

DEFINING THE UNSPEAKABLE:  
INCITEMENT IN *HALAKHAH* AND ANGLO-AMERICAN  
JURISPRUDENCE

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“What constitutes evil speech? Rabbah said: As when one says,

There is a fire burning in [the oven of] So-and-So’s house.

Abbaye asked: But what harm does he do? He merely provides information.

Nevertheless, [said Rabbah,] such information may be uttered with intent to slander,

As though he were saying: where else would such a fire be burning

Except in the house of So-and-So, who has plenty of meat and fish?”

(BT *‘Arakhin* 15b)

INTRODUCTION

One significant challenge confronting any state legal system is defining what speech should be permitted, or, more precisely, what speech should and should not enjoy protection from governmental interference. While the parameters of freedom of speech have been shaped and reshaped over several centuries, Anglo-American jurisprudence has not yet fully defined one of the several categories of speech that is not—and should not be—protected from interference. This is the category of incitement.<sup>1</sup> Jewish law (*halakhah*), too, has long wrestled with this category of speech and has yet to define its contours clearly. This paper explores how these two legal systems define this category of speech, whether their approaches are commensurable, and how each can benefit from nuances found in the other.

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1. Another broad and embattled category is that of the obscene. *See, e.g.*, LAWRENCE W. SUMNER, *THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION* (Univ. Toronto Press 2004).

This paper provisionally defines incitement as a speech-act intended to motivate others to engage in unlawful lethal activity.<sup>2</sup> Such a narrow definition is necessary to differentiate incitement from other kinds of speech that the law, especially Anglo-American law, also considers potentially dangerous and worthy of interference. These other categories include hate speech,<sup>3</sup> fighting words,<sup>4</sup> discriminatory speech,<sup>5</sup> crime-facilitating speech,<sup>6</sup> and inflammatory speech.<sup>7</sup> Of course, there are other forms of expression that should not be said because they are offensive, abusive, or factually inaccurate. Such expressions, however, generally receive governmental protection and may be uttered with no legal repercussions.<sup>8</sup>

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2. On speech-acts, see *infra* notes 63-64, for discussion of JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (Harv. Univ. Press 1962). Motivational speech by itself is not criminal; indeed, it is often revered, as, for example, the oration by preachers that provokes rapture. Obviously within tolerant liberal democracies of the past 100 or 150 years, such speech is protected from governmental interference. This provisional definition can include expressions promoting and motivating others to commit genocide. See ILIAS BANTEKAS, *PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW* (Manchester Univ. Press 2002). There are some speeches that encourage lawful lethal activity, such as morale-boosting and motivational words from commanding officers to troops during wartime. Certainly such speeches should not be considered incitement or criminal as long as the lethal activity they encourage does not constitute war crimes or crimes against humanity. As will be seen below, context is critical.

3. The purpose of hate speech is, generally, to recruit and reinforce morale within hate-filled groups. See Lawrence W. Sumner, *Should Hate Speech be Free Speech? John Stuart Mill and the Limits of Tolerance*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 133-50* (Raphael Cohen-Almagor ed., Univ. Mich. Press 2000); Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243 (Univ. Mich. Press 2001). Some scholars conflate hate speech, incitement, and racial discriminatory speech; see David Nash & Chara Bakalis, *Incitement to Religious Hatred and the 'Symbolic': How Will the Racial and Religious Hatred Act 2006 Work?*, 28 LIVERPOOL L. REV. 349 (2007).

4. Fighting words are those that "could be expected to cause violence." DWIGHT L. TEETER & BILL LOVING, *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 121 (12th ed., West 2008). This category hearkens back to *Chaplinsky v. N.H.*, 315 U.S. 568 (1942). As will be seen below, foreseeability is a critical element for incitement. In Canada, see *R. v. Keegstra* [1990] 3 S.C.R. 697 (Can.).

5. Discriminatory speech often includes racist speech. See, e.g., Jordan J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 RUTGERS L. REV. 565 (1991). See discussions of global efforts to curb racist speech in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* (Sandra Coliver ed., Univ. Essex 1992). See also Law Reform Commission of Western Australia, *Incitement to Racial Hatred* (The Commission 1989).

6. Crime-facilitating speech cannot rightfully be considered incitement because it does not persuade or inspire but only gives "people information that helps them commit bad acts—acts that they likely already want to commit." Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

7. On inflammatory speech, see ERIC BARENDT, *FREEDOM OF SPEECH* 295-302 (2d ed., Oxford Univ. Press 2007).

8. See, e.g., *Va. v. Black*, 538 U.S. 343, 358 (2003). That the government cannot criminalize unpopular utterances, see note 23 in Robert S. Tanenbaum, *Preaching Terror: Free*

Defining incitement in this narrow manner is merely tentative for, as will be shown below, both legal systems are still struggling to conceive the parameters of incitement, much less to define it precisely. For this reason, I defer formally defining incitement to the latter part of this essay.

The following discussion considers how Jewish law and Anglo-American jurisprudence construe speech-acts that each considers as incitement. To facilitate this analysis, I employ a modified discourse analysis that focuses on elements found in most every speech-act.<sup>9</sup> These elements include the spoken, the speaker, the audience, the mode of transmission, and context; and, because this concerns law, we add the element of restraint. Examining each element in turn illuminates each system's assumptions about incitement; and taken together, we can sketch each system's working definition of incitement. Even though aspects of these elements overlap, teasing them apart enables us to assess the commensurability of these systems and consider what each has to offer the other.

## I. WHAT SHOULD NOT BE SPOKEN

A critical element of incitement is its content. As previously noted, one possible notion of incitement includes content that motivates illegal lethal activity. The question here is whether each legal system subscribes to this relatively narrow definition or modifies it to include different or broader content.

### A. *Halakhah* and the Content of Incitement

The Judaic tradition cherishes speech, for it is through speech that praise is uttered, ideas are shared, love is communicated, and texts are studied (the last of which leads to holiness—the preeminent Jewish aim).<sup>10</sup> Not all speech, however, is laudable or permitted. Jewish law

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*Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 789 (2006).

9. This modified discourse methodology integrates Aristotle's *On Rhetoric* with CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., Univ. Notre Dame Press 1969), and JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhardt & Shierry Weber Nicholson trans., MIT Press 1990), among other scholars of rhetoric and discourse. Examples of this kind of methodology include Elizabeth M. Bucar, *Speaking of Motherhood: The Epideictic Rhetoric of John Paul II and Ayatollah Khomeini*, 26 J. SOC'Y CHRISTIAN ETHICS 93-123 (2006); Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485 (2008); Jonathan K. Crane, *Rhetoric of Modern Jewish Ethics* (2009) (unpublished Ph.D. dissertation, University of Toronto) (on file with author).

10. Moses Ibn Ezra, *Shirat Yisrael* 12c. "When a person refrains from speech, the ideas die, the soul stops, and the senses deteriorate."

prohibits some forms of expression outright, such as *lashon harah* (evil speech, especially gossip), *g'neivat da'at* (deceit, particularly in commercial enterprises), and *'ed sheker* (bearing false witness), among others. These forms of speech can harm others both directly and indirectly.<sup>11</sup> Moreover, speech that embarrasses another (*halbanat panim*—literally, whitens a person's face) is tantamount to murder. Indeed, the Talmud teaches that it would be better for a person to commit suicide than to publicly embarrass another.<sup>12</sup>

But what constitutes inciting speech according to *halakhah*? Is it a subcategory of one of these other prohibited forms of speech, or a category in its own right? What, precisely, ought not be said?

