

Is There a Right to Privacy in Halacha?

Adapted from the writings of Dayan Yitzhak Grossman

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One of the key tools for containing the spread of infectious diseases in general, and COVID-19 in particular, is contact tracing, the process of identifying those who may have come into contact with an infected person. This was traditionally done by health-care workers privately interviewing individuals to trace their movements, but Google and Apple have recently announced plans to introduce software into their respective smartphone operating systems that will facilitate contact tracing via the automatic wireless exchange of identifiers between phones that come into close physical proximity. There is great concern on the part of privacy advocates that promised safeguards will prove insufficient, and that once such systems have been deployed, the temptation to use them for other purposes might prove irresistible.

The Halachic Foundations of Privacy

The Torah has no comprehensive framework of privacy rights and regulations. The two main classic halachic sources that establish at least some right to privacy are *hezeik re'iyah* (damage by viewing), which some *Rishonim* understand to embody a concern for the privacy of an individual whose affairs would be exposed to his neighbor's view,[1] and the *cheirem* (ban) of Rabbeinu Gershom (*chadra"g*) against reading mail addressed to someone else.

Some authorities have advanced additional reasons to forbid the reading of someone else's correspondence, including the prohibitions of theft, causing harm, and the bearing of tales, and the commandment to love one's neighbor as oneself, but it is not entirely clear whether these are intended as rationales for *chadra"g* or as independent considerations.[2] It is unclear whether the two specific prohibitions of *hezeik re'iyah* and *chadra"g* can serve as a halachic basis for more general privacy rights. With regard to the former, some

poskim limit it to the written word, and do not even extend it to telephone and electronic communications, but others assume that it does extend to those media. Moreover, even those who interpret it narrowly agree that eavesdropping on electronic communications is prohibited for other reasons, including those mentioned in the previous paragraph.[3] Similarly, early authorities discuss whether *hezeik re'iyah* includes *hezeik shemi'ah* (damage by hearing),[4] but some later authorities explain that even if it does not, that is only because traditionally, there was no expectation of privacy regarding verbal conversation, but insofar as there is, eavesdropping is forbidden.[5]

The Expectation of Privacy and Data Aggregation

The issue of expectation of privacy is another reason that the aforementioned halachos may not apply in our context. We have noted that *hezeik re'iyah* does not apply where there is no expectation of privacy. Similarly, there are disputes over whether *chadra"g* applies to unsealed letters or postcards, or to discarded letters. In our context of contact tracing, an individual does not generally have an expectation of privacy regarding his location when in public. On the other hand, contact tracing data can include the record of one's location even when he was not in public. More fundamentally, modern technologies of data aggregation result in the paradox of the whole being profoundly more ominous than the sum of its parts: an individual's profile can consist of a vast number of individual data points which may be totally innocuous in and of themselves, but in the aggregate they can constitute a grave breach of privacy.

Considerations That Outweigh the Right to Privacy

Even relatively stringent prohibitions such as slander give way in the face of the need to forestall harm to others, and much more serious breaches of privacy are sanctioned in such cases.[6] In the same vein, *poskim* allow and even require physicians to violate medical confidentiality and disclose their patients' medical conditions when necessary to

prevent them from harming others, even inadvertently, due to the prohibition of *lo sa'amod al dam reiecha* (do not stand by your fellow's blood), as well as other considerations.[7]

It is unclear whether the uncertain benefits of software-based contact tracing would be sufficient to override full-fledged Biblical prohibitions such as *rechilus* (talebearing). With respect to *chadra"g*, contemporary *poskim* debate the general question of whether the *cheirem* applies where accessing the information is necessary to fulfill a mitzvah, and it is also uncertain whether it applies where accessing the information is necessary to avoid harm.

[1] See Yitzhak Grossman, Bilam, Basilisks and the Evil Eye, in *The Bais HaVaad Halacha Journal*, Volume 5775 Issue XXXVI (*Parashas Balak*).

[2] See Yitzhak Grossman, Corresponding Respect: Privacy in Personal Mail, in *The Bais HaVaad Halacha Journal* (tinyurl.com/yb67lh7r) and Hack Attack and Halacha: The Halachos of Hacking, in *The Bais HaVaad Halacha Journal* (tinyurl.com/ycvufa7n).

[3] Ibid.

[4] See *Bais Habechirah Bava Basra* 2a end of s.v. *amar haMeiri*; *Shu"t R. Eliyahu Mizrachi* end of *siman* 8.

[5] *Pis'chei Choshen*, *Nezikin* ch. 14 n. 53 p. 406 s.v. *v'nireh*; *Eimek Hamishpat Hilchos Shecheinim siman* 26 *osios* 2-4 pp. 202-04, but cf. *Mishkan Shalom siman* 6 *mekoros uviurim os* 14 p. 342.

[6] See *Pis'chei Teshuvah* (Isserlin) *siman* 156; *Sefer Chafetz Chaim*, *Hilchos Rechilus Klal* 9.

[7] *Shu"t Chelkas Yaakov E.H. siman* 79; *Shu"t Tzitz Eliezer cheilek* 13 *siman* 81 *os* 2 and *cheilek* 15 *siman* 13 *os* 1; *Shu"t Yechaveh Daas cheilek* 4 *siman* 60. Cf. the entry for *Sodiut Refuit* in the *Encyclopedia Hilchatit Refuit*.