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**THE LIMITS OF CONFIDENTIALITY: WHEN JEWISH CLERGY MUST  
DISCLOSE A CONFIDENCE**

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**Thesis Submitted in Partial Fulfillment of Requirements for Ordination**

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One Page Summary of Thesis Submitted by Michael Howald in Partial Fulfillment of the Requirements for Ordination

My thesis, entitled "The Limits of Confidentiality: When Jewish Clergy Must Disclose a Confidence" consists of 7 chapters. The majority of the chapters examine whether Jewish tradition, from the time of the Hebrew Bible up to the modern era, imposes any obligation to protect confidences that a rabbi or a cantor must respect. The thesis took this focus because, under California law, the existence of clergy privilege depends on proof that the clergy member comes from a faith that imposes a duty of secrecy on its clergy. My thesis demonstrated that Jewish tradition does impose a duty on every Jew to respect confidences unless this obligation conflicts with the duty to protect human life and well-being.

Chapter Two focuses on the Hebrew Bible, particularly those portions of Scripture that discuss the harmful potential of the human faculty of speech. Chapter three addresses certain post-biblical literature that examines the need to protect secrets and confidences from disclosure. Chapter Four demonstrates, after reviewing passages from the *Mishnah*, *Tosefta*, *Sifra*, *Yerushalmi* and the *Bavli* that the Rabbis included disclosure of secrets among those acts of harmful speech prohibited by the concept of לשון הרע. Chapter Five turns to the *Mishneh Torah* and the *Sefer Chafetz Chaim*, two important post-rabbinic works that devote significant attention to harmful speech, including the disclosure of secrets. Chapter Six discusses the development of clergy privilege law in the United States in general and in California in particular. The thesis concludes by highlighting the need for further guidance from the CCAR and ACC to guide rabbis and cantors in making future decisions about whether to maintain or disclose the confidences they hear as part of their pastoral duties.

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## CHAPTER ONE

### Introduction

The human concern with protecting confidences surely preceded the invention of writing. Although we can only speculate about how our ancestors treated information shared in confidence before the creation of texts addressing the protection of confidences, the Hebrew Bible, one of our most ancient texts, indicates that they regarded the safeguarding of secrets shared in confidence as an important value from the beginning of our written history. Both explicitly and implicitly, our most ancient texts, among them the Hebrew Bible, the *Mishnah* and the Talmud, disparage those who reveal the secrets or inform on the actions of their fellows. At the same time, these texts emphasize the need for adherence to certain standards of conduct, including the need to protect the safety and well-being of the members of the community. When the protection of a confidence conflicts with our obligation to protect the community and its members, how do we resolve this clash of values within the context of our tradition? How does civil law, at least as developed in the United States, address this same potential conflict between the need to protect the confidentiality of communications between clergy and congregants and the safety of the community? This thesis addresses this question in order to provide guidance to rabbis and cantors about how to treat information they receive in confidence.

Reform rabbis and cantors particularly require guidance on issues of confidentiality as concern about issues such as child and elder abuse grows in light of the increased reporting of such incidents in the national and local media.<sup>1</sup> In response, many

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<sup>1</sup> A recent article in the *CCAR Journal* makes this point with even more urgency: "The sexual scandals rocking the Catholic Church and the resulting liability issues should

states have enacted legislation requiring members of the clergy to report known or suspected incidents of abuse unless bound by commitments of confidentiality imposed or expected by their religious tradition. In order to provide some guidance, the Central Conference of American Rabbis recently amended the portion of its Code of Ethics addressing confidentiality. The amended section, now entitled "Confidentiality and Its Limits" provides:

Within the exercise of pastoral care the rabbi shall maintain a relationship of trust and confidentiality holding sacred all information revealed within the provision of pastoral care. If, however, during pastoral care information emerges concerning abuse of a minor child or incapacitated adult or indicating imminent danger to any person, the rabbi is to follow the laws of the state or province concerning revealing this information to persons authorized to address the safety of the person at risk.

However, the nature and practice of Reform Judaism and its ethical legacy mandate that our religious conscience place highest priority on the needs of the vulnerable. It is therefore essential to report abuse of minors and incapacitated adults even when the state or province does not require the rabbi to do so. In addition, concerning one whose physical or psychological well-being is in danger, the rabbi's moral conscience may direct him or her to share such knowledge with appropriate authorities.

With this issue of clergy reporting as with many of the situations about which the Ethics Code is concerned, rabbis are encouraged to consult with the Director of Rabbinic Services to better understand these guidelines and their implementation. (CCAR Code of Ethics, as adopted March, 2003 and amended June 21, 2004)

Despite this further guidance, however, the amended Code of Ethics still leaves many questions unanswered. No Code of Ethics, of course, can provide enough guidance to enable practitioners to anticipate every situation. By their very nature, professional codes of ethics set broad guidelines and rely on the member to apply the ethical strictures in light of each individual's judgment and experience. The intersection of religious

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be a wake-up call for all spiritual leaders." Arthur Gross-Schaefer and Dan Van Bogaert, "The Changing Legal Landscape for Rabbis," *CCAR Journal* (Winter 2005) 59.

tradition, ethics and civil law, however, seldom raises questions with easy answers. In recognition of the complexity of questions of confidentiality in the setting of pastoral care, the CCAR's own Code of Ethics urges rabbis to consult the relevant state law, their own moral conscience and the Director of Rabbinic Services before reaching a final decision on the limits of confidentiality. Reform cantors will find themselves making decisions in even greater uncertainty since their Code of Ethics fails to even address issues of confidentiality.<sup>2</sup>

The laws of some states make identification of the limits of confidentiality even more difficult by referring the clergy member back to the traditions and customs of their own faith to determine the scope of protection afforded by state law. In California, for instance, the *Evidence Code* section defining the scope of the "clergy-communicant privilege"<sup>3</sup> clearly contemplates drawing the limits of confidentiality differently based on the religious tradition followed by individual clergy members. Instead of a "one rule fits all" approach, California *Evidence Code* §1032 confines the protection of the clergy-communicant privilege to the following:

communications made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, **in the course of the discipline or practice of the clergy member's church, denomination, or organization**, is authorized or accustomed to hear those communications and, **under the discipline or tenets of his or her**

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<sup>2</sup> The Code of Ethics adopted by the American Conference of Cantors on June 27, 1995, as amended on June 28, 2005, does not address the issues of pastoral counseling or confidentiality.

<sup>3</sup> The privilege has a variety of different names in the statutes and common law of the 50 states and federal government, including "priest-penitent privilege," "priest-communicant privilege," "clergy-penitent privilege" or the "clergy-communicant privilege." In order to respect the protection afforded by the privilege in a Jewish context, this thesis refers to the privilege as either the "clergy-communicant privilege" or, more simply, "the privilege."

**church, denomination, or organization**, has a duty to keep those communications secret. (emphasis added)

Determination of the limits of confidentiality for rabbis and cantors working in California or states with similar laws, accordingly, requires consideration of both Jewish tradition on the protection of secrets as well as the scope of the clergy-communicant privilege as set forth in statute and case law. In order to provide further guidance to Reform rabbis and cantors in dealing with issues of confidentiality, this thesis explores these considerations within the framework of California law.<sup>4</sup> Part I of this thesis addresses the guidance provided by Jewish tradition on the treatment of secrets and confidences. This discussion begins with the Hebrew Bible and concludes with a discussion of the approach taken by the *Chafetz Chaim* to the revelation of confidential information. Part II of this thesis focuses on the decisions of the California courts interpreting the obligations and rights of clergy with regard to confidential information received from congregants or others who seek out rabbis and cantors for pastoral care. Part III contains some conclusions regarding the treatment of confidences consistent with both Jewish tradition and American law.

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<sup>4</sup> The author of this thesis was, until 2002, an active member of the California Bar. For that reason, and for reasons of scope and practicality, this thesis limits discussion of the law of clergy-communicant privilege to the statutes and opinions of the state of California. The author is now on inactive status pending ordination and placement.

## CHAPTER TWO

### The Treatment of Confidential Information in the Hebrew Bible

Composed over a time period that may exceed a millennia, the 24 books of the Hebrew Bible speak in a number of voices and address a wide variety of audiences living in different social circumstances. Despite the wide variation of concerns addressed in the Hebrew Bible, however, those books that address the issue advise the protection of secrets and cast doubt on the motives of those who reveal them. Inevitably, this counsel has exceptions. Nevertheless, close scrutiny of the Hebrew Bible reveals a text almost as concerned with protecting secrets shared in fellowship as with revealing the content of those confidences when their disclosure might assist in the protection of human life and limb or the enforcement of community rules.

Discussion of the biblical protection of secrets generally begins with Leviticus 19:16, traditionally translated as "Thou shalt not go up and down as a talebearer among thy people; neither shall thou stand idly by the blood of thy neighbor: I am the Lord."<sup>5</sup> "Talebearing" when understood in this sense can include the recital of both true and false accounts about others.<sup>6</sup> Post-biblical Judaism interpreted Leviticus 19:16 as a prohibition

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<sup>5</sup> The King James Version and the Jewish Publication Society's 1917 edition of the Hebrew Bible translate Leviticus 19:16 in this way. The 1985 JPS edition of the *Tanakh* translates the Hebrew somewhat differently: "Do not deal basely with your countryman. Do not profit by the blood of your fellow: I am the Lord." *JPS Hebrew-English Tanakh* (Philadelphia: Jewish Publication Society, 2003) This thesis discusses this latter translation in more detail below.

<sup>6</sup> A "tale" may include any report or revelation. William Morris, ed., *American Heritage Dictionary of the English Language* (Boston: American Heritage Publishing Co., Inc., 1973), s.v. "tale." In its more specific sense, "tale" refers to a malicious piece of gossip, often, but not invariably, untrue. *Ibid.*

primarily focused on preventing לשון הרע, often translated as gossip or talebearing.<sup>7</sup> The

<sup>7</sup> The translation of לשון הרע into English presents some interpretive challenges. As this thesis demonstrates, the semantic range of the phrase includes both true and untrue statements as well as accounts on both serious and trivial matters. Translating a Hebrew term with this large spectrum of meaning as "slander," "defamation" or "gossip" inherently misleads the reader. According to the *Oxford English Dictionary*, "slander" originally comes from the Latin *scandalum*, a word based on the Greek *skandalon*, which refers to a trap, snare or stumbling block. J.A. Simpson and E.S.C. Weiner, *The Oxford English Dictionary*, 2nd. ed. (Oxford: Clarendon Press, 1991), s.v. "scandal." In its original meaning, "slander" included both false and malicious statements as well as the shame or discredit that falls on a person because of some action or attribute contrary to religious or moral law. According to this earlier meaning, "slander" could embrace both true and false statements that ascribe to someone a reason for shame, dishonor or ill repute. In common usage in the United States, however, "slander" usually refers only to a misrepresentation of fact. This may derive from more recent legal usage which limits "slander," usually defined in a legal context as injury to reputation through the spoken language, to false statements concerning another. Henry Campbell Black, *Black's Law Dictionary*, 5<sup>th</sup> ed. (prepared by the Publisher's Editorial Staff)(St. Paul, Minn.: West Publishing Co., 1979), s.v. "slander." Using "slander" to translate לשון הרע, accordingly, tends to read out the possibility that the speech identified may be both injurious to the reputation of the subject of the utterance and true.

"Defamation" suffers from the same difficulty. In modern legal usage, "defamation" refers to both slander, false oral statements, and libel, injury to reputation caused through a false or misleading publication, including writing, pictures or other signs. Ibid. At common law, the shared statutory and case law background of England and the American colonies before the American Revolution, a defendant could not raise truth as a defense to an action for criminal libel since such actions were designed principally to prevent a breach of the peace by the enraged victim of the defamatory publication, whether true or false. *Garrison v. State of Louisiana*, 379 U.S. 64, 67-8, 85 S. Ct. 209, 212 (1964). The development of the civil law of defamation, particularly after the United States Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1963)(limiting civil actions for defamation brought by public officials to false statements made with actual malice) and the dearth of modern prosecutions for criminal libel has tended, both in colloquial and legal usage, to imply some degree of falsity in any "defamation." This makes its employment to translate לשון הרע problematic.

Using "gossip" as an alternative translation does not solve the interpretive difficulty. In its archaic meaning, "gossip" described a person who stood in close enough spiritual affinity with another to sponsor their baptism, e.g. a godmother or godfather. *The Oxford English Dictionary*, s.v. "gossip." The term came to refer to the easy and unrestrained conversation between people who stood in such a relationship (ibid). In its pejorative sense, the meaning of "gossip" now embraces idle talk, including discussion of trifling matters and groundless rumor (ibid). "Gossip" may be true or false but generally refers to statements about other peoples' social affairs and does not always convey the

Hebrew phrase translated as "[t]hou shalt not go up and down as a talebearer, לא תלך רכיל, however, lacks sufficient context in Leviticus to definitively support such a translation. Some claim the phrase instead refers to economic wrongdoing akin to profiteering.<sup>8</sup> Others assert the phrase arises specifically in the context of potentially false testimony or judicial misconduct.<sup>9</sup> Based on these and other suggested meanings, the 1985 JPS translation of the Hebrew Bible asserts that we lack an appreciation of how the biblical audience understood לא תלך רכיל and therefore cannot come to firm conclusions about its original meaning.<sup>10</sup> We can, however, advance our understanding of this Hebrew phrase by placing Leviticus 19:16 and other verses in which הולך רכיל appears in their proper context.

In order to determine the biblical attitude toward the revelation of secrets, accordingly, a fruitful approach begins with an examination of texts which discuss the potential of speech to either uplift or debase human existence. The Hebrew Bible clearly recognizes the ability of words to rectify and redeem humanity. The entire enterprise of prophecy depends on the power of words to persuade and educate listeners to worship the correct God and to follow the proper path. Just as plainly, the Hebrew Bible acknowledges the ability of speech to mislead and betray. The narrative portions of the Hebrew Bible contain numerous stories which illustrate the ability of human beings to

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gravity with which Jewish texts regard לשון הרע. For the most part, accordingly, this paper does not translate לשון הרע in favor of reliance on the Hebrew phrase with its full semantic range.

<sup>8</sup> Baruch A. Levine, *The JPS Torah Commentary: Leviticus* (Philadelphia: Jewish Publication Society, 1989), 129.

<sup>9</sup> Jacob Milgrom, *Leviticus 17-22* (New York: Doubleday, 2000), 1643-45.

<sup>10</sup> Harry M Orlinsky, ed., *Notes on the New Translation of the Torah* (Philadelphia: Jewish Publication Society, 1969), 217.



flatter and dissemble. The Prophets, the Psalms and the Wisdom Books repeatedly warn against those who speak deceitfully or foolishly. True wisdom, in their estimation, lies with those who learn how to control the divine gift of speech through appreciation of those situations which require silence and those which demand dialogue. Only within the context of these biblical "ethics of caution"<sup>11</sup> when it comes to speech can we understand the Hebrew Bible's attitude toward the revelation of secrets.

The Hebrew Bible contains numerous accounts which illustrate the potential of speech to inflict harm, not just on the listener but the speaker as well. Rather than provide a complete catalog of these passages, this thesis focuses on a few of the more well known incidents as illustrative of the destructive power of speech. The chapter then discusses some regulation of speech in the legal portions of the Pentateuch, the first 5 books of Moses. After reviewing these biblical statutes, this thesis turns to a review of the significant words and phrases the Hebrew Bible uses to describe harmful speech. This discussion will serve as important background to the later rabbinic antipathy to the negative potential of the "power of the tongue." Finally, this chapter on the Hebrew Bible concludes with a detailed discussion of the relationship between Leviticus 19:16 and the biblical idea that the revelation of secrets deploys the power of speech to destructive ends.

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<sup>11</sup> This phrase comes from an article in the Hebrew Union College Annual by Jack Sanders. Jack Sanders, "Ben Sira's Ethics of Caution," *HUCA* 50 (1979) 73-106. The phrase refers to the caution expected of the wise in controlling their own conduct, particularly in their relationships with others.

## A. Two Narrative Examples of the Destructive Power of Speech

In connection with two different incidents in the Pentateuch, the text uses Hebrew phrases traditionally translated into English as an “evil report” or “evil reports.”<sup>12</sup> These accounts illustrate important features of the Hebrew Bible’s attitude toward the use of speech for improper purposes. The first occurs in the beginning of the story of Joseph (Gen. 37:2), the second takes place in connection with the story of the spies’ returning from their reconnoiter of the land of Canaan (Num. 13:32). Both episodes later play a significant role in the development of the rabbinic concept of לשון הרע and so serve as

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<sup>12</sup> Strictly speaking, only the reference in Genesis 37:2 calls for an English translation of “evil report” based on the Hebrew alone. The Hebrew noun used, דְּבָרָה, refers to a “report” or “rumor,” perhaps even a lawsuit. Ludwig Koehler and Walter Baumgartner, *The Hebrew and Aramaic Lexicon of the Old Testament* [CD-ROM ed.] (Leiden, The Netherlands: Koninklijke Brill N.V. 1994-2000) (hereinafter referred to as “HALOT”), s.v. “דְּבָרָה.” The word may be related to the Hebrew root דָּבַח which HALOT connects to the Akkadian *dabaabu*, “to speak, plead in court.” Rashi sees a connection to the same root in his commentary to Genesis 37:2 although he apparently mistakes a homonym found in Song of Song 7:10 (Perhaps meaning “to slide” or “to glide.” HALOT, s.v. “דָּבַח.”) for the Hebrew root based on this Akkadian antecedent. The *Theological Dictionary of the Old Testament* connects the Hebrew to the Akkadian *dibbu*, “word, speech, report, idle talk.” G. Johannes Botterweck, Helmer Ringgren and Heinz-Josef Fabry, *Theological Dictionary of the Old Testament* Translated by Douglas W. Stott. (Grand Rapids, Michigan: William B. Eerdmans Publishing Co., 1974) (hereinafter referred to as “TDOT”), s.v. “דְּבָרָה.” Theoretically, one might expect the word “report” to include both good and bad reports. In all its uses in the Hebrew Bible, only two of which actually contain the Hebrew רָע, however, the reference is negative. See, e.g., Gen. 37:2, Num. 13:32, 14:36, 37, Jer. 20:10, Eze. 36:3, Ps. 31:14, Pro. 10:18, 25:10. Ramban makes this point in his commentary to Genesis 37:2, noting that the addition of the Hebrew adjective רָע only exaggerates the already existing evil inherent in a דְּבָרָה. Together these references and their parallel expressions illustrate paradigms of the improper use of words which leads to strife and violence. TDOT, s.v. “דְּבָרָה.” Significantly, TDOT identifies רָעִיל as used in Prov. 20:19 as a parallel expression, suggesting that both describe harmful speech. In discussing the use of דְּבָרָה in the book of Proverbs, TDOT adds: “*dibbah* does not mean here a rumor about someone which arises out of ignorance, but a calculated rumor which is conceived for the purpose of hurting someone and concerning whose truth or falsity no precise statement is made” (ibid, 76-7).

important demonstrations of the destructive potential of speech as reflected in the narrative portions of the Torah. In both cases, the speaker(s) sets off a chain of events that produces unintended harm to themselves and those who hear their report.

The story of Joseph begins in earnest with Genesis 37. The second verse identifies Joseph as youth of 17 years, tending his father's flocks with the sons of Bilhah and Zilpah, when he brings "bad reports of them" (דִּבְתֵּם רָעָה) to their father, Jacob. The verse does not identify the content of these reports,<sup>13</sup> nor does the episode even inform the reader explicitly if the brothers ever learn about them. In fact, the following verses give multiple reasons why the brothers might hate Joseph independently of these bad or evil reports, including the priority Joseph enjoys in his father's affection and his insistence on revealing to his family dreams that imply their future subordination to his rule. When his brothers conspire against Joseph to take his life, they do not even mention the evil reports, instead focusing on his dreams as his most damning offense.

The failure of the biblical text to specify whether the evil reports Joseph brought to his father about his brothers were true or false strongly indicates that the accuracy of the information he provided was irrelevant to the interests of the biblical writer(s). The account of these reports leads a list of various causes for enmity between Joseph and his brothers and the listener or reader might reasonably assume a conscious ranking, even if the text never ties up some significant loose ends regarding the content of the reports and

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<sup>13</sup> Biblical commentators and Midrash, not surprisingly, attempt to fill this gap. Rashi, probably drawing on the *Yerushalmi* and Midrash, finds clues for the nature of Joseph's evil reports in the afflictions Joseph subsequently suffered at the hands of his brothers and the Egyptians. As explored below, the *Yerushalmi* explores this topic at length. Ramban and Ibn Ezra both reflect on the significance of the reference to the sons of Bilhah and Zilpah in Gen. 37:2 as a vital clue to the nature of Joseph's evil reports about his brothers.

the brothers' knowledge of them. From the details provided, the reader can piece together Joseph's offense in this instance: He reveals potentially harmful information about his own kin to a person, i.e., their father, most especially in a position to do them significant harm. Moreover, he seems to do so in a duplicitous manner by telling their mutual father without, at least according to the received text, informing his brothers of his conversations. As a result, his brothers have no opportunity to prepare or defend themselves against these accusations, at least before Joseph relays them to their father.

Joseph seemingly acts without thinking about the consequences of his action. The text refers to him as a youth, a נער, and his behavior reflects a certain youthful arrogance. Although 17 years usually conferred adult status in ancient times, the passage here emphasizes Joseph's need for further instruction on, among other topics, the proper uses of speech. The episode brings this point home with a forceful measure for measure conclusion when the brothers present Jacob with Joseph's blood-spattered tunic after throwing Joseph into a pit to die. Where once Joseph brought his father evil reports about his brothers, his brothers later bring an evil report about him to Jacob when they present his clothing and allow Jacob to think that wild animals have consumed his favorite son.<sup>14</sup> By the end of the episode, accordingly, both speaker and listener of the evil reports have suffered punishment in kind. Where once Joseph spoke evil reports about his brothers, they now speak evil reports about him. Where Jacob previously received Joseph's evil reports without reported reaction, he now weeps and mourns in response to the brother's presentation of Joseph's tunic.

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<sup>14</sup> The reader will note Jacob's passivity as a listener. The text does not report that he asks questions of Joseph when he brings his evils reports, nor does he inquire of the brothers when they bring Joseph's tunic to him. He reacts with grief but does not critically examine the brothers or their story.

Some of these patterns repeat themselves in the story of the return of the spies to the Israelite camp after scouting the land of Canaan (Num. 13:25-33). After describing the land, its produce and inhabitants in increasingly alarming terms, the spies “spread an evil report” or “spread calumnies”<sup>15</sup> (ויוציאו דבת הארץ) among the Israelites about the land they scouted. In this episode, the text provides us with the content of their report as well as some information by which to judge its accuracy. The land they scouted, the spies recount, devours (אוכלת) its inhabitants. The people who live there, they continue, loom so large that we “looked like grasshoppers to ourselves, and so we must have looked to them.” This information, however, contradicts the spies’ earlier statement that the land of Canaan “flows with milk and honey” and supports many powerful peoples living in large, fortified cities. (Num. 13:27-29).

In this case, the report portrays an inanimate object, “the Land,” in damning terms designed to discourage the people of Israel from attempting to conquer its inhabitants. The land obviously cannot defend itself against the accusations of the spies. On its behalf, however, Caleb and Joshua speak before the community, referring to Canaan as an “exceedingly good land.” (Num. 14:7) When the people refuse to listen, God appears and eventually decrees their terrible punishment. In another example of *lex talionis*, punishment in kind, both the spies who uttered the report and the people who gave it credit face God’s terrible retribution. Those who believed that the Land devoured its

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<sup>15</sup> The first quote comes from the 1917 version of the Jewish Publication Society translation of the Hebrew Bible, the second from the 1985 JPS translation (the “NJPS translation”). Unless otherwise noted, this thesis cites the NJPS version in setting forth quotations from the Hebrew Bible. The text at Numbers 13:32 does not, in contrast to Genesis 37:2, include the Hebrew adjective רעה. When the biblical text addresses the punishment inflicted on the spies in chapter 14, however, verse 37 includes this word when referring to the דבת הארץ.

inhabitants will be devoured by the earth rather than enter the Land. (Num 14:26-35) Those who uttered the charge face an even more awesome punishment, a divine plague (מגפה) fatal to every spy who scouted the land except Caleb and Joshua who defended the goodness of the land against the spies' evil report.<sup>16</sup>

The reports uttered by Joseph and the spies have negative consequences for both speaker and listener. Negative consequences do not depend on the falsity of the report since the episode involving Joseph does not allow the reader to reach any firm conclusions on this point. The consequences for the spies are, of course, fatal while Joseph goes on to play a vital role in the story of the people of Israel. Joseph's youth probably mitigates his penalty, particularly when contrasted with the leadership role played by each of the spies before their selection for the mission into Canaan. This factor alone, on the other hand, cannot satisfactorily explain the differences in the severity of the consequences experienced by Joseph and the spies.

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<sup>16</sup> The Hebrew can refer to either a plague brought by God (Ex. 9:14, Num. 17:13, 25:8, 2 Chron. 21:14) or to a slaughter or disaster. (1 Sam. 4:17, 2 Sam. 17:9) Unlike the rabbinic disease of אסכריה, which the Rabbis considered the most gruesome form of death since it involved slow strangulation by constriction of the throat, this particular plague is not explicitly directed at the human instruments of speech. On the other hand, Zech. 14:12 states that the "plague," using the same Hebrew word, causes the tongue to rot away in the mouth. Despite the lack of specificity in the text in Numbers concerning the type of plague, the text clearly indicates that God sends the plague in this instance because the spies lack faith in divine power and reliability. This retribution illustrates a general biblical pattern in which disease follows a violation of some previously announced commandment. Hector Avalos, *Illness and Health Care in the Ancient Near East* (Boston: Harvard Semitic Museum Publications, 1995), 243. Even close readers may disagree about precisely what rule violation the spies' evil report about the land entailed. In general, the Hebrew Bible does not command internal faith and the peoples' complaints in the wilderness do not necessarily transgress any commandment. The Hebrew Bible does, on the other hand, prohibit false rumors (Exod. 23:1) and false charges (Exod. 23:7). God also demands obedience to the command to annihilate the other peoples currently residing on the Land. (Exod. 23:20-33) Whatever the rule the spies and the people violated, God plainly inflicts the plague on the spies because they failed to listen to the divine voice. Num. 14:22.

Given the information about the report provided in the incident of the spies, we could reasonably conclude that the text's ideological purpose at this point lies with convincing the listener that the spies misrepresent the intelligence they gained on their mission into Canaan. In the hierarchy of sinners, the one who willfully speaks lies doubtless ranks higher than the one who disparages with the truth.<sup>17</sup> These two texts, however, reflect the workings of another biblical principle when it comes to speech: The speaker frequently determines his fate through his own harmful words. The spies die for all the reasons already listed but also because their report claimed the land "consumed" its inhabitants. These words determine their own punishment. The silence of the text on the content of Joseph's evil reports, in distinction, permits his eventual rehabilitation and triumph.

As a pair, these two episodes illustrate the "power of the tongue" to accomplish good or ill. At the beginning of his story, Joseph lacks the ability to properly control his tongue and he suffers hatred and hardship as a result. In contrast, his later mastery of the facility of speech serves as a principal sign of his maturity and power as a leader in Egypt. The spies also suffer from an inability to deploy the power of speech to proper ends. The words of Caleb and Joshua cannot overcome the doubts of the people created

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<sup>17</sup> Rashi, however, seems to presume that each of the statements made about the land and its inhabitants by the spies at 13:32-33 had some element of truth. Ramban, in contrast, opines in discussing verse 32 that the spies perished because their report consisted of lies told to prevent the Israelites from attempting to conquer Canaan. Ibn Ezra also accepts the essential falsity of the spies' report in discussing the same verse. Both Ramban and Ibn Ezra unfavorably contrast the report of the spies with Joseph's evil report based on the verbs used in connection with the act of speaking. In their view, בוא when used in connection with דבר (as in Gen. 37:2) connotes a disparaging but true report while אצ' (as in Num. 13:32) indicates a lie. In their view, accordingly, Joseph spoke the truth, while the spies lied, in relying the evil reports which set their respective punishments in motion.

by the spies' report and only God's intervention saves Moses and Aaron from death. Israel spends the next 40 years in the wilderness and the next generation must await a new leader to redeem the power of speech to lead the people forward into Canaan.

The two episodes, in fact, exemplify why the Hebrew Bible expresses such ambivalence toward the power of speech, a natural subset of the conflicting ideas and attitudes toward humanity as a whole presented throughout in the biblical text. In later tradition, these two episodes serve as iconic examples of the destructive use of the power of the tongue.<sup>18</sup> Both passages illustrate the power of speech; both demonstrate that even the powerful and the patriarch may misuse its potential. In the rabbinic view, the power of speech lifts human beings above the beasts of field yet frequently condemns rather than redeems. This ideology finds important support in both narrative and non-narrative portions of the Hebrew Bible. In the next section, this thesis explores the misuse of words in a legal context in the Hebrew Bible.

#### B. Legal Examples of the Destructive Power of Speech

By and large, the legal sections of the Pentateuch address conduct rather than mere intention. Although a prohibition like the 10<sup>th</sup> Commandment (לֹא תַחַמֵּד) continues to generate intense debate about the place of intention in ancient Israel's conception of its duties to God, the courts in ancient Israel generally did not impose

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<sup>18</sup> Calum Carmichael argues that the accounts of Jacob and his sons constitute the primary framing device for the rules put forth in the Holiness Code. In his view, the prohibition of Leviticus 19:16 arises out of Joseph's report about his brothers. Calum M. Carmichael, *Law, Legend and Incest in the Bible* (Ithaca: Cornell University Press, 1997), 80-1. This undoubtedly exaggerates the importance of the incident to the formation of the prohibition but supports the connection between this episode and the later rabbinic concept of לשון הרע.



human punishment for mere intention.<sup>19</sup> Since words alone often merely express intentions, opinions or emotions, biblical legislation generally does not establish penalties for words *qua* words. The Pentateuch, accordingly, does not usually specify human punishment for words when they merely demonstrate some state of mind or intention without reference to any external act other than the utterance itself. Punishment for such words, accordingly, generally falls to the realm of divine action. This does not necessarily mean that the one who utters hurtful words goes unpunished; divine retribution in the Hebrew Bible often exceeds the penalties established in the legal portions of the text.

In some circumstances, on the other hand, the Hebrew Bible does appear to impose liability for the speaking of certain kinds of words, normally where the speaker combines the words with conduct or with a ritual with some kind of performative significance. Perhaps the most serious offense involving language in the Hebrew Bible concerns the worship of other gods. Although worship in the Ancient Near East involved various actions in addition to speech, such as the manufacture of idols and the offering of sacrifices, the Hebrew Bible mandates death to certain individuals who even attempt to “entice you” (״תִּטְּוּ״) to follow other gods. (Deut. 13:1-19) As Jeffrey Tigay points out, this legislation as a whole amounts to a law forbidding high treason against the Sovereign of Sovereigns.<sup>20</sup> Arguably, Deuteronomy limits capital punishment to circumstances where the persuasion has a greater likelihood of success, such as the case of the false

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<sup>19</sup> Bernard S. Jackson, “Liability for Mere Intention in Early Jewish Law,” *HUCA* 42 (1971), 207. For a summary of the debate over the status of intention in the 10<sup>th</sup> Commandment, see *ibid.*, 198-207, and the notes thereto.