The content that *halakhah* most explicitly links to incitement is speech that provokes others to engage in idolatry. The Mishnah,<sup>13</sup> the earliest layer of rabbinic law, rules that a *mesit* (an enticer)<sup>14</sup> is one who incites someone else to engage in idolatry; and he is subject to death by stoning.<sup>15</sup> This ruling seems to emerge from the Deuteronomic teaching that people should not only distance themselves from someone who secretly (*baseter*) entices others to engage in idolatry, but should show him no pity and kill him by stoning (13:6-10).<sup>16</sup> But neither this

11. When Rabbi Yohanan was asked, "What is evil speech (*lashon harah*)?" he replied, "What is uttered explicitly as well as what is only hinted at." JT *Peah* 1:1/16a. See also BT, *Baba Metzia* 58b, for commentary on *Leviticus* 25:17 and discussion of how speech can wrong others in ways worse than monetary or physical injuries.

12. BT *Baba Metzia* 58b-59a, *ad loc.* The graveness of this teaching derives from the unlawfulness under Jewish law of committing suicide. See BT *Baba Kama* 91b; MT *Rotzeach* 2.2-3. Compare with narratives of Saul's suicide (1 Sam 31:4-5) and Samson's (Judg 16:30).

13. The Mishnah was written around 200 CE, and serves as the centerpiece for later rabbinic commentary in the Jerusalem and Babylonian Talmuds.

14. A note about translation: the Hebrew verb *yasat* means to stir up, to instigate, to cause another to do. The causative form of the verb *yasat* is the root of the noun *mesit*. Because of these words' multiple senses, I translate them variously, depending upon context, as to instigate, to entice, to incite, an instigator, an enticer, an inciter, etc.

15. M at BT *Sanhedrin* 53a. Someone who incites a whole town to idolatry is called a *maddiah*, and also deserves death. Idolatry remained a capital crime even into the medieval era, cf. MT *Avodah Zarah* 5.1 and 5.2. See also MT *Sanhedrin* 15.10 for a recapitulation of this Mishnah.

16. The eleventh-century French commentator R. Solomon b. Isaac (universally known as Rashi) connects this Deuteronomic passage to the *mesit* at BT *Sanhedrin* 67a, s.v., *hamesit et hahedyot*. The Jerusalem Talmud, however, portrays the *mesit* speaking in a loud voice (*bilshon gavoha*) and the *maddiah* speaking quietly (*bilshon namuch*); and a *mesit* usually speaks in the Holy Tongue (i.e., Hebrew) (*bilshon hakodesh*) while a *maddiah* speaks in the vernacular (*bilshon hedyot*). If a *mesit* speaks in the vernacular, he is dealt with as if he were a *maddiah*, and vice versa. See YT *Sanhedrin* 7/25d. A *maddiah*, like a *mesit*, is stoned and not strangled, according to the M at BT *Sanhedrin* 53a. For a discussion of the command to kill the inciter, see Bernard M. Levinson, "But You Shall Surely Kill Him!": *The Text-Critical and Neo-Assyrian Evidence for MT Deuteronomy 13:10*, in "THE RIGHT CHORALE": STUDIES IN BIBLICAL LAW AND INTERPRETATION 166 (Mohr Siebeck 2008).

mishnah<sup>17</sup> nor the *Gemara*<sup>18</sup> explicitly defines any other constitutive elements of incitement. We do not know at this stage, for example, whether an inciting speech is conveyed exclusively through words or through other forms of persuasion, such as force or modeling certain behavior.

This discussion of the *mesit* suggests that Jewish law conceives of inciting content as that which incites others to engage in idolatry—but not to other sorts of illegal much less lethal behavior.<sup>19</sup> *Halakhah*'s concern thus appears to be more focused upon serious religious wrong than social harm. Yet as Spinoza's groundbreaking scholarship taught, during the early stages of Judaism, the civil was the religious and *vice versa*.<sup>20</sup> Thus, insofar as idolatry rejects normative Judaism's worship of God in favor of other deities, the *mesit* rejects the authority of Jewish norms and institutions. Moreover, the *mesit* encourages others to join in rejecting Judaism's fundamental underpinnings and thereby threatens the Judaic system as a whole. Taken together, these *halakhic* passages conceive of incitement to idolatry as having a particularly narrow, albeit especially potent, content, and as ruling that the one who speaks such content is guilty of a capital crime and should be punished accordingly.<sup>21</sup>

But incitement to idolatry is not the only kind of criminal incitement in *halakhah*. Another kind of incitement of importance to *halakhah* is intentionally distorting normative Jewish law in such a way that co-religionists knowingly or unwittingly break the law of the

17. Without a capital M, mishnah means the individual law, while Mishnah refers to the corpus as a whole. See *supra* note 13.

18. The *Gemara* is rabbinic commentary on the Mishnah. It includes pieces that are as old as the Mishnah but were not incorporated into the Mishnah, as well as later commentary. The Jerusalem Talmud's *Gemara* came into its final form around 400-500 CE, and the Babylonian Talmud's *Gemara* around 600-700 CE.

19. Other Biblical instances of the verb for inciting (*hesit*) offer interesting comparisons. In 1 *Samuel* 26:19, it is understood that God can incite humans to engage in idolatry. At 1 *Kings* 21:25-26, Jezebel incites her husband King Achav to idolatry. In *Jeremiah* 43:3, the people claim that Baruch ben Neriya incites the prophet Jeremiah to lead the people astray—but not to idolatry *per se*. And *Job* 2:3 depicts God complaining to Satan (the angelic adversary) that Satan incited God to do evil to Job (referring to *Job* 1:9-12). Contrast these with Calev's daughter, Achsah, who impressed (*t'sitehu*) him for a blessing, specifically for water wells (*Josh* 15:18).

20. See B. SPINOZA, *THEOLOGICAL-POLITICAL TREATISE* (2d ed., Hackett 2001).

21. The *Gemara* goes on at length about this point, and finally ends with a fascinating assertion that this rule was carried out against a particular famous inciter: the son of Setada in the city of Lod, who was hung on the eve of Passover. This son of Setada, also known as the son of Pandera, was Jesus of Nazareth. BT *Sanhedrin* 67a. That the rabbis labored to retell Jesus' trial and death according to Jewish—not Roman—law (e.g., BT *Sanhedrin* 43a) is discussed with great erudition in PETER SCHAFFER, *JESUS IN THE TALMUD* (Princeton Univ. Press 2007). He argues that the Talmud offers a counternarrative to John's version of these events and not a historical account of what happened.

highest court, the Sanhedrin.<sup>22</sup>

The question here is whether deceit constitutes incitement. Though harmful and considered heinous, deception in general is not criminal.<sup>23</sup> But what about deliberately misconstruing Jewish law? The Torah provides that a man who deliberately disobeys a court's ruling is to be executed.<sup>24</sup> Early rabbinic sages applied this teaching to a judge who ruled contrary to a superior court's decision.<sup>25</sup> This judge, called a rebellious elder (*zaken mamre*), is to be strangled, but only by order of the greatest court in the land, the Sanhedrin.<sup>26</sup> This would occur if and only if the judge attended the Sanhedrin, learned its position on an issue, and yet he or a follower of his rejected its position and ruled according to his own contrary teaching instead.<sup>27</sup> Maimonides<sup>28</sup> clarifies these rules as follows:

The rebellious elder spoken of in the Torah is a sage among the sages of Israel and is steeped in Jewish lore, functions as a judge, and teaches Torah [law] like other sages who judge and teach, but disagrees with the Sanhedrin on an issue of law, refuses to adopt their ruling, and gives a practical ruling (*hor'ah la'asot*) counter to theirs. The Torah condemns him to death, and if he confesses he has a portion in the world to come. Even though he and the Sanhedrin rule according to tradition,<sup>29</sup> the Torah pays honor to their [i.e., the Sanhedrin's] position. Even if the Sanhedrin is willing to forego the honor due to them and let him go unpunished, it cannot, in order that strife may not increase in Israel.<sup>30</sup>

A judge may continue to advocate a dissenting view on an issue after learning the Sanhedrin's position only as long as he never issues a practical ruling (*hor'ah la'asot*) on the issue.<sup>31</sup> Maimonides emphasizes that disagreement among judges of Jewish law and teachers of Torah is

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22. The juxtaposition of the call to idolatry and the contravention of superior law has ancient roots. See BT *Sanhedrin* 88b.

