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 Dedicated in loving memory of
 Harav Yosef Grossman zt"l



THE PRIVATE SECTOR: CORONAVIRUS, CONTAGION, AND CONTACT TRACING

Is There a Right to Privacy in Halacha?

Adapted from the writings of Dayan Yitzhak Grossman

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 certain 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

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

The Bais Hava'ad
 on the
Parsha
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Excerpted and adapted from a shiur by
 Dayan Yitzhak Grossman

PARSHAS NASO

FIRST OF FENCE

And grapes, fresh or dried, he shall not eat. (Bemidbar 6:3)

Why does the Torah forbid a *nazir* to eat grapes and not just to drink wine? The Midrash (Bemidbar Rabbah) explains that by forbidding the consumption of grapes, the Torah is creating a *syag* (fence) for the *nazir*, to distance him from the prohibition of drinking wine. Avos D'Rabbi Nasan and the Midrash here say that the prohibition of *lo sikrav*, barring close contact with a forbidden woman, is another example of a Biblical *syag*.

However, some *mefarshim* argue that there is no such concept as a *syag de'Oraisa*. The Rashbatz says the Torah legislates prohibitions, not *gezeiros* to distance us from prohibitions. The Sdei Chemed agrees but suggests that an exception is made in the cases of *nazir* and *nida* because they both were previously permitted, so there is greater

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Q&A from the
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A Conflict of Interest

Q I am a residential landlord. When a tenant signs a lease, he provides me with a security deposit, which I am legally required to deposit into an interest-bearing escrow account. I confess that I often didn't do so and instead used the funds for my own expenses. (I wasn't concerned about coming up with the money to return to the tenant at lease end, because I have sufficient cash reserves.) I regret this and would like to return a now-departing tenant's deposit with the interest it would have earned had I escrowed it. Is this a problem of forbidden interest, considering that this tenant is Jewish?

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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

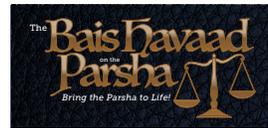
Even relatively stringent prohibitions such as slander give way in the face of the need to forestall harm to others, and much more serious breaches of privacy are sanctioned in such cases.⁶ In the same vein, *poskim* allow and even require physicians to violate medical confidentiality and disclose their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

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.

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concern that one will sin.

Rabbeinu Yonah in Sha'arei Teshuva argues

that these examples do indeed demonstrate that the Torah institutes *gezeiros*. R' Yosef

Engel also suggests numerous examples of apparent *gezeiros* in the Torah. For instance, the prohibition of *yichud* (seclusion with a woman) is assumed by many *Rishonim* to be *de'Oraisa*, and the Sefer Hachinuch explains that the purpose of *yichud* is to prevent *gilui arayos* (illicit relations).

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A You are indeed correct; this would be a violation of *ribbis*. You effectively borrowed the money from your tenant (see Shulchan Aruch Y.D. 168:13), so returning more than you borrowed constitutes *ribbis*. Hence you may not pay the interest, and you must seek a way to avoid it. If the tenant isn't religious and will forcibly require you to pay, many *poskim* would allow you to do so if you tell him that you aren't giving the excess as an interest payment but to protect yourself.



DAYAN YEHOSHUA GRUNWALD

There are *poskim* that allow an alternate resolution: Share your dilemma with someone you're close with, and tell him that if a friend would pay the tenant, in your stead, the deposit principal plus the owed interest, that would resolve the issue. You may commit to reimburse the hypothetical donor (don't say "you") for the principal, but you can't mention that you will reimburse him for the interest. This way, your friend will pay your debt, but not as your *shaliach* (proxy). You also may not inform the tenant that your friend will be paying the interest on your behalf. Later, you could repay your friend the principal you committed to pay as well as the interest that you didn't (see Sefer Mishnas Ribbis, Perek 1, footnote 16).

Note that you may not repeat this routine with the same friend, as after he has completed the process once and been reimbursed, were you to approach him again with a similar request it would be akin to asking him directly.

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/yjcvufa7n).

3 Ibid.

4 See Bais Habechirah Bava Basra 2a end of s.v. amar haMeiri; Shu"t R. Eliyahu Mizrahi 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 uvivrim os 14 p. 342.



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