<sup>20</sup> Jeffrey H. Tigay, *The JPS Torah Commentary: Deuteronomy* (Philadelphia: Jewish Publication Society, 1996), 128.

prophet or the close relative who entices in secret. . Since speaking often involves an attempt to persuade the listener, however, the distinction between speech which deserves punishment and that which the law cedes to divine action cannot logically rest on the distinction between "mere speaking" and "active persuasion." Accordingly, as with most laws against treason, the prohibition in this instance does appear to impose punishment based on the content of the words spoken rather than on the specific actions of the speaker.<sup>21</sup> When it comes to the worship of other gods, accordingly, the Hebrew Bible assumes that words alone can justify human punishment when they move from mere intention to an actual attempt to convince others to join in such worship, regardless of their degree of actual success.

Other prohibitions also allow punishment for the content of speech without regard to whether it accomplishes the speaker's purpose. In these cases, as with worship, however, the words spoken have ritual or performative<sup>22</sup> significance, either because they occur in a ritualized setting or they attempt to effect a change in status, that take the spoken word beyond the realm of mere intention. Deuteronomy 19:16-21, for example, punishes the witness who gives maliciously false testimony in a dispute. If the judges determine a witness testified in such a manner, then the court may impose as punishment

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<sup>21</sup> Deuteronomy 13:13-18 addresses the situation where someone succeeds in convincing a town to worship other gods. The earlier verses of chapter 13, in contrast, do not require any degree of success before the imposition of punishment.

<sup>22</sup> The idea of performative language comes from the 1955 lectures of philosopher John Austin. In his lectures, Austin proposed that in certain circumstances words can bring reality into being rather than just describe an existing state of affairs. Saying "I do" in a wedding ceremony or willing a watch to a brother provides just a few examples of such performative language. Worship, the making of oaths, and the rituals of marriage also fall under this rubric of performative language. For a discussion of this concept in the context of modern worship, see Lawrence A. Hoffman, *The Art of Public Prayer* 2<sup>nd</sup> ed. (Woodstock, Vermont: SkyLight Paths Publishing, 1999), 150-54.

what the witness hoped to accomplish through the false testimony. In this case, however, liability appears to follow from ritual significance of witness testimony as evidence capable of resolving disputes, regardless of whether the court actually relies on it or not in reaching a decision. Once offered, the testimony moves from the realm of "mere words" to proof capable of supporting a decision changing the legal status of another person.

The same argument applies to the case of the groom who falsely claims that his bride was not a virgin at the time of consummation of the marriage. (Deut. 22:13-21). The groom in this instance, usually referred to as the *מוציא שם רע*, attempts by such a false accusation to divorce his wife with a charge that, if proven, carries the death penalty (Deut. 22:21). Such a charge, accordingly, places the bride's life in the balance and brings shame on her family. Once the groom utters such a charge publicly, the biblical legislation contemplates the more or less immediate initiation of a dispute heard before the elders of the town sitting as judges in the gate (Deut. 22:13-22). If the charge proves false, the elders flog and fine the groom. If it proves true, the elders stone and kill the bride. Once again, accordingly, the situation appears to involve more than the utterance of words expressing a state of mind or intention.

The legal sections of the Hebrew Bible, accordingly do provide examples which confirm the seriousness of the misuse of words in certain circumstances. These examples demonstrate the Hebrew Bible's concern for correct conduct in the use of language even in the legal realm, a realm which generally avoids legislation punishing words which merely express an opinion or state of mind. While one could argue that each of the examples cited above involves some degree of conduct beyond the words uttered, the

fragility of the distinction between “mere words” and the words which invoke human punishment, only confirms the Hebrew Bible’s concern with controlling the destructive potential of language. This concern appears with even sharper relief in those portions of the Prophets and the Writings that address the human faculty of speech. This thesis now turns to a survey the significant passages used in the non-narrative portions of the Hebrew Bible to describe harmful speech, with particular emphasis on the psalms and wisdom books.

### C. Non-Narrative Examples of the Destructive Power of Speech

A number of the prophetic, wisdom and poetic books address the harmful potential of the human faculty of speech, particularly the Book of Psalms<sup>23</sup> and the Book of Proverbs. In these works, the tongue (לִשׁוֹן), and to a lesser extent, the lips (שִׁפּוֹת) and the mouth (פִּי), frequently act as metonyms for the whole person. In these books, the tongue represents both the ability to speak language and, in a larger sense, the totality of the purposes and values of the speaker.<sup>24</sup> Through speech, a person gives voice to his or her inward character and expresses the individual’s power of intellect and will. The tongue may uplift or degrade human existence, create or destroy friendships and

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<sup>23</sup> The Book of Psalms contains a number of individual and communal laments which address the conduct of evil-doers intent on harming the speaker or speakers. Other psalms address, in the same general way that wisdom literature does, the contrast between the wise and the foolish. Psalms containing these elements constitute the bulk of the poetic material cited in this section. While the category of “Wisdom Psalms” remains controversial, the idea that the outlook of wisdom influenced the significant parts of the Book of Psalms as a whole continues to garner support among modern scholars. See, e.g., Martin E. Tate, 2004 Supplement to *Word Biblical Commentary: Psalms 1-50*, by Peter C. Craigie (Colombia: Thomas Nelson, Inc., 2004), 460 (“All in all, it can be argued with considerable cogency that the Psalter in its final form belongs to the wider scope of Wisdom literature.”)

<sup>24</sup> The entire discussion here benefits from Walter Bruggemann’s discussion of “tongue” in Emory Stevens Bucke, ed., *The Interpreter’s Dictionary of the Bible* (New York: Abingdon Press, 1962), s.v. “tongue.”

community. In the words of the Book of Proverbs: Death and life are in the power of the tongue." (Prov. 18:21).

The Hebrew noun לִשׁוֹן probably derives from an Akkadian verbal root (*liš*, *lišš* ?) meaning "to lick" or "to tongue."<sup>25</sup> This stem has a variety of parallels in other languages of the Ancient Near East. In Akkadian, the word *lišānu* refers most simply to the tongue of a human or animal. The word *lišānu* also came to mean "speech" or "discourse" and, reflecting the negative potential of speech, an "informer" or a "speaker given to talk."<sup>26</sup> Thus, a *ša lišāni* connotes a person who knows of something held secret<sup>27</sup> and *lišānu* can refer to a talkative person expected to reveal secrets, particularly to a king or his agents.<sup>28</sup>

Similar metonymical expressions, whereby the activity or a facet of speaking comes to stand for the person, found their way into the Hebrew Bible. These expressions equate the way a particular person uses the instruments of speech, whether tongue, or mouth or lips, with their inward character. The expression can reflect positively on the person. The tongue of the righteous person, for example, לשונו תדבר משפט, "speaks what is right." (Ps. 37:30). The prophet speaks with a לשון למודים לדעת, a skilled tongue (Isa. 50:4). The faithful swear loyalty to God through their tongues (Isa. 45:23). The tongue can also heal and act like a tree of life in the mouth of the righteous (Prov. 15:4).

By and large, however, the association with לִשׁוֹן has a negative connotation.

Psalms 12:4, for example, prays for divine retribution against those who speak with לִשׁוֹן

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<sup>25</sup> TDOT, s.v. "לִשׁוֹן."

<sup>26</sup> David Sperling, "The Informer and the Conniver," in *The Journal of the Ancient Near East Society* 19 (1989) 101.

<sup>27</sup> TDOT, s.v. "לִשׁוֹן."

<sup>28</sup> Sperling, *The Informer*, 101-02.

לשון מרמה, "arrogance" or "boasting." The evildoer speaks with מרמה, a "treacherous tongue" (Jer. 9:7, Ps. 52:6). The Psalms and the Wisdom literature warn against associating or listening to לשון שקר, the "lying tongue" (Ps. 109:2, Prov. 12:19, 22:6, 26:28). The prophet Micah inveighs against those who speak with לשונם רמיה<sup>29</sup>, treacherous tongues in their mouths. Psalm 120:3-4 reflects a similar sentiment. Not surprisingly in the face of the weight of negative imagery associated with the tongue, the "man of the tongue," איש לשון, becomes synonymous with the evil-doer, rather than the righteous, in Psalm 140:11.<sup>30</sup>

The tongue as negative metaphor also appears routinely in the Psalter and the Prophetic books. The Psalms describe the tongue as a razor (Ps. 52:4), a sword (Pss. 57:5, 64:4) or a serpent (Ps. 140:4). The prophets also associate the tongue with the weapons of war and contention (Isa. 57:17), including bows that shoot arrows (Jer. 9:2, 7) and instruments capable of striking and silencing the prophet (Jer. 18:18). Job describes the tongue as a scourge or whip capable of doing violence to those without divine shelter (Job 5:21). The tongue can also be slippery or smooth, a reference to the ability of the

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<sup>29</sup> רמיה and its related form, מרמה, refer to situations where reality differs from appearance, as when someone deliberately strives to conceal facts in order to gain personal advantage. *TDOT*, s.v. "רמיה."

<sup>30</sup> The mouth and the lips can serve the same function. פה can refer to what issues from the mouth even though the lips and tongue are the primary instruments of speech. "פה" *TDOT*, s.v. "פה." God speaks through a mouth to the prophets and the prophets speak as the mouthpiece of God. The mouth of the righteous utters wisdom. (Ps. 37:30, Prov. 10:31). The פה can also misuse language. A scoundrel goes about with a crooked mouth. (Prov. 6:12). The mouth can also utter deceit. (Ps. 109:2). The same examples can be presented for the lips. See, e.g., Pss. 12:3 (smooth lips), 140:4 (spider's poison on the lips), Prov. 10:18 (lying lips).

fluent to deceive or flatter<sup>31</sup> (Ps. 5:10, Prov. 28:23). These metaphors emphasize the power of the tongue to do harm to the righteous rather than serve the interests of justice against the wicked. The prophet and the sage, accordingly, constantly urge their listeners to control the power of the tongue, both by direct exhortation and by emphasizing the consequences of misusing words.

Much of this instruction appears in the Book of Proverbs. In ancient Israel, sages communicated wisdom through speech and repeatedly addressed, as part of their instruction, the “possibilities and functions of language...”<sup>32</sup> The aphorisms collected in Chapters 10-29 of Proverbs devote significant attention to the importance and power of speech. The wise cultivate their mastery of language and warn repeatedly against lies, deceit, calumny, flattery and gossip to promote the proper use of speech. Fools, on the other hand, fail to control their tongues and put their lives, and the well-being of everyone around them, in peril.

This opposition between the wise and the foolish particularly concerns their use of language. This includes not just how the wise and the foolish express themselves, but also the deliberation devoted to the decision to speak at all. “Where there is much talking,” another verse from Proverbs declares, “there is no lack of transgressing, but he who curbs his tongue shows sense.” (Prov. 10:21). The decision to speak preoccupies

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<sup>31</sup> The Hebrew root used here, קלל, means “be smooth” or “smoothness.” Metaphorically, the root refers to flattery, duplicity, hypocrisy and deceit. *TDOT*, s.v. “קלל.” Mitchell Dahood asserts the root means “to die, perish” in this context. Mitchell Dahood, *Psalms I: 1-50* (New York: Doubleday, 1965), 35. This is almost certainly mistaken. See, e.g., Peter C. Craigie, *Word Biblical Commentary: Psalms 1-50* (Colombia: Thomas Nelson, Inc, 2004), 85 (rejecting Dahood’s translation in favor of the more common sense of the root; namely, the employment of the tongue for flattery or deception).

<sup>32</sup> Roland E. Murphy, *Word Biblical Commentary: Proverbs* (Nashville: Thomas Nelson Pubs., 1998), 259.

the wise because the ill-advised word may kill while the well-chosen word may heal.

“Death and life are in the power of the tongue: those who love it will eat its fruit.” (Prov. 18:21). The wise and righteous person, accordingly, exercises patient self-control of the divine gift of speech. The power of words addressed repeatedly in Proverbs, accordingly, transcends their truth or falsity. Truth prevails over lies, see, e.g., Prov. 12:19 (“Truthful speech abides forever, a lying tongue for but a moment.”) yet the wise do more than speak the truth. Unlike the fool who pours out words without thinking, the sage acts judiciously and speaks only when wisdom dictates.

The discipline of controlling the power of speech includes the preservation of secrets shared in fellowship or kinship. Proverbs, in fact, clearly places the safeguarding of confidences among the virtues of the wise in their use of language. The fool, in contrast, speaks without thinking and causes unnecessary strife, both personal and communal. “A base fellow (הוֹלֵךְ רֵכִיל) gives away secrets (סוד), but a trustworthy soul keeps a confidence” (Prov. 11:13). This attitude toward secrets receives additional emphasis toward the end of the same unit of Proverbs: “He who gives away secrets (סוד) is a base fellow (הוֹלֵךְ רֵכִיל); do not take up with a garrulous man.” (Prov. 20:19)<sup>33</sup> The Book returns to this point a third time: “Defend your rights against your fellow, but do not give away the secrets (סוד) of another (Prov. 25:9).

<sup>33</sup>

The Book of Proverbs associates discrete sections of the text with various authors or editors. A superscription associates Chapter 10:1 through 22:16 with Solomon. Other superscriptions identify the “wise,” “the men of Hezekiah, king of Judah,” “Agur, son of Jekeh” and “Lemuel, King of Massa” as the source of other units. These units together constitute an anthology characterized by pithy sayings expressing a particular philosophy and way of life called “wisdom.” James L. Kugel, *The Bible as it Was* (Cambridge, Massachusetts: Belknap Press, 1997), 13.



The three proverbs quoted above do not precisely identify the nature of the secrets the wise and righteous should respect. Their context, however, strongly suggests that the secrets referred to arise in the context of confidential discussions between those who gather together for some common purpose. סוד, the Hebrew word usually translated as "secret" in Proverbs, derives from the Semitic root *swd* meaning "to come together or combine."<sup>34</sup> The word can refer to an assembly of tribes (Gen. 49:6), a company of youths (Jer. 6:11) or a person's closest friends (Job 19:19). The *Hebrew and Aramaic Dictionary of the Old Testament* identifies a primary meaning of the word as a reference to confidential discussions in an assembly between human beings and God or between human beings alone.<sup>35</sup> The word may also refer to the content of such confidential discussions.

One scholar proposes an original form of סוד referring to a "free meeting together in time of leisure...in the evening circle" of village inhabitants, as the "place for the handing on of the ancient wisdom of life."<sup>36</sup> Another proposes that the term expresses "the intimate fellowship obtaining with a group, and ...the knowledge that can arise from that fellowship."<sup>37</sup> The word can therefore refer both to the group and the confidential communications which result from shared fellowship. The semantic range of the word therefore includes both "counsel," at least when used as a noun, and "council."

The word has a theological dimension as well. The *sod Adonai* refers to the heavenly council which gathers before the throne of God (Ps. 25:14; 89:8; Jer. 23:18).

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<sup>34</sup> *TDOT*, s.v. "סוד."

<sup>35</sup> *HALOT*, s.v. "סוד."

<sup>36</sup> *TDOT*, s.v. "סוד."

<sup>37</sup> *Ibid.*

Those who participate in this council share access to divine wisdom and attention (Jb. 15:8). The prophets enjoy special entree to this heavenly assembly (Jer. 23:18; 23:22). To the prophets in this divine council, God reveals heavenly purpose and plan (Am. 3:7). In the theological context, **סוד** refers to the intimate encounter between God and the prophets and to the divine plan imparted during such a council.

In both settings, accordingly, **סוד** refers to information shared amongst a group of intimates meeting for a common purpose. Just as the true prophet only reveals the divine plan to other human beings at the direction of God, so the participants in a purely human *sod* council apparently accepted limits on their ability to reveal the matters discussed to outsiders. **סוד**, in fact, eventually comes to describe "the secret decisions rendered at such councils, and for counsel in general."<sup>38</sup> According to Proverbs, the trustworthy or faithful participant concealed the content of these deliberations, but the **הולך רכיל** revealed such information, whether inadvertently or by design (Prov. 11:13; 20:19). Such a person acted contrary to the dictates of wisdom as set forth in the Book of Proverbs. The revealer of secrets, moreover, misused the power of the tongue granted to every human being.

#### D. The Interpretation of Leviticus 19:16

This background provides vital assistance in understanding the meaning of Leviticus 19:16. Although traditionally translated as a prohibition directed at speech, the phrase **לא תלך רכיל** from Leviticus 19:16 poses a number of interpretive difficulties. The solution to at least some of these difficulties requires an effort to place the verse in the

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<sup>38</sup> Raymond E. Brown, "The Pre-Christian Semitic Concept of 'Mystery,'" *Catholic Biblical Quarterly* 20 (1958) 416-443, 421

wider context of the Hebrew Bible's attitude toward the human faculty of speech. The passages from Proverbs cited above provide particular assistance since **לֹא תִלְךְ רֵכִיל** plainly is a variation of the phrase **הוֹלֵךְ רֵכִיל** from Proverbs 11:13 and 20:19.<sup>39</sup> By understanding these passages as an expression of wisdom on the proper use of the power of the tongue, we can begin to unravel some of the knots which left the translators of the 1985 version of the Jewish Publication Society's *Tanakh* uncertain as to the meaning of the verse. While the revelation of confidential information may not exhaust the kinds of conduct forbidden by this verse, the passages from Proverbs discussed above strongly indicate that disclosure of secrets falls within this prohibition.

This indication finds additional support in an analysis of the root. This root is attested to 25 times in the Hebrew Bible, either as a noun or a participle but never otherwise takes a verbal form. The lack of verbal forms in biblical Hebrew points toward foreign origin or influence, with Phoenicia or Arabia as most probable candidates.<sup>40</sup> The root **רכל** may be a variant of **רגל** which in its verbal forms refers to movement by foot.<sup>41</sup>

<sup>39</sup> According to Gesenius, **רֵכִיל** in Lev. 19:16 serves as an accusative subordinate to the verb **הוֹלֵךְ**. In this construction, the subordination helps describe the immediate circumstance under which an action or an event takes place. E. Kautzsch, ed., *Gesenius' Hebrew Grammar* 2<sup>nd</sup> English ed. A.E. Cowley (Oxford: Clarendon Press, 1910), ¶ 118q. Jouon refers to the phrase as an accusative of the internal object in which the internal object acts as an abstract noun of action, identical with, or analogous to, the action expressed by the verb. In Lev. 19:16, **רֵכִיל** connotes circulation. Paul Jouon, *A Grammar of Biblical Hebrew*, trans. T. Muraoka (Rome: Editrice Pontificio Istituto Biblico, 2000), ¶ 125q.

<sup>40</sup> The root, however, has not been found in Ugaritic or Phoenician texts. In Minaean, a language of South Arabian, the reflexive form *rtkl* occurs with the meaning, "engage in trade." *TDOT*, s.v. "רכל"

<sup>41</sup> Rashi's commentary to Lev. 19:16 notes the relationship between **רכל** and **רגל**. According to Rashi, all guttural Hebrew letters that have the same "source in the throat"

Modest support for that position comes from the Arabic, *rakala*, “kick, use the foot,” a word which expresses similar ideas of movement.<sup>42</sup> More importantly, the denominative verbs derived from רגל can refer to slander (Ps. 15:3; 2 Sam. 19:28) or spying (Gen. 42:30; Num. 21:32; Dt. 1:24; Josh. 6:22, 25; 7:2, 14:7; Jgs. 18:2, 14, 17; 2 Sam. 10:3; 1 Chron. 19:3). The piel participle מרגל denotes a spy (Gen. 42:9, 11, 14, 16, 31, 34; Josh. 2:1; 6:23; I Sam. 26:4; 2 Sam. 15:10). According to one scholar, this connection between movement by foot and spying was not accidental, since “a person whose feet are all too busy was considered a spy.”<sup>43</sup> A spy, of course, traffics in information and secrets.<sup>44</sup>

This consideration may underlie part of the negative connotation associated with the root רכל. In the majority of its occurrences, this root refers to merchants or trading goods (1 Kings. 10:15; Eze 17: 4, 26:12; 27:3, 13, 15, 17, 20, 22-24; 28:5, 16, 18; Nah. 3:16; Neh. 3:31, 32; 13:20). In Ezekiel’s prophesy against the Phoenician city of Tyre, the prophet repeatedly uses the root to refer to the trading activity of the city (Ezek. 27:3,

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can be interchanged with each other. As prooftexts, Rashi cites I Sam 19:28 and Psalm 15:3 where the root רגל refers to harm to reputation.

<sup>42</sup> *TDOT*, s.v. “רכל.”

<sup>43</sup> *TDOT*, s.v. “רגל.”

<sup>44</sup> Rashi comments in discussing the phrase לא תלך רכיל from Leviticus 19:16 means the same thing as הולך מרגל, “goes about spying.” He compares the activity of the spy to that of merchant. Just as a peddler goes about in the towns and repeats the bad things he sees and hears during the traveling to others, so a spy goes about collecting information and repeating it. Ibn Ezra makes a similar economic comparison between the activity of the merchant and the gossip. Just as a merchant buys from one and sells to another, the gossip reveals to one what he heard from another. Ramban makes essentially the same point.

13, 15, 17, 20, 22-24).<sup>45</sup> . In this prophecy, for example, the prophet uses the participle רֹכֵל to refer to either a merchant of Tyre or a trader who acts as an intermediary between Tyre and the people of other lands or cities. This corresponds to Middle Iron Age Tyre (900-550 B.C.E.) which was the foremost naval and commercial power in Asia.<sup>46</sup> Tyre built this renown on its merchant fleet and the ability to deliver its goods inland through a network of traders that incorporated peoples of neighboring lands, including Judah and Israel.<sup>47</sup>

Merchants bringing goods inland to customers would have needed to travel by foot or otherwise from one place to another. Travel in the ancient world was a risky business and communities may have viewed those who made a living by moving from one city to another with inherent suspicion. Trade in the Ancient Near East, moreover, would have been closely associated with the interests of the palace. The *rokel* referred to in the text of Ezekiel 27, accordingly, would have been acting as at least a commercial agent of the King of Tyre in furthering Phoenician trade with his own people.<sup>48</sup> These conflicting loyalties may underlie some part of the suspicion directed at the discretion of the רֹכֵל הַיָּם whose allegiance to profit and his Phoenician trading partners may have

<sup>45</sup> The city of Tyre was the trading and seafaring city *par excellence* in antiquity. Maria Eugenia Aubet, *The Phoenicians and the West: Politics, Colonies and Trade* Trans. Mary Turton, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2001), 31.

<sup>46</sup> Ibid., 44.

<sup>47</sup> Ezek. 27:17 ("Judah and the land of Israel were your merchants; they trafficked with you in wheat of Minnith and Pannag, honey, oil, and balm.")

<sup>48</sup> Aubet, *The Phoenicians*, 126. Levine argues that Leviticus 19:16 comes from a cultural setting in which "merchants were often foreigners who felt no close ties to those with whom they did business." Levine, *Leviticus*, 129. This may indeed underlie some of the hostility expressed against the merchant or trader elsewhere in the Hebrew Bible but Leviticus 19:16 clearly addresses Israelites. If the phrase בְּעַמֶּיךָ "against" or "among your kinsmen" doesn't clinch the argument, then common sense also dictates that prohibitions in the Hebrew Bible concern conduct in which at least some of its audience engaged.

conflicted with the ties of kinship. This may underlie Hosea's negative comparison of Ephraim to a country of tradesman with no sense of allegiance.<sup>49</sup>

This negative attitude toward Phoenician trade and traders reflects the Hebrew Bible's often ambivalent attitude toward the idea of profiting at the expense of others. Ezekiel's prophesy against Tyre expresses unmistakable admiration for the great cosmopolitan city yet imagines the city captured and destroyed for its arrogance (Ezek. 28:1-10). The story of Solomon epitomizes this ambivalence toward the accumulation of wealth. Solomon earns fabulous wealth through his trading relations with nations such as Phoenicia, Sheba, Egypt and Cilicia (see 1 Kings 10:1-29) yet eventually succumbs to sin through his own arrogance and exposure to the idolatrous ways of these foreigners. Like Solomon, those who become obsessed with gain subvert justice (e.g., 1 Sam. 8:3; Jer. 6:13), revile God (e.g., Ps. 10:3), shed innocent blood (Jer. 22:17; Eze. 22:12, 13, 27) and imperil their own lives (Prov. 1:19; 15:27; 28:16).

Against this background, the semantic range of *רַכָּל*, from "merchant" (Eze. 27; Neh. 3:31-32), "trade" (Eze 26:12; 28:5, 16, 18) or "marketplace" (Eze. 27:24) to corruption (Jer. 6:28), deception (Jer. 9:3) and depravity (Eze. 22:9) becomes more explicable.<sup>50</sup> According to Lipinski, the meaning of the root evolved from the descriptive

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<sup>49</sup> Brian Peckham, "Phoenicia, History of," *The Anchor Bible Dictionary*, ed. David Noel Freedman (New York: Doubleday, 1992), 5:351 ("The Tyrians and Sidonians were famous and successful merchants living in coastal Canaan [cite omitted] and the geographical designation, consequently, acquired a commercial connotation. Hosea criticized Ephraim for its deceitfulness and dealings with the powerful nations of the world (Hos. 12:1-3) and then illustrated his point by comparing Ephraim to a wealthy and arrogant Canaanite merchant with no sense of allegiance.")

<sup>50</sup> As note above, the 1985 JPS translation avoids these negative nuances by consistently translating *הוֹלֵךְ רַכָּל* as a reference to some undefined base conduct. In its notes to the translation, JPS justifies this approach by reasoning that, particularly in the Jeremiah passages, more is at stake than talebearing.

“going door to door” or “peddling” to the pejorative “swindling” in much the same way that the Arabic *makkār*, “supplier” or “peddler” became “*makār*” “swindler.”<sup>51</sup> Phrases like הולך רכיל (Prov. 11:13, 20:19) and אנשי רכיל (Ezek. 22:9) therefore almost certainly include some notion of economic exploitation. As Proverbs demonstrates, however, sharp economic practices alone do not exhaust the semantic range of רכיל. At some basic level, the presence of the הולך רכיל points to a breakdown in community solidarity as rich exploit poor and kinsman reveal the secrets of their fellows to further their own interests at the expense of the community.<sup>52</sup>

This analysis illuminates the phrase לא תלך רכיל found in Leviticus 19:16. The prohibition addresses conduct which itself weakens allegiance to the Israelite community and its values or indicates the presence of such diminished loyalties. The כ in the word בעמך in this context may take on the meaning of “against” with a nuance of hostility toward “your kinsman.”<sup>53</sup> The second strophe of verse 16 further supports this analysis. While the meaning of לא תעמד על דם רעך poses some of the same difficulties as לא תלך רכיל in the first half of the verse, it plainly refers to conduct which imperils the lives or livelihood of the people. In the Hebrew Bible, blood is often synonymous with life, “for the life of the flesh is in the blood... (Lev. 17:11).” Whether one interprets the

<sup>51</sup> TDOT, s.v. “רכיל.”

<sup>52</sup> William L. Holliday, *Jeremiah* (Philadelphia: Fortress Press, 1986), 1:230, 300-01. The prophet Jeremiah particularly addresses the injustices done by the people of Israel to each other and the strangers within their midst. Holliday speculates that Jeremiah does so with the text of Lev. 19:16-18 in mind that, in general, emphasizes the obligations of the individual to the community.

<sup>53</sup> Jouon, *Grammar of Biblical Hebrew*, § 133. Levine asserts that the *bet* in this context means “among, with your kinsmen” but his sense of the passage closely resembles that proposed here: namely, a prohibition on conduct that exploits your fellows. Levine, *Leviticus*, 129.

Hebrew phrase **לֹא תִעַמּוּד עַל דַּם רֵעֶךָ** as passive (don't stand by) or active (don't stand over), the prohibition clearly prohibits conduct which threatens the life of those with whom one shares bonds of kinship or fellowship. Exactly what conduct the verse prohibits, however, remains unclear.

The answer depends, in part, on whether to read the two parts of the verse conjunctively or disjunctively. The Masoretic text does not place a *waw* before the *lo* that begins the second half of the verse, indicating that the reader should interpret the two parts of the verse as a unit. The apparatus to the *Biblia Hebraica Stuttgartensia* indicates that some manuscripts add a *waw* but this cannot support emending the text since the MT yields a perfectly acceptable reading.<sup>54</sup> Many scholars have implicitly rejected a conjunctive reading of the verse, however, probably reasoning, along with the translators of the 1985 JPS version of the *Tanakh*, that talebearing is not sufficiently grievous to threaten life.<sup>55</sup> As demonstrated above, however, the Hebrew Bible regarded sins of the tongue as serious violations of the obligations owed to one's kin and companions. The comparison of the tongue to a sword, a razor or a bow shooting sharp arrows demonstrates the biblical writers' understanding of the destructive potential of speech, a destructive potential perfectly in keeping with the admonition, following the phrase **לֹא תִלַּךְ רַכִּיל**, not to "stand upon the blood" of those you have an obligation to protect.

One possible conjunctive reading limits the meaning of the verse to a judicial setting. Such a reading places particular emphasis on the court as the principal forum in which speech can assume a deadly character, presumably through the use of false

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<sup>54</sup> Karl Elliger and Wilhelm Rudolph, *Biblia Hebraica Stuttgartensia*, rev. Hans Peter Rüger 5<sup>th</sup> ed. (Stuttgart: Deutsche Bibelgesellschaft, 1997), 190.

<sup>55</sup> Orlinsky, *Notes*, 217.



testimony or the refusal to provide exculpatory evidence.<sup>56</sup> The discussion above, in contrast, did not limit the power of the tongue to court proceedings. While court procedures illustrate one particular way in which speech can attain its destructive potential, other avenues also exist. Other commentators note the possibility of multiple scenarios in which speech could result in harm.<sup>57</sup> Such circumstances include both the active use of destructive language and a passive failure to speak when silence will result in harm. These circumstances, as discussed at length above, include situations in which the revelation of a confidence, or the failure to reveal a confidence, could result in harm to human life. Such a reading comports well with the Hebrew Bible's larger concern with channeling the human faculty of speech to proper ends. This material provides important background as we now turn to post-biblical sources relating to the protection of confidences.

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<sup>56</sup> Milgrom suggests that the possibility of charges based on slander provides a realistic scenario in which talebearing could have resulted in death in ancient Israelite society. Milgrom, *Leviticus 17-22*, 1645. He cites Exodus 23:7 as his proof-text. He also believes that since the two parts of verse 15 form a complementary pair, the two parts of verse 16 should do likewise. Based on this, he views Leviticus 19:16 primarily as an admonition not to remain silent when you have testimony to offer on behalf of an accused.

<sup>57</sup> Hartley notes that harm could result from speech in various ways, including through the spreading of lies, the initiation of conspiracy and the refusal to testify when one has evidence to clear the accused. John E. Hartley, *Word Biblical Commentary: Leviticus 1-27* (Colombia: Word Books, 1992), 316. Levine also reads the two parts of Leviticus 19:16 conjunctively but takes a more economic interpretation based on the relationship between רכיל and the activities of a merchant. In his view, the verse prohibits a concern solely with profits and consequently forbids pursuing a livelihood in a manner that endangers others. This interpretation, while entirely reasonable, does not grapple with the relationship between רכיל and רכיל elsewhere in the Hebrew Bible, particularly the Book of Proverbs. Levine, *Leviticus*, 129.

