

A COMPARISON OF FREE SPEECH IN AMERICAN AND JEWISH LAW

I write this paper as two kinds of student – I am at the same time a law student and also a rabbinical student. In law school, I need not look very far to see the tremendous importance that American law has placed on the fundamental freedom of speech. The framers placed so much emphasis on the right to free speech that they made it the very first amendment to the United States Constitution. So it was a natural question to ask coming from law school to my rabbinic studies: where does the Torah¹ discuss the freedom of speech?

The answer, surprisingly, is that it does not. In the all the annals of Jewish law, there does not appear anywhere to be a clear statement of the freedom of speech held so important by the American people. The subject of this paper is to ask why that clear statement is missing and to ultimately compare American and Jewish law to discover what the Jewish approach to free speech is and how it differs from American law.

Talmudic law is much more comfortable regulating what it considers harmful speech than American law is. To understand the difference between the two systems' approach, one must examine each system's view of speech and government and each system's notion of how laws are made. Part I of this paper more fully defines what speech means to each philosophy, thus

¹ Throughout this paper I reference the Torah, Talmud and Jewish law relatively interchangeably. Torah refers to the five books of Moses, as well as to the body of Jewish law and philosophy as a whole. The Talmud, organized by tractates, is a collection of debates among Jewish Rabbis during 14 generations around 200-400 C.E. Jewish or Talmudic law refers to that legal system which was practiced when there was a religious Jewish state (as opposed to the modern, secular state of Israel). While some religious Jewish courts still perform legal functions today such as marriage and divorce as well as adjudicating civil disputes between Jewish litigants, there is no religious criminal court and there will not be one until the Jewish monarchy from the House of King David is restored (may it come speedily in our days).

further refining the paper's scope. Part II will briefly discuss the origins and moral basis for the right to free speech in the First Amendment and contrast each point with a similar Jewish perspective. Building on that foundation, Part III will examine some specific case studies found in Jewish law, and explain why Jewish courts are often more willing to limit speech that criticizes the government.

I. VALUING SPEECH

A tempting explanation for the absence of a Jewish parallel to the First Amendment might be to suggest that Jewish law simply does not value speech as much as American law does. With that answer, Americans can continue their First Amendment jurisprudence and the Jewish courts can carry on without it because the right to free speech is not a right that Jewish courts value enough to protect. But that is not the rule – speech is equally important to both Jewish theology as it is to American philosophy.

A. American Law - The Right to Reform

Freedom of speech is arguably the most important right in American law. Protecting and defining that freedom has been the subject of countless Supreme Court opinions, law review articles and philosophical discussions. James Madison called free speech “one of the great bulwarks of liberty” and argued that it was directly tied to the “indubitable, unalienable, and inalienable right to reform or change [the U.S. Government] whenever it shall be found adverse to or inadequate to the purposes of its institution.”²

Without freedom of speech, many would argue that the United States Constitution loses all credibility.³ The reason for this is due to what Madison suggested; free speech leads to the

² James Madison, “Speech to the House of Representatives on Amendments to the Constitution” (June 8, 1789).

³ I make this statement after observing passionate debate from my fellow students in Professor Steve Heyman’s First Amendment Seminar, Spring Semester of 2008 at Chicago Kent School of Law. The

reformation of government. Madison thus grouped free speech together with freedoms of the press and peaceable assembly, linking each of them to the basic notion that speech is fundamental to preserving the ability of the people to seek government reform.⁴

While the philosophy of speech varies between the absolute freedom of self-expression⁵ to the freedom of offering useful political input to the “marketplace of ideas,”⁶ or to a similar metaphor of a town hall debate,⁷ the basic premise of each view is that speech allows Americans to reach personal fulfillment by having their voices heard in the political process. According to freedom of expression thinkers, speech can be negative or seemingly unrelated to politics, and still be protected because the Constitution exists to also allow a nation of individuals to achieve their full potential, even outside of the political realm, so that when they enter the marketplace they are whole individuals.⁸ Speech is important to expression thinkers because it is the ultimate goal of why the Constitution exists.

According to “marketplace” thinkers (and expression thinkers as well), freedom of speech is the most important right in the Constitution because speech is what created the Constitution.⁹ Without the free flow of ideas, the drafters feared that monarchists, fascists or other totalitarian regimes could form within the Country, thereby suppressing change. Americans point to a proud history of speakers including the likes of Dr. Martin Luther King, Jr. and Abraham Lincoln, men whose legacy is encapsulated in the words they left for the nation, to

earliest instance of an American defending the First Amendment this way may be James Madison’s speech cited above (Note 2).

⁴ Madison, “Speech to the House of Representatives.”

⁵ Edwin Baker, *Scope of the First Amendment Freedom of Speech* (1978).

⁶ *Lamont v. Postmaster General of the U.S.*, 381 U.S. 301 (1965) (Brennan, J. *concurring*) (first Supreme Court opinion to use the term “marketplace of ideas”). The term has often been attributed to John Stuart Mill, but there does not appear to be a text where he uses it explicitly.

⁷ Alexander Meiklejohn, *Political Freedom* (1948/1960).

⁸ Harry Kalven, *Metaphysics of the Law of Obscenity* (1960) (criticizing Meiklejohn for not considering art as also valuable political expression).

⁹ John Trenchard & Thomas Gordon, *Cato’s Letters Nos. 62 & 15* (1720-21).

show that a vocal minority can achieve change so long as it can be heard. Speech is guarded more fiercely by Americans than almost any other right because speech is what gives legitimacy to those other rights.

B. Jewish Law – The Spirit of Debate

Initially, one may be surprised to learn that there is no naked right to free speech in Jewish law. The reason for this glaring omission is not that Jewish law does not value speech or that Jewish law does not protect and recognize the social benefits of the free exchange of ideas. On the contrary, Jewish law is characterized by debate (“Talmudic logic”¹⁰) and the delicate balance between the sound majority and the perceptive minority. The clearest indication that the Talmud supports debate is the document itself – each tractate of the Talmud is arranged as a manuscript of arguments between Rabbis of various academies debating a myriad of subjects in Jewish law and theology. The Talmudic legal system is at least as staunchly supportive of the notion of a “marketplace of ideas” as the American system.

Jewish thought also embraces speech for many of the same reasons and more. Jewish thinkers have often warned that speech is dangerous, so much so that the Chofetz Chaim, one of the most oft-quoted Rabbis from around the turn of twentieth century, wrote that the prohibition against speaking *loshon hara* – evil speech – is the most important commandment for a Jew to keep in the face of modern culture.¹¹ The Chofetz Chaim understood the power of words and placed more emphasis on vigilance in guarding one’s tongue than on any other commandment.

Speech is so dangerous, one of the great Talmudic sages said that “in all my life, I have found nothing wiser than silence.”¹² Commentaries teach that contradicting one’s teacher is

¹⁰ An expression frequently used in American courts to refer to logical but often hair-splitting reasoning. See e.g. *U.S. v. Libby*, 498 F.Supp.2d 1, 5 (D.D.C. 2007).

¹¹ Rabbi Yisroel Meir (the Chofetz Chaim), *Shmirat HaLoshon*.

