

“THOU SHALT NOT GO ABOUT AS A TALEBEARER AMONG
 THY PEOPLE”¹: JEWISH LAW AND THE PRIVATE FACTS TORT

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INTRODUCTION

As we begin the twenty-first century, the viability of the public disclosure of private facts tort² in America very clearly has been called into question. Indeed, the individual’s right to keep sensitive personal information private has been under fire for some time; its very existence threatened by an increasingly broad interpretation of the right to free speech. The classic example of

¹ *Leviticus* 19:16.

² RESTATEMENT (SECOND) OF TORTS § 652D (1977). The Restatement defines the Disclosure of Private Facts Tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id.

the inherent conflict between the right to privacy and free speech occurs when a newspaper publishes information about an individual that is embarrassing, yet truthful.³ Theoretically, the newspaper should be liable for the public disclosure of a private fact. However, the courts have generally granted the media tremendous leeway in publicizing truthful information, effectively rendering the private facts tort impotent in all such cases.⁴ Legal thinkers like Diane Zimmerman⁵ have taken the next step, questioning the very validity and desirability of the private facts tort. Indeed, many of the arguments marshaled against the private facts tort have proved quite convincing.

In such an atmosphere, it may prove very rewarding to those debating the scope of an individual's right to privacy to consider the approaches of other legal systems in the matter of privacy and the law. In particular, the traditional Jewish legal system has developed a novel approach to privacy that may shed some light on the efficacy of the disclosure of private facts tort in the United States.

Part I of this Note chronicles the evolution of the private facts tort in the American legal system and the challenges posed by numerous critics to its legitimacy and effectiveness as a cause of action. Part II examines some fundamental differences between the American and Jewish legal systems, focusing on the interplay of law and morality, as well as the role of human rights in both systems. In addition, the Jewish legal system's approach to freedom of speech and its expression in Jewish history are also considered. Part III analyzes Jewish law's rough equivalents of the private facts tort, *Lashon Hara* and *Tzeniut*, highlighting some significant differences between the two legal systems' approaches to privacy law. Part IV compares the application of American and Jewish privacy law to damages for the violation of privacy rights. The conclusion argues that while the Jewish equivalent of the private facts tort is entirely legitimate within the Jewish system of divine law, the private facts tort represents an improper imposition of a particular set of values upon American society.

³ Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147 (1996).

⁴ *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981).

⁵ Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

I. THE PRIVATE FACTS TORT IN THE UNITED STATES

A. *The Creation of the Private Facts Tort*

The story of the private facts tort in American legal history begins in 1890 with a groundbreaking law review article penned jointly by Samuel Warren and Louis Brandeis, entitled *The Right to Privacy*.⁶ In response to the perceived abuses of the yellow press, which were quite prevalent at the end of the nineteenth century, the authors argued for the right “to be let alone.”⁷ Although the “right to privacy” has since been expanded to include many varied situations,⁸ the tort, as envisioned by Warren and Brandeis, was limited to the improper publication of “essentially private information”⁹ for which a remedy should be made available. The contemporary transformation of gossip into a thriving business created the need for a private facts tort. Although the traditional forms of gossip were bearable as an evil confined to a morally deficient minority, the modern press transformed gossip into the daily fare of the average citizen. As such, the negative impact of gossip was magnified to a tremendous extent, oftentimes causing severe mental and emotional distress to the victims of these gossip columns.¹⁰

However, despite the significant emotional harm that often resulted for victims of such disclosures, “mere injury to feelings”¹¹ alone does not suffice as a basis for legal action in the American legal system. Rather, emotional distress may only be taken into account when computing the amount of damages for some other legally recognized injury—it is only “parasitic of an independent tort.”¹² Instead, some other justification for the tort is necessary, prompting Warren and Brandeis to offer a fascinating justification for a right to privacy:

Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless,

⁶ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁷ *Id.* at 195 (quoting THOMAS COOLEY, LAW OF TORTS 29 (1888)).

⁸ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

⁹ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975).

¹⁰ Warren & Brandeis, *supra* note 6, at 194.

¹¹ *Id.* at 195.

¹² Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

when widely and persistently circulated, is potent for evil. It both belittles and perverts Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.¹³

The steady stream of gossip available in newspapers not only harmed the individual whose right to privacy had been violated, but also lowered the moral standards of American society as a whole. With this introduction, the authors clearly distinguished the private facts tort from all other causes of action for damages. The creation of the private facts tort is a “recognition of the moral and spiritual integrity of individuals, rather than simply their material interests.”¹⁴ Even more unique among the great variety of actionable torts, the justification for the creation of the private facts tort appears to rest largely upon the authors’ own subjective perspective of morality. As will be explained below,¹⁵ the authors’ basic assumption of the immorality and undesirability of gossip has been seriously challenged in more recent times. Nevertheless, Warren and Brandeis seemed to believe that the “right to be let alone” was self-evident; no other explanation was needed.

B. *Justifications for the Private Facts Tort*

Warren and Brandeis called upon the legal profession to establish a private facts tort by appealing to notions of a higher morality and by calling attention to the emotional distress suffered by the victims of the public disclosure of private facts. Nevertheless, while eloquently describing the need for such a tort, the authors did not clearly formulate the particular interest violated by public disclosures of private information. As Edward Bloustein has noted, Warren and Brandeis “were not as successful in describing the interest violated by publicity concerning private rights as in saying what it was not.”¹⁶ Consequently, the legal basis for the tort remains an open question to this very day.

The need for a clear justification for the private facts tort has led some scholars to justify the tort on foundations explicitly rejected by Warren and Brandeis. For instance, Warren and Brandeis explicitly rejected defamation as a justification for the tort, as it concerns material injuries affecting individuals in their “external relations to the community.”¹⁷ The invasion of privacy,

¹³ Warren & Brandeis, *supra* note 6, at 195.

¹⁴ HEATHER MACNEIL, *WITHOUT CONSENT: THE ETHICS OF DISCLOSING PERSONAL INFORMATION IN PUBLIC ARCHIVES* 24 (1992).

¹⁵ *See infra* Part I.C.

¹⁶ Bloustein, *supra* note 12, at 970.

¹⁷ Warren & Brandeis, *supra* note 6, at 197.

on the other hand, is a spiritual wrong that affects a man's "estimate of himself."¹⁸ Yet, in his seminal article analyzing the right to privacy, Dean Prosser makes this very assertion, justifying the private facts tort as a defense of reputation. In essence, the private facts tort is an extension of the defamation tort to certain limited areas of truthful speech, eliminating the defense of truth. For Prosser, the private facts tort is simply an extension of an ancient right to reputation, which provides a remedy for a small class of defamation victims whose wrongs have not previously been actionable.¹⁹

Edward Bloustein takes issue with Prosser's view and considers the right to privacy an interest unique to modern times. According to Bloustein, Warren and Brandeis feared that an uncontrollable press would "destroy individual dignity and integrity and emasculate individual freedom and independence."²⁰ Simply put, the right to privacy generally, and the private facts tort in particular, protect the "spiritual" dignity of individuals, in contrast to the strictly monetary interest protected by the defamation tort. The harm caused by a violation of privacy is "not one which may be repaired" and the loss suffered cannot be repaired by any award of damages.²¹ The purpose of the tort is not to compensate the victim, but rather to "social[ly] vindicat[e] . . . the human spirit thus threatened."²²

The factual circumstances of private facts cases reflect the uncertainty of the underlying purpose of the law. For example, in *Melvin v. Reid*,²³ a fascinating case from the 1930s, the plaintiff was a former prostitute who had abandoned her sinful ways and was living a respectable life in a different community. Years later, the defendant filmmakers publicized her life story in a movie entitled "The Red Kimono," thereby ruining her new life and reputation. The court, in granting Melvin relief, admitted to the "lack of uniformity in the reasoning"²⁴ employed by the various jurisdictions that had upheld the right to be left alone. Nevertheless, the court based its acceptance of this right upon the "right to pursue and obtain happiness" guaranteed by California's Constitution, which "by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty,

¹⁸ *Id.*

¹⁹ Prosser, *supra* note 8, at 398.

²⁰ Bloustein, *supra* note 12, at 971.

²¹ *Id.* at 1003.

²² *Id.*

²³ *Melvin v. Reid*, 112 Cal. App. 285, 297 (Cal. Ct. App. 1931).

²⁴ *Id.* at 287.

property, and reputation.”²⁵ In short, the court justified the private facts tort as a protection against reputational harm, in line with Dean Prosser’s view.