### CHAPTER THREE

#### Post-Biblical Sources Relating to Confidentiality

##### A. The Apocrypha: The Wisdom of Ben Sira

The discussion of the Hebrew Bible above shows a persistent concern with controlling the power of language to inflict harm, even in the absence of defined punishment for misuse of the power of the tongue. This concern, however, is not limited to the books that form the accepted canon of the Hebrew Bible. The Apocrypha, for instance, contains a number of Jewish works that did not, in the view of the Rabbis "defile the hands." These books consequently lacked the holy status necessary for inclusion into the canon of Hebrew books that make up the Hebrew Bible. These texts nevertheless contain a wealth of information about the history and concerns of Second Temple Judaism. Among the apocryphal books, the Wisdom of Ben Sira has particular relevance to any discussion how Jewish society in that period viewed harmful speech, including the revelation of true yet hurtful information about another.

The Wisdom of Ben Sira, also known as Sirach (the name found in the Greek manuscript) and Ecclesiasticus (the title in Latin) represents the work of a single author writing sometime between 219-175 B.C.E.<sup>58</sup> In the extant Hebrew manuscripts, the author refers to himself as Yeshua ben Eleazar ben Sira and a subscription to one of the

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<sup>58</sup> The author's grandson translated his grandfather's Hebrew work into Greek in the 38<sup>th</sup> year of King Euergetes ("Benefactor") (Ptolemy VII) of Egypt, which corresponds with 132 B.C.E. In the book, Ben Sira refers to the high priest Simeon II (219-196 B.C.E.) as if he wrote at a time when Simeon had died in the recent past. The omission from the book of any mention of events during the tumultuous reign of Antiochus IV Epiphanes (175-164 B.C.E.) implies that the author had published his work shortly after Simeon II died but before Antiochus IV came to the throne.

manuscripts refers to the work as "The Wisdom of Yeshua son of Eleazer ben Sira."<sup>59</sup>

The Wisdom of Ben-Sira contains instruction on a wide variety of subjects written by a professional scribe and teacher during a period when the Ptolemies and Selucids, both Hellenistic dynasties, contended for control of the strategically important Levant. Like the book of Proverbs, the Wisdom of Ben Sira contains a significant amount of practical instruction intended for young men making their way in society. Unlike Proverbs, however, the author focuses on promoting Jewish faith and piety as an essential part of wisdom. The Rabbis did not confer canonical status on the Wisdom of Ben Sira but they apparently regarded it as a valid source of instruction on some matters based on its citation on a number of different topics in the Talmud and other rabbinic writings.<sup>60</sup>

The Wisdom of Ben-Sira contains extensive passages devoted to the benefits and dangers of speech.<sup>61</sup> The author advises the wise to speak at the proper moment in order to exercise correct leadership and provide proper instruction.<sup>62</sup> The foolish, on the other hand, should hide their folly rather than speak, for dishonor and disgrace can come from ill-chosen words.<sup>63</sup> Particularly hated are those who speak with the "double-tongue," probably a reference to those who say pleasing things to a friend's face and damaging

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<sup>59</sup> Alexander A. Di Lella, "Wisdom of Ben-Sira," in *The Anchor Bible Dictionary* (New York: Doubleday, 1992), 6:932.

<sup>60</sup> James L. Crenshaw, "The Book of Sirach," in *The New Interpreter's Bible*, ed. Leander Keck, David L. Petersen and Thomas G. Long (Nashville: Abingdon Press, 1996), 5:603-37. Crenshaw reports that the Talmud and other rabbinical writings refer to Ben-Sira 82 times. *Ibid.*, 634

<sup>61</sup> Ben Sira wrote in Hebrew. His Hebrew text, however, began to disappear after the Rabbis excluded the book from the accepted canon of the Hebrew Bible. Over time, the Hebrew text was forgotten in favor of the Greek and Syriac translations of the book. With the discovery of a number of manuscripts of the Hebrew version of Ben Sira in the Cairo Genizah in the late 19<sup>th</sup> Century, however, it became possible to publish an almost complete Hebrew version of Ben Sira. Di Lella, *Wisdom of Ben-Sira*, at 934-5.

<sup>62</sup> The Wisdom of Ben Sira, 4:23-24, 5:10-12, 9:17, 20:24:27-31.

<sup>63</sup> *Ibid.* at 5:13-6:1, 20:1-8.

words behind his or her back.<sup>64</sup> Damaging words can involve either lies, which Ben-Sira roundly condemns<sup>65</sup> or the revelation of true yet confidential information about either friend or foe.<sup>66</sup> Don't repeat a conversation or relay gossip, he warns, for a person cannot believe everything heard concerning others.<sup>67</sup> Particularly reprehensible, in Ben Sira's view, are those who betray a friend's confidence and reveal a secret. Faithful friendship, in his view, provides a priceless source of support and counsel.<sup>68</sup> A person who reveals a friend's secrets, on the other hand, destroys such a friendship and must abandon all hope of reconciliation.<sup>69</sup>

Some commentators find Greek antecedents in Ben-Sira's concern with the importance of proper speech and the preservation of secrets revealed in friendship. Some, for instance, find strong correlation between the expression of these concerns in the Wisdom of Ben Sira and their discussion in Greek works like the "Sayings of Seven Sages" compiled (at least) by Demetrius Phalerus (345-283 B.C.E.) and *Elegies* by Theognis (6<sup>th</sup> century B.C.E.).<sup>70</sup> Both Greek works offered practical advice to wealthy or aristocratic young men that expressed a similar "ethic of caution" in choosing friends or

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<sup>64</sup> Ibid. at 5:14, 28:13. The Hebrew text recovered from the Cairo Genizah uses the phrase "בעל שתיים" where, for instance, the New Standard Revised Version translates "double-tongue." Where the NRSV translates "meddlesome tongue," the Hebrew version has "לשון שלישית", the "triple tongue." This phrase makes its way into the *Targumim* and the *Yerushalmi* in passages discussing or translating לא תלך רכיל. For a discussion of the significance of the triple tongue, see below.

<sup>65</sup> Ibid. at 7:12-13, 20:24-26.

<sup>66</sup> Ibid. at 19:7-12

<sup>67</sup> Ibid. at 19:8-17.

<sup>68</sup> Ibid. at 6:14-17.

<sup>69</sup> Ibid. at 27:16-21. The Hebrew text does not use הולך רכיל in discussing the revelation of secrets. Instead, the text uses the phrase "מגלה סוד," the "one who reveals secrets." The same Hebrew phrase appears in Prov. 11:13.

<sup>70</sup> David A. deSilva, *Introducing the Apocrypha* (Grand Rapids, Michigan: Baker Academic, 2002), 165-69.

conducting oneself in public. Control over what one said served as an important gauge of wisdom and self-discipline for both authors. Other commentators minimize Greek influence on Ben Sira, emphasizing the continuity between the concerns expressed in his work and such Hebrew books as Proverbs and Ecclesiastes.<sup>71</sup>

At the very least, however, the expression of similar concerns with the protection of confidences and the avoidance of harmful speech in Hebrew, Greek and perhaps even Egyptian works, shows that Mediterranean society shared certain cultural values regarding the proper uses of speech. The use of the Wisdom of Ben Sira in both the Qumran community<sup>72</sup> and the Jewish community in Alexandria<sup>73</sup> attests to its wide appeal as an expression of the concerns of diverse Jewish communities in the Second Temple period. As with the Book of Proverbs, review of the Wisdom of Ben Sira shows a society concerned with limiting the consequences of harmful speech including, as one important aspect of the discipline of the wise, the revelation of confidences.

#### B.. The Dead Sea Literature.

In addition to the evidence provided by the Wisdom of Ben Sira, the literature of the ancient Qumran community, once located on the shores of the Dead Sea, also demonstrate a concern with the proper uses of speech, including the protection of community secrets. The "Rule of the Community" text (1QS)(the "*Rule*") found among

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<sup>71</sup> See, e.g. Crenshaw, Book of Sirach, where he refers to "this meager evidence of Greek influence on Ben Sira." Crenshaw does acknowledge, however, the possibility of Egyptian influence on Ben Sira through such documents as "Papyrus Insinger" and "'Instruction for Duauf.'" Ibid. at 625.

<sup>72</sup> The Qumran community had a copy of the Wisdom of Ben Sira written stichometrically, a style usually reserved for books the Rabbis later received into the Jewish canon. Di Lella, Wisdom of Ben Sira, 934.

<sup>73</sup> The Greek speaking Jews of Alexandria included the Wisdom of Ben Sira in the *Septuagint*, the Greek translation of the Hebrew Bible and some of the apocryphal books.

the Dead Sea Scrolls strongly indicates that the biblical prohibition, *לֹא תִלְךָ רֵכִיל*, was understood as a reference to wrongful conduct involving speech during the Second Temple Period. Despite continuing disagreements about dating of the Dead Sea literature, most scholars now agree that the Qumran community occupied the Dead Sea settlement between the mid-2<sup>nd</sup> century B.C.E. to approximately 68 C.E., the date of the Roman destruction of the site<sup>74</sup> The paleographical evidence dates the scrolls found in the caves near Qumran to a period between 250 B.C.E. and 70 C.E.<sup>75</sup> Most of the literature written specifically for the Qumran sect and its members, however, dates to the middle of the Hasmonean period, circa 100 B.C.E. This places the Dead Sea literature 2 to 3 centuries before the redaction of the *Mishnah*.

The *Rule* text, which initiates at Qumran probably studied during their probationary period before admission into the community<sup>76</sup>, sets forth a number of regulations governing the conduct of community members, including prohibitions and punishments. Among these are rules prohibiting members from *יִלְכּוּ רֵכִיל* against their fellows or against the community itself.<sup>77</sup> The member who committed the earlier offense faced banishment from the food of the community for one year, the one who committed the latter permanently lost his place in the community. Immediately following this listing of offenses and punishment, the text admonishes members not to

<sup>74</sup> John J. Collins, "Dead Sea Scrolls," in *The Anchor Bible Dictionary* (New York: Doubleday, 1992), 2:86.

<sup>75</sup> Frank Moore Cross, "The Historical Context of the Scrolls," *Understanding the Dead Sea Scrolls*, ed. Hershel Shanks (New York: Vintage Books, 1992), 23.

<sup>76</sup> Elisha Qimron and James H. Charlesworth, "Rule of the Community (1QS: cf. 4QS MSS A-J, 5Q11)," *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations*, ed. James H. Charlesworth (Louisville, Kentucky: Westminster John Knox Press, 1991), 1:1.

<sup>77</sup> 1QS7:15-17.

grumble or murmur<sup>78</sup> against either the community or fellow members on penalty of either temporary or permanent expulsion. The text then addresses the rules for those who deny the authority or foundation of the community before turning to the rules for the governing council of the Qumran community.

The announcement of these rules in a text governing the conduct of members of the Qumran community strongly implies that its author/s did not intend to address the economic conduct of the trader or peddler through the phrase יֵלֵךְ רֹכִיל. The *Rule* demanded a mingling of property after the successful completion of a two-year probationary period<sup>79</sup>. One need not enter into the debate concerning the place of private property at the community at Qumran to observe that the purchase and sale of private property amongst the members of the community in the manner of a trader would violate such a rule. The restrictions on relations with outsiders, in addition, would have made trading relationships with outsiders extremely difficult<sup>80</sup>. The location of the Qumran community in the wilderness surrounding the Dead Sea would have also made development of trade more difficult. It seems unlikely, accordingly, that the *Rule* would have prohibited the specific economic activity of trading or peddling when the entire import of the rules was the protection of an insulated way of life that would have made such activity almost impossible in the first place.

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<sup>78</sup> The word used יָלַן comes from the root לָנָן which in biblical Hebrew refers to murmuring or complaining as part of an effort to refuse or reject authority. See, e.g., Ex. 15:24, 16:2, Num. 14:2-36.

<sup>79</sup> 1QS6:24-25.

<sup>80</sup> 1QS 5:14-18 ("he will not enter into community with him (the outsider) regarding his work or his money....). Lawrence H. Schiffman, *Reclaiming the Dead Sea Scrolls* (New York: Doubleday, 1995), 110-12.

On the other hand, the *Rule* repeatedly address offenses related to speech, including angry speech<sup>81</sup>, intentional insults<sup>82</sup> foolish talk<sup>83</sup> and deliberate lies<sup>84</sup>. The *Rule* locates most of these speech-related prohibitions in the same literary unit as those that address ילכ רכיל when directed against the individual or the community<sup>85</sup>. The proximity of these rules to those prohibiting ילכ רכיל provides additional, if marginal, support, for the conclusion that the latter regulate what a member could say about a fellow member of the community or the community as a whole. Perhaps in part for these reasons, or based on the latter rabbinic understanding of לא תלך רכיל, a number of English translations of the *Rule* render ילכ רכיל as “gone about”<sup>86</sup> “slandering”<sup>87</sup>, “goes round defaming,”<sup>88</sup> or “slanders about”<sup>89</sup>.

Nothing in the references to ילכ רכיל in the *Rule* text, however, explicitly indicates that it addresses the revelation of secrets or confidences. The *Rule* directs the “master” of the community to “conceal the teaching of the Law from the men of injustice”—i.e. outsiders but the prohibitions involving ילכ רכיל clearly govern the relationships between the members of the community. They form part of a system of

<sup>81</sup> 1QS 6:25

<sup>82</sup> 1QS7:1-5.

<sup>83</sup> 1QS7:5-10

<sup>84</sup> 1QS7:25-26.

<sup>85</sup> John J. Collins, “Dead Sea Scrolls,” *The Anchor Bible Dictionary* New York: Doubleday, 1992), 2:87 (concluding that the *Rule* is composed of distinct literary units, one of which is the penal code set forth at 1QS 6:24-7:25).

<sup>86</sup> *The Complete Dead Sea Scrolls in English*, trans. Geza Vermes (London: Penguin Books, 2004), 111.

<sup>87</sup> Ibid, 108

<sup>88</sup> Florentino Garcia Martinez and Eibert J.C. Tigchelaar, eds., *The Dead Sea Scrolls Study Edition* (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 1997), 87.

<sup>89</sup> Qimron & Charlesworth, *Rule of the Community*, 33.



rules and punishments that do not address the internal protection of personal privacy or confidences in any modern sense. The *Rule*, after all, defines the regulations governing the members of the quasi-monastic community at Qumran and, as a whole, they presume a social setting where individual privacy gives significant way to the community's need to preserve ritual purity and good order.

Perhaps not surprisingly given this priority, the *Rule* text repeatedly admonishes members to rebuke their companions who fall into error lest they bear responsibility for sin. The text does not make distinctions amongst, or even address, the various public or private ways that knowledge of another's transgressions might have come to the attention of the rebuking member. If the Qumran community had rules or customs demanding the protection of confidences between members, they do not appear in the *Rule* and the references to ילכ רכיל do not seem to supply this missing element. For the Qumran community, the issue was not how one learned of a transgression, but how to address the erroneous conduct in a proper way. To this end, the *Rule* counsels members to reproach their fellows gently and without rancor:

"Reproach each other in truth and humility and in charity. Let no one address his companion with anger, or ill-temper, or obduracy [or in a] spirit of wickedness. Let him not hate him [ ] heart, but let him rebuke him on the very same day lest he incur guilt because of him." (1QS 5:24-6:1)

Between the members of the community, accordingly, the emphasis lies with the correction of wrongful behavior rather than with the protection of friendship or mutual regard at the expense of correct conduct. This does not mean that the Qumran community completely erased any distinction between public and private discussion of wrongdoing. Significantly, the regulations of the community directed the admonishing member to first attempt to correct the behavior by uttering the rebuke before a minimum

number of witnesses before proceeding to the leaders of the community. According to another writing of the community or sect which settled Qumran, the Damascus Document<sup>90</sup>,

“Any man from the members of the covenant who brings against his fellow a charge which has had no reproach before witnesses, but brings it out in anger, or tells it to his Elders in order to shame him, he is guilty of taking revenge and holding a grudge...His sin is upon him insofar as he did not carry out the commandment of God who said to him, “You shall surely reproach your fellow and shall bear no sin because of him.”  
Damascus Document 9:3-8.

With regard to outsiders, however, the Dead Sea literature consistently takes a more secretive approach. In addition to the rule directing the concealment of the teachings of the community for outsiders,<sup>1</sup> a Zadokite fragment from the Damascus Document also lists various types of offenders worthy of punishment, including one who “reveals the secret of his people to the nations...”<sup>91</sup> The Temple Scroll, an halakhic document primarily concerned with purity and temple holiness, goes so far as to mandate death by hanging if “a man slanders his people and delivers his people to a foreign nation and does evil to his people...”<sup>92</sup> This amounts to the addition of a capital penalty for treason to those already set forth in the Hebrew Bible, a dramatic confirmation of the importance the Qumran community attached to the regulation of speech.<sup>93</sup> This sharp distinction between members and outsiders with regard to “slander” or the revelation of

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<sup>90</sup> The Damascus Document addresses the rules for those members of the Qumran sect, frequently identified as the Essenes, who lived in towns or camps. Collins, Dead Sea Scrolls, 88.

<sup>91</sup> Schiffman, Reclaiming, 375

<sup>92</sup> Temple Scroll 64:5-10.

<sup>93</sup> Lawrence H. Schiffman and James C. VanderKam, eds., Encyclopedia of the Dead Sea Scrolls (Oxford: Oxford University Press, 2000), 2:457.

secrets echoes the division between members of the *sod*-counsel and outsiders discussed above in connection with the biblical approaches to secrets and their disclosure.

### C. The Targumim

The Aramaic translations of the Hebrew Bible take a number of different approaches to the translation of רכלך רכל and its related forms. These translations have their origin in the need to translate biblical Hebrew into the Aramaic vernacular used by the Jewish populace from the late Second Temple through the Talmudic period.<sup>94</sup> Originally, "*targum*" referred to any translation from one language to another. During the early rabbinic period, *targum* and *targumim* came to specifically refer to Aramaic translations of the Hebrew Bible. These translations did not replace the Hebrew original; they were instead read along side the original. *Targumim* exist for all the books of the Hebrew Bible with the exception of Ezra-Nehemiah and Daniel.

The *Targumim* vary from more or less literal translation of the Hebrew text to extended aggadic expansions on the translated verses. The dialect of Aramaic and the style of translation vary from *Targum* to *Targum*. Even within a single *Targum*, the language and approach to translation may differ from one verse to the next. Although often edited by later generations, perhaps even into the Renaissance, some of these Aramaic translations, or their earliest strata, date back to the time of the *Mishnah* or earlier. Since the theoretical goal of these Aramaic translations was to make the Hebrew text intelligible to listeners according to the understanding of the time of their preparation, their ancient rendering of the phrase רכלך רכל and רכל in its various

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<sup>94</sup> The *Mishnah* presumes that the Torah reader will pause for a spoken Aramaic interpretation to make the text understandable to listeners. *M. Megilah*. 4.4. The *Mishnah* does not explicitly mention any written translation

forms can advance our understanding of the evolution of Jewish thinking about the disclosure of confidences and secrets.

1. The Babylonian Targumim

*Targum Onkelos* to the Pentateuch and *Targum Jonathan* to the Prophets provide the authoritative Aramaic translation to their respective Hebrew texts. Both probably originated in Palestine in some early form during the Tannaitic period but received extensive editing in Babylonia in during the Amoraic period.<sup>95</sup> The Babylonian Talmud quotes both translations from time to time with approval.<sup>96</sup> Both use the same Aramaic dialect and their relative uniformity, at least as compared to the so-called "Palestinian Targumim," suggests some organized effort by Babylonian editors to impose a consistent approach to translation of the Hebrew text. Differences in translation of the same or similar phrases between these two Aramaic versions of the Hebrew Bible, accordingly, provide clues about the semantic range of particular words and phrases in the mind of the translators involved in the enterprise which produced the *Targumim*.

The Babylonian *Targumim* take distinguishable yet related approaches to the translation of the phrase הוֹלֵךְ רַכִּיל. *Targum Onkelos* translates לא תלך רכיל from

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<sup>95</sup> Philip S. Alexander, "Targum, Targumim," *The Anchor Bible Dictionary* (New York: Doubleday, 1992), 6:320-31; Jacob Neusner, *Introduction to Rabbinic Literature* (New York: Doubleday, 1994) 611-29.

<sup>96</sup> The Babylonian Talmud refers to *Targum Onkelos* as "our Targum" (B. *Qidd.* 49a) and cites the *Targum* on some occasions as authority on *halakhic* questions. Alexander, "Targum, Targumim," 6:320-31. *Targum Jonathon* received the same respect in Babylon with regard to the Prophets. The *Bavli* introduces a number of verses from *Targum Jonathan* with the phrase: "Were it not for the Targum of this verse we would not know what it means" (B. *Berakhot* 28b; B. *Mo'ed Katan* 28b; B. *Megilah* 3a; B. *Sanhedrin* 94b).

Leviticus 19:16 as לא תיכול קורצין [קרצין] בעמך<sup>97</sup> “don’t inform against [or on] your people....” This meaning of the root קרץ derives from the Akkadian *karsu* which refers to calumny or an unfounded accusation.<sup>98</sup> When used with the root אכל, the phrase refers to the act of informing on someone else.<sup>99</sup> Grammatically, the phrase in Aramaic is similar to לא תלך רכיל with a verb followed by a substantive derived from a verbal root. As with the Hebrew phrase, the Aramaic expression appears to describe an act done with a particular spiritual, mental or moral state.<sup>100</sup> Although the function of the verbal root אכל in the phrase is somewhat unclear,<sup>101</sup> it may simply refer to consumption to convey a sense of destruction.<sup>102</sup> The literal sense, accordingly, of the phrase could be to consume or destroy through accusation.<sup>103</sup> Notwithstanding its Akkadian usage, the phrase could

<sup>97</sup> The Aramaic text used above comes from the Comprehensive Aramaic Lexicon (hereinafter “CAL” [website: <http://cal1.cn.huc.edu>]) For *Targum Onkelos*, the CAL website used the text prepared by M. Cohen for his multi-volume publication *Mikraot Gedolot HaKeter* (Israel: Bar Ilan University Press, 1992), based on the best available manuscripts for each text. The variant noted in the quote comes from a text cited in the apparatus prepared by A. Sperber in his *The Aramaic Bible* (Brill, 1959-73).

<sup>98</sup> HALOT, s.v. “קרץ.”

<sup>99</sup> CAL, s.v. “QRC.”

<sup>100</sup> Gesenius, §118q.

<sup>101</sup> Rashi interprets the phrase as a reference to an ancient custom of eating a small meal to confirm the words of the gossip. Both Ramban and Rashbam reject this interpretation. They both interpret אכל, based on Aramaic usage, as a reference to making the voice heard.

<sup>102</sup> See Daniel 7:23, where אכל is used in this sense.

<sup>103</sup> The translation of Proverbs 11:13 and 20:19 given in *Targum Proverbs* conforms to the pattern observed in *Targum Onkelos*. The history and provenance of *Targum Proverbs* remains unclear although the more literal philosophy of translation underlying the work seems closer to the approach taken by the *Babylonian Targumim* than the Palestinian translations into Aramaic. Alexander, “*Targum, Targumim*,” 6:326. *Targum Proverbs* translates הולך רכיל in both verses as אכל קורצא [קורצין], the same reference to informing found in the rendering of Leviticus 19:16 found in *Targum Onkelos*. Instead of סוד, however, both verses use רזא, an Aramaic equivalent meaning “secret,” “mystery” and occasionally “council.” Marcus Jastrow, *Dictionary of the Targumim*, the

refer to an act of informing in which the informer reveals true yet damaging information regarding another.

This understanding comports well with the only biblical use of **אכל קורצין** in the Book of Daniel. At verses 3:8 and 6:25, the Aramaic phrase refers to efforts to discredit Jews in positions of influence at the court of the king of Babylon. In each verse, the phrase describes the disclosure of information about Jewish religious practices that set Diaspora Jews apart from the Chaldeans in a potentially dangerous way. Both in the case of Shadrach, Meshach and Abed-nego (Chap. 3) and Daniel (Chap. 6), the Aramaic describes efforts by jealous rivals to bring Jewish religious exclusivity to the attention of the king in a way that insinuates disloyalty to the throne.

In both cases in Daniel, the accusation forces the king to notice something he might have otherwise overlooked yet the text clearly indicates the essential truth of the information provided. In form, both incidents bear remarkable similarity to the accusation that Mordacai would not bow down to Haman brought by the king's courtiers in the Book of Esther. Est. 3:1-6. "Informing" in this sense has a political meaning which involves focusing attention on conduct which, while not necessarily private in the modern sense, had at least previously escaped the attention of the ruler. Needless to say, given the king's judicial function in both Daniel and Esther, the accusation can also initiate legal action against the accused. As both books also illustrate, the accuser need not speak falsely to put the accused in danger of loss of life or liberty. The informer may

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*Talmud Bavli and Yerushalmi and the Midrashic Literature* (Jerusalem: Judaica Press, 1903), s.v. "רזא". In Daniel, the word usually connotes a secret known to God and revealed to a particular human being through a vision. Dan. 2:19, 27, 30, 47. It need hardly be said that in this divine context the "secret" is presumptively true or accurate.

falsely imply disloyalty yet still accurately describe the conduct which places the accused in danger.

Regardless of the meaning of the original Hebrew, the Aramaic translation of לא תלך רכיל in *Targum Onkelos* interpreted the phrase as a reference to harmful speech, particularly to Jews living under foreign rule. In prophetic passages where הולך רכיל or similar phrases appears in *Targum-Jonathan*, however, the reference to harmful speech is not so clear cut in all cases. The Aramaic translation of Ezekiel 22:9 (אנשי רכיל) also refers to the activity of the informer, as evidenced by the similar use of the Akkadian loanword קרץ with the Aramaic root אכל. Other prophetic references to the root רכל in the context of trading or merchandise have little bearing on this issue because *Targum Jonathan* consistently translates the Hebrew root as either תרג or סחר, both clearly also related to trading activity and goods.<sup>104</sup> The translation of the passages in Jeremiah (6:28 and 9:3) that contain the phrase הולך רכיל, on the other hand, refer only to deceitfulness in general through the use of the Aramaic נכל.<sup>105</sup> In the Hebrew Bible, craftiness and deceit often rely on speech although not invariably so.<sup>106</sup> Based on this pattern, *Targum Jonathan* provides only moderate support for the conclusion that its translators also viewed הולך רכיל as a reference to harmful speech or the revelation of secrets.

<sup>104</sup> See, e.g., 1 Kings 10:15, Ezek 17:4, 27:3, 13, 15, 17, 20, 22, 23, 24, 38:13 Nah. 3:16..

<sup>105</sup> Jastrow defines the root as a reference to craftiness, fraud or deceit. Jastrow, s.v. "נכל."

<sup>106</sup> One need look no further than the story of the snake in the Garden of Eden who was the "craftiest of all the beasts of the field." See also Job 15:5 ("crafty language"); Job 27:4 (the tongue as an instrument of deceit), Psalm 120:2 (same). But see Prov. 10:4 (reference to a deceitful or slack hand).

## 2. The Palestinian Targumim

The *Palestinian Targumim* include *Targum Pseudo-Jonathan*<sup>107</sup> and *Targum Neofiti*<sup>108</sup>, the so called *Fragmentary Targumim* as well as the remnants of Pentateuchal *Targumim* found in the Cairo Geniza. All use a Palestinian Jewish or western Aramaic dialect and generally take a more aggadic approach to translation of the Hebrew original. Primarily for this reason, the Aramaic translations found in the *Palestinian Targumim* frequently contain additions, sometimes extensive, to the Hebrew original.

The translation of Leviticus 19:16 found in *Targum Pseudo-Jonathan*, for instance, offers an interpretation much less bound to the original Hebrew text than *Targum Onqelos*. *Targum Pseudo-Jonathan* translates the verse as "you shall not go after the triple tongue, which is as hard as the sword that kills from its two edges, to inform against and to afflict your kinsman, don't prevent the acquittal of your friend by testifying against him in a lawsuit." This translation seems to arise out the analogy, frequently made in the Hebrew Bible, between the tongue and a sharp instrument capable of cutting flesh.<sup>109</sup> The image of the master of the "double" found in the Wisdom of Ben Sira probably arose out of the same comparison and may have informed the translation found in *Targum Pseudo-Jonathan*. As we shall see below in the discussion of the

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<sup>107</sup> The name apparently resulted from a misunderstanding of the Hebrew abbreviation "י"ת". Instead of understanding this as a reference to *Targum Yerushalmi*, the first printed edition referred to the work as *Targum Yehonatan*. Alexander, *Targum, Targumim*, 322. *Targum Pseudo Jonathan* is the most expansive of the *Targumim* to the 5 books of Moses, comprising text roughly twice that of the Hebrew original. Ibid.

<sup>108</sup> This *Targum* also translates the Pentateuch. Neusner identifies this *Targum* as among the oldest of the rabbinic *targumim*, dating the original manuscript to "sometime between the mid-second and the early fourth centuries C.E." Neusner, *Introduction to Rabbinic Literature*, 613. Alexander agrees that a stratum of this *Targum* may date back that far noting there are no good grounds for dating anything in *Targum Neofiti* later than the 3d/4<sup>th</sup> centuries. Alexander, *Targum, Targumim*, 323.

<sup>109</sup> See, e.g., Pss. 52:4, 57:4, 64:3, 140:4



*Yerushalmi* and *Bavli*, the idea of the “triple tongue” as a metaphor for harmful speech also found its way into the two Talmuds.<sup>110</sup> Whether the Talmuds influenced the Aramaic of *Targum Pseudo-Jonathan* or the other way round, however, remains unresolved.<sup>111</sup>

Regardless of the direction of influence between the Talmuds and the *Targumim*, however, the translation of Leviticus 19:16 found in *Targum Pseudo-Jonathan* particularly emphasizes the destructive potential of speech. The translation even implies the expansion of the semantic range of *לֹא תֵלֵךְ רַכִּיל*, at least in the view of the writers that produced the *Targum*, beyond informing on one’s fellow to include giving false testimony in a lawsuit. As we saw earlier, this implication arises from more than a creative translation of the second strophe of Leviticus 19:16 (*לֹא תַעֲמִיד עַל דַּם רֵעֶךָ*). According to *HALOT*, the Aramaic root *קִרַץ*, also encompasses the initiation of legal proceedings against someone. Needless to say, an informer might initiate such a proceeding through either true or false accusations depending on the conduct of the accused and the suggestibility of the authorities in charge of the courts. *Targum Pseudo-Jonathan*, accordingly, also translates Leviticus 19:16 and the phrase *לֹא תֵלֵךְ רַכִּיל* as a

<sup>110</sup> Tractate *Y. Peah* asks in speaking about harmful speech “Why is [it] called the three? Because it kills three, the one who speaks it, the one who receives it and the one about whom it is spoken.” This implies some idiom widespread among the Galilean population at least, of referring to destructive words as “the three.” Ben Sira refers to the “triple tongue” as well. The reference in the *Yerushalmi* may, or may not, refer to the usage of this idiom in Ben Sira and/or the *Targumim*. See also *B. Arakhin* 15b: “In the West, they say [the] triple tongue kills three [it] murders the one speaks, the one who accepts and the one about whom it is spoken.”

<sup>111</sup> *Targum Pseudo-Jonathan* contains both early and late material. It may be “reasonable to conclude...that a stratum of Ps-J must have originated before the redaction of the *Mishnah* and the *Yerushalmi*.” Alexander, *Targum, Targumim*, 322.

reference to harmful speech. Indeed, the Aramaic rendering of the ambiguous Hebrew emphasizes the destructive potential of words.

