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THE INTERNET REVOLUTION

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JEWISH LAW

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WORSHIP IN THE CLOUD

Edited by
Walter Jacob

The Internet Revolution

and

Jewish Law

STUDIES IN PROGRESSIVE HALAKHAH

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THE INTERNET REVOLUTION

AND

JEWISH LAW

Edited by

Walter Jacob

Solomon B. Freehof Institute of Progressive Halakhah
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To

Irene

1927 - 2012

Her love of nature, family,

and

sense of adventure,

opened new worlds

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INTRODUCTION

Communication is the key to civilization. When methods change the economic, social, and political world is transformed. - sometimes with enormous speed as in our own time. The internet initially influenced only the western world, but then everywhere. This new form of communication has amplified speech and made knowledge universally available. Much more lies ahead.

Even as this revolution has changed our life - the way we think, work, communicate, and relax; it has yet to engage us fully morally and ethically. We welcome the avenues which have been opened, but do not yet understand the changes to values, relationships, and institutions which are occurring around us. The outer forms of the great world religions appear eternal, but few have looked behind that facades

The handful of essays in this book look at a few issues which confront us. They deal with some practical implications and begin to review their philosophical bases as we experiment with the new media and attempt to integrate it into our tradition.

These essays investigate very different ways in which the internet affects us. They sensitizes us to the potential dangers of the speed of communication, its anonymity, and our lack of caution. They confront us with new views of Shabbat as a day of rest, and challenge our patterns of worship. They question our restrictive view of intellectual property. They demand a thorough review of some fundamental assumptions in a longer essays.

We, obviously, are dealing with far more than a means of communications as the internet shapes the way in which we look at ideas as well as people and our relationships. There are enough questions to fill a dozen volumes and we hope to turn to these and related questions in the future. The revolution has only begun.

THE INTERNET: A REVOLUTION IN HUMAN CONSCIOUSNESS

A Jewish Perspective

Michael Stroh

The purpose of this paper is Jewish philosophical musing, and I will discuss some ideas about technology, communication and the Internet. This paper will be a reflection on the impact of technology on our lives and Jewish perspectives on these lives. We live in a world of computers, cell phones, I Pads, I Pods, voice mail, faxes and email. Recently, my wife announced that the mouse was dead. I wasn't aware that we had a mouse problem but of course she meant the computer mouse. We live in a new era with basic and fundamental changes in the methods of communication. This will have an impact on our total culture but we need to understand how far-reaching this impact might be.

Of course, prediction is fragile. When I became a rabbi, pundits said our big problem would be what to do with all our leisure-time. If one wanted a guaranteed and successful career, one should go into any leisure time field. It has not worked out that way; we are all busier and more stressed than ever. We remember the prediction that micro-waves would replace ovens; cook books were published with instructions for micro-wave cooking of chickens and roasts.. It has turned out that the micro-wave is used for re-heating. We are now told that printed books will disappear and be replaced by e-readers. Maybe ! So raising issues about the future is fraught with speculation. Finally, this paper is more about meta-*halakhah* than *halakhah*, by which I mean the values grounding *halakhah*.

Let us begin with Marshall McLuhan, famous philosopher of communication, and convert to Roman Catholicism. He is knownfor phrases that have become part of our functioning vocabulary: *hot and cold media, global village, the medium is the*

message, and the idea that electrification will replace print media as the main vehicle of communication. What are hot and cold media? A hot medium gives you everything it has; a cold medium opens spaces for participation. A hot medium makes you cold; a cold medium makes you hot. When I started my career, I had a McLuhanesque epiphany. During a Saturday morning worship service, I realized that the congregation was irrelevant. If there were no congregants, the rabbi would read, the cantor would chant, the choir would sing and the service would be unaffected by the absence of any people praying. Our Reform services were a very hot medium; they were well designed to create "God's frozen people". But, we have learned and our worship now has become much cooler, opening spaces for people to participate and become warm. Now worship at conventions of the Union for Reform Judaism resembles revival meetings, with 3,000 people singing, reading and feeling.

The *medium is the message* means that media are not neutral transmitters of information. Rather, the medium enters into the communication and shapes what we receive. The content is not just an idea or information, but the information in the shape determined by the medium. The Protestant Reformation was Bible centered and affirmed the priesthood of all believers, requiring people to read the Bible. This theology could not have appeared before the invention of mechanical printing made it possible for every home to have a Bible. Protestantism was a phenomenon of print communication. Before mechanical printing most Jews did not own a Talmud; there might be one in the synagogue.

We Jews have successfully negotiated every revolution in communications media: oral culture, hand written manuscripts and print. If McLuhan is correct, the medium entered into the content being communicated. We can speculate on how this affected the

development of Judaism and we can speculate on how Judaism will be affected by the transition from print to electrification. But what kind of medium is the Internet? Is it a cold medium that involves us or a hot medium that makes us passive?

In order to assess the possible impact of the Internet on the development of Judaism, let us refer to the philosopher of science, Thomas Kuhn. In his book *The Structure of Scientific* Revolutions, he introduced the concept of paradigm shift. The received wisdom about the development of science is that it is evolutionary, that each generation builds on the previous generation, extending knowledge one step further. Kuhn challenged this notion. He suggested that the new generation did not, simply build on the concepts of the past, but created a whole new way of looking at things. Thus it integrated the past into the new paradigm. In other words the history of science is not evolution, but leaps. New paradigms don't emerge from the previous paradigm; they are invented by the human mind. If Kuhn is right, perhaps more than science operates this way? Maybe, the development of all thought proceeds, not by evolution, but by leaps.

We know that the Talmud did not develop out of the Torah, but was a paradigm shift. If you start with the Talmud and work your way back, you would never arrive at the Torah. The Talmud integrates the Torah into its own paradigm through the use of its own methodology which suits the new paradigm. This, of course, would contradict nineteenth century liberal, Reform theories about the evolutionary development of Judaism. It implies that Reform did not evolve out of medieval Judaism; it was a paradigm shift. Perhaps, the secret of Jewish survival is not an evolution operating under intrinsic historical laws, but the mysterious, Jewish creative ability to recreate Judaism in every historical paradigm shift. So the Talmud was a paradigm shift and integrated the Torah into its

paradigm and not the other way around. The development of medieval Jewish law may not be, simply, an application of, or evolution of the Talmud. Post-Enlightenment Judaism was a paradigm shift and the creation of something new. Will the Internet result in more than simply a few adjustments to new technology, but in a paradigm shift that creates a flip in the way we conceive reality? And how will Judaism respond to this?

Now let us broaden our perspective to technology, in general. We are used to the idea that technology is neutral; we can apply it for good or for evil. But some disagree. Jacques Ellul, sociologist and theologian, in his book *The Technological Society*, says that technology is negative. It rules us and not the other way around. In our culture, it is a mitzvah (commandment) to do whatever technology enables us to do and to refrain from an action we have the technical capacity to do is a sin. We live in a Tower of Babel culture. Like a snowball gathering more and more snow as it rolls along until there is no snow left, technology will fulfill all its potential. Technical surveillance means that, ultimately, we will all be surveyed constantly with monitoring of our computers, tapped phones, cameras watching every street. A man is in a shopping mall and he is standing next to a map of the mall. On the map is an X., and it says "You are here." The man says:" How do they always know where I am?" If you have a car or Blackberry with a GPS, they always do know where you are. Does this seem a little paranoid? That doesn't mean it isn't true.

Presently in development are devices for digital face recognition and in December, 2009 the Israeli Knesset passed a law approving a data base of biometric information which could be placed on citizens' identity cards. I remember many years ago reading that the F.B.I had stolen the membership list of the Union of American Congregations. They got it back, but I suspect the F.B.I. copied it. Why would the F.B.I. want the U.A.H.C's membership list?

Several years ago, in a Purim edition of their bulletin, Holy Blossom Temple, Canada made a front page announcement, complete with pictures, that Prince Charles and Princess Diana were coming to visit Holy Blossom. They got a call from the R.C.M.P. saying that they should have been informed; because they had to provide security. Why does the R.C.M.P. read the Holy Blossom bulletin? If we are capable of total surveillance, we must do it. This is a very frightening look at an Internet world, although Ellul wrote before computers and the Internet.

The Roman Catholic paleontologist and theologian Teilhard de Chardin, in *The Phenomenon of Man*, takes a positive view of technology. He sees evolution as positive; it creates mind and spirit. We have reached a stage where mind is collective; humans must think and work together. No one mind can grasp all that is known. Thus humanity will rise to a point of necessary cooperation in a collective mind. This will lead to the "omega point" which is human salvation. In a similar vein, Jeremy Rifkin in *The Empathic Civilization* speculates that evolution can lead to a civilization of empathy. Just as for Teilhard de Chardin, there is a certain inevitability as technology requires cooperation and empathy. On the other hand, Rifkin, also, refers to Jean M. Twenge, in her book *Generation Me*, who says that research shows that young people born in the 1970s, 1980s, and 1990s, are the most narcissistic generation in history. A civilization of empathy may be coming, but, right now, our culture is filled with narcissm. In the book *Habits of the Heart*, a study of American culture by a team headed by Robert N. Bellah, they report a meeting with a woman named Sheila who referred to her religion as "Sheilaism", exquisitely designed to reflect her and meet her every need. How much of liberal Judaism's a-la-cart approach plays into Sheilaism, a religion, not about God, but about me, meeting my needs, self defined, with no obligations? This is a liberal problem that plays into the narcissism of our culture, and it is difficult to believe that

the Internet will reduce this phenomenon. It is, more likely, to increase it.

Martin Heidegger, philosopher and unrepentant Nazi, is quite negative to technology. He says we live in a culture in which everything is a tool; we relate to everything functionally. When we encounter the world, we encounter it as a resource for use. We are incapable of encountering the natural world as it is, in itself; everything is perceived and related to as a tool. In a notorious comparison, he compared the concentration camps to modern factory chicken farming. The one produces chicken meat in the most efficient manner with no regard for the welfare of the chickens, the other produces death in the most efficient manner with no regard for the welfare of the victims. It is the modern mind set that sees all reality and all truth in the same way. I hate to say it, but he might have been on to something. Let us remember that technology, in general and the Internet, in particular, have no values, but they do shape the way we perceive reality. Perhaps, we should say that technology does have one value, the efficient use of matter. A decision not to use matter in the most efficient way is a violation of political and economic wisdom, and in our culture is a sin. Maybe, it is the only sin.

Let us now look at Ferdinand Toennies. He coined the terms *Gemeinschaft* and *Gesellschaft*. Gemeinschaft, or community, is an organic world in which people relate to one another, speak the same language, share values and care about each other. Gesellschaft, or society, is a world in which people relate functionally, and it is held together by business. Gemeinschaft is the medieval world; Gesellschaft was created by the Enlightenment and we live in it. When we read Toennies on Gemeinschaft and Gesellschaft, we think of Martin Buber's distinction between the I-Thou world and the I-It world and his philosophy of community. The I-It world is a world in which we

relate to everything functionally. This is not, per se, immoral, but is the realm in which immorality happens, where we treat people as a means. Buber, contra Heidegger, posits another world, an I-Thou world, open to human beings, in which we relate person to person and not person to function. Yet, attempts to change a Gesellschaft culture to a Gemeinschaft culture have resulted in Fascism and Nazism. Does this mean we can only live in a Gesellschaft world, an Ayn Rand world? Can there be I-Thou possibilities in the midst of the I-It world?

Reform Judaism teaches community, which is a Jewish value. But it also believes in individual choice. It looks with nostalgia at a Gemeinschaft world, but would not exist without a Gesellschaft world. We teach Jewish tradition, but we came in to existence in a post-Enlightenment world in which we had to negate tradition to make progress. We want to negate and preserve tradition at the same time. We want to teach an attitude of reverence for tradition while we eliminate and transform traditions. No easy task! We want to create community in our congregations, yet we teach our congregants to make individual choices. Our values, many times, clash with each other. We yearn for Gemeinschaft but we know the individualized, narcissistic, consumerist, anti-tradition, technological, Internet-connected world in which we live epitomizes Gesellschaft.

Does the Internet make all this worse? Are people less and less connected in any meaningful community? My daughter was at a wedding where no one at her table spoke to anyone else at the table. They were all on cell phones talking and texting. What does this mean? Will communities in the future be virtual communities? What will this mean for Judaism?

Joseph Soloveichik, Orthodox theologian and Rosh Yeshiva at Yeshiva University, in his book *The Lonely Man of Faith*, talked about Adam I and Adam II. Soloveichik was Orthodox. We would talk about Adam and Eve I and Adam and Eve II. The typologies of the two first couples are his interpretation of the two creation stories in Bereshit (Genesis). I quote Soloveichik: "Adam the first who was fashioned in the image of God was blessed with great drive for creative activity and immeasurable resources for the realization of this goal, the most outstanding of which is the intelligence, the human mind, capable of confronting the outside world and inquiring into its complex workings... God, in imparting the blessing to Adam the first and giving him the mandate to subdue nature, directed Adam's attention to the functional and practical aspects of his intellect through which man is able to gain control of nature." (Soloveitchik, p.12) Adam/Eve the first is technological humanity.

Again Soloveichik, "Adam the second is, like Adam the first, also intrigued by the cosmos. Intellectual curiosity drives them both to confront courageously the *mysterium magnum* of Being. However, while the cosmos provokes Adam the first to quest for power and control…Adam the second responds to the call of the cosmos by engaging in a different kind of cognitive gesture. He does not ask a single functional question. Instead his inquiry is of a metaphysical nature… He asks: 'What is the purpose of all this?" (Soloveitchik, p.21) Adam/Eve the second is spiritual humanity.

Both aspects of the human being are legitimate and Adam/Eve must fulfill both natures. If the pre-Enlightenment world made a great deal of room for the spiritual, the modern world becomes more and more technical and functional. In universities we see science, engineering and business departments expanding while philosophy, literature, art and music departments shrink and even close. Our world is in desperate need of the spiritual and people

seek it; it is human nature to fulfill the spiritual aspects of our being. Perhaps, here, we can see a counter-cultural role for the synagogue that people both want and need, if it is made available to them. The synagogue should be a center for preserving the humanness of humanity, a place for community, moral values, service to others, reflection, *berit* (Covenant), *mitzvah* (commandment), and *talmud torah* (the study of Torah).

What does the synagogue have to offer? We offer God, Covenant, spirituality, inwardness and Torah. The Internet will not go away and neither will technology because this, too, is human nature. Our role, I believe, is to offer a strong religious message; to cultivate the spirit. It is my belief and my experience that people do want it. We do not live in a pre-modern house and people are, now, educated by our culture to see, and sometimes only to see, the technological aspects of humanity. I suggest that our response to the Internet and the world it creates should be in the spirit of Buber and Soloveichik. We teach the values of Adam/Eve II in a world that, frequently, finds them irrelevant to technology and efficient management. We have our work cut out for us, but we are not trying to get blood from stones. The desire for Judaism, for spirit and religion, are built in to human nature and we should have confidence in the Judaism we offer.

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THE INTERNET: *LASHON HARA* JUST A CLICK AWAY

Amy Scheinerman

Great minds discuss ideas, average minds discuss events, small minds discuss people.[1]

"Death and life are in the hand of the tongue."
Does the tongue then have a hand?
This comes to teach us that just as the hand can kill, so can the tongue kill[2]

Flying Feathers Carried Through The Ether of the Internet

The classic image of words of gossip as feathers scattered by the wind is a stallion in the stable of Jewish folklore. In the story, often attributed to Rabbi Levi Yitzhak of Berdichev (1740-1809), the irretrievable feathers symbolize irreversible utterances. The message is that *lashon hara, rechilut,*[3] and *motzi shem ra* can be neither repealed nor nullified, and atonement is not truly possible because their damage can never be fully mitigated. One who slices open a feather pillow and scatters its contents even in a windstorm knows that the feathers will travel only so far. With the advent of the Internet, this image is outdated. The information revolution has connected human beings as never before. Feathers loosed on the Internet can span global distances almost instantaneously, multiply indefinitely, and reach far more people than ever before. Imagine one person sending an email to ten others, who in turn send it to ten people, who do the same. Within an hour, the message could reach one million people, and this presumes no one has a distribution list greater than ten names. The Internet as high-speed highway provides us with more vehicles for communicating *lashon hara* and *rechilut* than ever before: email, texting, IM, blogs, tweets, and comment for example, to name but a few. The Internet has the potential to transform the quaint story of the feathers into a high tech version of Hitchcock's "The Birds."

In recent months many examples of *lashon hara* and *rechilut* have spread like a virus through the Internet, sometimes with devastating consequences.

> Rutgers University Freshman Tyler Clementi's roommate and another student videotaped Clementi engaging in a sexual encounter with another male student in his dorm room. The roommate streamed the video live over the Internet, making it immediately available to a large audience of Clementi's peers. Clementi jumped to his death from the George Washington Bridge on September 22, 2010.[4]
>
> Duke University senior Karen Owen composed a mock senior thesis entitled "An education beyond the classroom; excelling in the realm of horizontal academics." The Power Point piece, parodying an academic study, revealed personal and even intimate details of 13 male athletes with whom Owen had had sexual encounters. Owen emailed the Power Point to two friends. Within days, it spread not only through the Duke campus, but was posted on numerous websites and was being discussed by major news networks.[5]
>
> How many of us have received the email hoax claiming that President Barack Obama is a Muslim? Or perhaps I should ask: How many times have you received this email?[6]
>
> Employers now routinely make use of social networking sites to vet prospective hires. Few companies have crafted policies to govern how information gathered on the web may be used, perhaps because it is not possible to determine the accuracy of information collected in this manner. Anyone can publish anything about anyone.
>
> Last summer, conservative political firebrand Andrew

Breitbart released a selectively edited video clip from a speech delivered by USDA official Shirley Sherrod at a NAACAP Freedom Fund Banquet on March 27, 2010. In the speech, Sherrod told a story about having once – prior to her employment at the U.S. Department of Agriculture – seen things through the lens of race. Sherrod's point in telling the story was that she had discovered – on her own – that racism in all its manifestations is morally wrong. The video clip, posted by Breitbart to the Internet without context or explication, caused a media frenzy and went viral. Agriculture Secretary Tom Vilsack, viewing only the deceptive and damning clip excerpted by Brietbart on an iPod, sought to end Sherrod's employment at the USDA. In the end, the truth came to light, but not before Sherrod became a household name, an icon of intentional defamation via the Internet.

Many rabbis have described Internet conversations – usually by email – held among the leadership of their institutions that were marked by egregious *lashon hara* in the name of synagogue business. Many congregations have formulated Internet guidelines for their leadership to avoid this problem.

Two days before this paper was presented, the front page center article of the New York Times[7] concerned a 14-year-old girl who took a photo of herself nude and texted it to a boy, who texted it to another girl, who added a nasty caption and sent it on to a large number of their classmates. Three middle school students were arrested and charged with disseminating child pornography, a Class C felony. Among the three was the boy who sent only the photograph. We must now consider that not only words – spoken, printed, and

conveyed electronically – but graphic images, as well, can constitute *lashon hara*. Can images that are *chezek r'iah* (visual damage) be considered *lashon hara* as well?

The Internet is a remarkably efficient vehicle for spreading *lashon hara* and *rechilut*. Expecting or hoping that we can rid the Internet of such material is like expecting ocean waves to cease crashing against the shore. However, each of us has the choice whether or not to put a toe into that ocean, or to remain on shore as far from the churning waters as possible. Therefore, we will not discuss the tsunami itself, facilitated by the Internet, but rather what a committed and ethical Jew can do in the face of the incoming storm.

Numerous Questions Leap to Mind:

1. Is the circulation of *lashon hara* and *rechilut* on the Internet morally and halakhically equivalent to verbal utterances? Torah recognizes speech as the natural medium of *lashon hara* and rechilut, but the modern world is Internet saturated. Do email, tweets, blogs and websites hold the same halakhic status as speech vis-à-vis *lashon hara*? Just as the U.S. Constitution recognizes the written word as "speech," so too do electronic words (shall we call them e-words?) function as speech in our age and indeed, the Internet is a far more effective and powerful medium for conveyance.

2. How should we, as Jews, respond to an ever-burgeoning "In Box" filled with stories, gossip, and hot-off-the-press revelations that constitute *lashon hara* and *rechilut* at a speed [8] inconceivable to our Sages and increasing exponentially?

3. *Is lashon hara* disseminated via the Internet qualitatively different than normal human speech or conventionally printed material, or only quantitatively different? Does it differ in kind, or only in degree? Is the Internet new and unprecedented? Even if not, do the

speed, immediacy, and magnitude of what is circulated render it a new phenomenon, and if so, what are the moral implications of this new medium?

4. Are the *halakhic* standards designed to discourage *lashon hara* and *rechilut* adequate to the problem of lashon hara and *rechilut* on the Internet?

5. Given the importance of conveying and receiving accurate information and news, what should be our approach to what is circulated on the Internet concerning those in positions of power and authority?[9] U.S. law draws a distinction between public figures and private individuals with respect to protection from slander and insult; only private individuals enjoy legal protection.[10] Does this distinction apply in halakhah to material circulated on the Internet?

Social, Cultural, and Psychological Phenomena that Impact Our Assessment of Lashon Hara on the Internet

To address these questions, I highlight three recently identified phenomena (one social, one cultural, and one psychological) whose effects are greatly magnified by the Internet, and have implications for answering these questions.

The first is a social phenomenon described by Malcolm Gladwell in *The Tipping Point*.[11] The tipping point is a concept investigated not only by sociologists, but also mathematics and computer scientists using computer algorithms in an attempt to predict how such a cascade can be modeled using social network analysis.[12] In short, the "tipping point" is how fads are created: mob mentality in the cultural arena, fertilized and nourished by the Internet. It happens in a flash, and often the Internet is the catalyst or the accelerant.

Richard Dawkins described the cultural phenomenon in his 1976 bestseller *The Selfish Gene*, where he coined the term "meme," now

a staple of Internet vocabulary, and a very telling term of the times. An Internet meme is any cultural idea (concerning fashion, technology, ideology, politics, art, for example) that is propagated through a web channel (hyperlink, video, website, hash tag) via social networks, blogs, email, news feeds, or twitter. Internet memes can spread astonishingly quickly. Among the best-remembered and innocuous memes are the Trojan Room coffee pot[13], Obama Girl[14], and Rick Rolling.[15] Youtube has become the most powerful purveyor of memes. In the commercial world, memes are used to launch viral marketing, creating free "buzz" for products and services. Memes can launch new artists, musicians, actors, and comedians. For better or worse, that includes Justin Bieber. However, if memes carry false or inaccurate information, innuendos, or outright lies, they can reach a worldwide audience before anyone has the chance to vet them, by which time it is too late to positively influence many of those who have received them. Memes can launch myths, lies, and gossip, conveyed with stunning speed around the globe, and accepted as truth by countless numbers of people on the basis that "everyone knows" and "everyone heard" and "everyone received that email." Examples include false equivalences, moral equivalences, and death panels.

The psychological phenomenon arises from a new sub-field of psychology called CyberPsychology that was spawned by the Internet. CyberPsychology explores a host of issues that arise in the ether of the relative anonymity, immediacy, asynchronicity[16], and lack of face-to-face feedback endemic to cyberspace. Chief among these issues is the "disinhibition effect" which may prove benign (such as the revelation of secret emotions, fears, and desires) or toxic (such as the unleashing of harsh criticism, anger, hatred, and threats). Sitting at a keyboard, many people feel both invisible and anonymous. Words they would normally never utter in public flows out of their fingertips on talk-backs, discussion boards, or by simply hitting "forward." Professor of psychology John Suler[17] argues that some people go so far as to develop an alternative "self" – dissociated from their real self – on the Internet. Suler writes:

> Inhibiting guilt, shame, or anxiety may be features of the in-person self but not the online self. This constellations model also helps explain other online phenomena, like identity experimentation, role-playing fantasy games, multitasking project, and other subtle shifts in personality expression as we move from one online environment to another.[18]

If this is the case for one's self and its boundaries, does it not have significant implications for behavior related to *lashon hara* and *rechilut*? If I hide behind a wall of perceived anonymity, I can believe I'm not responsible for what I disseminate, however fictitious and malicious. The speed and immediacy of the Internet are augmented by the perceived anonymity of cyberspace. "I just forwarded what I received," "I thought it was interesting," and "I'm just passing it along" are oft-heard explanations for engaging in cyber-assisted *lashon hara* and *rechilut*.

Formulating a Halakhic Response to Lashon Hara on the Internet

Torah enjoins us *lo teilekh rakhil b'amekha*,"Do not go about tale-bearing among your people" (Leviticus 19:16).[19] Our Rabbis understood this prohibition in conjunction with *lo tonu ish et amito v'yareita mei'elohekha ki ani adonai eloheikhem*,"Do not wrong one another, but fear your God, for I, the Lord, am your God" (Leviticus 25:17) to establish a broad ban on talking about other people, whether what is said is true or false, malicious or benign, injurious or innocuous. The Rabbis understand Miriam's affliction with *tzara'at* in the Wilderness to be a consequence of *lashon hara* when she speaks about Tzipora.. Arakhin 15b tells us:

> *Tzara'at* was a "miraculous" disease that occurred when the *Bet ha-Mikdash* was still standing. If a person spoke evil about someone else, first his home was affected. If he did not repent, his clothes were affected. If he still did not repent, his body was ultimately affected. He had to separate from

> civilization. He was publicly proclaimed an "impure person" as a result of his evil speech.

One has the sense that eliminating *lashon hara* and *rechilut* are all but impossible; God therefore unleashes a drastic disease in a failed attempt to stop us from uttering what so naturally issues from our mouths. *Lashon hara* is likened to a progressive disease. Even Rambam, who rarely launches ino philosophical discussions in the *Mishneh Torah*, makes an exception here. He writes:

> "...and concerning this matter we are warned in the Torah: Remember that which the Lord your God did to Miriam on the road (Deuteronomy 24:9). The Torah is saying: contemplate what happened to the prophetess Miriam. She spoke about her younger brother whom she loved and helped raise. She had endangered her own life to save him from the Nile. She (furthermore) did not speak malicious evil about him. She just erred by equating his greatness to that of other prophets [who do not separate themselves from their wives]. And Moses was not bothered by any of her comments, as it is written, *And the man Moses was extremely modest* (Numbers 12:3). Nevertheless she was immediately punished with *tzara'at*. *Kal va-chomer* [how much the more so] how great a punishment will come to those wicked fools who frequently speak great and wondrous (criticisms)."[20]

Maimonides, following the traditional midrashic interpretation of the account of Miriam's speech and subsequent affliction with *tzara'at* in Numbers, chapter 12[21], concludes that although Miriam's *lashon hara* is not malicious and causes no one injury, even well-intentioned talk about another is poisonous in the end.

Our Rabbis understood the dangers of *lashon hara* and *rechilut* for the individuals involved, the cohesion and spiritual health of the

community, and the integrity of the broader society. Talmud abounds with exhortations to guard our tongues, going so far as to declare, Whoever engages in *lashon hara*, God says of him: "He and I cannot inhabit the same world."[22] A similarly hyperbolic passage in Midrash Tanhuma serves as an emotional summary and exhortation:

> If a person involves himself in *lashon hara*, he makes himself worthy of death, because *lashon hara* is as serious as murder, for one who murders only takes one life, while the bearer of *lashon hara* kills three: the one who says it, the one who listens to it, and the one about whom it is said.[23]

This hyper-sensitivity to how our communication effects others, and how our role in listening to, and disseminating, the communication of others, forms the strong Jewish moral aversion to gossip and tale-bearing even as we recognize it is the sin all of us commit the most often, and most egregiously[24] Moreover, atonement for the hurt and damage of *lashon hara* can never be complete. Words, like feathers, loosed into the world have a life and trajectory that cannot be controlled. All the more so, *lashon hara* disseminated via the Internet.

Maimonides' formulation of the laws of *lashon hara* and *rechilut* in the *Mishneh Torah*, *Hilkhot Deot*, chapter 7 forms the backbone of the Jewish approach to whether, when, and how we may speak about others (see Appendix A). Rabbi Israel Salanter, founder of the Musar Movement made a significant contribution to the discussion, as well. The most extensive writings on the subject are those of Rabbi Yisrael Meir Kagan, the Chofetz Chaim, in his landmark work, *Sh'mirat haLashon*. With each reformulation, the requirements for avoiding *lashon hara* and *rechilut* are considerably heightened until, after reading *Sh'mirat haLashon*, the well-meaning Jew isn't sure if he can safely open his mouth at all. Perhaps the strategy of our Sages and teachers was to view *lashon hara* and *rechilut* as a zero-sum game: because our natural proclivities are likely to bring us so low morally,

the bar is raised exceedingly high in the hopes that people will rise to something that constitutes a tolerable level.

There was a time when we heard a tidbit about someone, or a story about someone and then some time elapsed before we had the opportunity to retell it, time that could be used to consider its veracity and the propriety of passing it along. Today, hitting the "forward" button takes but an instant, and is often done with little thought. The speed with which memes are circulated on the Internet – even without carefully reading or considering its content – reflects both the ease and speed with which one can forward a link, making the Internet an ideal vehicle for *lashon hara* and *rechilut*. That "everyone knows already" or "everyone has seen it" lends a sense of legitimacy to hitting the "forward button," or at least gives us cover to say, "I didn't start it; I'm just passing it along." This is Sulen's "disinhibition effect" at work.

The Internet certainly affords a quantitative leap of many magnitudes in disseminating gossip, stories, rumors, and outright lies. The immediacy and relative anonymity of the Internet discourage thoughtful reflection. A knee-jerk, emotional response is possible with the click of a mouse. The nature of immediacy, and the speed and quantity of dissemination of communications via the Internet amount to a wholesale qualitative change from conventional means of spreading *lashon ha-ra* and *rechilut* by word of mouth or print media. The Internet is different not only in degree, but also in kind. This has profound ethical implications for us. We must exert increased caution and vigilance over our use of the Internet commensurate with the increased danger – quantitatively and qualitatively – it presents for committing *lashon hara*.[25]

As rabbis, we must redouble our efforts to teach the ethical value of keeping far from *lashon hara* and help our people develop standards for their own behavior on the Internet. While we cannot control what

others circulate on the Internet, we can control what we do. I offer seven points:

First, remind people to stop and think before hitting the "forward" button. It's not just common sense; it's a religious obligation, because casual "forwarding" is ethically identical to carefully planned and intentional "forwarding." Consider whether what you're about to forward, post, or circulate is *lashon hara*, *rechilut*, or *motzi shem ra*.[26]Consider the effect the material might have on another person's reputation, career, and life. Repeating something already in the public domain that is true and factually accurate is not *lashon hara*, but it may be *rechilut*. Rambam points out that the prohibition against *rechilut* (Leviticus 19:16) includes in the very same *pasuk* the words, *lo ta'amod al dam rei'ekha* "Do not profit by the blood of your neighbor" to remind us of the gravity of the prohibition against evil speech.[27]

Second, avoid being an audience for lashon hara, *rechilut*, and *motzi shem ra*. Tanhuma makes the astute observation that "*Lashon hara* kills three [people], the one who speaks it, the one who listens to it, and the one about whom it is spoken."[28] Those who listen to – and in the case of the Internet, willingly receive and read or listen to – *lashon hara* are compromising their own spiritual wellbeing. Simultaneously, they are contributing to the circulation of *lashon hara*, which, without an audience, would go nowhere. While it may seem uncomfortable to say to a friend or acquaintance, "Please do not send me messages like this, containing unsubstantiated rumors and innuendoes, because it violates my religious ethics to read it," doing so will not lose one the respect of a friend or acquaintance, and may well inspire the sender to curtain his or her trafficking in such material.

Third, remember that material sent by email, posted to blogs, or tweeted does not fade away. Much is archived, and much remains on the web, easily located by people with malicious intent. Like the

feathers that cannot be gathered in, our posts are accessible for a long time. Rambam hyperbolically warns that we are forbidden to live in the neighborhood of people who traffic in evil speech.[29] The Internet has reduced the entire globe to one electronic neighborhood. There are no borders or fences, and distances have been reduced to zero.

Fourth, there are times when it *is* appropriate to pass along information about someone. Here, proper intention is crucial, as is the commitment to prevent harm to others. Consider the example of Rachel who is applying to be a counselor to alcoholics, and has posted pictures of her drunk on facebook. May Rebekah, stumbling across these photos, make them known to Rachel's potential employer? First, because Rachel posted the photos to her facebook page, Rebekah would not be committing *lashon hara* because Rachel made the photographs available. However, we might ask if this is *rechilut.* If Rebekah – with proper intent – shows the photographs to the potential employer, there is no *rechilut*. The Chofetz Chaim tells us that Reuven may convey negative information about Shimon to Yaakov if it would save Yaakov from a disastrous business deal with Shimon that would have caused him financial loss.[30]Our example is not, strictly speaking, a case of monetary risk in a business venture. In fact, perhaps more is at risk – the welfare of recovering alcoholics – and Rebekah's intention is to protect them from someone who misrepresents himself. Similarly, if we possess reliable information about a pedophile living in the neighborhood, we may convey it to neighbors with children living at home? So too, if we have reliable evidence that a doctor is incompetent, we may, on a need-to-know basis, inform others. But may we post our suspicions or an account of our experience with the physician on an Internet site that rates doctors? The Chofetz Chaim offers us five safeguards to insure that what we share is done with proper intent and in an appropriate manner:

1. Don't make a knee-jerk negative judgment. Investigate thoroughly.
2. Do not exaggerate the information.

3. Intend only to achieve a beneficial outcome.
4.Share the information only as a last resort, once you have determined there is no other way to avoid a harmful outcome.
5.The information may be shared only if the potential harm to the recipient far outweighs the harm done to the person whose information is shared.