Later cases, however, do not fit very neatly into the category of defamation and protection of reputation. In *Sidis v. F-R Publishing Corp.*,²⁶ Sidis, a well-known former child prodigy, sued the *New Yorker* magazine for publishing a detailed account of his life, despite his every effort to live a secluded life. The biographical sketch, though “merciless in its dissection of intimate details of its subject’s personal life,”²⁷ did not portray Sidis in a particularly unfriendly manner. In fact, the article was generally sympathetic towards the eccentric genius. The plaintiff did not rest his cause of action upon the premise that the *New Yorker* had ruined his reputation or defamed him in any way. Rather, Sidis believed he had been wronged simply by having the private details of his life exposed to the public.²⁸ The unwanted publicity, rather than any measurable harm to reputation, was the principal factor underlying his claim. The same can be said of numerous other cases involving the unwanted public exposure of nonnegative personal factual information. The wrong involved was not that of a sullied reputation, but rather, that previously unknown people were forced into the public eye.²⁹

C. Questioning the Premise of the Public Facts Tort

The lack of agreement on the fundamental interests protected by the private facts tort has left the tort particularly vulnerable to criticism. In fact, the basic premise of the tort can easily be challenged even without focusing on the troublesome constitutional issues presented by its collision with the First Amendment.³⁰ Warren, Brandeis and Professors Prosser and Bloustein all assume that society has a greater interest in protecting the privacy of private individuals than in the value of exposing people for who they really are. This assumption, however, has not always been accepted historically, nor is it necessarily accepted by the American public today.

Dianne Zimmerman extensively documents an alternative approach to the values of privacy and gossip. While we certainly may feel religiously or ethically uncomfortable in exposing the negative personal traits or improprieties of others, Zimmerman

²⁵ *Id.* at 291.

²⁶ 113 F.2d 806 (2d Cir. 1940).

²⁷ *Sidis v. F-R Publ’g. Corp.*, 113 F.2d at 807.

²⁸ Bloustein, *supra* note 12, at 979.

²⁹ *Id.*

³⁰ *See infra* Part 1.D.

argues that we must “at least tacitly recognize that the cohesiveness and durability of any social organization depends upon the ability of its members to evaluate each other accurately and to use their observations to exert, modify, or develop social controls.”³¹ Historically, many societies have believed that one who reveals the moral shortcomings of another has not committed a wrong, but instead has performed a service for the community by exposing the hypocrisy of its members. In Christian societies, the public exposure of the weaknesses of individuals was seen as an effective way to encourage moral behavior and facilitate the salvation of the sinner.³²

The public’s moral conception of privacy has certainly evolved since Warren and Brandeis decried the invasiveness of the press. As Professor Chafee wrote in 1965, “[s]eeing how society dames and damsels sell their faces for cash in connection with cosmetics, cameras, and cars, one suspects that the right to publicity is more highly valued than any right to privacy.”³³ In the forty years since then, Americans’ propensity for gossip and exposure has only increased, and dramatically so. In a recent article in the *Wall Street Journal*, Katherine Rosman wrote that publicly exposing the infidelities and shortcomings of others has become a fashionable occupation for many Americans.³⁴ New outlets are now available to all private citizens, offering anybody the opportunity to gain public attention. “Talk radio and reality television have made it acceptable to turn private lives into public theater, and the explosion of blogs is giving nobodies the means to write about everybody.”³⁵

The modern conception of gossip is far less critical than the evaluation offered by Warren and Brandeis more than a century ago. As a result, Zimmerman contends that the right to privacy from the press cannot have its source in fundamental moral law, in spite of Warren and Brandeis’ claims to the contrary. The public disclosure of private facts tort relies merely “on a vague consensus that we should not cause one another unnecessary pain, an agreement that we regularly temper by our tacit preference for the freedom to dissect one another’s lives and characters.”³⁶ According to this view, the law should not impose the moral ideals

³¹ Zimmerman, *supra* note 5, at 327.

³² *Id.* at 326.

³³ *Id.* at 327 n.189 (quoting ZECHARIAH CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS* 138 (1965)).

³⁴ Katherine Rosman, *Leak Chic*, *WALL ST. J.*, Dec. 16, 2005, at W1.

³⁵ *Id.*

³⁶ Zimmerman, *supra* note 5, at 336.

of a portion of the population upon the rest of society while ignoring the facts on the ground. People gossip, and they do so constantly through a multitude of mediums. The existence of the private facts tort ignores reality, making its continued application untenable.

D. *Free Speech and the Right to Privacy*

Although the moral basis of the private facts tort has been forcefully disputed by those who point to the positive value of gossip and modern mores, the right “to be let alone” has been most severely challenged by scholars of the First Amendment right to free speech. Because, as the Supreme Court has declared, the gravamen of the private facts tort is the publication of truthful information, the exposure of which is embarrassing or otherwise painful to an individual, “it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.”³⁷ Indeed, the Court has expressed its fear of excessive self censorship by the press, imagining scenarios where the media would be forced to sift through all of the information it has gathered, weeding out material that is arguably unlawful.³⁸ Yet, while the Court has plainly acknowledged the troublesome conflict between the private facts tort and the freedom of speech and press, it has refused to explicitly rule on whether the private facts tort is a constitutionally permissible vehicle to protect an individual’s right to privacy.³⁹

The Supreme Court has only decided two cases involving the public disclosure of private facts. In *Cox Broadcasting Corp. v. Cohn*,⁴⁰ the father of a rape victim brought a public disclosure of private facts claim against the owner of a television station that had broadcasted the victim’s name. The Court did not consider the validity of the tort in light of the First Amendment, but rather confined its ruling to the question of whether information obtained from a public record could ever create liability for the private facts tort.

The Court did not rule on a private facts question again until *Florida Star v. B.J.F.*,⁴¹ nearly fifteen years later. In a case very similar to *Cox*, a newspaper had published the name of a rape victim. The victim sought to hold the newspaper liable under a Florida statute that forbade the press from publishing a rape

³⁷ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975).

³⁸ *Florida Star v. B.J.F.*, 491 U.S. 524, 535-36 (1989).

³⁹ Zimmerman, *supra* note 5, at 303.

⁴⁰ *Cox Broad.*, 420 U.S. at 469.

⁴¹ *Florida Star*, 491 U.S. at 524.

victim's name. The case differed from *Cox* in that this time, the victim's name was not mentioned in the court's public record, but had been mistakenly included in the public police report. Once again, the Court limited its treatment of the private facts tort to the particular facts of the case, ruling that the press could not be held liable for publishing information obtained from the public domain. The Court summed up its approach as follows: "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."⁴²

While the Court has refused to rule on the constitutionality of the private facts tort, it has offered some clues as to how it might rule in the future. In *Florida Star*, the Court stated:

If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. According to the press the ample protection provided by that principle is supported by at least three separate considerations, in addition to, of course, the overarching public interest, secured by the Constitution, in the dissemination of truth.⁴³

Justice White dissented, noting that the majority would only allow the application of the private facts tort to protect "a state interest of the highest order." By holding that that the protection of a rape victim's right to privacy is not considered "a state interest of the highest order," the Court implies that it has accepted the defendant's invitation "to obliterate one of the most noteworthy legal inventions of the twentieth century: the tort of the publication of private facts."⁴⁴

Although concerns for the freedom of speech and press have yet to strike the private facts tort from the books, such concerns have made it very difficult for plaintiffs to prevail in private facts cases. Courts have chiefly used the "newsworthiness" doctrine to limit the applicability of the private facts tort. Information that is considered "newsworthy" is protected by the First Amendment and thereby immune from legal action.⁴⁵ In the absence of a ruling from the Supreme Court as to the standards of "newsworthiness" in private facts cases, courts have applied a number of different standards in determining the newsworthiness of the private

⁴² *Id.* at 532.

⁴³ *Id.* at 533.

⁴⁴ *Id.* at 551.

⁴⁵ *Id.*

information disseminated to the public. In theory, the newsworthiness doctrine is seen as a judicial check on the private facts tort that is essential in protecting the First Amendment. In practice, however, courts have used the newsworthiness doctrine to exclude almost every case from the reach of the private facts tort, allowing most defendants in private facts cases to prevail on summary judgment.⁴⁶ The resulting practical impotence of the private facts tort has provided even more ammunition for those scholars who have argued for the end of the private facts tort.⁴⁷

II. FUNDAMENTAL DIFFERENCES BETWEEN AMERICAN AND JEWISH LAW

A prerequisite to any comparative study in American and Jewish law is a basic understanding of the essential underlying differences between the two systems of law. Chief among these differences are their vastly different approaches to the relationship between law and morality and what is meant by individual rights. The following two sections endeavor to clarify these differences.

A. *Law and Morality*

As a general rule, American law does not attempt to regulate the personal and ethical conduct of its citizens where such conduct does not adversely affect others, either physically or monetarily. While there is great debate as to the definition of “private” and “public” areas of concern, there is a general theoretical agreement that “private” conduct is not subject to legislation. As Robert George has noted, public debate is no longer focused solely on the most effective ways of protecting public goods and combating public evils; rather, people disagree about *what* is a public good and *what* is a public evil.⁴⁸ Hence, the debates over the legality of abortion and same sex marriage hinge on the definition of the private and public spheres. Those opposed to an absolute right to abortion claim that the protection of unborn children represents a public concern, while advocates of abortion rights assert that choices involving a woman’s body lie outside of the public domain. The same analysis is true of same sex marriage; those in favor of the right argue that one’s sexual orientation and family structure is a purely personal question, while those in opposition claim that the legitimization of same sex marriage will endanger the traditional family structure, and is

⁴⁶ See Zimmerman, *supra* note 5, at 293 n.5.

⁴⁷ Dendy, *supra* note 3, at 164.

