

# Ubiquitous Presence: Protecting Privacy and Forbidding Intrusion into a Person's Records in Jewish Law

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The development of internet use raises serious questions about a person's right to privacy and the duty of companies to safeguard the confidentiality of information they possess. In practice, too many events have occurred in which confidential information leaks out of the companies responsible for safeguarding it; such information is sometimes even sold to criminals. In the face of these abuses, the western legal system and regulatory agencies have been forced to deal extensively with this seemingly new issue in recent years. Yet, we find that this topic was discussed in some of the earliest sources of Jewish law. This article reviews this development, particularly given incidents in cyberspace in recent years.

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## Introduction

Disturbing reports have been published recently about Facebook, the social network giant, and its use of the personal information of its members. Facebook has recently been the subject of negative publicity because of problems it has had in safeguarding the personal data of its users, as well

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as the way it uses their personal information in order to increase its income from targeted advertising. The problem, however, seems to be far more serious: Although Facebook proposes that a two-factor authentication be used to make it more difficult to steal the personal information of its users, this authentication system will require users to disclose their cellphone numbers to the company, which Facebook will then make commercial use of in order to bolster its own targeted advertising.<sup>1</sup>

Researchers have proved that Facebook systematically allows the use of identifying information, such as mobile phone numbers, for the purpose of targeted advertising aimed at cellphone owners. It does this without any transparency through saved user profiles, to which the users themselves have no access, and even worse, can do nothing about.<sup>2</sup> This means that even if a user does not want to be targeted by advertisers, the company will, nevertheless, still find a way to target the user and direct the advertising through a range of personal data.<sup>3</sup>

To paraphrase an ancient source, it can be said that “its presence is ubiquitous,”<sup>4</sup> meaning that there is virtually no hiding place from the discerning eye of Big Brother—the giant companies operating in cyberspace that use the information they accumulate with their tools. At the legal and moral level, this can be compared to a case in which the sinner profits,<sup>5</sup> instead of paying for his sin; not only is he committing a transgression, he is also being rewarded for it, as in, “have you murdered and also inherited?”<sup>6</sup>

Facebook is not the only culpable party in this matter; other companies are also using similar mechanisms, while the economic motive behind this is clear. When an advertiser wants to publish an ad, the advertiser tries to maximize the exposure of the product and display it to a targeted audience that is relevant to the product being sold. The large internet companies, such as Twitter, Google, Facebook, and others, follow this practice. They provide mechanisms for targeting the subject audiences and utilize the information

1 Lowell Heddings, “Facebook is Using Your Phone Number to Target Ads and You Can’t Stop It,” *How to Geek*, September 28, 2018.

2 Ibid.

3 Kashmir Hill, “Facebook Is Giving Advertisers Access to Your Shadow Contact Information,” *Gizmodo*, September 26, 2018.

4 Tikunei HaZohar, *Tekona 57*, p. 92:72.

5 For example, see *Baba Kama* 38:72.

6 *Kings* 1:21:19.

gathered about the users. In most cases, the information is collected and utilized without the users' knowledge or consent.

The actions of these huge internet corporations violate the right to privacy, which is a basic principle of the concept of human rights. The essence of the right to privacy is a person's right to keep his or her life private and maintain a physical or virtual private space, which is exclusively controlled by that person and cannot be penetrated by anyone else without the person's consent. Some consider the right to privacy to be one of the "natural rights," such as the right to life and the right to human dignity and liberty, to which every human being is entitled. Others regard the right to privacy as part of a person's right to dignity, or as a means of exercising autonomy in accordance with the person's will.

The right to privacy is regarded by many as having been recognized relatively recently by human rights law, in comparison with other rights. They trace its origin to a seminal article, "The Right to Privacy," written by Samuel D. Warren and his law firm partner Louis D. Brandeis, later to become the first Jewish US Supreme Court Justice.<sup>7</sup> In it, the authors discuss the essence and origin of this right and extend it beyond a person's right to confidentiality of conversation and the right to protection from exposure of personal data and information (such as information about a person's health, economic circumstances, and past convictions for criminal offenses) to include a right to be left alone and in peace, without being unnecessarily disturbed against his will.

This basic constitutional right was established in Israeli law in Section 7(A) of the Basic Law: Human Dignity and Liberty, which states that no person can violate another's privacy without consent. The Protection of Privacy Law—1981 adds to this by stating, "No person shall infringe upon the privacy of another without his consent." Like other human rights, this right is not absolute. It can be qualified for reasons of state security, preservation of human life, safety and health, and so forth.