23. M and Gemara at BT *Baba Metzia* 58b.

24. Deut 17:8-13.

25. See M *Sanhedrin* 11.2.

26. M *Sanhedrin* 11.1, 11.4. See also BT *Sanhedrin* 14b, 16a, 87a-ff.

27. BT *Sanhedrin* 88b.

28. Maimonides is the twelfth-century Spanish-Egyptian legal scholar and philosopher whose work is universally perceived as most authoritative after the Talmud and before Joseph Karo's sixteenth-century *Shulchan Aruch*.

29. This may be a nod to the notion that competing rabbinic arguments intended to clarify the will of God are each "words of the living God"—that is, worthy of articulation, consideration, and retention in the textual tradition. Cf., BT *Eruvin* 13b.

30. MT *Mamrim* 3.4. See also MT *Sanhedrin* 5.1, 14.11. Maimonides discusses some rationales for these laws in his *Guide of the Perplexed* III:41.

31. MT *Mamrim* 3.6.

legally permissible as long as they do not rule contrary to the Sanhedrin.<sup>32</sup> Yet Maimonides is silent about the Talmudic position that a judge is guilty when he offers a dissenting opinion—but not a practical ruling—and someone else acts upon it. On the one hand, this silence suggests that Maimonides wants to protect the right of judges to offer dissenting views without fearing reprisal if someone acts according to them. On the other hand, it may also suggest that Maimonides views the audience as ultimately responsible for its actions regardless of whether its acts are based upon a judge's minority opinion. More on the issue of audience will be discussed below.

The importance here is the distinction between advocating and ruling. Judges and teachers may advocate opinions on many matters of law that run contrary to normative law. But they may not rule contrary to that law, for if they do, they flout the superior authority of the Sanhedrin and in doing so threaten the integrity of the legal system as a whole.<sup>33</sup> Like idolatry, such defiance strikes at the heart of the Judaic system and cannot be accepted. Hence, teaching contrary to normative law is permissible only so long as it never leads to a practical ruling in an actual case.

It is clear that *halakhah* acknowledges that certain inciteful content is potentially harmful and criminal. The content about which *halakhah* is most concerned, however, does not comport with this paper's provisional definition of incitement, i.e., speech that motivates others to commit lethal behavior. But as will be discussed below, a speech's content is not the only dimension critical to identifying it as incitement.

#### B. Anglo-American Jurisprudence and the Content of Incitement

The issue of dangerous speech is not new to Anglo-American legal thought. In the nineteenth century, Englishman John Stuart Mill famously illustrated this issue as follows:

[E]ven opinions lose their immunity [from legislative interference] when the circumstances in which they are expressed are such as to constitute [by] their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the

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32. See also M *Sanhedrin* 11.2; BT *Sanhedrin* 86b. Minority opinions are essential to *halakhah* and are carefully recorded in legal deliberations. See discussion in MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES IV*:1848ff (Jewish Publ'n Soc'y 1994).

33. For this reason, this judge's speech is distinct from crime-facilitating speech. The personage of the speaker has a greater bearing in the former than in the latter; that is, perceived and real authority are relevant to incitement but irrelevant to crime-facilitating speech. See Volokh, *Crime-Facilitating Speech*, *supra* note 6.

poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which without justifiable cause, do harm to others may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind.<sup>34</sup>

For Mill, speech that is likely to provoke an audience to harm nearby individuals is properly subject to control and interference. Later in this text, he acknowledges that the audience inflicting injury is wholly responsible for the harms committed, but if it was following a speaker's counsel, the speaker may also be culpable if he or she stands to gain from the harms inflicted.<sup>35</sup> Although Mill does not say what constitutes such gain, his account focuses on harm and proximity, themes that reappear in subsequent Anglo-American legal thinking.

In 1925, American Supreme Court Justice Oliver Wendell Holmes, Jr., joined by Justice Louis Brandeis in a dissenting opinion, thought that not all expressions should be unfettered, as perhaps incitement—stated with eloquence and enthusiasm—could “set fire to reason.”<sup>36</sup> He based this conclusion on a test he established in 1919 to distinguish advocacy from incitement:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>37</sup>

This “clear and present danger” test became the standard for subsequent jurisprudence on incitement and many other forms of harmful speech.<sup>38</sup> As it stands, however, this test does not define the “question” of “proximity and degree.” For example, does “proximity” refer to temporal proximity or spatial or both? What makes one thing proximate and another not? And does “degree” mean the severity of the advocated

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34. JOHN S. MILL, ON LIBERTY 53 (David Spitz ed., Norton 1975) (1859).

35. *Id.* at 91.

36. *Gitlow v. N.Y.*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting, joined by Brandeis, J.).

37. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

38. See also *Hess v. Ind.*, 414 U.S. 105, 108 (1973) (per curiam). See discussions in David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002); David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT'L L.J. 263 (2006).



illegal behavior, or the probability that an audience will do this illegal behavior at the speaker's urging? These ambiguities aside, both imminence and probability have become critical elements of later definitions of incitement.<sup>39</sup>

Justice Brandeis refined the clear and present danger test in a 1927 concurring opinion. For him, intention as well as personal or group history matter more than probability and imminence when deciding whether a speech-act is incitement or mere advocacy to illegal behavior.<sup>40</sup> Yet accurately determining a speaker's intention is no easy matter. If intention is not sufficient to identify incitement, something else, perhaps something specific, must. In the famous case of *Brandenburg v. Ohio*, the Supreme Court ruled in 1969 that general advocacy to violence is protected speech, but advocating (including preparing and steeling a group to violence) a specific imminent unlawful violent act is not.<sup>41</sup> That is, specificity of desired action becomes a necessary component to the definition of incitement.<sup>42</sup> Preeminent First-

39. Justice Learned Hand disagreed with this approach that leaned so heavily on predictions and causal linkages. For a case about espionage Hand ruled that it would be best to examine an utterance not on a speaker's intention or on possible outcomes of a speech given its context, but rather solely on its content. "[T]o assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government." *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). Later reversed, 246 F. 24 (2d Cir. 1917). Though Hand's focus on "words that counsel the violation of law" fails to identify concrete content that constitutes incitement *per se*, it does suggest that motivational speech is a critical element of incitement. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 157-61 (Knopf 1994).

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Even advocacy of violation [of the law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

*Whitney v. Cal.*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

41. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam). See also *Noto v. U.S.*, 367 U.S. 290, 297-98 (1961). See discussion in Lyrissa B. Lidsky, *Brandenburg and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009 (2002).

42. Must the speaker's desired action come about for a speech to count as incitement? Suppose a speaker emphatically and authoritatively instructs an audience to assault a particular and nearby third party—and yet the audience does nothing. Should that speech be considered incitement, and the principal culpable for a crime?

Two views are possible. The first would hold that if the speaker does not succeed in inciting anyone into the desired action, then the speech is, at most, attempted incitement. In a similar way, Aristotle comments that a speech is persuasive "because there is someone whom it persuades." Aristotle, *On Rhetoric*, Book I, Pt. 2, 1356b. Thus, for Aristotle, an argument that falls short of actually persuading anyone falls short of being persuasion; it is, at most, attempted persuasion.