⁴⁸ ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 43 (2002).

therefore a public issue subject to legislation.⁴⁹

The reason for the public/private dichotomy is both practical and ideological. Practically, the legal tradition only seeks to create laws which can potentially be enforced. As the purpose of law is to regulate the activities of the people, laws that cannot be enforced serve no practical purpose, as they will be useless in affecting the conduct of the citizenry. In the words of Diane Zimmerman, “as centuries of experience have shown, many of the most important aspects of human relationships are beyond the reach of the law and must work themselves out in the imprecise laboratory of manners and mores.”⁵⁰ Although there are many laws in effect today that go virtually ignored without fear of punishment by a great percentage of the population, these laws, at the very least, may theoretically be enforced, thereby serving in some way to encourage or deter some particular conduct.

Ideologically, modern Americans shudder at the prospect of the government regulating their personal and private conduct. This general sentiment can be easily traced to John Stuart Mill’s *On Liberty*, where he famously states that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”⁵¹ Although Mill’s formulation of personal liberty is quite vague, his general approach has been adopted by American lawmakers. Consequently, American law does not seek to regulate strictly ethical conduct in personal areas that do not immediately affect the lives of others. For example, it would appear ludicrous if Congress were to pass a law forbidding spouses from lying to each other. Not only would this be impractical and impossible to enforce, but it would violate the generally accepted understanding of personal liberty.

Jewish law, by contrast, has no qualms about regulating the ethical conduct of its constituents. The Jewish tradition views every aspect of human life as governed by law, recognizing no distinction between laws governing nature, human relations, and God’s relationship to the creatures of the world. The laws governing ethical and moral human behavior are no different than the laws of contracts or torts; both equally reflect the divine will.⁵² While Roscoe Pound warns American lawmakers against

⁴⁹ James Dobson, *Eleven Arguments Against Same Sex Marriage* (May 23, 2004), CITIZENLINK.COM, <http://www.family.org/cforum/extras/a0032427.cfm>.

⁵⁰ Zimmerman, *supra* note 5, at 365.

⁵¹ JOHN STUART MILL, *ON LIBERTY* 13 (Norton Critical ed., W. Norton & Co. 1975) (1859).

⁵² HAIM COHEN, *HUMAN RIGHTS IN JEWISH LAW* 3 (1984) [hereinafter COHEN, *HUMAN*].

making the law “do the work of the home and of the church,” and making “legal duties out of moral duties,”⁵³ Jewish law does just that. Ideologically, then, the divine nature of Jewish law renders Mill’s arguments for personal liberty irrelevant. Laws are commandments, or at least human interpretations of divine commandments. God’s law is the only truth, and in the ideal Jewish state where the commandments are the sole basis of law, the members of such a society are careful to act accordingly.

The divine nature of Jewish law also negates the practical argument for legal abstention in personal ethical matters. The expectation of divine reward or punishment, both in this world and after death, is often enough to compel a believer to obey laws that cannot be enforced by any human government. As a result, Jewish law does not differentiate between its ethical and strictly legal commandments.⁵⁴ As Haim Cohen explains, “the fact that a violation of moral or ethical norms carries no ‘sanction’ in this world and no court can recognize a claim based on such a violation, does not detract from their status and importance as legal . . . norms.”⁵⁵ Jewish ethics are not simply an inspirational guide to ethical living; they are laws, enforceable or not. For the observant Jew, divine sanction is a very real and concrete matter.⁵⁶ The prohibition against tale bearing carries as much weight in the eyes of Jewish law as the more traditionally “legal” commandments that have a secular equivalent, such as the prohibition against cheating in business.⁵⁷

Having established that Jewish law holds sway, at least theoretically, over the personal ethical conduct of its followers, it is imperative to define the nature of this “legal morality” in contrast to American law. The greater American public of the twenty-first century has accepted and abides by standards of morality quite foreign to those held dearly by men such as Warren and Brandeis. In fact, it is safe to assume that Warren and Brandeis would be appalled by many of the widely held views on morality prevalent in

RIGHTS IN JEWISH LAW].

⁵³ Zimmerman, *supra* note 5, at 336 n.243 (quoting Roscoe Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55, 56 (1917)).

⁵⁴ It is important to note that not every ethical stance taken in the Jewish tradition is codified as law; Jewish tradition limits the number of biblical commandments to 613. The non-legal ethical positions are often described in the Talmud as *Lifnim Mishurat HaDin* (beyond the letter of the law). Still, there is a tendency among later Jewish legal scholars to incorporate these “extra legal” positions into the law itself. See generally SHUBERT SPERO, *MORALITY, HALAKHA AND THE JEWISH TRADITION* 168-84 (1982).

⁵⁵ HAIM COHEN, *HUMAN RIGHTS IN THE BIBLE AND TALMUD* 12 (1989) [hereinafter COHEN, *HUMAN RIGHTS IN THE BIBLE*].

⁵⁶ Ben Zion Eliash, *To Leave or Not to Leave: The Good Samaritan in Jewish Law*, 38 ST. LOUIS L.J. 619 (1994).

⁵⁷ COHEN, *HUMAN RIGHTS IN JEWISH LAW*, *supra* note 52.

American society today. And this, of course, is no accident; it is an unavoidable consequence of America's liberal tradition. As Robert Bork explains, "[t]he idea of liberty has continuous change built into it, precisely because it is hostile to constraints. Men seek the removal of the constraint nearest them. But when that one falls, men are brought against the next constraint, which is now felt to be equally irksome."⁵⁸ More specifically, the ideology of liberalism has compelled the American people to consistently move away from constraints on personal liberty imposed by morality. The triumph of liberalism in the United States has created a dynamic and ever-changing conception of what kind of behavior is considered moral. For some, this process is considered one of progress, in which an enlightened society continuously refines and improves upon the imperfect interpretations of personal liberty and values held by its forbearers. For others, liberalism has been disastrous, tearing down essential constraints imposed upon human behavior by religion, morality, family and community. All agree, however, that standards of morality in the United States have changed, and quickly at that.

As standards of morality have changed, so has the American legal system's approach to those areas in which law and morality intersect. In fact, the development of American law is driven by contemporary standards of morality. It is only natural that as the majority of Americans change their views, those views should eventually become the law. In contrast to the American legal tradition, however, Jewish legal thinkers have remained essentially consistent in their approach to ethical and moral issues. While the Jewish legal system has proven remarkably capable of adapting to tremendously varied social contexts, it has done so by remaining consistent in its dedication to the Jewish value system. Laws concerning standards of dress, lying, and sexual conduct have remained essentially unaltered, with only minor changes necessary during the passage of time.⁵⁹

American law is fundamentally a secular code. Although it often reflects the religious views of its constituents, it lacks the eternality of a divine code of law. As only a "relative" human authority, it remains subject both to changing views and to

⁵⁸ ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 61 (1996).

⁵⁹ In contrast to the views of Reform and Conservative Judaism, and consistent with the belief that Torah was given to the Jewish people directly by God, more traditional Jewish scholars do not generally allow for essential changes in any area of Jewish law. See generally Bruria Hunter David, *The Dual Role of Rabbi Tzvi Hirsch Chajes: Traditionalist and Maskil 17-107* (1971) (Doctoral Dissertation, Columbia University, 1971), available at <http://www1.cs.columbia.edu/~spotter/david-chajes.pdf>.

compromises for the sake of expediency, whereas a “law of absolute authority will not be overruled by such considerations.”⁶⁰

B. *Judaism and Human Rights*

More than any other work in American legal history, the Bill of Rights represents what may be called the most definitive of American values: the idea that “the individual is prior to and takes precedence over any government.”⁶¹ Individual rights and liberty are at the core of the American legal tradition and rank among the values Americans, for good reason, hold most dear.

It is difficult to find an equivalent to the American concept of individual rights in Jewish law. The reason for this is the divine nature of Jewish law, which, by its very nature, does not grant rights but rather imposes obligations. The heart of Jewish law is comprised of commandments. In the Jew’s relationship with God, he has no rights, only obligations.⁶²

This is not to say that Judaism does not effectively grant some measure of individual rights in human affairs. Although the law contains no outright guarantee of individual liberty equivalent to the American Bill of Rights, many human rights are implied by means of negation. The commandment “[y]ou shall not murder,”⁶³ implies that a person has a “right” to live. “You shall not steal,”⁶⁴ implies that a person has a right to property. In the words of Haim Cohen, “the Bible establishes human rights, not by positing rights but rather by rejecting actions which violate them; by defining the negation one defines the great affirmation.”⁶⁵

According to the Jewish view of “rights,” any acceptance of a “right to privacy” would have to be formulated differently than the one propounded by Warren and Brandeis. In place of the individual right “to be let alone,” Jewish law would obligate its members to “leave others alone,” thereby implying an individual right to privacy. This distinction, however, is not merely a semantic one; the focus of Jewish law upon the potential violator of privacy, as opposed to the potential victim, may have important practical implications.⁶⁶

⁶⁰ Eliezer Berkovits, *Law and Morality In Jewish Tradition*, in *ESSENTIAL ESSAYS ON JUDAISM* 17 (2002).

⁶¹ U.S. Department of State, *The Bill of Rights as Beacon* (Dec. 2003), <http://usinfo.state.gov/products/pubs/rightsof>.