The right to privacy and the prohibitions in it constitute a large family of sub-rights and subordinate clauses. These include prohibitions on wiretapping, body searches, searches involving entry into a person's private premises, personal surveillance, perusal of personal documents without a person's

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7 Samuel D. Warren, Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (December 15, 1890), pp. 193–220.

knowledge and consent, penetration of a person's personal computer and its content, and so on. An examination of the sources of the right to privacy in Jewish law is likely to teach us that, the principles of maintaining a person's privacy and the right to an inviolate personal space are of ancient origin and can be used in our time as the basis for solutions for this issue.

### Sources of the Right to Privacy in Jewish Law

Some are inclined to base the right to privacy in Jewish law on Balaam's prophecy in the Book of Numbers: "Balaam raised his eyes and saw Israel dwelling according to its tribes . . . and spoke in a parable . . . 'How goodly are your tents, O Jacob, your dwelling places, O Israel!'"<sup>8</sup> Although the context of this verse is a poetic prophecy by Balaam, who intended to curse Israel but gave a blessing instead, and not a normative-legal one that binds and commands (such as "Do not murder" and "Do not steal"), the verse was used by the ancient Jewish sages as a legal source for establishing the prohibition on infringing upon a person's privacy. In explaining what exactly Balaam saw that was "goodly" in "Jacob's tents," the sages said, "'How goodly' refers to his observation that they pitched their tents so that their openings did not face one another."<sup>9</sup> Balaam was thus praising Israel for what he regarded as scrupulous observance of the right to privacy.

The ban on infringing upon a person's privacy is specifically mentioned in Jewish law in many contexts<sup>10</sup> in which its importance is reflected, both through the commandment "Avoid evil and do good"—the obligation to prevent in advance any breach of privacy and the use of means of prevention—and through punishment after the fact. For example, the Mishnah states, "A person must not create an opening opposite an opening, or a window opposite a window. If his opening or window is small, he must not make it larger. If there

8 Numbers 24:2–5. It is interesting to note that this verse, spoken by a non-Jew—a Midianite prophet—was selected for the start of the Jewish prayer book and was placed at the beginning of the morning prayer recited every day. In our days, the "Voice of Israel" radio station began its daily broadcasts by quoting this verse.

9 For example, see Rashi, Numbers 24:5.

10 E. Lipshitz, "The Right to Privacy in Jewish Law and State Law," in *Parashat Hashavua*, vol. 4, ed. A. Hachohen and M. Wygoda (Jerusalem, 2012), p. 195; S. Aharoni-Goldberg, "Privacy on the Internet through a Halachic Prism," *Hapraklit* 52 (2013): 151–234.

is one opening, he must not turn it into two openings.”<sup>11</sup> The Talmud asks, “What is the source for this? Rabbi Yochanan said, As the verse says, ‘Balaam raised his eyes and saw Israel dwelling according to its tribes.’ What did he see? He saw that the tent openings did not face each other and said, ‘They are worthy to have the divine presence among them.’”<sup>12</sup> In his commentary on the Talmud, Rabbi Shmuel Bar Meir (Rashbam)<sup>13</sup> explains that the ban on creating a new opening opposite the opening to his neighbor’s yard (or even opposite a yard shared by both of them) is designed to prevent damage caused by looking into another person’s property; that is, infringement of another person’s privacy.<sup>14</sup>

Eliahu Lifshitz states<sup>15</sup> that the Mishnah shows that damage to privacy caused by opening a window opposite a shared yard is **relative** and not **absolute** damage. For this reason, there is no requirement to conceal an existing window, even a large one; it is merely forbidden to create a new window or enlarge an existing one. If the window existed even before the neighbors moved in, they cannot force the window owner to change his situation; rather, they must take their own measures to prevent the infringement of their privacy. This ruling was summarized by Maimonides (Rambam) in his Mishnah Torah: “When a person has a window in his wall and a colleague comes and builds a courtyard next to it, the owner of the courtyard cannot tell the owner of the window: ‘Close this window, so that you will not look at me,’ for the owner of the window has established his right to maintain the window.”<sup>16</sup>

## Rabbi Gershom’s Ban on Reading a Letter Without the Writer’s Permission

Jewish law took a more significant step in protecting a person’s privacy regarding personal documents—such as medical records, letters, and, nowadays, material stored on a personal computer—based on a *takanah*

11 Mishnah, Baba Batra Tractate, Chapter 3, No. 7.

12 Babylonian Talmud, Baba Batra, 60a.

13 Rabbi Shmuel Bar Meir (Rashbam) was a commentator on the Bible and the Talmud, one of the authors of the medieval Talmudic annotations, and a grandson and student of Rashi who lived in the first half of the twelfth century.