*Targum Neofiti* takes a similar approach. Although the manuscript seems somewhat garbled, the sense of its translation of Leviticus 19:16 once again confirms the need to restrain the harmful potential of speech: "My people, the children of Israel, you shall not go after the triple tongue to afflict (to curry agreement?), don't silence litigants, don't stand upon the blood of your friend's murderers when you know he is innocent in the case."<sup>112</sup> Although the precise meaning of the last part of the translation remains uncertain, comparison with the *Fragmentary Targumim* and the marginal comments to the text suggest it should read: "'Don't you stand silently by when you know that justice lies with your friend in a lawsuit according to the law."<sup>113</sup> In other words, the Aramaic translators of the *Palestinian Targumim* understood Leviticus 19:16 to include both an obligation to refrain from speaking when harm would result and a responsibility to speak when harm would come to friend through silence.

The Aramaic translation of לא תלך רכיל in the *Palestinian Targumim*, accordingly, clearly relates to the human facility of speech symbolized by the tongue. The rendition of the first part of the verse prohibits verbal accusations which place one's fellows in a potentially harmful or damaging position. These accusation may, or may not be, false as well. The Aramaic translation of the second strophe focuses on the beneficial

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<sup>112</sup> The Aramaic here למרעיה is unclear. A comparison with *Targum Pseudo-Jonathan* favors the first reading.

<sup>113</sup> CAL provides a side-by-side comparison of all *targumim* available for any biblical verse. The *Palestinian Targumim* provided for Leviticus 19:16 include *Pseudo-Jonathan*, *Neofiti* and both the "P" and "V" manuscripts of the *Fragmentary Targumim*. The website also provides separate and occasionally lengthy marginal notes to *Neofiti* where available.

potential of speech when a friend needs aid. A person cannot proclaim fellowship with another at one time and yet remain silent when obligated to speak at another. Just as a witness has an obligation to speak, see, e.g., Leviticus 5:1, the *Targumim* interpret Leviticus 19:16 to impose an obligation to deploy our power of speech to aid those deserving of our protection.

## CHAPTER FOUR

### Rabbinic Literature

#### A. The Mishnah

The *Mishnah*, redacted in the latter part of the 2<sup>nd</sup> Century C.E., has surprisingly little to say about the regulation of harmful speech, particularly given the dangers of speaking repeatedly identified in the biblical text. The topic receives no comprehensive treatment anywhere in the *Mishnah* and only occasional references in a handful of *mishnayot* spread widely through the Mishanic text. Perhaps because the program of the *Mishnah* is the preservation of rituals “focused upon and emanating from the Temple,” and not “the everyday life of Israel in the towns and villages of the Holy Land,” the redactor or redactors of the *Mishnah* largely limited discussion of rules and regulations related to speech to those instances involving interaction with Temple officials or the administration of justice.<sup>114</sup> These discussions proceed in the characteristically brief manner of the *Mishnah* yet manage to articulate a few important concerns, already identified in the Hebrew Bible, about the need to control hurtful speech and the revelation of confidences where such conduct threatens the societal order.

Tractate *Arakhin*, for instance, which topically deals with the redemption of vows and consecrations made to the Temple, also devotes some attention to fixed amounts paid as indemnities for conduct that injures another. In discussing the 100 *sela* fine imposed by Deuteronomy 22:19 for publicly denying a new bride’s virginity and bringing her into disrepute, *M. Arakhin* 3:5 comments on the stringency of the fine for the false accusation

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<sup>114</sup> Jacob Neusner, *The Talmud of the Land of Israel: A Preliminary Translation and Explanation: Introduction, Taxonomy*, vol. 35. (Chicago: University of Chicago Press, 1990), 44.

of unfaithfulness prior to marriage when compared to the 50 *sela* fine for violating or seducing a virgin. This stringency, the *Mishnah* concludes, shows that the law treats one who commits wrongdoing with words, in this case, the מוציא שם רע who falsely accuses his bride of infidelity, more harshly than one who transgresses through actual deed.

As proof of this conclusion, the *Mishnah* cites a biblical example: God's decree, set forth in Numbers 14:21-23, sentencing to perish in the Wilderness the generation that refused to enter the land of Canaan after hearing the report of the spies. God uttered and sealed this decree, the *Mishnah* concludes, on account of the לשון הרע spoken against the Land in the Wilderness. In other words, God imposed this punishment because the spies uttered a negative report about the Land, and not as a result of the wrongful conduct the Israelites had previously committed in the Wilderness, including, for example, the creation and worship of the Golden Calf. This case, at least in the minds of redactor/s of the *Mishnah*, supported the conclusion, set forth in *M.Arakhin*, that the harm done by words could exceed the damage caused by deeds.

The reference in *M Arakhin* 3:5 is among the earliest, if not the earliest, textual reference to the phrase לשון הרע in rabbinic literature. The phrase does not appear elsewhere in the *Mishnah* although a related term בעלי לשון "masters" or "men of the tongue" appears in *M.Sotah* 9:15.<sup>115</sup> Despite this lone reference, the conclusion that "the

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<sup>115</sup> This *mishnah* details the decline in Jewish fortunes since the death of Rabbi Meir. Arguably, the quoted passage does not form part of the original *Mishnah* because it earlier refers to the death of Judah *HaNasi*, the primary redactor of the *Mishnah*. It does appear as part of the *Mishnah*, however, in the *Yerushalmi* and *Bavli* versions of the text. The sentence containing this phrase says: "Rabbi Pinchas *ben* Yair says: With the destruction of the Temple, colleagues and freemen were shamed and covered their heads, accomplished men faltered and men of arms and tongue prevailed and no one looks

one who speaks with his mouth [is treated more severely] than one who does a deed,"<sup>116</sup> serves as an important paradigm for all further rabbinic discussion of לשון הרע. After the *Mishnah*, rabbinic texts typically discuss לשון הרע as the epitome of wrongful behavior, exceeding even idol worship, sexual immorality and the shedding of blood as conduct worthy of condemnation and punishment, if not in this world, then clearly in the world-to-come. This is more than mere hyperbole. While these texts seldom apply rigorously the implications of such a statement,<sup>117</sup> the reader should take this approach to wrongful speech as a serious expression of a rabbinic view on the workings of God's justice in the world. Indeed, at least one scholar views *M.Arakhin* 3:5 citation of Numbers 14:22 as an attempt to describe "a regularity governing nature or world," -- i.e.—that one who wrongfully utters suffers more severely than one who commits a wrongful deed<sup>118</sup>

The other few passages in the *Mishnah* that deal with wrongful words hint at this "meta-halakhic" principle. *M.Baba Metzia* 4:10, for instance, notes that just as wrongdoing exists in buying and selling, so does wrongdoing<sup>119</sup> exist in the exchange of words between people. This *mishnah* then gives several examples of prohibited words.

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closely, no one requests and no one asks." In later rabbinic usage, the term "men of tongue" becomes synonymous with the "accusers," "slanderers" or "defamers."

<sup>116</sup> *M.Arakhin* 3:5. This refers, however, not to human punishment but divine retribution.

<sup>117</sup> These texts, for instance, do not generally ask how, if the consequences of לשון הרע are so severe and לשון הרע so common, individuals and society can long withstand divine justice. Nor do they analyze the Written and Oral Torah as their authors understood it in their time for consistency with this principle.

<sup>118</sup> Alexander Samely, *Rabbinic Interpretation of Scripture in the Mishnah* (Oxford: Oxford University Press, 2002) 163-69.

<sup>119</sup> The *Mishnah* uses אונאה, a noun that can mean oppression, wrongdoing or fraud. Jastrow, s.v. אונאה. In the context of *M.Baba Metzia* 4:10 the word means overreaching or fraud which either invalidates a transaction or entitles the victim to redress.

A shopper, for example, may not ask for a price with no intention of buying. Nor may an acquaintance reproach one who has repented with his or her past deeds. The same prohibition applies to a person who would ask a convert to remember the "deeds of his ancestors." For fraud in connection with a purchase or sale, the victim has legal remedies as set forth in *M. Baba Metzia* 4:2-9, for wrongdoing in connection with the kind of statements illustrated in *M. Baba Metzia* 4:10, however, no human remedy exists. Yet, if every human wrong bears some divine punishment<sup>120</sup>, this *Mishnah*, implicitly indicates that human law does not limit the penalty for wronging by words. The listing of specific examples of this kind of wrongdoing in *M. Baba Metzia* 4:10 without discussion of punishment strongly implies that the redactors of the *Mishnah* believed that the remedies available to God would exceed any merely human repertoire.<sup>121</sup>

The implication admittedly is more diffuse with the last *mishnah*, although much closer to the core concerns of this thesis. In *M. Sanhedrin* 3:7, the *Mishnah* discusses the method judges should use to announce their verdict to the litigants. After the senior judge renders a verdict by announcing which party the court has exonerated and which the court has found liable, the *Mishnah* prohibits a judge from seeking favor with the losing party by revealing the secret deliberations of the court: "He may not say: I ruled 'not liable' but my colleagues ruled 'liable,' but what could I do, my colleagues outnumber me?" As prooftexts, this *mishnah* cites both Leviticus 19:16, לא תלך רכיל, and Proverbs 11:13, הולך רכיל מגלה סוד. Like the *mishnah* above in *M. Baba Metzia* 4:10, this passage prohibits wronging by words but leaves the punishment for

<sup>120</sup> See, e.g., Lev. 25:17 ("Do not wrong one another, but fear your God; for I the Lord am your God.")

<sup>121</sup> The *Gemara* draws this conclusion, concluding that wronging by words exceeds wronging by monetary fraud *B. Baba Metzia* 58b-59a.

violation unstated. Both the biblical verses cited also fail to specify any fine or penalty for the *הולך רכיל*, once again implying, albeit only in the context of the other *mishnaic* passages about speech cited, that the violator faces divine, not human, punishment.

The citation together of Leviticus 19:16 and Proverbs 11:13, moreover, demonstrates that the *Tannaitic* generation of rabbis considered the wrongful revelation of secrets within the biblical prohibition of Leviticus 19:16. Nothing in this context, in addition, suggests that the prohibition rests upon the falsity of the statement made. Indeed, the truth of the information revealed seems essential to the reasons for its protection. The wrong done to the repentant sinner and the convert in *M. Baba Metzia* 4:10 also stems from the accuracy of the information underlying the offensive comments, although the prohibitions stated in that *mishnah* do not clearly rest on a distaste for the revelation of secrets.

*Mishnah Arakhin* 3:5, on the other hand, tilts firmly toward a concern with the falsity of the statements made. The *מוציא שם רע*, only faces punishment if the court finds the accusation of infidelity incorrect. If the husband speaks accurately, the wife faces death by stoning.<sup>122</sup> Further, and as discussed earlier, the episode with the spies must necessarily include some aspect of falsity. The "land flowing with milk and honey" cannot pose the obstacles to conquest and settlement identified by the spies without undercutting the entire covenantal enterprise between Israel and God. The possibility that some of the information conveyed by the spies is true misses the entire point of the biblical episode. Based on the *mishnaic* passages discussed above, accordingly, we cannot confidently conclude that the term *לשון הרע* included the wrongful revelation of

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<sup>122</sup> Deut. 22:20-21; *M. Sanhedrin* 1:1.



truthful information at the time of the redaction of the *Mishnah*. We can say, however, that the *Mishnah* regarded the revelation of secrets as a harmful aspect of speech which human beings should endeavor to control.

The *Mishnah*, however, never discusses how to balance the protection of secrets and the prevention of harmful speech against other values, particularly the protection of human life and the well-being of others in the community. The *Mishnah*, for instance, never explicitly addresses the second half of Lev. 19:16, either in the context of לא תלך רכיל or otherwise. The *Mishnah* does, however, contain several passages that establish the priority of human life over observance. These passages do not address Leviticus 19:16 or the control of harmful speech in general, yet they nevertheless implicitly limit the reach of all the negative and positive commandments, including the prohibition addressed by לא תלך רכיל.

In discussing the prohibitions against eating and drinking on Yom Kippur, for example, *M.Yoma* 8:5-7 discusses the treatment of those whose life or health depends on access to food and/or water during the fast. The *Mishnah* concludes that life prevails over even the obligation to afflict oneself on the Day of Atonement. The pregnant woman who smells food and the sick should be fed until satisfied (*M.Yoma* 8:5). In the face of danger to life, in fact, the law permits otherwise forbidden foods, even on Shabbat, because in all cases of doubt, life supersedes observance of the restrictions of the Sabbath (*M.Yoma* 8:6). This applies even to permit work otherwise forbidden, such as digging through the debris of a collapsed building, if the possibility of saving human life exists (*M.Yoma* 8:7).

The *Mishnah* reinforces this principle in a different way in addressing the laws of the pursuer derived from Deut. 22:25-27. The obligation to save in this context arises from two different considerations. First, the obligation to save innocent life from harm requires intervention to rescue the intended victim, even at the cost of the pursuer's life (*M. Sanhedrin* 8:7). Second, and at least equally important, the obligation to prevent the pursuer from committing certain heinous sins relating to murder and sexual impropriety imposes an obligation to rescue the pursuer from sin, even at the cost of his life (*ibid.*).

These passages establish the priority of human life over almost all other considerations.<sup>123</sup> These limitations almost presumptively apply to the limitations on harmful speech discussed in the *Mishnah*. As noted earlier, the regulation of speech does not occupy a central place in the *Mishnah's* program of setting forth the regulations of ritual life, nor does the *Mishnah* contain rules relating to the control and punishment of speech comparable to, for instance, those regulating capital cases.<sup>124</sup> At the very least, the prohibition on speech contained in לא תלך רכיל stands on no different footing than any other negative commandment when weighed against the priority of human life. From the perspective of the *Mishnah*, accordingly, the restrictions on the use of harmful speech, including the revelation of secrets, must necessarily give way in appropriate circumstances to the protection of human life.<sup>125</sup> The passages of the *Mishnah* detailing the circumstances that justify suspending biblical prohibitions give an important insight

<sup>123</sup> This thesis discusses the exceptions to the priority of human life below.

<sup>124</sup> See, e.g., *M. Sanhedrin* 1:4 which requires a court of 23 for judging a capital case but only 3 judges for a case involving a מוציא שם רע. *M. Sanhedrin* 1:1.

<sup>125</sup> The *Tosefta* and the *Yerushalmi* discuss the passages from *M. Yoma* and *M. Sanhedrin* indicating the priority of human life. Their discussion, however, neither contradicts nor materially carries forward that discussion. As a consequence, this thesis will not include an analysis of those passages.

into the nature of those circumstances. With the benefit of this insight, and mindful of the *Mishnah*'s recognition of the need to protect secrets, at least in certain circumstances, this thesis now turns to the discussion of harmful speech, including the revelation of secrets, in other rabbinic literature.

#### B. The Tosefta

The *Tosefta*, the next major rabbinic text produced after the *Mishnah*,<sup>126</sup> makes an important advance in the rabbinic concept, noted above, that the punishment for wronging by words exceeds the penalty for actual misdeeds. The *Tosefta*, organized according to the same plan as the *Mishnah*, contains a large amount of additional material. Each tractate of the *Mishnah* has its parallel in the *Tosefta* although the *Tosefta* contains approximately 4 times as much text. In general, however, the *Tosefta* follows the program of the *Mishnah* and does not impose its own structure on the material. The additional material ranges from citation and explanation of text contained in the *Mishnah* to *baraitot* only indirectly, if at all, related to the statements in the *Mishnah*. The *Tosefta* forms a bridge between the *Mishnah* and the two Talmuds and an understanding of its approach to לשון הרע can deepen our understanding of the development of the halakhah related to the disclosure of confidences.

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<sup>126</sup> Most scholars date the *Tosefta* to the century after the redaction of the *Mishnah*, ca. 300. See, e.g., Neusner, *Introduction to Rabbinic Literature*, 129. Some scholars place the document somewhat later, e.g., Moses David Herr, "Tosefta," in *Encyclopedia Judaica* CD ROM ed. (Israel: Judaica Multimedia Ltd., 1997) ("It would therefore seem obvious that the *Tosefta* in its present form was not edited before the end of the fourth century C.E...."). Some view the *Tosefta* as a companion volume to the *Mishnah* that dates to the same period of time. Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder, Colorado: Westview Press, 1998), 8. (Neusner, *Introduction to Rabbinic Literature*, 131 somewhat reluctantly admits this possibility) Even Hauptman concedes that the *Tosefta* contains a large amount of material posterior to the *Mishnah*. This paper accepts the standard scholarly opinion that the *Tosefta* dates to some period after the final redaction of the *Mishnah*.

Importantly, in the *Tosefta*'s collection related to *Peah*, the tractate addressing the obligation to leave a portion of the harvest for the poor, we find a statement that addresses the severity of the punishment for לשון הרע. This statement expresses the view, already noted in the *Mishnah*, that the punishment for words exceeds the penalty for deeds. The passage, however, has only indirect connection to the parallel text in the *Mishnah*. Nevertheless, one cannot completely understand the Talmudic discussion of לשון הרע without examination of these *baraitot*.

*Mishnah Peah* begins with a discussion of the obligations whose maximum measure the Torah did not quantify.<sup>127</sup> The obligation to leave the corners of the field for the poor, for instance, does not specify, either by area or quantity of produce, how much of the harvest an owner should leave uncollected. The *Mishnah* cites other obligations without measure in the Torah, including the commandment to bring first fruits<sup>128</sup> (no specification of quantity), the obligation to appear at the Temple and offer sacrifices at the festivals<sup>129</sup> (no specification of the value of the sacrifice), deeds of loving kindness<sup>130</sup> (no statement of amount in terms of money or time) and study of Torah<sup>131</sup> (no specification of time). Fulfilling some obligations without measure, the *Mishnah* continues, allows a person to enjoy the rewards of such conduct in this world yet does not detract from the positive "capital"<sup>132</sup> a righteous person accumulates in the world-to-

<sup>127</sup> *M. Peah* 1:1.

<sup>128</sup> Deut. 26:1-11.

<sup>129</sup> Deut. 16:16.

<sup>130</sup> See, e.g., Deut. 15:7-8.

<sup>131</sup> See, e.g., Josh. 1:8.

<sup>132</sup> The Hebrew word used for capital, קרן, means in this context the "capital of reward or punishment laid aside for the hereafter." Jastrow, 1422. The word can be either positive or negative depending on context. *Mishnah Peah* uses the word in its positive sense.

come; among these are giving honor to mother and father,<sup>133</sup> deeds of loving kindness, bringing peace between a person and his friend but the study of Torah כנגד כלם “equals them all” or “exceeds them all.”

*Tosefta Peah* opposes this positive listing of righteous deeds with an enumeration of wrongful conduct which entitles a person to punishment in this world without reducing the negative capital a blameworthy person accumulates in the world-to-come. These immoral practices include idol worship, sexual impropriety with a close relative and the shedding of blood but לשון הרע כנגד כלם equals or exceeds them all! Without explanation of why לשון הרע deserves such condemnation, this passage then turns to an extended discussion of the concept of the accumulation of positive and negative capital for the world-to-come, whether through deed or intention. This discussion does not directly mention לשון הרע yet the opposition between the righteous and wicked behavior enumerated in the *Tosefta* clearly frames the discussion. Righteous conduct or intention, of which the paradigm is Torah study, increases positive capital for the world-to-come and results in פירות, variously translated as reward or interest in this world.<sup>134</sup> A transgression, of which the paradigm is לשון הרע, on the other hand, results in an increase in negative capital in the world-to-come and potentially increases interest in this world, depending on whether the wrongdoing leads to further sin.

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<sup>133</sup> See, e.g., Deut. 5:16.

<sup>134</sup> Translating פירות uniformly as reward results in confusion, particularly in this passage. Using “interest” on occasion better suits the intended meaning as long as the reader keeps in mind that interest can have positive or negative connotations depending on whether one lends or borrows.

While set forth in *Tosefa Peah*, this passage elaborates on the meta-halakhic principle, stated in *Mishnah Arakhin*, that the penalty for words exceeds the punishment for deeds. The author or authors of the *Tosefta* have merely taken that reasoning to a further logical conclusion: If the penalty for words is more severe than that for deeds, then the penalty for evil speech must even exceed that set forth for the most heinous sins, including idol worship, incest and murder. In terms of form, in addition, the opposition between study of Torah, לשון הקודש, and evil speech, לשון הרע, must have appealed to the redactors of the *Tosefta*. Just as the study of לשון הקודש had no prescribed limit or quantity, so the practice of לשון הרע had no defined standard or penalty. The authors of the *Tosefta* highlighted these contrasts by setting the list of obligations whose performance accrues to one's benefit in this world and the world-to-come against those transgressions whose commission calls one to account in both this world and the next. The writers of the *Yerushalmi* analyzed the implications of this contrast, particularly as it regards לשון הרע, and it is to that topic that this paper now turns.

### C. Sifra

*Sifra*, a *halakhic midrash* to Leviticus, unites the prohibition addressed in the phrase לא תלך רכיל with the admonition in the second half of Lev. 19:16 לא תעמוד על דם רעך, variously translated as "do not profit by the blood of your fellow" or "neither shall thou stand idly by the blood of thy neighbor." *Sifra* unites these two clauses by implicitly proposing, as part of its collection of *midrashim* to Lev. 19:16, that the first clause addresses the active use of language in a destructive way while the second focuses on the passive refusal to speak or act when speaking or acting may rescue another from

danger. The combination of these interpretive approaches to this single verse balances the requirement to protect confidences shared in friendship against the need to preserve human life.

*Sifra*, literally meaning “a book” in Aramaic, collects various interpretations of Leviticus now loosely organized according to the Babylonian reading order of the sections of the Torah.<sup>135</sup> *Sifra* comments on all of Leviticus on a verse by verse basis, including Lev. 19:16. The style is typically exegetical, with a quote or précis of the verse followed by questions and answers designed to explore the meaning of the passage. The language indicates an origin in *Eretz Yisrael* although the precise century remains a matter of some dispute. Given the incorporation of extensive material from the *Mishnah* and *Tosefta*, the work clearly postdates those two texts.

*Sifra* addresses Lev. 19:16 as part of its larger discussion of *parashat Kedoshim*. Chapter 4 offers 3 different explanations of לֹא תִלַּךְ רֵכִיל. First, the verse forbids speaking soft words to one and harsh one to another, a possible reference to the demeanor expected of a judge in deciding between litigants. The second explanation also probably

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<sup>135</sup> H.L. Strack and Günter Stemberger, *Introduction to the Talmud and Midrash* (Minneapolis: Fortress Press, 1996), 260. The compiler(s) of *Sifra* originally organized the book according to topics based on material drawn largely from the *Mishnah* and the *Tosefta*. Subsequent editing has adulterated this original organization and, given this extensive afterlife, various parts of *Sifra* now have diverse origins. Ibid. at 260-63. Neusner, however, proposes that *Sifra* originally had a uniform and coherent character. Ibid. at 263 (quoting Jacob Neusner, *Sifra in Perspective: The Documentary Comparison of the Midrashim of Ancient Judaism* (Atlanta: Scholars Press for Brown Judaic Studies, 1988), 36.) Moshe Herr believes *Sifra*'s compilation and arrangement cannot predate the end of the 4<sup>th</sup> century. Moshe David Hess, “*Sifra*,” *Encyclopedia Judaica*. Strack disagrees, placing the compilation of a basic core of *Sifra* sometime in the second half of the third century. Strack & Stemberger, at 263. Neusner basically agrees with Strack, placing the compilation of the text somewhere around 300 C.E. Jacob Neusner, *Judaism and the Interpretation of Scripture* (Peabody, Massachusetts: Hendrickson Publishers, 2004), 60.

addresses the correct use of speech although the ambiguity of the terse language prevents a confident conclusion on this matter. According to this second interpretation, a person should avoid acting like the peddler or merchant who "gives a taste of things [tantalizes with words] and goes [on his way]." This expression likely refers to an inappropriate attempt to use language to one's advantage by dropping hints, either about one's own advantages or another's faults.<sup>136</sup> The third interpretation draws almost verbatim from the already discussed passage from M. Sanhedrin 3:6 that prohibits a dissenting judge from revealing the vote of the *Beit Din* to a losing party for the purpose of disassociating himself from the judgment. As in the *Mishnah*, *Sifra* ties this proscription against revealing the deliberations of the court directly to Lev. 19:16 and Prov. 11:13.

The same chapter also discusses the second half of the verse: **לֹא תַעֲמֹד עַל דָּם** (Lev. 19:16). Once again, *Sifra* offers 3 different interpretations. Each interpretation emphasizes the need to speak or act in situations where another stands in peril of life, limb or other harm. The first speaks to the situation of the witness who has information relevant to the disposition of a dispute in court. "How do we know that if you have testimony in someone else's case you may not remain silent," the text asks. In response, *Sifra* quotes the second half of Lev. 19:16, interpreting it as an obligation to speak even where one might wish to remain silent. The next two explanations also forbid passivity where the situation may require something besides words. A person may not, for instance, stand by while someone drowns or is attacked by robbers or wild animals. In the case of the pursuer,<sup>137</sup> moreover, the second half of Lev. 19:16 imposes an obligation to save

<sup>136</sup> In *B.Sotah* 21b, a similar expression refers to a party who attempts to explain his case to the judge before his adversary appears. Jastrow, s.v. "טַעַם."

<sup>137</sup> Deut. 22:25-27.



innocent life and prevent another from committing a heinous sin, even at the cost of his life. This final interpretation locates the scriptural justification for killing the pursuer before he commits the sins identified in *M. Sanhedrin* 8:7 in Lev. 19:16.

This illuminating paragraph takes an exegetical move toward a balanced approach to the interpretation of Lev. 19:16. Although the first half of the verse may prohibit harmful speech, including the revelation of secrets, the second part raises the possibility that silence and inaction may also inflict harm. This brief paragraph does not, of course, explicitly tie the two parts of the verse together. The implication of a unified reading, however, seems entirely reasonable, particularly given the focus of a number of the explanations on the judicial forum. If these two prohibitions from a single verse govern conduct in the same arena, at least in the mind of the compiler(s) of *Sifra*, then expansion of their exegetical meaning to other contexts may also demand a unified reading. This thesis will explore that premise further in following sections.

#### D. The Yerushalmi

The *Yerushalmi*, the Talmud of the land of Israel,<sup>138</sup> expands on the *Mishnah*'s limited discussion of the biblical prohibition contained in Leviticus 19:16 by making an explicit connection between רכילות, an abstract noun<sup>139</sup> describing the activity of the הולך רכיל, and לשון הרע. *Y. Peah* 1.1. In *Yerushalmi Peah*, an extended discussion of the ideas raised in the *Tosefta* about punishment for heinous sins, including לשון הרע,

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<sup>138</sup> Traditional scholarship places the final redaction of the *Yerushalmi* in the first half of the 5<sup>th</sup> Century C.E.

<sup>139</sup> Rabbinic Hebrew in general made greater use of abstract Hebrew word formations than biblical Hebrew. See, Angel Saenz-Badillos, *A History of the Hebrew Language*, trans. John Elwolde (Cambridge: Cambridge University Press, 1993) 184-195.

produces a loosely organized passage that discusses both true and false reports about the activity of others under the rubric of לשון הרע. Consistent with the general program of the *Yerushalmi*,<sup>140</sup> the passage explores the biblical precedents for the punishment of harmful speech noted in the *Tosefta*. In addition to several biblical accounts that illustrate, at least in the mind of its expositors, the punishment exacted for לשון הרע, this passage in *Y. Peah* locates the applicable biblical verse which prohibits לשון הרע in Leviticus 19:16. As perhaps the earliest textual connection between לשון הרע and רכילות, this passage deserves close examination.

Although the *Yerushalmi* is primarily a commentary on the *Mishnah*, it devotes significant attention to exploration of comments contained in parallel passages contained in the *Tosefta*. After discussing the "obligations without measure" which enjoy reward both in this world and the next as set forth in the opening lines of the *M. Peah*, *Y. Peah* turns to the conduct that results in punishment in this world and the next. Although perhaps a logical antipode to the *Mishnah*, this discussion plainly derives from the parallel passage in the *Tosefta*. The *Yerushalmi*, however, amplifies the brief discussion in the *Tosefta* by adding biblical proof texts, including individual verses and extended citation of biblical accounts, as well as references to rabbinic discourse on the subject. As part of this augmentation of the *Mishnah* and *Tosefta*, the pericope reads back into the Hebrew Bible a profound prohibition on speaking לשון הרע that does not explicitly appear in the biblical text.

<sup>140</sup> See generally, Jacob Neusner, *The Talmud of the Land of Israel: A Preliminary Translation and Explanation: Introduction: Taxonomy*, vol. 35 (Chicago: University of Chicago Press, 1983)

The discussion begins with an effort to expose the biblical foundations of the statement identifying לשון הרע as the worst of the heinous sins. The first proof comes from word play: Although the Bible describes the sins of idolatry (Exod. 32:31: the Golden Calf) and sexual misconduct (Gen. 39:9: the proposition of Potiphar's wife) as גדולה and murder as גדול (Cain's killing of Abel), Scripture describes כלי-שפתי חלקות, "all flattering lips" as לשון מדברת גדולות (Ps. 12:4) "tongue[s] that speaks arrogance". The plural גדולות, to the rabbis of the *Yerushalmi* at least, implies the egregious nature of the sin of לשון הרע. The person who speaks "smooth" words, who flatters while keeping his or her hatred hidden,<sup>141</sup> accordingly, receives pride of place in the *Yerushalmi*'s identification of the punishment awaiting those who speak לשון הרע.

The second proof takes a more exegetical approach. In a passage combining both Scriptural citation and midrashic material, the *Yerushalmi* maintains that the story of Joseph shows that even a biblical patriarch suffered punishment in this world on account of speaking לשון הרע. Although the biblical text does not specify the bad reports (דבתם) about his brothers that Joseph brought to his father as reported in Genesis 37:2, the *Yerushalmi* identifies three different statements Joseph made against his brothers.<sup>142</sup> For each instance of לשון הרע, Joseph suffers punishment in kind: (1) He claims his brothers ate from an animal without proper slaughtering it first and his brothers use the blood of slaughtered kid to deceive Jacob into thinking wild animals have killed Joseph (Gen.

<sup>141</sup> See Ps. 5:10 ("For there is no sincerity on their lips; their heart is filled with malice; their throat is an open grave; their tongue slippery.")

<sup>142</sup> A different rabbi offers each of the three statements. Consistent with the biblical text, the *Yerushalmi* assumes that Joseph made multiple bad reports to Jacob about his brothers.

37:31-35); (2) he claims his brothers treated the sons of Bilhah and Zilpah like slaves and his brothers sell him into slavery ( Gen.37:25-28); and (3) he asserts that his brothers cast their eyes on the daughters of the land and his Egyptian master's wife later casts her eyes upon him (Gen. 39:11-18).

Each of the statements of Joseph identified by the text provides clues about the range of meaning assigned to לשון הרע by the rabbis of the *Yerushalmi*. As to the statement concerning slaughtering, the passage latter indicates that the rabbis assumed Joseph lied to his father on this score. They draw their proof text from Gen. 37:31, reasoning that the verse's use of the verb שחט demonstrates the brothers' proper observance of שחיטה, the ritual slaughter of animals. In their view, accordingly, a false statement about others' lack of ritual observance fits the definition of לשון הרע. One could assume, based on this statement alone, that the concept of לשון הרע includes a presumption of falsity.

The other two statements, however, do not clearly fit into this pattern of falsity. At the very least, the *talmudic* text does not belabor the inaccuracy of these statements in the way it dwelled on the falsity of the first. Genesis 37:2, which identifies Joseph as a shepherd who helps the "sons of Bilhah and Zilpah" tend the flocks, hints at the truth of the statement concerning the disrespect the sons of Leah and Rachel allegedly showed the sons of Bilhah and Zilpah. A close reader of the biblical text could plausibly interpret this as an implication that the sons of Leah and Rachel did not themselves tend the flocks but had the sons of Bilhah and Zilpah do so with the youthful assistance of Joseph. The account of the killing of the men of Shechem by Jacob's sons, which concludes with the taking of the children and women of the city as captives (Gen. 34:29), makes the

suggestion that Jacob's sons looked favorably on the women of the land at least plausible. In any case, the *Yerushalmi* does not provide proof texts to demonstrate the falsity of the latter two reports as it did with the first.