⁶² COHEN, *HUMAN RIGHTS IN JEWISH LAW*, *supra* note 52, at 12. *Contra* SPERO, *supra* note 54, at 182.

⁶³ *Exodus* 20:12.

⁶⁴ *Id.*

⁶⁵ COHEN, *HUMAN RIGHTS IN JEWISH LAW*, *supra* note 52, at 12.

⁶⁶ This distinction gives rise to important practical implications, such as cases where the speaker of negative information is absolutely certain that no negative consequence

C. *Judaism and the Right to Free Speech*

As explained above,⁶⁷ the breadth and scope of the right to free speech in the United States play a central role in determining the potential potency of a right to privacy. Consequently, in an analysis of Jewish law's approach to the private facts tort, a similar investigation of the right to free speech is in order.

The Jewish tradition offers a complex and varied approach to the value of free speech. Generally, Jewish law does not detail rights in the same manner as the Bill of Rights. Rather, it lists obligations and prohibitions, thereby only implying the existence of rights. As such, it is necessary to briefly examine the various commandments relating to speech. Biblical law is full of restrictions on the freedom speech, both for the sake of God and men. One of the Ten Commandments, "[t]hou shalt not take the name of God in vain,"⁶⁸ restricts man's speech for the purpose of preserving God's "dignity" among humanity. Other negative commandments prohibit cursing the deaf, cursing one's father or mother, blasphemy, and slander. In particular, the prohibition against slander, which will be examined in depth below, places serious constraints on the Jew's freedom of speech.⁶⁹

Although Jewish law greatly restricts the individual's right to speech, it also seriously curtails the government's ability to enforce such restrictions. As a general rule, prohibitions that do not entail any action may not be punished by human hands.⁷⁰ We are left with a fascinating result. In theory, Jewish law greatly restricts freedom of speech, while in practice, there appear to be few human barriers capable of restricting such freedom.

The fate of free speech in Jewish history further complicates the issue. The first temple era⁷¹ alone offers contradictory approaches to speech. On the one hand, Jewish tradition granted kings the right to use capital punishment in response to expressions of rebellion or sedition;⁷² on the other hand, prophets

will result to the subject of his speech, or where the listener already knows the negative information being relayed. Jewish law's focus on the *speaker's* obligation, as opposed to the privacy rights of the *subject* of such speech, causes the prohibition to remain in effect even where no practical negative effects occur. It may be that Jewish law is concerned for the speaker's moral state even where no practical harm is effected. *See generally* ISRAEL MEIR KAGAN, CHAFETZ CHAYIM 3:6 (1873) ("[E]ven if no evil befalls that person as a result of the evil speech . . . [the speaker nevertheless] requires atonement."). *Contra* Shlomo Levi, *Halakhot of Lashon Ha-ra and Rekhilut* (translated by David Silverberg), <http://vbm-torah.org/archive/halak64/04lashon%20hara%20part%201.doc> (last visited Sept. 28, 2006).

⁶⁷ *See supra* Part I.D.

⁶⁸ *Exodus* 20:7.

⁶⁹ COHEN, HUMAN RIGHTS IN JEWISH LAW, *supra* note 52, at 109.

⁷⁰ MAIMONIDES, MISHNEH TORAH, *Sanhedrin* 18:2.

⁷¹ 950 - 586 B.C.E.

⁷² MAIMONIDES, MISHNEH TORAH, *Kings* 3:8.

were celebrated for publicly berating those very same kings. In a stirring call to action, the prophet Isaiah declared “for Zion’s sake I will not hold my peace, and for Jerusalem’s sake I will not keep quiet!” The prophets had the courage to reject the lifestyle of their societies, condemning their complacency and sinfulness.⁷³ Yet, we cannot ignore the fact that the prophets purported to speak only as mouthpieces of God; their opinions were not really their own, but emanated from a higher, more authoritative source. The Bible’s celebration of their courageous stand against sinful kings and hostile crowds more realistically reflects approval of those who stand up for God than a general call for the freedom of speech. False prophets, in fact, are repeatedly berated for their harmful effects upon the people.⁷⁴

During the Talmudic period, Rabbis began to employ a new tactic to minimize dissent among members of the community - excommunication. Referred to as either *niddui* or *cherem*, social ostracism was used to maintain order within Jewish communities.⁷⁵ At first it was used only to punish legal scholars who persisted in their dissent; over time, it became a widely used method for enforcing Jewish law upon the community. The Talmud lists twenty four offenses for which excommunication could be imposed, among which certain types of speech are included.⁷⁶ Insulting a scholar, calling a man a slave, uttering God’s name in trifling matters, and any speech by a scholar that might bring Jewish scholarship into ill repute could all be punished through excommunication.⁷⁷ Over time, excommunication was used to enforce the community leadership’s will in a great number of situations.⁷⁸

Beginning with Medieval times, traditional rabbinic authorities began to censor the works of Jewish writers deemed to contain revolutionary and strange ideologies and which posed a threat to the continued influence of the Jewish tradition. Most notoriously, the philosophical works of Maimonides were banned in many Jewish communities during this time because of his non-traditional, excessively rationalistic approach to Jewish thought. Copies of his seminal philosophical work, the *Guide to the Perplexed*, were publicly burned in both Paris and Montpellier in 1233 by Dominican friars, probably due to the likely urging of rabbinic

⁷³ COHEN, HUMAN RIGHTS IN THE BIBLE, *supra* note 55.

⁷⁴ *Jeremiah* 23:2,14; *Ezekiel* 13:2.

⁷⁵ COHEN, HUMAN RIGHTS IN THE BIBLE, *supra* note 55, at 120.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Excommunication was famously imposed on Barukh Spinoza in 1656 for abandoning Jewish Orthodoxy and embracing pantheism.

authorities in those locales.⁷⁹ The practice of censorship reached its peak in early modern times when traditional Judaism was challenged by the advent of numerous non-traditional movements within Judaism. Works by messianic Sabbatians and modernizing Jews such as Moses Mendelssohn were regularly banned in Jewish communities throughout Europe.⁸⁰ On occasion, even works by Hasidic writers, who belonged to a divergent movement that remained *within* the realm of classical Jewish tradition, were banned.⁸¹

The increasingly frequent use of excommunication and censorship in the early modern era as a response to perceived heretical views implies that freedom of speech held a generally low place on the totem pole of Jewish values.⁸² One notable exception to this trend was Rabbi Judah Loew of Prague, who writes concerning religious dissenters that

even if his words spoken are directed against faith and religion, do not tell a man not to speak and suppress his words. Otherwise there will be no clarification in religious matters. On the contrary, one should tell a person to express whatever he wants The elimination of the opinions of those who are opposed to religion undermines religion and weakens it.⁸³

The totality of Jewish law and experience offers some conflicting views regarding the freedom of speech. Moshe Carmilly Weinberger has argued that the instances of censorship and excommunication in Jewish history have been the exception, rather than the norm, and are “the result of the abnormal circumstances of a nation living protracted exile” from its homeland of Israel.⁸⁴ A landless people, surrounded by a plethora of both secular and religious cultures for over 2,000 years, could not help but resort to such measures on occasion in order to ensure the continued survival of the Jewish tradition.

What is clear, however, is that the right to speak one’s mind does not hold anywhere near the same importance in traditional Jewish law as does its American equivalent. This emerges as a logical distinction between two vastly different societies and their bodies of law. An expansive right to free speech is the ultimate guarantor of personal liberty. As personal liberty is a foundational ideal of American society, it is only logical that the right to free

⁷⁹ MOSHE CARMILLY-WEINBERGER, CENSORSHIP AND FREEDOM OF EXPRESSION IN JEWISH HISTORY 36 (1977).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Be’er HaGola 1, translated in COHEN, HUMAN RIGHTS IN JEWISH LAW, *supra* note 52, at 128.

⁸⁴ CARMILLY-WEINBERGER, *supra* note 79, at 3.

speech should be zealously guarded by the laws of this country. Judaism, however, is not founded upon the ideal of personal liberty. Personal liberty is an ideal only insofar as it furthers the overarching goal of every committed Jew: the service of God through the performance of His commandments. It follows, then, that the right to free speech only has value to the extent that such a right furthers the Jewish people's service of God.

While the exact parameters of the right to free speech within Jewish law remain elusive, one point is abundantly clear: the right to free speech does not present the same kind of barrier to a private facts tort as it so apparently does in American law.

III. EVIL SPEECH IN JEWISH LAW

A. Lashon Hara—*Introduction*

In her seminal article on the private facts tort,⁸⁵ Dianne Zimmerman claims that the framers of the First Amendment would have disapproved of restraints placed upon truthful speech by tort law, and would certainly not have considered the embarrassment that may result from such revelation of private information as a compensable wrong.⁸⁶ While Zimmerman may very well be correct in her assertion, her proof for this claim—that neither the common law nor the Bible prohibit the spreading of truthful yet unflattering information—is not entirely accurate. According to the Jewish tradition, the Bible unequivocally forbids the discussion and dissemination of negative or embarrassing personal information, whether or not such information is true or false. The Bible states: “Thou shalt not go about as a talebearer among thy people,”⁸⁷ a verse that has long been interpreted by Jewish commentators as referring to negative truthful statements.⁸⁸ In *Proverbs*, the text clearly decries truthful gossip of personal matters: “A talebearer reveals secrets, but he that is of a faithful spirit conceals the matter.”⁸⁹ Moses Maimonides, the great codifier of Jewish law, lists the prohibition of truthful gossip as one of the official prohibitions of the Bible:

A talebearer is one who collects gossip and goes from one to the other, saying, “This is what that man has said, this is what I have heard about him;” even if he speaks the truth, he destroys the world. But there is a far graver sin than that, namely *Lashon*

⁸⁵ Zimmerman, *supra* note 5, at 308.