¹² Ethics of Our Fathers 1:17.

inappropriate whether in private or in the public discourse,¹³ and that one should not speak ahead of someone who is wiser.¹⁴

Yet at the same time, the Chofetz Chaim does not discourage speech totally and frequently states that a person should speak up, even at the expense of a third party's reputation, in order to prevent harm or financial loss.¹⁵ Another Talmudic sage, qualified the earlier praise of silence by stating “do not practice false modesty” which the commentaries interpret to mean “if someone asks you your legal opinion, and you are qualified to answer, do not pretend to not know what to say.”¹⁶ Indeed, the sages in Ethics of Our Fathers praise the study of Torah above all else and state that the best way to learn is through debate. Learning by oneself, they say, is like blunting a knife against a stone. This clear affirmation of the benefits of speech demonstrates the Talmud's acceptance of and encouragement of some version of the marketplace of ideas – although the Talmud's marketplace has a few more rules about how vendors may peddle their wares.

Chassidic philosophy takes the analysis a step further. Citing Kabbalistic¹⁷ sources, the Chassidic masters say that the power of speech is the power to rule.¹⁸ Anybody can have plans or desires, but it takes a ruler to make them happen. Anybody can think about social reform, but

¹³ Commentary of Rashi to Numbers 25:6-7.

¹⁴ Ethics of Our Fathers 5:9.

¹⁵ Rabbi Yisroel Meir (the Chofetz Chaim), *Shmirat HaLoshon*, E.g. The Laws of Speech by Parents to their Children.

¹⁶ Ethics of Our Fathers 6:6.

¹⁷ “Kabbalistic” sources, strictly speaking, means the Zohar (a book whose origins are of some debate, but was written some time between 200 C.E. and 1200 C.E.) and its progeny in Jewish mysticism. While most Kabbala scholars do not engage in much practical legal analysis, there are many Jewish Legal experts who incorporate mysticism into their response. One such expert is Rabbi Shneur Zalman of Liadi, who famously rewrote his own codification of Jewish law according to kabbalistic sources though large portions of that manuscript were lost in a fire.

*** The term Kabbala has been abused in recent media. By using the term here I give no legitimacy to the Kabbala Center in Los Angeles or its most famous practitioner Madonna. Under Jewish law, the statements by that organization have no basis in fact and may indeed constitute heresy. But as we live under American law, they are welcome to say what they want.

¹⁸ Rabbi Shmuel Dov Ber Schneerson, *RaNaT*, 3-4.

a leader is someone who speaks and gets others to listen to him. Thus Chassidic thought teaches that words have the power to be a vessel for ideas and to be a creative force in the world¹⁹ – certainly a strong endorsement of the value of speech.

C. Narrowing the Inquiry to Political Speech

As such, both American and Jewish law recognize that words are powerful and can accomplish social reform or further a political agenda. The difference between the two philosophies is that Jewish law is more willing to make the tough decisions about what is valuable speech and what is disrespectful. American law's most important goal concerning speech is to protect the ability of the minority opinion to be heard in the marketplace of ideas, even if expressing those views may be hurtful or offensive to some. Talmudic law's most important goal in speech law is to fulfill the will of G-d. Thus, the Talmud sees no problem protecting the core ideals of Judaism from disrespectful criticism – preserving the decorum of the “marketplace” as it were – even at the expense of certain views being excluded. Where these goals diverge, so too diverge the laws.

Nonetheless, the waters have become increasingly murky in recent years. The United States continues to refine the law of slander, some scholars believe stricter European libel laws are pushing American courts to recognize even more such actions,²⁰ and First Amendment jurisprudence has made many exceptions for the likes of incitement and fighting words.²¹ In that way, the Jewish law of slander, held so dearly by the Chofetz Chaim, has been adopted by American courts at least to some extent.

¹⁹ Rabbi Shneur Zalman of Liadi, *Tanya*, Chapter 4.

²⁰ Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1 (1983).

²¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

To streamline the analysis, this paper will only focus on what is the key type of speech contemplated by the framers of the First Amendment: political speech. The laws of slander, fighting words, incitement, loshon harah, and other sometime exceptions to the First Amendment are important areas of speech law because they sometimes may become political speech. But core political speech – opinions about the current government or the current law, opinions about how the law should be and statements of general philosophy – are the subject of the analysis henceforth.

II. FUNDAMENTAL DIFFERENCES IN THE TWO APPROACHES

Jewish law differs radically from American law in the way its legal framework is designed, so it makes sense to compare the two systems before diving into specific cases. The systems diverge in the type of governments they represent – American law espouses a Democracy; Jewish law espouses a theocracy, in many ways a monarchy. American statutes, even the Constitution, are passed through a public vote or through publically elected officials. Talmudic law is rooted in the Torah, a set of laws sent down by G-d, and supplemented by decrees of Jewish courts that appoint their own successors. American law protects rights; Jewish law assigns duties. Both systems find strength in the marketplace of ideas and the power of words, but differ as to how they allow those words to be expressed.

A. Governmental Structure

The American Constitution sets forth a system of democratic government, driven by the will of the people, and then follows that system with a Bill of Rights guaranteed to the people by virtue of their identity as citizens of the United States.²² The document begins “We the people”

²² U.S. Constitution, Fourteenth Amendment §1. Some would argue that the rights in the Constitution extend to everyone that the United States government has dealings with, though the recent Guantanamo Bay cases suggest that citizenship does garner some extra privileges. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

and names as a primary goal “to secure the Blessings of liberty to ourselves and our posterity.”²³ The opening line “We the people” rather than “We the representatives” or “We the government” reads like the beginning of contract between all the members of society – *the* Social Contract. And the goal of that contract is not to push the people toward any specific common objectives beyond “domestic tranquility,” “common defense” and “general welfare,”²⁴ but to maintain as much individual freedom as possible – allowing each person to decide his or her own objectives.²⁵

In American law, the government is, ideally, simply a proxy for the people deciding their own fate. The people vote often to ensure that laws are being made to further their personal agendas, and, in the event of a runaway leadership, the people have the power to “throw the rascals out.”

In Jewish government, on the other hand, there are three crowns: the crown of kingship, the crown of priesthood and the crown of Torah.²⁶ Each creates a position of leadership which carries divine authority. The Jewish King inherits his throne from his father, and if no heir is available, then a prophet anoints a new King.²⁷ The Jewish high priest, the Kohen Gadol, is appointed from among the other priests,²⁸ whose status is strictly hereditary –all of the priests authorized to carry out temple duties (“Kohanim”) are from a small cross-section of the Jewish population and one may only be a member of this group if he is born to a father who is also a

²³ U.S. Constitution, Preamble.

²⁴ *Id.*

²⁵ One may argue that, especially with the advent of Medicare and Social Security, we are shifting as a nation away from libertarianism and toward more social-welfare ideals. While this may be the case regarding other areas of law, First Amendment jurisprudence remains a “bulwark” of freedom, as evidenced by the 102 Supreme Court decisions making reference to the First Amendment since January 1, 2000.

²⁶ Ethics of Our Fathers §4:13.

²⁷ Maimonides, *Mishneh Torah*, Laws of Kings and Their Wars, Chapter 1.

²⁸ Tractate Sanhedrin, 2a.

priest.²⁹ Finally, the Crown of Torah may pass to anyone, for the leader of the Jewish court systems is simply the greatest mind of the generation.³⁰ But even that position is not elected by the people, but by the other members of the courts, and is clearly skewed toward those who can afford a life preparing in the study halls rather than working a job.