We could tentatively conclude, based on this reading of the *Yerushalmi*'s expansion of the *Tosefta*, that לשון הרע by at least the 4<sup>th</sup> Century C.E. includes both truthful and untruthful reports about others that might lower their estimation in the eyes of the listener. An even more nuanced interpretation might focus on the close relationship between the subjects of the reports (the brothers) and the listener (Jacob) and the possibility of personal gain the speaker (Joseph) might enjoy from relaying these reports to a person in a position to take detrimental action (their father) based on them.<sup>143</sup> Certainly, in the Joseph story as a whole, the brothers perceive Joseph as a threat and the "evil reports" Joseph provides to their mutual father and source of their future patrimony gives them some cause for concern. The authors of *Y. Peah* presumably chose the Joseph story because Joseph in some way exemplified the blameworthiness of the speaker of לשון הרע, and these factors may have played a part in the selection of this biblical narrative.

Our tentative conclusion receives additional support from the additional evidence brought to bear in *Y. Peah* on the punishment destined for the speaker of לשון הרע. After noting that לשון הרע is called שלישי, "three" because it kills three, "the one who speaks it, the one who receives it and the one about whom it is spoken",<sup>144</sup> the tractate gives the

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<sup>143</sup> This has obvious parallels to the accounts in the Books of Daniel and Esther discussed earlier.

<sup>144</sup> The Wisdom of Ben Sira also warned against the לשון שלישת, the "triple tongue." This reference also warned against the consequences of harmful speech.

example of Doeg from the account given in I Sam. 22:6-19. In that biblical passage, Doeg, after Saul complains that his retainers have concealed information from him, truthfully reveals that he saw David receiving food and the sword of Goliath from Ahimelech, a priest of Nob. Although Doeg offers accurate information to Saul about the exchange he witnessed between David and Ahimelech (1 Sam. 21:1-8), the *Yerushalmi* clearly discusses the revelation as an example of לשון הרע. In support of this conclusion, the passage asserts that Doeg's לשון הרע killed Doeg who spoke (presumably 1 Sam. 31:6), Saul who listened (ibid) and Ahimelech about whom Doeg spoke (1 Sam. 22:18).

One other example will suffice. In discussing אבק לשון הרע, a statement akin or close to לשון הרע, the *Yerushalmi* gives the example of the exchange between Abraham and Sarah after the prediction Sarah will give birth to a son in the next year despite the couple's advanced years (Gen. 18:10-15). In this familiar passage, God repeats Sarah's disbelieving reaction to the prediction ("Now that I am withered, am I to have enjoyment - with my husband so old?") but omits her comment about the age of her husband, then 99. The implication seems relatively clear: If God had repeated Sarah's entirely truthful comment about Abraham's age, such a statement would have resulted in the divine utterance of לשון הרע. Sarah's own statement about herself ("Now that I am withered,..."), on the other hand, does not constitute לשון הרע in the minds of the redactors of the *Yerushalmi*.

Accordingly, לשון הרע includes the dissemination of both true and false reports about others, particularly in those situations where the listener has potentially detrimental

influence over the subject of the information. Even biblical patriarchs and matriarchs may commit the sin of לשון הרע and they face punishment as a result. Perhaps in part for this reason, *Y. Peah* 1.1 attempts to locate the precise biblical source for the prohibition of לשון הרע. The text first anonymously offers Deut. 23:10: רע, “be on guard against anything untoward,” or, more fitting of the context, “be on guard against every evil word.” Rabbi La, on the other hand, cites Rabbi Ishmael as teaching that the prohibition comes from Lev. 19:16: לא תלך רכיל בעמך because לשון הרע. We might translate this latter Hebrew sentence as: “This [term] רכילות is [or refers to] לשון הרע.”<sup>145</sup> These terms connect, at least according to the following teaching of Rabbi Nehemiah in *Y. Peah*, because Scripture warns against being like the רוכל “who carries his words to that one and that one’s words to this one.”

The *Yerushalmi* therefore connects species of verbal wrongdoing that the *Mishnah* had treated separately in different tractates. If Lev. 19:16 prohibits both the לשון הרע discussed in *M. Arakhin* 3:5 and the רכילות identified in *M. Sanhedrin* 3:7, then the two terms may have had more in common than sharing a source in the same biblical proscription, they may also have had some co-extensive range of meaning. One term

<sup>145</sup> Roger Brooks translates the Hebrew as “Said R. La, ‘R. Ishmael taught, ‘Do not go about as a talebearer among your countryman’ (Lev. 19:16)--this implies [a prohibition against] slanderous gossip.” Roger Brooks, *The Talmud in the Land of Israel: A Preliminary Translation and Explanation* Vol. 2 *Peah* (Chicago: University of Chicago Press, 1990), 64. The context of the teaching, however, does not demand translating לשון הרע as a particular kind of רכילות (“slanderous gossip”) rather than a statement implying equivalence between the two Hebrew terms. If, as Brook implicitly contends, the addition of רכילות refers to a specific subset of the broader category of לשון הרע, it would hardly make sense to place the source of the prohibition of an entire category of wrongful speech in a verse addressing only one of its aspects.

might have had a broader meaning than the other but some types of verbal wrongdoing might have been validly described as both לשון הרע and רכילות.

Based on the *Yerushalmi* passage, however, we cannot conclude that the two terms included a common concern with the protection of secrets or confidences. Although the Hebrew Bible identifies the הולך רכיל as a revealer of secrets, the examples of לשון הרע given in the passage from the *Yerushalmi* do not identify the information relayed as particularly confidential. The false statement made by Joseph about his brothers' failure to observe שחיטה, for instance, cannot be considered the revelation of a secret or confidence. More important, most of the true statements discussed in the *Yerushalmi* passage under the rubric of לשון הרע reveal facts that a number of others might have known besides the speaker but about which the hearer apparently was ignorant.

Clearly, however, whether described as לשון הרע or רכילות, the statements described in this sustained discussion in the *Yerushalmi* fall within the meta-halakhic principle identified in connection with the *Mishnah*; namely that the harm done by words can exceed that caused by deeds. For that reason, the *Yerushalmi* describes the act of speaking לשון הרע as equivalent to denying the existence of God, an affront to both heaven and earth.<sup>146</sup> What's more, the harm done by לשון הרע exceeds the done by arrows. While arrows strike close at hand, לשון הרע can strike from afar.<sup>147</sup> Even the pain of לשון הרע persists longer than other wounds, engendering suffering that persists

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<sup>146</sup> The *Yerushalmi* here uses Psalm 50 as its proof text.

<sup>147</sup> Here, the *Yerushalmi* cites Ps. 120:3-4 for support.



longer than slow-burning coals.<sup>148</sup> Accordingly, while other sins earn punishment only in this world, idolatry, incest, murder and לשון הרע produce punishment in both this world and the next.

Given the egregious nature of the sin of לשון הרע, the *Yerushalmi* identifies only two circumstances where a person may utter it. The first we have already discussed above in connection with Sarah: a person may speak truthfully about themselves even though the same words in the mouth of another might constitute לשון הרע. The second situation the rabbis of the *Yerushalmi* draw from the account given of the final days of David's reign as set forth in I Kings 1:1-31. Based on Nathan's counsel to Bethsheba, in which he advises Bathsheba to truthfully tell the failing king that Adonijah has claimed the kingship. Rabbi Samuel bar Nahman, in the name of Rabbi Jonathan, concludes that one may speak לשון הרע against בעלי מחלוקת, opponents in an argument or dispute.

Although this exception seemingly speaks a lot more about the world of the rabbis of the *Yerushalmi* than the circumstances of David's time, this exception receives critical attention in later rabbinic commentary.

#### E. The Babylonian Talmud

Two centuries, perhaps as many as three, separate the completion of the *Yerushalmi* from the close of the Babylonian Talmud.<sup>149</sup> The passage of 200-300 years and the different cultural settings of the two compilations influenced the style, interests and values reflected in the two Talmuds. These differences result from more than just the ongoing accretion of legal and *aggadic* material in the latter Talmudic collection. Both

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<sup>148</sup> Ibid.

<sup>149</sup> Jeffrey L. Rubenstein, *The Culture of the Babylonian Talmud* (Baltimore: John Hopkins University Press, 2003), 3.

collections contain traditions attributed to Amoraic sages, but the Babylonian Talmud also has an extensive anonymous layer of commentary that provides sustained analysis of the Amoraic stratum.<sup>150</sup> This anonymous layer reflects the contribution of scholars who postdate the last generation of Amoraic sages, dated to somewhere in the 5<sup>th</sup> Century C.E.,<sup>151</sup> and contains detailed argumentation that probes the sayings attributed to the Amoraim. These latter scholars, now generally referred to as the Stammaim following the title given them by David Weiss-Halivni, preserved not just the conclusions of their discussions (when they reached a conclusion), but also the trajectory of the argument itself.

As a result of this shift from preservation of the brief, apodictic statements of the Amoraim to the construction of elaborate and highly structured arguments sparked by these sayings, the material in the *Bavli* associated with לשון הרע and harmful speech in general vastly exceeds that found in the *Yerushalmi*. This paper, accordingly, concentrates on passages specifically dealing with the issue of confidentiality as well as several extended *sugyot* which exemplify the *Bavli*'s treatment of harmful speech, which,

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<sup>150</sup> Ibid., 2-7. The *Yerushalmi* also has limited anonymous layer, consisting of about 10% of the total text. The *Bavli*'s anonymous commentary, in contrast, comprises about half of the text. Ibid., 4.

<sup>151</sup> Scholars generally place the end of the Amoraic period sometime in the 5<sup>th</sup> Century C.E. The *Bavli* refers to the generation of R. Ashi and Ravinah as the end of הוראה. *B. Baba Metzia* 86a; See also *Iggeret Rav Sherira Gaon*. If this reference means to deny following generations the authority of the "expounders," then the Amoraic period ended sometime between 420 and 499 C.E., depending on whether the Ravina mentioned in this passage is Ravina I (d. circa 420 C.E.) or Ravina II (d. circa 499). Scholars generally accept this dating of the close of Amoraic period, although a lively debate continues as to when precisely the editing of the *Bavli* ceased. Rubenstein, *Culture of the Babylonian Talmud*, 1; Meyer S. Feldblum, "The Talmud: Abraham Weiss's Views," in *Essential Papers on the Talmud*, ed. Michael Chernick (New York: New York University Press, 1994), 88-126; David Weiss Halivni, "The Amoraic and Stammaitic Periods," *ibid.*, 127-60.

as a category, may include the revelation of truthful yet hurtful information about another. Those passages which only refer in passing to harmful speech or merely repeat content or concepts already illustrated in the longer discussions are dealt with, if at all, only subtextually.

The *Bavli*'s standard source for the treatment of confidential discussions appears as part of an extended passage dealing with the manner in which Moses communicated with God in the "Camp of the Shekinah," the camp which contained the Tent of Meeting after the "כבוד" inhabited the Mishkan (B. Yoma 4b).<sup>152</sup> Immediately after the divine cloud descends upon the Mishkan at the close of Exodus, the first verse of Leviticus begins: ויקרא אל משה וידבר יי אליו מאהל מועד לאמר. The Rabbis puzzled about the sequence of words of speaking expressed in this one verse: "The Lord **called** to Moses and **spoke to him** from the Tent of Meeting, **saying**:" According to their usual interpretive schema, the Rabbis interpreted the verse to give each word meaning. God **called** to Moses in order to bring him into the Tent of Meeting, which he could not have otherwise entered.<sup>153</sup> God **spoke to him** alone from or in<sup>154</sup> the Tent of Meeting so that only Moses could hear the voice. The verse therefore teaches that God called Moses from the Tent of Meeting into a confidential discussion which only the two of them could hear.

The Rabbis interpreted the last word "saying," to teach an important lesson about confidential conversations. They interpreted לאמר as a contraction of לא אומר, "don't

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<sup>152</sup> Exod. 40:34-35.

<sup>153</sup> Exod. 40:35: "Moses could not enter the Tent of Meeting, because the cloud had settled upon it...."

<sup>154</sup> Rashi interprets this verse as a statement that God spoke to Moses to the exclusion of others in the Tent of Meeting.

“speak” or “don’t repeat.” According to R. Menasya, the son of R. Mosya, this word instructs us that when we have a conversation with a friend in confidence, we may not repeat what we have heard without permission. Just as Moses only repeats, from the total content of his confidential conversation with God within the Tent of Meeting,<sup>155</sup> what God instructs him to reveal, so a confidant should respect the confidentiality of conversations held in a place of privacy by only revealing as much of the conversation as his or her friend permits.

This teaching is not simply a backdrop for the Rabbis’ belief in the existence of Oral Law, the body of law traditionally conceived as transmitted orally to Moses at Sinai along with the Written Law. The Rabbis also expected those bound together in fellowship to respect each other’s confidences. As already demonstrated above, this expectation had significant warrant in both biblical and post-biblical statements on the subject of harmful speech. The Rabbis would have taken these statements seriously on their own merit.

The protection of confidences may have also served other practical interests. In part, the discussion in *B.Yoma* 4b may have stemmed from a desire to encourage free discussion between friends. The *Bavli* has high regard for friendship and companionship. “Companionship or death!” Rava notes in connection with the story of Honi the Circle-Drawer who died because the Sages failed to recognize or honor him when he awoke from a 70 year sleep (*B.Taanit* 23a). Those friends who, like Job’s companions, listen to and attempt to comfort a comrade in pain are particularly praiseworthy: “Rava said:

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<sup>155</sup> The Rabbis interpreted the imperative *לֹא יִסְתֵּר* Lev. 1:2 and following verses as God’s permission to Moses to reveal what he had heard in the Tent of Meeting but only to the extent explicitly set forth.

‘Either friends like the friends of Job or death!’” *B. Baba Batra* 16b. By relating a concern to a friend, the *Bavli* also affirms, a person may remove it from their mind and heed the wisdom of Proverbs: “If there is anxiety in a man’s mind, let him quash it, and turn it into joy with a good word” (*B. Sotah* 42b; *B. Yoma* 75a).<sup>156</sup>

Those who reveal the secrets of their companions, on the other hand, receive condemnation in the *Bavli*. After quoting the *Mishnah* directing judges not to reveal the opinions of their fellow jurists to the litigants (*M. Sanhedrin* 3:7), the Gemara relates an incident involving a student who revealed a matter spoken of in a place of study 22 years earlier. *B. Sanhedrin* 31a; Cf. *B. Baba Kamma* 99b. Following the student’s revelation, Rav. Ami expelled him from the בית מדרש saying: “This one reveals secrets (רזי)!” (*B. Sanhedrin* 31a). Just as a judge should not reveal the secret deliberations of a group of fellow jurists, so a student should not disclose the private content of the discussions between those who share the companionship of a place of study. Neither the passage of time nor the number of those engaged in the common enterprise excuses the revelation of the secrets of companions to outsiders. Even the heat of argument does not excuse the disclosure of secrets. Quoting Proverbs 25:9 (“Defend your rights against your fellow, But do not give away the secrets of another,...”), *B. Sanhedrin* 44b portrays the Angel Gabriel as daring to admonish God for directing Ezekiel to proclaim the non-Jewish origin of Abraham and Sarah in Ezekiel 16:3.<sup>157</sup> According to the *Bavli*, Gabriel dares to admonish the Creator in this way because the revelation of information most people

<sup>156</sup> The *Bavli* apparently reads שָׁקַדָה “subdue” or “weigh down” as if it came from the root סָקַד (or perhaps נָסַד) “to sweep away” or “remove.” But see Rashi to *B. Yoma* 75a (suggesting connection to the root שָׁח “to talk” or “converse” for a friend will listen and offer advice.)

<sup>157</sup> “By origin and birth you are from the land of the Canaanites—your father was an Amorite and your mother was a Hittite.”

would prefer to keep secret (in the cultural milieu of the Rabbis, the non-Jewish origin of one's ancestors) falls into the category of "wronging through words" elsewhere forbidden.<sup>158</sup> Even God, in the imagination of the Rabbis, may be rebuked for its violation.

We cannot discount, in addition, the practical function the prohibition on "wronging through words," including the revelation of secrets, may have played in the world of the Rabbis. Recent scholarship has raised questions about the extent of influence the Rabbis of the *Mishnah* and Talmuds had in non-rabbinical Jewish society, let alone in the Roman (Palestine) or Persian (Babylon) culture which surrounded them.<sup>159</sup> The more insulated the world of the Rabbis from the surrounding population, both Jewish and non-Jewish, the more concerned the Rabbis would have been to protect their secrets from disclosure to outsiders.<sup>160</sup> The *sugyot* discussed above demonstrate that protection of secrets remained a concern of the Rabbis although, on the basis of these few citations alone, one could hardly say that protection of these secrets played the same role in, say, Tiberias or Babylon, as it did at Qumran.

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<sup>158</sup> *M. Baba Metzia* 4:10 says: "Just as there is wronging through buying and selling, so there is wronging through words...if he were a descendant of converts, one must not say to him, 'Remember the deeds of your ancestors! For it is said, 'You shall not wrong a stranger or oppress him,...'" This *mishnah* receives extended discussion at *B. Baba Metzia* 58b-59b.

<sup>159</sup> See, e.g., Gunter Stemberger, "Rabbinic Sources for Historical Study," in *Judaism in Late Antiquity* ed.. Jacob Neusner and Alan J. Avery-Peck (Boston: Brill, 2001), 169-86.

<sup>160</sup> Indeed, if this recent scholarship has merit, we might have anticipated even more admonitions against the revelation of secrets in the Talmudic corpus. Nothing in the nature of the specific punishments meted out to the members of the Qumran sect in the *Rule* for רכיל, for instance, appears in the Talmud. The more diffuse nature of rabbinic culture, however, might have made expulsion an ineffective punishment in any case.

Even within rabbinic society, the Rabbis had reason to restrict hurtful speech, including that involving the revelation of secrets disclosed as part of the common enterprise of teaching and learning which occupied the attention of the Rabbis. In his study of the culture of the Babylonian Talmud, Jeffrey Rubenstein points out that oral cultures tend to be “agonist”—i.e., “orality situates knowledge within a context of struggle.”<sup>161</sup> Debate of the kind experienced in the Babylonian academies involved direct, face-to-face conversations between opponents whose tempers could flare and whose fists could fly. For that reason, Rubenstein concludes, the Babylonian Talmud reflects a culture which valued argumentation so highly that stories of verbal violence and shaming played an important part in the creative imagination. Although Rubenstein does not, one could attempt to extend his analysis into the area of hurtful speech associated with such phrases as *לשון הרע*, *הוציא שם רע* and *הולך רכיל*, *אונאת דברים*. Although a detailed analysis is beyond the scope of this paper, the *Bavli* does appear to reflect a culture more accepting of the possibility that its members may, from time to time, fall into the error of *לשון הרע*. The possibility of punishment in the “world-to-come” for *לשון הרע* disappears from the *Bavli* as the text turns to more mundane questions regarding the nature and avoidance of punishment in this world for hurtful words. The *Bavli* primarily addresses these questions through *sugyot* discussing *לשון הרע*.

By number, the *Bavli* contains more references to *לשון הרע* than the *Yerushalmi*. Only a handful of these *sugyot*, however, contain more than a passing discussion of the

<sup>161</sup> Rubenstein, *Culture of the Babylonian Talmud*, 62-3 (quoting Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1982), 43-6)

concept. As with the *Mishnah* and *Yerushalmi*, the *Bavli* focuses on the difficulty of assigning hurtful speech to a proper category in the dialectic of sin and atonement that occupies much of the attention of the Rabbis. Is לשון הרע a sin? If the בעל לשון commits a sin, what is the nature of his or her punishment? Once the speaker has uttered לשון הרע, can she or he atone for their harmful words? If so, how and to what effect? These questions dominate the discussion of לשון הרע in the *Bavli* because harmful speech defies easy categorization. The *Mishnah* hardly remedies this problem in its few terse references to harmful speech. The *Yerushalmi* makes a more determined effort but, assuming that the editors of the *Bavli* were even aware of the *Yerushalmi*'s discussion of this subject, the *Bavli* pulls back from important implications of the categorization of לשון הרע as the worst of all possible sins by delving into the possibility of atonement or justification for harmful speech. In its sensibilities, the *Bavli*, as opposed to the *Yerushalmi*, seems to assume a human propensity to לשון הרע that cannot be addressed solely by raising the specter of punishment in both this world and the next.

The *Bavli* admittedly has several statements acknowledging the severity of the sin of לשון הרע. Like the *Yerushalmi*, the *Bavli* (*B. Arakhin* 15b) declares that the speaker of לשון הרע denies the existence of God, citing Psalm 12:5<sup>162</sup> as the prooftext.<sup>163</sup> The *Bavli* also identifies a number of punishments that come as a result of לשון הרע: destruction

<sup>162</sup> "They say, "By our tongues we shall prevail; with lips such as ours, who can be our master?"

<sup>163</sup> The *Yerushalmi* attributes the saying to R. Yose in the name of R. Yochanan. The *Bavli* attributes the saying to R. Yochanan in the name of R. Yose ben Zimra.



(*B. Arakhin* 15b, *B. Sotah* 5a),<sup>164</sup> distinctive death (*B. Sotah* 35a),<sup>165</sup> denial of reception into the presence of the שכינה (*B. Sotah* 42a),<sup>166</sup> division of David's kingdom into two monarchies (*B. Shabbat* 56b), צרעת (*B. Arakhin* 15b),<sup>167</sup> אסכרה (*B. Shabbat* 33a, *B. Sotah* 35a),<sup>168</sup> and withholding of rain (*B. Taanit* 7b).<sup>169</sup> Also similar to the *Yerushalmi*, the *Bavli* contains statements identifying לשון הרע as a sin more grievous than idol worship, sexual impropriety and the shedding of blood (*B. Arakhin* 15b). Both the *Bavli* and the *Yerushalmi*, accordingly, regard לשון הרע as a terrible sin worthy of punishment.

The *Bavli*, on the other hand, does not explicitly maintain, as the *Yerushalmi* does at length, that לשון הרע earns the speaker punishment in both this world

<sup>164</sup> Psalm 101:5 ("He who slanders his friend in secret I will destroy; I cannot endure the haughty and proud man.") serves as the biblical prooftext.

<sup>165</sup> The evidence for the distinctive death of the spies comes from the death by "the plague" suffered by those who brought back evil reports about the land as reported in Numbers 14:36-8. The Rabbis took the *patach* under the *bet* in verse 37 as the definite article: hence "the plague," a distinctive plague, and not just an ordinary plague.

<sup>166</sup> Based on Psalm 5:5 ("For you are not a God who desires wickedness; evil (רע) cannot abide with you.")

<sup>167</sup> A complex of various ailments afflicting human skin, fabrics, leather and plaster. The conventional English translation of this Hebrew word, "leprosy," misleads the reader because the symptoms of צרעת as described in Leviticus do not conform to Hansen's disease, the medical name for the affliction known in English as leprosy. Levine, *Leviticus*, 75. The biblical prooftext for the association between צרעת and לשון הרע appears in Numbers 12:1-3, where Miriam suffers צרעת as a result of her criticism of Moses "because of the Cushite woman he had married...."

<sup>168</sup> Sometimes identified with diphtheria since death comes through constriction of the throat. See Rashi to *B. Shabbat* 33a. The Rabbis considered אסכרה the harshest of all forms of death. *B. Berachot* 8a.

<sup>169</sup> Proverbs 25:23 supplies the support: "A north wind produces rain, and whispered words, a glowering face."

and the world-to-come.<sup>170</sup> The *Yerushalmi*'s view that לשון הרע inevitably increased the capital laid aside for punishment in this world and the hereafter, in fact, does not find support in the *Bavli*. The *Bavli* instead devotes some attention to how a person or a people may atone for לשון הרע in this world. A sage may find atonement in Torah study. (*B.Arakhin* 15b).<sup>171</sup> The ignorant should humble themselves (*ibid*).<sup>172</sup> When the Temple still stood, the *Bavli* concludes (*B.Arakhin* 16a), the people found atonement for לשון הרע through either the robe worn by the High Priest<sup>173</sup> or through the daily burning of incense<sup>174</sup> in connection with daily service. Accordingly, whereas the *Yerushalmi* accommodated the absence of a prescribed system of sacrifices to atone for לשון הרע by positing an exemplary sin that consigned its practitioners to divine retribution in this world and the next, the *Bavli* attempts to bring לשון הרע within the scheme of atonement which applied to other sins. In the absence of a Temple and its sacrificial system, however, the Rabbis could only envision Torah study and modest action as potential atonement for לשון הרע.

<sup>170</sup> The denial of reception into the presence of the שכינה implies some form of punishment in the world-to-come. This passing reference in *Sotah*, however, lacks the clarity and vigor of the *Yerushalmi*'s denunciation of לשון הרע.

<sup>171</sup> The first strophe of Prov. 15:4: "A healing tongue is a tree of life." The Rabbis probably interpreted מרפא as "cure" or "recovery"; hence, "the Tree of Life is (the) cure of (the) tongue."

<sup>172</sup> The second strophe of Prov. 15:4: "But a devious one (tongue) makes for a broken spirit." The Rabbis interpreted the root מלק according to its meaning in Aramaic; hence, "a broken spirit removes (the tongue)"

<sup>173</sup> The robe has bells on its hem that announce the coming of the High Priest. *Exod.* 28:33-35. In the Rabbis' imagination, the sound of the bells atoned for the sound of לשון הרע.

<sup>174</sup> The incense burned in private on the inner alter atoned for לשון הרע which is often done in secret whispers.

This attempt is consistent with Rubenstein's view that the Babylonian academies placed such a high value on argumentation that the Babylonian sages frequently insulted, embarrassed or disparaged each other while contesting points of law.<sup>175</sup> Torah study accordingly offered the Rabbis a way to atone for intemperate and hurtful language uttered in debate. He contrasts this situation with the mores of the Palestinian rabbis who, at least according to the reports in the *Bavli*, generally treated each other with respect even when debating disputed matters. We might anticipate that a culture with this heightened tendency toward verbal antagonism would struggle to classify and explain לשון הרע so as to place at least the customary features of academic debate outside the definition of sin. The *Yerushalmi* had already begun to move in this direction by including the saying attributed to Rabbi Samuel bar Nahman, in the name of Rabbi Jonathan, that one may speak לשון הרע to an opponent in a dispute or argument (*Y. Peah* 1:1). The *Bavli* continues this movement by identifying and discussing other circumstances in which a person may utter hurtful speech and yet not utter לשון הרע. This identification is more than self-serving rhetoric; it demonstrates that the Babylonian academies also acknowledged some biblical prohibition against speaking לשון הרע while struggling with how to make this commandment intelligible in a culture where the outcome of oral debate mattered. Neither the *Mishnah* nor the *Yerushalmi* (assuming the Babylonians were even aware of the discussion of לשון הרע in *Y. Peah* or the *Tosefta*) explained how the general prohibition against לשון הרע applied to the rhythms of

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<sup>175</sup> Rubenstein, *Culture of the Babylonian Talmud*, 56. Rubenstein cites *B. Sanhedrin* 24a for support, a text that contrasts the graciousness of the Palestinian sages in debate with the bitterness of their Babylonian counterparts.

everyday life and the *Bavli*, consistent with the give and take of its rhetorical style, attempted to fill that gap.

An important part of the background of the *Bavli*'s discussion of לשון הרע appears in *B. Baba Batra* 164b-165a. As part of a discussion examining what statements, even seemingly complimentary ones, may indirectly lead the hearer to draw negative conclusions about the subject of the conversation, the Gemara attributes a telling statement to Rav Amram in the name of Rav: "There are three transgressions from which no person is protected every single day; they are impure thoughts, calculation of the effects of prayer and לשון הרע. The anonymous *Stam* layer of the *sugyah* expresses surprise at this notion: "Do you really think (this could be so)?" The *Stam* then retreats from the implications of the statement attributed to Rav Amram by proposing that it really refers to אבק לשון הרע, a shade of, or something akin to, לשון הרע.<sup>176</sup> This phrase usually refers to ambiguous statements that the listener could take either as a compliment or a criticism.<sup>177</sup> The *sugyah* (*B. Baba Batra* 165a) then repeats the same pattern before concluding. After citing another *Amora* in the name of Rav (Rav. Yehudah) to the effect that everyone speaks לשון הרע, the *Stam* once again relates the statement to אבק לשון הרע, refusing to admit that most people regularly violate the prohibition against speaking לשון הרע but conceding that they habitually come close.

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<sup>176</sup> Literally, the "dust" of לשון הרע.

<sup>177</sup> The example usually given comes from *B. Arakhin* 15b: "Where can one find fire except in Ploni's house where there is meat and fish?" One could view this statement as a compliment concerning a person's reputation for hospitality. According to Rashi, however, this could also imply that the owner of the house flaunts his wealth by constantly cooking various dishes.

This realism about human nature produces some important qualifications to the general rule against speaking לשון הרע. First, *B.Arakhin* 15b ascribes to Rabbah the position that anything said in the presence of the person being discussed does not constitute לשון הרע. This may violate other strictures, such as the prohibition against אונאת דברים (verbal wronging), but, in the position attributed to Rabbah, does not involve לשון הרע, presumably because such statements do not entail the conduct criticized in, for example, Psalm 101:5: "He who slanders his friend in secret I will destroy;...." In this view, forthright criticism in the presence of the person spoken about, even if it involves hurtful speech, does not transgress the prohibition against לשון הרע.

Second, according to the position ascribed to Rabbah bar Rav Huna (*B.Arakhin* 16a), nothing said in the presence of three people (or more, presumably) violates the prohibition against speaking לשון הרע. This conduct falls outside the prohibition on לשון הרע because disclosing the information to three people presumptively ensures its wide circulation. In the words of the *Bavli*: "Your friend has a friend and your friend's friend has a friend."<sup>178</sup> This justification implies that the *sugyah* envisions a situation where a person reveals information about himself or his affairs in a manner that reasonable people would expect to result in even wider disclosure. The number three has a certain arbitrary quality if the probability of wider disclosure serves as the benchmark for this exception. What seems important here is not so much the number 3 as what the number represents. While, as already discussed in connection with *B.Yoma* 4b, disclosing information to just one person in private entitles the speaker to a presumption of confidence, the *Gemara*

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<sup>178</sup> *B.Arakhin* 16a.

apparently reasons that telling 3 people represent the minimum number entitled to the opposite presumption of public disclosure.

In addition to these explicit exceptions to the prohibition of speaking לשון הרע, we must also consider whether the *Bavli* subjects לשון הרע to the same exceptions that otherwise apply to other commandments. *M.Yoma* 8:6, for example, affirms the priority of human life over ritual observance by allowing food and medicine to save life even on Yom Kippur or Shabbat. The *Bavli* concurs (*B.Yoma* 84b-85b; *B.Sanhedrin* 73a-74b) and extends this reasoning to permit a person to save her life<sup>179</sup> through any forbidden conduct with the exception of idolatry, sexual impropriety and murder (*B.Pesachim* 25a-25b). Given the comparison between these sins and לשון הרע made in both the *Yerushalmi* and the *Bavli*, we might expect some discussion in the Gemara about whether we may speak לשון הרע to save ourselves or others from harm. Unfortunately, no such statement appears in the *Bavli*.