⁸⁶ *Id.* at 311.

⁸⁷ *Leviticus* 19:16.

⁸⁸ Commentary of RASHI, *Leviticus* 19:16; MAIMONIDES, Negative Commandments 301.

⁸⁹ *Proverbs* 11:13.

Hara—and that is where he vilifies another, even if he speaks the truth The ordinary slanderer is one who sits around and says, “This or that some other man has done, such and such were his ancestors like, this and the other thing have I heard about him”—or made any derogatory remarks about him; of such a man, scripture says. “The Lord shall cut off all flattering lips and the tongue that speaketh proud things.”⁹⁰

In Maimonides’ view, the violation of *Lashon Hara* results in serious punishment for the speaker of such words. However, Rabbi Israel Meir Kagan, the preeminent modern Jewish legal scholar on the topic of *Lashon Hara*, expands the severity of the sin by attributing to it more global consequences. In his view, the Jewish people’s persistent violation of this prohibition was responsible for their exile from the land of Israel at the end of the second temple period, as well as the prolonged nature of the exile. He cites a Talmudic passage that attributes the destruction of the temple to the baseless hatred and infighting that was prevalent among the Jewish people of that period,⁹¹ and which seriously hampered their ability to create a united front against the Roman Empire. Such hatred could only have been caused by evil speech.⁹²

B. Lashon Hara—*Justifications for the Prohibition*

As Biblical law is believed to have been given directly by God, the prohibition against truthful gossip does not require justification.⁹³ Nevertheless, Jewish legal theorists offer a number of different reasons for the prohibition that roughly parallel the various justifications offered by Prosser and Bloustein for the private facts tort in American law.⁹⁴ Chief among these theories is that of reputational harm. Dean Prosser commented that the disclosure of private facts “is in reality an extension of defamation . . . with the elimination of the defense of truth.”⁹⁵

The same line of reasoning is found in the traditional Jewish sources, predating Prosser by many hundreds of years.

⁹⁰ MAIMONIDES, MISHNEH TORAH, Laws of Deiot 7:2-3, translated in HAIM COHEN, HUMAN RIGHTS IN JEWISH LAW, *supra* note 52, at 69.

⁹¹ BABYLONIAN TALMUD, Yoma 9b, JERUSALEM TALMUD 1:1.

⁹² ISRAEL MEIR KAGAN, CHOFETZ CHAIM, Intro.

⁹³ A fundamental debate among Jewish scholars since Talmudic times concerns the appropriateness of assigning reasons to the biblical commandments. Some positivists have forbidden such speculation, while others have written entire treatises for the purpose of explicating the commandments. All traditional scholars agree, however, that the validity and practical applicability of the commandments do not depend upon human speculation as to their reasons. See generally ISAAC HEINEMAN, REASONS FOR THE COMMANDMENTS IN JEWISH LITERATURE 11-13 (Hebrew).

⁹⁴ See Prosser, *supra* note 8; see also Bloustein, *supra* note 12.

⁹⁵ Prosser, *supra* note 8, at 398.

Maimonides views the disclosure of private facts and defamation as two elements of the same prohibition against slander: “[D]efamation (*Lashon Hara*) is where he vilifies another, even if he speaks the truth. And if what he speaks is untrue, he is called a calumniator (*Motzi Shem Ra*).”⁹⁶ In effect, then, the prohibition forbidding the disclosure of private facts is not chiefly a matter of privacy law, but of the significantly more heinous category of defamation. Jewish law prohibits speech that reflects negatively on its subject, regardless of whether the information is true or false. This presents an important difference between Jewish and American law. In the United States, truth is an absolute defense against a charge of defamation⁹⁷; “true” defamation may only be prosecuted under the disclosure of private facts tort. Jewish law, however, generally draws no distinctions between true and false defamation; both are equally reprehensible. Additionally, “true” defamation is forbidden even when the defamation does not involve any particularly private information. In short, the disclosure of negative information, whether it is secret or well known, falls under the prohibition against defamation. It follows that since the great majority of disclosure of private facts cases involve the disclosure of facts the plaintiff considers negative, the area of Jewish law most relevant to this discussion is defamation. It should be noted, however, that the disclosure of purely sensitive but non-negative information is also treated by Jewish law, as will be discussed below.⁹⁸

Related to the prohibition of defamation is the separate but integrally related prohibition against causing embarrassment to one’s fellow. The Talmud states in an astounding analogy that “one who shames his fellow in public is as if he shed blood.”⁹⁹ The equation of embarrassment with murder is emphasized by the Talmud’s fascinating analysis of the biblical story of Judah and Tamar. Tamar, the widow of Judah’s son, seduced an unwitting Judah by disguising herself as a harlot, taking his distinctive staff and signet cord as a pledge of payment.¹⁰⁰ Three months later, upon discovering that Tamar was pregnant, Judah commanded that she be burned to death in punishment for her harlotry. The Talmud explains that at this point, Tamar could have presented Judah’s staff publicly, thereby proving that Judah was the father, in

⁹⁶ MAIMONIDES, MISHNEH TORAH, Laws of Deiot 7:3, translated in HAIM COHEN, HUMAN RIGHTS IN JEWISH LAW, *supra* note 52, at 69.

⁹⁷ N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

⁹⁸ See *infra* Part III.D.

⁹⁹ BABYLONIAN TALMUD, Bava Metzia 58b.

¹⁰⁰ Genesis 38:17-18.

order to save herself from death.¹⁰¹ Instead, Tamar privately sent these items to Judah with the message that the owner of these items (Judah) was the father of her unborn children. Astoundingly, Tamar left her fate in Judah's hands; if he so wished, he could have avoided public embarrassment by ignoring Tamar's message, thereby allowing Tamar to go to her death.¹⁰²

The Talmud derives a powerful lesson from this story; "better for one to hurl himself into a fiery furnace than to shame his fellow in public."¹⁰³ Incredibly, some rabbinic authorities have taken this statement literally, declaring that the prohibition against embarrassing another publicly actually takes precedence over self preservation.¹⁰⁴ While this literal view is certainly a minority opinion, it succeeds in emphasizing the seriousness of embarrassment in Jewish law. According to the Talmud, embarrassment results in an "emotional death" that clearly parallels more modern formulations of tort law such as "emotional harm" or "mental distress." This kind of "emotional death" is certainly present in the public disclosure of private facts. Rabbi Isaac Abohav explicitly states that emotional harm is a justification for prohibiting the disclosure of embarrassing private information: "whoever intentionally says things that will cause his fellow embarrassment when he hears them, and whitens his face due to the humiliation that he feels" has committed a transgression that is equal to spilling blood.¹⁰⁵

C. *The Parameters of Lashon Hara (Evil Speech)*

Any study of the laws of *Lashon Hara* will lead, almost inevitably, to a study of *Chofetz Chayim*,¹⁰⁶ a treatise of Jewish law dealing exclusively with the laws of gossip and slander. Its author, Rabbi Israel Meir Kagan, was one of the leading Jewish figures of the late 18th and early 19th centuries and the first Jewish scholar to systematically organize and detail the laws of slander. The dearth of any previous works on the topic that are comparably comprehensive indicates a lack of interest in the laws of slander among Jewish scholars during this time, which is likely due to the difficulties inherent in codifying the complex laws of everyday speech. In any event, as the only classic in the field, it is of

¹⁰¹ BABYLONIAN TALMUD, Bava Metzia 59a.

¹⁰² *Genesis* 38:1-26.

¹⁰³ BABYLONIAN TALMUD, Bava Metzia 59a.

¹⁰⁴ YONAH OF GERONDI, *THE GATES OF REPENTANCE* 3:139; DANIEL FELDMAN, *THE RIGHT AND THE GOOD: HALAKHAH AND HUMAN RELATIONS* 4 nn.10-11.

¹⁰⁵ FELDMAN, *supra* note 105, at 23 (quoting ISAAC ABOHAV, *MENORAT HAMAOR*, Ner 2, Klal 8:57).

¹⁰⁶ ISRAEL MEIR KAGAN, *CHOFETZ CHAIM*, Intro.

primary importance to this study.