All three of these positions are considered divinely ordained – to dispute with the King, the Kohen Gadol or the Chief Judge is regarded as a dispute with G-d himself.³¹ The first words of the Ten Commandments are “I am your G-d,”³² not “we the people.” The commentator Rashi states that the whole reason for beginning the Torah with an account of creation, rather than simply the first commandment, was to affirm G-d’s sovereignty over everything.³³ No one should complain about their place in the world because, according to Jewish law, it all belongs to G-d anyway. Thus, the King can have authority because G-d, the “King of Kings”³⁴ has the true authority and has appointed a King to rule beneath him.

B. Rights v. Duties

The First Amendment³⁵ states that “Congress shall make no law... abridging the freedom of speech” – *the* freedom of speech – a right that seemingly existed before ratifying the constitution. The purpose of the First Amendment is thus not to create a right, but to prevent Congress from impinging upon the natural right to free speech. Many of the Amendments read similarly, referencing rights that predate the document that protects them.³⁶ One purpose of the

²⁹ Numbers §18:17.

³⁰ Maimonides, *Mishneh Torah*, Laws of the Sanhedrin and the Laws Given to Them, Chapter 1.

³¹ Maimonides, *Mishneh Torah*, Laws of the Kings and Their Wars, Chapter 3.

³² Exodus 20:2.

³³ Rashi Commentary to Genesis 1:1.

³⁴ Friday Night Liturgy, “Shalom Aleichem”

³⁵ US Constitution, Bill of Rights.

³⁶ *See e.g.* 2nd Amendment (“The right of the people to keep and bear arms shall not be infringed”); 4th Amendment (“The right of the people to be secure in their persons, houses, papers, and effects, against

American Constitution is thus to protect the natural rights of the people from those who would infringe them.

That goal corresponds to the Preamble's stated goals of providing "common defense" and "securing the blessings of liberty." Liberty means the enjoyment of one's natural rights and autonomy subject only to the natural rights of others. Common defense means the protection of those rights from outsiders or citizens who would trample them. Freedom of Speech is one such natural right.

First Amendment jurisprudence only limits the rights of a speaker or speakers in the face of a compelling social interest. For example, Justice Holmes's example of shouting fire in a crowded theater compares the right of speech with the need for public safety – safety that could be threatened in a mad dash for the door.³⁷ The Westborough Baptist funeral protest debate centers on the rights of the protesters to express their religious views against an arguably compelling interest in privacy or dignity at a funeral.³⁸ In each of these cases, the Court does not directly discuss the duties owed by each party to fellow Americans or fellow human beings – only to social interests in limiting certain behavior. Jewish law, by contrast, embraces that every Jew has a set of duties he owes to other Jews and to G-d.

The foundation for Jewish law comes from the 613 mitzvot – or commandments – found in the Torah.³⁹ Mitzvot come in two varieties: positive commandments – duties to do something – and negative commandments – duties to not do something. Every mitzvah imposes a duty, such as the obligation to pay various tithes to the temple and to the poor and the obligation not to steal. Some duties are stated both ways, for example the Ten Commandments open with a

unreasonable searches and seizures, shall not be violated"); 9th Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

³⁷ *Schenck v. United States*, 249 U.S. 47, 51 (1919).

³⁸ *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan.App.2d 537 (Kan. App. 1996).

³⁹ Maimonides, *Mishneh Torah*, Introduction. See also *id.* Book of Mitzvot.

positive duty to believe in G-d and a negative duty to refrain from worshipping other gods.⁴⁰ There is an understood right to life⁴¹ and property⁴² in Jewish law⁴³ but there is no expressly stated list of fundamental rights like in the American Bill of Rights.

Since Jewish law focuses on duties, it requires some logic to discover what rights the law espouses. Generally, rights can be found either (1) because the absence of a duty implies a right to the opposite; or (2) an existing duty on one party creates a corresponding right in another. To discover a freedom of speech in Jewish law, since none is explicitly stated, there would have to be either (1) the absence of a duty not to speak; or (2) some general duty that individuals may not interfere with another's speech. The best example of the first case will be discussed later in the case of a Rebellious Sage, who has a duty not to state law contrary to the Court, but no duty to refrain from arguing that the Court's ruling was poorly reasoned.

As for the second case, it seems forced to discover a right by way of a duty "not to interfere with another's right to free speech." Such an argument would be somewhat circular – stating a duty not to interfere with speech requires almost explicitly assuming the existence of a right to free speech. But the real obstacle to discovering a right to free speech through the second method is that the right to free speech has no obvious corresponding duty. Most rights do have obvious corresponding duties: the right to life creates the duty not to kill; the right to a fair

⁴⁰ Exodus 20:2-3.

⁴¹ A somewhat crass proof for the right to life is availability of monetary damages in wrongful death action. A more esoteric proof is the oft quoted verse "And you shall live by them," which is used to nullify duties that would put the actor's life at risk. See e.g. Maimonides, *Mishneh Torah*, Laws of Keeping the Sabbath Chapter 14.

⁴² There is lengthy discussion of the rights of ownership in tractates Bava Kamma, Bava Metzia and Bava Basra. Bava Metzia, for example, discusses the method for taking possession of a lost object. The term "Baal" – meaning owner – is frequently used when discussing monetary loss.

⁴³ Liberty is somewhat more complicated for reasons not relevant here. There is a general preference that a person not sell himself into indentured servitude (slavery), and there are certain punishments on those who choose to give up their freedom, but there is no prohibition on doing so. The reason, however, for this preference is that a man should not serve *two* masters – Jewish law considers everyone a servant of G-d. Hence, in one sense Judaism would not call everyone truly free, and in another Judaism allows everyone an extra measure of freedom through serving G-d and not any other master.

trial creates a duty on the courts to provide such a trial; the right to housing or healthcare places a duty on the government or the people in general to provide the same.

The right to free speech, however, does not create an obvious corresponding duty – at least, linguistically it does not. American free speech law creates no duty to listen, no duty to repeat, no duty to comprehend; it only creates a duty not to silence a speaker in the majority of situations. But the “duty” not to silence is cumbersome, and it is much clearer to legislate a right to free expression for the speaker rather than finding a way to create a duty not to silence others.

There is no duty like the one described in the second possibility to be found in Jewish law. The opposite is true; there are numerous instances where a person is allowed or is obligated to interfere with another’s speech. As will be discussed further, there is a direct obligation not to disagree with the King, and there are also prohibitions against even purely verbal idolatry⁴⁴ or the taking of G-d’s name in vain.⁴⁵

A court that does not punish these crimes has failed its duty;⁴⁶ and an individual arguably has a duty to rebuke his fellow if he sees him engaging in any of these crimes.⁴⁷ The same is true of slanderous speech, even if purely opinion and based on good facts – those of us who allow a gossip or a tabloid to spread his information without trying to silence him, or those who listen to what a gossip says are in many ways transgressing the Jewish law to rebuke a sinner.

As will be demonstrated through a series of case studies, primarily regarding cases of speech that criticizes the religious or political establishment, American law has taken the position that nearly all speech should be allowed in order to avoid a slippery slope toward censorship. Talmudic law has taken the opposite approach, and has exhibited a willingness in certain

⁴⁴ Exodus 20:4-6.