Amendment scholar Frederick Schauer sharpens this element of specificity when he says that, to qualify as incitement a speech must specify the victim, be direct about what particular action should be done, and be exclusively about this action against this victim.<sup>43</sup>

Early Anglo-American jurisprudence did not clearly define what constitutes the content of inciting speech. While the clear and present danger test remains critical in contemporary rulings, this test does not define content *per se* but context, as will be seen below. And Justice Louis Brandeis' focus on intention also avoided the issue of content in favor of scrutinizing a speaker's motivation for the speech uttered. Only with *Brandenburg* did incitement's content become concretized. Now a speech that exclusively specifies an illegal and lethal action against a particular and nearby victim can possibly be considered inciting content.<sup>44</sup>

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Under the second view, a speaker need not actually succeed in leading an audience into violence for a speech to count as incitement. This view appears to prevail in both the United States and Britain, where the courts have ruled that regardless of a speech's success at rousing an audience to criminal behavior, if the speech intends unlawfulness then it should be considered incitement. In Britain, *see* *The King v. Higgins*, 102 Eng. Rep. 269, 274-75 (K.B. 1801) (Grose, J.):

But further, an attempt to commit even a misdemeanor has been shewn [sic] in many cases to be itself a misdemeanor. Then if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a robbery were actually committed, the inciter would be a felon. The incitement, however, is the offence, though differing in its consequences, according as the offence solicited (if it be felony) is committed or not.

And in the United States, the government may "forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Hess v. Ind.*, 414 U.S. at 108 (internal quotation marks omitted) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) (emphases modified). It therefore appears that the audience need not actually respond. *See also* Owen Fiss, *Freedom of Speech and Political Violence*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE*, *supra* note 3, at 71.

43. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 192 (Cambridge Univ. Press 1982). For national and international laws criminalizing incitement to group hatred, *see* NATAN LERNER, *THE CRIME OF INCITEMENT TO GROUP HATRED: A SURVEY OF INTERNATIONAL AND NATIONAL LEGISLATION* (World Jewish Congress 1965); to genocide, *see* Joshua Wallenstein, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 *STAN. L. REV.* 351 (2001); to racial discrimination, *see* Eliezer Lederman & Mala Tabory, *Criminalization of Racial Incitement in Israel*, 24 *STAN. J. INT'L L.* 55 (1987); and to unlawful violent behavior generally, *see* Adam Shinar, *Reflections on the Judgments Regarding Jabarin and Kahana—A Conflict Between Freedom of Speech and Incitement and Encouragement of Violent Acts*, 35 *ISRAEL L. REV.* 153 (2001). The last two sources focus on Israel in particular. Some countries, such as Canada, attempt to address multiple forms of incitement simultaneously; *see* Irwin Cotler, *Holocaust Denial, Equality, and Harm: Boundaries of Liberty and Tolerance in a Liberal Democracy*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE*, *supra* note 3, at 151-81.

44. For this reason, a court did not consider an ambiguously-worded ad an expression of incitement. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989).

## II. THE INCITER

Who, according to these legal systems, speaks inciting content? Can just anyone incite? Conversely, are there certain classes of people or institutions that cannot be liable for this kind of speech, and if so, who are they?

### A. *Halakhah* and the Speaker of Incitement

As seen above, *halakhah* assumes that human beings—and not institutions—incite. A *mesit* is an enticer to illegal activity, and could be any person in the community; while a *zaken mamre*, a rebellious judge, is a person of legal stature. Both classes of people would be deserving of the death penalty were they to be found guilty.<sup>45</sup>

### B. Anglo-American Jurisprudence and the Speaker of Incitement

It would be all but impossible to hold anyone but an individual liable for incitement were Justice Brandeis' focus upon intention were the sole element in determining whether a speech-act constituted incitement.<sup>46</sup> Even though this is not the case, publishers, newspapers, movie producers, and entertainers in general are usually protected from accusations of incitement unless they convey explicit and specific information promoting illegal and lethal action.<sup>47</sup>

## III. THE AUDIENCE

Inciters seek to move and motivate audiences. The question at hand is whether all audiences are the same when it comes to incitement. What happens if the intended audience is not moved to action by a speaker's speech: does the speech then qualify as incitement *per se* or as something else? Would such a speech be legally actionable?

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45. A *mesit* is subject to stoning; a *zaken mamre* to strangulation.

46. Cf., Raphael Cohen-Almagor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination*, in LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE, *supra* note 3, at 83, 93; Lidsky, *supra* note 41, at 1018.

47. In *Braun v. Soldier of Fortune Magazine*, an advertisement for "GUN FOR HIRE" was found sufficiently dangerous to the public and thus a prosecutor charged the magazine with incitement. See *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110, 1121 (11th Cir. 1992). See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (*en banc*). See discussion in Teeter & Loving, *supra* note 4, at 122-24, 131-34. See also discussion by symposium participants in 27 N. KY. L. REV. (2000).

### A. *Halakhah* and the Audience of Incitement

The *halakhic* principle *ein shaliach l'davar averah* teaches that it is not permissible to send, by either verbal or written instructions, emissaries on missions that will transgress the law.<sup>48</sup> Talmudic rabbis debate whether this holds true for every kind of audience.<sup>49</sup> They conclude that a speaker is liable for an audience's crime if and only if that audience had the freedom to reject the proposed action.<sup>50</sup> In the case of incitement, it is unclear whether an audience is at liberty to reject a speaker's call to illegality. As will be shown below, the audience for a *mesit* indeed has the liberty to reject the speaker's call. But for the immediate audience of a *zaken mamre*, litigants may not be at liberty to reject the judge's rule. Thus an audience is culpable for its actions if the speaker encourages idolatry but not if the speaker rules contrary to superior law.<sup>51</sup>

There are a few exceptions to the principle *ein shaliach l'davar averah*. While some of the exceptions refer to a speech's content, others focus exclusively on the audience. If a speaker encourages an audience to use sacred objects unlawfully, the speaker alone is liable for the ensuing crimes.<sup>52</sup> Obviously this reinforces concerns about the *mesit*. The same holds true if a speaker encourages someone to steal and slaughter an ox or sheep.<sup>53</sup> A speaker is thus liable if he encourages religious error or economic theft. In all other instances, however, audience members themselves accrue liability for whatever illegal activity they are encouraged to do by the speaker.

But what if a speaker addresses an audience that lacks competence to reject the speaker's proposal? Suppose an audience is comprised primarily or only of those who cannot be held legally responsible for

48. The literal translation is: there is no (or one may not send out an) emissary for a transgression. Or, there is no agency for wrongdoing. The earliest mention of this principle is in the *Gemara*. Moreover, it is found only in the Babylonian Talmud and not also in the Jerusalem Talmud. See, e.g., BT *Kiddushin* 42b; *Baba Kama* 79a. See also MT *Sheluchin v'Shutafin* 1:1; Tur, *Choshen Mishpat* 182:4.

49. For example, women and slaves who were sent to steal are exempt from paying for this crime, for they cannot personally pay reparations without permission from their husband or master, respectively. See BT *Baba Kama* 87a.

50. See R. Sama's comment at BT *Baba Metzia* 10b.

51. There is a contrapositive to this principle: "action by an agent is equivalent to action by the principal" for matters not transgressing the law. Cf., *Mekhilta de Rabbi Ishmael. Bo, Tractate De-Pisha* § 5 (p. 17). Found at Elon, *supra* note 32, I:342. See also SA *Choshen Mishpat* 182.1.

52. See Lev 5:15-16 about guilt-offerings for trespasses. This crime (*me'ilah*) applies to all consecrated things, including sacrifices, money and objects donated to the Temple. BT *Kiddushin* 42b; MT *Me'ilah* 7.2.

53. See Exod 21:37 about the reimbursement for such wrongdoing. On this crime (*t'vichah u'mchirah*), see BT *Kiddushin* 42a.

their actions, such as the *halakhic* classes of deaf-mutes, imbeciles and minors.<sup>54</sup> In this situation, the speaker is legally responsible for the audience's wrongdoing.<sup>55</sup> Furthermore, insofar as this legally incompetent audience does not have the wherewithal to reject a principal's exhortations, the speech may not qualify as incitement *per se* but be more akin to coercion. If this be the case, and if the speaker encourages this audience to engage in idolatry or some other illegal action, the speaker is rightfully held accountable for the ensuing crime.