The *Chafetz Chayim* defines *Lashon Hara* as derogatory speech, writings,¹⁰⁷ or even hand motions about another person or group of people, even if no harm, physical or emotional, will be caused to the subject of the speech.¹⁰⁸ That no harm is necessary for a violation of this law is yet another example of the inseparability of morality and law in Jewish thought; not only is Jewish law interested in protecting the subject of defamatory speech, but it is equally concerned for the moral rectitude of the speaker himself. Along the same lines, it is even forbidden to merely *listen* passively to slanderous speech and accept it as truth, as it negatively impacts the listener's soul. Rabbi Kagan offers a number of common examples of forbidden derogatory speech, although the list is by no means comprehensive. Negative references to actions of a person's family or ancestors,¹⁰⁹ derogatory references to a person's past actions,¹¹⁰ and references to a person's bad character traits, such as haughtiness, anger or any other,¹¹¹ are all forbidden under the laws of *Lashon Hara*. Even references to a person's lack of a universally desired quality (e.g., he's not very athletic or smart) are proscribed by the laws of slander.¹¹²

The legality of certain statements depends upon the speaker's intent. When a speaker comments, "they are always cooking something in that house," the comment will only be proscribed if the speaker had negative intentions when speaking. If the speaker meant to convey that the residents of the house are a family of overeating gluttons, his comment would be forbidden. However, if the speaker meant to imply that the family has many children or hosts many guests, the comment would be permitted.¹¹³

The incredibly wide scope of the laws of *Lashon Hara* has a serious impact on the day to day life of observant Jews, as they apply to every casual, formal, and business conversation or correspondence in which people engage. Few other commandments in classical Judaism affect the practical lives of its

¹⁰⁷ *Id.* 1:8.

¹⁰⁸ *Id.* 1:1, 3:6.

¹⁰⁹ *Id.* 4:1.

¹¹⁰ *Id.*

¹¹¹ *Id.* 4:9.

¹¹² *Id.* 5:2-5:5.

¹¹³ *Id.* 8:2. Interestingly, Professor Zimmerman has argued that applying the same standard in American law to the private facts tort would defeat the very purpose of the First Amendment. The Court has repeatedly acknowledged that a purpose of the First Amendment is to encourage "free trade in the marketplace of ideas." According to this view of free speech, a speaker's statements are neither more nor less significant simply because they are spoken with anger or calmly. As a result, Zimmerman concludes that an otherwise protected statement should not be restricted merely because of the speaker's negative intentions. See Zimmerman, *supra* note 5, at 319.

adherents in so constant a fashion. The laws of gossip and slander, when followed assiduously, require a speaker to carefully weigh his words in every conversation and email. Even more significantly, these laws must be followed at the expense of personal monetary losses or social ostracism to the speaker. In fact, the laws of slander are considered the chief reason for the dearth of observant Jews working as journalists in the United States. Whereas observant Jews are quite visible within the medical, legal and academic fields, most observant Jews have avoided a profession in which it is difficult to succeed while simultaneously observing the laws of slander.¹¹⁴

While the laws of slander are usually uncompromising, Jewish legal scholars agree on a moderate number of exceptions to the general prohibition. For instance, it is permitted to speak negatively about others in order to prevent any danger that might occur to the physical safety and well being of others.¹¹⁵ Negative speech is also permitted to prevent monetary exploitation and to rebuke sinners.¹¹⁶ Significantly, defamatory speech is not only permitted, but required, in order to expose wicked individuals and hypocrites. As Rabbi Yonah of Gerondi, a medieval commentator, has explained, “[t]he laws prohibiting . . . verbal wrongdoing and embarrassing someone publicly do not apply to dishonest and unscrupulous people whose actions are the antithesis of Torah prescribed behavior.”¹¹⁷ Rabbi Yehoshua Falk goes so far as to permit the public condemnation of Jews who refuse to conform to community standards of behavior.¹¹⁸ As might be expected, this particular exclusion from the laws of slander has occasionally been abused and used to justify flagrant violations of the laws of *Lashon Hara*. Significantly, however, that information is considered newsworthy is not listed as a valid exception to the prohibition of slander. As Jewish law is not restricted by the First Amendment, it permits a far narrower exception to the laws of *Lashon Hara*.¹¹⁹

¹¹⁴ Rabbi Yaakov Menken explains “[j]ournalism creates theological problems of its own; it is difficult to be a good journalist and follow the rules against *Lashon Harah*, gossip or evil speech.” Joel N. Shurkin, *Rabbi Begins Web Blog to Present the Orthodox Media View*, JEWISH TIMES, Dec. 31, 2004.

¹¹⁵ ISRAEL MEIR KAGAN, CHAFETZ CHAYIM, AHAVAT CHESED 20:2.

¹¹⁶ *Id.*

¹¹⁷ RABBEINU YONAH OF GERONDI, THE GATES OF REPENTANCE 3:218.

¹¹⁸ YEHOSHUA FALK, SHEMIRAT EINAYIM 228:4 (stating that if a miscreant refuses to mend his ways after being approached privately, a newspaper, in consultation with its rabbinic advisor, may publish an article to pressure him to change). See Rabbi Moses Isserles (RaMO) 228:1 (adding that someone who by his actions demeans himself may be disparaged by others); ISRAEL MEIR KAGAN, CHAFETZ CHAYIM 6:4 (“If one person sees in another person an ugly characteristic, such as conceit or pride or some other bad traits . . . it is proper that he report this thing to his child or student, to warn them not to associate with him in order that they not learn from his deed . . .”).

¹¹⁹ Even the exceptions listed here are subject to seven significant conditions:

D. *Modesty vs. Privacy:**Jewish Law and Non-Defamatory Disclosures of Private Fact*

While the Jewish legal tradition unequivocally derides gossipmongers for revealing negative personal information about others, it is far more ambivalent about the revelation of private facts not deemed to be defamatory. Whereas American law views the revelation of negative and non-negative private facts as essentially the same tort, Jewish law treats the two kinds of public disclosures as entirely distinct areas of law. For example, if a reporter reveals the sexual habits of a well known actor, he cannot be said to have spoken or written words of *Lashon Hara*. Assuming the actor's sexual habits are not considered to be deviant from Jewish norms, the reporter cannot be said to have defamed him. Nonetheless, by disclosing private information of this nature, the reporter has entirely ignored all standards of *Tzeniut*, commonly translated as modesty.

As explained above, the American conception of "rights" is foreign to Jewish law. Values are almost universally expressed in terms of obligations rather than rights. The same is true of privacy; while Jewish law does not directly guarantee a right to privacy, Jews are bidden to protect their intimate dealings "from the eyes and ears of our neighbors."¹²⁰ By way of contrast, "privacy" refers to what I would prefer to keep hidden, while "modesty" refers to what normatively ought to remain hidden.¹²¹ The Jewish conception of *Tzeniut* demands respect for integrity of the self. As Rabbi Norman Lamm explains, every human being possesses "a mysterious, vital center of personality" which transcends his purely physical qualities. The personality, however, is not simply mysterious in fact; it is meant to be mysterious in practice as well, through the implementation of *Tzeniut*.¹²²

Modesty holds a treasured place in the Jewish tradition. As he looks down from a mountaintop upon the Israelite nation

If A committed a wrong against B, the speaker may only tell others of this occurrence if he saw the act himself or if a rumor is substantiated; the speaker should not conclude immediately that A did something wrong; the speaker must first gently rebuke the sinner and prod him to mend his ways; when the speaker tells people, he should not exaggerate the magnitude of the sin; the speaker's intentions must be noble, not deriving from hatred of A; the speaker should first seek to resolve the situation in a way that does not include negative speech about A; the speaker should not cause greater harm to A by telling others of his act than if someone had testified against the sinner in court.

KAGAN, *supra* note 92, 10:2.

¹²⁰ Norman Lamm, *The Private Lives of Public Figures: A Jewish View on the Kennedy-Manchester Controversy*, JEWISH LIFE MAG., Jan.-Feb. 1967, at 13.

¹²¹ *Consumer Privacy on the Internet: Big Brother Is Watching You*, VALUES FOR MANAGEMENT (Dec. 2000), http://www.besr.org/journal/besr_newsletter_2.html.

¹²² Lamm, *supra* note 120, at 14.

camping in the desert wilderness, Bilaam, the gentile prophet, comments, “How goodly are your tents, O Jacob!”¹²³ The Talmud explains that the tents of the Jewish people are “goodly” because they were carefully arranged so that no Jew could look into his neighbor’s dwelling.¹²⁴ Indeed, from Bilaam’s outsider perspective, the defining attribute of the Israelite people was their dedication to modesty!

Tzeniut is not simply an ethical idea, as it has purely legal implications as well. Rabbi Nachman forbids the revelation of sins committed between man and God; repentance for sins that do not involve other human beings should not be made public due to a concern for modesty.¹²⁵ In the realm of sexual relations, modesty plays a particularly important role. The Talmud relates: Samuel said, “In the area of discussion of sexual matters . . . the Sages would not adhere strictly to the Truth.”¹²⁶ Rabbi Shlomo Yitzchaki explains that this statement means that “if one is asked whether he had sexual intercourse with his wife, the requirement of *Tzeniut* (modesty) permits him to say ‘No,’ even if the truth is otherwise.”¹²⁷

A final, and especially relevant, example of *Tzeniut* in Jewish law is the edict of Rabbi Gershom of Mayence. Rabbi Gershom, the universally acknowledged leader of European Jewry in the eleventh century, issued an edict forbidding all Jews from intercepting or reading someone else’s correspondence, thus clearly declaring the commitment of the Jewish legal tradition to modesty, and by logical extension, to the right to privacy of information.¹²⁸

Perhaps the most fascinating element of the Jewish approach to non defamatory privacy is the exception to the general rule forbidding immodest disclosures. The Talmud relates two anecdotes that, at first glance, appear to be quite disturbing:

Rabbi Akiva said, “[o]ne time I followed Rabbi Yehoshua (his teacher) into the bathroom, and I learned from him three laws . . .” Ben Azai said to him: “How could you have such nerve before your own teacher!” To which Rabbi Akiva responded: “It, too, is Torah, and I must learn it!”¹²⁹

Similarly, Rav Kahana once hid under the bed of his teacher, Rav. Later, he even dared to question Rav about his sexual

¹²³ Numbers 24:5.