14 Rashbam, Baba Batra, 59b, 4:5 “Do not open.”

15 Lifshitz, “The Right to Privacy in Jewish Law and State Law.”

16 Rambam, Laws of Neighbors, Chapter 7, First law.

(Jewish religious ruling) by Rabbi Gershom ben Judah, the greatest Jewish sage in Germany in the tenth century. Among other things,<sup>17</sup> he declared a *herem* (communal shunning) against a person who reads someone else's letters without permission, as it invades the letter writer's privacy. The text of the *herem* reached us from a secondary source, among other things, because it was quoted in a book of responsa by Rabbi Meir from Rothenburg (Maharam),<sup>18</sup> who wrote, "There is a *herem* against looking at another person's letter, sent to a friend, without his knowledge."<sup>19</sup>

The *herem* declared by Rabbi Gershom was later confirmed and became a cornerstone of Jewish religious law, to the extent that many people wrote at the beginning of their private documents that the *herem* also applied to reading them. Some added "one who breaks a fence—a snake shall bite him;"<sup>20</sup> according to Rabbi Gershom, the letters of the Hebrew word for "snake" are an acronym for *nidui*, *herem*, and *shamta* (ostracism, shunning, and boycotting).<sup>21</sup> These expressions highlight the severity with which the sages of Jewish law regarded the invasion of privacy.

## Reasons for the Ban in the Sources of Jewish Law

The Jewish law sages wrestled with the question of the source and reason for the prohibition on the infringement of privacy in past generations, many years before the article by Warren and Brandeis was published. Some scholars stated that an invasion of privacy unjustly enriches the person committing the infringement, at the expense of the person whose rights are violated. They believed that a person reading someone else's letters usually does so to gain an economic or other benefit by illegally using the other person's asset. Others regarded infringement of privacy by reading another person's writings as a form of borrowing without the owner's knowledge, an act

17 The most famous of his rulings were forbidding a man to divorce his wife against her will and a ban on polygamy.

18 Rabbi Meir from Rothenburg (Maharam) was a twelfth century Jewish sage in Germany.

19 Maharam from Rothenburg responsa, Part 4A, Section 22.

20 A verse appearing in the Book of Ecclesiastes 10:8. See the source in the preceding footnote for this custom.

21 Torat Chaim 3:47, *Talmudic Encyclopedia*, the entry "herem of Rabbi Gershom" (and in the online edition of the *Talmudic Micropedia*).

tantamount to stealing, which is forbidden even when committed for the purpose of fulfilling a religious commandment.<sup>22</sup>

Rabbi Chaim Palachi (Maharaf)<sup>23</sup> later extended the reasons for the prohibition in a different direction—to the “prohibiting” aspect rather than the “legal” aspect of Jewish law.<sup>24</sup> In his opinion,<sup>25</sup> opening and reading someone else’s letter without that person’s knowledge is the same as stealing “his conscience and deepest secrets.” The violator thereby transgresses against the grave ban against deception. At the same time, Rabbi Palachi also cites the general and broad principle of the commandment, “love your neighbor as yourself,”<sup>26</sup> (which, as is known, the early sages interpreted in a negative form: “do not do to your fellow man what is hateful to you”) as a possible source for applying the prohibition against infringing privacy.

Another scholar of Jewish law, Rabbi Israel Jacob Hagiz,<sup>27</sup> gave a different and interesting explanation for the prohibition on violating the privacy of a person’s writings and stored information. He also held that the ban on looking at a person’s records without permission came from the “prohibiting” aspect of Jewish law and was part of the stricture against gossip, one of the most severe prohibitions in Jewish law. He wrote that, “Another person’s letter must not be opened, because it is forbidden to seek and search another person’s secrets, and what is the difference between forbidding gossip for others or for himself?”<sup>28</sup>

Other scholars of Jewish law regarded this prohibition as being grounded in the prohibition on disclosing any information obtained from another person without that person’s explicit permission. This view usually cites a ruling that appeared in the Babylonian Talmud: “Rabbi Musya, grandson of Rabbi Masya, said in the name of Rabbi Musya the Great, ‘How do we know that, when one person says something to a second person, that the

22 Torat Chaim, *ibid*; *Talmudic Encyclopedia*, *ibid*.

23 Rabbi Chaim Palachi was one of the Jewish sages of Izmir in Turkey in the nineteenth century.

24 For the distinction between the “prohibiting” aspect and the “legal” aspect in Jewish law, see M. Alon, *Jewish Law* (Jerusalem: Magnus, 1988), pp. 100–124.

25 Rabbi Chaim Palachi, *Hikekei Lev*, Yoreh De’ah section, 49.

26 Leviticus 19:18.

27 Rabbi Israel Jacob Hagiz was one of the Jewish scholars in Fez, Morocco and later head of a yeshiva in Jerusalem in the seventeenth century.