⁴⁵ Exodus 20:7.

⁴⁶ Deuteronomy 13:9 “You shall not be compassionate nor conceal him.”

⁴⁷ Leviticus 19:17.

circumstances to support religious, political or judicial leadership even in the face of a reasoned dissent.

The reason for this difference stems from another key value in Talmudic law that is absent from modern readings of the US Constitution – trust and faith in G-d and the leadership that He has appointed. The injection of faith into Talmudic law creates a very different approach to speech that criticizes the government or threatens the rule of law.

III. Case Studies

Each of the following is a specific case study in Jewish law, and my own attempt to explain why that case differs from American law. The first study is the general concept of tortious speech and harmful words. The second is the law of a false prophet, one whose words may undermine G-d's leadership of the people. The third is the law of a rebellious sage, who does not accept that the will of G-d follows the majority. The fourth is the law of a Jewish King, who represents G-d's will to the people and may execute any who directly disobeys him.

A. Tortious Speech

American law makes a clear distinction between verbal injury and physical injury and is much quicker to grant redress for the latter. If A intentionally strikes B, no matter how lightly, B can usually carry a tort action for battery and recover at least nominal damages.⁴⁸ If A makes mean comments toward B, the likelihood of recovery is significantly lessened. States generally do not recognize a valid tort action where A made disparaging remarks toward B unless A had intentionally inflicted severe emotional distress upon B through conduct that was extreme and outrageous.⁴⁹ Where a physical tort accompanies the harm, emotional harm is included in nearly

⁴⁸ Rest 2d Torts § 13 (1965).

⁴⁹ See e.g. *Doe v. Calumet City*, 641 N.E.2d 498 (Ill. 1994).

every damages discussion. Likewise, several states have declined thus far to adopt so called “privacy torts” where A reveals ill-gotten secret information about B to the public.⁵⁰

Jewish law is similarly cold toward tort claims based purely on verbal injury. The Talmud lists five⁵¹ types of damages for which a person may recover when injured including emotional distress (referred to as embarrassment).⁵² One example of a viable case mentioned by the Talmud is if someone spits at another person and the spittle strikes his body. If the spittle does not reach the persons body, however, there is no recovery available.⁵³ The sages derive from this that verbal insults alone, no matter how embarrassing, are not recoverable harms.⁵⁴

The Talmud does have strong words for one who verbally embarrasses his friend though, stating that he has no share in the world to come.⁵⁵ According to one opinion, the Court therefore may put one who makes derogatory language into *cherem*⁵⁶ until the speaker makes restitution, but this opinion is not a universal opinion because *cherem* would still qualify as a punishment.⁵⁷ Another exception mentioned in the Talmud is one who curses his fellow,⁵⁸ but this is a special case where the speech carries with it some resulting action, in this case a “hex” similar to the “evil eye.”

⁵⁰ See e.g. *Howell v. New York Post Co. Inc.*, 81 N.Y.2d 115 (1993). New York’s privacy law is governed by two statutes: N.Y. Civ. Rights L. § 50-51 (McKinney 2007).

⁵¹ The five are actual injury, pain, medical costs, lost wages and embarrassment.

⁵² Tractate Bava Kamma, Page 83b

⁵³ Tractate Bava Kamma, Page 90a. Spitting, along with certain other injuries, is afforded the highest standard award of damages of the sample cases brought, though the award may be adjusted by a court.

⁵⁴ Tractate Bava Kamma, Page 91a. Rav Pappa rules that if spittle only strikes a person’s garment, there is no reward. From this precedent, Rabbi Yose bar Avin explains that since spitting like that would certainly be equivalent to a verbal insult, no recovery is available for verbal insults.

⁵⁵ Tractate Bava Metziah, 59a.

⁵⁶ A minor form of exile where the Court decrees that no-one should do business with a person and places various other restrictions on the defendant’s life – in some extreme cases even forbidding anyone to sell food to the defendant.

⁵⁷ Commentary of the *Rosh* to Bava Kamma Chapter 8 § 14, citing the opinion of *Rabbeinu Sherira Gaon* as a source for putting the defendant into *cherem*. See also Shulchan Aruch, Choshen Mishpat 420:38 (stating that one who only embarrasses another is free from judgment, but mentioning the opinion of *Rabbeinu Sherira Gaon* as a minority).

⁵⁸ Tractate Sanhedrin 66a.

Both American and Talmudic law recognize that certain specialized types of speech do merit redress, but without any resulting physical harm, the list is quite short. American courts are not always shy about stating their disapproval with some speakers,⁵⁹ and, as discussed above, there are exceptions for libel⁶⁰ threats,⁶¹ or false advertising⁶² but such exceptions are also recognized in Jewish law. The differences between the systems lies in the core speech value that criticizing the government or popular thought should always be permissible.

While each system draws the line somewhat differently on tortious speech, American law and Talmudic law generally agree that no redress is available without some physical injury even though such deliberately hurtful speech is deplorable. American law declines to adopt such redress in part because the courts have no precedent to do so.⁶³ Talmudic law similarly lacks precedent because the scriptural verse relied upon as a basis for embarrassment damages states “and she grabbed his private parts⁶⁴” – referencing a physical act.

Because there is no philosophical argument between the two systems regarding tortuous speech, this paper will not focus on civil torts for hurtful speech, but rather will focus on speech that criticizes various ruling bodies and individuals – typically political speech. With political speech, there is considerable divergence between the systems. American law again stays away

⁵⁹ See e.g. *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 102 (1933) (referring disparaging speech to the “code of common decency” rather than American law) See also *Collin v. Smith* 578 F.2d 1197 (7th Cir) where Judge Sprecher complains in his dissent that the majority “apologized” too much for its ruling not to grant an injunction against Nazi demonstrations.

⁶⁰ Restatement 2nd of Torts § 569.

⁶¹ AmJur Extortion § 59 (2008).

⁶² Lanham Act § 43(a).

⁶³ *Howell*, 81 N.Y.2d at 122 (declining to create a privacy tort system beyond the narrow New York statutes).

⁶⁴ Deuteronomy 25:11 – The case discusses a wife who helps her husband in a fight and inadvertently grabs the attacker’s genitals. The verse continues that the woman’s hand be cut off – which means she must pay damages worth the value of her hand. See also commentary of Rashi to Bava Kamma Page 83b on the line “And the humiliated.”

from granting a remedy for hurtful speech, but Talmudic law places often strict sanctions on those who oppose the will of the majority or disrespect the ruling bodies.

B. Cursing One's Parent

The Talmud⁶⁵ lists several specific individuals who are liable for death by strangulation⁶⁶ including a kidnapper, a child who physically attacks or curses⁶⁷ his or her parents, a rebellious sage and various categories of false prophet. Of this list, only a kidnapper carries the same stigma in American society, frequently meriting long prison terms and the wrath of the nation with such legislation as Megan's Law.⁶⁸ The Talmud explains that kidnappers who put their victims into slavery are liable for the death penalty; certainly American society has voiced its disapproval for the practice of slavery through the 13th Amendment ban and through the Civil War which arguably was motivated by anti-slavery sentiments.