We may, however, imply permission to utter לשון הרע to save human life from the rhetorical patterns of the *Bavli*'s discussion of harmful speech. In the first instance, we cannot regard the exclusion of לשון הרע from the list of cardinal sins in the discussion of saving human life as a mere oversight. As important, the Gemara's attempt to identify circumstances where a person may speak לשון הרע without violating the prohibition against evil speech implies an important distinction from the other cardinal sins. By acknowledging circumstances permitting the use of לשון הרע, *B.Arakhin* 16a regularizes the sin and implicitly removes it from the same category as idolatry, sexual

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<sup>179</sup> A person may also protect the life of another fleeing from a pursuer through all possible means, even at the cost of the attacker's life. *B.Sanhedrin* 73a-74b.

impropriety and the shedding of blood. If the impropriety of לשון הרע depends on the particular facts and circumstances of the situation, then לשון הרע, at least as it regards the protection of other values, must give way to the priority of human life.<sup>180</sup>

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<sup>180</sup> In the area of punishment, however, the severity of לשון הרע still applies. As noted before, the Rabbis regarded the establishment of punishment or a system of sacrifices for designated conduct as an important aspect of God's mercy toward human beings. By suffering the punishment or making the prescribed sacrifice, a person could atone for his or her sins and reconcile with God. Even a person guilty of capital crime could anticipate that their death would atone for the wrong they had committed. Wrongful conduct without identified punishment or sacrifice, however, left open the possibility of divine retribution in both this world and the next. From the Bible, the Rabbis knew that speech could inflict harm, yet, with the exception of the מוציא שם רע, the Bible failed to identify specific punishment or sacrifices. This implied a divine system of justice, including disease and calamity in this world and punishment in the next, for לשון הרע. In this way, accordingly, one could speak of לשון הרע as exceeding the cardinal sins of idolatry, sexual impropriety and the shedding of blood. An important aspect of the Rabbis' discussion of לשון הרע therefore concerns the establishment of a method of atonement for harmful speech besides those associated with the Temple cult. For the Sages, Torah study provided an easily accessible method of securing divine pardon.

## CHAPTER FIVE

### Post-Rabbinic Literature

#### A. Mishneh Torah

Rabbi Moses ben Maimon, known by his acronym RaMBaM, perhaps the greatest figure in post-Talmudic Judaism, compiled his great *Mishneh Torah* over a 10 year period ending in approximately 1180 C.E.<sup>181</sup> The *Mishneh Torah*, a title with a number of possible English translations, including “second to Torah,” “repetition of Torah,” or “teaching of Torah”, compiles in a systematic way the corpus of Jewish law from the Hebrew Bible up to Rambam’s own time.<sup>182</sup> Unlike previous books of *halakhah*, Rambam included in his code the entire Jewish legal system, regardless of its practical significance in the Diaspora. His code also includes “principles relating to Jewish thought, theology, and ethics, and to the mental and physical aspects of human conduct.”<sup>183</sup>

Rambam divided his *Mishneh Torah* into 14 different books. Each book, in turn, contains a number of sections, each entitled *Hilchot* (“laws of”) followed by the name of the legal topic covered. The laws of לשון הרע are located in ספר המדע, the Book of Knowledge, in chapter 7 of the section entitled הלכות דעות, the laws of ethics or wisdom.

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<sup>181</sup> Louis Isaac Rabinowitz, “Maimonides, Moses,” *Encyclopedia Judaica*. According to Menachem Elon, however, the *Mishneh Torah* itself mentions 3 different dates in connection with its composition. He notes that while uncertainty surrounds the exact date of the completion of the *Mishneh Torah*, we know that Rambam wrote it over a period of 10 years. Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), 1188 n. 22. Isadore Twersky further points out that Rambam kept reviewing and revising the *Mishneh Torah* throughout his lifetime. Isadore Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale University Press, 1980), 17-18.

<sup>182</sup> Elon, *Jewish Law*, 1186.

<sup>183</sup> *Ibid.*, 1191.



Rambam's codification, not surprisingly, draws upon the Bible, *Tosefta*, *Yerushalmi* and *Bavli*. In accordance with his practice throughout the *Mishneh Torah*, however, the author includes no citation to previous authority beyond biblical quotations.<sup>184</sup>

Rambam begins his discussion of לשון הרע by describing the laws against לשון הרע as a negative commandment based on Leviticus 19:16. לשון הרע, in his view, includes both gossip, i.e., carrying words from one person to another and the denigration of a friend with factually true information.<sup>185</sup> The *Mishneh Torah* regards the second as a far more serious sin, perhaps because the latter implies a greater degree of intentionality of harm on the part of the speaker. Consistent with the material which underlies the codification, the *Mishneh Torah* regards לשון הרע as a serious sin. Following the *Tosefta*, *Yerushalmi* and *Bavli*, *halakhah* 3 in chapter 7 places לשון הרע among those sins which deny a transgressor a place in the world-to-come.

The *Mishneh Torah* devotes some additional attention to defining the scope of לשון הרע, including אבק לשון הרע, literally the "dust of *lashon hara*" which refers to the speaking of words which, although not technically harmful, will likely lead to the denigration of another. As a whole, the *Mishneh Torah* takes a relatively stringent view of לשון הרע, including within the prohibition the dropping of hints, speaking favorably about a friend in the presence of his or her enemies and the telling of disparaging information in jest or with mock sincerity. Despite Rabbah's position in *B. Arakhin* 15b

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<sup>184</sup> Rambam intended his work as an authoritative distillation of *halakhah* without recourse to other works to ascertain the law. Elon, *Jewish Law*, 1185-6.

<sup>185</sup> The telling of lies to slander another person, on the other hand, does not fall within the *Mishneh Torah*'s definition of לשון הרע. Rambam assigns the person who tells lies to the category of a מוציא שם רע. Chapter 7, *halakhah* 2.

that לשון הרע does not include a statement made directly to the person disparaged, *Mishneh Torah, Halakhah 5*, forbids disparaging a person even to his or her face. This includes any statement that, directly or indirectly, causes harm to another's person, property or psychological well-being.

Rambam, on the other hand, gives very little explicit attention to when a person may permissibly relate לשון הרע to another. The only real discussion of this subject comes in a brief passage devoted to the "presence of three" argument set forth in *B.Arakhin 16a* discussed above. In Rambam's view, a person who hears harmful information in the presence of at least 2 other people (comprising a total of 3 or more) may repeat that information a second time without violating the prohibition against לשון הרע as long as he or she does not intend by doing so to cause further harm.

The scenario Rambam contemplates in this *halakhah* is not entirely clear. As a matter of logic, if a person may not speak לשון הרע in front of the person affected by it, then Rambam cannot justify the further revelation of information initially disclosed before 3 or more people on the grounds that such information will necessarily come to the attention of the person affected. This seems to be the rationale identified in *B.Arakhin 16b* for this particular leniency regarding לשון הרע. The Talmud, however, seems to accept the notion that a person may speak disparagingly about someone in their presence without violating the prohibition against לשון הרע. In both this situation, and

where one speaks harmful information openly before 3 or more people, the speaker at least has not pretended friendship while speaking deceitfully in secret.<sup>186</sup>

The *Mishneh Torah*, in contrast, rejects the first leniency while accepting the second. Later commentators, particularly the *Chafetz Chaim* have devoted a great deal of attention to this matter, usually with the intent to restrict this exception to very limited circumstances.<sup>187</sup> For the purposes of this discussion, however, we need only note that Rambam endorses an exception to the prohibition against לשון הרע tied to the number of people who have already heard the potentially harmful information. Where 3 people hear לשון הרע, according to the *Mishneh Torah*, one of them may relate the information a second time without violating the prohibition but only as long as one does not intend thereby to spread it further. The Rambam permits this for the reasons identified in the *Bavli*—i.e.—because the disclosure of disparaging or harmful information before 3 people presumptively makes it public knowledge.

Beside this explicit exception to the prohibition on speaking לשון הרע, other sections of the *Mishneh Torah* implicitly endorse other circumstances where a person may permissibly speak לשון הרע. In הלכות רוצח ושמירת נפש, the *halakhah* relating to the murderer and the protection of life, the *Mishneh Torah* discusses the obligation to prevent the רודף, the pursuer, from taking human life.<sup>188</sup> This obligation includes the commandment even to maim or kill the pursuer to prevent life-threatening harm to the

<sup>186</sup> The Bible repeatedly criticizes the duplicity of those who pretend friendship to one's face while speaking disparagingly behind one's back. See, e.g., Jer. 9:7 ("Their tongue is a sharpened arrow, they use their mouths to deceive. One speaks to his fellow in friendship, but lays an ambush for him in his heart.") Proverbs 10:18 ("He who conceals hatred has lying lips, while he who speaks forth slander is a dullard.")

<sup>187</sup> *Chafetz Chaim, Hilkhos Lashon Hara* 2:3-10.

<sup>188</sup> *Halakhah* 7.

victim.<sup>189</sup> The person who refuses to save a life when able to do so violates the negative commandment set forth in the second clause of Leviticus 19:16: "neither shalt thou stand idly by the blood of thy neighbor...."<sup>190</sup> This negative commandment applies even when the harm is not imminent.<sup>191</sup> If, to use an example set forth in the *Mishneh Torah*, a person overhears others plotting to harm a colleague, he or she has an obligation to warn the friend of danger, presumably even if the plot has not yet been set in motion.<sup>192</sup>

The priority of life, accordingly, allows the violation of positive and negative prohibitions when designed to prevent death or serious bodily harm. Serious bodily harm embraces all forms of significant bodily violence, including rape.<sup>193</sup> In the face of such a threat against another, we can even inflict mortal injury if less violent means prove ineffective. In so acting, Rambam concludes, the rescuer should act without pity or compassion for the pursuer.

This confirms the precedence of life and health set forth in הלכות שבת, the rules relating to the observance of Shabbat. In Chapter two of those rules, the *Mishneh Torah* acknowledges the suspension of the laws of Shabbat whenever sickness or other danger threatens life.<sup>194</sup> Indeed, danger to life overrides, with only a small number of

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<sup>189</sup> *Hilkhot Rotze'ach, halachot 7-12.*

<sup>190</sup> *Ibid.*, *halakhah 14*. In this case, I rely upon the 1917 JPS translation which better captures the traditional understanding of the clause than the 1985 translation: "Do not profit by the blood of your fellow...."

<sup>191</sup> *Ibid.* (discussing duty to warn where the harm is not imminent).

<sup>192</sup> *Ibid.*

<sup>193</sup> *Hilkhot Rotze'ach, halachot 10-11*. The status and sex of the intended victim of rape play some role in the discussion of the *Mishneh Torah* on this point. These discussions need not concern us here.

<sup>194</sup> *Hilkhot Shabbat, halakhah 1*. The Rambam bases this section of *Mishneh Torah* principally on his reading of *M. Yoma* and *B. Yoma*.

exceptions, any commandment.<sup>195</sup> To preserve the life of a sick person, a caregiver may perform anything necessary to secure their recovery notwithstanding the prohibitions of Shabbat. Even in the face of doubt as to the seriousness of an illness or injury, the *halakhah* commands the violation of Shabbat where any question of danger exists.<sup>196</sup> Where such a threat to life exists, the Rambam explains, one cannot hesitate to transgress the rules of Shabbat. As prooftext, *Mishneh Torah* cites Leviticus 18:5 which requires the observance of God's laws and rules in order to secure life and not death.<sup>197</sup>

These exceptions to the negative prohibitions forbidding the taking of life and violation of Shabbat implicitly endorse violation of the laws forbidding לשון הרע in the face of serious threats to life, limb or wellbeing. The command to sacrifice one's own life rather than worship other gods, engage in forbidden sexual relations or commit murder<sup>198</sup> does not undercut this implication. While the *Mishneh Torah* does equate לשון הרע with all three of these particularly forbidden misdeeds,<sup>199</sup> Rambam does not include לשון הרע among those prohibitions for which one should accept death rather than transgress under coercion.<sup>200</sup> If we may save our own life by violating the prohibition against לשון הרע, logically we may rescue someone else from danger by committing the same transgression.

This conclusion finds additional support in the principle, noted a number of times in the *Mishneh Torah*, that the law does not impose lashes on those transgressions that

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Ibid.

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Ibid.

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*Hilkhot Shabbat, halakhah 3.*

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*Hilkhot Yesodei HaTorah 5, halakhah 2.*

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*Hilkhot Deot 7, halakhah 3..*

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Ibid.

involve something other than conduct. The person who speaks לשון הרע, for instance, does not merit lashes because the law draws a distinction between speaking and actions.<sup>201</sup> This principle puts לשון הרע in a different category than actual misdeeds, no matter how seriously the *Mishneh Torah* may regard the sin. The speaker of לשון הרע may indirectly cause death, in illustration, but does not wield a physical weapon. The *Mishneh Torah* therefore implicitly obligates us to save life and limb against the actual threat of the real רודף, even at the cost of transgressing the prohibition against לשון הרע.

#### B. Sefer Chafetz Chaim

In 1873, Rabbi Israel Meir Ha-Cohen Kagan, “one of the most saintly figures in modern Judaism,”<sup>202</sup> published anonymously a book entitled ספר חפץ חיים, literally the “book of [one who] desires life” devoted to the laws forbidding לשון הרע and רכילות. Rabbi Kagan apparently based his title on two lines from Psalm 34: “Who is the man who is eager for life (חפץ חיים), who desires years of good fortune? Guard your tongue from evil, your lips from deceitful speech.” Although Rabbi Kagan wrote a number of other books, not all of which discuss the laws and ethical strictures forbidding gossip, slander and talebearing, he became so identified with the subject that he became known as the *Chafetz Chaim* after the title of his first book on לשון הרע and רכילות.

According to the analytical structure established by the *Chafetz Chaim*, לשון הרע consists of true yet disparaging speech. רכילות, on the other hand, includes any report

<sup>201</sup> *Hilkhot Deot*, chapter 7, *halakhah* 1.

<sup>202</sup> Mordechai Hacohen, “Israel Meir Ha-Cohen,” *Encyclopedia Judaica*.

that causes hatred between people, even if the report does not disparage.<sup>203</sup> As the *Chafetz Chaim* himself acknowledged, harmful speech often involves both לשון הרע and רכילות, disparaging comments likely to cause enmity between people. In his forward to ספר חפץ חיים, he laments that most people disregard the laws forbidding לשון הרע and רכילות, both of which have their primary source in Leviticus 19:16.<sup>204</sup> The average person, he notes, does not realize that this prohibition applies to true information as well as slander. Moreover, he continued, only the especially pious in his day continued to observe the rules forbidding harmful speech. As a result, he believed that לשון הרע and רכילות, had become virtually an epidemic.

To address this regrettable situation, the *Chafetz Chaim* organized the rules forbidding harmful speech, which are scattered throughout the Bible and the Talmud, into one book. To foster the distinction he perceived between לשון הרע and רכילות, the *Chafetz Chaim* divided his book into two parts, one entitled הלכות איסורי רכילות, the other called הלכות איסורי לשון הרע. He further divided each part into chapters devoted to related subjects. The book sets forth the *Halakhah* and some additional rules for ethical conduct with regard to harmful speech in a part called מקור החיים, the “source of life.” Rabbi Kagen set forth his source material and explanation for these law and rules in a part he called באר מים חיים, the “well of living waters.”

<sup>203</sup> As when, for example, a person praises a person in front of his or her enemies.

<sup>204</sup> Introduction, *Sefer Chafetz Chaim*. The *Chafetz Chaim* also lists additional sources for the prohibition against לשון הרע and רכילות, including Exod. 23:1 (“You must not carry false rumors,...”), Deut. 27:24 (“cursed be he who strikes down his fellow countryman in secret.) and Deut. 24:9 (“Remember what the Lord your God did to Miriam on the journey after you left Egypt.”)

A complete discussion of *Sefer Chafetz Chaim* is well beyond the scope of this paper. This paper instead focuses on those chapters of the *Chafetz Chaim* that discuss when a person may speak *לשון הרע* or *רכילות* without violating the prohibition set forth in Leviticus 19:16. This paper therefore bases most of the following discussion on a close reading of chapter 10 of *Hilchot Lashon Hara* and chapter 9 of *Hilchot Rekhilus*. Both chapters conclude, subject to certain conditions, that one may disclose harmful information where the disclosure can confer a benefit (תועלת), particularly in the face of threat of injury to life, limb, liberty or financial interest. Indeed, in some cases, the *Chafetz Chaim* concludes that a person must disclose the information lest he or she violate the second clause of Leviticus 19:16: "Do not stand idly by the blood of thy neighbor...."

Before, however, a person speaks *לשון הרע* or *רכילות*, he or she must, in the view of the *Chafetz Chaim*, satisfy conditions in addition to those imposed by *Halakhah*. These conditions differ somewhat between *לשון הרע* and *רכילות* but each requires careful consideration of the seriousness and actuality of the threatened harm as well as the motivation for speaking.<sup>205</sup> In both cases, a careful review of the circumstances must convince the speaker that injury has occurred or will occur. In the case of *לשון הרע*, the speaker must have actual knowledge of the truth of the disparaging information before speaking. Where, for instance, a person has committed a wrongful act without the victim knowing of his or her identity, the speaker may not disclose the act to the victim unless based on reliable knowledge, which includes either witnessing the wrongdoing personally or verifying its authenticity through other reliable means. The speaker must also

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<sup>205</sup> *Hilkhot Lashon Hara* 10:1-2.



carefully consider whether the purported wrongdoer acted with justification and within the scope of the law.

In the case of רכילות, the speaker must have confidence in the likelihood of significant detriment should he or she keep silent.<sup>206</sup> Where, for example, a friend contemplates forming a partnership with an unsavory person, the speaker must be convinced the partnership will result in harm. If so, then the speaker is obligated, not merely permitted, to warn against the שדוך.

Whether the act of speaking involves either לשון הרע or רכילות, moreover, the speaker must assess his or her motives for speaking. The speaker must intend only to achieve a constructive purpose, such as the protection of a victim of wrongdoing. If, however, the speaker has another motivation, such as feelings of animosity toward the wrongdoer or a desire to make another suffer for the same sin the speaker also commits, then the speaker must remain silent. If the speaker has any negative feelings about the person he or she intends to speak against, he or she must strive to master them before proceeding. When they do speak, people who find themselves in this situation must carefully avoid any exaggeration or embellishment. This means that the speaker must neither omit positive or mitigating circumstances nor overstate the gravity of the known facts.

The speaker must also attempt to achieve a constructive purpose through the least harmful means possible. In the case of לשון הרע, if any possibility exists that the wrongdoer might heed a rebuke and make the victim whole, then the speaker must first admonish the offender privately. If the speaker is certain that the wrongdoer will not

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*Hilkhot Rekhilut* 9:1-2.

listen to private reproof, then they can disclose the wrongdoing to others. In the case of both לשון הרע and רכילות, the speaker should strive to obtain the benefit sought, whether compensation for the loss or potential reform of conduct through public distain, through the least harmful means possible. If the speaker can do so without revealing the misconduct, or without revealing its full scope, then they should do so. If the speaker does reveal the wrongdoing to others, moreover, they should do so before at least 3 other people to undercut any implication that the speaker hopes to conceal the revelation from the wrongdoer. Where the speaker reveals the misconduct in secret, the *Chafetz Chaim* reasoned, the listeners may doubt the accuracy of the information. Where, on the other hand, the wrongdoing becomes known in a public way, the listeners should incline to trust the accuracy of the disclosure.

Finally, the speaker must carefully consider whether revelation of the wrongdoing will result in more harm than permitted by *Halakhah*. If, for instance, disclosure of the information is likely to lead relatives of the victim to physically assault the wrongdoer in addition to demanding compensation for the loss, then the speaker must either find another way to address the situation or keep silent. Or, if the speaker intends to discourage a שדוך, he or she must consider whether speaking רכילות will have harmful consequences beyond preventing the match or partnership. If such additional consequences will ensue, then the speaker must, according to the *Chafetz Chaim*, remain silent.

If all the conditions set forth above are met, the *Chafetz Chaim* concludes, the speaker may then utter לשון הרע or רכילות to achieve a beneficial purpose. Indeed, if these conditions are met, the speaker must reveal the information despite the prohibitions

against לשון הרע and רכילות. This obligation to speak exists even if the information was revealed in confidence<sup>207</sup>

The ספר חפץ חיים made discussion about לשון הרע and רכילות a more central concern of *halakhic* authorities. The book sealed the reputation of its author as the outstanding authority on the laws of לשון הרע and רכילות. Today, no *halakhic* authority can discuss these subjects without reference to the *Chafetz Chaim*.<sup>208</sup> While the Hebrew Bible and rabbinic literature still lead any discussion of harmful speech in Jewish tradition, *Chafetz Chaim* is essential to any analysis of the day-to-day uses and implications of the “power of the tongue.” This thesis now turns to a consideration of the clergy-communicant privilege in light of these principles as developed from the Hebrew Bible, rabbinic literature, the *Mishneh Torah* and the *Chafetz Chaim*.

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<sup>207</sup> This is the clear implication of the *Chafetz Chaim*’s analysis. While, for instance, he insists that listeners respect the confidentiality of information explicitly or implicitly revealed in confidence, see, e.g., *Hilkhot Lashon Hara*, chapter 2 (the rules relating to the revelation of לשון הרע before 3 people), he still discusses the revelation of such information under the larger rubric of לשון הרע. The rules governing the revelation of לשון הרע and רכילות, should therefore also apply to confidential information.

<sup>208</sup> It is not always clear, however, whether פוסקים regard the conditions for uttering harmful speech as *halakhic* or as stringencies in the category of מוסר. Rabbi Kagan clearly intended readers to regard these conditions as *halakhah* yet not all commentators analyze disclosure of harmful information by this yardstick. Rabbi Bleich, for instance, while setting forth the *Chafetz Chaim*’s conditions in his analysis of a New York case involving disclosure of information revealed during a rabbinic conference, does not scrutinize the conduct of the rabbis at issue to insure it met those conditions. J. David Bleich, “Survey of Recent *Halakhic* Literature: Rabbinic Confidentiality,” *Tradition* 33:3 57-87 (1999).

## CHAPTER SIX

### The Clergy-Communicant Privilege in California

In California, the clergy-penitent or clergy-communicant privilege<sup>209</sup> appears in California *Evidence Code* §§1030-1034. California recognizes a number of testimonial privileges in addition to the clergy-communicant privilege, including the attorney-client, marital, physician-patient and psychotherapist-patient privileges.<sup>210</sup> Testimonial privileges like these, which permit persons in protected relationships to refuse to provide even relevant evidence in certain circumstances, “contravene the fundamental principle that ‘the public... has a right to every man’s evidence.’” *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912<sup>211</sup> (1980) *quoted with approval*, *People v. Thompson*, 133 Cal.App.3d 419, 427-8, 184 Cal.Rptr. 72, 77 (1982) When interpreting testimonial privileges, accordingly, appellate courts generally admonish lower courts to strictly construe the language of the privilege statutes and apply them “only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth” (*ibid*). Both California and the federal courts accept the clergy-communicant privilege as an effort to meet the “need for confidence and trust” between a

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<sup>209</sup> As noted earlier, in order to respect the protection afforded by the privilege in a Jewish context, this paper refers to the privilege as either the “clergy-communicant privilege” or, more simply, “the privilege.” In California, on the other hand, the statutory language refers to a “clergy-penitent” privilege. In cases where this paper quotes the California statute directly or specifically reviews the consequences of using “penitent” in this context, it may refer to a “clergy-penitent-privilege.” Unless otherwise limited, the term includes clergy of all religious faiths, including priests, ministers, rabbis, cantors, imams, etc.

<sup>210</sup> These privileges are set forth in Division 8 of the California *Evidence Code* §§ 911-1070.

<sup>211</sup> This style of citation denotes a case published by the United States Supreme Court.

member of the clergy and the people that he or she serve (*Thompson*, 427, 184 Cal.Rptr., 76). California courts acknowledge this need for confidence and trust as a weighty and legitimate interest worthy of protection (*ibid*, 428, 184 Cal.Rptr., 77).

The California privilege applies to all manner of clergy. "Clergy" within the meaning of the clergy-communicant privilege means a "priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization" (*Evidence Code* § 1030). This definition includes rabbis, *Simrin v. Simrin*, 233 Cal.App.2d 90, 43 Cal.Rptr. 376 (1965), and, although California has no cases on point, should include cantors as well to the extent they serve functions similar to those of rabbis. A "penitent" within the meaning of the California statute refers to any person who makes a "penitential communication" to a member of the clergy (*Evidence Code* § 1031). The statute does not require that such a person actually enjoy membership in the clergy person's synagogue, church, mosque or other religious organization unless, from the standpoint of the clergy member, confidentiality depends on such membership (*Doe 2 v. Sup. Ct.*, 132 Cal.App.4<sup>th</sup> 1504, 1517, 34 Cal.Rptr.3d 458, 467 (2005)). In California, both the clergy member and the communicant may assert the privilege (*Evidence Code* §§ 1033-4). Even if the communicant waives the privilege, accordingly, the clergy member may still decline to testify (*Evidence Code* § 1034).

The clergy-communicant privilege in California and other states derives from the sacramental confession in the early Christian Church as it existed in England before the Reformation (*Roman Catholic Archbishop of Los Angeles v. Sup. Ct.*, 131 Cal.App.4<sup>th</sup> 417, 443, 32 Cal.Rptr.3d 209, 229 (2005)). This history has consequences for the application of the privilege in a Jewish setting. For that reason, a complete understanding

of the obligation of rabbis and cantors to respect confidential communications imposed by secular law requires extended discussion of the implications of the Christian origins of the clergy-communicant privilege.

A. The Seal of the Confessional

The clergy-communicant privilege arose from different concerns than those underlying the prohibition against speaking לשון הרע. Following the view about speech expressed in the Bible, particularly the Psalms and Proverbs, the Rabbis viewed לשון הרע as a species of violence against human beings nearly equivalent to shedding actual blood. In their view, shedding human blood, whether figuratively or literally, violated a fundamental aspect of respect for our collective Creator. As Genesis 9:6 puts it: "Whoever sheds the blood of man, by man shall his blood be shed; for in His image did God make man." For similar reasons, the Rabbis of the *Yerushalmi* and the *Bavli* consequently felt a pressing need to develop rules to limit even the metaphorical shedding of human blood. Accordingly, the Rabbis read the restriction on לשון הרע in light of God's desire to secure proper conduct between human beings as part of a broader effort to expand the definition of worship to include all aspects of our daily life. Circumstances may require actual or verbal violence, but proper concern for the image of God in our fellow human beings demanded, in their view, that we largely limit such occasions to situations analogous, given the similarities and differences between these two types of human aggression, to self-defense or the defense of others.

The clergy-penitent privilege, on the other hand, initially arose from the State's recognition of the importance of the seal of the confessional in the canons of the Roman Catholic Church. In the first 4 centuries of the Common Era, Christians apparently did

not insist on secrecy in connection with confession,<sup>212</sup> preferring instead to admit their sins in public within their own communities.<sup>213</sup> The gradual decline of the practice of public penance produced a concomitant insistence on the right of the Christian penitent to insist on respect for the confidentiality of his or her confession. During his papacy, Pope Leo I (440-61) outlawed public and mandated private confessions.<sup>214</sup> The Church eventually came to regard private penance in this sense as one of the "sacraments," a rite ordained by Jesus in which Catholics must participate throughout their religious lives. At the Council of Trent in 1551, the Church officially recognized already established practice: that forgiveness of sins depended on oral confession and absolution by a priest.<sup>215</sup>

The need for private confession led to the development of a formal obligation on the part of the confessor not to reveal the matters confessed. By the 9<sup>th</sup> century, the Church began to develop positive legislation mandating respect for matters revealed during confession. The Church eventually incorporated this legislation into a code of canon law written in absolute terms: "The sacramental seal is inviolable. Consequently the confessor must exercise all diligent care not to betray the penitent in any degree by

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<sup>212</sup> "Confession" comes from the Latin *confeor* "to acknowledge or avow" or, in a more specific sense, "to confess a sin or fault." Mircea Eliade, "Confession of Sins," *The Encyclopedia of Religion* (New York: MacMillan Publishing Company, 1987), 4:1.

<sup>213</sup> J.L. McCarthy, "Confession, Seal of," *New Catholic Encyclopedia* (New York: McGraw-Hill Book Co., 1967), 4:133.

<sup>214</sup> William Harold Tiemann and John C. Bush, *The Right to Silence: Privileged Clergy Communication and the Law* 34-5 quoted in R. Michael Cassidy, "Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Exception to the Clergy-Penitent Privilege?", 44 *William and Mary Law Review* 1636 n. 41.

<sup>215</sup> 1 Henry Charles Lea, *A History of Auricular Confession and Indulgences in the Latin Church* 251 (1968) quoted in Cassidy, *Sharing Sacred Secrets*, 1636 n. 41.

word, sign or in any other way or for any cause whatsoever.”<sup>216</sup> Ecclesiastical law further established the consequences of failure to respect the seal of the confession: deposition from priestly office and life-long incarceration in a monastery.<sup>217</sup>

The Church offers various reasons for the seal of confession.<sup>218</sup> The Church requires its members to regularly confess their sins and its theologians came to regard the secrecy of the confessional as an inherent feature of the “Sacrament of Penance.”<sup>219</sup> According to Aquinas, penance wipes away sin by rendering misdeeds hidden even from the sight of God.<sup>220</sup> In Catholic theology, only secrecy effectuates this purpose and revelation of the matters confessed without permission of the penitent undercuts an essential feature of this sacrament. More generally, the Church asserts that natural law also mandates secrecy since revelation of the sins confessed might cause embarrassment or pain to the penitent and violates the implicit understanding that the confessor, who stands in a position of trust, will respect the penitent’s confidence.<sup>221</sup>

#### B. Rabbinic Confidentiality

Although the Rabbis would locate its source in divine rather than natural law, this latter justification for the seal of the confessional overlaps with at least part of the considerations which underlie the discussion of confidentiality in bYoma 4b and which have become part of the larger concept of לשון הרע. God calls Moses into a place that no person save Moses, as a prophet and leader of his people, may enter. This call and the privacy of the subsequent encounter led the *Bavli* to infer a corresponding obligation on

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<sup>216</sup> J.L. McCarthy, Confession, 133-34.

<sup>217</sup> Ibid., 134

<sup>218</sup> Ibid., 134.

<sup>219</sup> Ibid., 134.

<sup>220</sup> Ibid., 134

<sup>221</sup> Ibid., 134.



Moses' part to restrict repetition of the matters disclosed to those specifically permitted by God. Reasoning from this inference, Rabbi Menasya identified a responsibility on the part of those who respond to such a call by a friend to respect the confidentiality of the information disclosed until released by the discloser. Even though the relationship between friends does not usually embrace the imbalance of power and status inherent in the priest-penitent relationship, the association between friends nevertheless usually includes some assumption of trust, קל וחומר, all the more so, the relationship between a person communicating a confidence and a rabbi or cantor who listens to it.