28 Rabbi Israel Jacob Hagiz, *Halakhot Ketanot*, responsa, Part 1, 276.

second person cannot relate it to others without explicit permission from the first person? From Leviticus 1:1 —And the Lord spoke to him from the Tent of Meeting, saying.”<sup>29</sup> Rashi commented that the word “saying” is a compound word—a kind of abbreviation, an acronym for “should not say,” meaning that a person is usually enjoined from repeating things told to them by someone else unless given explicit permission to do so. If this is the case with something said directly to a person, it is even more valid with respect to something that was not directed at that person, whether it is written or spoken.<sup>30</sup>

### Meaning of the Prohibition in the Information Age

Preserving the confidentiality of personal information is a basic duty of anyone possessing information of this type. The duty to conscientiously preserve the confidentiality of such information and adopt all reasonable measures to prevent it from reaching unauthorized parties applies to the major internet companies. In actuality, not only are these companies negligent about keeping the information confidential, as shown by recent cases of information leaked from Facebook as well as the recent disclosure that customers’ data from the Marriott Hotel chain had been hacked,<sup>31</sup> but some make commercial use of the private information they possess and are taking steps to obtain information from other sources in order to promote their business. These companies compete for access to information in order to give those who advertise with them the opportunity to improve the targeting of their ads. They gather data from every possible source, including information about the viewing of internet pages, “like” clicks, the sharing of information, connecting via wireless networks, end-user device features, language, location, and dozens (some say hundreds) of other parameters. Data gathering is not confined to the internet; it is also spreading to the cellular space. For example, Android users who use Facebook’s messaging application unknowingly provide their cellphone numbers to the company. Huge databases—private, public, military, medical, and commercial—contain enormous quantities of information that affect privacy, such as residential addresses, family status, CVs, and so forth.

29 Babylonian Talmud Yoma 4B.

30 Aharoni-Goldberg, “Privacy on the Internet through a Halachic Prism.”

31 Brian Krebs, “Marriott: Data on 500 Million Guests Stolen in 4-Year Breach,” *KrebsOnSecurity*, November 30, 2018.



An employee or authorized person to whom confidential information has been given and who reads it or uses it without permission is a thief. This situation can open the door to civil damage suits against people or organizations who are negligent in preserving the confidentiality of the information they possess and who fail to implement all of the sufficient information security measures that a reasonable party like them should take. This also applies to an even greater extent to organizations that use this information in order to make a profit. In certain circumstances, such information security failure is also likely to constitute a criminal offense.

As noted above, the literature of Jewish religious law establishes various rules designed to protect the privacy of a person's documents. Some of these are determined by "avoid evil" statutes—whether by taking preventative measures before privacy is breached, or after the fact by punishing the party that has violated someone else's privacy. In other cases, infringement of the prohibition is combated by means of "do good"; that is, promising incentives and economic or spiritual rewards for a person who scrupulously avoids violating the privacy of others.

Given the severity of the prohibition, Jewish sages have ruled that Rabbi Gershom's herem, which bars opening or reading a document without its author's consent, applies even if the document is not labeled as confidential or classified.<sup>32</sup> In other words, reading a document without its author's express consent is forbidden. It is permissible only in exceptional cases, when it is intended for a worthy purpose (such as saving a person's life or in order to safeguard state security and public safety). Even then, it is permitted only proportionately, "to an extent that does not exceed what is necessary." In the opinion of one scholar of sage Jewish law, simply gaining access to another person's documents, even without reading them, constitutes a breach of Rabbi Gershom's herem.<sup>33</sup> This approach also has significant consequences for big data analysis by the major internet companies.

Maintaining privacy and the confidentiality of private information is not merely a technical matter; it has an exalted purpose. In the opinion of Rabbi Alfred Cohen, a person needs privacy, because privacy is the source and

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32 See Palachi, *Hikekei Lev*, Yoreh De'ah section, 49.

33 Beit David, 14, 158.

means for realizing one's unique capabilities and talents.<sup>34</sup> Safeguarding the right to privacy is therefore not only a means of exercising other rights; it is also a value in itself as part of human dignity, as can be seen in Jewish law.

The general prohibition against infringing upon privacy as well as the specific prohibition against accessing another's records without that person's explicit consent are therefore deeply rooted in Jewish law. Accelerated technological development, the weaknesses of cyberspace, and difficulties in security pose new and exciting challenges to Jewish law concerning the application of ancient principles to our times—pouring the fine old wine of Jewish law into the new container of the legal system in Israel, whose values are both “Jewish and democratic.”

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34 Rabbi Alfred S. Cohen, “Privacy: A Jewish Perspective,” *Journal of Halacha and Contemporary Society* 1 (1981): 57.