

Digitales Brandenburg

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The internet revolution and Jewish law

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Pittsburg, Pa., 2014

Internet, Privacy, and Progressive Halakhah

urn:nbn:de:kobv:517-vlib-10174

INTERNET, PRIVACY, AND PROGRESSIVE HALAKHAH

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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 privacy¹⁷ 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 "inviolable 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 eavesdropping³⁴ 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 "inviolable 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? Nachmanides⁶⁴ 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 spy⁷³ 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’khillut*, “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'khillut*) 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'fratuyut 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 "inviolable 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 scholar⁸³ 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 Engard’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 Engard 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 privacy¹⁴⁰ 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 fit¹⁴⁴ – 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").

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 statutes 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, above), 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 24:2ff. 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. 299ff.
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* 7:1ff. 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, Hilkhos R'khilus* 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 erez* 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'kadesh 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 *mitzvot* 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. 477ff). 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. 158ff. 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. 53ff.

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 mamot 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. 43ff (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* 24:12ff.

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.