If, on the other hand, the audience is legally competent and the speaker encourages them to murder or engage in idolatry, the audience should opt to be killed rather than follow his exhortations because they and not the speaker will be liable.<sup>56</sup> Even though the speaker to a legally competent audience generally would not be criminally liable, according to Maimonides, he who sends another to murder has spilled blood and carries the guilt of killing, and is obliged to die at heaven's behest—but is not executed by a human court.<sup>57</sup> In this situation, a speaker who encourages others to murder has done something morally condemnable though not legally or civilly actionable.<sup>58</sup>

#### B. Anglo-American Jurisprudence and the Audience of Incitement

Throughout Anglo-American legal consideration of the audience of incitement, the issue of harm is critical.<sup>59</sup> The law categorizes harms in three ways: according to those affected; the location of harms vis-à-vis the speech; and the degree of the intended harms.

Harms to people include harms to third parties and to participants. Third parties—people beyond the immediate audience—are the targeted victims specified in an inciting speech. Participant harms, which need not be present at all, can be subdivided into those suffered by a speaker

54. These categories—the *cheresh*, *shoteh* and *katan*, respectively—are frequently cited in *halakhah* as classes not legally responsible for their actions. They cannot, for example, serve as witnesses in court cases. See BT *Gittin* 51b; BT *Ketubot* 18a; *ad loc.*

55. MT *Me'ilah* 5.1. See also R. Isserles' commentary on SA *Choshen Mishpat* 182:1. The principal should have "known that the agent would carry out the agency inasmuch as the agent would not thereby be committing any wrong himself"—in the opinion of Elon, *supra* note 32, at III:1365.

56. The Talmud rules that an individual should rather die than be coerced to engage in idolatry or sexual licentiousness or commit murder. See BT *Sanhedrin* 72a-74b.

57. MT *Rotzeach U'Shmirat Nefesh* 2.2. See also BT *Kiddushin* 43a.

58. Israeli law, by contrast, holds an inciter culpable for offenses an audience perpetrates that "are a probable consequence of carrying out the counsel" of the speaker. See Eliezer Lederman & Mala Tabory, *Criminalization of Racial Incitement in Israel*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION, *supra* note 5, at 182, 186.

59. This discussion of harms draws from Sumner, *supra* note 3, and Sumner, *supra* note 1.

and those suffered by an audience. An inciting speech may harm a speaker if that individual was coerced to say it or if the speech specifically targets the speaker or a group associated with the speaker. Although conceivable,<sup>60</sup> it is unlikely a speaker would articulate inciting expressions against him- or herself. On the other side of the speech, if an audience did not willingly choose to be exposed to a particular speaker, we may say the speaker addresses a “captive audience,” and the audience is harmed in the very act of being addressed. While this may occur, it is probably more common that an audience willingly listens to a speaker, and as such, it would be inappropriate to ascribe participant harms to the audience.<sup>61</sup>

The location of harm may be external or inherent to inciting speech. External harms are those Mill would recognize: actual harms inflicted upon third parties such as discrimination, hostility, and outright violence. While a speaker does not personally perform these harms by speaking his speech, he intends them and encourages the audience to bring them about.<sup>62</sup> Inherent harms, by contrast, refer to an expression’s content. The content can damn and damage an intended victim’s self-esteem and security. Certain statements, such as insults and threats, inherently harm.<sup>63</sup> An audience of an inciter’s speech may be victim of inherent harms and yet perform external harms inspired by the speaker.

The category of degree of harms can be divided into primary and secondary harms. The former are harms society directly seeks to prevent, such as assaults, and the latter are acts “likely to cause a primary harm,” such as fighting words.<sup>64</sup> The free speech principle of the First Amendment of the U.S. Constitution suggests that speeches causing secondary harms are usually protected forms of speech. But when a speech seeks harm to national security, especially in times of war, it warrants interference.<sup>65</sup> Because of this special context, certain forms of speech that would otherwise not warrant interference are now subject to possible interference so as to protect governmental institutions or individuals or groups critical to governmental or national security.

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60. Cf., Plato’s *Apology*, in which Socrates all but urges the Athenian jurors to convict him and sentence him to death.

61. This is distinct from the scenario of the hostile audience. See Barendt 302ff, *supra* note 7.

62. Austin, *supra* note 2, would call these perlocutionary acts.

63. These would be illocutionary acts, according to Austin, *supra* note 2. See discussion of such harms in *R. v. Keegstra* [1990] 3 C.S.R. 697 (Can.).

64. Schauer, *supra* note 43, at 192. On fighting words, see *Chaplinsky v. N.H.*, 315 U.S. 568 (1942).

65. Schauer, *supra* note 43, at 199.

Outside of such extraordinary circumstances, however, speech advocating secondary harms would not be considered incitement and audiences would be free to hear it.

This focus on harms allows Anglo-American jurisprudence to differentiate audiences for inciting speech in the following manner. On the one hand, it is understood that a human audience can impose primary harms upon third-party victims immediately following a speaker's motivational speech. This conceptualization has held constant ever since Mill's illustration of an angry mob outside a corn-dealer's home. Even if they were abused into action or freely and willingly did so, members of the audience are culpable for their actions. In this scenario, both speaker and audience are understood to be responsible for the enacted harms and are punishable . . . but for different crimes: the one for incitement, the other for the illegal behavior enacted. On the other hand, if a speaker's intended victim is the government in general and the context is a time of national insecurity, no action is necessary by an immediate human audience for a speech to qualify as incitement.<sup>66</sup> It is the speech's public venue that renders it suspicious and warrants intervention.<sup>67</sup> That is, the audience's presence—but not necessarily the audience's probable ensuing lethal actions—is a necessary component in times of war for a speech to be considered incitement that in other times would not.

But in a time of relative peace, consider a speech that sounds like incitement, given to an immediate audience, and the intended victim(s) is nearby—yet the audience does not perform said lethal action. Would this speech qualify as incitement? It seems that if a susceptible mob is not persuaded to engage in illegal behavior, the speaker's speech cannot rightly qualify as incitement, regardless of how vituperative or insulting it may be. This means that in times of relative peace, an audience must actually harm a victim in order for the law to recognize a speech as actual incitement, rather than merely attempted incitement.

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66. The challenge here is to differentiate this incitement from sedition.

67. "Public provocation" is a critical element for international, European and Australian legal systems. Cf., Ben Saul, *Speaking of Terror: Criminalizing Incitement to Terrorism*, 28 UNIV. N. S. WALES L.J. 868 (2005). Saul distinguishes indirect incitement (e.g., "Osama is a great man") from *apologie du terrorisme* (i.e., speech that praises, condones or justifies terrorism in the abstract). Recklessness, however, may bring about utterances that could be considered indirect incitement or *apologie*. For this reason, intending actual harm (to government or persons) is critical for prosecution for incitement. Saul (at 884) acknowledges that the United States' "clear and present danger" test generally protects public provocation, indirect incitement and *apologie* from unnecessary restriction even in times of war.

## IV. TRANSMISSION

The modes permitting the transmission of inciting speech need further clarification. It already seems that direct address to an immediate audience is one such mode. Is this an inviolate mode, that is, are there exceptions when inciting content orally given to an immediate audience does not constitute incitement? What other modes of transmitting inciting content would be culpable for the crime of incitement?