What is significant in this Talmudic teaching is that all the other items listed relate to offensive speech, and the Talmud equates kidnapping with crimes, making each a capital offense. American law, on the other hand, does not outlaw the majority of these acts because, as speech crimes, they would generally be protected under the First Amendment.

The first such law is the prohibition against cursing one's parents. Initially, the Talmud makes a statement similar to that in American law that a child who strikes his parent is criminally liable. American law does follow the Talmud's example of defining a special offense

⁶⁵ Tractate Sanhedrin 84b.

⁶⁶ There are four types of death penalty available in Jewish law including stoning, beheading, strangulation and burning. A different set of crimes applies to each and it is the subject of some debate which punishments are considered the most severe. See Tractate Sanhedrin, 49b and commentaries for discussion.

⁶⁷ Striking one's parents is part of the initial list at 84b; cursing is first mentioned at 85a.

⁶⁸ 42 U.S.C. § 13701 (Law relates specifically to sex offenders, arguably the worst type of kidnappers, but demonstrates the nation's higher standard of punishment for crimes against children)

for violence against a parent,⁶⁹ but the notion that offenders should be punished is universal to both systems. In American law, the offending child would be liable for assault, battery or some other similar statute.⁷⁰ There is no law in the United States making it a crime to curse one's parents, but the expectation in most states is that parents should police such conduct themselves.⁷¹

The Talmud, on the other hand, steps in to specifically punish children for crimes against their parents, even beyond those they would normally be liable for against any other person. The Talmud would also hold a minor liable for cursing another,⁷² but that offense would only carry a civil remedy and therefore only warrant monetary restitution or at worst corporal punishment (in the face of aggravating factors).⁷³ A child who strikes or curses his parent is liable for death. The reason for this increased penalty is because of the message the child is sending through his criminal act – he is disrespecting one of the main authority figures in his life.

Jewish law places a tremendous emphasis on respecting G-d and includes respect for other authority figures in that obligation. The fifth of the Ten Commandments states “Honor your father and your mother.”⁷⁴ Commentaries explain that the first five Commandments are between man and G-d and are ordered in correspondence with the last five Commandments between man and his fellow man.⁷⁵ The obligation to honor one's parents is akin to the

⁶⁹ Sanhedrin, 84b.

⁷⁰ See e.g. 720 ILCS 5/12-3 (Illinois battery statute making a person guilty of a class A misdemeanor who “intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.”)

⁷¹ 705 ILCS 405/5-101 (2008) (“The Illinois Juvenile Court Act of 1987,” stating a preference that the “care and guidance” needed to secure the “moral, emotional, mental and physical welfare” of a delinquent child is best obtained “in [the minor's] own home”).

⁷² Tractate Bava Kama 66a.

⁷³ The standard penalty is 39 lashes. See Tractate Makkos (“lashes”) for details.

⁷⁴ Exodus 20:12

⁷⁵ See e.g. *Haamek Davar* commentary to Deuteronomy 5:16.

obligation to respect G-d.⁷⁶ When a child curses or strikes a parent, he is sending a message that he also would strike or curse G-d; and that is why the Court invokes a stricter penalty.

As such, the only situation where a child would be allowed to curse his parent is when he was acting as the Court's agent to administer a punishment on behalf of the Court. In such a case, according to the opinion of Rav Sheishess (not that of the majority), a child may curse his parent because the same G-d that forbade the child to strike or curse his parent may now allow him to do so on behalf of the Court.⁷⁷

C. A Caveat about Cursing

One criticism of this explanation is that cursing one's parent is not a unique speech crime. As mentioned above, cursing anyone is a crime under Jewish law. Hence, disrespecting a parent should not serve as a proof about the Torah's approach to speech against authority.

There are several responses to this criticism. First, as discussed above, cursing one's parent carries a much harsher penalty (death) than the civil remedy for cursing anyone else, so this harsher penalty can convey the lesson. Second, the fact that the Talmud, and scripture, list cursing a parent as a separate crime demonstrates that there is a lesson unique to that smaller class.⁷⁸

Another interesting response to this criticism is to note the proof text for the Talmud's blanket prohibition on cursing. The Torah states "And a prince among your people you shall not

⁷⁶ Tractate Kiddushin 30b-31a (Stating that if someone honors his parents, G-d considers it as if he had honored G-d, and if someone does not honor his parents, G-d says "I did well not to live among them, for if I had dwelled among them they would have tormented Me as well.") *See also* Maimonides, *Mishneh Torah*, Laws of the Rebellious Ones 6:1.

⁷⁷ Tractate Sanhedrin 85a. The majority ultimately rejects the view of Rav Sheishess in all cases except those of an idolater, as discussed below.

⁷⁸ *Toras Kohanim*, Parshat Vayikra, Chapter 1 (A general statement followed by a specific statement is one of the 13 accepted methods of scriptural interpretation for the purposes of making legal rulings).

curse.”⁷⁹ So the way that scripture derives a prohibition on cursing is by comparing the Jewish people to royalty. As such, cursing is permitted against someone who is not a “prince among your people,” namely one who is condemned to die. But, a child may still not curse a parent who has been condemned to die because while the parent is not a “prince among your people,” the parent still deserves respect under the separate ruling dealing with respect for parents.⁸⁰ In either case, the prohibition against cursing stems from an inherent respect for authority.

The one exception to this second ruling is where a parent is guilty of instigating others to idolatry. In that case, the parent’s blasphemy against the religious government allows the child’s duty to G-d to supersede even loyalty to his parent.⁸¹

The case of a child cursing his parent thus forms a good beginning for analyzing the Talmudic approach to limiting speech. In this case, the punishment for cursing a parent was more severe than for other curses because the child had an extra legal obligation to honor his parent. The following cases will discuss other specific obligations to respect authority figures, including the Prophet, the High Court or the King. In each of these cases as well, the Talmud introduces a restriction not present in American law based on the inherent respect for authority built into the Talmudic system of law.

D. False Prophet

Another of the parties listed who are liable to death by strangulation is a false prophet.⁸² The definition of false prophet includes one who falsely claims to have received prophecy from G-d (the true G-d) and one who claims to have received prophecy from another god (not the true G-d). The reasoning behind these laws is scriptural, there are specific commandments to put

⁷⁹ Exodus 22:27

⁸⁰ Tractate Bava Kama 85a.

⁸¹ Tractate Bava Kama 85b. Noting the proof verse “you shall not be compassionate nor conceal him” concerning an idolater. Deuteronomy 13:9

⁸² Tractate Sanhedrin 84b

such individuals to death,⁸³ but there is also an ethical basis for this punishment based on the Jewish approach to leadership.

The Jewish faith, especially in its formative years, was primarily practiced through allegiance to a prophet. The first such prophet was Moses, whom the people famously recognized as G-d's prophet at the same time they fully realized their faith in G-d.⁸⁴ When the Jewish people received commandments from G-d, it was typically through Moses, and in subsequent generations the people were led by other prophets such as Jeremiah, Ezekiel and Mordechai (whose leadership is recorded in the Book of Ester). While a Jewish King is prohibited from serving on a Jewish Court,⁸⁵ the Prophet was usually the head of the court and a source of spiritual guidance in trying times.⁸⁶

Because the Prophet plays such an important role for the Jewish people, the concept of prophecy is held to a higher standard in speech. If a false prophet makes the same statement that was given to another prophet – a true prophecy – but does so as if he were the prophet who received the message from G-d, then that person is liable to death.⁸⁷ If a person claims to be a prophet, but is merely lying and telling a false prophecy, that person is liable to death.⁸⁸ If a person claims to be a prophet of another G-d, that person is liable to death.⁸⁹ Each of these false prophets is usurping the authority of a true prophet to speak on behalf of G-d. Since the words of

⁸³ Deuteronomy 18:20

⁸⁴ Exodus 13:31 “And the people of Israel saw the great hand that G-d had used on Egypt; and the people revered G-d and believed in G-d and Moses his servant.”