These criteria can help us decide any number of situations, including whether or not to delete or forward the stories and allegations that daily deluge our In-Boxes and what it is appropriate to circulate and post to websites.

Fifth, we have a legitimate need for, and right to, information about leaders and politicians in positions of power and authority. However, that need does not obviate the responsibility to evaluate the accuracy of what we read, and especially what we share with others. In becoming a public servant or politician, one does not forfeit one's right to not become the subject of *lashon hara*. Our public servants and politicians are not "fair game" for our frustrations, suspicions, and political differences.[31]

Sixth, we can teach people the concept of *avak lashon hara*[32] (the dust of *lashon hara*) which means language or writings intended to lower a person's reputation in the eyes of others, or which invites others to engage in *lashon hara* with statements such as, "Let's not talk about Ploni because I don't want to reveal what I know about him." Similarly, praise at the wrong time, or delivered in such a way that it raises doubt about a person's integrity, is *avak lashon hara*. News stories specialize in the dust of *lashon hara*

Seventh, we need to begin teaching our children the meaning of *lashon hara*, *rechilut*, and *motzi shem ra,* and the Jewish values that pertain, when they are young, because children in our society are gaining access to the Internet at a younger age than ever before, and it constitutes an increasingly large proportion of their daily

communication with others. Legion are the reports of children engaging in cruel gossip using Instant Messenger tools, email, and texting. These teachings should become a staple of every religious school curriculum from the earliest age and taught often in an age-appropriate manner.

Conclusion

We live in a society that thrives on gossip. Alice Roosevelt Longworth is said to have quipped, "If you haven't got anything good to say about anyone, come and sit by me." Norman Rockwell's painting "The Gossips" lovingly depicts 14 people transmitting a tantalizing bit of gossip. The number 14 seems quaint when we consider the numbers of people one can reach on the Internet via email, facebook, and twitter with just one click.

Rabbi Israel Salanter said, "Man is a drop of intellect drowning in a sea of instincts."[33] Considering human nature, we cannot realistically say to people, "Don't read what comes around." But we can remind them that our tradition places a moral premium on avoiding lashon hara, *rechilut*, and *motzi shem ra* for the sake of human dignity and causes emotional harm. We can encourage people to critically filter what they read, and forward, post, or disseminate only that which they are certain rises to the level our tradition approves. We can remind them that what they do may influence and affect many others, and redouble our efforts to teach the principles of *lashon hara* especially in connection with use of the Internet.

I began with the story of the feathers scattered abroad. Presciently, our Rabbis understood that *lashon hara* has a broad range of operation. As Bereishit Rabbah observes, "it is uttered in Rome and kills in Syria."[34]

Midrash Tehillin expresses it this way:

The tongue is compared to an arrow. Why? Because if a person draws a sword to kill his fellow man, the intended victim can beg mercy and the attacker can change his mind and return the sword to its sheath. But an arrow, once it has been shot and begun its journey, even if the shooter wants to stop it, he cannot."[35]

The Internet has no error-correcting code for lashon hara. The only brakes we can place on *lashon hara* and *rechilut* traveling through the Internet is by halting it at the one source we can control: ourselves. The private meditation of Mar ben Ravina recounted in Berakhot 17a serves us well here with a slight update for the 21st century: *Elohai, n'tzor l'shoni mei'ra u's'fa'tay mi-dabeir mirmah* "O Lord, guard my tongue from evil, my lips from speaking guile, and my fingertips from disseminating *lashon hara*."

APPENDIX:

Moses Maimonides, *Mishneh Torah, Hilkhot Deot*, chapter 7

1. A person who collects gossip about a colleague violates a prohibition as [Leviticus 19:16] states: "Do not go around gossiping among your people." Even though this transgression is not punished by lashes, it is a severe sin and can cause the death of many Jews. Therefore, [the warning]: "Do not stand still over your neighbor's blood" is placed next to it in the Torah (ibid.). See what happened [because of] Doeg, the Edomite.

2. Who is a gossiper? One who collects information and [then] goes from person to person, saying: "This is what so and so said," "This is what I heard about so and so." Even if the statements are true, they bring about the destruction of the world. There is a much more serious sin than [gossip], which is also included in this prohibition: *lashon hara*, i.e., relating deprecating facts about a colleague, even if they are true. [*Lashon hara* does not refer to the invention of lies;] that

is referred to as defamation of character (*motzi shem ra al chaveiro*). Rather, one who speaks *lashon hara* is someone who sits and relates: "This is what so and so has done;" "His parents were such and such," "This is what I have heard about him," telling uncomplimentary things. Concerning this [transgression], the verse (Psalms 12:4) states: "May God cut off all guileful lips, the tongues which speak proud things..."

3. Our Sages said: "There are three sins for which retribution is exacted from a person in this world and, [for which, nonetheless] he is denied a portion in the world-to-come: idol worship, forbidden sexual relations, and murder. *Lashon hara* is equivalent to all of them." Our Sages also said: "Anyone who speaks *lashon hara* is like one who denies God as [implied by Psalms 12:5]: "Those who said: With our tongues we will prevail; our lips are our own. Who is Lord over us?" In addition, they said: "*Lashon hara* kills three [people], the one who speaks [36] it, the one who listens to it, and the one about whom it is spoken."[1] The one who listens to it [suffers] more than the one who speaks it.

4. There are certain matters that are considered "the dust of *lashon hara*" (*avak lashon hara*). What is implied? [For example, a person says:] "Who will tell so and-so to continue acting as he does now," or "Do not talk about so and so; I do not want to say what happened," or the like. Similarly it is also considered the "dust of *lashon hara*" when someone speaks favorably about a colleague in the presence of his enemies, for this will surely prompt them to speak disparagingly about him. In this regard, King Solomon said (Proverbs 27:14): "One who greets his colleague early in the morning, in a loud voice, curses him," for his positive [act] will bring him negative [repercussions]. Similarly, [to be condemned is] a person who relates *lashon hara* in frivolity and jest, as if he were not speaking with hatred. This was also mentioned by Solomon in his wisdom (Proverbs 26: 18, 19): "As a madman who throws firebrands, arrows, and death and says: 'I am

only joking.'" [Also to be condemned is] someone who speaks *lashon hara* about a colleague slyly, pretending to be innocently telling a story without knowing that it is harmful. When he is reproved, he excuses himself by saying: "I did not know that the story was harmful or that so and so was involved."

5. [There is no difference] whether one speaks *lashon hara* about a person in his presence or behind his back. [The statements] of people who relate matters which, when passed from one person to another, will cause harm to a man's person or to his property or will even [merely] annoy him or frighten him are considered as *lashon hara*. If such statements were made in the presence of three people, [one may assume that the matter] has already become public knowledge. Thus, if one of the three relates the matter a second time, it is not considered *lashon hara*, provided his intention was not to spread the matter further and publicize it.

6. All the above are people who speak *lashon hara*, in whose neighborhood one is forbidden to dwell. How much more so [is it forbidden] to sit [together] with them and hear their conversation. The judgment against our ancestors in the desert was only sealed because of *lashon hara*.

Who is the man who desires life,
who desires years of good fortune?
Guard your tongue from evil,
and your speech from deceitful speech.[36]

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Notes

1. Variously attributed to Eleanor Roosevelt and Admiral Hyman G Rickover.

Rickover quoted it in "The World of the Uneducated" (*The Saturday Evening Post*, November 28, 1959) where he prefaces it with, "As the unknown sage puts it..." There are variants attributed to others, as well.

2.Ibid. There is a tendency to regard the Talmud's adage as hyperbole, but the branding of Prime Minister Yitzhak Rabin z"l a *boged* (traitor) and *rodef* (pursuer whom one is obligated to kill before he commits murder) by a rabbi contributed to creating an atmosphere in which it was far more likely that someone would act on the "logic" and assassinate Rabin, as Yigal Amir did on November 4, 1995. See Moshe Zemer, "*Crime and Punishment in Jewish Law: essays and response*," W. Jacob and M Zemer (ed.) *Studies in Progressive Halakhah* (Freehof Institute of Progressive Halakhah, 1999), and Chaim Povarsky, "The Law of the Pursuer and the Assassination of Prime Minister Rabin," *Dinei Yisrael* 18 (1995-1996), pp. 7-59

3. Leviticus 19:16 instructs *le teileikh rakhil b'amekha* "Do not go about tale-bearing among [JPS: deal basely with] your people. Leviticus 25:17 more generally instructs, *lo tonu ish et amito v'yareita me-elohekha ki ani Adonai Elohekha* "Do not wrong one another, but fear your God; for I the Lord am your God." Tradition has long identified such "wrong doing" with gossip and tale-bearing, including statements that humiliate, insult, deceive, or cause emotional distress to another person. The Bavli, in masechet Baba Metzia 58b boldly interprets *lo tonu ish et amito* – overreaching in buying and selling – as applicable in the realm of spoken social intercourse, i.e. verbal wrongs. Numerous examples are given in the Mishnah, which are repeated and elaborated upon in the Gemara, and illustrated by an extended aggadah in which we learn that even God can commit the verbal violation of *tonu ish*.

4. In the weeks following Clementi's death, many people noted that three other adolescents – Billy Lucas, 15; Seth Walsh, 13; and Asher Brown, 13 – took their lives in response to taunting and bullying related to their real or perceived homosexuality. While Tyler Clementi's case is related to these because the harassment he suffered concerned sexual orientation, the use of the Internet to publicize his private behavior distinguishes this case for our purposes.

5.Owen documented highly personal information about basketball, lacrosse, and tennis players, including photographs, scores, and sexual ranking.

6.I received it from one congregant, wrote back providing documentation that it was a hoax, and received it again from the same congregant two months later. This testifies to how casually people forward hoaxes, lies, and inaccurate "information" without taking the time to examine and vet it, and even failing to note when others

have done so for them.

7. "A Girl's Sexy Text, and Altered Lives," Hoffman, New York Times, Sunday, March 27, 2011 (Vol.CLX, No. 555,357), p. 1 and 18.

8. Currently high-speed connections run at 256 gigabytes, but soon that number will seem quaint.

9. There are exceptions to the prohibition against *rechilut*. One may give testimony in a court to insure that justice is served; indeed one's obligation to give truthful testimony – even if it involves what appears to be *rechilut*, overrides the prohibition against tale bearing. One may speak about another person in order to protect a person from bodily harm (e.g., revealing a person's intention to commit murder). Similarly, one may reveal information about another to protect a person from entering into a business arrangement with a person who is untrustworthy or dishonest. This last exemption is complex and requires careful thought and a cautious approach.

10.The First Amendment of the U.S. Constitution, as interpreted by the Supreme Court in the 1964 case New York Times v Sullivan requires a public figure to prove not only defamation, but also "actual malice." This means that the person makingthe defamatory statement new it to be false and issued it without regard to the truth. Ariel Sharon, accusing *Time Magazine* of libel for its February 21, 983 issue that alleged that Sharon had "reportedly discussed with the Gemayels the need for the Phalangists to take revenge" for the assassination of Lebanese Christian President Bashir Gemayel prior to the massacres at the Sabra and Shatila refugee camps. *Time Magazine* was exonerated because although their story contained falsehoods and was defamatory, they had not acted with "acted out of malice." The courts have ruled that the category "public figure" can include individuals, who haveinvoluntary attracted public attention, such as those accused of crimes, or those whose actions bring them media attention, even for a limited period of time.

11. Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* Little, Brown, 2000. Gladwell, analogizing from the observed phenomenon in physics, describes the "tipping point" as an event that, previously rare, has become suddenly and dramatically common. Dr. Mark Granovetter, professor of sociology at Stanford University, observed the phenomenon and termed it the "threshold model of collective behavior." Examples abound in economics, human ecology, and epidemiology.

12.As just one example, three Cornell computer scientists, David Kempe (now at the

University of Washington), Jon Kleinberg, and Eva Tardos, authored a study published in 2003 in the Proceedings of the Ninth ACM SIGKDD International Conference on Knowledge Discovery and Data Mining. In their paper, the authors discuss how many people, and who, are needed to seed a cascading trend in a given social network. The seed group will convince others to follow the trend, transforming it into a "viral" phenomenon. They analyze what is the smallest seed group needed to initiate the cascade and who the individuals of that seed group might be.

13.The Trojan Room coffee pot was located in the old University of Cambridge (England) Computer Laboratory. A webcam was set up to provide constant monitoring of the coffee pot to save people the waste of time of making pointless trips to the coffee room. In 1993, the camera that had provided a live 128x128 grayscale picture of the coffee pot on workers' computers was connected to the Internet, and soon people around the world were checking to see the state of the Trojan Room coffee pot.

14.Actress and model Amber Lee Ettinger made an online video in 2008 entitled "I Got a Crush on Obama" that was viewed well over 21 million times (as of 2/6/2011) and garnered her appearances in a *Saturday Night Live* sketch, as well as an interview on *Geraldo at Large*.

15. Rick Astley's "Never Gonna Give You Up" (1987) became an internet meme in 2007, when it began to be used as a "bait and switch" joke: people provided a link to an article or video on a prescribed topic, but the link instead took the user to Astley's video. Other examples of memes include "The Last Lecture" by Randy Pausch and various *Saturday Night Live* sketches.

16. People do not interact with one another in real time in email and on the message boards. Responses may take minutes wor weeks. Feedback - scuch as disapproval or refusal to listen to *lachon hara* and *rechilut* is lacking.

17. Dr. John Suler, Ph.D., professor at Rider University, is author of numerous articles in the new field of CyberPsychology, and edits a journal entitled *CyberPsychology and Behavior*. His online article on the "Disinhibition Effect" is found at *a* http://users.rider.edu/~suler/psycyber/disinhibit.html; it is based on an article published in *CyberPsychology nd Behavior*, 7, 321-326.

18. http://users.rider.edu/~suler/psycyber/disinhibit.html (gathered 12/8/2010). There, Suler writes: "Life in cyberspace tends to disrupt these factors that support self-boundary. The physical body and its five senses no longer play as crucial a role as in face-to-face relationships. What others know or don't know about me is not

always clear. The feeling of a linear past, present, and future becomes more obscure as we move back and forth through synchronous and asynchronous communication. As a result, this altered state of consciousness in cyberspace tends to shift or destabilize self-boundary. The distinction between inner-me and outer-other is not as clear. The person shifts to what psychoanalytic theory calls "primary process thinking" in which boundaries between self and other representations become more diffuse, and thinking becomes more subjective and emotion-centered. Within the transitional space of online communication, the psyches of self and other feel like they might be overlapping. We allow the hidden self to surface because we no longer experience it as a purely inner self; but at the same time we also sense, sometimes vaguely and sometimes distinctly, the intrusion of an unknown other into our private world, which results in suspicion, anxiety, and the need to defend our exposed and vulnerable intrapsychic territory."

19. The Jewish Publication Society translation of Leviticus 19:16 reads: "Do not deal basely with your countrymen," and provides a footnote that the meaning of the Hebrew is uncertain.

20. Maimonides *YadhaChasakah*, Tum'at Tzara'at 16:120.

21. *Sifrei Metzora* on Numbers loc.cit.: *Avot de-Rabbi Natan* loc.cit.

22. Babylonian Talmud, Arakhin 15 b.

23. Midrash Tanhuma, *parshat Metzora*.

24. Of the 43 sins enumerated in the traditional *al Cheit* confessional of Yom Kippur, eleven are sins committed through speech.

25. One dramatic example of the confluence of these many new facets of communication via the Internet will suffice to dramatize the degree of the problem. A popular advice column, "Ask Amy," authored by Amy Dickinson and syndicated in newspapers across the country, printed a letter on February 14 and 15, 2011 in which a customer service employee claimed she was fired due to an angry young customer who refused to speak with the manager yet tweeted her complaint later that evening. Managers at the headquarters learned of the tweet and fired the employee. (The letter was available on 4/3/2011 at http://www.startribune.com/lifestyle/116183554.html.)

26. Two additional pieces of advice to reduce *lashon hara* at the keyboard: (1) impose a waiting period before forwarding or sending anything that might contain

lashon hara because a waiting period reduces the urgency and pleasure of sending or forwarding something that is inappropriate; and (2) ask someone you trust to read and vet what you are considering sending to others. 27. Moses Maimonides, *Mishneh Torah*, Hilkhot Deot 7:1.

28. Maimonides quotes this passage from Arakhin 15b in *Hilkhot Deot* 7:4. See Appendix A. Ibid. 7:6. See Appendix A.

29. Ibid. 7:6. See Appendix A.

30. Chofetz Chaim, *Shmirat haLashon*, Hilkhot Esurei Rechilut 9:1. The safeguards that follow are from the same citation.

31.In this regard, halakhah comes to a different conclusion than U.S. law, which does not provide protections for public personages as it does for private individuals.

32. Ibid. 7:4.

33. Attributed to Rabbi Israel Salanter (1810-1883), founder of the Musar Movement.

34. *Bereishit Rabbah* 98:23.

35. Midrash Tehillim 120, ed. Buber, p. 503.

36. Psalm 34:13-14.

37. Rambam quoting *Arakhim 16b and Midrash Tanhuma, Parashat Metzora.*

NECESSARY ACTS AND ADDITIONAL DELIGHTS
CONNECTIVITY AND SHABBAT

Lisa J. Grushcow

A number of years ago, I gave a sermon on Shabbat Vayakhel[1] In it, I explored notions of work and rest, asking whether we can find ways to choose not to work. One congregant heard it as a personal challenge. Recently, she wrote me this account:

> So, as a Reform Jew (and one who came to my involvement as a Jew very late in life), I never really thought of how I would observe Shabbat. Sure, I went to services every Friday night that I could (and sometimes on Saturday mornings) and we lit candles every Friday night but that was the extent of my observation of Shabbat. Until, one Friday night about five years ago, when [you] suggested during a sermon that we just stop doing one thing on Saturdays to observe the Sabbath.
>
> Because I tend to work all the time, I had to think a bit about this; finally though, I decided to stop e-mailing. This was difficult in the beginning but not for long. Observing Shabbat in this way has allowed me to spend more time really relaxing and thinking about my blessings which are many…It has made a very big difference in my life.[2]

This congregant's experience led me to take this paper as an opportunity to explore Reform Judaism's teachings on Shabbat, as they have been written for congregants looking to observe it. Specifically, her experience with email led me to a study of how these teachings might relate to our own modern issues of connectivity, work and rest. How might a committed lay person – or member of the clergy – approach Shabbat, guided by our movement's writings? For the purposes of this paper, I focus on the sixty years of the post-WWII period. I will begin with a discussion of significant statements about Shabbat observance over

this time period; turn to a consideration of what might be new or different about the issue of connectivity; and conclude with reflections as to how we might approach the internet and halakhah on Shabbat, with a focus on personal Shabbat observance.

In 1952, Rabbi Israel Bettan wrote a responsum which addressed a number of Shabbat-related questions together.[3] He opened this responsum, titled "Sabbath Observance," with the following observation: "For some time now, many of the questions directed to the Committee on Responsa have had to do with situations in which traditional observance of the Shabbat is involved." Those questions included whether dances could be permitted in the Temple on a Friday night, or whether a synagogue could sponsor a teenage baseball team's practice on a Saturday afternoon, despite Orthodox objection.

Bettan offers a summary of rabbinic law on these topics, focusing on leniencies, as well as observing that in the absence of a widespread five day work week, the major issue for many Jews is the requirement that they work on Shabbat. He then makes the following argument:

> Yet, however wide an area of freedom we may still discover within the narrow limits of traditional law, no one who is acquainted with the vast bulk of restrictive measures designed to keep the Sabbath inviolate will question the accuracy of the Mishnaic observation, that the Sabbath laws represent "mountains suspended from a hair" (Chagiga 10a). But, unfortunately, we have chosen to avert our gaze from these mountains. We prefer to ignore their presence. In doing so, however, we have willfully turned away from the opportunity that was ours to bring the institution of the Sabbath under the searching light of liberal thought…

> The principle that fences must be built around the law, which has led to the enactment of countless precautionary regulations, is a principle that we today must boldly reject in the interest of a saner observance of the Sabbath. Instead, we should reaffirm and employ as our constant guide the more important and fruitful Rabbinic principle: That the Sabbath has been placed in our control, and that we are not under the control of the Sabbath (Yoma 85b).
> Taking our stand on this principle, we shall, of course, continue to stress the twofold nature of our Sabbath, namely, that it is our Jewish day of rest, and that, moreover, it is a day dedicated to the delights of the soul. But we shall not seek, in the name of Judaism, to deny men the freedom to perform such necessary acts and to engage in such additional delights as they have learned to associate with their periods of rest. In an age like ours, when we have come to view sports and games of all sorts as proper forms of relaxation on rest days; to hark back to the puritanic rigors of the Rabbinic Sabbath is to call in question the relevancy of religion to modern life.

At the beginning of the second half of the twentieth century, then, the Reform position on Shabbat observance – as expressed by Bettan – was to emphasize the need to move away from the traditional system of Shabbat restrictions. The traditional categories of work were all determined by the occupations of Jews in the Biblical and Rabbinic periods, with additional restrictions built on the precautionary basis of fences around the law.
To be relevant, Judaism had to abandon these "puritanic rigors," and expand its notion of rest (rather than work) to allow for new definitions.

Rest in the modern world, according to Bettan, included "necessary acts" and "additional delights" that traditionally were

forbidden, but could no longer be denied. The fundamental question of this paper is how Reform Jews might determine what acts are necessary or unnecessary, diminishing or delightful, as we try to observe the timelessness of Shabbat in our own particular time.

Twenty years after Bettan's responsum, the CCAR published *A Shabbat Manual*, as the culmination of the work of a Sabbath Committee under the leadership of Rabbi W. Gunther Plaut. Whereas both Bettan and Plaut are striving to make Shabbat viable for modern Reform Jews, Bettan's emphasis is on freeing them from traditional strictures, while Plaut's emphasis is on rediscovering the principles behind them. Much of this difference is attributable to the different reasons for which they are writing, but the divergence seems to have deeper roots. On the very first page of Plaut's guide, the loss of the "discipline" of Shabbat is lamented as "both tragic and unnecessary"; the manual itself is offered as "our beginning in the effort to recover Shabbat observance as an enhancement of Jewish life."[4]

Bettan had suggested that, "many of us might even today be true Sabbath observers in the essential meaning of the term, if we could but rescue the Sabbath from the host of unreasonable restrictions which mar its character and weaken its appeal to the modern mind."[5] From Plaut's vantage point, this revitalization of Shabbat does not seem to have happened:

Among large numbers of our people only a few negative Shabbat commandments are still observed. We do not have funerals or weddings on the seventh day, but otherwise there are more exceptions than observances. Of the positive commandments, equally little remains, like the lighting of the candles, a simple *Kiddush*, and an occasional visit to the synagogue[6] .

Despite the arrival of the five day workweek (Plaut even refers to a four day week), Shabbat is largely neglected. Plaut's call therefore is for something more substantive:

> Beyond these remnants must lie a renewed commitment of the Jew to his people and to his future, and in a deeper sense, a commitment also to the God of Israel. Since we can no longer make this commitment under the force of communal disapproval or penalty, we must make it by free decision. We must do it because this is how we *want* to live, and because we know that this is how we ought to live. Here the concept of mitzvah enters… For us, mitzvah means that God offers an opportunity to introduce an "ought" into our existence."[7]

So what "ought" the Reform Jew do on Shabbat, and why? Plaut delineates five purposes of Shabbat observance, and connects each one with a theme central to biblical or rabbinic understandings of Shabbat.[8] Here, I list Plaut's five purposes, with the English titles and Hebrew transliterations he provides, along with my own translation of the Hebrew:

1. Awareness of the World (*zikaron lema'aseh bereshit*: remembrance of the works of creation)
2. Commitment to Freedom (*zecher litzi'at mitzrayim:* remembrance of the going out from Egypt)
3. Identity with the Jewish People (*berit*: covenant)
4. Enhancement of the Person (*kedushah, menuchah, oneg*: holiness, rest, joy)
5. Dedication to Peace (*Shabbat shalom*: Sabbath peace)

From these purposes, Plaut goes on to catalogue specific mitzvot – in his words, "Shabbat Opportunities." Despite the creative language, he is clear what he means about commandments:

> You must always remember that you are performing mitzvot. It is not a question of "how you feel about it" at any given time. You may not be "in the mood." But being a Jew is not always convenient or easy. The performance of mitzvot ought to be the pattern of one's life. The more deep-rooted such a pattern, the more intense and regular one's performance of mitzvot, the richer and truer will be one's life as a Jew.[9]

Plaut includes a list of positive and negative commandments for liberal Jews related to Shabbat. The *mitzvot lo ta'aseh*, negative commandments, are listed with the caveat that "experience and personal circumstance" will indicate whether certain specific activities are appropriate for any given individual: not engaging in gainful work; not performing housework; not shopping; not participating in social events or public events during worship hours; and avoiding all public activity which violates or gives the appearance of violating *Shemirat Shabbat*.[10] Notably, whereas Bettan, in his responsum, cites Yoma 85b to insist "[t]hat the Sabbath has been placed in our control, and that we are not under the control of the Sabbath," Plaut cites the words of Ahad HaAm: "More than Israel has kept the Sabbath, the Sabbath has kept Israel."[11]

The next Reform publication which addressed Shabbat observance in a significant way was Peter Knobel's *Gates of the Seasons*, published twenty years after Plaut's manual. Knobel frames his discussion of Shabbat by noting the importance of two Shabbat commandments, as found in the two different versions of the Ten Commandments in Exodus and Deuteronomy: one is connected with creation and the other with redemption; one uses the word *zachor*, which he defines as spiritual rest and sanctification, and the other uses the word *shamor*, which he defines as physical rest and the avoidance of labor. Knobel then states:

The primary goal of Shabbat observance is the avoidance of gainful work and of all activities which do not contribute to the celebration of Shabbat as a day of joy (*Oneg*), a day of holiness (*Kedushah*), and a day of rest (*Menuchah*). Shabbat is a day of leisure in which time is used to express our humanness.[12]

Knobel then revises Plaut's list of Shabbat *mitzvot*. Knobel's list is longer than Plaut's, and includes more of what might be called the ethical *mitzvot* in addition to the ritual ones. Concerning refraining from work, Knobel recognizes the challenge of defining what qualifies as work that should be avoided on Sabbat:

Abstinence from work is a major expression of Shabbat observance; however, it is no simple matter to define work today. Certain activities which some do to earn a living, others do for relaxation or to express their creativity. Clearly, though, one should avoid one's normal occupation or profession on Shabbat whenever possible and engage only in those types of activities which enhance the *Oneg* (joy), *Menuchah* (rest), and *Kedushah* (holiness) of the day.[13]

Whereas for Plaut the definition of work was relatively straightforward, for Knobel it is not.

The question of what is rest and what is work comes to the fore in the *Gates of Shabbat*, written by Rabbi Mark Shapiro and published by the CCAR in 1996. *Gates of Shabbat* is intended as a new guidebook to observing Shabbat for Reform Jews, based on Plaut's efforts a generation before. The tone is noticeably different, and this difference is acknowledged in one of the final sections, "Thinking in Terms of Mitzvah/Commandment for Reform Jews." Whereas Plaut defines *mitzvah* as "what a Jew ought to do in response to God and the tradition of our people," Shapiro suggests

that a sense of *mitzvah* is a goal of Reform Shabbat observance, but not its starting point. He writes:

> The hope [behind this new manual] was that Reform Jews had a text which helped them encounter the beauty and joy of Shabbat, they would embrace Shabbat as a necessity in their lives. In other words, *Shabbat would become a mitzvah for Reform Jews*… Hopefully, your experience of Shabbat will add a dimension of sanctity to your life that nothing else can replace. When that happens, *you ought to begin to feel commanded to observe Shabbat because you would not want to do anything but that*. At that time what you do will not only strengthen you as a Jew, but also strengthens the Jewish people.[14]

In keeping with this approach, the actual listing of Shabbat *mitzvot* – which is almost an exact replica of the one in *Gates of the Seasons* – appears towards the end of *Gates of Shabbat*. Instead, the center of Shapiro's guide is a section on "Establishing Definitions for Work and Rest on Shabbat." This is defined as the greatest challenge facing "the contemporary Jew who wants to observe Shabbat," and yet Shapiro insists that "these very worthwhile tensions are the creative dynamic out of which you can fashion your Shabbat observance."[15] The itemization of *mitzvot* has yielded its place to a focus on what might inspire the reader to begin to explore Shabbat observance.

Shapiro's guide then offers three different models for work and rest on Shabbat: the walker, who aims at a complete change of pace on Shabbat, withdrawing from work and human creation; the museumgoer, who focuses on refreshing the soul, and celebrating freedom from necessity; and the painter, who uses creativity to express a sense of liberation. Although these models are radically different from each other in terms of the traditional *mitzvot* of

Shabbat, Shapiro argues that what is essential is what they share: "The walker, the museumgoer, and the painter are authentic Reform Jews because the decisions they reach are made with sincerity, commitment, and a desire to draw on the resources of Judaism in order to enrich contemporary life."[16]

The reader is encouraged to make similar decisions, deciding on his or her own definitions of work and rest. To help the reader do so, the guide suggests six questions, similar but not identical to the five principles delineated by Plaut. Shapiro's six questions are:[17]

1. Will this activity lend Shabbat a quality of kedusha/holiness?
2. Is this activity done for its own sake or is it merely a means to an end?
3. Does this activity imbue Shabbat with a sense of liberation?
4. Does this activity help cultivate a sense of wonder at God's creation?
5. Does this activity advance the spirit of Shabbat embodied in the home and synagogue celebrations of the seventh day?
6. Does this activity bring me closer to the Jewish people?

Fundamental to this approach is the assumption that definitions of work and rest change. Like Bettan, who argued that the traditional halakhic definitions of work were based on the social and economic context in which they were written, so too here: "Reform Jews depart from the traditional definitions of work and rest because we believe they do not represent the final word on Jewish practice."[18]

Mark Washofsky's guide, *Jewish Living*, came out four years after the *Gates of Shabbat*, and consolidates the mitzvot of Shabbat observance into four: remembering Shabbat through liturgy; observing Shabbat by refraining from work; and honoring and

delighting in Shabbat through special food, clothes, and use of time.[19] Washofsky acknowledges that "the idea of *mitzvah*, of commandment, is deeply problematic in Jewish theology," but at the same time, "no matter how "Reform" our Judaism, it would be Jewishly unthinkable without the *mitzvot* of Shabbat."[20] He draws on the earlier works, especially *Gates of the Seasons* and *Gates of Shabbat*, to outline what contemporary Reform Jewish Shabbat observance might look like. Washofsky concludes:

What unifies these alternatives is the conception that Shabbat is a day that is not to be treated like any other. It is not merely a day off; it is rather an expanse of time that is holy, different in quality and essence from all other days, consecrated both to God and to us for the purpose of our fulfillment as Jews.[21]

Finally, in 2007 came the URJ's Embracing Shabbat Initiative, based on Rabbi Eric Yoffie's biennial sermon. This initiative was primarily focused on Shabbat synagogue observance, and in particular Shabbat morning services. But Yoffie also spoke to the place of Shabbat in the practice of individual Jews:

But most important of all, Reform Jews are considering Shabbat because they need Shabbat. In our 24/7 culture, the boundary between work time and leisure time has been swept away, and the results are devastating. Do we really want to live in a world where we make love in half the time and cook every meal in the microwave? When work expands to fill all our evenings and weekends, everything suffers, including our health. But families take the worst hit. The average parent spends twice as long dealing with email as playing with his children.
For our stressed-out, sleep-deprived families, the Torah's mandate to rest looks relevant and sensible. Our tradition does not instruct us to stop working altogether on Shabbat; after all, it takes a certain amount of effort to study, pray and go to synagogue. But

we are asked to abstain from the work that we do to earn a living, and instead to reflect, to enjoy and to take a stroll through the neighborhood. We are asked to put aside those Blackberries and stop gathering information, just as the ancient Israelites stopped gathering wood. We are asked to stop running around long enough to see what God is doing.

And this most of all: In synagogue and at home, we are asked to give our kids, our spouse and our friends the undivided attention that they did not get from us the rest of the week. On Shabbat we speak to our children of their hopes and dreams. We show them that we value them for who they are and not for the grades they get or the prizes they win. During the week we pursue our goals; on Shabbat we learn simply to be.[22]

Yoffie insists that Reform Shabbat observance will not be "neo-frumkeit" or "an endless list of Shabbat prohibitions;" like Betton, Yoffie argues that "we fled that kind of Shabbat, and for good reason."[23] Rather, it will be creative, emphasizing the positive mitzvot over the negative ones, revisiting the definitions of work and rest, and recognizing that no approach will fit everyone. The resulting publication, *Embracing Shabbat*, thus offers many texts and suggestions for study, but unlike the CCAR publications, it is not a guide.

One might see *Embracing Judaism* as the end point; following the Reform model of informed choice, the individual studies and decides. But the "worthwhile tensions" referred to in *Gates of Shabbat* are prominent. In particular, what does it mean to put aside our Blackberries and stop gathering information, if Reform Shabbat observance is to be characterized by positive, and not negative, commandments? What are we to make of the fact that groups outside the world of organized religion – most notably, Reboot and its Sabbath Manifesto [24] – are calling precisely for a

day of rest which avoids technology?[25] What is it about the use of technology, and connectivity and the internet above all, that brings the question of Shabbat observance to the fore?