A. *Halakhah* and the Transmission of Incitement

As seen above, *halakhah* understands that inciting content moves people either to engage in illegal behavior generally (in the case of the *zaken mamre*) or in illegal worship (in the case of the *mesit*). The *zaken mamre* renders judgments in courts that are neither private nor unfettered public arenas. Jewish courts certainly had more than one person immediately before the ruling rabbi(s). Although such courts could theoretically permit significant proportions of the general population to be present when the ruling is made, usually the only ones present were the litigants, scribes, witnesses and concerned citizens. Thus, when a *zaken mamre* chooses to rule in contravention to the Sanhedrin, he does so within a semi-public context, verbally and directly to those upon whom he renders judgment.<sup>68</sup>

In the case of the *mesit*, however, the situation is more complicated. According to the Mishnah, a *mesit*, speaking directly to the audience, describes the location of an idol and its powers.<sup>69</sup> But how many are in this audience and where does it take place? Is it in a regulated place as a rabbinic court? Or does it occur in, say, the marketplace in full daylight with random people walking by? The Mishnah answers these questions by delineating how a *mesit* is brought to justice.

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68. As indicated above, Maimonides (MT *Mamrim* 3.4) opines that even if a *zaken mamre* confesses his crime, he may retain a place in the world to come but does not relieve himself of due punishment.

69. M at BT *Sanhedrin* 67a. Someone who entices another Jew to idolatry is a commoner (*hediyot*) and the one so seduced is also a *hediyot*. The *Gemara* on this mishnah points out that if the *mesit* were a prophet, he would be strangled and not stoned. See Rashi's comments on this mishnah in this regard. Maimonides disagrees. He rules that prophets should also be stoned. See MT *Sanhedrin* 5.1. The other forms of execution include decapitation and burning. The rabbis disagree about the levels of severity these modes of execution entail. See M and discussion at BT *Sanhedrin* 79b and following.



If [the *mesit*] incited two [to idolatry], they themselves are witnesses against him, and they bring him to a court and stone him. But if he enticed one, that one is to respond, saying “I have friends who desire [to engage in idolatry, so tell them too].” If [the *mesit*] was cunning and declined to speak before them, witnesses are hidden behind a partition, while he who was incited says to him, “Make your proposal to me now in private.” When the *mesit* does so, the other replies, “How shall we forsake our God in Heaven to go and serve wood and stones?” Should he retract, it is well and good. But if he answers, “It is our duty [to worship idols], and it is good for us,” then the witnesses stationed behind the partition take him to court and have him stoned.<sup>70</sup>

It appears that entrapping a *mesit* and bringing him to justice is no easy task.<sup>71</sup> The easiest scenario is when a *mesit* speaks directly to at least two individuals. The Mishnaic insistence on two is because two witnesses are needed to serve in capital cases.<sup>72</sup> But what if the people a *mesit* speaks to are not eligible to serve as witnesses, such as deaf-mutes, imbeciles and minors? Would the oral transmission encouraging idolatry still constitute a capital crime? The mishnah does not address this scenario, but its silence suggests that such a speaker would not be executed for so speaking to this legally-incompetent audience.

Yet the mishnah stipulates other ways to entrap a *mesit* and bring him to justice. If a *mesit* speaks first to a sole individual, that individual—who for one reason or another understands that the content spoken is criminal—is to deceive the *mesit* on at least two issues. The first deceit is that the person has friends who desire to engage in idolatry and want to know where this idol is; yet these “friends” do not have idolatrous intentions. The second deceit is that these friends are brought to hear the *mesit*’s speech not for the purpose of being motivated to wrongful worship but rather for the purpose of witnessing the *mesit* articulating such content and to attest to this fact in court. The mishnah figures that a *mesit* might be clever enough to anticipate these false

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70. The mishnah continues: “If he says, “I will worship it,” [Rashi comments here that if the *mesit* says any one of the following phrases he incurs guilt:] or “I will go and worship,” or “Let us go and worship,” or “I will sacrifice [to it],” or “I will go and sacrifice,” or “Let us go and sacrifice,” or “I will burn incense,” or “I will go and burn incense,” or “Let us go and burn incense,” or “I will make libations to it,” or “I will go and make libations to it,” or “Let us go and make libations,” or “I will prostrate myself before it,” or “I will go and prostrate myself,” or “Let us go and prostrate ourselves”—[for all these sayings, guilt is incurred].” M at BT *Sanhedrin* 67a. See this ruling also at MT *Avodah Zarah* 5.3.

71. On entrapment generally, see STEPHEN M. PASSAMANECK, *POLICE ETHICS AND THE JEWISH TRADITION*, 131-32 (C.C. Thomas 2003).

72. See M *Makkot* 1.8.

friends' intentions and not to repeat his call to idolatry. Still, the initial single hearer is not sufficient to bring a *mesit* to court and testify against him. That is, a *mesit* may directly speak words designed to motivate one person to illegal worship and still not be culpable for punishment, even though he has committed a crime with that speech.

Stopping the spread of such dangerous speech seems to motivate the mishnah to rule that the single hearer should organize spies to witness the *mesit* speaking to the single hearer again. Yet here again, the single audience knowingly deceives the *mesit* to encourage him to repeat the criminal content: "Make your proposal to me now in private." The single hearer knows that this venue is not private. Nor is his intention to hear the *mesit's* encouraging words himself, but to allow the hidden witnesses to hear those criminal words. When the *mesit* does repeat his call to idolatry, the supposedly single hearer challenges him and hereby offers him an opportunity to recognize the folly of his proposal. If the *mesit* acknowledges that his call to idolatry subverts mainstream theology and worship and hence retracts, "well and good": he is absolved and cannot be brought to a court or testified against by the hidden witnesses (it has already been established that the single hearer has no case against the *mesit*). While the mishnah accepts this retraction occurring outside of court and in front of the people who heard the initial exhortation as sufficient for absolution, other sages think differently. Maimonides, for example, argues that the retraction is to be made in court, and if the *mesit* is merely silent (*shatak*) when given the opportunity to retract, it is sufficient to absolve him.<sup>73</sup> In Maimonides' view, then, conviction is possible only if a court extracts an idolatrous statement from an alleged *mesit*. In this scenario, a *mesit* can directly articulate inciting content twice (once in private, the second in semi-private) and remain guiltless.

When a *mesit* does not recant but insists on the rightness of the call to idolatry, the hidden witnesses come forth, capture the *mesit*, take him to court and testify against him so that he receives the proper punishment ascribed to this crime. It should be noted that the hidden witnesses are neither random passers-by nor the immediate known direct audience. They are audience members unknown to and unattended by the speaker. Their sole purpose is to witness the speaker articulating

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73. MT *Avodah Zarah* 5.3. Elsewhere, Maimonides rules that if one remains silent or nods his head when warned that he is about to engage in a flogging-worthy or capital crime, this suffices to protect him from those punishments. See MT *Sanhedrin* 12.2. This holds true even if he repeats the crime and in spite of being warned again. But this does not hold if he does the crime a third time: he is imprisoned for life. See MT *Sanhedrin* 18.5.

criminal content; they are not present to hear—that is, to contemplate or be inspired by—the content. It could be said that the quality of their witnessing is superficial insofar as they are only to attest to the fact that the *mesit* said what he did, but not to pay attention to his message. Put differently, while these witnesses are necessary for a *mesit* to be held accountable for articulating inciting speech (again), they cannot testify as to whether the *mesit*'s oral delivery or content was compelling.<sup>74</sup> Transmission of criminal content in this semi-private scenario is thus twofold: it is to a direct immediate audience (the single hearer) and to an unknown unintended audience (the hidden witnesses).