⁸⁵ Maimonides, *Mishneh Torah*, Laws of the Sanhedrin and the Judgments Given Over to Them, 2:5.

⁸⁶ Perhaps the most famous example of this is Isaiah 40:1, read on the Sabbath after the anniversary of the destruction of the First Temple and known as *Shabbos Nachamu* for the verse “Comfort, comfort my people, says your G-d.”

⁸⁷ Tractate Sanhedrin 89a; Maimonides, *Mishneh Torah*, Laws of the Foundations of Scripture; 9:1-5.

⁸⁸ *Id.*

⁸⁹ *Id.*

the Prophet are granted special status in Jewish law, the words of a false prophet are given a special punishment.

However, not all crimes associated with prophecy are capital offenses. Those who ignore the words of a prophet, including the prophet himself, are said to be liable to the Heavenly Court, but are not prosecuted by Jewish courts for their crimes.⁹⁰ The same punishment applies to one who receives Prophecy but refrains from telling it to the people (hoping for a freedom *not* to speak).⁹¹

The difference between a false prophet and one who does not follow the words of a prophet is that false prophets are speaking. As the verse explains, a false prophet is one who will “willfully speak a word in My Name... or who will speak in the name of the gods of others.”⁹² Speaking is the crime – the words of the Prophet have the status of law, and indeed can temporarily even overturn the laws.⁹³ It cannot be argued that it is the effect of false prophecy that is punishable because one who speaks true prophecy said by another is still punished. It cannot be argued that it is the idolatrous nature of the prophecy that is punishable because a false prophet may speak in G-d’s name or the name of another G-d. Rather, a false prophet is punished because he or she has abused the power of speech that a true prophet wields over the people.

American law has no parallel to this law; anyone may speak in the name of whatever deity they wish to favor or oppose the current establishment. For this reason, Senator Barrack Obama cannot levy charges against his “former” pastor, Jeremiah Wright, for purporting to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Deuteronomy 18:20.

⁹³ *See e.g.* 1 Kings 18 where the prophet Elijah temporarily allows bring offerings at an alter outside of the Temple.

speak as a servant of G-d while making statements such as “G-d Damn America” in a sermon.⁹⁴ Senator Obama cannot even levy civil charges against Wright for the serious damage that he has done to the Obama political campaign because Wright’s sermon was protected under the First Amendment’s freedom of religion and freedom of speech. Likewise, Warren Jeffs, the controversial prophet of the renegade Fundamentalist Church of Latter Day Saints can be sentenced on charges of aiding and abetting statutory rape, but not for his teachings that those rapes were appropriate.⁹⁵ In American law, words are not sufficient to warrant punishment, no matter how repugnant the philosophy they convey.⁹⁶

This then is the distinction between American law and Talmudic law. In the United States, the people have made a decision to protect their marketplace of ideas by allowing any idea to be expressed. In the U.S., free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁹⁷ For this reason, the Supreme Court even permits the desecration of the very symbol of the freedom of this Country, the American Flag.⁹⁸ To preserve this freedom, the First Amendment specifically keeps the government out of religious discussion⁹⁹ and courts are careful to only consider disputes between religious parties based on neutral principles of law.¹⁰⁰

⁹⁴ Nicholas D. Kristoff, *Obama and Race*, 3/20/08 NYT A27.

⁹⁵ John Dougherty, “Polygamist Sentenced to 10 Years in Prison,” 11/21/07 N.Y. Times A16.

⁹⁶ There are exceptions to the right to free speech that arguable apply to Jeffs. In particular, one could argue that many of his teachings qualify as incitement to violence against some of the young girls in his community. Such speech would need to be fairly specific, *see Bridges v. California*, 314 U.S. 252 (1941). General statement such as “G-d wants us to practice polygamy” or “a 14 year old girl has a religious obligation to submit to her husband” are not specific enough to qualify as incitement.

⁹⁷ *Terminello v. Chicago*, 337 U.S. 1, 4 (1949).

⁹⁸ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁹⁹ The Religion Clause states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

¹⁰⁰ *Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich*, 426 U.S. 696, 721 (1976) (declining to “repeat the error of the Illinois Supreme Court” by considering provisions of one Church’s constitution). *See also Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 286 (N.Y. 2007) (involving conflicts between members of a large Jewish sect).

Since a Torah government is a religious government, deriving its legitimacy from G-d rather than the people, the issue of the free practice of religion is not a concern. A Jewish government can and does punish those who prophecy falsely, and Reverend Jeffs would have been punished under a Jewish government for falsely prophesying. Pastor Wright is a somewhat murkier case because he did not claim to be a prophet, only to teach the word of other prophets, but his speech could nonetheless be subject to trial under the final case study to be discussed, speaking against the King.

D. The Rebellious Sage

The next, and perhaps most interesting example of free speech discussion in Talmudic law, is the law of the rebellious sage. The most famous example of a rebellious sage is the story of Rabbi Eliezer and a debate about whether a vessel called the “Oven of Aknai” could become ritually unclean:

It has been taught: On that day Rabbi Eliezer brought forward every imaginable argument, but they did not accept them. He said to them: 'If the *halachah*¹⁰¹ agrees with me, let this carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place — others say four hundred cubits. 'No proof can be brought from a carob-tree,' they retorted. Again he said to them: 'If the *halachah* agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards — 'No proof can be brought from a stream of water,' they rejoined. Again he urged: 'If the *halachah* agrees with me, let the walls of the schoolhouse prove it,' whereupon the walls inclined to fall. But R. Yehoshua rebuked them, saying: 'When scholars are engaged in a halachic dispute, what have you to interfere?' Hence they did not fall, in honor of R. Yehoshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined. Again he said to them: 'If the *halachah* agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do you dispute with R. Eliezer, seeing that in all matters the *halachah* agrees with him!' But R. Yehoshua arose and exclaimed: 'It is not in heaven.' What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we

¹⁰¹ Halachah is a Hebrew word meaning “the law.” In this sense, that sages are debating who’s opinion is the correct law, ultimately turning to G-d as a judge.

pay no attention to a Heavenly Voice, because You have long since written in the Torah at Mount Sinai: 'After the majority must one incline.'¹⁰²

The lesson of this story is that no miraculous occurrence should influence the legal majority to change its halachic ruling. While prophets, discussed in the previous section, and kings, discussed in the next section, have the ability to make certain exceptions to the normal Jurisprudence of the Jewish courts, the general rule is that the halachah follows the majority. If a prophet sits at the head of the Sanhedrin, the High Court of 71, and G-d himself proclaims that the prophet's legal ruling is correct, the will of the majority can overrule him.

