

# Public and Private Spaces: A Jewish view of Civil Liberties

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## 1) Genesis 9: 20-26

(כ) ויחל נח איש האדמה ויטע כרם: (כא) וישת מן היין וישכר ויתגל בתוך אהלה: (כב) וירא חם אבי כנען את ערות אביו ויגד לשני אחיו בחוץ: (כג) ויקח שם ויפת את השמלה וישימו על שכם שניהם וילכו אחרנית ויכסו את ערות אביהם ופניהם אחרנית וערות אביהם לא ראו: (כד) וייקץ נח מיינו וידע את אשר עשה לו בנו הקטן: (כה) ויאמר ארור כנען עבד עבדים יהיה לאחיו: (כו) ויאמר ברוך ה' אלהי שם ויהי כנען עבד למו:

Noah, the tiller of soil, was the first to plant a vineyard. He drank of the wine and became drunk, and he uncovered himself within his tent. Ham, the father of Canaan, saw his father's nakedness and told his two brothers outside. But Shem and Japheth took a cloth, placed it against both of their heads and, walking backwards, they covered their father's nakedness. When Noah woke up from his wine and learned what his younger son had done to him, he said, "Cursed be Canaan, the lowest of slaves shall he be to his brothers." And he said, "Blessed be Adonai, the God of Shem, and let Canaan be a servant to him."

*What does Ham do wrong here? Why do you think that he is punished so severely for this action?*

## 2) Talmud, Bava Batra 22a-b

מתני'. מי שהיה כותלו סמוך לכותל חבירו, לא יסמוך לו כותל אחר א"כ הרחיק ממנו ארבע אמות. החלונות, בין מלמעלן בין מלמטן בין כנגדן - ארבע אמות. .

תנן: החלונות, בין מלמעלן בין מלמטן בין מכנגדן - ארבע אמות, ותני עלה: מלמעלן - כדי שלא יציץ ויראה, מלמטן - שלא יעמוד ויראה, ומכנגדן - שלא יאפיל

**Mishnah:** One whose house abuts a neighbor's house should not build another adjoining wall unless there are four cubits (between 6 and 7½ feet) between this new wall and the existing wall of the neighbor's house. If there are windows in the existing wall, the new wall must be four cubits from the windows, whether the wall will be above, below or across from the windows.

**Gemara:** . . . If there are windows in the existing wall, the new wall must be four cubits from the windows, whether the wall will be above, below or across from the windows. A comment on this explains—if the windows are above, it is so that he will not peek and see into the neighbor's house; if the windows are below, it is so that he will not stand on tiptoes and see in; if the windows are across, it is so that the wall will not block the light.

**The Talmud** is the primary text of the Jewish oral tradition. . It consists of two parts: the **Mishnah** (codified by 200 CE), which consists primarily of concise legal statements; and the **Gemara** (codified around the 7<sup>th</sup> century CE), which expands upon and comments on the Mishnah. The Talmud is divided into **tractates** (Hebrew: masekhtot), each of which deals primarily with a certain set of topics.

*The Talmud here introduces the concept of “hezek ri’ah”—the damage done by looking. By classifying “looking” as a tort, Jewish law places “looking” in the same category as physical damage. Do you agree or disagree with this assessment of “looking” as a form of damage?*

### 3) **Tur, Hoshen Mishpat 154:17**

יש חזקה לראייה שאע"פ שאין אדם רשאי לפתוח חלון לחצר חבירו אם פתח והחזיק בו מועיל. . .

וכשאינן בו היזק ראייה עסקינן אבל אם יש בו היזק ראייה לעולם אין בו חזקה דכקוטרא ובה"כ דמי וכ"כ רב אלפס בתשובה ואפילו אם נתן לו רשות לפתחו יכול לומר סבור הייתי לקבל ואי אפשר לקבל ואפילו מחל לו הניזק כיון דודאי אסור למזיק להזיקו בראייה ואין אדם יכול לזוהר ולעמוד כל היום בעצימת עינים על כרחנו נאמר לזה סתום חלונך ואל תחטא תדיר

“Seeing” creates *hazakah* (a binding legal precedent). Even though a person is not permitted to create a window that looks into a neighbor’s courtyard, if one has created such a window and it has been in place for at least three years [without the neighbor complaining], it is fine. . .

This applies only to the case in which there is no *hezek ri’ah*. However, in a case in which there is *hezek ri’ah*, there can never be *hazakah*. . . even if one person gave the other permission to create this window, the first can go back and say, “I thought that I could stand it, but I can’t.” Even if the one who is injured [by being looked in on] forgives the one who does the injury, since it is forbidden to injure another by looking in on him, and since it is impossible for a person to be careful and to keep his eyes closed all day long, we are forced to tell the injurer to close his window and to stop sinning all the time.