Much has been written in recent years about the effects of constantly being connected to the internet, primarily through mobile devices, and all that entails: the prevalence of social media such as Facebook and twitter, and the constant access to email and work. In addition to the flurry of articles about Reboot's National Day of Unplugging (the second one was observed on the Shabbat of March 4-5, 2011), the New York Times ran a series called "Your Brain on Computers," and books like Nicholas Carr's *The Shallows: What the Internet is Doing to our Brains* and Sherry Turkle's *Alone Together: Why We Expect More from Technology and Less from Each Other* are being widely read and discussed.[26] The argument found in many of these books and articles is that our use of the internet – and in particular, the practices of multitasking and constantly looking for new information – are altering everything from our brain chemistry to our relationships with our children and spouses. The titles of the articles in the New York Times series are indicative of the issues that they raise: "An Ugly Toll of Technology: Impatience and Forgetfulness," "The Risks of Parenting While Plugged In," "Digital Devices Deprive Brain of Needed Downtime," and "Growing Up Digital, Wired for Distraction," to name a few.[27]

In addition to the growing body of scientific literature is anecdotal evidence. Individuals who experiment with "unplugging" for limited periods of time use words like "unbearable" to describe their experience.[28] Rabbis are far from immune; if anything, the extent to which our work requires multitasking might make us more vulnerable. There is the story of the rabbi whose toddler dropped his cell phone in the toilet when he kept using it on his day off;[29] the rabbi who made a Rosh Hashanah resolution not to

use the internet on Friday nights, but couldn't resist checking Facebook and Twitter; and my own experience, even on maternity leave with an "out of office" message set on my computer, of checking email almost constantly.

In 1971, Rabbi Morrison David Bial wrote *Liberal Judaism at Home*, and in it he contrasts traditional and liberal Shabbat observance. He observes: "Most willingly, the traditional Jew separates himself from much that most Liberal Jews consider necessary, the telephone and radio, all mechanical transport... cooking, smoking, and much more."[30] This is evocative of Bettan's reference in his responsum to "necessary acts and additional delights." The word "necessary" is notable. From this vantage point, it could be argued that the issues raised by the internet are nothing new; there are many aspects of weekday life which liberal Jews are not willing or wanting to abandon on Shabbat. However, when it comes to the issue of connectivity, it is worth noting that this phenomenon is not limited to the liberal Jewish world. Within Orthodoxy, the phenomenon has emerged of teens observing "half shabbos," in which they keep using social media on Shabbat, arguing that they can't communicate without it.[31]

Notes

1. Rabbi Lisa Grushcow, "Choosing to Work, Choosing to Rest: *Vayakhel* 5765."

2. Personal correspondence,with Jane Dystel March 24, 2011.

3. Rabbi Israel Bettan, "Sabbath Observance," Walter Jacob (ed.), *American Reform Responsa 1889-1983* (excerpted from the CCAR Journal, Vol. LXII, 1952, pp. 129-132).

4. W. Gunther Plaut (ed.), *A Shabbat Manual*, New York, 1972, p.1.

5. Bettan, *op cit.*

6. Plaut, p.4.

7. Ibid.

8. Ibid, pp.5-6.

9. Ibid, p.8.

10. Ibid, pp.11-13.

11. Ibid, p.13.

12. Peter Knobel (ed.), *Gates of the Seasons: A Guide to the Jewish Year*, Central Conference of American Rabbis, New York, 1983, p.18.

13. Ibid., p.23.

14. Mark Dov Shapiro, *Gates of Shabbat: A Guide for Observing Shabbat*, Central Conference of American Rabbis, New York, 1996, p.92.

15. Ibid., pp.49 - 50.

16. Ibid., p.54.

17. Ibid, p.55.

18. Ibid, p.57.

19. Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice*, New York, 2001, p.72.

20. Ibid., p.74.

21. Ibid., p.84.

22.. Eric Yoffie, "Adapted from a Presidential Sermon, Delivered at the 69th General Assembly, December 15, 2007," Sue Ann Wasserman (ed.), *Embracing Shabbat: 2007 Biennial initiative*, New York, 2007, p.12.

23. Ibid.

24. "The Sabbath Manifesto was created by a group of Jewish artists in search of a modern way to observe a weekly day of rest. The group are all members of Reboot, a non-profit group designed to "reboot" the cultures, traditions and rituals of Jewish life." See http://rebooters.net/.

25. Reboot's "Ten Principles" overlap significantly with many of the lists of Shabbat mitzvot in Reform writings: *1. Avoid Technology 2. Connect with your loved ones 3. Nurture your health 4. Get outside 5. Avoid commerce 6. Light candles 7. Drink wine 8. Eat bread 9. Find silence 10. Give back.* In the"About" section, the authors describe their aims as follows: "Way back when, God said, "On the seventh day thou shalt rest." The meaning behind it was simple: Take a break. Call a timeout. Find some balance. Recharge. Somewhere along the line, however, this mantra for living faded from modern consciousness. The idea of unplugging every seventh day now feels tragically close to impossible. Who has time to take time off? We need eight days a week to get tasks accomplished, not six. The Sabbath Manifesto was developed in the same spirit as the Slow Movement, slow food, slow living, by a small group of artists, writers, filmmakers and media professionals who, while not particularly religious, felt a collective need to fight back against our increasingly fast-paced way of living. The idea is to take time off, deadlines and paperwork be damned. In the Manifesto, we've adapted our ancestors' rituals by carving out one day per week to unwind, unplug, relax, reflect, get outdoors, and get with loved ones. The ten principles are to be observed one day per week, from sunset to sunset. We invite you to practice, challenge and/or help shape what we're creating." See http://sabbathmanifesto.org

26. *Your Brain on Computers*, a series of seven articles by various authors from the *New York Times*, June 7, 2010-Nov. 21, 2010. Nicholas Carr, *The Shallows: What the Internet is Doing to our Brains*, New York, 2010. Sherry Turkle, *Alone Together: Why We Expect More from Technology and Less From Each Other*, New York, 2011.

27. The following is a list of the seven articles in the series, in chronological order: Marjorie Connelly, "More Americans Sense a Downside to an Always Plugged-In Existence," June 7, 2010; Tara Parker-Pope, "An Ugly Toll of Technology: Impatience and Forgetfulness," June 7, 2010; Matt Richtel, "Attached to Technology and Paying a Price," June 7, 2010; Julie Scelfo, "The Risks of Parenting While Plugged In," June 10, 2010; Matt Richtel, "Outdoors and Out of Reach, Studying the Brain," August 16, 2010; Matt Richtel, "Digital Devices Deprive Brain of Needed Downtime," August 25, 2010; Matt Richtel, "Growing Up Digital, Wired for Distraction," November 21, 2010.

28. Tara Parker-Pope, "An Ugly Toll of Technology."

29. Rabbi Michael Latz, personal communication (Facebook message, March 28, 2011). "Basic story: I was working too much. Promised to take Noa to the zoo on Sunday morning. Then took one call after another saying "5 more minutes." after 2 hours, she got fed up, took my cell phone, and plopped it in the toilet. Best lesson of my rabbinate! :-)"

30. Morrison David Bial, *Liberal Judaism at Home: The Practices of Modern Reform Judaism*, Summit, New Jersey, 1967, p.104.

31. Miriam Shaviv, "New ways of wishing 'gd Shbs'," thejc.com (Jewish Chronicle), Jan. 28, 2011.

WORSHIP IN THE CLOUD

Worship Services Over the Internet

Jason Rosenberg

As I was finishing up the research for this paper, workmen were scurrying around my synagogue pulling various cables through the walls and ceilings, connecting various parts of the building. As I begin to write this, they are in the sanctuary, testing out various locations for a couple of cameras, and hooking those cameras up to some of those cables which they recently put in place. Why? It goes by various names, but it's usually called webcasting, livestreaming, or just streaming. In short, it's using the Internet to broadcast events, as they happen.

In just the last few years, the technology to allow this kind of broadcasting has become widely available and extremely affordable. Almost all new computers come with the necessary technology built in. In other cases, it would cost well under $100 to add the basic capability to a computer. More elaborate, higher quality setups, which would have cost tens of thousands of dollars, not so long ago, have now come down in price to the point where many synagogues can think about installing them. They are installing them, usually for the purpose of live-streaming services. For the first time, many synagogues are offering their members, or in some cases, anyone who's interested, the ability to observe services, in real time, from another location.

In 2001, the Conservative Movement [1] examined this issue in a comprehensive responsum. Although our approach will necessarily be different from theirs, as will our conclusions, much of their thinking is extremely relevant to us. This paper owes a great deal to that responsum.

It is not the intent of this paper to be a responsum, itself, rather, an attempt to give an overview of some

of the halakhic issues surrounding live streaming services, and to raise some issues which must be considered by those who wish thoughtfully to evaluate this practice for themselves.

Why would a synagogue livestream its services and make its services available to anyone with a web connection? Based on anecdotal evidence, the dominant reason seems to be to serve those who are unable to physically attend, the hospitalized and homebound.

Clearly, those who are unable to attend services can gain substantial benefit, from participating through a webcam. Indeed, it seems to be a kind of *bikur holim,* probably not as effective or sacred as an in-.person visit, but still capable of countering some of the loneliness and capable of lifting the spirits of some of those who are saddened by their isolation.

There is some precedent for this kind of distance praying In a 1989 responsum[2] the Responsa Committee was asked whether it was appropriate to record services for Shabbat and holidays, and to then broadcast them to patients in a hospital. The committee allowed it, but not without reservations. As we will see later, they seem to imply that although this was an acceptable activity, it was not to be seen as " real prayer."

Also frequently mentioned as a potential target for this kind of technology are the relatives a *bar* or *bat mitzvah*, or of a participant in a wedding or other

simhah, who are not able to join their families for their loved ones big day. We live in a time where family is often spread far and wide, and unable to come together for the major moments of life. Without suggesting that it is as good as being here, this does allow people a kind of participation, even if passive.

Interestingly, in the RA's responsum on this issue, Rabbi Reisner suggests that this kind of connection over a distance may have a very ancient analog. In 1998, Rabbi Saul Berman argued that the *maamadot* service may have originally been intended to solve this exact problem. It might have been a way for persons living too far from Jerusalem to participate vicariously in the Temple service. As Rabbi Reisner says, "One cannot help but wonder what arrangement would have been made had our current technology for distant connection been available."[3] Less often cited as a motivation for making services available online is the hope that this will serve as an enhancement or promotion of Judaism. By allowing those who might not otherwise enter a synagogue be spurred into greater observance. It is true that fear and inertia have kept many a person from attending services. It's certainly possible, therefore, that an easy way to observe and learn could be the first step towards a life of larger observance and participation.[4]

There are other reasons, as well, for some synagogues to make their services available on the Internet. It can be a form of advertising, and outreach. What better way to judge a synagogue than by observing its services? Some synagogues, and non-synagogue communities, are exploring the possibility of promoting Internet services as an equally valid alternative to physical congregating. This last

possibility is, of course, the most controversial, and will be addressed later.

May a Service be Broadcast Over the Internet?

Very often, when this issue is raised, people immediately begin discussing whether or not it is a valuable, worthwhile endeavor, and whether or not we can consider this true participation in a worship service. But, in fact, there is a prior question which must be asked: are we allowed, in a Reform Jewish context, to livestream our services? Although we may not be used to thinking in terms of allowed on these issues, the *halakhah* does raise some interesting and important questions.

Although the question of live streaming services is new, there are relevant precedents within halakhic literature. The permissibility of microphones during services, especially on Shabbat, has long been debated within Judaism. We also have long had the capability to make a video and audio recordings of our services, and many issues which arise with live streaming are relevant to those technologies. Rulings around those issues can definitely inform us as we explore this new technology.

The question of livestreaming should not be restricted to Shabbat services; the technology is useful for any service, though currently most of our worship happens on Shabbat, and that is certainly what most others are most likely to want to observe. Even though livestreaming may be a new technology, it relies heavily on older technologies including the microphone. Many authorities across the religious spectrum have ruled on the permissibility of using microphones in worship, on Shabbat as well as other

times. It is generally assumed that, in the halakhic world, microphone use is forbidden without question. But, that is not completely true. Current normative Orthodox practice certainly forbids the use of microphones on Shabbat,[5] on two grounds: the use of electricity, and the creation of something new in this case, a sound.

In terms of electricity, it's obvious that all microphones, whether attached to a PA system or a webcam, use electricity. But, that does not automatically forbid their use on Shabbat; electric lights may be used on Shabbat, provided they are turned on before Shabbat begins, or via a timer. But, halakhic authorities do not apply this logic to microphones as they use more or less electricity depending on whether they are amplifying sound. So, speaking into a microphone, even if already turned on, would constitute "additional work," and therefore be forbidden. In recent times, there have been efforts to make a "Shabbat microphone"which use a constant amount of electricity and might therefore be usable, much as a Shabbat elevator.[6]

In our context, this would not be necessary, as Reform Judaism has long asserted our right to use electricity on Shabbat. We use light, heat, air-conditioning, etc. There is no reason to think that a microphone attached to a webcam should be treated differently.

The other main halakhic objection to microphone use on Shabbat deals with "creation." There are those who feel that amplification systems do not truly "amplify" sound, but "create" a new sound similar, but louder, than the original sound and from a technical point of view, they are surely correct. As such, even without involving electricity, they would constitute a violation of Shabbat.[2] Again, clearly this is not a concern from a

Reform point of view. We engage in many similar acts of creation and using PA systems is just one of them. There is no reason to be stricter with webcams than other similar systems.

As an aside, it is worth noting that Orthodox Judaism was not always united in its opposition to electrical amplification on Shabbat. Arguments were made that a sound system can be viewed like electric light, and could be used, if not turned on or otherwise adjusted once Shabbat began. if turned on before Shabbat, whether manually or through a timer, some synagogues allowed it. Indeed, several Orthodox synagogues used microphones on Shabbat, well into the mid-.twentieth century.[8]

Why is that no longer the case? Some who believe that, at least this is partially a reaction to Reform and Conservative Judaism leniency.[9] However, it's also important to note that there were other halakhic reasons besides *hukat reformim* to forbid microphone usage, and some Orthodox deciders directly refute this idea.[10] Whatever the motivation, clearly at one point, some halakhic authorities permitted the use of microphones on Shabbat. Currently, essentially none do. For those within our movement who try to keep electrical use to a minimum on Shabbat, it is worth noting that there has always been a *mekeel* position.

Photography and Videography

Long before livestreaming, synagogues had to face the question of recording services. Photography and videography are not new, and their appropriateness at Shabbat services has regularly been debated as has another older technology, very

similar to live streaming, closed-circuit television. Many congregations, especially on the High Holy Days, when seating is at a premium, have set up cameras and microphones so that others in distant parts of the building might observe services in real-time. "Distance praying" will be discussed later. Currently, we are interested in the question whether cameras and microphones should be allowed in the sanctuary, at all.

Both the Reform and Conservative movements have looked at this question over the years. Within the Conservative responsa, we can see an example of halakhic reasoning which probably does not apply in our context. The question of "writing." Several responsa debate whether recording on a videotape or audiotape, qualifies as "writing."[11] It is one of the thirty-nine *melakhot*, and therefore forbidden on Shabbat. Some argue that the technology is so different that it does not qualify,[12] while others state that the function of videotaping is essentially identical to writing, and therefore must fall under the same halakhic prohibitions.[13] Still others argue that videotaping s actually most similar to audio amplification (i.e. the use of microphones), and since microphones are explicitly allowed in the Conservative movement, there is no reason to prohibit video cameras, as well.[14]

Tech Support and Making a Tikun

The issue of *shema yitaken*, lest something be fixed. raised in an early Conservative responsum may interest us. Certain activities have long been prohibited on Shabbat not because they are themselves forbidden, but because engaging in them may necessitate a repair which would be a violation of Shabbat. Most famously, musical instruments may not be played on Shabbat for this reason (for

example, repairing a broken guitar string would qualify as a *tikun*, so playing guitar is a violation if *shema yitaken*). Rabbi David Lincoln[15] noted that the presence of a complicated recording system would almost guarantee, the need to make a repair during Shabbat services. Sooner or later, technology breaks down; there are no fool-proof systems. Anticipating the rejoinder "if it breaks/stops functioning, we will just leave it and fix it after Shabbat. Lincoln points out the unrealistic nature of this plan. Especially if these cameras are used for *bar mitzvah*, it is all but impossible to imagine that we would tell the family, sorry no recording for you.

While *shema yitaken* might not be a category with which most Reform Jews are familiar, or to which we pay much heed, it does contain an important lesson for us. We might be willing to allow simple " repairs" on Shabbat; indeed, we may not see these as a violation of Shabbat, at all. But, getting involved in complicated technical support is certainly not in the spirit of Shabbat. Is it fair that the known " techie" who is in synagogue simply to pray might be called on to suddenly troubleshoot a problem during services? What would happen if, in the middle of service, someone runs up to the rabbi and whispers, "Don't start the Torah service yet; the webcam has stopped working?"

One could argue that we already face this problem, since we regularly use sound systems and video recorders. But, the complexity of webcams and livestreaming is far greater than these simpler, better established technologies. It is reasonable to believe that a video camera can be turned on and left alone for the duration of the service. It is reasonable to believe that a sound system that works at the start of services can be counted on for the duration. It is probably not reasonable to believe, at least now, that

webcams, computers, and Internet connections will be as reliable. Synagogues who wish to use them on Shabbat had best be prepared, and willing, to fix them on Shabbat, as well.

Protecting the Sacred Nature of the Service

When in 1986, the Responsa Committee answered the question about videotaping services,[16] Rabbi Jacob answered in the affirmative, but took the opportunity to mention the importance of maintaining decorum and the sacred character of the service. Videotaping which was obtrusive to worshipers, or had an impact on the behavior of those present, was not acceptable and, indeed, not permissible. Those caveats seem to apply to livestreaming, possibly even to a greater degree.

The important question seems to be, does livestreaming change the service for those present? One could argue that there is no difference between videotaping, to which most worshipers are by now quite accustomed, and livestreaming. Indeed, one could argue that livestreaming is less obtrusive, since the cameras can often be permanently fixed out of the way, and be all invisible to the worshipers, while video cameras are most often placed on tripods in the back of the sanctuary. If video cameras are allowed, *al achat cama chama* webcams!

On the other hand, it's possible that the knowledge that this service is viewable across the world could be relevant, and distracting, to those who are participating. Will people feel less comfortable knowing that anyone could be watching? That discomfort may surely have a negative impact on their worship experience. More likely is the possibility that the presence of cameras, and a potentially

infinite audience, will affect the behavior of the Rabbi and the Cantor. The 1986 responsum addresses this, as well, and points out the inappropriateness of staging the service for the cameras. The clergy must not "play to the cameras." The cameras must be passive observers of the scene; any modifications that we make to the service for their benefit would be problematic.

In the end, it seems hard to make the argument that webcams are qualitatively different (or, possibly, even quantitatively) from video cameras. But, its worth keeping the question open, as we see the effect of more webcams in our services.

Recruiting and Hasagat Gevul

One potential issue which arises for livestreaming is that of institutional boundaries and recruiting, or "poaching" from each other. In all likelihood, none of the current congregations which are livestreaming their services, or which are considering doing so, are doing so in the hopes of attracting members from other congregations, but intentional or not, it is a possibility. Making services easily available to those who are not at your congregation, opens the possibility that members of congregation, especially one nearby, could observe your services and eventually decide that they want to change congregations.

Reform rabbis often invoke the principle of *hasagat gevul* (violation of a boundary) to talk about the impropriety of recruiting members from another congregation. The Responsa Committee looked at this question of solicitation,[17] and came to the conclusion that there is nothing within Jewish law which explicitly prohibits the

recruitment of members from another congregation, or Jewish organization. However, members of the Reform movement have signed onto a code of ethics which prohibits exactly this. So, even though "poaching" may not be, inherently, a halakhic violation, we have bound ourselves to a code of ethics, and so we have a halakhic obligation to obey those rules and restrictions.

That doesn't mean, of course, that livestreaming services is inherently a violation of those rules. Congregations are always open to non-members for services, and regularly advertise in local papers, community newsletters and so on. These activities are not "poaching." Offering easy viewing of services is not, either. So long as efforts are not made to explicitly target members of other congregations, there is not any real reason to think of livestreaming as poaching.

There is an important issue, likely to be overlooked, that is copyright law. Probably every service conducted in a Reform synagogue involves the performance of at least one piece (musical or reading) which is under copyright, and for which permission has not been granted. US law states that: the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

> (4) in the case of literary, musical, dramatic, and choreographing works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly. (17 USC section 106).

The Responsa Committee has already looked at the question of copyright in the Internet Age.[18] They invoke the principle of *dina demalkhuta dina* in saying that it is against Jewish law to download material from the Internet without explicit permission. There is no reason to think that US copyright law is in any way a violation of Jewish law or principles, and therefore we are bound to it. But, the responsum goes on to look at the question not only through the lens of *dina demalkhuta dina*, but also as an inherently Jewish question: aside from any civil law: Does Judaism accept the idea of copyright, and intellectual property? In summary, we do. Intellectual property is a valid concept, Jewishly speaking, and possibly even a benefit to our people. However you look at it, the Responsa Committee taught us, we are responsible to obey the laws of copyright.

Al ahat kama v'kama, how much more so are we obligated when we are dealing not with entertainment materials, but rather with sacred texts and music? Participating in a service which violates US law through copyright infringement would seem to be a case of *mitzvah habaah aveira,* a m*itzvah* which is performed through a sin (such as performing *netilat lulav* with a stolen *lulav*).

Anecdotally, it seems that many congregations which are engaging in livestreaming are not aware, or perhaps are not admitting, that there is a serious issue here. It's possible that some kind of "religious fair use law" can be created, or that the law can be otherwise modified to allow webcasting of copyrighted materials. It's also possible that my interpretation of US law is faulty (although I spoke to a lawyer about this, my knowledge is obviously far from comprehensive, and I have heard from others who disagree with the legal opinion which I

was given. According to at least one knowledgeable lawyer, we are in an unclear area of the law here, and so there is no definitive answer, yet). But, unless and until its legality is firmly established, it would seem to be incumbent on our congregations, and our clergy, to ensure compliance with the law, especially during our most sacred acts.

Livestreaming is it Real Prayer?

Again, this paper is not a responsum. It is not my intent to rule on whether or not a congregation is allowed to live stream their services. However, the above discussion makes it clear that it is, at the very least, reasonable for a congregation to choose to do so. Once they decide to livestream their services, what exactly are they streaming? Can we say that what is going out over the Internet, and what is being received by those on the other end, constitutes true prayer?

One close analog in the traditional literature can be found in a Talmudic discussion [19] about hearing the echo of a shofar. The sages rule that a person who hears only the echo of the shofar sound, but not the sound directly from the shofar itself, has not fulfilled their obligation to hear the shofar. In other words, there is a difference between direct sound and what we might call "secondary sound."That would imply that the sounds which are heard over an Internet connection are not the same as the sounds which are heard while sitting in synagogue, even if they sound the same to the listener.

The *halakhah* reflects this understanding when ruling about participating in a service from a distance. The *Shulhan Arukh*[20]

rules that a person may answer "amen" to a *minyan*, even if she/he is not physically with that *minyan*. Later authorities assert that listening via telephone is an analogous situation, so someone listening on a phone would respond "amen" upon hearing a blessing. However, if the blessing was to fulfill an obligation of his/her own, than the person does not say " amen" and they can not count the blessing as their own (as they could have, had they been physical, present).[21]

So, it seems that hearing a blessing via technology counts for something (we can/must respond to those blessing), but it doe not equal hearing the blessing in person. "Being there" through the telephone seems to count as a kind of lesser presence. As we'll see, this is a common theme in the *halakhah*, and one which is useful to us. Technology allows us to be there, in some sense, but not in the full sense.

But, a Reform halakhic approach requires that we do more than know what the traditional sources say, it also requires that we understand why, so that we can decide whether this is relevant to us. In this case, the tradition seems to be taking a somewhat philosophical approach to the nature of prayer.

Is "true" prayer defined solely by the perception of the person in question? By the effect that it has on the listener? Does prayer exist solely in the eyes/ears of the beholder? The tradition seems to say "no." Prayer has an independent reality, even if it seems just as good to the listener as the echo of a shofar might.

Interestingly, a 1989 Reform responsum about playing recorded services in a hospital. also seems to imply that "prayer via technology" is not the real thing. Although it allowed the activity, the committee never claimed that listening to the service on a recording was communal worship. Instead, they called it "a stimulus to individual prayer." The implication was that the prayer itself may not have been fully valid, but that it still had value. Both parts of the equation seem relevant here: prayer heard via the Internet may not rise to the "status of true prayer," but it may not be useless, either.

Much of the discussion surrounding the live streaming of services revolves around the issue of community and communal prayer. Does web-participation in a service count" as communal prayer? Is that a real community? Implied in that question is that communal prayer is important, or possibly even mandatory, in some way. It's worth mentioning that the Responsa Committee has directly affirmed this.[22] Although it counseled leniency, in general, and left open the possibility of flexibility with the definition of *minyan* (e.g. how many people are actually needed), it strongly held that communal prayer, defined as prayer with a *minyan*, was an integral part of our Jewish lives. So, can that need to be filled over an Internet connection? Can we say that one is fully part of a *minyan* which exists on the other side of a webcam? The traditional sources would seem to say no. The conversation begins with *Berakhot* 6a which tells us that the divine presence accompanies a group of ten people who sit together in prayer. As the text, which forms the basis of all the laws of *minyan*, uses the word "sitting" can be understood to imply physical proximity. Although it is obvious that the rabbis of old could not imagine praying over the distances that are

now possible, they did wonder what it meant to be " together," and whether distance had an impact on that.

The Mishnah (*Berakhot* 7.5) teaches that, for the purposes of *birkat hamazon*, groups of people who are in a separate room may be considered one group, provided that some members of each group are visible to some of the other. And, the Talmud expands on that[23] saying that, even if the two groups are not visible to each other, at all, they may be considered one group (for purposes of the *zimmun*) if a single attendant is waiting on both of them. Mishnah (Rosh Hashanah 3.7) teaches that a person who hears a *shofar,* despite not being in the presence of that *shofar* (e.g. they were in the house next door to the synagogue) has fulfilled their obligation to hear it (provided they were attentive to the sound). So, it would seem that physical proximity is not an absolute requirement to constitute a prayer group, or to engage in ritual. However, the Talmud shows that these models are not applicable when it comes to statutory, communal prayer:

Mar Zutra says: This only applies to three, but as regards two, the law follows Mar Zutra. What is the reason? Since they wish to mention Gods name, less than ten would not be acceptable.[24]

Its one thing to overcome physical distance for relatively minor acts of ritual. However, when it comes to public prayer, a physical gathering of ten is required. So, once again we see that we have model of "lesser presence." Being linked by sight, or by a waiter, is good enough for some purposes, but not for others. This is made clear (Eruvin 92b) which shows that there are different standards in

different situations. Personal obligations might not require physical presence; *minyan* does. And, the codified *halakhah*[25] reflects this

We do have to ask whether it is appropriate to apply these texts in our situation. When thinking of what it meant to be out of physical proximity, our sages could not have imagined the virtual closeness which we are able to create. Is it possible that, had they known of webcams and video chatting, they would have had a different approach? Are we reading too much into an ancient text?

Its impossible to answer, of course, but, the fact that the Rabbis were willing to allow distance praying for some rituals, but not for communal prayer, does give some weight to the presumption that, no matter what the technological realities were, they would not have accepted anything less than physical presence for communal prayer.

Building off of these texts. Rabbi Avram Israel Reisner, in the RAs responsum, finds other flaws in the idea that it is possible to be present via the Internet. First, he points out that it has been decided, across the spectrum of Judaism, that online versions of sacred texts are not sacred..[26] How could we then claim that online texts are not sacred, but online prayers are? What, he asks, about someone in a different time zone? Can someone participate in *Kabbalat Shabbat* if it is still Friday afternoon in their local area? Can someone *daven shaharit* if its already evening where they are? What would happen if a person had two livestreamed services running at the same time? Would they be part of both *minyanim*? All of these quirks and contradictions act as a *reducto ad absurdum* for Reisner, showing that it is nonsensical to understand the

Internet as overcoming the issue of distance, when it comes to prayer.

When discussing the possibility of including a person not physically present in a *zimmun* , the Talmud raises one other issue: Abaya says that a person can so be counted only if they called and he answered.[27] Even in this "lesser ritual," two-way communication is essential. Once again, a halakhic point raises a relevant insight for us.

Being a part of a community is a reciprocal act. Being able to watch and listen in on a community is not the same as being a part of that community.

It is possible to have two-way communication via the Internet, but not the norm. Very often, that communication is of a very limited sort - sending simple messages in a chat window alongside the "video-feed," for example. True multi-user video- conferencing is still uncommon, although it is getting easier to access in the past few years. But, even if that is possible, that is not what is done with livestreaming No one, whom I know has suggested putting virtual-.participants on a screen, so that everyone in the congregation can see and hear them ! For now, and for the foreseeable future, participating in a livestreamed service is a unidirectional activity; you receive the service, but you do not give back. It would seem to be somewhat nonsensical to believe that someone can be a full part of a community, or a *minyan*, when they are only able to participate in such a limited way.

In the end, discussing whether or not prayer via Internet is adequate is inherently a discussion about what it means to be "together" in a community. It is clear that a community (a *minyan*) is a required part of full prayer in Judaism. It is

equally clear that the traditional *halakhah* does not consider the Internet a sufficient way to create that community, or that *minyan*. But, once again, knowing the *halakhah* is not enough for us; we have to understand the reasons behind the *halakhah*.

Why do we need a *minyan* to pray? What is it about 10 people coming together that is so important? Until we know that, we can not really decide whether the Internet is a reasonable way to accomplish it.

In his responsum, Reisner explores the possibility that coming together was not only a required part of communal prayer, it may have been the entire point. It is possible that our sages required a *minyan* explicitly so that the community would come together, and public communal structures could develop. Prayer is a pretext for gathering, and so anything which interferes with that gathering could be presumed to be opposed.

Abraham Millgram also explores the reason for the requirement of *minyan*. While acknowledging the value of private prayer, Milgram believes that, "the rabbis felt that the Jew who worships privately treads a spiritually lonely road;"[28] coming together with other people has strong psychological effects. The weak and the wavering among us can draw strength and support from those who are stronger within the group. "Spiritual strength" is a communal quality, not an individual one. Coming together binds us more closely with the community of Israel.

Similarly, Isaac Klein discusses the compelling force of the public. The lessons which prayer is trying to teach us are simply not effectively conveyed when we do not feel the presence of others:

> The compelling force of this moral training does not come about when man is in seclusion, but rather when he joins with his fellow men in communal life. *Therefore, the main point and purpose of prayer lies in the coming together of men* [Italics mine].[29]

This theme, that it is the creation of a sense of community, and a connection with our fellow Jews, which is the entire point of communal prayer, is also supported by Samson Raphael Hirsch:

> The individual found his relationship purified and sublimated as soon as he conceived it as an essential part of the whole, thus regarding himself also as an active member of the community as soon as you regard yourself as a member of a whole, as a member of the community of Jacob, then all egotism, which selfishly knows only itself, is banished you will then feel yourself elevated and sanctified. You will regard your whole being and all the power within it as holy when you consider that you must contribute to the execution of the great and holy mission that was given to the whole House of Jacob at *Horeb*.[30]

All of these thinkers are expressing a powerful idea,[31] that coming together, as a corporate group, has enormous power. That we are transformed, on a deep, spiritual level, by the presence of other people engaged in prayer, as we are.

Of course, this says nothing explicit about whether this kind of transformation is available via the Internet. About whether people can truly feel part of a sacred group, when their presence is only virtual. But, it does at least sharpen the question. We are not simply asking whether an Internet connection can create a *minyan* (a fairly technical question). Now we are asking whether an Internet connection can convey the sense of compelling moral force, of which Klein speaks. Whether a webcam can create the nearly mystical union of individuals into a whole, as Hirsch suggests. Whether spiritual loneliness can be mitigated by a screen, or whether it takes flesh and blood to do so.

It seems obvious that different people will respond differently to those questions. Most, at least in this day, will feel intuitively that this kind of serious, deep connection is simply not available, or even close to available, via a virtual connection. That only physical presence can carry and convey the spiritual presence of which our sages speak. They will agree with Malcolm Gladwell who recently asserted that the Internet is highly effective at breadth of communication, but not at depth of connection.[32]

One real possibility, though, is that this sense that the Internet provides only partial, ersatz presence is true of this generation, but not necessarily of the next which will still be addressed.

One of the same sages unknowingly suggests a way in which prayer via the Internet could be *more* effective than an in-person *minyan*. Millgram suggests that, in coming together, we create a group focused on one prayer. That helps us keep our *kavannah* where it should

be.[33] One could argue, however, that the presence of others is often a deterrent to *kavanah*. We all have our share of kibitzers in synagogue, and these talkers are often a distraction not only to those to whom they speak, but also to those within earshot. By viewing a service over the web, a person could have a focus for his or her *kavanah*, without the associated distractions.

Of course, those making this argument would also have to account for the myriad distractions available to someone at their computer. its not clear if a person trying to talk while your are trying to pray is more or less distracting than the temptation to web surf during services !

There are obviously those who question the value of participation in services via the web. But, some go further and who actively oppose any attempt to livestream services, sometimes going so far as to consider it dangerous to do so.