One important other point in the story however, is that Rabbi Eliezer was not wrong bringing forward "every imaginable argument." Jewish scholarship is built on an appreciation for debate and the compilation of wisdom. "Ben Zoma would say: Who is wise? One who learns from every man."¹⁰³ In listing the ideal Torah scholar, and therefore the ideal judge, Ethics of Our Fathers states that he must at the same time have faith in the sages and deliberation in study.¹⁰⁴ The story of Rabbi Eliezer continues:

R. Nathan met Elijah [the prophet] and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, 'My sons have defeated Me, My sons have defeated Me.'

The Torah values faith in G-d and obedience to his precepts and his chosen leaders, but does not request blind faith. The Talmud is filled with arguments, often-times carried on through generations of study halls, yet the will of the majority always overrules any individual person's perception of the will of G-d. While G-d created the Jewish people and created His Kingdom, he passed the ability to make laws to the people.

¹⁰² Tractate Bava Metzia, 59a-59b.

¹⁰³ Ethics of Our Fathers, 4:1

¹⁰⁴ *Id.* 6:6 Listing a total of 48 virtues.

Rabbi Eliezer¹⁰⁵ was free to debate fiercely with the sages, but was obligated to accept their ruling insofar as he could not continue to teach his own views as the proper halachah. This is the Talmudic approach to free speech in the marketplace of ideas – when the debate rages in the marketplace, anyone may give his opinion, but only so long as the debate remains in the marketplace. Once the majority has passed judgment, their ruling has very real consequences, for example, about whether an oven may be used or must be thrown away. At that point, a scholar may not teach his own opinion as law. If he does so, he is deemed a “rebellious sage” and may be liable for death in certain circumstances.¹⁰⁶ To be clear, a sage *may* say that in his opinion the ruling should have gone another way, but he may *not* say that the majority is wrong.¹⁰⁷

Rabbi Eliezer’s story shows the importance the Talmud places on respect for authority, but it also shows the respect the authorities had for Rabbi Eliezer. Given the option to have him executed, the other Rabbis decided instead to excommunicate him. When faced with the news that he could no longer perform his work, Rabbi Eliezer died

¹⁰⁵ The conclusion of the story of Rabbi Eliezer and the Oven of Aknai is as follows: “It was said: On that day all objects which R. Eliezer had declared clean were brought and burnt in fire. Then they took a vote and excommunicated him. They said, 'Who shall go and inform him?' 'I will go,' answered R. Akiva, 'lest an unsuitable person go and inform him, and thus destroy the whole world.' What did R. Akiva do? He donned black garments and wrapped himself in black, and sat at a distance of four cubits from him. 'Akiva,' said R. Eliezer to him, 'what has particularly happened today?' 'Master,' he replied, 'it appears to me that your companions hold aloof from you.' Thereupon he too rent his garments, took off his shoes, removed [his seat] and sat on the earth, while tears streamed from his eyes. The world was then smitten: a third of the olive crop, a third of the wheat, and a third of the barley crop. Some say, the dough in women's hands swelled up. A Tanna taught: Great was the calamity that befell that day, for everything at which R. Eliezer cast his eyes was burned up. R. Gamliel too was traveling in a ship, when a huge wave arose to drown him. 'It appears to me,' he reflected, 'that this is on account of none other but R. Eliezer b. Hyrcanus.' Thereupon he arose and exclaimed, 'Sovereign of the Universe! You know full well that I have not acted for my honor, nor for the honor of my paternal house, but for You, so that strife may not multiply in Israel! 'At that the raging sea subsided.’”

¹⁰⁶ Maimonides, *Mishneh Torah*, Laws of the Rebellious Ones, Chapter 4 (the punishment for the sage depends on the punishment for the matter in disagreement – if he argues over certain capital offenses, he is also liable for a capital offense).

¹⁰⁷ Tractate Horayos 2a.

of a broken heart. The Talmud recognizes the importance that the majority must rule, but to silence a voice like that of Rabbi Eliezer was considered a tragedy for everyone involved.

In American law, there is generally no criminal statute and certainly no capital offense for disagreeing with the Court, and there is no real distinction made between giving one's own opinion and saying that a court is wrong. Martin Luther King Jr., for example, was praised for espousing "civil disobedience" – peaceful non-compliance with an unjust law.¹⁰⁸ Likewise the law permits anyone to aggressively voice their displeasure with police action so long as that opposition does not cause an actual obstruction of justice.¹⁰⁹

However, there is a concept of attorney malpractice or professional misconduct for making either statement. If an attorney gives a client advice with negligent disregard for the law,¹¹⁰ or a judge presides over a case without acting with "legal knowledge, skill, thoroughness and preparation"¹¹¹ then both may face disbarment by their respective licensing bodies. Furthermore, if an attorney fails to adequately research the law or recklessly advises a client to go against previously decided law, that attorney may be liable to the client for breach of contract, breach of fiduciary duty or attorney malpractice.¹¹² Of course, a judge or attorney may espouse a legal position knowing there is law against him, but only if he has a good faith basis for distinguishing his client's case from previous *stare decisis* positions, or if he has a good faith basis for overturning those cases.¹¹³

¹⁰⁸ Martin Luther King Jr., "Letter from Birmingham Jail" (April 16, 1963).

¹⁰⁹ *Houston v. Hill*, 482 U.S. 451 (1987).

¹¹⁰ ABA Model Rules of Professional Conduct §1.1 (2008).

¹¹¹ ABA Code of Judicial Conduct §2.1 (2008).

¹¹² *See e.g. Aloy v. Mash*, 38 Cal.3d 413 (1985).

¹¹³ ABA Model Rules of Professional Conduct § 3.1

Attorney malpractice claims, however, stem from a client being wronged by his attorney. The attorney has an obligation to tell his client how to win, or at least how to best try to win within the boundaries of the law.¹¹⁴ If an attorney errs and causes his client harm, then client has a valid claim. The lawyer's speech, however, is not on trial in and of itself. The lawyer can say whatever he wants, but must only be careful not to create an attorney client relationship when doing so.

While the Talmud does have additional remedies if a judge's poor advice causes harm to the people¹¹⁵ the punishment of a rebellious sage is a separate law from the restitution paid if an improper ruling causes harm. The rebellious sage is punished purely for what he says, i.e. denouncing the legal sanctioned majority as invalid. Such a statement is akin to the words of a false prophet, failing to offer the proper respect to the Torah system and threatening to undermine the leadership of the Jewish people. To denounce the Jewish leadership is to denounce G-d, and for this reason, a sage is guilty of a capital offense. That absolute allegiance does not exist in the United States.

E. Rebellious Sage 2: Perhaps not so different

Nonetheless, the ABA and other licensing boards have adopted rules that do create a type of absolute allegiance – allegiance to justice and the rule of law. The duty to interpret the law in the United States belongs to the courts, but the duty to make law belongs to the legislature and ultimately to the people.¹¹⁶ Therefore, even the highest court is bound to decide cases according to the laws put forward to it by the people. A further limitation in American courts, like Jewish courts, is that the law will follow the majority's interpretation of those statutes.

¹¹⁴ *Id.* § 2.1, 3.1, 3.2.

¹¹⁵ Tractate Horayos, Chapter 1 and the cases mentioned there – depending on the circumstances a judge or judges may have to bring a sin offering for giving a poor ruling.