The potential overlap between the natural law justification for the seal of confession and the assumptions underlying the discussion of confidentiality in bYoma4b, accordingly, make it impossible to simply dismiss the clergy-penitent privilege as a Christian innovation without application to Jewish practice. The prohibition incumbent on all Jews not to speak לשון הרע, whether the harmful information comes from confidential sources or not, also mandates that rabbis and cantors seriously consider whether they owe a duty under Jewish law not to further disclose potentially hurtful information learned from another. We cannot simply deny that the clergy-communicant privilege has any place in Jewish life by merely noting that Jewish practice does not assign special penitential significance to conversations with intermediaries,<sup>222</sup> whether friends or religious leaders, concerning sins or "flawed acts." Although the duty not to disclose may not arise from the "seal of the confessional" in a Christian sense, rabbis and cantors have independent reasons, well-grounded in Jewish law, not to disclose the

<sup>222</sup> Jewish practice requires confession of sin, whether individually or collectively, before seeking atonement. *Mishneh Torah, Hilkhoh Teshuvah*, chapter 1, *halakhah* 1; Confession of Sins, *Encyclopedia Judaica*. The sinner, however, utters his or her confession directly to God, not to a representative of the synagogue or congregation.

secrets revealed to them in private conversations with those who seek out their advice or sympathetic ear.

At least one responsa authored by a former chairman of the Responsa Committee of the Central Conference of American Rabbis (CCAR), however, failed to consider these reasons in responding to a question regarding a rabbi's obligation with regard to information about an unsolved murder disclosed in confidence to a rabbi. In a *teshuvah* entitled "secrets of the 'confessional'" Rabbi Solomon B. Freehof concluded that since "Jews do not confess to a human being with the expectation of receiving 'absolution' from him...such confidential conversation between a congregant and the rabbi is in no sense 'sacramental' and, therefore, does not have the status of something which the rabbi must guard against divulging."<sup>223</sup> According to Rabbi Freehof, any witness who has direct, as opposed to hearsay,<sup>224</sup> evidence of a matter must disclose such information to

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<sup>223</sup> Solomon B. Freehof, "Secrets of the Confessional," *Current Reform Responsa* (Hebrew Union College Press, 1969), 205-09.

<sup>224</sup> In his responsum, Freehof writes that the information revealed in confidence to the rabbi contained "clues as the identity of the murderer." This might have been hearsay evidence—i.e.—"so-and-so said that Ploni admitted to the murder" or it may have been evidence based on the communicant's own observation of some event or conduct relevant to guilt. When used in its legal sense as used in California courts, "hearsay" refers to evidence of a statement made by someone other than the witness which a party offers to prove the truth of the matters addressed in the statement made by the absent witness. *Black's Law Dictionary*, s.v. "hearsay." Subject to many exceptions, California's Evidence Code excludes hearsay evidence from admission at trial. Freehof notes that the *Mishnah* takes the same position on this kind of indirect evidence. *M. Sanhedrin* 4:5. If the congregant's information only came from the indirect statements of third parties, Freehof believed that the congregant had a duty, but hardly a strong one, to report the evidence to the police. He implies that this would relieve the rabbi as well of any obligation to disclose the confidence if the congregant refused to contact the police. If, on the other hand, the congregant based her information on her own direct observations, then the responsa affirmed, based on Leviticus 5:1 and *Shulchan Arukh Chosen, Mishpat* 28:1, that it would be a "sin to refrain from testifying if you have real knowledge of the matter." If the congregant refuses to testify, then the rabbi commits a sin by keeping the information from the police.

the relevant authorities.<sup>225</sup> Even a rabbi who has such evidence, Rabbi Freehof admonished, should not feel bound by any sense of "confessional secrets" in deciding how to proceed. If therefore a rabbi receives evidence in confidence on an unsolved murder that a court would find admissible, Rabbi Freehof advises the rabbi to disclose it to the relevant authorities regardless of any commitment made to respect the confidence.

In reaching his conclusions, Rabbi Freehof failed to consider whether obligations to respect confidences or to avoid לשון הרע constituted independent reasons to respect information revealed in confidence to Jewish clergy. A *responsum* issued 18 years later by Walter Jacob, a successor to Rabbi Freehof as chairman of the CCAR's responsa committee, moved toward correcting this oversight by considering Leviticus 19:16 in the context of information revealed in confidence to a rabbi.<sup>226</sup> In this *responsum*, a congregant with a rare and potentially fatal illness refused to disclose her medical condition to her fiancé. In light of these circumstances, the responsa committee examined whether the rabbi should divulge this confidential information to the groom despite a statement from the bride that she would commit suicide if the rabbi did so.

The *responsum* began with the "biblical prohibition against 'being a tale bearer.'" This prohibition, Jacob noted, applies even to true and accurate information like that at issue in the responsa. We must balance this prohibition, however, against others that require us to "prevent someone from committing a sin or placing themselves in a position

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<sup>225</sup> Freehof cites Leviticus 5:1 and the *Shulcan Arukh, Choshen Mishpat* 28:1 for support on this issue.

<sup>226</sup> Walter Jacob, "Confidential Information," *Contemporary American Responsa* (New York: Central Conference of American Rabbis, 1987), 7-8.

of personal or financial loss.”<sup>227</sup> In weighing these competing prohibitions, we must “do everything possible to protect life and property from injury directly or indirectly, including providing information.”<sup>228</sup> In a situation where the person acting in ignorance of the information is likely to consider it a major factor in the decision-making process, Jacob adds, the *Chafetz Chaim* argues “vigorously” for disclosure. In this specific instance, on the other hand, the rabbi must weigh the danger of the congregant committing suicide against the need to disclose relevant, specific information to the fiancé. If the rabbi believes that disclosure would cause the congregant’s suicide, Jacob concludes, the rabbi may not divulge the information.

Jacob’s analysis, by recognizing grounds separate from the “seal of the confessional” for respecting the confidentiality of information disclosed to Jewish clergy, contradicts Freehof’s earlier denial of any such obligation. This contradiction is not particularly surprising since the CCAR had passed in 1976 a resolution entitled “privileged communications” in which the Conference expresses its conviction that “all clergy receiving [privileged] communications should consider themselves morally obligated to protect the confidentiality of such communications.”<sup>229</sup> The resolution, perhaps in reaction to Rabbi Freehof’s *responsum*, closed with the comment that disclosing information revealed in confidence to a member of the clergy “would violate a

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<sup>227</sup> Ibid., 7(citing the second clause in Leviticus 19:16 [in the 1917 Jewish Publication Society translation: “neither shalt thou stand idly by the blood of your neighbor.”] and the *Mishneh Torah*, *Hilkhot Rotze’ach* 1.13 and 12.4).

<sup>228</sup> Ibid. (citing *Mishneh Torah*, *Hil. Rotze’ach* 1.13 and *Shulkan Aruch Choshen Mishpat* 426.1).

<sup>229</sup> *Privileged Communications*, Resolution Adopted by the CCAR at the 87th Annual Convention of the Central Conference of American Rabbis 1976 [available on the CCAR website: <http://ccarnet.org>].

sacred or moral trust unless the person making the confidential communication waives such privilege.”<sup>230</sup>

Other authorities, from other branches of Judaism, have weighed in on Jacob's side of the issue. In his extended analysis of the issue of family violence, Rabbi Elliot Dorff,<sup>231</sup> for instance, recognizes that the prohibitions against *לשון הרע*, causing shame to another (בּוֹשֶׁת),<sup>232</sup> or desecrating God (חִילּוּל הַשֵּׁם)<sup>233</sup> may independently counsel respect for confidences revealed in discussions with Jewish clergy.<sup>234</sup> Dorff believes that these prohibitions impose on every Jew, including Jewish clergy, the obligation to consider withholding information, whether learned in confidence or otherwise, when it may result in loss of reputation to a person or community. Each of these prohibitions has exceptions, he acknowledges, particularly where divulging the information may save the life, limb or emotional well-being of another. Yet, for all the cogency with which Dorff argues for the exposure of secrets in certain circumstances, he still describes disclosure as an exception to a general halakhic rule against defaming or shaming another by, among other possible scenarios, disclosing information learned in confidence by Jewish clergy.

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<sup>230</sup> The CCAR has adopted at least one other resolution addressing the issue of confidentiality. *On Clergy Confidentiality*, Adopted by the CCAR at the 98<sup>th</sup> Annual Convention of the Central Conference of American Rabbis 1987. This resolution accepts that congregants come to rabbis “with the expectation that what they tell the rabbi will be held in the strictest confidence” and firmly objects to “any and all attempts to force testimony where a breach of rabbinic confidentiality would result.”

<sup>231</sup> Rabbi Dorff is a member of the Committee on Jewish Law and Standards of the Rabbinical Assembly, the rabbinical association of the Conservative movement.

<sup>232</sup> See *B. Baba Metzia* 58b.

<sup>233</sup> *M. Avot* 4:5.

<sup>234</sup> Rabbi Elliot N. Dorff, *Family Violence* (1995) 794-801 [Available on the contemporary *halakhah* section of the Rabbinical Assembly website: [http://www.rabbinicalassembly.org/law/contemporary\\_halakhah.html](http://www.rabbinicalassembly.org/law/contemporary_halakhah.html).]

Rabbi J. David Bleich takes a similar view from an Orthodox perspective. In a survey of recent halakhic periodic literature, Rabbi Bleich considered the question of rabbinic confidentiality in the context of a ruling issued by a trial court in New York which held that a congregant could bring a civil suit for damages against two rabbis who allegedly disclosed information she revealed to them in confidence.<sup>235</sup> Although Rabbi Bleich vehemently disagreed with the decision, he acknowledged that the responsibility to maintain confidences and refrain from speaking לשון הרע incumbent on every Jew applies equally to information disclosed to a rabbi. Judaism, he writes, does not recognize a "fiduciary obligation of confidentiality" arising from a professional relationship but does "bind each and every one of its adherents, laymen as well as professionals,"<sup>236</sup> by an obligation of confidentiality far broader than that posited by any other legal, religious or moral system."<sup>237</sup> He bases this obligation on both the rules against לשון הרע grounded on Leviticus 19:16 (and eventually codified by Rambam in his *Mishneh Torah*) and the prohibition on divulging information set forth in *B. Yoma* 4b.<sup>238</sup> Like Jacobs and Dorf, Bleich identifies important exceptions to this obligation of confidentiality, particularly where maintaining the confidence imperils the lives and safety of others, yet he concedes that "[c]ommunications for which a clergy-penitent privilege may be claimed are virtually always of a nature to which the much more stringent prohibition against talebearing applies."<sup>239</sup>

<sup>235</sup> J. David Bleich "Survey of Recent *Halakhic* Periodical Material: Rabbinic Confidentiality," *Tradition* 33:3 (1999) 57-87.

<sup>236</sup> Ibid., 65.

<sup>237</sup> Ibid., 57.

<sup>238</sup> Rabbi Bleich identifies Leviticus 1:1 and Proverbs 11:13 as scriptural sources for this prohibition (Ibid., 58-9).

<sup>239</sup> Ibid., 65.

The origin of the clergy-communicant privilege in the seal of the confessional does not, accordingly, relieve Jewish clergy of the obligation to respect the confidentiality of communications made to them in confidence. As the resolutions of the CCAR recognize, Jewish clergy, no less than the clergy of other faiths who refer to the institution of the confessional, acknowledge a tradition that creates an expectation that they will not divulge matters related to them in confidence. These matters may concern the most private and painful secrets of the human heart. Despite the long-established priority of teaching for the leaders of the Jewish people, rabbis and cantors are "called to respond more than ever to substance abuse, domestic violence, and all kinds of family and personal problems."<sup>240</sup> Jewish clergy, no less than their colleagues of other faiths, therefore have a vital interest in how the clergy-communicant privilege intersects with their religious tradition. For that reason, this paper now turns to the development of the privilege under common and statutory law.

C. The Development of the Clergy-Communicant Privilege

In England, the relevant European state to ascertain the development of the common law prior to the American Revolution, early legal records do not specifically identify a privilege not to reveal matters discussed in the confessional. If more recent experience is any guide, the matter of clergy-communicant privilege probably came only rarely to the attention of the medieval English courts.<sup>241</sup> The emphatic nature of Church

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<sup>240</sup> Rabbi Dayle A. Friedman, "Introduction," in *Jewish Pastoral Care*, ed. Rabbi Dayle A. Friedman (Woodstock, Vermont: Jewish Lights Publishing, 2001) xiii.

<sup>241</sup> According to one particularly diligent author, a review of cases in the entire United States between 1658 through 1980, some 322 years, disclosed only 70 reported cases on the clergy-communicant privilege during that time. By way of some comparison, one state, California, reported 122 cases on the attorney-client privilege in

doctrine on the subject and the overlap between the Church and the English state before the Reformation strongly suggest that the secular courts recognized the seal of the confession from an early time.<sup>242</sup> After the Norman Conquest (1066), several statutes seem to recognize the privilege although a case published in connection with the infamous "Gunpowder Plot" to assassinate James I can be read to either support or deny its existence.<sup>243</sup> Regardless of the status of the clergy-communicant privilege prior to the Reformation, however, all authorities agree that for more than two centuries after the restoration of the monarchy in 1660, English common law did not recognize the privilege.<sup>244</sup> This apparently resulted from the decreasing influence of the Catholic Church in England after the Reformation and the Anglican's Church's removal of the rite of confession from a primary place in its pattern of devotion.<sup>245</sup>

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1963 alone. Jacob M. Yellin, "The History and Current Status of the Clergy-Penitent Privilege," 23 *Santa Clara Law Review* 95, 96 (1983)

<sup>242</sup> R.S. Nolan, "Seal of Confession," in *Catholic Encyclopedia* (New York: Robert Appleton Company, 1912), 13:649-64; Yellin, *The History and Current Status*, at 97.

<sup>243</sup> In *Garnet's Case*, 2 Howell's State Trials 218 (1606) the court called Father Garnet, the spiritual advisor to Guy Fawkes, to testify regarding his knowledge of the plot. Father Garnet refused to testify, even to state whether his knowledge derived from the confessional or other sources. The court tried, convicted and executed Father Garnet for "having knowledge of a treasonous plot without disclosing it, though not participating in the plot or approving it." The Church considers Father Garnet a martyr of the seal of the confession. G. Fitz Herbert, "Garnet, Thomas, BL," *New Catholic Encyclopedia*, 6:292-93. On the other hand, Wigmore, the preeminent source on evidence in the Anglo-American experience, finds the case inconclusive on the existence of the privilege at common law before the Reformation since the case also reveals that the questioners did not press Father Garnet to violate the seal of the confessional. John Henry Wigmore, *Wigmore on Evidence* (Frederick, Maryland: Aspen Publishers, Inc., 1961), ¶ 2394 at 869 n. 1. Father Garnet's execution may have resulted from the notion that high treason was an exception to the privilege. Such a position implicitly recognizes the privilege, albeit as less than absolute.

<sup>244</sup> *Wigmore on Evidence*, ¶ 2394 at 869.

<sup>245</sup> The Anglican Church regarded confession as voluntary. Yellin, *The History and Current Status*, 101-02.



Since the privilege did not exist in common law expounded prior to the American Revolution, the courts of the United States have looked to other sources for its recognition. The first reported case, *People v. Phillips*, decided in 1813 by the New York Court of General Sessions,<sup>246</sup> bases its recognition of the clergy-communicant privilege on the free establishment of religion clause of the First Amendment to the United States Constitution. Rather than force a priest to testify about the content of a confession made by a man accused of stealing, the court excused the priest on the grounds that forcing him to testify would violate the priest's religious freedom and undercut a central element of the sacrament of penance as recognized by the Roman Catholic Church. A following case, however, *People v. Smith*,<sup>247</sup> refused to recognize the privilege in response to its assertion by a Protestant minister, reasoning that the seal of the confession did not bind a Protestant member of the clergy.<sup>248</sup> In response to *Smith*, the New York legislature in

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<sup>246</sup> No official report exists for the case although an editor's report, abstracted in 1 W.L.J. 109 (1843), is extensively quoted in various sources, including Yellin, *The History and Current Status*, at 104-05.

<sup>247</sup> *N.Y. City Hall Rec.* 77 (1817). Like *Phillips*, *Smith* is not official reported but appears in abstract form in various sources including, Yellin, *The History and Current Status*, 106.

<sup>248</sup> In fact, a number of Protestant denominations also recognize the benefit of private confession. Protestants do not, however, mandate such confessions. Martin Luther, who argued that the believer should confess only when so moved, denied that the State had the power to invade the secrecy of the confession. Martin Luther, *Discussion of Confession* 1 *Works of Martin Luther* 89 (1943) quoted in Seymour Moskowitz and Michael J. DeBoer, "When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect," 49 *DePaul Law Review* 1, 10-11 (1999). In their survey of a number of the doctrine of a number of Protestant denominations regarded confession, including Reformed, Anglican and Baptist, Moskowitz and DeBoer establish that these religious groups also acknowledge that some congregants may, although not required to so, voluntarily confess their sins. These Protestant groups generally require their clergy to respect the secrecy of confession. The Anglican Church and its successor movements accord confessions a level of protection from disclosure similar to that they enjoyed in the Roman Catholic Church. Moskowitz and DeBoer, *When Silence Resounds*, 16-17. Other movements either do not endorse or actually reject the inviolability of the seal of

1828 adopted the first statute recognizing the privilege in the United States, extending its protection to any "minister of the gospel, or priest of any denomination whatsoever...." Now, all 50 states and the District of Columbia recognize by statute some form of the clergy-communicant privilege.<sup>249</sup>

As almost entirely based on statutory, rather than common, law the contours of the clergy-communicant privilege heavily depend on the statutory language adopted by the individual states. As already implied by the brief quotation of the original New York statute, the codes initially adopted by the states, even if intended for application to all recognized religions, derived their assumptions about the nature and scope of the privilege from a Christian milieu. For that reason, the statutes often contain words drawn from Christian experience such as "confession" or "penitent" that assume the member of the clergy plays some mediating role in the forgiveness of sin. These assumptions can result in decisions that limit the protection of the privilege to situations involving clergy playing this kind of role. The California experience confirms this observation.

Section 1881(3) of the California *Civil Code*,<sup>250</sup> the predecessor statute to *Evidence Code* § 1032, provided: "a clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his

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confession. A minister of a Lutheran church may reveal information disclosed in confidence "in the course of his care of souls or otherwise in his professional capacity" (in addition to situations where the minister does so with express permission of the person who revealed the confidence) *in order to prevent the commission of a crime.* (emphasis added) Moskowitz and DeBoer, *When Silence Resounds*, 11. As of 1999, the Reformed churches had not definitively addressed the level of secrecy appropriate for confessions (ibid. at 14-5). Baptist congregations hold that its clergy may abridge the confidentiality of confession when "conscience so requires" (ibid. at 19).

<sup>249</sup> Charles Tilford McCormick, *McCormick on Evidence* 4<sup>th</sup> ed. John Williams Strong ed. (Minneapolis, Minnesota: West Publishing Company, 1992), ¶ 76.2 at 109.

<sup>250</sup> Adopted in 1872.

professional character, in the course or discipline enjoined by the church to which he belongs."<sup>251</sup> The restriction of the privilege to the content of a "confession" obviously derives from the Christian practice of mandating or encouraging the private acknowledgment of sins as part of some religious act of penance. This approach left some confidential disclosures made outside of the context of a confession, but nevertheless addressed to a member of the clergy in her or her professional capacity, without testimonial protection.

In *Simrin v. Simrin*, 233 Cal.App.2d 90, 43 Cal.Rptr. 376 (1965), for example, a couple asked a rabbi to act as a marriage counselor. Before accepting their request, the rabbi asked both husband and wife to expressly agree to regard the counseling sessions as confidential, even in any subsequent divorce proceeding, in order to encourage honest communication. In the subsequent divorce action, the wife called the rabbi as a witness and he declined to testify on the grounds of the express agreement the couple made before the counseling sessions began. The husband asserted, in addition, that the sessions with the rabbi fell within the clergy-communicant privilege. The trial court ruled that the rabbi need not testify and the wife appealed on various grounds, including the court's exclusion of the rabbi's testimony.

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<sup>251</sup> Under present California law, the communicant "holds" the privilege and must consent to the disclosure of the content of any privileged communication. According to *Evidence Code* § 1033, the communicant can refuse to disclose, and prevent another from disclosing, a penitential communication. In order for this provision to apply, however, a "penitential communication" within the meaning of the privilege must first exist. For a detailed analysis of the meaning of "penitential communication" see the discussion below. If such a penitential communication does exist, and even if the communicant waives the privilege, a member of the clergy may elect not to disclose the information and stand on the privilege independently of the communicant. *Evidence Code* § 1034.

On appeal, the court quickly dismissed the husband's assertion of privilege. Believing that the wording of the statute left it no choice, the court found that marriage counseling, even by a religious or spiritual advisor, did not constitute a "confession[-] in the course of discipline enjoined by the church" (*ibid.*, 94, 43 Cal.Rptr., 378). The court nevertheless affirmed the exclusion of the rabbi's testimony, reasoning that public policy "strongly favors procedures designed to preserve marriages and counseling has become a promising means to that end" (*ibid.*, 95, 43 Cal.Rptr., 379). The restriction of the privilege itself to a "confession," however, comports well with the language of, or the interpretation given, clergy-communicant privilege statutes in the United States up to the 1960's.<sup>252</sup>

Following on the heels of the *Simrin* opinion, California revised its clergy-communicant privilege statute in 1965. As of 1967, *Evidence Code* §§ 1030-34 superseded Civil Code § 1881. *Evidence Code* § 1032 provides:

As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.<sup>253</sup>

The Law Revision Commission Comment that accompanies the revised statute states: "Under existing law, the communication must be a 'confession'....Section 1032

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<sup>252</sup>J. Wigmore, *Wigmore on Evidence*, ¶ 2395, 876-7 ("In the application of the statutes, it has been held, following the dictates of principle, that the privilege applies only to communication made in the understood pursuance of that church discipline which gives rise to the confessional relation, and therefore, in particular to confessions of sin only, not to communications of other tenor...")

<sup>253</sup> This language also reflects a 2002 amendment to make the statute gender-balanced.

extends the protection that traditionally has been provided only to those persons whose religious practice involves "confessions."<sup>254</sup> Under this revised statute, a person seeking to invoke the privilege only must present evidence of (1) a communication made in confidence outside the presence of third parties (2) to a member of the clergy authorized or accustomed, according to the discipline or practice of his or her religious denomination or organization, to hear such communications, and (3) who has a duty, according to the discipline or tenets of that religious group, to keep such a communication secret.

Notwithstanding the 1967 revision, a number of California cases suggested that the statute still required evidence of a confession for the privilege to apply. *People v. Johnson*, 270 Cal.App.2d 204, 75 Cal.Rptr. 605 (1969) and *People v. Thompson*, 133 Cal.App.3d 419, 427-8, 184 Cal.Rptr. 72, 77 (1982) illustrate this search for evidence of a "confession" in both Christian and non-Christian settings. In *People v. Johnson*, a defendant convicted of armed robbery and assault with a deadly weapon appealed on various grounds, including the court's admission of incriminating statements he made to a minister of the Church of Christ. In the act of fleeing from a service station robbery, defendant Johnson entered the office of the minister.<sup>255</sup> In the office, Johnson said he was in trouble and asked for the minister's help. As part of this statement, Johnson admitted he had been present during the gas station robbery and had fled the crime scene in the same car as the robbers. The minister advised the defendant to call the police and walked Johnson to a police officer. Upon meeting the police officer, the minister related

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<sup>254</sup> 7 Cal. L. Rev. Comm. Reports 1 (1965)

<sup>255</sup> The court felt it important to note that the minister "was not dressed in ministerial vestments but was wearing an ordinary business suit" and that the defendant was neither known to the minister nor a member of the minister's congregation (ibid., 207, 75 Cal.Rptr., 606).

what the defendant had told him while Johnson stood silently behind him. The court allowed the minister to testify and then later struck the testimony and advised the jury to disregard the evidence. On appeal, the defendant claimed that the admonishment did not correct the error committed by admitting the evidence in the first instance.

The *Johnson* court found no error in the admission of the minister's testimony at trial. The court found little or no evidence that the defendant made his statement to the minister in confidence or "in the course of" the relationship required" (*ibid.*, 207, 75 Cal.Rptr., 607). Even if the defendant communicated in confidence to the minister, Johnson waived the privilege by agreeing to accompany the minister to the police. Finally, the court concluded, the defendant failed to justify the assertion of the privilege by presenting any evidence that the minister "was authorized or accustomed to hear such communication, or that he had a duty to keep any such communications secret under the discipline, practice or tenets of his church."

Although the result in *Johnson* can be justified on various grounds, the court's reference to a "required relationship" reads back into § 1032 the need to establish some kind of penitential association between the communicant and the member of the clergy. By its terms, however, the statute, despite its unfortunate use of the term "penitent," requires only a "communication in confidence" made to a member of the clergy who regards such a communication as worthy of protection by virtue of the tenets of his or her religion. Given his description of his predicament and request for aid in the minister's office, the defendant arguably fulfilled the need for a "communication in confidence." Indeed, under *Evidence Code* § 917, the defendant's assertion of the clergy-communicant privilege at trial created a presumption that he communicated in confidence to the

minister.<sup>256</sup> The minister's decision to later relate the defendant's statements to the police should not have affected this presumption even if the defendant's acquiesce in the minister's course of action did raise legitimate questions about his implicit, yet subsequent, waiver of the privilege.

In light of the defendant's assertion of the privilege, the court should have turned to the second part of the test: Whether the practices of the Church of Christ accorded the defendant's statements some protection from disclosure. At trial, however, the defendant failed to present any evidence on this issue. The court eventually, and quite correctly, noted the defendant's failure to satisfy his burden of proof on this issue<sup>257</sup> yet, by initially focusing on such things as the minister's garb and prior relationship with the defendant, the court suggested that the existence of the privilege depended on some threshold showing that Johnson sought out the minister for some ritual purpose connected to the forgiveness of sin.

The court in *People v. Thompson*, 133 Cal.App.3d 419, 184 Cal.Rptr. 72 (1982) inferred such a test from its reading of *Johnson*. According to this reading, the existence

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<sup>256</sup> *Evidence Code* § 917 provides: "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

<sup>257</sup> The party claiming the clergy-communicant privilege has the initial burden to show that the evidence at issue falls within the terms of the statute. *Roman Catholic Archbishop of Los Angeles v. Sup. Ct.* 131 Cal.App.4<sup>th</sup> 417, 441, 32 Cal.Rptr.3d 209, 227-8 (2005). Once the party claiming the privilege meets this burden by, for instance, showing that (1) he or she confidentiality communicated with (2) a member of the clergy accustomed or authorized to hear such communications (3) acting under a duty, recognized by his or her denomination or organization, to keep such communications secret, the burden shifts to the party opposing the assertion of the privilege to show either that the communication was not made in confidence or was subsequently divulged.

of the privilege depends on a showing that "the statement was made in confidence or in the course of *the required relationship*" (*ibid.*, 426, 184 Cal.Rptr., 76 (emphasis added)). The *Thompson* court did not identify the exact contours of this "required relationship," although, to its mind, a meeting in an office, with a member of the clergy without vestments and dressed in a business suit undercut the existence of such a relationship. To the court's mind, the critical questions included not just the requirements of § 1032 but also a "threshold" question of whether the purpose of the communication was the confession of a flawed act in order to receive religious consolation and guidance in return (*ibid.*, 427, 184 Cal.Rptr., 76. Based on this analysis, the *Thompson* court found that a member of the Church of Scientology who insisted that defendant turn himself in immediately after he confessed to involvement in murder did not qualify as "a spiritual counselor to whom Thompson's communications were confidential."<sup>258</sup>

*People v. Edwards*, 203 Cal.App.3d 1358, 248 Cal.Rptr. 53 (1988) relied heavily on *Thompson* in rejecting a criminal defendant's claim that the court had improperly admitted into evidence confidential statements she had made to an Episcopal priest acknowledging embezzlement. The Defendant claimed that she intended her statement as a "penitential communication." The prosecution, in contrast, asserted that the defendant's statements at best amounted to a "secular request seeking counseling and not absolution" (*ibid.*, 1363, 248 Cal. Rptr., 56). At trial, the court heard extensive testimony

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<sup>258</sup> If defendant did not turn himself in, the member of the Church told Thompson that he would do so on his own. Although the trial court heard evidence that the tenets of Scientology require members to recount their past experiences to representatives of the Church called "auditors" who do not divulge the contents of such a conversation, the trial court decided, in the face of conflicting evidence, that the member of the Church who heard defendant's admission of involvement in murder did not hold himself out as an auditor.



from various church officials which turned on whether the defendant had made a "true confession" to her priest or had merely requested "pastoral counseling." Based on *Thompson*, the court reasoned that only the former exhibited the "very essence of the spiritual relationship privileged under the statute" (ibid., 1364, 248 Cal.Rptr., 57). Since the defendant's encounter with her priest involved only a "non-penitential, though private, communication," the court concluded, the trial judge did not commit error in admitting the defendant's statements concerning her embezzlement of funds.

As in *Johnson* and *Thompson*, the *Edwards* court might have found narrower grounds for its decision. The defendant, for instance, agreed to disclosure of her statements to a number of lay leaders of the church in an apparent effort to gain her priest's assistance in restoring some or all of the stolen funds. Though arguably dicta, the distinction drawn by the *Edwards* court between "true confession" and mere "pastoral counseling" could have significant consequences for Jewish clergy in California since, as Rabbi Freehof pointed out, "Jews do not confess to a human being with the expectation of receiving 'absolution.'" In combination, in fact, *Johnson*, *Thompson* and *Edwards* point toward the possibility of severely restricting legal recognition of the clergy-communicant privilege in a Jewish context.

If these cases were the latest word on the clergy-communicant privilege, rabbis and cantors might realistically consider the confidences they hear in their professional capacities as largely outside the ambit of the California law of privilege. As a matter of ethics, some Jewish clergy might interpret this concern with confession to include any communication forming part of a process of *teshuvah*. A narrow reading of these three cases, on the other hand, requires some evidence that the member of the clergy served

some ritual function associated with penance, a feature not traditionally associated with the interaction between Jewish clergy and their congregants.

Neither *Edwards* nor *Johnson* or *Thompson*, however, confronted the 1967 amendment to *Evidence Code* § 1032 or the comments of the Law Revision Commission that form an important part of the legislative history of the amendment. In *Doe 2 v. Sup. Ct.*, 132 Cal.App.4<sup>th</sup> 1504, 34 Cal.Rptr.3d 458 (2005) the appellate court, based on its reading of the revised statute, rejected any reading of *Evidence Code* § 1032 that required a confession to invoke the clergy-communicant privilege. In that case, three former youth group members who claimed they were molested as minors by a probationary Methodist minister sought written discovery from a number of United Methodist churches. After the arrest of the minister, the pastor of one of the churches organized an effort to provide “spiritual and religious counseling and healing” to those who may have been affected by the accused minister (*ibid.*, 1510, 34 Cal.Rptr.3d, 461). The pastor distributed an outreach letter in which she encouraged recipients to voice their concerns about the accusations directly to her.<sup>259</sup> She represented that she would hold any responses “in pastoral confidence” (*ibid.*, 1510, 34 Cal.Rptr.3d, 462). She subsequently spoke with about two dozen people involved in the youth ministry program. In response to discovery served in the civil suit brought by the three alleged victims, the pastor refused to discuss the possibility of other victims, citing “confessional confidentiality.”

The plaintiffs subsequently brought a motion to compel the pastor to reveal this and other information. The churches objected, citing, among other privileges, the clergy-communicant privilege. In ruling on the discovery motion, the trial court rejected the

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<sup>259</sup> She also encouraged anyone with evidence of wrongdoing to contact the appropriate law enforcement and legal authorities (*ibid.*, 1510, 34 Cal.Rptr.3d, 462).

objection based on the clergy-communicant privilege without considering the requirements of *Evidence Code* § 1032. After also overruling other objections not relevant here, the trial judge ordered the churches to answer written questions and produce documents relevant to the pastor's outreach efforts under a protective order designed to shield the privacy of the individuals involved. The pastor's church subsequently sought a writ of mandate from the court of appeal asking the appellate court to stay and vacate the trial judge's discovery order.