The dominant reason for considering livestreamed services as "dangerous" seems to be the fear that this will be an "easy way out" for people. Those who might otherwise attend services will choose instead to participate/observe on their computer screens.[34] With nearly all of us having such busy schedules, so little free time, and so little energy to spare, even if we don't believe that Web services are "as good," might nevertheless prefer them,? Therefore our attempt to reach the unavailable, and the otherwise marginalized, we might be inadvertently contributing to marginalization and alienation of our own members.

Is this a realistic fear? On the one hand, it seems like our movement might be the least susceptible to this kind of web centricity. In a halakhically bound community, the devout are under a binding obligation to pray regularly (especially those who are, for instance, saying *kaddish* for a loved one). Attending services serves not only a spiritual purpose, but also a technical one, to be *yotzei* so, its entirely conceivable that a busy person might log on to a web-service to fulfill his/her obligation, whereas he/she would find a way to attend services in person, were the virtual option not available.

But, that is not our reality. For all intents and purposes, there is no obligation to pray communally, in Reform Judaism. No one would ever log on to a livestreamed service simply to make sure that they were *yotzei*. The only reason that someone would participate in a service was because they got "something" out of that service. What that something might be is certainly highly variable. It could be spiritual uplift, it could be communal connection, it could be alleviation of guilt, or anything else But, most of the reasons that our members pray have to do, on some level, with how praying makes them feel. Therefore if some version of prayer does not create that same subjective experience for them, it is unlikely that they would choose it. To put it differently, for what reason would a Reform Jew who might otherwise attend services in person, decide instead to stay home? Clearly, it's not impossible to imagine such a situation, but it's hard to imagine a widespread movement toward this, but not impossible. It's certainly true that our society is moving, more and more, towards a focus on the individual, and on individual spirituality. The idea of community having inherent value, and inherent power, is less and less

current, especially with younger members of our society. Maybe people will indeed find that live-streamed services offer them everything they want - structured prayer, beautiful music, interesting sermons - without any of the concomitant hassle. All the benefits of synagogue services; all the pleasures of privacy, and individuality.

Is Livestreaming the Future ?

We have now looked at whether we should be allowed to livestream our services. We have looked at whether those services have a religious/spiritual benefit, and to what degree. We've even looked, briefly, at whether this is a dangerous idea, which needs to be avoided, at all costs.

However we decide to answer those questions, though, one thing seems clear: good or not, livestreamed services are going to be part of our religious world. More and more synagogues will offer this option to their members, and to the community. As more offer it, more of our members, and prospective members, will begin to expect it. Also with other synagogues providing livestreamed services, there will be less reason for us to resist. After all, someone who wants a livestreamed service will get it; we might as well make sure that they get "ours." They may become more accepted as equal, or perhaps even better than in-person worship.

This trend can already be seen., for example, through the effort of "Punk Torah," one of the few all online Jewish communities. It offers learning, worship, and community, entirely in an online setting. In a recent interview, cofounder and Executive Director Patrick Aleph said: "Just because

participants don't meet face-.to-.face doesn't make that community any less real."[35] They are not only interested in changing how we think about prayer; but explicitly in changing how we think about community. Aleph says that, "If you log on to our site or send us an e-.mail, you're part of our community." Some find this an exhilarating approach; as we all talk about lowering the bar to entry into our communities, "Punk Torah" has taken it to the extreme, and opens up its virtual doors to anyone and everyone. Others, however, may wonder if this is an open community, or simply a community only in name. When only a click on a link is the only requirement to be part of the community, then what value does this community have? Can this kind of community create the bonds which have sustained our people for centuries?

The questions are obvious; the answers are more difficult. It is easy to dismiss such a community as shallow, and ultimately irrelevant. In all likelihood, it is exactly that to the majority of those already involved in the Jewish community. But, what is true now, perhaps, will not always be true.

Some recent research implies there may be a qualitative shift in how younger generations see online interaction.[36] Those of us over a certain age tend to see the Internet, and similar technologies, as useful ways to facilitate communication. Communication can be used to further enhance our communities. But, the technology is a tool; the paradigm remains, essentially, the same.

For the younger generations, however, there may be a shift underway, and they may be seeing these technologies as community itself. For them, Facebook, Twitter, Punk

Torah, and so many more services are not enhanced versions of the telephone, but rather virtual versions of the community.

Those who do not hold such a positive view of the potential of the Internet are likely to respond that these kids and young adults only *think* that the community in which they participate is just as good as a real community. But, they are fooling themselves; they do not know what they are missing. Our job, the argument goes, is to convince them of the inadequacy of online community, and to try to draw them, instead, into the physical synagogue.

It's impossible to know what an experience means to anyone else. It is impossible to say, with any kind of certainty, that the community experienced by our youngest cohort is inherently worse, or better, than the community which has been part of Jewish life for millennia. It is possible that, with time, research will emerge which does shed some light on this issue in an objective way similar to the work of Gladwell. We may show that the Internet community is not as deep as traditional communities, or that Internet communities are even more engaging, and more sustaining than others.

As frustrating as it may be, important for now is the centrality of the question. The effectiveness, the goodness of the Internet worship is inherently tied to the reality of Internet community. The more we see a virtual community as equally valid, the more we will accept virtual worship as equally valid. The more that virtual community can move

us on the deepest levels, the more that virtual worship will be able to do the same. It is worth noting that what many dismissed as disproven, such as the value of Twitter, has been shown as wrong in the wake of the recent Egyptian uprising.

Notes

1. Avram Israel Reisner, "Wired to the *Kadosh Barukh Hu: Minyan* via Internet, OH 55:15.2001."

2. Walter Jacob, "A Televised Jewish Service in a Hospital," *New American Reform Responsa*, (CCAR Books, 1992).

3. Reisner, *Op.Cit.*

4. Mayer Rabinowitz, "An Addendum to Videotaping on Shabbat, OH 340:3.1982b" in *Responsa: 1980-1990*, edited by David J. Fine (The Rabbinical Assembly, 2005)

5. J. David Bleich, *Contemporary Halachic Problems*, vol 5 (Targum/Feldheim, 2005) p. 226.

6. Drzewiecki, Tadeusz M., "Acousto-.Fluidic Sound Augmentation for Orthodox Jewish Worship Spaces," prepared for *The Acoustical Society of America 132nd Meeting Lay Language Papers*, 1996.

7. Op. cit., Bleich, p. 227.

8 . Shlomo Brody. From Our Archives: May One Use a Microphone on Shabbat? http://text.rcarabbis.org/from-.our-.archives-.may-.one-.use-.a-.microphone-.on-.shabbat

9. Shlomo Brody. "Polemics and the Orthodox Prohibition Against Microphones on Shabbat."2010 http://text.rcarabbis.org/polemics-.and-.the-.orthodox-.prohibition-.against-.microphones-.on-.shabbat-.by-.shlomo-.brody/>

10. Op. cit., Bleich, p. 225.

11. Rabbi David Lincoln, Videotaping on Shabbat, OH 340:3.1982a (among other responsa) in *Responsa: 1980-.1990*, edited by David J. Fine (The Rabbinical Assembly, 2005).

12. Ihid., p.213.

13. Op.cit., Rabinowitz, p. 215.

14. Rabbi Gordon Tucker, T*he Use of a Remote Audio/Visual Monitor on Shabbat and Yom Tov*, OH 340:31.1989a. In *Responsa: 1980-1990*, edited by David J. Fine (Society of America 132nd Meeting Lay Language Papers, 1996).

15. Op. cit., Lincoln, p. 213.

16. Walter Jacob, "Video Taping in the Synagogue," *Contemporary American 16 Reform Responsa*, (CCAR Books, 1988).

17. Unpublished Responsum, 5763.1

18. Unpublished Responsum, 5761.1.

19. Rosh Hashanah 27b.

20. *Shulhan Arukh*, Orah Hayim. 55.20.

21. "Does One Answer to Kaddish Heard Over the Telephone or a Simulcast?" http://www.dailyhalacha.com/Display.asp?ClipDate=5/10/2010.

22. Unpublished Responsum 5752.17

23. Berakhot 50b.

24. Berakhot 45b.

25. *Shulan Arukh*, Orah Hayyim 55.

26. That is a good thing; otherwise, a computer displaying a sacred text could never be turned off, or even have its window scrolled or minimized, because all of these things would constitute destroying a sacred text!

27. *Berakhot* 45b.

28. Abraham E. Milgram, *Jewish Worship*, Philadelphia. 1971. P. 29.

29. Isaac Klein, *A Guide o Jewish Religious Practice*, New York and Jerusalem, 1979, p. 15.

30. Samson Raphael Hirsch, *Horeb*, London, 1962, pp. 505-06.

31. And, as an aside, none more beautiful than Hirsch, whose few pages on this topic merit being read.

32. Malcolm Gladwell,"Small Change: Why the revolution will not be tweeted ," *The New Yorker*, October 4, 2010.

33. Op.Cit., Millgram, p. 31.

34. For example, see Op.Cit. Reisner, p. 5.

35. Jill Fishkoff, "Turning Judaism into Online *Minyan*," http://www.ijn.com/ijn-.news/national/1886-.turning-.judaism-.into-.online-. minyan. *InterMountain Jewish News*.

36. http://ejewishphilanthropy.com/does-.your-.website-.push-.information-.or-.facilitate-. community-.building/. "Does Your Website Push Information to Facilitate Community Building?"

37. And which it >s worth noting, many have already dismissed as disproven, in the wake of the use of Twitter 28.

25. Shulchan Aruch, Orah Hayyim 154.

26. This is a good thing; otherwise, a computer (displaying a sacred text) could never be turned off, or even have its window scrolled or minimized, because all of these things would constitute destroying a sacred text.

27. Sanhedrin 56a.

28. Abraham E. Millgram, *Jewish Worship*, Philadelphia, 1971, p. 26.

29. Isaac Klein, *A Guide to Jewish Religious Practice*, New York and Jerusalem, 1979, p. 15.

30. Samson Raphael Hirsch, *Horeb*, London, 1962, pp. 505-06.

31. And as an aside, none more beautiful than Hirsch, whose few pages on this topic merit being read.

32. Malcolm Gladwell, "Small Change: Why the revolution will not be tweeted," *The New Yorker*, October 4, 2010.

33. Op.Cit., Millgram, p. 31.

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35. Jill Fishkoff, "Turning Judaism into Online Campus," http://www.ijn.com/ijn-news/national/1886-turning-judaism-into-online-campus, *Intermountain Jewish News*.

36. http://ejewishphilanthropy.com/does-your-website-push-information-to-facilitate-community-building/, "Does Your Website Push Information to Facilitate Community Building?"

37. And which it is worth noting, many have already dismissed as disproven, in the wake of the use of Twitter 28.

Internet, Privacy, and Progressive Halakhah

Mark Washofsky

The Internet is an all-pervasive cultural phenomenon. From its modest beginnings in the 1960s as a network linking individual computers, through its explosion onto the wider public scene in the 1980s and beyond,[1] it has served as a means of almost instantaneous communication - a source of data, an avenue for commerce, an arena for the sharing of ideas – and has become a veritable way of life, the space within which we express ourselves, the virtual location of numberless social communities. To borrow the advertising slogan of a well-known credit card, the Internet is everywhere you want it to be. It is also showing up, however, in places where we may wish it weren't. In a world already characterized as a domain of "ubiquitous surveillance,"[2] the Internet facilitates the collection, rapid dissemination, and preservation of one's personal information: data, opinions, and images that one might rather keep concealed or restricted to a small circle of friends. While governments and private organizations have long gathered information concerning citizens, clients, and customers, the new Web-based technologies increase the degree of danger exponentially. News – whether factual or fictional, whether of public or of prurient interest - can move around the world with the click of a mouse. Businesses and bureaucrats are able to track a person's Internet use ("browsing history"), learning a great deal about what she thinks and what she reads, about her commercial, recreational, and ideological preferences.[3] The very ubiquity of the Internet – the fact that anyone with a computer can link to stores of data that previously may have been housed in isolated libraries and file cabinets – means that the sorts of embarrassing information that once faded from the public consciousness may no longer be forgotten with time. The Internet never forgets; somewhere, somehow (probably through Google), somebody will find a link to information that once would simply have eroded from neglect.[4] The consequences of all this for the value we call "privacy" are sobering, quite

possibly frightening. As one leading scholar of American privacy law describes the situation:

> We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating or discrediting. We may find it increasingly difficult to have a fresh start, a second chance, or a clean slate. We might find it harder to engage in self-exploration if every false step and foolish act is chronicled forever in a permanent record. This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more. Ironically, the unconstrained flow of information on the Internet might impede our freedom.[5]

The seriousness of the problem can be judged by the fact that, in the view of some, it may already be too late to solve it. The technology of digital communication has become so sophisticated and the reach of the cyber-universe has become so pervasive that whatever we call "privacy" may be beyond saving. As long ago as 1999, the chief executive officer of Sun Microsystems was quoted as saying "You already have zero privacy. Get over it."[6] Similar sentiments have been attributed to both Mark Zuckerberg, founder and CEO of Facebook,[7] and Eric Schmidt, CEO of Google,[8] two websites frequently blamed for assaults upon the privacy of personal data. It would be an exaggeration, of course, to say that all is lost. Governments explore legislative remedies,[9] and private organizations stand as watchdogs to guard against Web-based encroachments upon the individual's private space.[10] The struggle, that is to say, is far from over. Still, those who cherish the value of personal privacy will look upon the situation in the Internet age as dire indeed.

There are, to be sure, some weighty reasons for pessimism. For one thing, despite all the praise rendered unto "privacy" in the public discourse, it is far from clear that society values that concept to an extent that would motivate the adoption of real protections and reforms. Philosophers and legal theorists, as we shall see, continue to debate the very existence of a "right to privacy" that would demand safeguarding. Even if we concede the existence of such a right, it is arguable that we ourselves have largely waived any "reasonable expectation of privacy"[11] by so fully opening ourselves to the digital world. When we conduct so much of our legal, commercial, and social activity online, the argument goes, we implicitly accept upon ourselves the risk that our personal data will be exposed to the gaze of others, particularly if the technology we so eagerly adopt renders that exposure well-nigh inevitable.[12] If citizens have only themselves to blame for their loss of privacy, in other words, then perhaps their privacy was no so dear to them in the first place.

In this article, I want to explore the web (pun intended) of issues connected with "Internet privacy" from the standpoint of Jewish law and particularly from that of what the participants in this volume would call "progressive *halakhah*."[13] In general, I want to inquire as to the range of responses that we are called upon to make: what sort of teaching should liberal Judaism offer to its communicants in the name of Torah, that is to say from the textual tradition through which "Torah" has always been expressed? To do so, I will need to confront the very real possibility that the Jewish tradition has nothing of any substance to say. While it should be obvious that the ancient and medieval texts do not mention the Internet, it is of even greater consequence that the concepts of "rights" and "privacy" are also absent from the sources. Jewish legal discourse does not speak the language of "rights," by which we mean the expectations and protections that the individual can legitimately demand from the society's legal machinery, but rather that of "duties" and "obligations."[14] Nor does Jewish law mention "privacy" as an independent concept; nowhere in the classical halakhic sources do we read of a duty incumbent upon an

individual to respect another's "privacy" or of a prohibition against trespassing against it. Nonetheless, I shall contend that the tradition does offer a substantive teaching on these matters and that this teaching is invaluable to us as we seek to formulate a progressive halakhic discourse concerning privacy in the Internet age.

My argument will proceed in several stages.

First, I will argue that while the halakhic sources do not explicitly mention a concept of "personal privacy," that concept – essentially, the obligation to respect the privacy of others – can be established through the method of traditional legal interpretation. The original model for this interpretive move is found in American law. Although the "right to privacy" is never explicitly mentioned in the common law, the U.S. Constitution, or in other foundational legal documents, jurists have constructed that right out of various pre-existing rules, appealing to fundamental principles of the law in order to construct an individual right to protection from unwarranted outside intervention. Various scholars of Jewish law have subsequently applied the same interpretive move to the texts of the *halakhah*. A close examination of one of these efforts will show how the "value" (if not a "right") of privacy has been argued in the name of the Jewish legal tradition.

Second, I will argue for the legitimacy of such an argument in Jewish law. This is necessary because of the formidable objections, both substantive and procedural, that some scholars have raised against this interpretive move. I want to answer those objections on the basis of legal theory, Jewish legal history, and the tradition of our own discipline of progressive *halakhah*.

Finally, I want to consider how this Jewish value of privacy applies in the age of the Internet. Specifically, I will ask whether and to what extent the Internet is something new: does it in fact pose challenges to personal privacy that differ in essential respects from those posed by older technologies and social arrangements to

which Jewish tradition may already have spoken? I will suggest that it does, and I will argue that this new sort of challenge requires liberal Jews to rediscover the relevance of some old Jewish values that, perhaps, they once dismissed as outmoded in a modern context.

Privacy as a Constructed Value in American and Jewish Law.

The "right to privacy," so familiar in the discourse of secular law, was constructed by jurists out of the sources of the American and common-law legal traditions. To say that a legal rule or concept is "constructed" is, potentially, to make two claims, one descriptive and one normative. The descriptive claim notes that, as a matter of fact, the legal value in question is not mentioned explicitly in the community's legal tradition but has been interpreted into existence by lawyers or legal theorists. The community *in fact* speaks of this value and considers it part of its law precisely because the scholars have constructed it out of the legal sources deemed authoritative by the community. The normative claim asserts the systemic legitimacy of this process of construction. It is entirely proper, that is to say, for lawyers, judges, and other legal actors to perform such interpretive operations upon the legal texts and sources so as to argue for the existence of rules, principles, rights and duties not explicitly mentioned therein. Their argument may or may not succeed; the fate of a particular effort at legal construction rests, as does that of any legal argument, upon its persuasive force in the eyes of the legal community, its target audience. Still, those who advance the normative claim hold that such arguments can and often do persuade and therefore succeed in establishing the implicit existence of the concept in question.

If we say that Jewish law values or protects individual privacy, we do so on the basis of such a process of construction. Although the Biblical and Talmudic sources of the *halakhah* do not refer explicitly to a concept of "privacy," modern scholars of Jewish law have argued for the implicit existence of that concept in the halakhic tradition in much the same way that American jurists

have made that argument regarding the common law. For this reason, an examination of the arguments of those jurists, as well as of the arguments of their opponents, offers a useful comparison to the writings of the halakhists. To what extent has either group succeeded in demonstrating the substantive existence of a right – or concept, or value – called "privacy," despite the absence of that concept in their own legal sources?

a. *American Law.*

The American discussion began in earnest in 1890, with the publication of what has been called the most influential law review article in history.[15] In their essay,[16] Samuel Warren and Louis Brandeis either invented the common-law right to privacy[17] or (according to the more moderate view) influenced the development of that law in an extraordinary way.[18] Warren, a member of Boston's high society "Brahmin" elite, and Brandeis, the future leader of American Zionism and U.S. Supreme Court justice, were law partners in Boston at the time. The genesis of the article, according to legend, lay in Warren's discomfort over newspaper gossip concerning his social life. Whether or not this is entirely true,[19] the authors were clearly exercised over the abuses stemming from the yellow journalism of the day.

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[20]

Included in this catalogue of evils was the "unauthorized circulation of portraits" and pictures of individuals for commercial

purposes.[21] These modern technological invasions of individual privacy, the authors claimed, exacted a heavy price from the society as a whole:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be the subjects of journalistic or other enterprise… Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[22]

But does the law protect the "privacy" of the individual? No such tort existed in the common law tradition. True, there are laws governing libel and slander, but those torts deal with damage to one's personal reputation and not with the feelings and emotions of the injured party.[23] Warren and Brandeis sought to establish that the law in fact does recognize a tort in the latter instance, a legal "right of privacy" enforceable through court action. Yet how does one prove the existence of a legal right that the law itself does not mention in any explicit way?

Warren and Brandeis began their search by presenting a controlling historical narrative,[24] a story of the law as a constantly developing entity. "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society."[25] Thus, in its primitive form, the law concerned itself with the narrowest conception of the classic rights of life, liberty, and property, protecting the individual exclusively against physical harm and battery. Eventually, as the law began to recognize "man's spiritual nature... his feelings and his intellect," the classic rights were broadened to cover intangible things. The law, in consideration of human sensibilities, came to provide protection against the fear of bodily injury as well as against injury itself; against nuisances, offensive noise, and noxious odors; against damage to reputation (libel and slander); and against wrongful appropriation of intangible and intellectual property. "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."[26]

This historical record encourages leads the reader to one to the conclusion that the common law tradition has developed to the point where "the right to life has come to mean the right to enjoy

life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession -- intangible, as well as tangible."[27] Such a law must therefore have the capacity to respond to the current challenge, namely to protect the individual from the assaults launched by yellow journalists and the 19th-century progenitors of the paparazzi. Warren and Brandeis locate the source of that protection in the well-established common law provision that empowers the individual to determine whether and to what extent his "thoughts, sentiments, and emotions [would] be communicated to others."[28] The law already provides that one cannot be compelled to share one's thoughts with the world, no matter what their form of expression. Importantly, claim the authors, this right is to be distinguished conceptually from all other legal categories. It is not, for example, comparable to copyright, which protects one's proprietary interests in literary or artistic works *after* they are published; the right *not* to publish or communicate one's thoughts inheres, by contrast, *before* publication. For this reason, it cannot be understood as a species of property right, since there is no material value to words, ideas, and thoughts that have not yet been set down in literary or artistic form. Rather, "the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone…". The general principle that lies at the basis of these laws "is in reality not the principle of private property, but that of an inviolate personality."[29] Nor can the principle be drawn by analogy from existing laws protecting individuals against injury stemming from breach of contract or confidence.[30] Rather, the protection must exist "against the world," against anyone who would injure us, even in the absence of a contract or prior agreement with that person. The right of which we are speaking, say Warren and Brandeis, is not a subset of property or of contract law, nor is it derivative of any existing tort; it is, rather, its own, self-standing right. "The principle which protects personal writings and any other productions of the intellect of or the emotions is the

right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise."[31]

In this way did Warren and Brandeis discover the existence a tort, a specific legal right and cause for action where none had explicitly existed before. The verb choice is crucial: the authors do not claim to have invented the right to privacy but rather to have identified it, along with the principle of "inviolate personality" that serves as its conceptual foundation, within the sources of the law. As can be expected with newly-discovered rights, it took some time for this one to gain wide acceptance. American courts argued for decades over whether to accept or reject the Warren-Brandeis thesis. By the mid-20th century, however, judges and statute-makers had generally enshrined the right to privacy in the law books.[32] Lawyers also discovered the right to privacy in the U.S. Constitution. At first, this too was a minority position, enunciated in 1928 by none other than Supreme Court Justice Louis D. Brandeis in his famous dissent in the case *Olmstead v. U.S*: "(The framers of the Constitution) sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."[33] Eventually, the Supreme Court came to accept Brandeis's position, recognizing the existence of the right to privacy in the Constitution. That right afforded the individual protection against government intrusion with respect to electronic eavesdropping[34] and family planning.[35] The American legal discussion was simply one aspect of a broad cultural development that encompassed many societies. In 1948, the United Nations adopted the Universal Declaration of Human Rights, expressing the growing conviction acceptance of the right to privacy in international law: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[36]

Similar legislation has been adopted in Europe,[37] the United Kingdom,[38] Canada,[39] and Israel,[40] among other jurisdictions.

Even so, the Warren-Brandeis thesis continues to attract its fair share of criticism in the jurisprudential literature. Some of the objections revolve around the most basic issues of definition. As one observer put it, "Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."[41] What, exactly, do we mean by "privacy," and what sorts of interests does the legal right to privacy protect? Warren and Brandeis focus their article upon injury to personal reputation, but contemporary legal theorists argue that the potential harm from invasion of privacy can extend far beyond that boundary.[42] Others question the very notion of a right to privacy in the context of a liberal society. A general right to be compensated against all forms of intrusion is difficult to square with the rights of free speech and expression, and actions taken to protect one's "inviolate personality" may well hamper the free flow of information so vital to democratic discourse.[43] For our purposes, however, the most important criticisms are those that have attacked the Warren-Brandeis thesis as a null set. The argument over this criticism has been characterized as "a philosophical debate between those who regard privacy as but a name for a grab-bag of intellectual goodies and those who think it is a unitary concept."[44] In the literature, the members of the former group are often termed "reductionists,"[45] in that they hold the concept of the "right to privacy" can be successfully reduced and limited to its component elements. Primary among them was the noted torts scholar William L. Prosser, who contended, based upon an analysis of the privacy cases brought forth since the Warren-Brandeis article, that the privacy tort "is not one tort but a complex of four," comprising "four distinct kinds of invasion of four different interests of the plaintiff."[46] Since each of these interests is essentially a property interest, Prosser rejected the Warren-Brandeis distinction between privacy and property. In his view, the privacy tort *is* the invasion of property interests and nothing more. It follows that, to Prosser, the "right to privacy" is no greater than the sum total of the

interests described in his four torts, all of which existed in the law before Warren and Brandeis penned their essay. To expand that right – one "to which there has always been much sentimental devotion in our land" - beyond its real limits is to invite judicial abuse, including "a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation." Thus, concluded Prosser, "it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt" to this expansion.[47] The legal scholar Harry Kalven launched a similar attack: the "privacy" tort is hopelessly vague and petty, containing little that is not or could not be accommodated in other, pre-existing causes of action.[48] This line of argument persuaded the House of Lords that the Warren-Brandeis "right to privacy," a "high-level generalization" of dubious utility, cannot be said to exist in the common law.[49] Outside the circles of professional jurisprudence, the philosopher Judith Jarvis Thomson made much the same point. The right to privacy, she claimed, is a "derivative" one, in that every right we can locate in the "cluster" of privacy rights already exists under some other rubric. Thus, we can explain why it is that we enjoy each of these rights "without ever once mentioning the right to privacy."[50]

Others have responded to these criticisms, defending either the Warren and Brandeis article or the concept of privacy as a distinct legal right. Against Prosser, Edward Bloustein argued that privacy is indeed a separate concept, founded upon the principle of human dignity. The Warren-Brandeis concept of the inviolate personality "posits the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. It is because our Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man 'literary and artistic property'- the right to determine 'to what extent his thoughts, sentiments, emotions shall be communicated to others.'"[51] This notion unifies all the cases grouped under the privacy rubric, making clear that their common

denominator is a concern for the human personality rather than the protection of a property interest. For example, Prosser thinks that the basis for the tort of intrusion is the infliction of mental distress, regarded by the law as a property right. He is therefore puzzled that courts allow plaintiffs to collect in intrusion cases in the absence of "genuine and serious mental harm."[52] Bloustein is not puzzled at all; once we move to a higher degree of conceptualization and realize that the right to privacy is based in the conception of human dignity, courts are able and entitled to extend the tort of intrusion to cases where it had not previously applied. In this way, the law provides guidance as to the future development of the right to privacy in an age of sophisticated technology.[53] Similarly, Jeffrey Reiman rejects the suggestion by Thomson that privacy is "derivative" of other rights. Privacy, rather, is "a social ritual by means of which an individual's moral title to his existence is conferred," a social practice by which the group recognizes the individual's moral right to shape his own destiny.[54] Thus, Prosser's separate torts may themselves be "derivative" of the right to privacy (rather than the other way around, as Thomson would have it), the necessary conceptual precondition to them all; "(privacy) is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights."[55] The Israeli jurist Ruth Gavison approached the issue somewhat differently, appealing to our normal and accepted patterns of thought and speech; "unlike the reductionists, most of us consider privacy to be a useful concept." While it is true that the concept is difficult to specify, that should be taken as a challenge to render it coherent. Like Bloustein, she argued that a "useful" conception of privacy will enable us to decide just what sorts of occasions warrant legal protection.[56]

The foregoing brief survey suggests how the common law right to privacy was constructed into existence. Beginning with protections long offered against various sorts of intrusion, Samuel Warren and Louis Brandeis identified a fundamental moral principle behind all of them: "the inviolate personality," or, as others have it, "human

dignity" or "the individual's moral right to shape his own destiny." This principle, by supplying a common element to the law's existing provisions, enabled the authors to posit a right to privacy, despite the fact that the existing law did not mention such a right explicitly. It supported their narrative of a legal tradition that gradually but surely evolved from a concern for protecting the individual against physical damage toward the recognition of a need to protect his more "spiritual" interests, reflecting a conception of the nature and purpose of social life and of the individual's place in it. The right to privacy, in turn, began to function in the same way that any real, substantive legal principle functions, as a tool with which lawyers can address new cases and situations not explicitly covered by existing legal protections. The Warren-Brandeis thesis has been subjected to various criticisms, which is certainly understandable: constructed propositions of this sort rely upon arguments that are inherently controversial. Still, the degree to which the concept of "a right to privacy" has gained wide acceptance in our society is evidence of the success of Warren and Brandeis and their followers in proving their point.

b. *Jewish Law*.

The recent history of scholarship in Jewish law tells a similar story. In much the same way that Warren and Brandeis move from specific legal provisions to posit the existence of a general principle, some students of the halakhic tradition point to existing provisions in the *halakhah* as evidence for a substantive Jewish legal value called "privacy," even though the legal sources do not expressly mention such a value.[57]

Among the "existing provisions" are the following.

1) The prohibition against unwarranted trespass into a person's private domain. The Torah speaks of this rule in the context of debt collection (Deuteronomy 24:10-11): "When you

make a loan of any sort to your neighbor, you must not enter his house to take his pledge. You must remain outside, while the man to whom you made the loan brings the pledge out to you." Jewish law ultimately determined that this prohibition applies not only to the creditor himself but also, with some limitations, to the court bailiff (*sh'liach beit din*).[58] This specific legal protection may bear some relation to ethical teachings that stress the inviolability of a person's home. For example, "One should never enter the home of another without warning. Let every person learn this proper behavior (*derekh eretz*) from God Himself, who stood at the entrance of the Garden and called out to Adam, "Where are you? (Genesis 3:9)"[59] This advance warning, writes one leading commentator, is necessary because "the occupants of the house might be engaging in intimate activities (*milta d'tzn'iyuta*)."[60]

2) The tort of "overlooking" into another person's premises (*hezek r'iyah*). "When neighbors own jointly a courtyard that is large enough to be divided, any one of them may require the others to erect a partition in the middle of it so that each one may use his portion of the courtyard without being seen by the others. We hold that damage resulting from sight (*hezek r'iyah*) is real damage (*i.e.,* an actionable tort)."[61] Similarly, a person sharing a courtyard with a neighbor can restrain that neighbor from creating a window that opens onto the courtyard, "because the neighbor can gaze at him through it"; if the neighbor creates the window, he can be sued to block it up.[62] The aggadic tradition attributes the rule of *hezek r'iyah* to Balaam's famous words of praise – "how goodly are your tents, O Jacob" - spoken because the Israelites made certain that the openings of their "tabernacles" did not directly face each other. Nobody gazing out of the doorway of his own dwelling could see into another's home.[63] Why is "overlooking" considered to be an actionable damage? Nachmanides[64] suggests three possible answers: because of the "evil eye"; because of the potential for gossip; and because of *tzniyut*, "modesty," the demand that a Jew conduct his personal life with restraint and keep his intimate affairs away from the public gaze. The theme of *tzniyut* is also present in the writings of Nachmanides' student, R. Sh'lomo ben

Adret (Rashba), who sharply criticized a communal *minhag* (custom) to waive *hezek r'iyah*:[65] "This would be an erroneous custom, one without legal force. Individuals are entitled to waive monetary damages to which they would normally be entitled, but one is not entitled to violate the bounds of proper Jewish behavior and to act immodestly (*shelo lin'hog b'tzniyut*), thereby causing the Divine Presence to depart from Israel."

