is the relatedness of 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] The unknowable Essence or Absoluteness is the inner boundary of God's 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

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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.

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 shou shalt not inquire, and in what is hidden from thee thou shalt not seek"—Ben Sira.

47. *Ex.* 3:6.

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 character 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 selfhood 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

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 life has come to an end.

50. *Micah* 6:8.

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

Indeed, it is personality itself which is at stake. *Persona* meant, originally, a mask. We change masks as we react to different stimuli and encounters, and the sum of these poses and postures is our personality. The *persona* or mask is the mode of our self-disclosure, the highly meaningful medium of our communication to the outside world. Without it we are both naked and dumb. In the absence of privacy we are stripped of such masks, and this process leads, ultimately, to the extinction of personality. Unfortunately, therefore, the current affronts to privacy harmonize with the trend towards the depersonalization of life in contemporary society.

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 Halachah, 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 prevails in contemporary Constitutional law: non-physical intrusion was considered the equivalent of actual trespass. The Halachah'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 proposed by the Sub-committee on Administrative Practice and Procedure promises significantly to advance the law safeguarding privacy from the threat of constant attrition and encroach-

51. *Ex.* 4:21, 7:3, *et passim.*

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.*

ment. Just as important, the hearings themselves have contributed to strengthening 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. 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 counseled 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 and for future interpretations of the Fourth Amendment by the Supreme Court.

When such legislation and constitutional interpretation will be forthcoming, it will have been largely anticipated by Jewish law. "Observe therefore and do them; for this is your wisdom and understanding in the sight of the peoples, that when they hear all these statutes shall say, 'Surely this great nation is a wise and understanding people' " (*Deut.* 4:6).*

54. *Avot* 2:1.

* After this article was completed, the press (July 7, 1967) carried reports of a memorandum by Attorney General Ramsey Clark on new regulations limiting electronic surveillance by Federal officials. Of special relevance to my thesis is the Attorney General's statement that "although the question has not been squarely decided, there is support for the view that any electronic eavesdropping on conversations in constitutionally protected areas is a violation of the Fourth Amendment even if such surveillance is accomplished without physical trespass or entry." This interpretation accords with the view of the Halachah on the laws of privacy.—N. L.