¹²⁴ BABYLONIAN TALMUD, Baba Batra 60a.

¹²⁵ BABYLONIAN TALMUD, Yoma 86b.

¹²⁶ BABYLONIAN TALMUD, Baba Metzia 23b-24a.

¹²⁷ RASHI, commentary on BABYLONIAN TALMUD, Baba Metzia 23b, “BePuraya.”

¹²⁸ BABYLONIAN TALMUD, Berachot 62a.

¹²⁹ *Id.*

conduct with his wife. When Rav rebuked his student for violating this most personal aspect of his life, Rav Kahana answered, "It is Torah, and I must learn it!"¹³⁰

Clearly, both Rabbi Akiva and Rabbi Kahana felt it appropriate not only to invade the privacy of their respective teachers, but also to disseminate their findings to the greater public. Indeed, these Talmudic sages revealed their masters' most intimate conduct for all generations by publicizing their findings in the Talmud. Their justification, however, is very significant; "It is Torah, and I must learn it." The Rabbis' conduct, though personal in nature, was properly considered newsworthy, as the public required religious guidance in these areas as well. As leaders of the community, their responsibility to instruct the community took precedence over their own personal privacy. In rare instances, Jewish law requires the individual to sacrifice his personal integrity for the sake of the community. Public figures and the leaders and teachers of communities are forced to allow the public to invade their private worlds.¹³¹

This exception to the general rule of *Tzeniut* is consistent with the exceptions to the general rule prohibiting *Lashon Hara* (defamatory speech). In both cases, the general rule prohibiting the public disclosure of private information may and should be abrogated for the sake of the public's physical and spiritual welfare.¹³² Just as defamatory speech is permitted to prevent the public from the pernicious influence of public sinners, invading the privacy of great rabbis and leaders is appropriate in order to provide examples of positive conduct for the community.

A logical result of Jewish law's concern for public morality leads to an expanded definition of the term "public figure." According to Rabbi Alfred Cohen, any person "who by virtue of rank, vocation, charisma or other distinguishing feature is placed in a position where he or she takes precedence over others, or who is admired by others" may be considered a public figure, be he or she a teacher, principal, rabbi, elected official or a judge¹³³ By contrast, the Supreme Court defines a public figure far more narrowly, as either an individual who "achieves such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" or, more commonly, as "an individual [who] voluntarily injects himself or is drawn into a particular public

¹³⁰ *Id.*

¹³¹ Alfred Cohen, *Privacy*, 1 J. HALACHA & CONTEMP. SOC'Y 59 (1981)[hereinafter Cohen, *Privacy*].

¹³² See *supra* note 115.

¹³³ Cohen, *Privacy*, *supra* note 131, at 64.

controversy and thereby becomes a public figure for a limited range of issues.”¹³⁴ It is probably safe to say that no contemporary American legal thinker would ever consider teachers, per se, public figures. Yet, because of their pivotal role in shaping the minds and character of their students, Jewish law deems teachers to be public figures, at least insofar as the laws of privacy and defamation are concerned. As a result, parents have a right to be assured of the “moral probity” of their children’s teachers, even where disclosures of personal information would otherwise be forbidden.¹³⁵

Although Jewish law emphasizes the needs of the community at the expense of individual privacy, invasions of privacy must be limited to situations of real public need. There is no right to reveal information concerning the personal lives of public figures simply to satisfy one’s curiosity.¹³⁶ The right to discuss and disclose intimate information about others ends once the physical and moral safety of the community is assured. The Talmud illustrates this point with a charming exchange. The Bible relates the episode of a nameless man who chopped wood on the Sabbath and was put to death for his public sin.¹³⁷ In a discussion concerning this incident, Rabbi Akiva identifies the nameless sinner as Zelaphchad, another biblical character. Rabbi Judah ben Bethaira, displeased with Rabbi Akiva’s remark, said to him:

Akiva, one way or the other, you will have to answer for what you said. If you are right, and Zelaphchad was the Sabbath desecrator, the Torah concealed (that fact) and you divulged it . . . and if he was not (the Sabbath desecrator), then you have maligned a righteous person.¹³⁸

It should be noted, of course, that Rabbi Akiva was the student who violated his teacher’s privacy by following him into the bathroom.¹³⁹ Nevertheless, his intrusion is justified for even his master’s most mundane acts are instructive, for “it is Torah, and I must learn it.” In this case, however, no such justification is available. Rabbi Akiva’s revelation of the woodcutter’s name serves no morally instructive purpose, as testified by the Bible’s

¹³⁴ Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

¹³⁵ Cohen, *Privacy*, *supra* note 131, at 65. Jewish law is not alone in its concern for the moral standards of school teachers even at the expense of the personal privacy of the teachers themselves, as seen in the recent controversy concerning Michelle McCusker, a teacher fired by a Catholic school, Saint Rose of Lima in Rockaway Beach, for being unmarried and pregnant. See Sandra Bookman, *Pregnant Teacher Fired from Queens School*, WABC (Nov. 21, 2005), <http://abclocal.go.com/wabc/story?section=local&id=365465>.

¹³⁶ Cohen, *Privacy*, *supra* note 131, at 70.

¹³⁷ *Numbers* 15:32-36.

¹³⁸ BABYLONIAN TALMUD, Shabbat 96b.

¹³⁹ See *supra* text accompanying note 129.

omission of the name, and was therefore inappropriate. “The claims of history, though they serve the loftiest and noblest ends, remain subordinate to the right to privacy of one long gone.”¹⁴⁰ Knowledge of history, if it serves no present communal need, cannot justify the disclosure of shameful and defamatory information.

IV. DAMAGES AND THE PRIVATE FACTS TORT

The preceding sections have highlighted a number of conceptual differences between the American and Jewish legal systems. The specific issue of determining damages for the disclosure of private facts is particularly illuminating in order to determine the continued practicality of the tort.

A. *Jewish Law and Damages for Verbal Harms*

When designing a system of compensation for victims of any kind of harm, it is crucial to first determine the purpose of providing damages. More specifically, what is the tort designed to *do*? In his analysis of the private facts tort, Stanley Ingber offers three possibilities.¹⁴¹ First, the opportunity to bring an action for the disclosure of private facts publicly acknowledges the existence of privacy rights by recognizing their violation. Second, if the plaintiff succeeds, the publishers of personal and intimate information will be economically penalized and publicly rebuked, thereby deterring other members of the media from committing the same violation of privacy rights. Finally, if the suit is successful, the plaintiff will be compensated for the emotional and economic damages caused by such infringements on her privacy.¹⁴²

In Ingber’s analysis, the very existence of the private facts tort hinges upon the possibility that when the plaintiff prevails in court she may then be compensated for her injuries, to the extent that the judge and jury see fit. The same is true, of course, of every tort; the overriding reason compelling plaintiffs to bring a lawsuit is the possibility of receiving monetary compensation. Yet Jewish law’s approach to its own version of the private facts tort, be it *Lashon Hara* (defamatory speech) or *Tzeniut* (modesty), does not assume the availability of monetary damages. In fact, it concludes that damages are usually unavailable for victims of disclosure of private facts.

While Jewish law very clearly recognizes the existence of

¹⁴⁰ Lamm, *supra* note 120, at 15.

¹⁴¹ Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 820 (1985).

¹⁴² *Id.*

emotional harm and the seriousness of violations of human dignity, it nevertheless precludes non-physical crimes from the reparations associated with personal injury. Although some Jewish legal thinkers speculate that the disclosure of private information and verbal embarrassment should be treated as a crime, and thereby subject to the punishment of lashes,¹⁴³ almost all scholars concede that monetary damages are not available to the victims of purely verbal crimes.¹⁴⁴

Although the Talmud is forthright in denying monetary compensation to victims of truthful slander and embarrassment, the reasoning behind this surprising conclusion is unclear. As illustrated earlier, the Jewish legal system is particularly harsh when describing the sins of *Lashon Hara* (defamatory speech) and public embarrassment.¹⁴⁵ Why then, does Jewish law deny compensation for the violations of prohibitions considered so terribly egregious? A homiletic passage elsewhere in the Talmud provides a clue:

Rav Yochanan said in the name of Rav Shimon bar Yochai: greater is the transgression of verbal oppression than that of monetary oppression, for in reference to [verbal oppression] the Torah says, “and you shall fear your God” and in reference to [monetary oppression] it does not say “and you shall fear your God.” Rabbi Elazar said: one is against an individual himself, and one is against an individual’s money. Rabbi Shmuel bar Nachmeni says: one is subject to repayment; the damage caused by the other can never be repaid.¹⁴⁶

Rabbi Nathan Gestertner explains this passage as follows: although it is possible for one who has been hurt verbally to forgive the offender, he can never be made completely whole again. Monetary damages can be repaid, but verbal abuse can never be rescinded—what has been done is done.¹⁴⁷ Interestingly, both Professors Bloustein and Ingber make similar points.

