

Freedom of Speech

Let us compare the understandings of freedom of speech in American law and Jewish law.

Freedom of Speech in American law

First Amendment to US Constitution:

Congress shall make no law... abridging the freedom of speech.

It takes freedom of speech for granted. It simply tells Congress not to reduce it!

The “the” in “the freedom of speech” means: It is not a new right, but a reaffirmation of a previously understood right, including its understood limitations. [Justice Stevens, 1993]

Sure enough, a society must prohibit some forms of speech, so:

Speech prohibited in the US:

- Incitement to violence or illegal actions, terrorist threats;
- Defamation (libel) -- publicly released info that is false and defamatory and, if a public person is the victim, done with malice;
- Public obscenity, as defined by community standards
 - “I know it when I see it” [Justice Potter, 1964];
- False testimony (perjury) in court;
- False advertising;
- Disclosing classified information, trade secrets, or other privileged information;
- “Falsely shouting ‘Fire!’ in a theatre and causing a panic” [Justice Holmes, 1919];
- ...and others.

States have further restrictions.

US allows (but many European states do not, e.g., France):

- Incitement to hatred and discrimination,
- Slander and racial insults,
- Racist, antisemitic, or xenophobic activities, including Holocaust denial,
- Hatred against people because of their sex, sexual orientation, or disability,
- Presentation of drugs in a positive light and incitement to their consumption,
- Insults to the national flag or anthem.

US courts allow flag burning [Texas v. Johnson, 491 US 397, 1989], or wearing clothes with antigovernment slogans [Cohen v. California, 403 US 15, 1971].

-The more freedom of speech is abused, the more it will be restricted.

The limits of tolerance

In 1945, Karl Popper [Jewish philosopher of science] introduced the “paradox of tolerance”:

If a society is tolerant without limit, its tolerance will be destroyed by the intolerant: Unlimited tolerance leads to no tolerance.

For a society to remain tolerant, it must be intolerant of intolerance:

Less well known is the paradox of tolerance: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.

In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies. As long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be unwise. But we should claim the right to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. **We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.**

[Popper, The Open Society and Its Enemies, Vol. 1, note 4 to Chapter 7; emphasis added]

So giving unlimited free speech to the intolerant is a mistake.

If abuse of free speech becomes a serious problem (as in Europe), it must be reined in. (Subjective, yes.)

Freedom of Speech in Jewish law

Judaism does not have as clear a statement on freedom of speech. So must examine the issues one by one.

On the one hand, the Talmud itself testifies to such freedom, within broad bounds. It includes vigorous and feisty discussions, followed by minority opinions, followed by the majority opinion, which is usually the decision. Opposing viewpoints are welcome. As they say: Two Jews, three opinions. Talmud:

-Ben Zoma would say: Who is wise? One who learns from everyone. [Avot 4:1]

-[When Resh Lakish died, Rabbi Elazar ben Pedat] went and sat before [Rabbi Yochanan to console him]. For every statement that Rabbi Yochanan made [Rabbi Elazar ben Pedat] would say, "[Good point: There is a teaching [*baraita*] that supports you."

[Rabbi Yochanan] said... "When I said something [Resh Lakish] challenged me with 24 objections, and I gave him with 24 answers, and this led to a fuller understanding of the Torah. But you -- you say, 'There is a teaching that supports you?!' Don't I already know myself that my teaching is good?!"

He went out and tore his clothes, cried and said, "Where are you, Resh Lakish? Where are you, Resh Lakish?" [Bava Metzia 84a]

The Mishna says that, in trials for capital crimes, the most junior rabbis on the court had to speak first, so that they would not be swayed or intimidated by the more senior rabbis. [Sanhedrin 4:2]

In the Talmud, the only one not to have freedom of speech is God!! (Story of Oven at Aknai.) [Bava Metzia 59b]

Speech prohibited by Jewish law (but not by American law)

- Blaspheming God,
- Pretending to be a prophet of God,
- Speaking against the king,

- Disrespecting a rabbi,
 - Contradicting a teacher in private or in public, [Rashi on Numbers 25:6-7]
 - Speaking ahead of someone who is wiser, [Avot 5:7]
 - A rabbi refusing to accept a ruling of the Sanhedrin,
 - Talmud: Rabbi Eliezer could not accept majority view and was placed under cherem. [Berachot 19a]
 - US: If a judge refuse to agree with the majority, no legal penalty, but he could be removed from the bench for not deciding impartially. [ABA Code of Judicial Conduct §2.7]
 - Cursing people,
 - Malicious gossip (*lashon hara*), the most reviled of all. Mishna:

[There are] four things for which ["interest"] punishment is exacted in this world, while the principal punishment remains intact for him in the World to Come: Idolatry, sexual immorality, and murder. And Lashon Hara' is equal to them all. [Peah 8a]
- However, it is allowed to prevent harm or financial loss, or in court testimony. [Chafetz Hayyim, Shmirat HaLashon]
- Onaat devarim* ("hurting people with words"), i.e. being rude or insulting. Talmud:

Torah states "וְלֹא תוֹנוּ אִישׁ אֶת-עֵמִיתוֹ" Do not wrong one another" [Leviticus 25:17]. This includes intentionally saying something that will hurt, frighten or embarrass someone. Whoever does this has no share in the world to come. [Bava Metzia 58b-59s; Sefer HaChinuch 338; Shulchan Aruch, Choshen Mishpat 228:1.]
- This includes:
- Reminding someone of his previous sins after he repented,
 - Speaking negatively to a convert about his previous life.

[Shulchan Aruch, Choshen Mishpat 228:4]
 - Telling someone that his troubles were caused by his sins.

[Shulchan Aruch, Choshen Mishpat 228:4]
 - Lying, except to save a life, keep the peace, make people feel good, appear humble and modest, and protect oneself from loss or harm.

Speech permitted by Jewish law (but not by American law)

- Disclosing trade secrets to save lives. Talmud story:

Rabbi Yochanan was sick with scurvy, and he went to a certain non-Jewish woman [for treatment]... She [said]: Swear that you will not reveal [the remedy]. He said: I swear to the God of Israel I will not reveal it. She then revealed it to him. The next day he revealed it in his [public] lecture. [A rabbi asked:] But did he not swear to her?

[Another rabbi answered:] He swore: To the God of Israel I will not reveal it, [implying that] I may reveal it to His people Israel.

[The first rabbi rejoined:] But is this not a profanation of the [Divine] Name?

[The second rabbi answered:] [No, because] he stated [that provision] to her originally. [Avodah Zarah 28a]

The rabbis' concern was Yochanan's oath, not the fact that he revealed a trade secret.

Maimonides' summary: Don't talk too much!

The Mishna [Pirke Avot 1:17] says:

Shimon... says, "All my days I grew up among the Sages, and I did not find anything good for the body except silence. And teaching [Torah] is not what is essential, but action. And whoever increases words brings sin."

The Rambam's commentary is: [Rambam on Pirke Avot 1:17]

[King Solomon] the wise said:

In many words there is no lack of transgression, [but the one who curbs his tongue shows sense.] [Proverbs 10:19]

The reason for this is that most words are unnecessary and sinful... If a man speaks abundantly, he will surely sin, because there will be among his words something that is not proper to say. Therefore, one of the signs of the wise is that they use few words and one of the signs of the foolish is that they use a lot of words... The Sages declared that using few words indicates great stature and good lineage...

According to our Torah, speech divides into five groups...:

-The first group is what we are commanded to say: Reading the Torah, learning and analyzing it. This is a positive commandment: [The Torah says:]

And you shall **speak** [about words of Torah when you sit in your house, and when you walk by the way, and when you lie down, and when you rise up]. [Deuteronomy 6:7].

It is as weighty as all the other commandments [put together]...

-The second group is forbidden speech, such as... bearing false witness, tale-bearing and cursing... foul language and evil speech.

-The third group is disgusting speech. It has no benefit... but it is not a sin and is not rebellious. [It is] average speech, relating news, happenings, or what some king did in his palace, or why someone died, or why someone became rich. The wise call this "idle chatter",

and pious men refrain from it... Included in this category is also disparaging a virtue or extolling a vice...

-The fourth group is beloved speech. It speaks the praise of virtues... and disparages vices... It points the soul to these virtues through stories and songs, and likewise prevents vices. Likewise, it praises great people, extols their qualities, so others may appreciate their actions and follow their ways. And it condemns lowly and evil people, so others may despise their deeds and their memory, distance themselves from them, and not follow their ways. This is called "*derech eretz*" -- "civility."

-The fifth group is permitted speech. It is speech one needs for business and livelihood, for eating and drinking, for clothing, and for all other needs. It is permitted. It is not beloved and not despised. If he wants, he may speak it, and if he prefers, he may be silent. In this group, it is praiseworthy to be sparing, and men of ethics warn against excessive speech.

Concerning [words that are] forbidden or despised... it is obviously worthy to completely refrain from them. Concerning [words that are] commanded or beloved, if a person could speak them all his life, it would be good. Nevertheless, there are two conditions: First, his actions must match his words... and second, he must be brief... As the Sages taught [in the Talmud]:

A man should teach his students concisely. [Pesachim 3a]

Conclusion

-For American law, freedom of speech is about:

- Individual liberty,
- Allowing minority opinions to be heard, even if offensive,
- Limiting the power of the state.

It does not guarantee anyone will listen to it, understand it or transmit it.

-For Jewish law, freedom of speech is about:

- Ethical behavior
- Performing God's commandments.