The appellate court partially granted the writ and remanded the case to the trial judge with directions to reconsider the discovery sought in light of the specific language of *Evidence Code* § 1032. The court provided a lengthy discussion of the statute to guide the trial judge's re-examination of the discovery motion after remand. After quoting the statutory language, the court of appeal began by noting that the definition of "penitential communication" set forth in the revised statute considerably broadened the protection available under previous law. Based on the comments of the Law Revision Commission, the court found that the definition of "penitential communication" in effect since 1967 "did not limit protection to confession of a flawed act" (*ibid.*, 1518, 34 Cal.Rptr.3d , 468). Given the definition set forth in the statute, which requires only (1) a communication intended to be in confidence (2) to a clergy member authorized or accustomed to hear such communication (3) acting under a duty of secrecy imposed by the discipline or tenets of the religious denomination or organization to which he or she belongs, the opinion considered irrelevant the definition of "penitential" found in sources outside the statute. As long as the communication satisfies the requirements of the statute, the trial court cannot require additional evidence a confession.

The results in *Johnson*, *Thompson* and *Edwards* did not, in the view of the appellate court, justify a different result. None of these three cases, according to the *Doe 2* court, ruled that the privilege applied only to confessions. Instead, each presented a narrower ground for its ruling, based either on an inability to meet the requirements of the statute or on a failure of the person asserting the privilege to meet the preliminary burden of invoking its protection. The *Thompson* court's citation of the "flawed acts or thoughts" language from the United States Supreme Court's opinion in *Trammel* did not affect this conclusion because the result in that opinion did not turn on the interpretation of either the federal or California clergy-communicant privilege. As a result, the court concluded, "any attempt to introduce a confessional element into § 1032 would be contrary to the clear statutory language and the legislative history, which reflects that the Legislature made a conscious decision to eliminate such a requirement" (*ibid.*, 1520, 34 Cal.Rptr.3d, 469).

Given the language of the statute and the *Doe 2* court's more complete analysis of the issue, the reassertion of a confession requirement seems unlikely barring some legislative action.<sup>260</sup> In the absence of the confessional requirement, the communicant-clergy privilege in California should protect the kind of "spiritual and religious counseling and healing" provided by the pastor in *Doe 2* as long as the person seeking to invoke the privilege meets the other requirements of § 1032. This has important

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<sup>260</sup> Strictly speaking, the decision of the Second District of California's Court of Appeal in *Doe 2* does not bind appellate courts in other judicial districts. Of *Johnson*, *Thompson* and *Edwards*, only *Johnson* also issued from the Second District. Courts in the First District (*Edwards*) or the Fourth District (*Thompson*) could ignore the reasoning of *Doe 2* until endorsed by the California Supreme Court. Since only *Doe 2* considered the language of § 1032 and the specific comments of the Law Revision Commission, however, the author believes it extremely unlikely that a subsequent appellate court would impose a confessional requirement.

implications for Jewish clergy since "religious counseling" broadly interpreted should include a significant body of communications between Jewish clergy and the people they serve. Based on this ruling and the language of the statute, rabbis and cantors cannot just dismiss the clergy-communicant privilege as an artifact of Christian religious practice without application to the customs of the synagogue. On the basis of this analysis, therefore, a rabbi or a cantor in California must consider both Jewish tradition and the requirements of *Evidence Code* §§ 1030-34 before deciding whether to divulge a confidence.

D. When a Rabbi or Cantor Must Protect a Confidence Under California Law.

In order to qualify for protection under California's privilege statute, as already discussed, a person seeking to invoke § 1032 must show the following: (1) a communication intended to be in confidence (2) to a clergy member authorized or accustomed to hear such communications in the course of the discipline or practice of the denomination or organization to which the clergy member belongs and (3) who acts under a duty of secrecy imposed by the discipline or tenets of the religious denomination or organization to which he or she belongs. In the absence of any of these elements, the privilege does not apply and the rabbi or cantor may make a decision to disclose or respect a confidence based on Jewish tradition, ethical strictures or whatever personal considerations he or she feels relevant. The absence of any of these elements also potentially subjects the rabbi or cantor to legal process which may require disclosure of facts to law enforcement authorities or result in testimony and/or the production of documents relevant to the communication which falls outside the statute. A rabbi or

cantor must carefully consider these elements, in consultation with their legal or religious counsel, before deciding how to proceed.

1. Communication Intended to be in Confidence

To qualify for protection, the information related must result from a "communication" between a member of the clergy and another person. A communication may involve both words and conduct intended to relay information. Conduct not intended to communicate would not fall within a testimonial privilege.<sup>261</sup> A party may therefore call a member of the clergy to testify concerning conduct or events he or she witnessed where no communication was intended. This might include the impressions formed concerning another person's mental condition or competence<sup>262</sup> or the direct observation of conditions relevant to, for instance, the existence of abuse or neglect. The communicant must also intend to communicate in confidence with a member of the clergy. The presence of any third party defeats the privilege if the person relating the confidence knows of it.<sup>263</sup> The communicant's knowledge that the member of the clergy intends to subsequently share the confidence with others also vitiates the

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<sup>261</sup> See, e.g., the definition of "statement" in Evidence § 225 as used in California's hearsay rule ("Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression). By analogy, a communication must be either an oral or written expression or nonverbal conduct of a person intended to substitute for oral or written expression.

<sup>262</sup> *Estate of Toomes*, 54 Cal. 509 (1880). In *Toomes*, a priest testified concerning the impressions he formed of a elderly woman's mental competence after speaking with her on the day before her death. He based his testimony on both her conduct and her answers to questions posed to test her mental condition to receive last rites.

<sup>263</sup> Evidence Code § 1032 ("[P]enitential communication" means a communication made in confidence, *in the presence of no third person so far as the penitent is aware*,.....[emphasis added]) The "so far as the penitent is aware" language apparently addresses the possibility of an eavesdropper unknown to the communicant. See, e.g., Evidence Code § 1033, Law Revision Commission Comment ("Section 1033 also protects against disclosure by eavesdroppers.")

privilege.<sup>264</sup> The argument that the clergy person only intends to share the information with other members of the same organization does not save the privilege.<sup>265</sup> In other words, "third person" means **anyone** beside the clergy person and the communicant, not just someone outside the religious organization to which the clergy member belongs.

2. A Clergy Member Authorized or Accustomed to Hear Such Communications

In order for the privilege to apply, the organization or denomination to which the clergy member belongs must authorize or permit him or her to hear confidential communications. This requirement presumably addresses situations where a religious organization operates through a number of professional and/or lay leaders, only some of whom, whether by stricture or custom, hear confidential communications. In *Thompson*, for instance, the court heard evidence that the Church of Scientology authorizes persons called "auditors" to listen to confidential communications with members. The church member who heard the defendant's murder confession in that case, however, gave

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<sup>264</sup> Evidence Code § 912(a)(stating that the clergy-communicant privilege is waived if a holder of the privilege discloses a significant part of the communication or consents to such disclosure.) *Roman Catholic Archbishop of Los Angeles*, 445 n. 14, 32 Cal.Rptr.3d, 230 n. 14. (noting that the clergy-communicant privilege is missing from the enumerated relationships that benefit from the rule, set forth in Evidence Code § 912(d) allowing holders of other privileges, including lawyers, physicians and psychotherapists, to disclose a confidential communication to third parties if "reasonably necessary for the accomplishment of the purpose" for which they were consulted).

<sup>265</sup> In *Roman Catholic Archbishop of Los Angeles*, 445, 32 Cal.Rptr.3d, 231, the court rejected the contention of the Archdiocese that divulging the content of the confidential communication to an agent of the clergy member did not constitute disclosure to a "third person" within the meaning of § 1032. The court did not accept the Archdiocese's contention that this disclosure represented an actual "penitent communication" because the priest knew the agent, who also happened to be a priest, intended to share the information disclosed to another party. In other words, the court viewed the process by which the Church trains and monitors its priests as more akin to employee supervision than a communication for the purposes of confession or pastoral care.

evidence that he was not an “auditor” or staff member of the church. Although the defendant testified that he believed he had communicated in confidence with a “minister,” the court reasoned that the church member’s lack of office rendered him unable “to take confidential statements.” *Id.* at 426, 184 Cal.Rptr. at 76.

By both stricture and custom, reform rabbis routinely hear confidential communications.<sup>266</sup> Communicating in confidence to a rabbi, therefore, clearly satisfies the statutory requirement for a clergy member “authorized or accustomed” to hear such a communication. A confidential communication with a cantor should also meet the language of § 1032, although the terse guidelines adopted by the American Conference of Cantors seem to condition a cantor-communicant relationship on specialized training in pastoral counseling.<sup>267</sup> Even without specific cantorial authorization, however, the reality of pastoral care in reform congregations includes both rabbis and cantors within the definition of congregational clergy.<sup>268</sup> Since the statute protects confidences communicated to members of the clergy who are either authorized or accustomed to hear such communications, cantors should also satisfy this statutory requirement.

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<sup>266</sup> See, e.g., Code of Ethics for Rabbis, Section III (acknowledging obligation of rabbi to maintain a relationship of trust and confidentiality); *Privileged Communications*, Resolution adopted at the 87<sup>th</sup> Annual Convention of the Central Conference of American Rabbis (referring to many situation in which rabbi is called upon to hear communications that must be deemed as totally private and personal).

<sup>267</sup> See, e.g., Guidelines on Cantorial –Congregational Relationships, section II(e) (“Those cantors who have received specialized training in pastoral counseling may serve the individuals and families who seek their help and guidance. The Cantor, guided by the ethics of confidentiality, should, where appropriate, consult with the Rabbi(s) and make suitable referrals.”) What specific “ethics of confidentiality” these Guidelines refer to, however, remains unclear.

<sup>268</sup> Rabbi Dayle A. Friedman, “Introduction,” in *Jewish Pastoral Care*, ed. Rabbi Dayle A. Friedman, (Woodstock, Vermont: Jewish Lights Publishing, 2001) xv.



### 3. Acting Under a Duty of Secrecy

This final requirement poses the most difficult challenge for Jewish clergy. By its terms, Section 1032 does not impose a general obligation of secrecy, but one specifically tailored to the religious tenets which govern the clergy member's organization or denomination. If a member of the clergy believes that his or her tradition would not regard a particular communication as confidential, then the statute does not, by its own terms, obligate the clergy member to respect its secrecy. Ideally, both clergy member and communicant would share the same understanding regarding the scope of confidentiality so that both parties would agree on what information falls within the privilege and what does not. The statute, however, does not make a common understanding of the scope of confidentiality within a particular tradition or denomination a prerequisite for protection. Nor does the statute contain any language to prevent disclosure based on a misapprehension on the communicant's part of the extent of the privilege within a particular faith.

In *Thompson*, for example, the defendant testified that he believed that the scientologist he talked to "was a minister and anything he told [him] would go no further" (ibid., 424, 185 Cal.Rptr., 75). The court, however, never considered this testimony relevant to the question of whether the scientologist the defendant confessed to fit within the definition of clergy set forth in § 1030. In other words, the court did not consider the defendant's belief, reasonable or not, capable of extending the protection of privilege beyond conversations with recognized members of the clergy. The court never decided the question of the scope of confidentiality recognized within the Church of Scientology. Nevertheless, one can only assume that a communicant's good faith belief

but erroneous belief that the clergy member's religious tradition regards certain disclosures as confidential would also fail to extend the protection of privilege beyond those subject matters actually conforming to the tradition's view of confidential information. In the case of those faiths that recognize limitations on the scope of confidentiality in private conversations with clergy, California law seems to presume that the communicant either knows these limitations before speaking or has assumed the risk of unwittingly revealing something the clergy member's faith does not regard as confidential.

The court may receive expert testimony on the scope of confidentiality in a particular religious tradition. In *Edwards*, the court received extensive testimony concerning the "discipline and tenets" of the Episcopal Church (*ibid.*, 1363, 248 Cal.Rptr., 56). One witness, a lawyer and chancellor of a neighboring diocese, testified that an Episcopalian priest has an "absolute duty" to maintain the secrecy of "the confession" (*ibid.*). In difficult cases, he maintained, the communicant should receive the benefit of the doubt.

Another expert witness, a bishop of the California Diocese, disagreed, arguing that clergy must judge each communication on a case-by-case basis. In the absence of clear rules from the church allowing priests to easily distinguish between a "religious confession" and a "secular confidence," each priest must decide individually whether to maintain a particular confidence (*ibid.*, 1364, 248 Cal.Rptr., 56). He conceded, however, that a promise of confidentiality, even in a purely pastoral setting, would bind the priest to maintain the confidence unless subsequently released from the promise by the communicant. In the face of this conflicting expert testimony, the trial court held that the

discipline and tenets of the Episcopal Church do not require priests to maintain the secrecy of pastoral counseling sessions. The appellate court found this ruling supported by the substantial weight of the evidence.

The court in *Roman Catholic Archbishop of Los Angeles* also received conflicting expert testimony on the "discipline and tenets" which governed the conduct of the clergy involved in that case. In opposing the production of documents pursuant to a subpoena duces tecum<sup>269</sup> served by a grand jury investigating allegations of child molestation by two Roman Catholic priests, the Catholic Church presented declarations from a variety of experts seeking to establish that the "discipline and tenets" of the Catholic Church regarded certain communications between priests and other church officials as confidential within the meaning of *Evidence Code* § 1032. These declarations asserted that the Church, as part of its obligation to care for the "emotional, physical, psychological and spiritual lives" of its priests, appoints vicars for clergy who encourage priests accused of sexual misconduct to undergo psychiatric evaluation and treatment (ibid., 427-8, 32 Cal.Rptr.3d, 216-7). The Church encourages priests who submit to therapy to reveal their "deepest psychological and sexual issue[s]" and to share these communications with the local bishop and vicar for clergy (ibid., 217, 32 Cal.Rptr.3d, 217). The Church claimed that it regarded these communications as absolutely privileged as part of its efforts to form and sanctify priests.

In seeking production of the notes and summaries of this kind of communication as part of its grand jury investigation, the Los Angeles District Attorney submitted a

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<sup>269</sup> A subpoena *duces tecum* is a "process by which the court, at the instances of a party, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of pending controversy, to produce it at the trial." *Black's Law Dictionary*, s.v. "subpoena duces tecum."

declaration from a Roman Catholic priest and expert in canon law. He disagreed with the position of the Archdiocese, claiming that, while the Church treats as confidential the written record generated as part of the church's efforts to investigate charges of sexual misconduct by clergy, it has disclosed such records to civil authorities where they involve a "matter as serious as sexual abuse" (ibid., 428, 32 Cal.Rptr.3d, 217). In the face of this conflicting expert testimony, the court relied heavily on the facts and the language of *Evidence Code* § 1032 in deciding in favor of disclosure. Where all parties to these communications knew that the Church would not restrict knowledge of their content to the original communicant and clergy member, the court held, the Church could not claim that its clergy regarded these conversations as confidential. The Church could not overcome the negative implications of the intent to share the content of these communications by claiming that this sharing occurred completely within the office of the bishop. The bishop may regard his subordinates as his alter ego for the purposes of dealing with suspected priests, the court reasoned, but this does not change the wording of the statute. Where the communicant recognizes that **any** third party will hear a substantial part of the content of his conversation with a clergy member, and the clergy member knows he or she must report on the conversation to **any** other person, the privilege is "vitiated *ab initio*" (ibid., 445, 32 Cal.Rptr.3d, 230).

The implications for rabbis and cantors of this last prong of the statutory test for privilege are quite significant. Based on the material already presented on the scope of the prohibition against לשון הרע, no discipline or tenet of Judaism requires any Jew to withhold information which reveals an ongoing threat to human life or limb. Indeed, according to a variety of sources, danger to life trumps all prohibitions with the exception

of the 3 cardinal sins previously discussed.<sup>270</sup> Any Jew, whether or not a rabbi or a cantor, must disregard the prohibitions of לשון הרע whenever such a danger exists.

Under § 1032 therefore, conversations which reveal a threat to human life or limb to a rabbi or cantor, do not qualify as privileged because the body of Jewish tradition, whether regarded as setting forth tenets or a discipline, does not impose a duty to keep such communications secret.

This analysis essentially moots the question of whether, for instance, rabbis and cantors in California are "mandated reporters" under statutes which require certain professionals to disclose knowledge or reasonable suspicion of abuse or neglect to the relevant governmental agency. California Penal Code § 11166, for instance, requires mandated reporters, who include clergy members,<sup>271</sup> to report knowledge or reasonable suspicion of child abuse. Penal Code § 11166(d)(1) excepts from this requirement any knowledge or reasonable suspicion derived from a "penitential communication." The statute defines "penitential communication" consistently with *Evidence Code* § 1032. In order for the exception to apply, accordingly, the clergy member must show that he or she has a duty, under the "disciplines, tenets, customs or practices"<sup>272</sup> of his or her "church, denomination, or organization" to keep secret a communication revealing child

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<sup>270</sup> *Mishneh Torah, Hilkhoh Yesodei Torah*, chapter 5, *halakhoh* 1-5; *B Sukkot*. 14b; Moshe HaLevi Spero, "Halakhic Definitions of Confidentiality in the Psychotherapeutic Encounter: Theory and Practice," *Tradition* 20(4) (Winter 1980), 298-326.

<sup>271</sup> California *Penal Code* § 11165.7 defines "clergy member" as "a priest, minister, rabbi, religious practitioner, or similar functionary or a church, temple or recognized denomination or organization."

<sup>272</sup> The discerning reader will note the addition of "customs or practices" to the "discipline or tenets" language contained in *Evidence Code* § 1032. This language would seem designed to include religious traditions less hierarchical than, for instance, the Catholic Church.

abuse or neglect. A Catholic priest could make such a showing, a rabbi or cantor could not.

The CCAR's recent revision to Code of Ethics regarding confidentiality moderately reinforces this point. In a section entitled "Confidentiality and Its Limits," the Code of Ethics counsels Reform rabbis to follow the laws of their state or province concerning revealing information learned in the course of pastoral care which concerns the abuse of a minor child or incapacitated adult or indicating imminent danger to any person. Even when the laws of the relevant state or province do not require the rabbi to reveal pastoral communications which concern such subjects, the Code of Ethics directs the rabbi to report abuse of minors and incapacitated adults. Not surprisingly for a non-*halakhic* stream of Judaism, the Reform movement's Code of Ethics also finds a moral basis for reporting such abuse beyond the implicit *halakhic* grounding presumably draw from some or all of the traditional sources cited above: Given the nature and practice of Reform Judaism and its ethical legacy, the Code affirms, the religious conscience of rabbis must place highest priority on the needs of the vulnerable.

The CCAR, however, chose to word this section of its Code of Ethics in effectively advisory rather than mandatory language. The CCAR comfortably directs its members to follow the dictates of civil law on reporting abuse pursuant to the rabbinic principle of *dina malkhuta dina*, yet pulls back slightly from requiring them to disclose danger to life or limb pursuant to "discipline, tenets, customs or practices" of Reform Judaism. The section on confidentiality does state that it is "essential to report" abuse of the vulnerable but "essential" in this context could mean either "necessary" or "fundamental to the principles of Reform Judaism." When viewed in isolation, this

language would probably undercut any inference that a rabbi must maintain the confidentiality of abuse revealed as part of pastoral communication. The voluntary language incorporated in the next sentence ("the rabbi's moral conscience **may** direct him or her to share such knowledge with appropriate authorities" [emphasis added]), however, seems to leave the decision to reveal clergy-communicant conversations in order to save life and limb to the individual rabbi. The failure to place the section within the larger context of Jewish tradition mandating disclosure of disparaging or confidential information to prevent danger to life adds to this impression.

The absence of guidelines or examples to guide clergy in making a decision to reveal a pastoral confidence also complicates the issue. No language, of course, could anticipate every possible situation. On the other hand, the section gives little guidance about the nature of the abuse or neglect that justifies disclosure. Nor does the Code of Ethics explicitly address what other kinds of harms might support revelation of confidences. The language of the section primarily responds to the increasing awareness of the incidence of abuse of children and the elderly without considering what other kinds of harms should mobilize clergy to warn or disclose.<sup>273</sup> By implication, in fact, the Code of Ethics endorses the confidentiality of pastoral care as a "sacred" obligation in every situation that does not involve danger to the vulnerable.

The section on confidentiality, accordingly, leaves California rabbis (and cantors who may consult its provisions for guidance in light of the failure of their own code of ethics to address the issue) in somewhat of a quandary. The section directs them first to consult California civil law while California law refers them to the "discipline and tenets"

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<sup>273</sup> Do, for instance, the "discipline or tenets" of Reform Judaism require a rabbi or cantor to relay disparaging information to prevent a harmful *נזק*?

of Reform Judaism to decide the issue. The language endorses limits on confidentiality to protect the vulnerable yet does not deny the individual rabbi's autonomy to decide the issue in conversation with his or her own conscience. No doubt the rabbi who decides to reveal the content of a pastoral communication to report knowledge of abuse will find comfort in language endorsing limits on confidentiality. How, however, is the rabbi to determine those limits? What steps should the rabbi employ before revealing a confidence? What if, moreover, a Reform rabbi decides not to reveal confidential information creating a "reasonable suspicion" of abuse on the grounds that disclosure requires more than suspicion? The limited guidance provided by the CCAR's Code of Ethics raises these and many other important questions. This thesis now turns to some conclusions that arise out of the interaction between Jewish tradition and the law of clergy-communicant privilege in California.



## CHAPTER SEVEN

### Conclusions

The above exploration of Jewish tradition establishes that Jewish clergy have an obligation to respect the confidentiality of conversations held as part of a rabbi's or cantor's pastoral duties. As already discussed, this obligation does not arise from the same considerations that support the "seal of the confessional" as developed in the Catholic Church and modified by other Christian faiths. Nevertheless, Jewish clergy must take their responsibility to protect confidences seriously in light of the weight of sources, from antiquity up to the modern era, that demand respect for secrets shared in fellowship. This responsibility derives both from the respect rabbis and cantors should have for those fellow human beings, also made *b'tzelem Eloheim*, who seek their counsel and from their awareness of the harm that careless or intentional revelation of confidences can have. As we have seen, the traditional sources discussing the obligation to avoid לשון הרע acknowledge the protection of confidences as a significant part of the obligation to avoid hurtful speech incumbent upon all Jews, whether clergy or not.

While the obligation to protect confidences may not arise from the professional status of rabbis and cantors, the duty predominantly affects Jewish clergy because they increasingly assume pastoral duties similar to those traditionally fulfilled by Christian clergy.<sup>274</sup> In many Reform synagogues, the rabbi and cantor often act as the agent of congregation in performing such duties as *bikkur holim* and what Rabbi Friedman refers

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<sup>274</sup> The term "pastoral care," emerged from a Christian context yet has clear roots in the Hebrew Bible. Rabbi Dayle A. Friedman, "Introduction," *Jewish Pastoral Care* ed. Rabbi Dayle A. Friedman (Woodstock, Vermont: Jewish Lights Publishing, 2001), xii. Rabbi Friedman notes that the increasing demand for Jewish pastoral care has produced a heightened interest in clinical training among rabbis and cantors (*ibid.*, xi-xvi).

to as *hitlavut ruchanit*, the spiritual accompanying of those in need of the comfort of another human presence.<sup>275</sup> Questions relating to the protection of confidences, accordingly, will frequently arise in the performance of the duties of Jewish clergy. These questions can no longer receive the brief attention they once received in Reform *responsa* of decades past. For, contrary to position taken by Rabbi Freehof in 1969, the preceding discussion clearly reveals that information revealed in confidence **does** have the status of something which the Reform rabbi and the cantor must guard against divulging.<sup>276</sup> This obligation arises from both Jewish tradition and from the law of clergy-communicant privilege as defined by state law.

As demonstrated above, however, the obligation to protect information revealed in confidence does have its limits in a Jewish context. Although the CCAR's Code of Ethics for Rabbis identifies these limits with the protection of the particularly vulnerable members of our communities, Jewish tradition gives general priority to the protection of human life and well-being, regardless of the age of person at risk. The presence of risk to life and health suspends or supersedes the need to observe almost every other commandment and stricture, including those prohibiting the utterance of לשון הרע and the revelation of confidences. In the specific context of California law, as demonstrated above, the priority of life under Jewish tradition denies the protection of clergy-communicant privilege to those confidences which reveal a threat to human life and well-being. In such circumstances, a rabbi or a cantor must reveal the confidence, both because Jewish tradition demands the revelation and because California's protection of

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<sup>275</sup> In addition to her "Introduction" cited above, see Rabbi Dayle A. Friedman, "PaRDeS: A Model for Presence in *Hitlavut Ruchanit*," *Jewish Pastoral Care*.

<sup>276</sup> Solomon B. Freehof, "Secrets of the Confessional," *Current Reform Responsa* (Hebrew Union College Press, 1969) 205-09.

communications between a member of the clergy and a "communicant" extends only as far as the tenets of his or her faith permit.

California's definition of the scope of privilege requires that every clergy member be intimately familiar with the traditions or tenets of his or her faith regarding the protection of confidences. Unfortunately, the CCAR's Code of Ethics does not provide much guidance on the kinds of information rabbis must protect. Given the failure of the ACC's Code of Ethics to address the subject of confidentiality, cantors fulfill their duties in even greater uncertainty. Rabbis and cantors may, of course, consult traditional Jewish texts for direction. Circumstances, however, may limit their access to such texts and, even if available, traditional texts may prove difficult to adapt to a liberal Jewish setting.<sup>277</sup> A code of ethics seems a natural and appropriate place to provide guidance to Jewish clergy on such an important subject. At the present time, however, the CCAR's Code of Ethics provides more information on the limits of confidentiality than on the circumstances that require the protection of confidences. A reform movement requires a reform code of ethics that defines not only what falls outside the "sacred" obligation to protect the confidentiality of information revealed within the provision of pastoral care, but also what kind of secrets deserve its shelter. Cantors in particular should insist on such a statement in their Code of Ethics since the present failure to address the subject

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<sup>277</sup> Traditional texts, for instance, generally place greater value on the protection of community standards of conduct derived from *Halakhah* than does a liberal Jewish community. This can produce dilemmas for Orthodox rabbis in the treatment of confidences that generally would not arise for Reform clergy. This makes reliance on such texts for guidance in a progressive context more difficult. For a discussion of the conflict between the rights of the individual and the needs of the community in an observant context, see Rabbi Alfred S. Cohen, "Privacy: A Jewish Perspective," *Journal of Halacha and Contemporary Society* No. VII (Spring 1984), 73-87.

implies that cantors do not or should not provide pastoral care to their congregations, a disservice to both the cantorate and the congregations they serve.

The *Chafetz Chaim* provides an instructive illustration of how the CCAR and the ACC might provide guidance to their members on the scope of confidentiality. As part of his extensive analysis of רכילות and לשון הרע, the *Chafetz Chaim* provides numerous examples, drawn from real life, of the application of the rules he derives. By giving concrete examples, the *Chafetz Chaim* moves from abstraction to realistic situations where the question of revealing information for a constructive purpose might actually arise. As part of these examples, moreover, the text supplies a number of considerations that should inform decisions of such import such as, for example, the personal feelings and interests of the person who wishes to reveal the information and the actual benefit its revelation might achieve. The CCAR's and ACC's Code of Ethics would greatly benefit from an inclusion of these kinds of examples, even if necessarily truncated to serve the purposes of the balance between brevity and detail inherent in any ethical code. Even if the CCAR and ACC reserved the statement of such examples for a separate document, such as a *responsa* devoted to a rigorous analysis of the issue of confidentiality in a Reform context, its availability to members would greatly improve assist rabbis and cantors in parsing their obligations of confidentiality in light of Jewish tradition.

The analysis of California law in this thesis also reveals some important directions for future legislative action on the protection afforded by the clergy-communicant privilege. In California, and perhaps other states as well, the origin of the privilege in the seal of the confessional as developed in Canon law has produced, in ways obvious and subtle, a law of privilege tailored to the experience of priests who act under a duty to hear

confessions in complete privacy and thereafter under an obligation to respect the absolute secrecy of the confessional. In addition to the previously discussed need for confession perceived by both statute and the courts under previous versions of California's clergy-communicant privilege, the present law of privilege still presumes that all clergy members who acknowledge some duty of secrecy must, according to the tenets of their faith, refrain from sharing any substantial part of the communication with others.

Although, for instance, a priest might view canon law as an absolute prohibition on sharing details of a penitential encounter with a supervising priest or relevant professional, rabbis and cantors may function in positions that require some degree of disclosure to supervisors. Such disclosure may serve the purposes of training or further the requirements of supervision in pastoral counseling yet, under California law as presently written, it runs the risk of waiving the privilege entirely.

Under Evidence Code § 912(d), for example, the disclosure of a confidential communication to third parties by a lawyer or physician does not waive the privilege if "reasonably necessary for the accomplishment of the purpose" for which they were consulted. This allows lawyers, for example, to reveal privileged information to experts hired to assist in the preparation of a litigant's case without risking waiver of the privilege. The statute does not, however, list clergy members among those professions who enjoy this important extension of the protection of the privilege. In the absence of their enumeration in this statute, Jewish clergy members risk waiver of the privilege if they reveal a substantial part of a privileged communication to, for example, a senior rabbi or cantor for the purposes of receiving advice from a more experienced

counselor.<sup>278</sup> Those clergy members whose training requires the routine presentation of a substantial part of their pastoral encounters to a supervisor run an even greater risk, particularly if they inform the people they counsel of their intention to reveal such information.

To avoid the choice between waiving the privilege or hindering the training and supervision of rabbis and cantors, the CCAR and the ACC should encourage states with laws similar to California's to amend their privilege statutes to allow the sharing of privileged information where reasonably necessary to accomplish the purposes for which the clergy member was consulted. In California, such an amendment would simply require listing clergy members as among those professionals who enjoy the protection of Evidence Code § 912. Such an amendment would help insure that congregants and others who seek religious counseling receive appropriate pastoral care without concern that consultation of a third party by a clergy member will risk waiving the privilege. Adding clergy members to the statute would also better reflect the realities of the modern religious landscape in which many members of the clergy seek more formal training in counseling and pastoral care.

This last conclusion particularly highlights the need of rabbis and cantors to educate themselves regarding the scope of protection afforded confidences both under

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<sup>278</sup> A rabbi or cantor could theoretically attempt to protect such conversations by claiming they took place in the context of a separate clergy communicant communication between, for instance, a senior and an assistant. This, however, confuses a supervisory communication for a pastoral one. The court in *Roman Catholic Archbishop of Los Angeles*, 445, 32 Cal.Rptr.3d at 231, rejected the contention of the Archdiocese that divulging the content of the confidential communication to superior did not waive the privilege. The court did not accept the argument of the Archdiocese that these communications took place in the context of a clergy-communicant communication even though the supervisor was also a priest.

Jewish tradition and applicable state law. Rabbis and cantors cannot assume that every secret they hear deserves their protection, nor can they assume that the protection of the clergy-communicant privilege applies to every secret shared in confidence. Neither can rabbis and cantor simply ignore the problem by concluding that Jewish clergy have no obligation to protect the secrets they hear as part of their duties as pastoral caregivers to their communities. The absence of absolute rules therefore requires the application of judgment informed by knowledge of Jewish tradition and the law of privilege as developed in the state in which they serve. In the years ahead, Reform rabbis and cantors should ask their respective governing bodies to specifically address their obligations of confidentiality as Jewish clergy in a liberal setting.

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