¹⁴³ See MORDECHAI BEN HILLEL, commentary to Baba Metzia, 4:306.

¹⁴⁴ BABYLONIAN TALMUD, Baba Kama 91a; See ASHER BEN JEHIEL (RoSH), commentary to Baba Kama, 8:14; JOSEPH CAIRO, SHULCHAN ARUCH, CHOSHEN MISHPAT 420:39 (Cairo, the preeminent 16th century codifier of Jewish law, makes no mention of the possibility of damages, ruling simply that “one who embarrasses someone verbally is not subject to having to pay reparations.”). But see FELDMAN, *supra* note 105, at 26 (citing SHLOMO LURIA, YAM SHEL SHLOMO, Baba Metzia 8:49, as ruling that lashes for verbal crimes can be commuted to a monetary fine).

¹⁴⁵ See *supra* text accompanying notes 75, 85-87. Additionally, Joseph Cairo feels it necessary to warn that while one who embarrasses another verbally is not subject to monetary fines, “it is a tremendous transgression, and it is only an evil fool and one of haughty spirit who insults and embarrasses others and whoever verbally embarrasses a decent member of the Jewish people has no portion in the world to come.” CAIRO, *supra* note 144, at 420:39.

¹⁴⁶ BABYLONIAN TALMUD, Baba Metzia 58b.

¹⁴⁷ NATAN GESTERTNER, NATAN PIRYO, Baba Metzia, at 291.

Bloustein notes that “the legal remedy [for invasion of privacy] represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.”¹⁴⁸ And Ingber adds, “the justification for invasion of privacy actions is less to correct past wrongs than to discourage future transgressions.”¹⁴⁹

The Talmud’s approach to damages inflicted by defamatory speech and public embarrassment is logical, though seemingly problematic. While it is true that emotional suffering can never be adequately compensated, the other purposes for the private facts tort—chief among them, its power to deter future violations of privacy—must still be accounted for. To state the problem plainly, how can Jewish law expect to prevent future violations of the right to privacy if violators know that there will be no pecuniary repercussions? The answer to this question lies in an inherent difference between religious/divine law and secular/human law. In the Jewish legal system, adherence to the law is at least partially accomplished by the very fact of the law’s existence. As explained above,¹⁵⁰ Jewish law is divine, thereby commanding respect independent of its ability to punish those who violate the law. Observant Jews who refrain from gossiping do not believe that they are simply doing a good deed or acting as decent human beings. Rather, they are observing divine *law*, and Observant Jews’ lack of observance results in real, if undetermined, punishment. Jewish law compels observance even without the infliction of punishment, monetary or otherwise. As a result, the Talmud could reject the possibility of compensation for the victim without abolishing the prohibition itself.¹⁵¹

By way of contrast, if Congress were to enact legislation expressly stating that violation of a law would not lead to any negative repercussions, Congress would be the laughingstock of the country. American law does not have the luxury, so to speak, of legislating without punishing. Only the prospect of punishment, by either incarceration or monetary fine, makes the law effective.

The disclosure of private facts tort is a particular indicative

¹⁴⁸ Bloustein, *supra* note 12, at 1003.

¹⁴⁹ Ingber, *supra* note 141, at 822.

¹⁵⁰ See *supra* Part II.

¹⁵¹ *Contra* SPERO, *supra* note 54, at 182. Spero asks:

Why were certain rules incorporated in the Halacha (Jewish law) and given over to the courts to enforce while others were left to voluntary observance? The obvious answer is that the moral rules like “Thou shalt not murder” . . . were considered so essential to the well being of society that society, unable to wait for or rely upon voluntary compliance, gave them the character of law so that they could be enforced by the courts.

Id. Spero, apparently, does not believe that ethical-legal injunctions will be adequately adhered to without being enforced by the courts.

illustration of this contrast between Jewish and American law. As noted above, both Jewish and American legal thinkers testify to the fact that money does little to compensate the victim of disclosures of private fact.¹⁵² Consequently, the primary purpose of the existence of the private facts tort in American law is to prevent such disclosures in the first place and to “chill” the media.¹⁵³ For Warren and Brandeis, the chief aim in creating the tort was not to make the victims of such invasions whole again, but rather to prevent increasingly insidious invasions of privacy from recurring in the future. Conceptually, monetary damages awarded under the private facts tort are more punitive than compensatory. Jewish law, by contrast, does not rely on punitive damages to protect against violations of privacy. The right to privacy is protected by a greater authority, i.e., God Himself.

It is now useful to return to Stanley Ingber’s three purposes for the private facts tort. In what way does Jewish law respond to these goals? The first objective in establishing a tort is to publicly acknowledge the very existence of privacy rights by recognizing their violation.¹⁵⁴ For its part, Jewish law succeeds in clearly establishing a right to privacy by creating an extensive web of laws regulating every aspect of speech. Through repeated and earnest warnings and injunctions, both the Bible and the Talmud limit man’s right to speak as he pleases. The second objective of the private facts tort is to act as a deterrent to other members of the media who might have committed the same violation of privacy rights.¹⁵⁵ This goal, too, is met quite effectively by the Jewish legal system despite the lack of pecuniary repercussions for those who ignore the law. The divine nature of the law itself acts as a safeguard towards observance. The final goal of the private facts tort is to compensate the plaintiffs whose private lives have been exposed to the public.¹⁵⁶ According to Jewish law, however, this goal simply cannot be accomplished. Emotional harm cannot be made whole through monetary compensation.

CONCLUSION

Privacy and modesty are clearly and unambiguously assigned primary importance within the scheme of Jewish law. Jewish legal scholars are not troubled by arguments that gossip is essential to a working society, nor are they concerned by any contradictory right

¹⁵² See *supra* notes 146-49.

¹⁵³ Ingber, *supra* note 141, at 822.

¹⁵⁴ *Id.* at 803.

¹⁵⁵ *Id.* at 796.

¹⁵⁶ See *supra* text accompanying note 142.

to free speech. As privacy represents a central element of Jewish law, it is safe to say that Jewish scholars would encourage a similar kind of law in other legal systems. Though Jewish law does not mandate damages for non-physical violations of privacy, it can be argued that its legal scholars would encourage the existence of such a tort in a secular system lacking the inherent coercive power of a divine system of law.

Jewish law, in practical terms, is only effective so long as the people believe in its foundational values. Although it is technically binding upon every Jew, simply by virtue of his or her being born Jewish, a Jew who does not agree with Jewish law is under no compunction to follow it. Nevertheless, regardless of the people's level of observance, Jewish law remains inherently valid. Due to its divine nature, the Torah and Jewish law dictate standards of morality to the people, and not vice versa.

American law, by contrast, depends upon the continued ideological support of the majority of its citizens. Consequently, American law can only maintain its legitimacy by conforming to the belief system of a majority of its citizens; as notions of morality change, so does the law. No part of the law is "divine"; theoretically, should a great majority of Americans wish to amend every last letter of the Constitution, they would have the right and ability to do so. Indeed, the First Amendment has achieved its present power and influence only because the American people have assigned increasingly more importance within their scheme of values to the notions of self expression and personal choice. As such, Americans are commonly upset when they perceive justices to be "legislating from the bench," or imposing a belief system upon society that is not consistent with the values held by a majority of the people.

Although a majority of the states appear to have recognized the private facts tort as legitimate,¹⁵⁷ plaintiffs rarely win such cases.¹⁵⁸ This is, of course, no accident. As standards of morality have grown increasingly liberal, judges, in a conscious and justifiable effort to keep up with contemporary values, have correspondingly narrowed the applicability of the private facts tort. As explained above,¹⁵⁹ we live in a culture that values the exposure of "prurient details of sexual relations" and supports a thriving trade of "unseemly gossip."¹⁶⁰ Given such a culture, were

¹⁵⁷ Zimmerman, *supra* note 5, at n.3.

¹⁵⁸ *Id.* at n.5.

¹⁵⁹ See *supra* text accompanying note 34.

¹⁶⁰ Warren & Brandeis, *supra* note 6, at 196.

judges to strictly apply the private facts law as originally intended, they would essentially be imposing an outdated ideological perspective upon society.

Modern proponents of Jewish law cannot ignore the prevailing cultural norms of society. Nevertheless, as a system of religious law, it is precisely the mission of Jewish law to reject those social norms and encourage an alternative system of values among its adherents. Whereas the private facts tort represents an inappropriate imposition of a particular value system in American law, its Jewish equivalent, *Lashon Hara*, embodies the unique ability of Jewish law to influence the consciousness of its adherents.

The picture of an American people obsessed with gossip, so compellingly painted for us by Warren and Brandeis, has no doubt come to fruition. But it is for this very reason that the solution they suggested, the private facts tort, is no longer viable. Secular law, by its very nature, lacks the right to dictate values and morality to the people. For those troubled by America's culture of exposure, the task at hand is not to legislate against it, but to change the culture itself.

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