#### B. Anglo-American Jurisprudence and the Transmission of Incitement

As discussed above, Anglo-American jurisprudence generally understands individuals as the ones who articulate inciting speeches. The question arises whether institutions can rightly be held liable for incitement. In particular, can media-producing entities be held accountable for legal cause if and when their consumers engage in illegal behavior? This question leads to consideration of foreseeability as a standard to limit freedom of the press.<sup>75</sup>

Courts have generally ruled in favor of media defendants in incitement cases. But there are exceptions. In cases when material published is explicit about causing harm, the intention of the publisher (e.g., advertiser, game producer, movie producer) is to cause harm, and that such harm would be reasonably foreseeable—then media defendants are often found liable for incitement.<sup>76</sup>

### V. CONTEXT

The contextual element considers whether inciting content is unprotected speech in every environment. Perhaps there are special contexts in which inciting content is not punishable.

#### A. *Halakhah* and the Context of Incitement

It appears that *halakhah* understands inciting speech to occur in particular locations. These spaces include the semi-public court for the

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74. A reckless speaker who repeatedly (at least twice) calls for idolatrous worship could be found guilty of a capital crime even though his speeches did not induce anyone to engage in such illegal behavior.

75. See symposium introduction by David J. Franklyn, *Media Violence Tort Cases: Problems of Causation and the First Amendment*, 27 N. KY. L. REV. iii (2000).

76. See cases discussed in Teeter & Loving, *supra* note 4, at 120-34.

*zaken mamre*, and the semi-private situation for a *mesit*. There are exceptions, however. *Halakhah* acknowledges that in extraordinary circumstances, ruling contrary to normative superior law so as to protect individuals and the community may be required. These innovative practical rulings are temporary measures meeting the needs of the hour (*hora'at sha'ah*).<sup>77</sup> This pressured context and the limited temporal nature of these provisional measures are critical to differentiate them from the contrary rulings put forward in otherwise normal circumstances by the *zaken mamre*. Such exceptional rulings are, according to Maimonides, to protect and strengthen religion (*lechazek hadat*) and prevent people from slipping into religious laxity.<sup>78</sup> This means that in times of communal insecurity, speech that otherwise would not be protected could now find protection as long as it is perceived to strengthen the audience's adherence to Judaism generally. Furthermore, actual harms need not ensue immediately following an inciting speech. No action is necessary on the part of the audience to qualify a speech as incitement. What matters is that the speech occurs in a space wherein both speaker and audience are present.

#### B. Anglo-American Jurisprudence and the Context of Incitement

Compared to *halakhah*, spatial context is less of a concern in Anglo-American legal thinking. Rather, temporal contexts matter more. As noted above, the clear and present danger test inquires "whether the words used are used in such circumstances . . . that they will bring about the substantive evils that Congress has a right to prevent."<sup>79</sup> This could be understood to mean that the test seeks to clarify causal links between speech-acts and actual harms. A speech would be considered incitement if strong links can be proven between that speech and actual harms subsequent to it.<sup>80</sup>

The phrasing of the test can also mean that only in certain circumstances does "clear and present danger" become the standard to differentiate inciting speech from other kinds of speech. As discussed above, some forms of inciting content are suspect especially during times of national insecurity. Courts using this test could argue—as was

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77. See BT *Yoma* 85b; BT *Yevamot* 90b; MT *Mamrim* 2.4, 9. Cf., Elon, *supra* note 32, at 1:519-20, 533-36.

78. MT *Mamrim* 2.4. See discussion in Jonathan Sacks, *Creativity and Innovation in Halakhah*, in *RABBINIC AUTHORITY AND PERSONAL AUTONOMY* 135-39 (Moshe Z. Sokol ed., J. Aronson 1992).

79. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

80. See Wallenstein, *supra* note 43.

done in *Brandenburg*—that circumstances require viewing particular spoken content as criminal, suggesting that if times were different such content would be protected. That is, the threshold between unfettered speech and incitement shifts because of temporal context, not content.

## VI. RESTRAINTS

Insofar as legal systems coordinate behavior to protect citizens from harming themselves and others, a significant element to consider is the mechanism of restraint. What are the means that each system thinks most effective and/or efficient to stem the harms of inciting speech?

### A. *Halakhah* and Restraining Incitement

*Halakhah* uses primarily *post hoc* though occasionally pre-emptive means to curtail incitement. As noted above in the discussion about the audience, for the lesser versions of incitement—expressions that encourage others to use sacred objects inappropriately or to engage in economic thievery—Jewish courts are empowered to punish speakers with monetary fines and perhaps moral condemnation. Obviously, such punishments are handed down only after a speaker has been found guilty of uttering inciting content to an audience, making them *post hoc* restraints.

For expressing more egregious incitement—encouraging others to engage in idolatry or ruling contrary to superior law—speakers may deserve capital punishment. These deaths, however, can come about in different ways.

The Mishnah rules that it is best to bring the *mesit* to a *bet din* (rabbinic court) to be convicted and punished.<sup>81</sup> Its ruling permits the use of entrapment to capture the inciter. Maimonides concurs that entrapping a *mesit* is permissible, as well as tricking him into attempting to entice others to idolatry. Yet Maimonides extends this permission further yet to killing a *mesit* without forewarning him that he is about to commit in a capital offense.<sup>82</sup> In Maimonides' view, if there is no reasonable way to capture and bring the offender to court, extra-judicial pre-emptive lethal intervention by civilians is permitted to keep an inciter from speaking.

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81. M at BT *Sanhedrin* 67a.

82. MT *Sanhedrin* 11.5. Though forewarnings (*hor'a'ah*) are generally required for capital crimes, the Talmud states that they are unnecessary to condemn a *mesit* to death. See BT *Sanhedrin* 88b.

One might liken this permission to pre-emptively killing a *mesit* to the permission given to pre-emptively kill an attacker (*rodef*) before that person lethally assaults a victim.<sup>83</sup> This attempted parallel, however, fails in light of the requirements imposed on a pre-emptive intervener who would save an intended victim. An intervener must use the least force necessary to stop an attacker from executing an intended victim lest the intervener be guilty of a capital crime himself.<sup>84</sup> No such restraint applies to those pre-emptively stopping a *mesit*. Any amount of force up to and including lethal force is permissible to prevent this inciter from speaking (again). Such permission suggests that this kind of speech is so dangerous that killing the speaker in any way possible is better than allowing his words to utter forth. Dangerous to whom or what? If the audience were harmed by the speech itself, it would be unreasonable to require the audience to be harmed again when trying to trap the speaker with the hidden witnesses. The affront, then, is not against persons *per se* but against the Judaic system as a whole insofar as calls to idolatry challenge the monotheistic foundation of Judaism.

The rebellious judge also deserves the death penalty, but his demise comes about only through the legal system itself. His conviction and punishment are determined in a court of law after he promulgated his contravening rule, not beforehand.<sup>85</sup> It should be recalled that he warrants death not just for articulating a distorted opinion about a law. Rather, he deserves death for adjudicating according to his personal opinion instead of deferring to the superior authority of the Sanhedrin and its stated position. In ruling against the Sanhedrin, the rebellious judge deliberately spurns the legal system as a whole. If the system permitted such “activist judges,” it might entertain a slippery slope toward anarchy. The *zaken mamre*’s death, then, is designed to stem the slide toward mass rebellion, or as Maimonides says, so that strife may not increase among Jews.<sup>86</sup> Nevertheless, he is not punished for what he utters *per se* but for what his utterance means to the system.

In sum, from the *halakhah*’s perspective, the *mesit* and the *zaken mamre* are speakers advocating not just any illegal behavior but illegal behavior whose very suggestion thwarts the integrity and authority of

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83. This latter permission falls within the *din rodef*—the laws of pursuit. See M at BT *Sanhedrin* 73a; BT *Sanhedrin* 74a; MT *Rotzeach U’Shmirat Nefesh* 1:6, 1:7, 1:8, 1:13, 1:14; SA, *Choshen Mishpat* 421:13.

84. See discussion in Jonathan K. Crane, *With a Mighty Hand: Judaic Ethics of Exercising Power in Extraordinary Warfare*, in *ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES* 184-206 (David K. Linnan ed., Praeger Security Int’l 2008).