¹¹⁶ *Marbury v. Madison*, 5 U.S. 137 (1803).

Were a judge to refuse to agree with the majority as Rabbi Eliezer did, no criminal penalty would apply, but the judge could be removed from the bench for failure to decide matters fairly or impartiality.¹¹⁷ A bitter pill swallowed by many dissenting judges through the years is that they may pen a vociferous dissent or even sharp concurrence, but the majority's opinion will always decide the law.

Judges are encouraged to participate in legal organizations and to participate in the public debate about changing the law.¹¹⁸ A judge may argue forcefully as a professor, scholar or dissenting opinion that the current law has been incorrectly decided or is immoral or improper on some other ground. However, there are limitations placed on judges that would not apply to any other legal scholar, including that a candidate for judicial office may not pledge to rule a certain way.¹¹⁹ A judge is charged to “uphold the integrity and independence of the judiciary” and may be subject to discipline if his speech gives an appearance of impropriety.¹²⁰ Thus the Rules of Professional Conduct governing judges' behavior inject a great deal of the inherent respect present in Talmudic law into the American legal system as well.

In that regard, it appears that the criminal code has not extended speech laws over judges, but the licensing bodies of the various states have. In Talmudic law, debate about the law is encouraged, and a scholar may present his views in opposition to those of the courts in the hope that bad law is overturned or not created in the first place. In American law, legal scholars are encouraged to write, speak and encourage others to do essentially the same thing. But while the American criminal system does not espouse the same respect for *stare decisis* that the Talmudic system does, legal licensing bodies have.

¹¹⁷ ABA Code of Judicial Conduct §2.7

¹¹⁸ *Id.* Canon 3.

¹¹⁹ *Id.* §4.1.

¹²⁰ Illinois Code of Judicial Conduct, Canon 2.

The reason for this difference is that legal licensing bodies (typically the ABA) have a higher power they can pledge allegiance to much as the Jewish people pledge allegiance to G-d. The ABA's preamble to the attorney Rules of Professional Conduct encourages lawyers to act as representatives of justice¹²¹ and places a duty upon lawyers to "uphold the legal process"¹²² This is similar to the Talmud's ideal that debate between scholars will create a better majority opinion, but universal allegiance to the legal process that created that ruling is essential once it has been passed.

Speech in the United States is prized over respect for authority. The courts have permitted, on First Amendment grounds, flag burning,¹²³ wearing a jacket with an offensive anti-government slogan,¹²⁴ and the public criticism of religious figures, even in poor taste.¹²⁵ However, an attorney or judge who participates in such actions is held to a higher standard and so may be held to answer to her professional licensing board for otherwise lawful misconduct. For this reason, the Talmud and American law do not differ so much on the law of rebellious sages, only on the theoretical punishment. And even in that regard, the differences are not so great, for the end of Rabbi Eliezer was excommunication, similar to disbarment, so the two systems can agree there as well.

E. The Jewish King

Speech before a Jewish King is a special ruling of the Talmud that is not found anywhere in American law – it is perhaps the ultimate expression of allegiance to G-d's chosen leader and in many ways the opposite of First Amendment ideals.

¹²¹ ABA Model Rules of Professional Conduct, Preamble §1.

¹²² *Id.* §5.

¹²³ *Texas v. Johnson*, 491 U.S. 397 (1989).

¹²⁴ *Cohen v. California*, 403 U.S. 15 (1971).

¹²⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

Jewish law requires that a King conduct himself in a royal manner. He must have his hair styled daily, be dressed in fine robes and carry a scepter and a crown.¹²⁶ It is law that a King must be treated with great respect, even by a prophet or high priest.¹²⁷ Most importantly, “anyone who rebels against a king of Israel may be executed.”¹²⁸ This is true even for a simple order by the King such as telling a subject to go to certain place, and even if the rebellion is outside the King’s presence.¹²⁹ Rebellion also includes the concept of speaking against the King.¹³⁰ The King’s ability to execute supersedes normal jurisprudence, allowing him to execute a murderer for whom there is insufficient evidence to convict and to leave the murderer’s body hanging for many days after execution, a punishment not permitted to the Court.¹³¹

In American law a governor or the president has the power to pardon, but does not have the power to punish rebellion. The Constitution protects a person from deprivation of life, liberty or property without due process of law.¹³² The President of the United States is powerless to punish those protesting his acts when those protests are through lawful acts of free speech – even citizens protesting a war the President views as important to the safety of the nation is free from prosecution.¹³³ For this reason, the Supreme Court held that a person could even wear a jacket criticizing the Vietnam draft while in the Los Angeles Courthouse.¹³⁴

This is the clearest division between Talmudic and American law. While the American president is seen as an instrument of the people, the Jewish King is seen as something more. In

¹²⁶ Maimonides, *Mishneh Torah*, Laws of Kings and Their Wars, Chapter 2.

¹²⁷ *Id.*

¹²⁸ *Id.* §3.8

¹²⁹ *Id.*

¹³⁰ See e.g. 2 Samuel 11:8 (where King David executes Uriah for talking back to him).

¹³¹ Maimonides, *Mishneh Torah*, Laws of Kings and Their Wars, §3.9.

¹³² US Constitution, Fifth Amendment §1 and Fourteenth Amendment §1.

¹³³ *Cohen v. California*, 403 U.S. 15 (1971).

¹³⁴ *Id.*

American law, not even the President is free from criticism, even in poor taste. In Talmudic law, there is a sense of decorum that cannot be breached in the presence of royalty.

IV. Conclusion

The Declaration of Independence was America's rejection of monarchy, where the people, "assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's G-d entitle them," thereby declaring that "all men are created equal."¹³⁵ The American system rejects decorum or respect for authority in favor of a raw and unobstructed democracy, in favor of the free exchange of ideas designed to turn the nation toward the will of the people.

Jewish law instead places its faith in G-d and in the Torah, granting the highest power to a priest who presides over the people's service to G-d, to a judge who serves as the guardian of G-d's will and knowledge, and to a King, who serves as G-d's voice to the people. All of these posts exist to turn the nation toward the will of G-d, who in turn will care for his people.

While Jewish law encourages free debate among scholars attempting to discover G-d's will, there remains an overarching requirement that the people respect that will. Talmudic law chooses to trust in G-d rather than in the people themselves. This dependence on another is only possible because of the huge component faith plays in a theocratic government. Lacking that faith, the minority could not be satisfied, feeling the greater numbers had simply trampled their needs.

The American system lacks the basic faith and trust that G-d will do the right thing, and while the Declaration of Independence mentions G-d as a justification, that Justification is merely a license for the people to act on their own behalf. American law is a simply that, the law made by Americans. Jewish law is the law made by G-d. Each system has its drawbacks –

¹³⁵ Declaration of Independence, ¶ 1 (July 4, 1776).

Americans have an easier time arguing against poor leaders; Jews have an easier time silencing those who speak in bad taste.

While both systems value speech and recognize its power to change the world, it is the Americans who value speech more. In America, no amount of disrespect or divisiveness can silence a minority opinion from being spoken – some say that is what gives the system its legitimacy. The Jewish system, relying on faith in leadership and in G-d, requires a person be silent in some circumstances and simply trust that G-d's representatives will speak for him.