An interesting question emerging from this discussion concerns *hezek sh'miyah*, damages resulting from overhearing. Is a homeowner entitled to require his neighbor to undertake repairs or improvements that would prevent the neighbor from hearing sounds and conversations emanating from the homeowner's domain? R. Menachem Hameiri answers "no," because "most persons (*s'tam b'nei adam*) are discreet when speaking."[66] That is to say, the average person takes care not to speak too loudly, since he has no reasonable expectation that his voice will not penetrate the relatively thin walls and partitions that separate his living space from that of his neighbor. Thus, when he raises his voice, he accepts the responsibility for being overheard. This conclusion suggests the possibility that the *halakhah* would differ in communities where people are customarily not so "discreet" in their speaking or in cases where a neighbor employs an electronic device to listen in on a conversation in which the speakers have no reason to imagine they are being overheard.[67]

3) The edict (*takanah; cherem*) attributed to R. Gershom b. Yehudah, "the Light of the Exile" (d. 1028) imposing a penalty upon one who "reads a letter intended for another person," unless the letter had previously been discarded.[68] The 19th-century Turkish authority R. Chaim Palache suggested five possible reasons (*ta`amim*) behind the edict:[69] "love your neighbor as yourself" (Leviticus 19:18) or Hillel's "golden rule" ("what is hateful to you, do not do to your fellow," *B. Shabbat* 31a); the prohibition against tale-bearing (Leviticus 19:16); the prohibition against deceptive behavior (*g'neivat da`at*);[70] the prohibition

against theft; and the prohibition against the disclosure of confidential information.[71]

4). The various forms of prohibited speech.[72] The Torah (Leviticus 19:16 – *lo telekh rakhil*) prohibits "tale-bearing," which Rashi (*ad loc.*) and others define as an invasion of another's private domain: the talebearer enters another's home to spy[73] upon him, to collect information about him that can be spread in public. Several forms of speech are interdicted under this heading: *hotza'at shem ra*, or slander, the spreading of false and damaging information; *lashon hara*, the dissemination of damaging information even if the information is true; and *r'khilut*, "gossip," the dissemination of information about another person even if the details are true and even though the information does no damage to that person's reputation.[74] Under this heading, too, we might place the various prohibitions against *gilu'i sod*, the revelation of secret or confidential information.[75]

Jewish law, therefore, does protect the individual against these four specific intrusions into what we might call his or her "private space." As yet, we do not have evidence that the *halakhah* recognizes a general concept of "privacy" that extends beyond (let alone that exists prior to) these specific provisions. As I have noted, however, some scholars deduce the existence of such a concept. They accomplish this through an interpretive strategy a strategy quite similar to that of Warren and Brandeis, identifying the fundamental principle that unites these existing specific protections and lends them moral and theoretical coherence. Like Warren and Brandeis, these scholars make both a descriptive claim (the *halakhah* contains a concept of "privacy," constructed on the basis of the existing provisions of the law) as well as a normative claim (it is legitimate to construct the existence of such a concept through the process of legal interpretation). I want to consider the work of Professor Nahum Rakover as the best example of these. I choose his work, first of all, because as a book-length monograph it is the more detailed and comprehensive than the others. In addition, his research was of practical legal significance, inasmuch

as it originated as a report to the Israeli government commission charged with preparing that country's official privacy legislation (*Chok haganat hap'ratiyut,* the Protection of Privacy Act, 1981).[76]

In both the introductory and concluding sections of his work, Rakover frames the theoretical problem confronting any attempt to locate a protected value (in his terminology, "*erekh mugan*") of "personal privacy" in the halakhic tradition. The sources, he tells us, "seemingly contain no general protection for this value; rather, they protect against specific intrusions into an individual's privacy, such as protection of confidential information or the safeguarding of an individual in his home." It is of some interest to note that this situation in the *halakhah* parallels that of the common law as Warren and Brandeis described it in 1890: the sources contain specific provisions that relate to what we might call "privacy" but make no mention of privacy as an independent legal concept.[77] Nonetheless, Rakover says, the Judaic teaching on privacy is hardly confined to these specific provisions, "for our sources also include the prohibitions of tale bearing (*lalekhet rakhil*) and of slander (*lashon hara*)." He singles out for special mention the *halakhot* concerning prohibited speech because, unlike the other specific provisions in our list, they cannot be included within the rubric of tort law (*n'zikin*).[78] Torts involve the duty of compensation for material damage that one actually causes to another. By contrast, the Torah forbids the very act of ordinary gossip (*r'khilut*) regardless of its effect, even if the gossip does no damage at all to the reputation of its subject.[79] The prohibition of gossip, in other words, is to be classified under the heading of ritual law (*isur v'heter*) rather than of monetary law (*dinei mamonot*), the province of torts such as *hezek r'iyah*, which are more easily definable as transgressions upon property interests. Rakover's invocation of the rules of forbidden speech is an interesting parallel to the use that Warren and Brandeis made of the right *not* to publish one's thoughts. The American authors cited that right to support their claim that not all privacy interests recognized by the law can be subsumed under the heading of property and that, therefore, there must exist a more general tort of

privacy - "the more general right of the individual to be let alone" - that encompasses those various but differing common law rules. Similarly, Rakover argues that all of the specific halakhic provisions, whether "ritual" or "monetary," share a common theme: the concern for protecting one's person from an act of intrusion. The *halakhah* seeks to prevent "the violation of individual privacy (*hap'giyah b'fratiyut ha'adam*), for every human being is sensitive to trespass against his private life, and none would want the details of his personal affairs to become public knowledge."[80] Privacy has now become a self-standing legal concern, a value worthy of protection in and of itself, quite apart from consideration of damage to any other interest.

The obvious objection to this conclusion, of course, would parallel that of Prosser and the other "reductionists" to the Warren-Brandeis thesis: Rakover's "individual privacy" value is merely a construct of his own devising, a label that denotes the commonalities he has identified among several existing provisions of the *halakhah* but that adds nothing of substance to the previously-existing law. Rakover seems sensitive to this possible criticism, and he takes pains to argue the opposite: Jewish law *in fact* recognizes "privacy" as a "protected value," and the existing provisions serve as evidence of that value's substantive existence. He bases this claim upon a set of fundamental principles of Jewish law that, he contends, lie behind the existing provisions, providing them with a legal-ethical rationale and supplying them with theoretical coherence.

> The right to privacy, which modern law has recently been recognized as worthy of protection, is founded upon a worldview not generally accepted in the past, that holds that one's personality and way of life, in addition to his body and his property, are worthy of protection.
>
> The Jewish belief that man is not simply "flesh and blood" but a creature fashioned in the image of God explains why

> a concept that was a new development in other legal systems has existed from the very beginning in our sources, which established rules and principles that protect one's spiritual as well as his material interests…[81]
>
> The general rules protecting privacy are neither fixed nor static; they were not meant for their own time alone. Rather, that which is prohibited or permitted is determined by fundamental principles (*ek'ronot b'sisi'im*) concerning love of one's neighbor, human dignity, and the safeguarding of one's good name. In this way, the rules are sufficiently flexible to be applied to changing reality and to the prevailing human sensibilities in every age.[82]

Again, Rakover's analysis tracks that of Warren and Brandeis. Where they identified the principle of the "inviolate personality" (rather than that of "private property") as the foundation for deducing a common law right to privacy, Rakover bases his claim of a general halakhic value of privacy upon four fundamental Jewish legal-moral principles: 1) the human being is created in the divine image (Genesis 1:27); 2) "you shall love your neighbor as yourself" (Leviticus 19:18); 3) the desire to preserve one's good name (Ecclesiastes 7:1); 4) and human dignity (*k'vod hab'riyot*, *B. B'rakhot* 19b). There are, of course, differences between the approaches. Warren and Brandeis framed their account as a story of the law's development from an exclusive focus upon material interests toward the protection of more spiritual concerns such as privacy, while Rakover prefers the traditional narrative of Jewish law as eternal and unchanging: the Torah has *always* sought to protect the privacy of the individual. At the same time, "unchanging" does not mean "fixed or static." Thanks to the generality of the fundamental principles that lie at its core, the definition of "privacy" is not etched in stone but is capable of keeping pace with the times. To utilize the terminology of American jurisprudence, the "original intent" of the act of revelation was precisely that the value of privacy be capable of

growth and expansion, so that halakhic authorities might address cases and challenges unprecedented in the sources.

To summarize: Nahum Rakover is one example of a Jewish legal scholar[83] who relies upon a fundamental principle or principles of Jewish law in order to derive, from various existing provisions of the law, a general "protected value" of privacy in the *halakhah*, a value that encompasses but is distinct from those provisions. This move reflects the Warren-Brandeis interpretive approach as opposed to a reductionist, Prosser-like reading of the *halakhah*: the totality of Jewish legal teaching on our subject cannot be limited to those provisions stated explicitly in the sources. Rather, when viewed through the interpretive prism of the fundamental principle, those explicit provisions testify to the presence of the more general, contextual value of privacy. In turn, that value becomes a tool which judges can apply to derive guidance in future cases raised by "changing reality" and "prevailing human sensibilities."

Privacy, Principles, and the Halakhah.

As one engaged in the study and practice of "progressive *halakhah*," I find Rakover's findings and his methodology to be congenial and persuasive. In saying this, I do not mean to call Rakover a "progressive halakhist"; indeed, as an Orthodox rabbi, he would presumably reject that label. My point is that there is a clear affinity between his work, in both its substance and methodology, and our own. With respect to substance, the determination that *halakhah* recognizes a value of individual privacy accords with progressive beliefs about the content and the ends of Jewish religious law. True, not all self-proclaimed progressives will define privacy in the same way. Take, for example, the issue of gossip. While many of us undoubtedly regard gossip as inimical to personal privacy – and keep in mind that the traditional prohibition against gossip is critical to Rakover's derivation of a more general halakhic value of privacy - some progressive thinkers defend it on liberal grounds as a benign or

even vital social practice.[84] Rather, to call privacy a "progressive" value is to say that, given the profound respect accorded to individual rights and freedom in liberal thought, it is difficult to imagine any sort of liberal or progressive world view that does not place a strong emphasis upon the protection of *something* called "personal privacy," however that value is constructed in specific terms. With respect to methodology, Rakover takes the path of interpretive flexibility: general, fundamental principles in the *halakhah* are not simply empty bromides but serve as intellectual resources that facilitate the development of legal innovation, interpretation and legislation to meet the challenges of every age. We encounter the same tendency, as is well known, in the writings of liberal halakhists who cite such principles as proof of the creativity and dynamism of Jewish law.[85]

Rakover's "progressive" halakhic tendencies are visible, too, in his long-standing affiliation with the academic movement known as *mishpat ivri* ("Jewish Law"). Although its overall program was to apply the tools of contemporary academic research to the study of Jewish law and legal history, a major goal of *mishpat ivri* has been to make traditional Jewish law, especially in its monetary and procedural aspects, the operative legal structure of the state of Israel, or, failing that, to integrate Jewish law into the Israeli legal system to the greatest extent feasible.[86] In pursuit of these ends, the rabbi-jurists associated with the movement have studied classical Jewish legal institutions with a view towards "updating" or "modernizing" them, translating their ancient and medieval literary and conceptual mode of expression into a form that serves the needs of a modern sovereign state. This effort, which has sparked considerable political and academic controversy,[87] bears at least a strong family resemblance to our progressive halakhic thought. It is, for one thing, positive and affirming in outlook. Like progressive halakhists, *mishpat ivri* scholars see Jewish law as a dynamic entity that is capable of development and that possesses the creative resources to respond positively to the conditions of modernity. Moreover, it is a profoundly liberal enterprise. That is to say, far from assuming a reactionary stance against the cultural

and political values that underlie the modern liberal state, *mishpat ivri* has largely affirmed those values, seeking to demonstrate their compatibility with the Jewish legal tradition. Much of Rakover's own writing, including his work on privacy, can be fairly characterized in this manner.[88] For all that religious ideology may divide us – the *mishpat ivri* scholars are in the main Orthodox rabbis or *yeshivah* graduates who have gone on to attain formal legal training – they and we share much in common. To make Jewish law for a modern Jewish state requires an interpretive approach to the sources that, to a great extent, is affirmative and accepting of the liberal political, moral, and social values that lie at the foundations of that community.

At any rate, Rakover's treatment of privacy strikes me as an example of a "progressive" reading of the halakhic literature, and my goal here is simply to argue for an adjustment in his theoretical structure. Specifically, where he cites four fundamental principles as the basis for his claim of a general halakhic value of privacy, I would reduce that number to one: *k'vod hab'riyot*, or "human dignity." I do this for two reasons. First, in my view *k'vod hab'riyot* takes logical precedence over the other principles that Rakover invokes. A substantive conception of the dignity of the individual human being is a necessary theoretical precondition for those principles. The affirmation of *k'vod hab'riyot* provides sense and purpose to them; it explains *why* we should love our fellow human beings, treat them with respect, and avoid deceit and duplicity in our dealings with them. One could respond, with no little justice, that the principle *b'tzelem elohim,* "humans are created in the divine image," would serve the same end. There is indeed a significant conceptual overlap between *b'tzelem elohim* and human dignity. It has even been suggested that *k'vod hab'riyot* is simply the Rabbinic restatement of the Torah's doctrine that mankind is fashioned in the image of God.[89] This brings me to my second reason for favoring "human dignity" as the central principle undergirding the privacy value: *k'vod hab'riyot* is a legal as well as a moral principle. While *b'tzelem elohim*, along with Rakover's other principles, occurs in the Rabbinic and

philosophical literature primarily agadic or doctrinal contexts,[90] "human dignity" serves as a source for practical legal decision (*halakhah l'ma`aseh*). For example, the Sages suggest that some of the Torah's commandments are based upon this principle.[91] More to the point, they bequeath to us the classic maxim *gadol k'vod hab'riyot*, "Great is human dignity, on account of which a negative precept of the Torah may be set aside," which in its literal reading suggests a potent halakhic reach.[92] The tradition, to be sure, seeks to limit the potentially radical implications of this maxim: concern for "human dignity" can override a Rabbinic prohibition but *not* a Toraitic one.[93] This restrictive reading, of course, flies in the face of the literal meaning of the maxim, and subsequent commentators have expended no little effort in attempting to resolve that contradiction.[94] Even so, the *halakhah* goes so far as to modify a number of Toraitic obligations when their fulfillment would tend to compromise human dignity. For example, one who comes upon an unburied corpse (*met mitzvah*) must bury that corpse immediately even if one was on the way to circumcise his son or to offer his Passover sacrifice. Even though delay in the performance of those obligations normally involves divine punishment, one buries the corpse first, because *k'vod hab'riyot* takes precedence.[95] The requirement to bury the *met mitzvah* extends even to a priest (*kohen*), who is normally prohibited from defiling himself through contact with a corpse other than that of a close relative. He must subject himself to defilement in this instance "out of concern for human dignity."[96] Similarly, the laws of carrying on Shabbat can be modified with respect to a corpse, "on account of the principle of human dignity."[97] One may be exempt from the Torah's requirement to return a lost object to its owner if in doing so one might be unduly burdened or one's dignity would be insulted.[98] The principle has retained its halakhic power in the post-Talmudic age, where leading post-Talmudic authorities have cited it in support of their decisions. R. Meir of Padua permitted the son of a *m'shumad* (a convert to Christianity) to replace the name of his father with that of his grandfather, so that he will not be called to the Torah as "*ben* (the son of)" the *m'shumad*. He bases this ruling, in part, on the principle *gadol k'vod hab'riyot*."[99] R. Yosef ben Lev

(16th-century Turkey) released a husband from a vow to divorce his wife in part on the grounds that "*gadol k'vod hab'riyot.*"[100] R. Moshe Isserles performed a wedding on Friday night when the acrimonious financial negotiations between the couple's families delayed the ceremony, which had been scheduled for Friday afternoon. A major argument he gives for this leniency (since weddings are normally prohibited on Shabbat) is *gadol k'vod hab'riyot*: the humiliation that this bride would suffer should the community learn of this sordid affair would amount to an intolerable insult to her dignity.[101] And in the name of *k'vod hab'riyot*, Rabbi Avraham Yitzchak Hakohen Kook permitted women to stitch the parchment sheets of a Torah scroll one to the other, even though women are traditionally ineligible to write a Torah scroll.[102] "Human dignity," in other words, has retained its vitality as a *legal* principle, as a rationale for actual halakhic rulings, long after the close of the formative Talmudic period of the *halakhah*. Contemporary Orthodox scholars continue to cite it for halakhic purposes.[103] Rabbi Daniel Sperber, for one, has recently argued that, on the basis of *k'vod hab'riyot*, women be called to the Torah in Orthodox congregations that are receptive to that practice.[104] All of this would support the contention that *gadol k'vod hab'riyot* retains its power as a robust Jewish *legal* principle and that it is much more than an abstract ethical maxim. The principle would seem therefore to offer an appropriate and sufficient conceptual basis upon which to base a claim for the existence of a Jewish *legal* value of individual privacy.

Not everyone, however, will agree with that assessment. Some will argue that "human dignity," far from being a "robust" Jewish legal principle, is in reality the halakhic equivalent of the proverbial ninety-eight pound weakling. Such is the conclusion drawn by Ya`akov Blidstein in his comprehensive study of the role of *k'vod hab'riyot* in the Talmudic and halakhic literature.[105] The principle, he informs us, is cited but rarely in the sources. As a purely quantitative matter, it has been largely absent from Talmudic discourse; as a substantive matter, the Rabbis fail to invoke it even in cases where it might provide an effective solution to some

halakhic problem. Moreover, while some later halakhic authorities, as we have seen, do cite *k'vod hab'riyot* as a justification for their rulings, they tend to make it, at best, a marginal consideration. For example, in the decisions of Meir of Padua, Moshe Isserles, Yosef ben Lev, and Rav Kook cited above, the principle never serves as the exclusive or decisive basis for the ruling (*p'sak*). Each decision stands on its own, on the basis of other legal considerations; each would be fully justifiable even had its author not mentioned the consideration of "human dignity". In Blidstein's reading, *k'vod hab'riyot* plays at most a rhetorical function in these cases: it is an expression of the *posek*'s sensitivity to the moral issues at stake, even though it is entirely superfluous from the standpoint of formal *halakhah*. The principle thus loses its legal heft and is reduced to the status of a vague and general moral exhortation. This state of affairs strikes Blidstein as somewhat puzzling. After all, *k'vod hab'riyot* is obviously a central element of Jewish doctrine; "there is no question that entire institutions of the *halakhah* exist in order to protect the dignity of the human being created in the divine image." How, then, can it be that "the actual halakhic reach of the concept of human dignity has been, relatively speaking, so modest, in all Jewish communities throughout history?"[106] The emphasis here is on the words "halakhic reach." Human dignity may be a "great" thing, and the need to preserve it may stir much Jewish ethical thinking. As a *legal* principle, however, as a reason or motivation for concrete halakhic decision, it has proven to be limited in scope and in power. Why?

Blidstein offers two explanations. The first, which we might call a *theological* rationale, has to do with the problematic, even radical implications of the principle. It is one thing to say that "human dignity" is central to the Torah's concerns, but it is quite another thing to say that the principle is weighty enough to override a commandment of the Torah. Is it indeed possible that some (many?) laws of the Torah are insulting to human dignity, to the point that we must decide to reject the former on the strength of the latter? Could the Author of the Torah have committed such a blatant transgression against *k'vod hab'riyot*? It is not surprising

therefore that the traditional Jewish religious mind recoils from the strictly literal reading of the maxim "great is human dignity, on account of which a negative precept of the Torah may be set aside." As we have seen, the Talmud already takes pains to limit its application to Rabbinic (as opposed to Toraitic) *mitzvot*. Later *poskim*, who display the same conservative mindset, are not likely to criticize the positive *halakhah*, let alone to overturn it, as "unethical" or as injurious to higher moral values. On the contrary, their general inclination is to presume that the existing rules and norms of the *halakhah* cohere with the standards of "human dignity" and do not violate them. Thus, while they occasionally cite "human dignity" as a halakhic argument, they do so in a highly limited and selective way, restricting the principle's sphere of influence to the margins of the law. Blidstein's second explanation is a more technically *legal* rationale: practical halakhic discourse, by its very nature, "does not like general principles." Halakhists have historically preferred to base their decisions upon clearly delineated, authoritative rules rather than upon general and abstract principles, the definition of which is subjective and the scope and substance of which must be determined in every individual case. Indeed, the fact that the Talmud leaves *gadol k'vod hab'riyot* in a state of abstraction, neither defining it substantively nor developing it into a complex and detailed body of legal instruction, indicates the principle's marginal status in the world of actual halakhic deliberation.

Blidstein's conclusion, if correct, raises a potentially significant difficulty for our project here. How can we rely upon *k'vod hab'riyot* (or, for that matter, any and all of the other principles that Rakover cites) as the theoretical basis for the establishment of a halakhic value of personal privacy when, historically considered, it has played such a modest, restricted function in Jewish legal thought? I do not seek to refute his argument, which is persuasive as far as it goes. At the same time, I do not think that either of the two rationales he offers for the relative weakness of "human dignity" as a principle of *halakhah* presents us with an insoluble problem. His theological rationale, first of all, is not especially

relevant to liberal Jews who, unlike their Orthodox counterparts, are not unwilling to engage in the ethical critique of the commandments of the Torah and of the substantive rules of the *halakhah*. In addition, the present inquiry is not one of "critique" but of construction. Our argument for a halakhic value of personal privacy in the *halakhah* does not imply a negative appraisal of various commandments or substantive rules of *halakhah*; on the contrary, it affirms those laws and builds upon them. Of much greater interest is Blidstein's legal rationale, namely that abstract principles like "human dignity" play a minor, even inconsiderable role in halakhic discussion. To the extent that this is the case, on what grounds can this or any abstract principle serve as the basis for the far-reaching claim that the *halakhah* recognizes a value called "personal privacy" that is nowhere mentioned explicitly in the sources?

Any adequate response to this challenge, I think, must begin by noting that Blidstein's legal rationale is not unique to the *halakhah*. General principles perform a limited, severely circumscribed function not only in Jewish law but in virtually all advanced legal traditions. The history of most legal systems is characterized by the movement away from adjudication based upon general and abstract principles toward the reliance upon discrete rules, "definite, detailed provisions for definite, detailed states of fact" that "admit of mechanical or rigidly logical application."[107] Rules, interpreted by means of traditional techniques of judicial interpretation, declare what the law in fact is, and as such they are obligatory "not only upon the community at large but specifically upon the judge or the commentator."[108] By contrast, general principles (for example, "one must conduct commercial transactions in good faith"; "it is wrong to profit from one's own misdeeds"), precisely because they are general and not "mechanical" or "rigidly logical" in their application, do not determine the legal outcome in a particular case. A principle "does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision."[109] Principles differ

from rules in that: 1) they involve a certain moral judgment upon conduct; 2) they are defined not so much by formal legal processes but by the use of common sense; and 3) they are not applied in the logical-conceptual manner of rules but in a way that is sensitive to time, place, and circumstance. A principle, unlike a rule, is a matter of judgment more than deduction. Principles do not *require* that judges decide cases in a particular way, because there may be other principles in the law that would support a different outcome. The judge in each case must first determine whether a principle applies and then weigh the relative importance of that principle against other principles that would argue a different result.[110] For this reason, the resolution of cases on the basis of general principles requires the exercise of a broad judicial discretion, and such discretion is more characteristic of "equity," which emphasizes the reaching of fair results in the instant case, than of formal "law."[111] As legal systems develop into maturity, the practice of wide judicial discretion begins to conflict with the basic conception of rule of law. "The discretion of a Judge is the law of tyrants"; who, after all, is entitled to say, on the basis of his personal judgment, just what is "fair" or "just" or "reasonable"?[112] Equity eventually gives way to formal, rule-based law and is combined with it; jurists begin to emphasize the value of rule-based law as a means of constraining the freedom of judges to arrive at whatever decisions seem right in their eyes. Over time, the old equitable principles are transformed into hard and fast rules that seek to define in precise terms just what constitutes "fair" or "just" or "reasonable" conduct in specific cases.[113] Given this growing identification between the positive rules of law and the fundamental principles of justice, jurists - no less than rabbis - are unlikely to perceive a conflict between them and will seldom overturn the former in the name of the latter.

Yet even if general principles play but a limited role in the discourse of mature legal systems, their function remains a vital and even creative one. Judges do resort to principles when the rules "run out": when a case is not covered by an existing rule, when the rule's application is unclear and in need of interpretation,

or when two or more conflicting rules would seem to apply to the case at hand. Judges utilize principles, in other words, to fill the "gaps" or resolve uncertainties in the law. And this is no little thing. It was the legal philosopher Ronald Dworkin who named his prototypical judge "Hercules," indicating the arduous task facing the judge who must decide a hard case, one for which no one obviously correct legal answer exists. The judge who confronts such a case must locate the relevant data – for example, the decisions of past judges in related cases – and create a theory that interprets those data in a "principled" way, explaining as best he can "according to (his) own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is." Principles are the tools with which the judge identifies the point of the earlier decisions, the unifying factor that lends them coherent meaning, the means by which Hercules creates the theory that best explains them and that corresponds to the "best available interpretation" of the law.[114]

Dworkin's understanding of the nature of legal interpretation is, to be sure, exceedingly controversial. He originally presented it as a critique of the theory known as legal positivism, which has largely dominated jurisprudential thinking in recent generations.[115] Legal positivists tend to define "law" as a system of rules, wherein each rule is validated by some formal, systemic pedigree ("rule of recognition"). If in the course of a decision the judge appeals to a source other than those rules, she is going beyond the "law" properly so-called. The judge, say the positivists, may be entitled and even required to make such an appeal in order to decide the case, but when she does so she is not deciding the matter according to "law" but is rather resorting to extralegal sources in order to modify a legal rule or to create a new one. General principles, say the positivists, are just such an "extralegal" source. Dworkin disagrees, arguing that "law" contains principles as well as rules. The conceptual issue between the two camps is the extent to which a judge's decision in a hard case is, as Dworkin sees it, constrained by the existing law or whether, as the positivists have it, the product of judicial discretion, more akin to an act of legislation

(albeit an "interstitial" one).[116] We need not engage in a detailed study of this controversy, much less resolve it in favor of either side. The important thing to note is that, in the view of both camps, general principles – whatever their legal or extralegal conceptual status - do act as a source of legal decision. Judges cannot do their job without resorting to such principles, even if principles, in comparison to rules, perform a limited (marginal? modest?) systemic function in judicial discourse. Even if many positivists would deny to general principles the status of "law," they would agree with Dworkin that, inasmuch as they are indispensable to the resolution of difficult cases (*i.e.,* cases for which the existing rules are not dispositive), principles are fundamental to the law's growth, development, and modification. Any case study in legal change would serve to demonstrate this point. How else, after all, do we account for the achievement of Warren and Brandeis, who utilized principles as a tool for the construction of new legal meaning (the existence of a tort of privacy) out of the existing sources, as a way of lending them coherence and purpose?

We come, therefore, to our response to Blidstein's legal rationale: general principles of *Jewish* law can function in the same way. To borrow Dworkin's language, the four existing provisions of Jewish law that we have noted – the prohibition against unwarranted trespass, *hezek r'iyah*, the penalty imposed for reading a letter intended for another person, and the rules concerning prohibited speech – constitute the "data" or precedents for which we seek a coherent explanation. That explanation, the theory that offers the best available interpretation of the *halakhah* as it exists, is based upon the principle *gadol k'vod hab'riyot.* The tradition's teachings concerning "human dignity" allow us to posit the existence of a connecting thread, a theory that lends coherence to the data. That theory is what Rakover calls the "value" of individual privacy.

These observations about the role of principle in legal discourse may offer a helpful perspective on a debate that, a generation ago, roiled the normally placid world of academic Jewish legal scholarship. The controversy was initiated by the Israeli legal

scholar Itzhak Englard, who aimed an "uncompromising" attack at the very heart of the *mishpat ivri* enterprise.[117] In particular, Englard criticized the efforts of *mishpat ivri* scholars to locate the "central idea" or principle that lies at the foundation of any given legal institution. The purpose of deducing such an idea or principle was to a pragmatic one, to identify the essence or permanent substance of that legal institution, on the basis of which one could draw conclusions as to how Jewish law ought to develop in the future. Englard denounced this project. "Central ideas" and principles, he asserted, do not exist: Jewish law, properly so-called, contains no substantive content other than the rules and decisions that are mentioned in its literary sources and by its authorized spokespersons.

> If Jewish law constitutes the *object* of study, one has to accept it in its integral entirety. It is totally unacceptable that the modern scholar should reach a legal solution which is different from that of the Rabbi. The decisions of the religious authorities are the very historical data constituting the object of the modern scholar's study. Modern criticism of the legal solutions' content as established by any given religious scholar is in the nature of a value judgment.[118]

The term "value judgment" is indicative of Englard's second broad objection to the work of the *mishpat ivri* scholars, many of whom engaged in the study of Jewish legal history expressly in order "to prepare Jewish law for its reception into the law of the State."[119] This practical goal, in his view, involves an unacceptable mixture of ideology with academic scholarship and casts doubt upon whether the scholars who share it possess "the measure of objectivity necessary for historical research."[120] The chief offender in this regard was Menachem Elon, one of the leading lights of the *mishpat ivri* school, who contends that by studying the "complete historical range" of any Jewish legal institution the researcher can locate "its common denominator, its axis, during the various

historical stages, in order to establish the central principle which lies at the basis of all periods."[121] The point is to enable legal reform according to the needs of contemporary society; once we know the central principle of a legal institution, we can alter (modernize) its specific details while supposedly remaining true to the institution's historical essence or spirit. Englard dismisses this "positive-historical" approach as overtly ideological, reminiscent "of the Jewish Conservative Movement's philosophy," which "emphasizes the need for change in Jewish law, to be introduced through a true understanding of its historical development." Elon and his *mishpat ivri* colleagues are entitled to what Englard describes as their "value-approach," but they are not entitled to call it "scientific" or objective.[122] Englard's article drew sharp responses from Elon and others in the *mishpat ivri* movement,[123] and little wonder: taken literally, his critique denies the very academic legitimacy of that movement and its scholarship. With respect to our discussion here, his position would mean that, on two grounds, one cannot properly speak of privacy as a "protected value" in the *halakhah*. First, it is illegitimate to posit the existence of substantive halakhic content that the rabbis and *poskim*, the "religious authorities" whose rulings determine the substance of Jewish law, have themselves never posited; and second, the attempt to derive that value's existence is tainted by the practical (ideological) goal, which Nachum Rakover openly acknowledges, of integrating Jewish law into the legal system of the state of Israel.[124]

Englard's first objection is well-taken, however, only to the extent that we concur with his definition of law in general and of Jewish law in particular. That definition, which identifies the substantive content of Jewish law exclusively with the binding *halakhot*, the recorded decisions of the *poskim*, is a rather extreme version of legal positivism. There is, admittedly, something to be admired in this tough and rigorous approach to legal thought. Positivism demands that the jurist stick to the objective, observable facts of the law and avoid fanciful theorizing, and that, in general is a good thing. Yet there is more to the law than that which is dreamt of in

the positivist philosophy. As we have seen, not all legal theorists embrace positivism, certainly not in such a pure form; "few positivists would assert that scholars are restricted in their critique to the use of binding sources" and are forbidden to consider more abstract entities such as principles.[125] Some academic scholars of Jewish law argue strongly that principles, no less than rules, are an inherent aspect of the *halakhah* because the legal "data" – the massive number of binding *halakhot* – would be unintelligible were it not for the general principles that lend them coherence and meaning.[126] This reality has long been recognized by rabbis, the very authorities whose rulings, in Englard's view, constitute the whole of Jewish law. While traditional halakhists may prefer to reason from hard and fast rules rather than from abstract general principles, they frequently resort to principles in order to justify and explain their decisions. Consider the phenomenon of analogical reasoning, an endemic feature of halakhic as well as of legal thinking. Rabbis constantly draw conclusions about instant questions on the basis of observed similarities and differences with past, previously-decided questions. Were they not able to do so, the law would be frozen in place; as the Talmud puts it, analogical reasoning is the way we develop the law in virtually every field (*veha kol hatorah kulav damo'i medaminan lah*; *B. Bava Batra* 130b). Analogies are therefore central to the halakhic enterprise, and they do not suggest or justify themselves. The decisor who makes an analogy must explain why and on what grounds the instant case resembles or does not resemble the precedential case, and such an explanation requires a degree of abstraction and conceptualization that is not stated explicitly in the rules – the cases – themselves. These abstract and conceptual constructions are often presented in the form of general principles.[127] When the academic scholar relies upon principles, in other words, he does not diverge from the path of the rabbi, as Englard insists; he actually follows the rabbi's lead. Principles –what some have called "*meta-halakhah*"[128] - no less than discrete rules, are essential to the working of the Jewish legal system, and the phenomenon called "*halakhah*" does not exist and cannot be understood without reference to them.

If principles are an important functioning element in halakhic thought, then Englard's second objection to *mishpat ivri* scholarship loses much of its sting. A scholar's claim that the *halakhah* includes general principles as well as discrete rules is well-founded in legal theory and is hardly evidence of a "value judgment" on her part. Moreover, while scholarly objectivity certainly ought to be the goal of every area of academic discourse, one ought not insist upon a super-human standard of that goal. As Menachem Elon asks rhetorically in his response to Englard, "in the humanities and the social sciences and the legal sciences is it possible to conceive pure objective scientific research without some degree of value-judgment deriving from the *Weltanschauung* of the scholar?"[129] We must also take care to define "objectivity" in a way that is appropriate to the discipline in question. While some disciplines legitimately aspire to a sort of *wertfrei* scientific rationality, in much legal scholarship the prescriptive and normative concerns of the scholar often and appropriately take center stage. "The point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and for the rationale adopted. The point of an article about a statutory provision or a regulation is to expose the errors made in drafting it, and to indicate what should have been done instead." If the natural and social sciences characteristically adopt a descriptive stance, the legal scholar displays a "penchant for prescription."[130] That is to say, the rigid distinction between *is* and *ought*, which constitutes the central dogma of the creed of scholarly objectivity, may be impossible to maintain with precision in legal writing, where the normative goal is entirely legitimate. Consider, once again, the Warren and Brandeis essay on the right to privacy: described as "the most influential law review article in history,"[131] it is normative to its very core. Its authors certainly did not hide their ideology or their value commitments. Rather, they proudly proclaimed them as a prolegomenon to their analysis of the law. Many of the other books and articles cited in the first part of this essay emerge from a similar commitment to the importance of privacy protection in the law or, in the case of Prosser and his

camp, to the importance of maintaining a strict-construction approach to the law's interpretation. The authors are not shy about stating that normative commitment, even as they present their findings as the product of objective scholarly investigation. It should be no surprise, therefore, that the religious and ideological commitments of Nahum Rakover and his *mishpat ivri* colleagues shine through their doctrinal legal writing. For that matter, the work we undertake in the name of "progressive *halakhah*" owes its impetus and direction to our value perspective that the Jewish legal tradition can and ought to be interpreted and applied toward the attainment of liberal ends and purposes.[132] None of this, I hasten to add, means that objectivity is an empty or worthless concept. We can acknowledge the inevitable influence of perspective and value commitments upon a scholar's work and yet continue to insist that there is a difference "between scientific research and apologetics, between research based on facts and data and expressions of mere wishful thinking."[133] Clearly, a bit of pragmatic realism is called for here. While the ideal of scientific (*wertfrei* or "mathematical" might be better terms) objectivity is presumably beyond the reach of the flesh-and-blood human researcher, she is nonetheless capable of examining the data critically and of interpreting them in accordance with the "agreed-upon, if tentative, conventions"[134] that comprise the methodological canons of her discipline. We are certainly entitled to demand that legal scholarship adhere to such a standard. What more, indeed, can we ask of it?