### 4) **Shulhan Arukh Hoshen Mishpat 154:7**

הרי שפתח חלון לחצר חבירו ומחל לו בעל החצר, או שגלה דעתו שהניחו כגון שבא וסייע עמו, או שידע הניזק ולא ערער, הרי זה החזיק בחלון, ואינו יכול אחר כך לחזור ולערער עליו לסתום. הגה: כן ראוי להורות מאחר שכבר החזיק זה בחלון, אע"פ שרבים חולקים וסבירא להו דאין חזקה מהני בהיזק ראייה. ואפי' למ"ד יש לו חזקה, היינו לגופו של חלון דלא יוכל בעל החצר לסתמו או למחות בו, אבל הוא אסור לעמוד בחלון ולראות בחצר חבירו, כדי שלא יזיקנו בראייתו, ובה אסורא קא עביד ולא מהני ליה חזקה, וזה יוכל בעל החצר למחות בו (ב"י בשם הרשב"א). אבל כל זמן שאין לו חזקה יוכל לערער עליו וצריך לסותמו, אף ע"פ שעכשו אי"צ לבנות בצדו. ואי בעינן חזקה ג' שנים, יש בו מחלוקת, וכמו שנתבאר לעיל סימן קנ"ג לענין זיזין ושאר דברים כיוצא בו (וע"ל סימן קנ"ה סעיף ל"ה).

If one creates a window looking into the courtyard of another, and the owner of the courtyard forgives him for any damage caused, or shows that he is permitting the window—for instance by helping his neighbor build it—or knows of the damage and does not complain, he has demonstrated his acceptance of the window and cannot later go back and demand that it be closed up.

**Rema:** This is appropriate for the case in which the owner of the courtyard has shown acceptance of the window, even though many disagree and say that there is no such thing as *hazakah* in the case of *hezek ri’ah*. But even for those who say that there is *hazakah*, this applies only to the window itself—the owner of the courtyard cannot close it off or complain about its existence. But it is forbidden for the owner of the window to stand at the window and look into his neighbor’s courtyard.

The **Tur** and the **Shulhan Arukh** are both codes of Jewish law—attempts to classify Jewish law into categories and simple rules. The **Tur** (full name: *Arbaah Turim*—Four Columns) was written by Rabbi Jacob ben Asher (Spain, 1270-1343) and the **Shulhan Arukh** (the “Set Table”) was written by Rabbi Joseph Caro (Spain/Northern Israel, 1488-1575).

*In what ways do these texts refine the understanding of “hezek ri’ah”? How do these texts add to our understanding of the Jewish definition of “looking” at someone else’s private property?*

**5) Sefer Kolbo 116 (anonymous medieval code)**

ושלא לראות בכתב ששולח אדם לחבירו בלא ידיעתו ובלא רשותו

[Among the decrees of Rabbenu Gershom are] that one should not read a letter that one person has sent to another without the sender’s knowledge or permission.

**6) Sefer Torat Hayyim 3:47 (Rabbi Hayyim Shabbetai ca. 1555-1647)**

I have been asked for a ruling in the case in which Reuven sends a sealed letter. . . to another city, and when the messenger arrives in that city, Levi comes and takes this letter together with other letters [that are actually meant for him] and opens it, hides it and does not give it to the intended recipient.

In short, I can say that what Levi has done is certainly forbidden, as it is already known and stated in the *Kolbo* that one of the early enactments of Rabbenu Gershom was the prohibition against reading a letter that a person has sent to another without this person’s knowledge or permission. For this reason, it is customary to write [a reference to this enactment] on every letter. We assume that Levi did this in order to get some benefit from this action, and we assume that the sender did not know about this. This is forbidden even if Levi opened it for the purpose of performing a mitzvah—The *Tur* wrote that some say that one is permitted to take and use another’s *tallit* without this person’s knowledge, as people want others to do mitzvot with their belongings, except in the case in which the owner of the *tallit* folded it and the other person found it folded. (by folding it, the owner shows an intention to protect it). . . [In the case in which it is folded] the person who takes it is like one who borrows something without the owner’s knowledge and is considered to be a thief. Even more so is this true in our case, as people write their secrets in their letters. . .(the text goes on to discuss the question of a penalty for the person who has injured another by opening a letter and revealing this person’s secrets).

*How do these writers apply the idea of “hezek ri’ah” to contemporary situations? How might we apply the concept of “hezek ri’ah” to contemporary civil liberties issues?*