3. The Halakhah of Privacy in the Age of the Internet. My effort in the first section of this article was primarily descriptive. I surveyed the efforts of scholars working in both the Anglo-American and the Jewish legal traditions to construct a "right" or a "value" of personal privacy out of a welter of existing provisions of the law. In part 2, I took on an evaluative function, arguing that this sort of constructive interpretation is a legitimate move in both traditions. Jurists and halakhists are entitled to derive new legal substance on the basis of recognized fundamental principles of law, using those principles to bring coherence and purpose to the "data," the mass of rules, precedents, and facts contained in the

legal sources. To be sure, the results of this sort of constructive interpretation are not necessarily "correct." As our discussion of objectivity in legal studies suggests, the contention that the law or the *halakhah* ought to be read in one way or another is always open to debate and to refutation.[135] Nonetheless, it is precisely the task of the legal scholar to make such arguments. Those of us who study Jewish law, in short, have every right to make the case that the halakhic sources support a value called "personal privacy." In Part 3, I turn to a consideration, from the standpoint of progressive *halakhah*, of the implications of the preceding sections. If the *halakhah* does recognize a value of personal privacy, what would that recognition specifically entail? What would be the content, of the Jewish law of privacy? Does that specific content change in the age of the Internet? Does the advent of the era of digital communication pose a set of challenges to personal privacy that differ essentially from those with which we have long been familiar? And, if so, what lines of response ought we to pursue?

In many respects, the halakhic approach to privacy would likely parallel the themes we encounter in general legal discourse, in which privacy law has assumed a largely defensive posture; its focus has been the protection of the individual's home, persona, effects, and "private space" against unwarranted intrusion from other individuals, institutions, and governments. And to the extent that they have addressed themselves to such issues, progressive halakhists have in their responsa been quite vocal in the defense of personal privacy on Jewish legal grounds.[136] Consider, as an example, the following case, submitted to the CCAR Responsa Committee.[137] A rabbi is about to be tested for the genetic condition known as Huntington's disease. If he tests positive, is he under an ethical obligation to share that information with his congregation and with any potential future employers? The Committee replied that the answer requires a balance between two halakhic values: on the one hand, the demand for integrity and the prohibition against deceitful conduct (*g'neivat da`at*), which would argue in favor of full disclosure of the rabbi's health information, and on the other hand "the concern which our tradition voices for

the privacy of the individual," which would justify the rabbi's decision to withhold that information from his employers. The Committee concluded that, as a rule of thumb, "respect for privacy takes precedence over the sharing of personal information in most cases. Those who seek to acquire and to make use of information concerning other persons must meet a fairly rigorous burden of proof in order to be permitted to do so." That burden of proof can be met, most obviously, in situations of real and present danger, since the protection of human life (*pikuach nefesh*) outweighs most other ethical and legal obligations.[138] In the present case, the Committee ruled that the possibility that the rabbi might one day develop Huntington's disease does not meet that burden of proof. So long as the rabbi can provide assurances to a congregation or other employer that he can perform the duties of his position during the term of his contract, he is under no obligation to reveal confidential medical information. The implication, clearly, is that the employer is not entitled to that information and that it would be wrong to demand such a disclosure, let alone to seek out that information without the rabbi's knowledge. To do so would be an unwarranted invasion of personal privacy.

This stance by our halakhists is paralleled by that of our progressive Jewish institutions, which have for decades adopted this approach in their public advocacy on behalf of privacy legislation. They have repeatedly called upon government, business and society to take steps to safeguard personal privacy against unwarranted intrusion of all sorts, including the electronic and Web-based variety.[139] Their record has been a distinguished one, although the rapid development of new and advanced digital technology, with the attending examples of hacking, data fraud, and identity theft, means that they should certainly maintain their vigilance.

I would argue, however, that this accepted rhetoric of privacy, which emphasizes the defense of the individual against unwanted surveillance of his or her personal affairs, whether the intruders be governments, businesses, or hackers, is by itself an inadequate

response to the contemporary challenge. The Internet age has introduced a new range of threats to our privacy. Our concern is no longer exclusively with old-fashioned sorts of intrusion - the peeping Tom, the prying journalist, the wiretapper, and the electronic eavesdropper whose trespasses originate from without - but increasingly with the newer forms of intrusion that emerges from within, that we ourselves facilitate and allow into our personal space. The Internet enables us to upload as well as to download, to produce as well as to consume digital content. Its technologies, particularly the new social media, permit and entice us to transmit a great deal of personal data to an electronic realm over which we exert very little control, a social network where our lives of necessity become an open e-book. *This* is the difference that the Internet makes, the unique threat that the World Wide Web poses to our privacy: its invitation to live our lives increasingly online and in public, to the point that we might be said to have waived any "reasonable expectation" of privacy[140] and, indeed, to have rendered that concept essentially meaningless. If in fact we enjoy "zero privacy" in the age of the Internet,[141] the blame lies not solely or even primarily with unwanted, external intruders but with ourselves.

Any cogent and coherent halakhic discussion of privacy in the age of the Internet will accordingly have to advance beyond the conceptual boundaries that have heretofore defined the subject. The current halakhic discourse on privacy, much like that in Western law, speaks mostly to the protection of the individual from damage caused by others invading his personal realm. The new discussion of which I speak will have to focus upon protecting the individual from the damage that he brings upon himself. It will have to acknowledge that we will not make much headway in protecting our Internet privacy from the unwanted attention of others without first addressing our own conduct. And here is where it really does help to be Jewish, for the very same fundamental principles that lie at the base of the traditional halakhic discourse on privacy also provide us with the intellectual resources needed to frame an adequate response for the challenge of our time. I refer,

in particular, to the concepts of modesty (*tzniyut*) and of human dignity (*k'vod hab'riyot*). It is to these principles we must appeal in the name of safeguarding our personal privacy in the current technological environment.

Let's begin with *tzniyut*, which as we have seen is cited as the basis for several of those existing "privacy" provisions of Jewish law. The concept, to be sure, can be a problematic one for liberal Jews. Today, we tend to associate the word *tzniyut* with the set of rules, social mores, and customary practices that comprise the particularly Orthodox definition of "modesty" in the relationship between the sexes. That definition diverges sharply from progressive values, based as it is upon assumptions of specific gender roles that we do not share.[142] Yet *tzniyut* extends far beyond the realm of sexual conduct. The term speaks as much of "restraint" as of modesty, expressing the value of moderation and humility in all spheres of personal behavior. Its linguistic root appears in the famous injunction of the prophet Micah (6:8) to "walk humbly (*hatzne`a lekhet*) with your God." The humility of which that verse speaks, according to its Talmudic interpretation (*B. Sukah* 49b), concerns neither gender norms nor sexual modesty but the conduct expected of us when we bury the dead, escort the bride to the *hupah*, and (by extension) when we give *tzedakah* to the poor. The commentators understand this as an exhortation to personal restraint: one should perform these and, indeed, all other *mitzvot* humbly and with moderation, so that one does not draw unnecessary attention to oneself.[143] This theme of restraint – the word "stringency" might also fit[144]- applies precisely to our subject. *Tzniyut* is the Jewish value that teaches us to practice restraint in self-expression, to behave mindfully and moderately when online, to think carefully before we share our lives with the denizens of the virtual universe, to consider the potential outcome of our actions before we post, upload, blog, text, or tweet. There is nothing essentially illiberal or non-progressive in this message; in fact, there is much we can and ought to learn from it. Accordingly, it is essential that we liberal Jews recover this value and make it our own, that we develop a specifically liberal Jewish discourse

and teaching concerning *hilkhot tzniyut*, the rules of self-restraint in social and personal behavior. Some encouraging efforts have already been made in this direction,[145] with more, hopefully, to follow. The argument here is that we have little choice but to do so. To protect what is left of our personal privacy in the age of the Internet, we must practice the traits of *tzniyut*. We must learn to restrain our tendency to live our lives increasingly in the virtual world, to share the facts and photos and data of our lives with the universe that lies on the other side of our computer and smartphone screens.

Yet *tzniyut* by itself is insufficient; the principle of *k'vod hab'riyot* is, for two reasons, its necessary complement. First, as I have argued, "human dignity" is the fundamental principle that undergirds the entire discussion of privacy in the *halakhah*. Without a substantive sense of what our "dignity" requires of us, it is unlikely that we will value our privacy enough to take concrete steps to protect it. Second, to speak of the need for "self-restraint" may raise concerns among some in our community. Since the 18th century, liberal political thought has stressed the importance of such values as individual liberty and freedom of expression, and to the extent that we liberal Jews share in this outlook, we are rightly disturbed by the admonitions of those in political, social, or religious authority to "watch what we say," even in the name of securing some important end. An objection of this sort would parallel the objection, cited above,[146] that some legal scholars have lodged against the "right to privacy" in the common law and in American constitutional discourse, namely that the enforcement of privacy rights is at some level inimical to the exercise of free expression in a democratic society. There can be, in other words, a very real tension between liberty and security. And this is why *k'vod hab'riyot* is so vital to this discussion. To affirm a substantive conception of human dignity is to overcome the liberty-vs.-security dichotomy, to deny that we must choose between them, to assert that the values of personal freedom and self-restraint do not contradict each other. To declare a commitment to *k'vod hab'riyot* is to acknowledge the overriding

importance of restraint in the way we conduct our personal and interpersonal affairs. It is to remind ourselves that freedom is not an end in itself. As Edward Bloustein put it in his discussion of American privacy law, "what provoked Warren and Brandeis to write their article was a fear that a rampant press feeding on the stuff of private life would destroy individual dignity and integrity and emasculate individual freedom and independence."[147] The survival of freedom, that is to say, is conditional upon our willingness to honor the essential dignity of each member of our community. Self-restraint, the reasonable limits that we can and do accept upon our personal expression, is the price we pay to secure this end. These restraints are set by our basic sense of self-respect, that modicum of dignity that we demand for ourselves and therefore are prepared to guarantee to others, that we cannot yield or forego and still hope to fulfill our human potential. Dignity is as essential to us as freedom; indeed, we actualize our freedom precisely when we use it within the boundaries dictated by *k'vod hab'riyot*. And the respect that we accord to those boundaries is what we mean by "the value of privacy."

Conclusion. In this article, I have argued that respect for personal privacy is a substantive value in traditional Jewish law as well as in progressive halakhic thought. I have also suggested that, to protect our privacy in the age of the Internet, we shall have to cultivate habits of moderation and restraint (*tzniyut*) that are vital to the maintenance of our self-respect and human dignity (*k'vod hab'riyot*). While we should persevere in our support for protection against unwarranted intrusion by outsiders into our personal domain, we must realize that the battle for Internet privacy begins – and will ultimately be decided – at home, with each of us. This is the message of the Jewish legal tradition, a message that ought to resonate with us progressives no less than with our fellow Jews.

NOTES

1. See, in general, Barry M. Leiner, *et al.*, "A Brief History of the Internet," http://www.isoc.org/internet/history/brief.shtml#Community (accessed April 5, 2011); "The World Wide Web History Project," http://1997.webhistory.org/home.html (accessed April 5, 2011); and Kevin Hillstrom, *Defining Moments: The Internet Revolution* (Detroit: Omnigraphics, 2005). See as well the memoir by Tim Berners-Lee, the primary author of HTML (hypertext markup language, central to Internet communication), *Weaving the Web* (San Francisco: Harper, 1999).

2. See A. Michael Froomkin, "The Death of Privacy?" *Stanford Law Review* 52 (2000), pp. 1461-1543, at p. 1476.

3. See "Anonymous No More," *Economist*, March 10, 2011, http://www.economist.com/node/18304046 (accessed April 6, 2011).

4. "Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmitted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and 'perpetuates the scandal'"; Judge Benjamin Nathan Cardozo, *Ostrowe v. Lee*, 256 N.Y. 36, 39 (1931). These words apply *al acaht kamah vekhamah* ("all the more so") in the age of the Internet.

5. Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2008), p. 17.

6. See Edward C. Baig, *et al.*, "Privacy: The Internet Wants Your Personal Info," *Business Week*, April 5, 1999, at p. 84 (quoting Scott McNealy). Like many famous quotations, this one exists in various versions. One such is "Privacy is dead. Deal with it."; http://www.msnbc.msn.com/id/3078854 (accessed April 11, 2011).

7. Helen A.S. Popkin, "Privacy is Dead on Facebook. Get Over It," http://www.msnbc.msn.com/id/34825225/ns/technology and science-tech and gadgets (accessed March 25, 2011). See also Marshall Kirkpatrick, "Facebook's Zuckerberg Says The Age of Privacy Is Over," http://www.readwriteweb.com/archives/facebooks zuckerberg says the age of privacy is ov.php (accessed April 12, 2011). It is important to note that both postings refer to a speech delivered by Zuckerberg that does not include either attributed quotation. What he actually said is: "… in the last 5 or 6 years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social

norm is just something that's evolved over time... A lot of companies would be trapped by the conventions and their legacies of what they've built, doing a privacy change - doing a privacy change for 350 million users is not the kind of thing that a lot of companies would do. But we viewed that as a really important thing, to always keep a beginner's mind and what would we do if we were starting the company now and we decided that these would be the social norms now and we just went for it." Zuckerberg's remarks may suggest that the traditional conception of personal privacy has changed radically in the era of the Internet and social media, and one could possibly infer from them (accurately or not) that he believes that "privacy" is in fact "dead." But he doesn't say those exact words. And the fact that the sentiment is widely attributed to him on the Internet is, ironically, an example of the very sort of problem that I refer to here.

8. John Dvorak, "Eric Schmidt, Google, and Privacy," http://www.marketwatch.com/story/eric-schmidt-google-and-privacy-2009-12-11 (accessed April 12, 2011). Schmidt's remarks, as quoted: "If you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place, but if you really need that kind of privacy, the reality is that search engines including Google do retain this information for some time, and it's important, for example that we are all subject in the United States to the Patriot Act. It is possible that that information could be made available to the authorities." (For the interview in which Schmidt made this statement, see http://video.cnbc.com/gallery/?video=1409844721, accessed April 12, 2011.) Dvorak comments: "For a chief executive to make what amounts to a threat to its users is absolutely astonishing. The general milquetoast reaction to this threat is even more astounding, but understandable. Our privacy rights have been eroding for years and just accelerated with the Bush administration. President Barack Obama has been on board since day one."

9. In the United States, at the time of this writing, these efforts center in a bill sponsored by Senators John Kerry and John McCain and supported by the Obama administration that would create a Commercial Privacy Bill of Rights. The legislation "would force companies to give consumers more control over how their personal information is collected, and possibly sold to third-party outfits. It would also require companies to tell consumers when privacy policies change. And companies would also have to give consumers an easy way to "opt out of having their data collected, and potentially sold"; Steven Gray, "Washington Takes Up Internet Privacy," *Time*, April 12, 2011, http://www.time.com/time/nation/article/0,8599,2064849,00.html (accessed April 17, 2011).

10. Among these are the Electronic Privacy Information Center (www.epic.org) and the American Civil Liberties Union (http://www.aclu.org/technology-and-liberty/internet-privacy).

11. The phrase, which has become a well-known formula in American privacy law, seems to have originated with Justice John Marshall Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 360: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

12. This is essentially the point made by Mark Zuckerberg (note 7, above).

13. The term "progressive *halakhah*" is subject to various definitions. All of them involve the interpretation and application of the texts and sources of traditional Jewish law through the prism of a commitment to contemporary liberal Western values. For my own attempts to offer a definition and approach, see my "Against Method: On *Halakhah* and Interpretive Communities," in Walter Jacob, ed., *Beyond the Letter of the Law: Essays on Diversity in the Halakhah* (Pittsburgh: Rodef Shalom Press, 2004), 17-77. The text is available under a slightly different title at http://huc.edu/faculty/faculty/washofsky/againstmethod.pdf .

14. For discussion see Haim Cohn, *Human Rights in Jewish Law* (New York: Ktav, 1984), 17-18, as well as his *Hamishpat* (Jerusalem: Bialik, 1991), 513.

15. The judgment as to the influence of the Warren-Brandeis article (see next note) is by Harry Kalven, "Privacy in Tort Law: Were Warren and Brandeis Wrong?" *Law and Contemporary Problems* 31 (1966), p. 327. Kalven is merely one of many who share that estimation. Elbridge Adams wrote, already in 1905, that the article was "one of the most brilliant excursions in the field of theoretical jurisprudence"; "The Right of Privacy, and Its Relation to the Law of Libel," *American Law Review* 39 (1905), p. 37. William L. Prosser (note 32, below, at p. 383) noted that the article "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." See also Diane L. Zimmerman, "Musings on a Famous Law Review Article: The Shadow of Substance," *Case Western Law Review* 41 (1991), p. 823 ("Samuel Warren and Louis Brandeis's *The Right to Privacy* is the most famous scholarly endeavor of its kind").

16. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890), pp. 193-220.

17. Take, for example, the pronouncement of Roscoe Pound (d. 1964), the long-time dean of Harvard Law School, that Warren and Brandeis "did nothing less than add a chapter to our law"; A.T. Mason, *Brandeis: A Free Man's Life* (1946), p. 70. See also Neil Richards, "The Puzzle of Brandeis, Privacy, and Speech," *Vanderbilt Law Review* 63 (2010), p. 1296 ("Their short article is considered by scholars to have established not just the privacy torts but the field of privacy law itself);

Benjamin E. Bratman, "Brandeis and Warren's *The Right to Privacy* and the Birth of the Right to Privacy," *Tennessee Law Review* 69 (2002), p. 624 ("Brandeis and Warren's article has attained what some might call legendary status. It has been widely recognized by scholars and judges, past and present, as *the* seminal force in the development of a 'right to privacy' in American law" [italics in original]); Diane L. Zimmerman, "False Light Invasion of Privacy," *New York University Law Review* 64 (1989), p. 365 ("the common law right of privacy was conceived in the late nineteenth century by the fertile intellects of Samuel Warren and Louis Brandeis, and was born on the pages of the *Harvard Law Review*"); and Ruth Gavison, "Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech," *South Carolina Law Review* 43, (1992), p. 438 (1992) (Warren and Brandeis "single-handedly created a tort").

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18. See Neil M. Richards and Daniel J. Solove, "Privacy's Other Path: Recovering the Law of Confidentiality," *Georgetown Law Journal* 96 (2007), p. 128, contending that, while "(t)heir article would forever change the intellectual landscape of American privacy law," Warren and Brandeis did not so much create the right to privacy as to channel its development in a direction not followed in other common law jurisdictions, particularly England.

19. It is difficult to substantiate this legend as a matter of fact. For a consideration of what we actually know, see Lewis J. Paper, *Brandeis* (Edgewood Cliffs, NJ: Prentice-Hall, 1983), pp. 35-36. Brandeis's most recent biographer summarizes as follows: "For reasons not altogether clear, at some point Sam [Warren] began to resent what he saw as press intrusion into his private life, and he turned to Louis [Brandeis]"; Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon, 2009), p. 98.

20. Warren and Brandeis (note 16, above), p. 196.

21. *Ibid.*, pp. 195-196.

22. *Ibid.*, p. 196.

23. *Ibid.*, p. 197.

24. On the significance of narrative as a tool of legal reasoning and writing, see my "Narratives of Enlightenment: On the Use of the 'Captive Infant' Story by Recent Halakhic Authorities," in Walter Jacob, ed., *Napoleon's Influence on Jewish Law* (Pittsburgh: Rodef Shalom Press, 2007), pp. 93-147.

25. Warren and Brandeis (note 16, above), p. 193.

26. Warren and Brandeis (note 16, above), p. 195.

27. *Ibid.*, p. 193. The phrase "the right to be let alone" has become tightly associated with the Warren and Brandeis article (and see below, at note 33), but it is not original with them. They attribute it to Thomas M. Cooley, *Cooley on Torts* (Chicago: Callaghan and Co., 1880), p. 29; see Warren and Brandeis, p. 195, note 4).

28. *Ibid.*, p. 198.

29. *Ibid.*, p. 205.

30. The article cites a string of cases on this point in English law, including *Prince Albert v. Strange*, (1849) 64 Eng. Rep. 293, 295 (Ch.), in which Queen Victoria and her husband Prince Albert successfully sued to prevent the publication of etchings made of their family. While Warren and Brandeis (at p. 207) read the case as an instance of "the more general right to the immunity of the person—the right to one's personality," others argue that the English court's ruling was more properly an application of the law concerning breach of confidence. See Neil Richards and Daniel Solove, "Privacy's Other Path: Recovering the Law of Confidentiality," *Georgetown Law Journal* 96 (2007), pp. 123-182.

31. Warren and Brandeis (note 16, above), p. 213.

32. For a survey of this process, with citations of cases and statutes, see William L. Prosser, "Privacy," *California Law Review* 48 (1960), pp. 383-423, especially at pp. 384-389.

33 *Olmstead v. U.S.*, 277 U.S. 438 (1928), 478. Note the resemblance of this language to that in the Warren-Brandeis law review article.

34. *Katz v. U.S.* 389 U.S. 347 (1967).

35. *Griswold v. Connecticut* 381 U.S. 479 (1965); *Roe v. Wade* 410 U.S. 113 (1973).

36. United Nations, *The Universal Declaration of Human Rights*, Article 12, adopted December 10, 1948; http://www.un.org/en/documents/udhr (accessed May 4, 2011).

37. *European Convention on Human Rights*, Article 8, adopted September 3, 1953, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (accessed May 4, 2011).

38 *Human Rights Act of 1988*, Article 8, http://www.legislation.gov.uk/ukpga/1998/42/contents (accessed May 4, 2011). On the other hand, a recent decision of the House of Lords suggests that the English courts have not accepted the existence of a common law right to privacy, so that the right must be fixed by statute; *Wainwright v. Home Office* [2003] UKHL 53, http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/wain-1.htm (accessed May 4, 2011).

39. For example, the federal Privacy Act, R.S.C., 1985, c. p-21, http://laws-lois.justice.gc.ca/eng/acts/P-21/page-1.html (accessed May 4, 2011).

40. *Chok Haganat Hap'ratiyut*, 1981, *Sefer Hachukim* 1981, p. 1011, http://www.knesset.gov.il/review/data/heb/law/kns9_privacy.pdf ; *Chok Y'sod: K'vod Ha'adam Vecheruto*, Article 7, *Sefer Hachukim* 1992, p. 150, http://www.knesset.gov.il/laws/special/heb/yesod3.pdf (accessed May 4, 2011).

41. Judith Jarvis Thomson, "The Right to Privacy," in F. D. Schoemen, ed., *Philosophical Dimensions of Privacy* (New York: Cambridge University Press, 1984), p. 272. See also J. Thomas McCarthy, *The Rights of Publicity and Privacy, Second Edition* (St. Paul: Thompson/West, 2005), vol. 1, sec. 5:59: "Like the emotive word 'freedom,' 'privacy' means so many different things to so many different people that it has lost any precise legal connotation that it might once have had," and Daniel J. Solove, "A Taxonomy of Privacy," *University of Pennsylvania Law Review* 154 (2006), p. 479: "Privacy seems to be about everything, and therefore it appears to be nothing."

42. Daniel J. Solove (see preceding note) is exemplary of this approach. His "taxonomy" of privacy relies upon a Wittgensteinian "family resemblance" approach to the problem. Concepts can be "related" to each other through "a complicated network of similarities overlapping and criss-crossing" even though they do not share an essential core element that is common to all usages of the concept; Ludwig Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe (Oxford: Blackwell, 1953), sec. 66, cited by Solove at p. 485. The taxonomy is meant to show that all sorts of "privacy" violations are part of the conceptual network suggested by the term. "Privacy" is therefore a substantive and useful concept, even if not all invasions of the privacy right involve the same sorts of harm.

43. Diane L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort," 68 *Cornell Law Review* (1983), pp. 292-367.

44. Laurence Tribe, *American Constitutional Law, Second Edition* (Mineola, NY: Foundation Press, 1988), p. 1302.

45. The term was coined by Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89 (1980), pp. 421-471.

46. Prosser (note 32, above), p. 389; see also William L. Prosser, *Handbook of the Law of Torts*, 4th Edition (St. Paul, MN: West Publishing Co., 1971), p. 804. The four torts are: 1. intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2. public disclosure of embarrassing private facts about the plaintiff; 3. publicity which places the plaintiff in a false light in the public eye; and 4. appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

47. Prosser (note 32, above), p. 423. See Jonathan Kahn, "Privacy as a Legal Principle of Identity Maintenance," *Seton Hall Law Review* 33 (2003), pp. 375-376.

48. Kalven (note 15, above), p. 328. "I suspect that fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored."

49. In *Wainwright v. Home Office* (note 38, above): "The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle." The opinion explicitly cites Prosser's response to the Warren-Brandeis thesis in paragraphs 16-17.

50. Thomson (note 39, above), p. 287.

51. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," *New York University Law Review* 39 (1964), pp. 962-1007. The quotation is at p. 971; the quotation at the end of the passage is from Warren and Brandeis (note 16, above), p. 198.

52. Prosser (note 32, above), p. 422.

53. "The identification of the social value which underlies the privacy cases will also help to determine the character of the development of new legal remedies for threats posed by some of the aspects of modern technology. Criminal statues which are intended to curb [eavesdropping] can be assimilated to the common law forms of protection against intrusion upon privacy if the social interest served by the common law is conceived of as the preservation of individual dignity"; Bloustein (note 45, abive), pp. 1005-1006.

54. Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood," in Schoeman (note 40, above), at p. 310. The article originally appeared in *Philosophy and Public Affairs* 6:1 (1976), 26-44.

55. *Ibid.*, p. 313.

56. Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89 (1979-1980), pp. 422-471. The quotation is at p. 422.

57. Among the writings on privacy are: Nahum Rakover, *Hahaganah al tzin`at hap'rat* (Jerusalem: Ministry of Justice, 2006); Norman Lamm, "Privacy in Law and Theology," *Faith and Doubt*, Third Edition (NY: Ktav, 1986), pp. 299-312; Alfred S. Cohen, "Privacy: A Jewish Perspective," *Journal of Halacha and Contemporary Society* 1:1 (Spring, 1981), pp. 53-102; Rabbis Elliot Dorff and Elie Kaplan Spitz, "Computer Privacy and the Modern Workplace," a responsum of the Rabbinical Assembly's Committee on Jewish Law and Standards (http://rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/dorffspitz_privacy.pdf?phpMyAdmin=G0Is7ZE%2CH7O%2Ct%2CZ1sDHpI8UAVD6); CCAR Responsa Committee, "Privacy and the Disclosure of Personal Medical Information," in Mark Washofsky, ed., *Reform Responsa for the Twenty-First Century*, vol. 1 (New York: CCAR Press, 2010), no. 5756.2, pp. 331-342.

58. *B. Bava Metzi`a* 113a-b; *Yad, Malveh veloveh* 2:1-2; *Shulchan Arukh Choshen Mishpat* 97:6. The authorities have struggled with the tension in this provision between concern for the debtor's dignity and the fact that this protection might work to the advantage of an unscrupulous debtor who claims that "I have nothing with which to pay you"; neither the creditor nor the bailiff may enter the debtor's home to verify that statement. Rambam, at *Malveh veloveh* 2:2, refers to post-Talmudic enactments imposing the requirement of an oath upon the debtor who claims inability to pay. Other authorities, particularly Rabbeinu Tam, sought to provide some relief to creditors by reading the Biblical prohibition strictly: the bailiff is forbidden to enter the debtor's home *only* to collect a pledge (*mashkon*) prior to the due date of the loan; however, the bailiff may enter the home in order to *collect* the loan once it has become due. See *Sefer Hayashar*, ed. Schlesinger (Jerusalem, 1959), ch. 602; *Tur, Choshen Mishpat* 97, *s.v. ul'divrei r"t* and *Beit Yosef ad loc.*; *Shulchan Arukh Choshen Mishpat* 97:15. The classic work on this subject is Menachem Elon, *Cherut hap'rat bedarkhei g'vi`at hachov bamishpat ha`ivri* (Jerusalem: Magnes, 1964).

59. *Tractate Derekh Eretz Rabah* 5.

60. See *B. Pesachim* 112a and Rashbam, *ad loc., s.v. velo tikanes*.

61. *Yad, Sh'khenim* 2:14 and *Shulchan Arukh Choshen Mishpat* 157:1, based upon *B. Bava Batra* 2a-3a.

62. *Yad, Sh'khenim* 5:6 and *Shulchan Arukh Choshen Mishpat 154:3,* from *M. Bava Batra* 3:7 and *B. Bava Batra* 59b-60a.

63. *B. Bava Batra* 60a, on Numbers 24:2*ff.* See also *Targum Yonatan* to Numbers 24:2

64. *Chidushei HaRambam, Bava Batra* 59a.

65 *Resp. Rashba* 2:268. See also *Resp. Rashba* 4:325, concerning a householder sued for damages resulting from overlooking. The householder responded that, inasmuch as he bought the house from a non-Jew and as non-Jews are not held liable to the rules of *hezek r'iyah*, he, too, should be immune to the lawsuit. Rashba rejected this defense: "If Gentiles are not strict about *hezek r'iyah*, Jews are indeed strict about it, for they consider it a worthy quality to be modest (*tz'nu'in*)."

66. R. Menachem Hameiri, *Beit Habechirah, Bava Batra* 2a.

67. The issue is discussed in Shlomo Daikhovsky, "Ha'azanat Seter," *Techumin* 11 (1991), p. 299*ff.*

68. The *takanah* is cited by the 13th-century R. Meir of Rothenburg in his *Responsa* (ed. Prague), no. 1022. See also *Sefer HaKolbo*, ch. 116, which cites the *takanah* but omits the exception concerning the discarded letter.

69. *Resp. Chik'kei Lev*, v. 1, *Yoreh De`ah*, no. 49.

70. *B. Chulin* 94a; *Yad, De`ot* 2:6, *Mekhirah* 18:1; *Shulchan Arukh Choshen Mishpat* 228:1.

71. *B. Yoma* 4b; see *Meiri, Beit HaBechirah ad loc.*

72. For a comprehensive treatment, see the article by Amy Scheinerman in this volume.

73. From *rigul*, "spying" or "espionage," which Rashi relates to *rakhil*. The "others" include Rambam, *Yad, De`ot* 7:1 and *Sefer HaChinukh*, *mitzvah* 236.

74. *Yad, De`ot* 7:1*ff.* Other acts of speech, while not falling under the definition of the Toraitic "gossip" or "slander," are nonetheless forbidden as *avak lashon hara*, a secondary level of the prohibition. For example, one is forbidden even to say things in praise of another, lest that praise cause the other's enemies to speak

disparagingly of him. See *B. Arakhin* 16b, *Yad, De`ot* 7:4; and *Kesef Mishneh ad loc.*

75. *Holekh rakhil m'galeh sod*; Proverbs 11:13 (and see *M'tzudat David ad loc.*). *B. Yoma* 4b on Leviticus 1:1 (*bal yomar*).

76. Rakover, note 57, above. On the *Chok haganat hap'ratiyut*, see note 40, above.

77. Rakover (note 57, above), p. 30. The parallels and similarities between Rakover's interpretive strategy and that of Warren and Brandeis raise the obvious question: was he in any significant way influenced by their essay? It is, of course, impossible to establish this with certainty on the basis of his text. What we can say is that he was keenly aware of those authors' contribution to the development of privacy law in Western thought. He cites Warren and Brandeis in his very first footnote (p. 13) and, at somewhat greater length, on p. 18, where he (like many of the legal scholars we have surveyed) credits them as the authors of the very notion of a legal right to privacy. We can also point to his affiliation with *mishpat ivri* (see below in text), the academic law-school movement that re-frames the halakhic tradition into categories recognizable by and common to other legal systems. Accordingly, Rakover might well be open to utilizing the trends and currents of academic jurisprudential thought, with which he is clearly familiar, in the analysis of specifically halakhic questions. Again, one cannot say for sure, but it's always fun to speculate!

78. To be sure, we might conceive of slander as the sort of "damage" to interests that pertain to what Warren and Brandeis called "man's spiritual nature," although there are difficulties with such a move in Jewish law. R. Yisrael Meir Kagan, the author of the pre-eminent halakhic treatment of prohibited speech, explains why: slander (*lashon hara*) differs from all other kinds of damage in that it is forbidden in principle (*l'khatchilah*): one is forbidden to utter *lashon hara* regardless of its material consequences. Other actions that cause "damage" are problematic only after they have taken place (*b'di`avad*), when the damage has occurred. The practical legal difference here is that one who commits *lashon hara* is liable even for *g'rama*, damages that are indirectly related to his slander. Ordinarily, one is liable only for damages that are the direct result of one's actions. See *Sefer Chafetz Chayim, Hilkhot R'khilut* 9, in the commentary *B'er Mayim Chaim* at the beginning of the chapter.

79. As Rabbi Avraham Yitzchak Hakohen Kook explains the difference: "the prohibition of tale bearing is not to be defined as a species of tort; its basis rather is found in the prohibition of evil speech... One who speaks so as to insure that his

words might find a receptive audience has by definition violated this prohibition. This is not the case with torts, where the prohibition attaches to the actual damage that one does to another"; cited in Rakover (note 57, above), p. 31, note 8.

80. *Ibid.*, p. 32.

81. *Ibid.*, p. 311.

82. *Ibid.*, p. 310.

83. "One example," because others make the same sort of interpretive move. See Norman Lamm (note 57, above, at pp. 296-298), who cites the fundamental principles of modesty (*tz'niyut*) and that man is created in the divine image (*b'tzelem elohim*) as the conceptual grounding for the specific provisions that protect the individual from the trespass of others.

84. Let me cite a few examples of this phenomenon. A philosopher notes that gossip is not, in the main, malicious and that it "is engaged in for pleasure, not for the purpose of hurting someone", Aaron Ben-Ze'ev. "The Vindication of Gossip," in Robert F. Goodman and Aaron Ben-Ze'ev, eds., *Good Gossip* (Lawrence, KS: University Press of Kansas, 1994), p. 11-24. A legal scholar argues that gossip "increases intimacy and a sense of community among disparate individuals and groups"; Diane L. Zimmerman (note 43, above), p. 291. An anthropologist defends gossip as a form of communication that, precisely because it is conducted out of earshot of the person talked about, enables people to discuss their neighbors in such a way as to avoid fights and open conflict; Karen Brison, *Just Talk: Gossip, Meetings, and Power in a Papua New Guinea Village* (Berkeley: University of California Press, 1992), p. 11.

85. A few examples will have to suffice. Robert Gordis speaks of "abiding principles of Jewish law, especially *k'vod bab'riyot*, in his *The Dynamics of Judaism* (Bloomington: Indiana University Press, 1990), pp. 121-126. Elliot N. Dorff discusses the relationship between "moral norms" and halakhic decision in *For the Love of God and People* (Philadelphia: Jewish Publication Society, 2007), pp. 211-243. Moshe Zemer builds a great deal of his approach to *halakhah* upon these principles; see the first section of his *Evolving Halakhah* (Woodstock, VT: Jewish Lights, 1998). Eliezer Berkovits, the noted Orthodox theologian, was also a creative (and to my mind progressive) halakhic thinker; see his *Hahalakhah: kochah v'tafkidah* (Jerusalem: Mosad Harav Kook, 2006), especially at pp. 112-158. Louis Jacobs charts the relationship between *halakhah* and the ethical principles (including that of *derekh eretz* or "good manners") in his magisterial *A Tree of Life* (Oxford: Oxford University Press, 1984), pp. 182-199. Joel Roth considers the influence of "ethical data" upon halakhic decision in *The Halakhic Process: Systemic Analysis* (New York: Jewish Theological Seminary, 1986), pp.

285-304. Daniel Sperber discusses several "metaprinciples" (*ekronot `al*), including *k'vod hab'riyot*, in *Darkah shel torah* (Jerusalem: Rubin Mass, 2007), pp. 51-101. It is no accident, I think, that our own Nahum Rakover speaks of *k'vod hab'riyot* as a "metaprinciple" in the subtitle of his *Gadol k'vod hab'riyot* (Jerusalem: Ministry of Justice, 1998).

86. Of the many works that might be cited here, the one that deserves special mention is Menachem Elon's *Jewish Law* (Philadelphia: Jewish Publication Society, 1994). While most of that work is devoted to a comprehensive doctrinal and historical survey of Jewish law, much of its fourth volume deals with the role that the Jewish tradition does play and (in the author's view) ought to play in the law of the state of Israel. Elon includes as well a brief history of the *mishpat ivri* movement and its efforts to revive Jewish law and to integrate it into the law of the state.

87. See below, the discussion of the controversy sparked in the 1970s by Itzhak Englard's critique of *mishpat ivri*. In general, the movement encountered opposition from all sides. Secular lawyers, who had been trained in the English common law tradition, did not relish the prospect of finding their legal training and world view rendered obsolete by a major change-over to Jewish law. Orthodox jurists and rabbis did not look kindly upon the notion that a secular legislators and judges would presume to speak in the name of Jewish law. Those on both sides who viewed the *halakhah* essentially as a system of religious law found it difficult to imagine its application in the life of a state that did not officially recognize the *halakhah* as binding. See Elon (note 86, above), pp. 1906-1914, and Menachem Mautner, *The Law and Culture of Israel* (Oxford: Oxford University Press, 2011), pp. 32-35. For a "postmodern" reading of the movement to "revive" Jewish law, see Asaf Likhovski, "The Invention of 'Hebrew Law' in Mandatory Palestine," *American Journal of Comparative Law*, 46 (1998), pp. 339-373.

88. What we might term Rakover's programmatic statement in this regard is his *L'shiluvo shel hamishpat ha`ivri bamishpat hayisra'eli* (Jerusalem: Ministry of Justice, 1998). And see especially the books he has authored under the rubric of *Sifriyat hamishpat ha`ivri* (The Jewish Law Library), published with the assistance of Israel's Justice Ministry. These titles include *Eikhut has'vivah* ("Quality of the Environment"; Jerusalem, 1993); *Z'khut hayotzrim b'm'korot hay'hudi'im* ("Intellectual Property Rights in Jewish Sources"; Jerusalem, 1991); *Matarah ham'kadeshet et ha'emtza`im* ("Does the End Justify the Means?"; Jerusalem, 2000); *Ethics in the Marketplace* (Jerusalem, 2000); *Hamischar bamishpat ha`ivri* ("Commerce in Jewish Law; Jerusalem, 1987); *Osher v'lo bamishpat* ("Unjust Enrichment"; Jerusalem, 1987); and, especially pertinent to our topic, *Gadol k'vod hab'riyot* ("Human Dignity is a Weighty Thing"; note 85, above), and *Hahaganah al tzin`at hap'rat* ("Protection of Individual Privacy," note 57, above) .

89. R. Joseph D. Soloveitchik, *Y'mei Zikaron* (Jerusalem: World Zionist Organization, 1987), pp. 9-11, on the basis of the comment of Ramban to Genesis 1:26.

90. See the references in R. Barukh Halevy Epstein's *Torah Temimah* to the Biblical verses upon which these principles are based.

91. See *Sifre* to Deuteronomy 20:3 (*piska* 192), where the exemption of the fearful person from military service is explained in part on the basis of *k'vod hab'riyot*. See *Encyclopedia Talmudit*, v. 6, col. 477. In the words of Soloveitchik (note 89, above, at p. 9), "The value of *k'vod hab'riyot* is the theoretical focal point for numerous *halakhot*: for example, burial, respect for the corpse, ritual defilement of priests, the *met mitzvah*, *Aninut*, mourning, the dignity of an elderly person, public humiliation and others. It is even possible that all *mitzvoth* dealing with interpersonal relationships are based upon this value."

92. *B. Berakhot* 19b.

93. *B. Berakhot* 19b-20a. By contrast, the Talmud Yerushalmi (*Y. B'rakhot* 3:1 [6b]) takes a somewhat more expansive view of this principle than does the Bavli. See Ya`akov Blidstein, "Gadol k'vod hab'riyot," *Sh'naton hamishpat ha`ivri* 9-10 (1982-1983), pp. 127-185, and Nahum Rakover, *Gadol k'vod hab'riyot* (note 85, above), pp. 54-68.

94. One possible answer is that the "negative precept" to which the maxim refers is *lo tasur* (Deuteronomy 17:11), which the halakhic tradition cites as the basis for Rabbinic legislative authority (*B. Shabbat* 23a; see *Encyclopedia Talmudit*, v. 6, col. 477*ff*). Another answer is that the rule "great is human dignity" can indeed override Toraitic commandments, but only in a passive way (*shev v'al ta`aseh*; that is, one may refrain from fulfilling a positive commandment). Finally, the "negative precept" in question has to do with monetary law (*dinei mamonot*), a sphere of legislation where the rules tend to be less strictly formal than in ritual law. For discussion and references, see the works of Blidstein and Rakover cited in the preceding note.

95. *B. B'rakhot* 19b-20a, and Rashi, 20b, *s.v. aval m'tamei hu l'met mitzvah*; *Yad, Kilayim* 10:29.

96. *B. B'rakhot* 20a. The quote is from Rashi *ad loc., s.v. aval m'tamei hu l'met mitzvah*.

97. *B. Shabbat* 94b; *Yad, Shabbat* 15:22.

98. *B. B'rakhot* 19b, and Rashi, *s.v. v'einah l'fi k'vodo*; *Yad, Kilayim* 10:29. The exception: one who wishes to act at a higher level of ethical attainment (*lifnim mishurat hadin*) may return the lost object even when his dignity would be violated in doing so; *B. Bava Matzi`a* 30b; *Yad, G'zeilah ve'aveidah* 11:17.

99. *Responsa Maharam Padua*, no. 87.

100. *Resp. Maharival* 1:40.

101. *Responsa Rema*, no. 125.

102. *Responsa Da`at Kohen*, no. 169. For an argument permitting women to serve as scribes for Torah scrolls see W. Gunther Plaut and Mark Washofsky, editors, *Teshuvot for the Nineties* (New York: CCAR, 1997), no. 5755.15, pp. 177-183.

103. See, for example, Berkovits (note 85, above).

104. Sperber (note 85, above), pp. 17-43. His summary, on p. 42: *k'vod hab'riyot* outweighs the countervailing principle of *k'vod hatzibur* ("the dignity of the congregation"), which has traditionally been cited as the basis for the prohibition of calling women to the Torah.

105. Blidstein (note 93, above).

106. Blidstein (note 93, above), p. 128. His discussion of the concept's overall absence from halakhic discourse is at pp. 128-131.

107. Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1954), p. 56-57. See also Haninah Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur, Switzerland: Harwood, 1991), p. 180: "Western legal thinking demands total obedience to the letter of the law, making no allowance for extra-legal considerations." Ben-Menahem contrasts this with his own study, which suggests that Talmudic law "allows judges to deviate from the law if, in their opinion, such a course is justified" (*ibid.*). Ben-Menahem's observations are restricted to the legal situation as indicated in the two *talmudim*. The question: do they likewise describe the decisional tendencies of rabbis in post-Talmudic times? As I read it, the massive research into the history of the post-Talmudic *halakhah* reveals a complex picture. The *poskim* do attempt to decide according to the rules of the law rather than in accordance with general, abstract principles of ethics and equity. At the same time, halakhic jurisprudence ensures that the individual *posek* enjoys a great amount of interpretive freedom, allowing him to construct arguments that to a great extent reshape the rules in accordance with the needs of his time and the requirements of the individual case. For more extensive consideration of this question, see my "Against Method" (note 13, above)

and "Taking Precedent Seriously: On *Halakhah* As A Rhetorical Practice," in Walter Jacob and Moshe Zemer, eds., *Re-examining Progressive Halakhah* (New York: Berghahn Books, 2002), pp. 1-70, and at http://huc.edu/faculty/faculty/washofsky/takingprecedentseriously.pdf .

108. Haim Cohen, *Hamishpat* (Jerusalem: Mosad Bialik, 1991), p. 69.

109 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 26.

110 Mark Washofsky, "Against Method" (note 13, above), p. 38. Haim Cohen (note 108, above), p. 69, describes the application of general principles in language that evokes the famous High Holiday poem *k'chomer b'yad hayotzer* ("Like clay in the hands of the potter...").

111 "Equity" is the name given to those procedures that at one time existed alongside the formal law and that served as a corrective to it in cases where the application of formal legal rules would lead to unjust results. Thus Aristotle: "This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality. It is because there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary"; *Nicomachean Ethics* 317 (H. Rackham, transl., 1947) On the relationship of equity and formal law see, in general, Ralph A. Newman, *Equity and Law: A Comparative Study* (New York: Oceana Publications, 1961) and Roscoe Pound, *The Decadence of Equity* (New York: Columbia University Press, 1905). On "equity" and "law" in the halakhic tradition see Aaron Kirschenbaum, *Equity in Jewish Law* (Hoboken, NJ and New York: Ktav/Yeshiva, 1991).

112 "The discretion of a Judge is the law of tyrants: it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable"; Lord Camden, L.C.J., *Case of Hindson and Kersey*, 8 Howell State Trials 57 (1680). See also Blackstone, *Commentaries on the Laws of England*, I:62 (1765-1769): "Law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law, which would make every judge a legislator, and introduce most infinite confusion, as there would be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind."

113 See Pound (note 107, above), p. 58. See also Edgar Bodenheimer, *Jurisprudence* (Cambridge, MA: Harvard, 1974), p. 249: Equity, which originated as an *ad hoc* departure from the rigid rules of the common law when these would lead to an unjust result in a particular case, "became transformed into a 'rule of equity' jurisprudence." Similarly, the Roman praetor's equitable deviations from the fixed *ius civile* "became incorporated into a separate body of law known as *ius*

honorarium."

114. Dworkin first put forth his theory systematically received in *Taking Rights Seriously* (note 111, above); for its most recent elaboration, see *Law's Empire* (Cambridge, MA: Belknap Press, 1986). The quotations in the text are taken from his *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp. 158*ff*. There, he offers his famous comparison of legal interpretation to develops his understanding of the nature of legal interpretation to the writing of a chain novel. Like the latest author in such a chain, the judge in the instant case must "interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own" (p. 159).

115. Dworkin calls legal positivism, rooted in the writings of Jeremy Bentham and John Austin, "the ruling theory of law"; *Taking Rights Seriously* (note 114, above), p. ix. The leading modern exposition of the theory is H.L.A. Hart, *The Concept of Law, Second Edition* (Oxford: Clarendon Press, 1994); the first edition of that work, to which Dworkin responds, was published in 1961. For a good survey of the theory and its criticisms, see the essays in Tom D. Campbell, *Legal Positivism* (Aldershot: Ashgate, 1999).

116. On the judge's role as an "interstitial" legislator, see the dissent of Justice Oliver Wendell Holmes, Jr., in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 201 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially." See also Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale, 1921), p. 113: the courts do legislate, but only within "the open spaces of the law."

117. Itzhak Englard, "Research in Jewish Law: Its Nature and Function," in Bernard S. Jackson, ed., *Modern Research in Jewish Law* (Leiden: Brill, 1980), pp. 21-65. The original Hebrew version of Englard's article appeared in *Mishpatim* 7 (1975-1976), pp. 34-65. The term "uncompromising" is Jackson's description; see his Preface, p. vii.

118. Englard (note 118, above), p. 52.

119. *Ibid*., pp. 53*ff*.

120. Englard (note 118, above), p. 52. Assaf Likhovski makes a similar point in his "The Invention of 'Hebrew Law' in Mandatory Palestine," *American Journal of Comparative Law* 46 (1998), pp. 339-374, available at http://ssrn.com/abstract=1117796 (accessed May 17, 2011).

121. Menachem Elon, *Herut hap'rat b'darkhei g'vi`athov bamishpat ha`ivri* (Jerusalem" Magnes, 1964), p. xiii, cited by Englard (note 118, above), p. 51.

122. Englard (note 118, above), p. 53.

123. See especially the response by Menachem Elon in the Jackson volume (note 117, above), pp. 66-111, a translation of the original Hebrew article appearing in *Mishpatim* 8 (1976-1977), pp. 99-137.

124. Rakover (note 57, above), p. 13, as well as Rakover, note 86, above. His volume on privacy was a direct outgrowth of his involvement with the Israeli legal system; see note 76, above.

125. Jackson (note 83, above), p. 138. Hart himself came eventually to espouse a theory of "soft" or "inclusive" positivism, "which permits the identification of the law to depend on controversial matters of conformity with moral or other value judgments"; Hart (1994; note 115, above), p. 251. For more on "inclusive positivism" see Jules Coleman, "Incorporation, Conventionality, and the Practical Difference Thesis," in Jules Coleman, ed., *Hart's Postscript* (Oxford: Oxford University Press, 2000), pp. 99-148, and W. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994). The opposing viewpoint, termed "exclusive positivism," holds that "legal validity is exhausted by reference to the conventional sources of law," that is, to rules validated by the system's ultimate rule of recognition; see Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001), p. 49. This approach, obviously, is more congenial to Englard's point of view.

126. For a strong statement of this view see Shalom Albeck's introduction to his *Dinei mamonot batalmud* (Tel Aviv: Dvir, 1976), pp., 13-31, translated in Jackson (note 118, above), pp. 1-20. That law should embody the characteristic of coherence is an element of Ronald Dworkin's conception of "law as integrity"; Dworkin, *Law's Empire* (note 114, above), p. 211. This, of course, presumes that law is necessarily coherent, a presumption challenged by Andrei Marmor (note 125, above), p. 70.

127. For general discussion see my "The Woodchopper Revisited: On Analogy, *Halakhah*, and Jewish Bioethics," in Walter Jacob, ed., *Medical Frontiers and Jewish Law* (Pittsburgh: Solomon B. Freehof Institute of Progressive Halakhah, 2012), pp. 1-62, http://huc.edu/sites/default/files/people/washofsky/The%20Woodchopper%20Revisited.pdf (accessed January 14, 2014). Let one example suffice to illustrate the phenomenon here. In *B. Bava Batra* 47b-48a, the Talmud seeks a theory to explain Rav Huna's statement that a coerced sale of property is legally valid. How does such a transaction not violate the law's general provision that the seller must freely

consent to the sale? An attempt is made to analogize his case to that of a husband who is coerced by the court into issuing a divorce to his wife, even though the law of the Torah explicitly requires that the husband freely consent to a divorce. If coercion does not contradict the fact of consent in the divorce case, perhaps it does not contradict it in the sale of property case. The Talmud, however, rejects the analogy. The divorce case is explicable by the principle that "it is a *mitzvah* to heed the words of the sages," *i.e.,* the court that requires the divorce: since one is obligated to obey the law and since one arguably wishes to do so, we can say that consent to the divorce, though elicited by pressure, is consistent with one's "true" wishes (see *Yad, Gerushin* 2:20). This principle does not apply, obviously, to the sale of personal property, which involves no religious obligation. Note that the Talmud invokes a general principle to illuminate the differences between the cases and hence to reject the analogy.

128 The term was first coined, it would seem, by the rabbi and philosopher Eliezer Goldman in a lecture he delivered at the 5th Conference for the Study of Jewish Thought (Tel Aviv, 1958). By "*meta-halakhah*," Goldman meant those principles and conceptions - some of which are mentioned explicitly in the Talmudic sources while others are not - that, while not part of what he called the positive *halakhah*, are absolutely necessary for halakhic thought to function at all. See Eliezer Goldman, *Yahadut l'lo ashlayah*, ed. Dani Statman and Avi Sagi (Jerusalem: Shalom Hartman Institute, 2009), pp. 15-37. For a collection of essays devoted to the subject see Avinoam Rosenak, ed., *Halakhah, Meta-halakhah ufilosofiah* (Jerusalem: Magnes, 2011).

129. Elon, in Jackson (note 117, above), p. 84.

130. Edward L. Rubin, "The Practice and Discourse of Legal Scholarship," *Michigan Law Review* 86 (1988), pp. 1835-1905. The quotation is at p. 1848.

131. See at note 15, above.

132. The foregoing does not even begin to consider the "critique of methodology" offered by postmodernist theory, which emphasizes that, especially in the humanities and social sciences, the phenomena the scholars observe are more the products of construction than of discovery and that "reality" is contingent rather than essential, created by language and enjoying no independent existence outside the linguistic universe. The literature on the subject is vast. I offer my own summary of the debates over critical theory and their relation to law and *halakhah* in "Against Method" (note 13, above), at pp. 43*ff* (the section entitled "*Halakhah* as a Social Practice.")

133. Elon (note 117, above), p. 84.

134. Moshe Rosman, "Writing Jewish History in the Postmodern Climate," in his *How Jewish Is Jewish History?* (Oxford: Littman Library, 2007), p. 14.

135. As Nachmanides famously observed in his Introduction to *Sefer Milchamot Hashem*, which appears at the beginning of most folio editions of the Babylonian Talmud, the truths of "Talmudic science," unlike those of mathematics or astronomy, are not subject to demonstrative proof. As the products of persuasive argument, they partake of the realm of probability and reasonability rather than that of hard fact.

136. For the CCAR Responsa Committee, see *Teshuvot for the Nineties* (note 107, above), no. 5750.4, pp. 187-190 (on the prohibition of *lashon hara* even within the context of marital communication) and *Reform Responsa for the Twenty-First Century, Volume 1*, no. 5756.2 (see note 57, above). See also Walter Jacob, ed., *Contemporary American Reform Responsa* (New York" CCAR, 1987), no. 46, pp. 79-80, on the "privacy of a convert." On the latter topic, see also *Reform Responsa for the Twenty-First Century, Volume Two* (note 57, above), no. 5760.6, pp. 85-92. For the Committee on Jewish Law and Standards of the Rabbinical Assembly, see Dorff and Spitz (note 57, above).

137. *Reform Responsa for the Twenty-First Century, Volume 1*, no. 5756.2 (note 57, above).

138. The decision in such cases, of course, will involve the drawing of a difficult and sensitive balance between the degree of danger and the privacy interests of the individual. See, for example, *Teshuvot for the Nineties,* (note 102, above), no. 5750.1, pp. 103-110, on the question of mandatory testing for the HIV virus.

139. The following are some examples; they do not constitute an exhaustive list. The CCAR, the professional association of Reform rabbis in North America, has gone on record in opposition to government-sponsored invasions of personal privacy in 1975 (http://data.ccarnet.org/cgi-bin/resodisp.pl?file=privacy&year=1975) and 1976 (http://data.ccarnet.org/cgi-bin/resodisp.pl?file=privacy&year=1976). The Union for Reform Judaism adopted a resolution on "privacy and surveillance" in 1971 (http://urj.org//about/union/governance/reso//?syspage=article&item id=2213), on "privacy and national security" in 1984 (http://urj.org//about/union/governance/reso//?syspage=article&item id=2103), and "privacy and freedom of information" in 1976 (http://urj.org//about/union/governance/reso//?syspage=article&item id=2168). A resolution on "Internet privacy" was adopted by the North American Conservative movement's Rabbinical Assembly in 2011

(http://rabbinicalassembly.org/resolution-internet-privacy).

140. See at notes 11-12, above.

141. See at notes 6-8, above.

142. For a classic description of the expectations that *tzniyut* places upon females as opposed to males see *Yad, Ishut* 24:12*ff*.

143. Rashi, *B. Sukah* 49b, *s.v. hotza'at hamet*; *She'iltot d'Rav Achai, she'ilta* 3.

144. See *M. Kilyaim* 9:5, *M. Demai* 6:6, and *M. Ma`aser Sheni* 5:1, where the title "*tznu'im*" is applied to those who are careful and stringent in their performance of *mitzvot* (see Rambam and Bartenura to all three *mishnayot*).

145. Two of these are: Lisa Grushcow, *A Responsum on Synagogue Attire* (Rabbinical Thesis, HUC-JIR, New York, 2003); and Loren Filson Lapidus, *Tzniut in Reform Judaism and Its Educational Applications* (Rabbinical Thesis, HUC-JIR, Cincinnati, 2008).

146. At note 43.

147. Bloustein (note 51, above), p. 971.

INTELLECTUAL PROPERTY IN THE DIGITAL AGE

Protect or Share

Walter Jacob

"Intellectual property" as a term is a modern invention; the designation seeks to deal with the enormous expansion of products of the mind. Till quite recently virtually the only products of the mind were books and music, both occasionally protected. The technological changes of recent times have vastly expanded our understanding of intellectual property and its treatment to include all creations of the mind - major, minor, and trivial.

It is, of course, tempting to guard intellectual products like physical inventions as that area is well known and has a long legal history. There are similarities: Intellectual properties like physical properties involve power, control, and money. It after all makes no difference whether we are dealing with a new turbine, a scientific theory, a business model, a new drug, a song, or a book; nor may it matter whether the idea is ultimately expressed in a physical form, an image, musical notation, or as an abstract formula.

Protection of intellectual property, whatever form it takes raises concern about interfering with intellectual exploration of any kind as well as governmental control. We should remind ourselves that most societies have discouraged news ideas as well as unlimited creativity because they disturb the status quo, threaten those in power, and may bring social instability. All institutions, political, social or religious prefer to remain with what is known though they also realize that selective new ideas may be useful. In our age of nearly universal education, widespread democracy, and unfettered communication challenges to such conservatism are more likely to be raised and restraint becomes more difficult.

The current protection of intellectual property takes different forms and encompasses old areas as well as vast new fields. It is as if vast new territories previously unsettled have been discovered and can now

be staked out and fought over as the Americas in the fifteenth and sixteenth centuries.

In many ways the category, named intellectual property now dominates physical property, while also demanding a series of special laws, ever growing in their complexity. Yet like all property, it can be sold, leased, mortgaged, subdivided and fought over. We are in a new era of staking out territorial claims.

It is well recognized that portions of such intellectual property only represent innovations with limited potential and their protection may merely be a nuisance. However, the rest of this category may move us in a new direction and possess immediate or latent financial value. This paper will view intellectual property, in the light of Jewish tradition which has a long history of dealing with physical property, but has not treated intellectual creations in a parallel manner.

A World Without Intellectual Property Protection

As we look at the Jewish aspect of this, let us begin with the most ancient Jewish creativity, the book of the Bible. Here we see a major distinction between the Jewish and Greco/Roman world. The biblical authors had no pride of authorship. Even if a name was attached to a book, its content was attributed to God. The person who transmitted it was secondary, even in the case of Moses and clearly so with some late books, the *Song of Songs*, *Proverbs*, and *Ecclesiastes* along with some psalms. The attribution which may reflect Greek influence or simply an effort to attract readership through the attribution to a well known great individual. In other books of the Bible new ideas were introduced into older works by later writers as modern analysis has shown. This was in no way malicious as those involved wished to find a way of getting their ideas to the public and had no interest in personal identification. The ideas mattered, not their ego. Such new ideas may have conflicted with earlier passages. As we know the

Bible is full of contradictory theologies, sometimes expressed side by side beginning with the stories of creation in Genesis. Both became understood as part of the tradition.[1] Those who thought about eternal problems as well as more mundane matters were concerned with ideas not their ego and so were willing to remain anonymous. Protection of ideas did not enter their minds.

Such anonymity is also found in writings rejected by the biblical canon.[2] Only with Philo (20 B.C.E. - 40 C.E.), Josephus (37 C.E.- 105 C.E.), the *Pirkei Avot* of the Mishnah do we see a of pride of authorship among Jewish scholars under Greek influence, but that was not a path generally taken till later.

New ideas were encouraged in the rabbinic period through the very form of the literature. The first page of the Mishnah and the subsequent Talmud begins with a question.[3] In this way exploration was encouraged. The open ended discussions which followed may remain baffling and sometimes disturbing, but it stimulated new ideas.

Such discussions along with proposed solutions were understood to be in the service of God. The results whether accepted or dismissed, often led to further explorations. Efforts to curb such discussions through miraculous divine intervention or in the name of a "correct theology"were rejected as demonstrated by a well known story of R. Eliezer who wished to prove his point through several miracles. His colleagues responded with the statement: "The Law is not in heaven" (Deut. 30:12), i.e. as God has given us the Torah, it is up to us to interpret it without divine interference. The tale ends by stating "God laughed and said "My children have conquered me." (B.M. 59b).
In contrast to the Bible statements, the rabbinic literature were often attributed to a scholar, living or dead.[4] The ideas, however, were shared and there was no thought of more than casual personal recognition. Honor was given to scholars who held different opinions and they were cited even in disagreement. Plagiarism or quoting

without attribution was considered wrong, though not a crime; it was dishonorable and to be avoided, but there was no punishment. The rabbinic literature constantly quoted statements of earlier sages, either in agreement or disagreement. Those shedding new light on some aspect of knowledge were lauded and the individual creator praised., but nothing beyond that occurred. Few efforts to ban ideas were undertaken and usually were unsuccessful.

As we have seen in both the biblical and rabbinic period no need to protect ideas was felt. Whether anonymous or attributed to an individual, the ideas were never considered personal property. Inspiration came from God and could not be personally claimed.

Most of the ideas in these rabbinic discussions had no economic value, although they provided a different intellectual understanding of Judaism. Much of our current concern with intellectual property is due to its financial value and that was not entirely absent in the past. The best known example is the *prosbul* attributed to Hillel (30 B.C.E.-20 C.E.). His idea reinterpreted a biblical law intended to help the peasant, but it had become an obstacle to all commerce. The new interpretation removed a threatened credit crunch which threatened all commerce and especially affected the poor. The Bible had mandated the cancellation of all debts through the sabbatical year. As that year approached, lenders became unwilling to extend credit. The situation became critical if a bad harvest threatened and timely repayment before the sabbatical year became extremely unlikely. This, had undoubtedly always been a problem, but in the more commercial society of the first century it threatened the Jewish economy. Commerce large and small was in danger; it affected the livelihood of poor peasants as well as the wealthy trader. Hillel's invention of the *prosbu*l, a new financial tool, turned the court into an artificial person and loans deposited there were not cancelled by the sabbatical year (*Git.* 36a; *Shulhan Arukh Hoshen Mishpat* 67), so commerce could continue. This radical move contradicted the literal meaning of

the levitical prohibition as well as the intent of that law; Hillel, however, understood that it also destroyed the economy. A sabbatical year without a viable economy was of no use to anyone, so he preferred to create a path around the biblical injunction. Hillel possessed sufficient authority along with the will to introduce this change. It was an invovation of enormous economic value; Hillel was duly credited, but sought and received no control of his idea nor any fiscal reward.[5]

Actually similar reinterpretations of the Biblical texts occurred in the early rabbinic period although none can be precisely dated. They dealt with the sabbatical year in the rural setting (Lev 25:2 ff.). The biblical ideal mandated that the land be left idle and the population either lived off previously stored grains or consume the meager crop which grew wild (Lev. 25:18-22). The Book of Maccabees is one of the few texts which noted its observance (I Mac. 6:49, 55). The rabbinic interpretation of these measures restricted them to the land of Israel and as those boundaries were far from clear, the law became void. There was talmudic discussion about the calendar and the sabbatical years (A.Z. 9b), but little about details of observance. Some farmers in modern Israel, however, to this day continue to attempt to observe it during each sabbatical year.

Much more difficult was the Jubilee Year (Lev 25:2 ff.). Its mandate declared that all rural property be restored to the original owner after fifty years - a noble attempt to re-balance society. An anonymous author even rewrote early biblical history into fifty year cycles to emphasize this ideal (*The Book of Jubilees)*; the book, however disappeared from Jewish life only to be rediscovered in the nineteenth century. Neither the biblical ideal nor the effort of its later proponent was followed. The rabbinic literature anonymously nullified the law by stating that the biblical Jewish kingdom under which they had been created no longer existed.

The nullification of the sabbatical year and the Jubilee represented anonymous new ideas as significant as Hillel's *Prosbul*. These three biblical ideas could have had enormous economic impact and more important they basically destroyed the social vision of the biblical author. What had been a mandatory re-balancing of the society was now limited to voluntary aid for the impoverished.

Similar later new economic vehicles were created to solve other economic problems connected with loans; they led to extensive laws of *rivvis* and the creation of the *heter iska*; these efforts enabled the charging of interest on loans something clearly prohibited by the Bible (Ex 22:25; Deut 23:20). Again idealism was sacrificed to economic forces. The biblical laws represented an ideal. Human nature being what it is, the ideal was lauded, but not followed. Less idealistic solutions were demanded so that commerce could continue. Society may have benefitted, but the ideal demanded by the Bible was removed and left to a weakened humanitarian impulse.

The presentation of new ideas, anonymously or by attribution to an earlier famous figure, certainly with no thought of protection, continued to a lesser degree in the Middle Ages and early modern period. The *Sefer Hassidim* of Judah Hehasid (Germany twelfth century) made it a principle to avoid citing authorities for its statements in contrast to contemporary *halakhic* works. On the other hand, Moses de Leon, most likely the author of the *Zohar,* which appeared in the thirteenth century, attributed it to Shimon ben Yochai (2nd century). Moses de Leon claimed to have rediscovered this long forgotten work of the mishnaic author. Although suspected earlier, his actual authorship has now been generally accepted. It is a revolutionary mystical work which gained enormous influence. The highly gifted inventive scholar rejected the path of personal fame and this led to the wide acceptance of his work.[5] This path may appear strange to us in our egocentric world; however it was a path frequently taken in the broader non-Jewish world as well.[6]

The Introduction of Intellectual Property Protection

The principle which governed intellectual creativity within Judaism was that it was a gift of God and should be freely shared. Within the Jewish realm these discussions centered around books rather than the myriad of other creations which could be protected. Intellectual efforts were recognized and praised, but they were not to be translated into riches. There is no basis for any kind of payment for intellectual effort in biblical and classical rabbinic Judaism. Study and teaching were considered *mitzvot* and everyone's duty. If new ideas came through such concentrated efforts, they were praised, but nothing more. When the Talmud (Ned 37a) discussed this matter, it quoted the verse originally directed to Moses, "And God commanded me to teach you" (Deut 4.14) and went on to state "I, the Lord, taught you without pay (*behinam*), so you must teach without payment." Therefore virtually every scholar and teacher throughout the rabbinic period had another profession through which he earned his livelihood. The community in appreciation might try to ease that path by patronizing his shop or helping his efforts in some other way such as providing a partial monopoly, but there was no direct payment.

This was of course, somewhat counter-productive as the gifted scholar spent valuable time tending his crops or store. So eventually compensation for intellectual efforts became permitted. Compensation for teachers began under the guise of making up for time lost from his actual livelihood (Ned 37a, Kid 16b, B.M. 68b). The scholar R. Berab Ishmael categorized such payments as compensation for lost time (*s'char betel on hem notlin*). It took some centuries before this path became completely accepted. Another way of justifying a salary was by stating that these teachers also looked after the children beyond teaching them, or by claiming that the rabbis who taught and made legal decisions had no time to devote himself to other means of supporting himself and his family (Ber 29a). Basically it was based

upon the issue of time lost (*Mishneh Torah Hil. Talmud Torah* 3.11; *Shulhan Arukh Hoshen Mishpat* 9.5). The intellectual effort of teaching was to be compensated. The student's progress was seen as a value which demanded compensation. However, any written product created by a scholar was not protected though the author may have been paid for his effort of teaching children. The only indication of something akin to copyright was a decision by Isaac Alfasi (1013-1105) who stated that a scholar's efforts should not be copied without permission (Alfasi, *Responsa* # 133). As the rabbinate became professionalized and as his communal role expanded and left no time to earn a living through something else, thinking changes. In modern times, as we shall see, this led to compensation for the product of the intellect, usually a book; however, that road was far from direct.

A major change occurred through Gutenberg's invention of the movable type (1439) and the revolution in printing. The new technology spread rapidly and was immediately seen as an enormous step forward. Jews embraced it quickly as the Jewish tradition has always encouraged access to books, so anything which furthered this was welcome. Prior to Gutenberg's invention, every author hoped that his "intellectual property" would be widely distributed and read, but the spread of ideas both practical and theoretical had always been slow as it was limited to personal contacts, correspondence or hand copied books. The means of distribution changed only a few times in human history. The limits of oral distribution were extended through writing, first though inscriptions on stone, eventually on clay, a more readily available substance. Mass distribution awaited the use of parchment (skin) or some form of paper as papyrus. The next step was the scroll which enabled the ready distribution and storage of longer texts and then the revolution of the book with its easily handled pages. That simple invention simplified both reading and copying as various parts of a book could be copied simultaneously. There were, of course, advantages for the reader as well.

We can hardly overestimate the enormous effort needed to produce even a limited library in earlier ages. Manuscripts had to be located, borrowed, or stolen, and then copied. It was a tedious task and not as well organized among Jews as in the monastic Christian world. Jewish scribes copied Torahs and when they had time other books. A book burning as that of the Talmud in 1244 at Paris was more than a symbolic attack on Judaism, it threatened the intellectual life of the French Jewish communities.

Mass distribution of books and their ideas became possible through the invention of the movable type. Later improvements in printing made the printed book cheap and readily available.[7] The current evolution into digital media marks a further step in access, storage and distribution of ideas unless new barriers are imposed. This trek through the millennia may now bring universal access to human knowledge with little cost - a dream come true.

As the Jewish tradition has mandated a high degree of literacy books were always especially valued and in most centuries rare in every community. Precocious youngsters in dozens of generations struggled to gain access to the library of the wealthy. Even in the age of printing, books were expensive and inaccessible. As late as the sixteenth century, Moses Isserles (1525-1572) *Shulhan Arukh, Hoshen Mishpat* 292:30) stated that if books are not available for study, the community may mandate that they be made available free of charge.

The invention of Gutenberg should have changed that, but there were economic obstacles. Printing was expensive; the equipment was costly; skilled personnel had to be engaged for typesetting in languages which they may not have known. Paper and other supplies had to be purchased in large quantities before any book appeared. The printer looked for ways of protecting his product from competition; monopoly over distribution granted by a government or consumer group was sought and provided.[8] In the semi-autonomous Jewish

communities those in authority were asked for help, Moses Isserles (1525-1572) among them. He ruled that the first publisher of a work can stop another from reproducing the same book or selling it until the initial edition was entirely sold. (*Responsa,* # 10). This reponsum is of special interest as both publishers were non-Jews, so Isserles sought to be effective by prohibiting Jews from purchasing the books of the second publisher. As the publisher, not the author faced risks, protection was invoked for him, not the author. Some printers also protected themselves through subscriptions paid in advance[9]

The problems raised by the new technologies of the 15th century led to limited rethinking of the traditional Jewish view of unrestricted publication rights of books new and old. On the one hand obstacles to republication were removed; however, the need for protecting the investment of the publisher at least for a limited time was recognized. The aim was a balance between a monopoly and absolute freedom. The goal was a wider distribution of all works both old and new.

These thoughts modified the major pattern of the Jewish tradition; these thinkers now began to understand intellectual creations akin to physical property and its history of protection. A limited group of authorities took this road; they understood the need to spread ideas, but also the importance of assisting the author with his livelihood and the publisher with his expenses.

These rabbinic authorities provided protection for printed works through an official *haskamah*, the earliest to survive was written for Jacob Landau's *Agur (*1487, Naples) and signed by seven rabbis. Another *haskamah* to Elijah Levitas' *Ha-Bachur* (Rome, 1519) is similar in style though signed by only one rabbi. All were printed at the end of the book in the years before title pages were introduced. These approbations provided protection and also attested to the correctness of the printed text, that it had been properly type-set, necessary as this may have been done by journeymen who did not

know Hebrew or knew it poorly. For an original work, it may have certified its orthodoxy which was critical for the rabbinic authorities of that period who were concerned about the spread of the Shabbatians and later other groups which they considered wrong.

These copyrights were initially limited to ten years, sometimes only five. By the middle of the sixteenth century, some rabbis of Italian cities extended the period to twenty-five years and issued a *herem* against the purchase of illegally printed similar books. Efforts in this direction can be traced through prohibitions in various responsa collections which set the limits of copyright to fifteen or twenty years.[10] However, some books appeared without a *haskamah*. In Ferrara an ordinance stipulated that three rabbis had to approve any new book published in that city (1554) By the end of the sixteenth century a few rabbinic authorities took an additional step to protect authors by declaring that publication should not occur without the permission of the author (1597 Venice).[11] All these were efforts to establish a new pattern and each rabbinic authority took the path which seemed appropriate for the local conditions

The most widely known copyright controversy provides insights into its limits and possibilities during the last years of Jewish self-government. The controversy arose over the publication of Wolf Heidenheim's (1757-1832) edition of the prayer book. Heidenheim, a well known scholar and Hebrew grammarian, had previously published a critical edition of the Pentateuch (1797). His edition of the prayer book followed a careful study of dozens of manuscripts and the discovery of numerous errors. His prayerbook for the festivals appeared in 1800 and was followed by a daily prayer book (1806). Both appeared in beautiful typography, with a German translation in Hebrew letters and a commentary. Heidenheim's friend, Wolf Breidenbach, enabled him to establish a publishing firm in Roedelheim and the books quickly became popular. However,

another printer in Sulzbach recognized the possibilities of these books and soon printed them as well.

Heidenheim and his friends felt that his work deserved protection as he had devoted many years to this task. This was not merely the republication of a work already in the public domain. As the civil authorities in the splintered lands of Germany could not provide it, Heidenheim sought approbations from Hatam Sofer (1762-1839) and Mordecai Banet which provided twenty-five years of protection. As the period of governmental enforcement of religious authorities was largely over, these efforts made little difference, but Heidenheim was helped by the popularity of his prayerbook which quickly outsold the competition. The Roedelheim edition could claim to be the "genuine original" and sold very well. A pattern which has been repeated often with books and other commercial products. The controversy demonstrated the shortcomings of protection.[12] The Roedelheim publishing house continued to provide versions of their prayer book, eventually in more than 80 editions which continue to be published to this day.

Concern for authors proceeded , so Saul Nathanson (1808-1875) took this a step further and extended a copyright through the lifetime of the author and to his descendants. (*Helek Alef* 44); his contemporary, Joseph Margolis, agreed. He based his decision on the biblical prohibition against moving "your neighbor's border stones" (Deut. 19.14; 27.17; Is. 42.17[13] This responsum for the first time equated intellectual creations with physical property as it sought to protect the author.

In the nineteenth century a distinction began to be made between publication of original works and new editions of classics basic to Jewish studies. The rabbinic authorities were primarily interested in providing such works inexpensively. However, this laudable goal became problematic with the publication of the multi-volume Talmud;

all rabbinic authorities considered such a publication highly desirable, but also understood the cost and risks involved. The printers insisted that they needed protection and in Russia, where the Jewish community continued to govern itself, only rabbinic authorities could provide it. They guaranteed a fifteen year copyright for the Talmud (Edition of Slavuta 1817-22) and later for the Vilna and Horodno edition (Widow Romm 1832-1842) When the former began reprinting before the copyright of the second expired a major rabbinic controversy ensued.

Further Jewish developments in the area of copyrights ceased along with Jewish self-government. Emancipation placed this matter totally in the hands of the various European governments which considered rabbinic ordinances an infringement on the powers of the state.[14]

Some rabbinic authorities, however, continued to analyze the issues. They interpreted the concern of previous rabbinic authorities for the publisher as entirely commercial and it should, therefore, follow the extensive commercial Jewish law. They usually favored modifications which limited copyrights as their primary concern was the wide availability of books. Joseph Saul Nathanson (1810-1875) favored issuing an *issur* (prohibition) for Russia where the secular government had not seized jurisdiction, for a specified time to protect a first edition. After that republication without protection would assure broad distribution (*Shoel Umeshiv Mahadura Kamma* I # 44). In this period Mordecai Banet (1731-1829) refused to protect printers further as he felt that the community's interest lay in a wide, reasonably priced availability (*Perashat Mordecai* # 8) which competition would provide. Others like Hatam Sofer (1782-1869) followed the older path and would not permit republication before a copyright had expired, unless the initial edition was exhausted. (*Yore Deah 326*, also *Hoshen Mishpat* 657). He interpreted publication without permission as stealing property which was prohibited by the injunction against "moving the boundary of a field illegally."[15]

In recent time few responsa on this theme have appeared, among them is a statement from Moshe Feinstein (on copyrighting a cassette; he ruled that permission for use must be given and affirmed the secular law. (*Igerot Moshe Orah Hayyim* Vol.4 # 40 Section 19). Some academic discussion continues. Such discussions restricted to the world of the printed book could have been expanded to other areas which now concern us, but that did not occur.

Consumer Protection and the Poor

Statutes and copyrights shield "intellectual property" and its creator, but they do not protect the consumer. This has become especially important when we look beyond the limited realm of books which are, after all not a necessity of life. Matters are very different when we turn to medical treatments, pharmaceuticals, advanced agriculture technologies and a good deal else.

Here we must reemphasize the biblical concerns which wished to deal with the practical problems of rural poverty and as an ultimate goal sought to re-balance society through the sabbatical laws, the Jubilee, and the prohibition against taking interest. However these statements, as we have seen remained as hortatory guides, but they were never expanded into legally enforceable norms. They remained as noble goals. However, this represents a major concern for us.

The Mishnah, however, recorded a practical approach to the problems of the urban poor for whom gleanings and other efforts were meaningless. It took the path of communal legislation. When such legislation appeared, no effort was made to discover a biblical basis for it. The necessary statutes along with a vigorous enforcing mechanism were simply enacted and enforced as if they had always been there and no effort was made to discover a source for them. We therefore suddenly have a revolutionary system of governmental controls carried out for the good of the community. It provided for

the necessities of life and led to major communal legislation in the succeeding centuries.[16]

The path taken was highly creative and is worth outlining. At the end of the tractate *Peah*, in chapter eight, the Mishnah was revolutionary; it turned to the urban poor. None of this had anything to do with the previous legislation about "corners" and "gleanings." The legislation was detailed and therefore enforceable and effective. I will describe it in some detail, so that we may understand how far it went, how intrusive it was, and how expensive for the upper classes.

It began by specifying a minimal support of the poor with the additional statement that it must suffice for two meals. Then follows a set of statements that established a system of dealing with both the itinerant and local poor through two collections, *tamhui* and *kupah*[14] along with the regulations for distribution. *Kupah* took care of the longer term needs of the poor on a weekly basis and so dealt with the local poor. The sums were generally distributed on Friday by three officials and were intended to provide fourteen meals, two per day, for an entire week. Funds were collected by two communal officials from anyone who had been in residence for three months. *Gabbai* or *parnas* were the titles used to designate these collectors; they were leaders of the community. The task was an honor but involved much work and responsibility. The intermingling of funds as well as the exchange of coins, and so on were prohibited. Everything possible was done to raise the system above suspicion.

Tamhui consisted of daily collections, that were immediately distributed and so were largely intended for the itinerant poor; this was a kind of soup kitchen. Collection of it – in kind or moneys –, was mandatory and was gathered by two communal officials and distributed by three; in other words the equivalent of a *bet din*. The distribution was considered more difficult than the collection (B.Shab. 118a). These individuals were given absolute trust and were not

required to present an audit (B.B.. 9a). Those who did not contribute were subject to fines, whipping, or the ban.

Other specifics were also included so the itinerant who could not store anything must be given a loaf of bread (defined by the value of a Roman coin), a place to sleep or funds to rent one, and three meals if he stayed over *shabbat*. Anyone who had enough for two meals could not qualify for *tamhui* distributed each evening (for the non-local poor); if he had enough for fourteen meals, he could not collect the next distribution of *kupa,* which took care of the local poor. (Peah 8:1). It was collected on a weekly, monthly, or twice annual basis. Those too proud to receive it could be forced, in a nice way, to take it. Everyone was obligated to give and should also give small amounts when a poor person appeared at the door.[17]

The Mishnah tried to deal separately with the special circumstance of the fallen rich who had sunk to the level of poverty. They were not to be shamed, and some effort was made to sustain the m at their former level. This demonstrated concern for the psychology of the poor, a thought stressed in the Talmud Jerushalmi and in the later Code literature.

This Mishnah defined poverty as possessing less than 200 *zuzim* in money or property. The discussions indicated that the details of this eligibility test had been well worked out. If these funds were pledged to a creditor, for example, or represented a wife's marriage contract, the man was eligible. The poor person was not compelled to sell his house or his clothing; if he received an expensive gift of pottery after he had been accepted as poor, he remained eligible. He was also not considered poor if he had 50 *zuzim* in working capital. (Peah 8:8 and 9). These sums dealt with a single individual, not a family unit. This legislation had no foundation of any kind in the biblical legal sections although buttressed by strong moral injunctions.

Although this section of the Mishnah began with harvest legislation, it defined poverty and set the broad standards for welfare which were to endure through the centuries. It dealt with itinerants and local poor. This revolutionary system was presented as if it had always existed and became the foundation of all future poor relief. This followed the pattern of so much else in the Mishnah which introduced revolutionary changes. We may see this even in the opening section of *Berakhot* which dealt with the time for reading the *shemah* without any stipulation that the *shemah* had to be read at all, nor any statement of how the service was constructed. We may speculate about dating this revolutionary approach, but the texts provide no hints.

Theological foundations for such legislation were provided in many places in the Babylonian Talmud. Rabbinic commentaries on the biblical passages dealing with the poor abound in the talmudic and midrashic literature.

The rabbis of the talmudic period emphasized the temporary nature of human riches since everything belonged to God, so it should be used in part to help others. Thanks for such beneficence should be shown not only through prayers, but through the human act of *tzedakah*. Human efforts were not discounted, but the transitory nature of life was stressed.

Tzedakah provided a way through which human beings could perfect the world and bring about the Messianic Age. Here was a practical path open to everyone, not dependent upon learning or mysticism. It brought that grand vision within reach.

The talmudic discussion provided further detail, but never question the basic premise, that the market place be governed by communal concerns. They expressed it through controls placed on of the basic necessities, such as food and shelter, which in our time would extend much further.

The medieval Jewish community accepted these controls which included limitations on profits for essential items. In periods of crisis they included profits on necessities. Such items and their distribution were often strictly regulated.[18]

Governmental interference in the operation of the market place occurred regularly through the enactments of *takkanot*. These not only regulated prices, but also dealt with distribution. *Takkanot* which protected the community were regularly enacted through the centuries.[19]

Now let us return to the issue of "intellectual property." There were no discussions along those lines in the classical Jewish literature as the problems now faced had not appeared. Patent or intellectual property restrictions which govern all areas of medical, agricultural technologies, etc. now play the same role as hoarding in earlier times. They prevent people from receiving care or improving their productivity at a reasonable cost. The civil government is well aware of these problems, but has turned to their solution only very slowly.

We cannot have the slightest doubt that the Jewish community would have included all of these matters and passed legislation restricting the intellectual property rights. The cost to certain individuals would have been high, but communal needs would have prevailed.

Guided by these millennial of concerns expressed in practical ways, we should follow that path. Regulations do not lie within our power, but working for them and restricting the scope of "intellectual property" lies within our power. The long centuries of tradition urge us to move along those lines.

These precedents indicate a broad interest in social welfare and in our time would go far beyond food and shelter. They would certainly

include numerous matters which have been classified as "intellectual property" and in which the broader interests of society must remain fundamental.

Some Concluding Thoughts

The products of the mind have always been important and appreciated, but we now find them at the forefront of economic development and change. What once may only have been interesting are now major engines of commerce. A series of mathematical formulae or a similar abstract statement can be translated into an enormously valuable product. Jews along with everyone else are involved in this process and support it. We may well support some protection, but this does not excuse us from reviewing the detailed implications and concerns of the secular treatments of "intellectual property." They fence off large segments of intellectual life and prohibit access to vast new territories - something to be discussed elsewhere. Of immediate concern are the limitations placed upon new technologies in the field of medicine and agriculture. If the sole concern is economic value, then the biblical emphasis on the value of human life becomes secondary or is not considered at all.

Our discussion of the Jewish tradition shows that the possibility and perhaps the temptation of protecting mental creations may have existed earlier in our long history, but was not taken. The biblical and rabbinic tradition affirm free and open exchange of ideas. Creations of the mind were not understood as physical property. Even as we take contemporary economic developments into account, it cannot be at the price of eliminating our fundamental biblical ideals.

Notes

1. As the our text of the Bible was composed over many centuries, new segments were added to existing books from time to time. Most of this was anonymous as modern biblical scholarship has shown. The authors did not seek protection for

their work, but readership. A larger audience could be gained by assigning authorship to a famous person. This happened regularly throughout the ancient world even among the early Greeks as in the Iliad and Odyssey.

2. *Jubilees, Testament of the Twelve Patriarchs. Books of Adam and Eve, The Assumption of Moses*, and many others. Some have survived only in fragments or are known only by title.

3.The tractate *Berakhot* initiates a discussion of the worship service. Instead of beginning with an outline of the service as we might expect, it starts with a question which presupposes a good bit of earlier development and continues with the presentation of ideas new and old..

4. Discussions about authorship abound.

5.The *Zohar* remains the most widely read book of Jewish mysticism; it is presented as a commentary on the Torah and so was especially attractive as it could be studied during the annual reading cycle.

6. We see a similar phenomenon in 18th century opera in which segments of the plot as well as music were often lifted from other pieces and placed elsewhere without attribution and created a pastiche; some of these pieces became very successful. This practice was widely accepted and not considered wrong.

7 The popularity and wide distribution of the *Shulhan Arukh* rested to a large degree on the invention to movable type. It rapidly became the standard guide to Jewish life throughout the world.

8 A large number of printing houses were set up in Naples, Rome as well as northern Italian cities. Each sought and received a monopoly through their local government or in the case of Hebrew books through the rabbinic authorities of the Jewish community. A good list of printers may be found in the *Jewish Encyclopedia* (New York, 1940). It has been augmented by later monographs.

9. Subscriptions continued to be used much later also. I possess a Mishnah of my great-grandfather with a German translation in Hebrew type published in Berlin in 1832; it contains an interesting list of subscribers.

10. A very long and complete statement of prohibitions appeared in the responsa collection *Torat Emet* (Aaron Sason, Venice 1626) which tried to prohibit printing anywhere without the author's permission. (*Otzar Yisrael*). Some Ezekiel Landau in 1778 seet a copyright for 20 years, others for15 years (1799) and used the *herem* to threaten the purchase or the printer.

11· Other authors or printers sought different routes; one author in 1807 did not seek a *herem*, but appealed to both the religious and non-religious Jews to preserve the copyright of the author - basing himself not only on the talmudic injunction "not to move boundary stones" (*hasagot gevul*) and the common desire for justice. It was a quotation also used by rabbinic authorities. In northern Europe by the mid-eighteenth century, the authorities generally agreed on protection with our without a *herem* for a period of six or ten years so *Sha-agat Aryeh* printed in 1746 (Amsterdam) and 1756 (Frankfurt a.O.).

12. For a discussion of aspects of this controversy see David Nimmer *In the Shadow of the Emperor: The Hatham Sofer's Copyright Rulings* and Nimmer's numerous other writings on copyright. For a series of examples on the negative aspects of copyright, see Michele Boldrin and David K. Levine, *Against Intellectual Monopoly*, Cambridge, 2008; many other sources are cited there.

13. This was discussed and expanded in the Talmud and the later codes, but there not applied to written material (B.M. 60a-b; B.B. 21b; *Shulhan Arukh, Hoshen Mishpat* 156.5; *Shulhan Arukh Yore Deah* 245.22.)

14. Austria and Prussia also raised the issue of religious interference with commerce which lay in the jurisdiction of the state, not religious groups. The older system of semi-self-government continued in Russia which had not emancipated its Jewish population. Nahum Rakover dealt with this period well in his *Zhut Hayotzrim bamekorot hayehudiyim*

17. *Kupah* could refer to the general communal treasury and was often designated as *kupah shel tzedakah*. *Tamhui* means basket.

18. The mark-up on them could not exceed 1/6th (*Baba Basra* 90a; *Shulhan Arukh Hoshen Mishpat* 213.20; *Mishneh Torah, Mehirah* 16.1.

19. Louis Finkelstein, *Jewish Self-Government in the Middle Ages*, New York, 1964.

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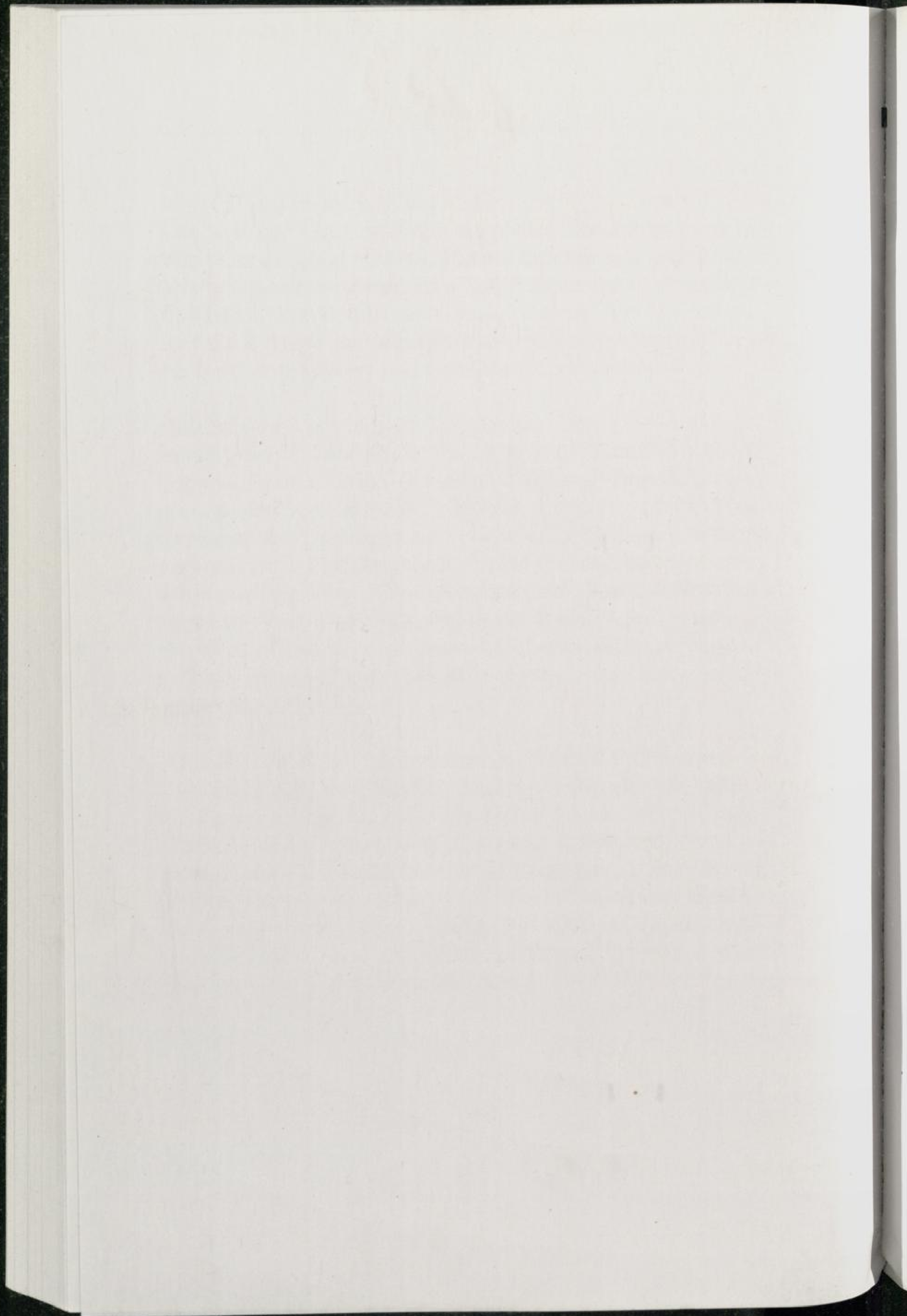

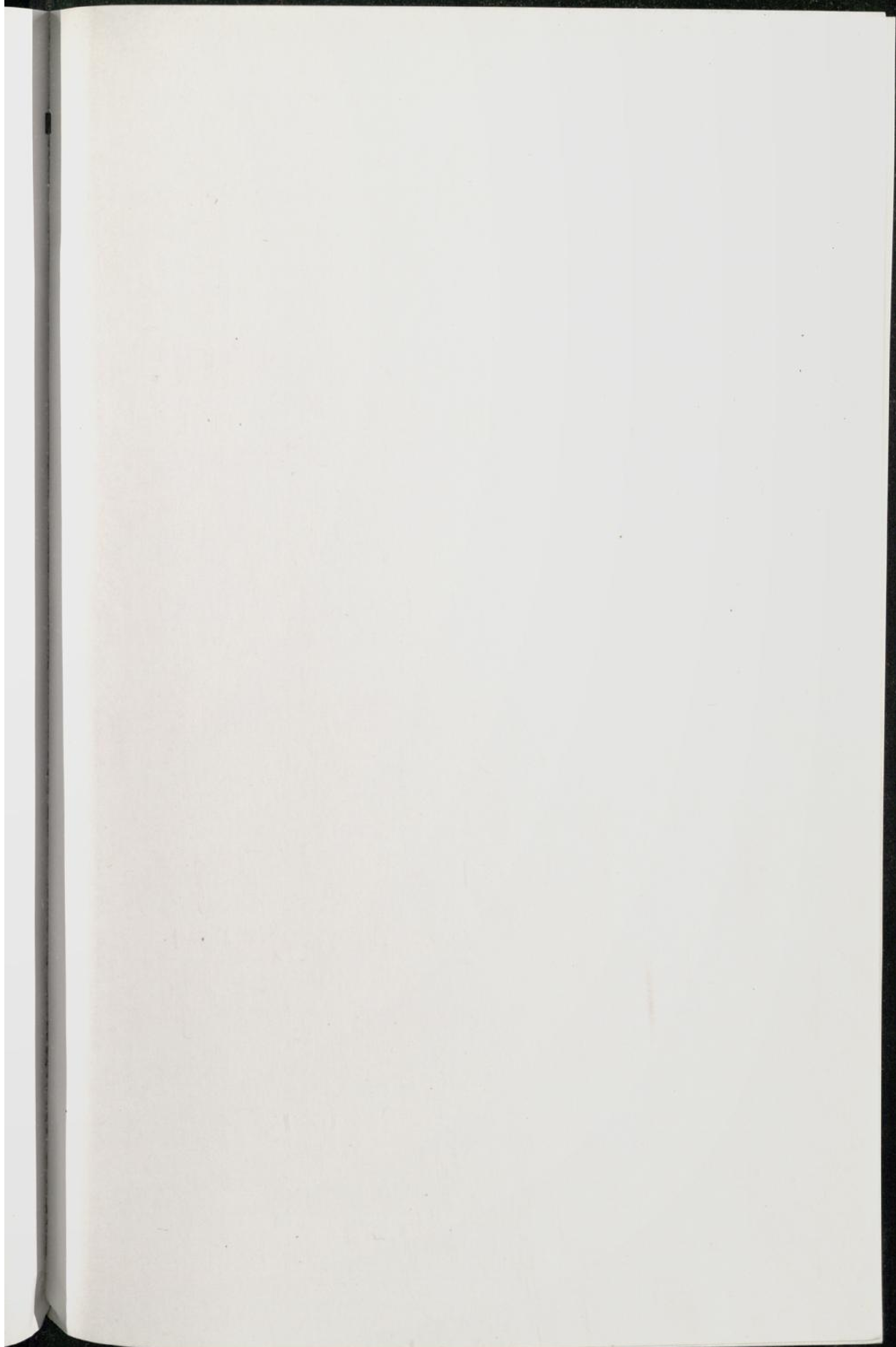

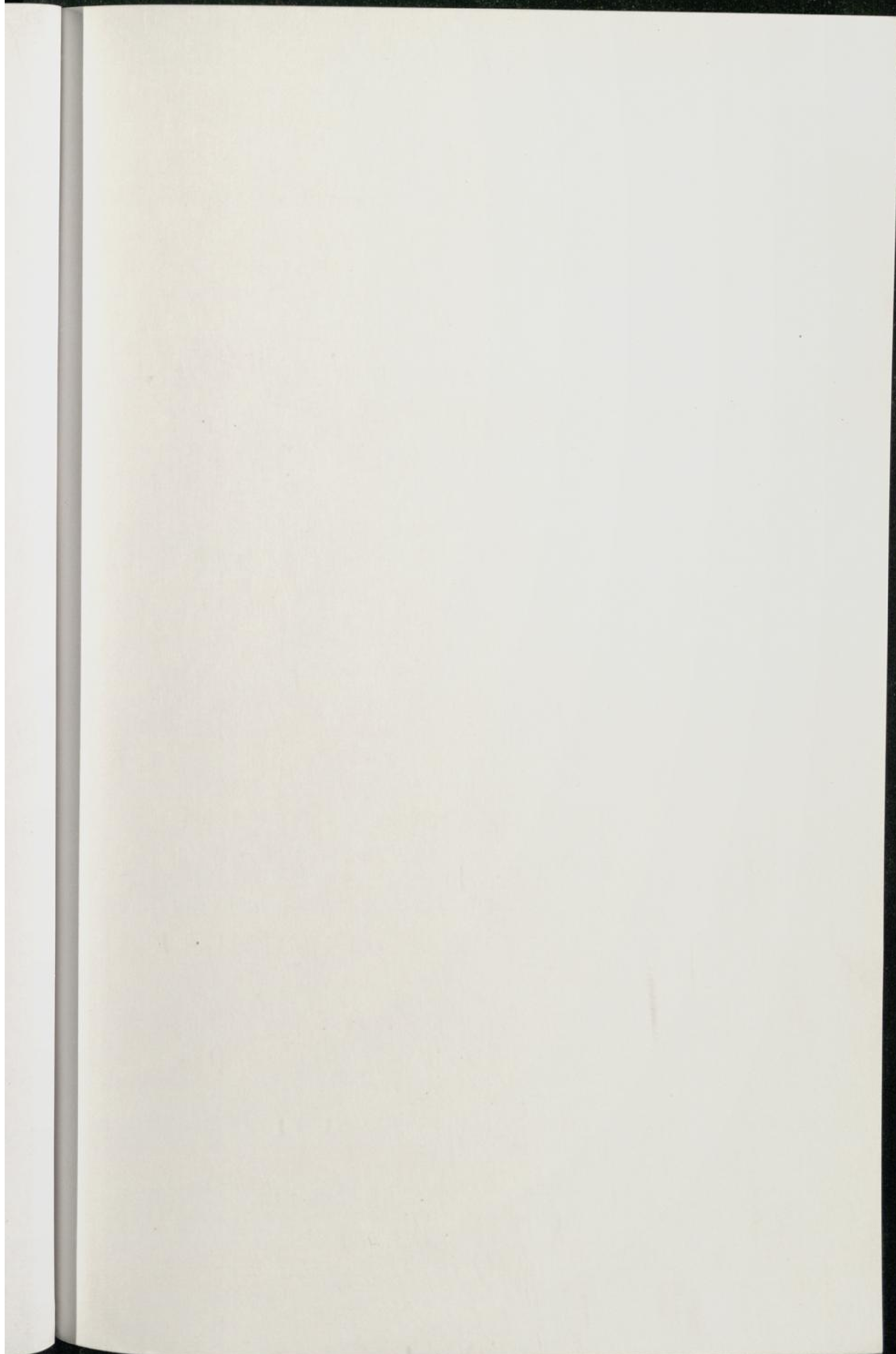

THE INTERNET REVOLUTION AND JEWISH LAW

Editor

Walter Jacob

Communication is the key to civilization. When methods change, the economic, social and political world is transformed. The internet, has intrigued us even as it changes our life, the way we work, relax and deal with each other; it has yet to engage us fully morally and ethically. We welcome the vast avenues which have been opened, but do not yet understand the subtle changes to values, relationships, and institutions which they continue to bring.

The papers here presented deal with philosophical and practical issues as seen from the perspective of Liberal Jewish thought. They seek to add another set of voices to the continuing public debate on these questions.

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