85. See BT *Sanhedrin* 88b.

86. MT *Mamrim* 3.4.

the Judaic theological and legal system as a whole. As such, their words are deemed dangerous to the system as to warrant their public deaths.<sup>87</sup>

#### B. Anglo-American Jurisprudence and Restraining Incitement

On the whole, Anglo-American law functions within a broad framework that cherishes personal liberty. With few exceptions, this includes a presumption of a Free Speech principle.<sup>88</sup> This means that laws defining criminal speech are enforceable only after the fact; people are initially free to speak what they want and take the risk of being held responsible afterwards (that is, after their words).<sup>89</sup> Culpability, however, depends upon actual harms produced by an audience or, if the audience does not so act, upon a speaker's intent to bring about harm.

Details of punishment, however, are less important to Anglo-American law than in *halakhah* insofar as Anglo-American law does not expend much effort delineating punishments for incitement; or, at least, punishment is not inherent to its definitional project. As one example, Anglo-American law assumes that incitement is not a capital crime. Even during extraordinary times of national insecurity, speaking incitement does not warrant execution.<sup>90</sup>

### VII. COMMENSURABLE?

The above survey of *halakhah* and Anglo-American jurisprudence demonstrates that a modified discourse-analysis enables us to unpack these legal systems' definitional projects concerning incitement. As can be seen in Item 1 below, this methodology identifies elements necessary for a working definition of this form of expression, as understood in each legal system.

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87. The *zaken mamre* is taken to Jerusalem and executed during one of the three major pilgrimage festivals when masses of Jews would be able to witness it (a minority opinion says he should be executed immediately and not wait until the next holiday). A *mesit's* execution is to be publicized to the whole of Israel. Cf., M at BT *Sanhedrin* 89a and *Gemara* there; MT *Mamrim* 3.8.

88. See Schauer, *supra* note 43; Fred Schauer, *The Cost of Communicative Tolerance*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE*, *supra* note 3, at 28-42.

89. Thus the Supreme Court held in the so-called "Pentagon Papers Case" that prior restraints on speech (or the press) are subject to "a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (*per curiam*) (internal quotation marks and citation omitted).

90. Other forms of speech, however, may warrant the death penalty, especially during times of national insecurity.

## Item 1: Key Rhetorical Elements of Incitement

According to *Halakhah* and Anglo-American Jurisprudence

	<i>Halakhah</i>	Anglo-American Jurisprudence
Content	Idolatry or ruling contrary to superior law.	Clear and present danger, plus intent, plus specific actions against a particular target.
Speaker	Individuals: <i>mesit</i> (anyone encouraging others to idolatry) and <i>zaken mamre</i> (judges ruling contrary to superior law).	Individuals are the primary articulators of incitement; the media may, in certain situations, originate incitement.
Audience	The audience of a <i>mesit</i> is culpable, but not that of a <i>zaken mamre</i> . And the legally incompetent audience is absolved in both cases.	Context matters: in times of peace, an audience must perform illegal action for a speech to qualify as incitement; in times of national insecurity, public provocation (regardless of audience action) is sufficient to warrant restriction.
Transmission	<i>Zaken Mamre</i> : direct, oral, semi-public; <i>Mesit</i> : direct and indirect, repeated, semi-private.	Individuals: direct, oral. Media: plausible but must demonstrate foreseeability to establish legal cause.
Context	Spatial concerns: semi-public courts; semi-private audiences. Extraordinary circumstances may extend protections.	Temporal concerns: extraordinary circumstances limit protections.
Restraint	Mostly <i>post-facto</i> court-ruled convictions. Pre-emptive extra-judicial lethal intervention is permitted to prevent a <i>mesit</i> from repeating the call to idolatry.	<i>Post-facto</i> court-ruled convictions. This form of expression is not a capital crime.



From this analysis it is now possible to develop working definitions of incitement for these systems.

### Item 2: Working Definitions of Incitement

According to *Halakhah* and Anglo-American Jurisprudence

<i>Halakhah</i>	Anglo-American Jurisprudence
Incitement is an expression by individuals encouraging illegal activity whose very expression, given to an immediate audience, threatens the integrity or foundation of the Jewish theocratic community.	Incitement is an expression articulated primarily by individuals that encourages illegal and harmful behavior toward a specific target, the expression of which is in close temporal proximity to the harms encouraged (though in times of insecurity no harms need obtain).

These working definitions suggest that neither system accepts the narrow definition put forward at the beginning of this paper—that inciting speech is a speech-act intended to motivate others to engage in unlawful lethal activity. Neither system requires that incitement be focused exclusively on unlawful lethal activity. It appears that only in Anglo-American law would such content be considered suspicious and worthy of investigation. Yet such expressions encouraging illegal lethal activity would need to be more precise than general advocacy in order for the expressions to qualify as incitement *per se*.

Despite the apparent differences between these working definitions, concluding that these legal systems' notions of incitement are incommensurable is premature. The overlaps between the definitions can best be seen through Item 1. Both systems understand that individuals are the primary speakers of incitement; the speech is given primarily orally and directly to an audience; the illegal activity a speaker encourages need not actually come about; and restraints of such speech are *post hoc*.<sup>91</sup> This last point deserves a moment's pause. Both systems acknowledge that, *ab initio*, incitement is not protected speech

91. The *halakhic* permission to lethally prevent a *mesit* from re-articulating his call to idolatry would be difficult if not impossible to translate into Anglo-American law insofar as this would all but deputize citizens to pre-emptively kill one another lest the other speak inciting content. It should be noted, though, that the *halakhic* permission to use lethal force to prevent a speaker from promoting idolatry is only that: permission. It is not a preference, and certainly not a religious or legal obligation. Furthermore, it could be argued that as capital punishment is only theoretically available to Jewish courts and not actually so, all the more so is this true for individuals acting extrajudicially: they should not take another's life even though *halakhah* permits them to. *Cf.*, BT *Makkot* 7a; MT *Shofetim* ch. 12.

and should not be uttered. Yet both systems recognize that the best means of curtailing and even preventing such speech from occurring at all is through the penal system. That is, both systems admit that what should not be said can, ultimately, be said . . . albeit with repercussions.

This raises the important issue of implementation and enforcement. Insofar as the *halakhic* system has for all intents and purposes rendered capital punishment moot, it might be concluded that its consideration of incitement as a capital crime is irrelevant for modern times. Such a conclusion, however, would dismiss *halakhah's* insistence that not all forms of expression are equally valuable. Indeed, as has been discussed above, certain forms of speech are not worthy of being protected from legal action, with incitement being one of them. Just because the maximum punishment may no longer be applicable does not mean the exercise of identifying speech that should go unsaid is a waste of time. Indeed, engaging in the business of defining the unspeakable is one of the critical ways *halakhah* goes about protecting its legal and theological foundations. Defining the unspeakable as a crime conceptually worthy of execution contributes to the preservation of the system as a whole.

Though the harms individuals suffer following an inciting speech are the primary focus of Anglo-American jurisprudence, it too acknowledges that speech intended to harm the system as a whole may, in certain circumstances, qualify as incitement. This challenges courts to articulate clearly what constitutes such special circumstances. For only with these circumstances clearly delineated and met can content challenging the government be rightfully considered incitement. Now it could be argued that it is not up to the courts to define whether a nation is in a time of national insecurity or not; this task is reserved for politicians. But as it stands, the court controls this definitional aspect and thus controls when certain content is or is not criminally culpable. This violates the principle of fair warning as the court would, in essence, be declaring *ex post facto* that a speech was criminal.<sup>92</sup>

While it appears that both *halakhah* and the Anglo-American tradition suffer significant challenges in regard to enforcement, each can learn from the other.

On the one side, *halakhah* can do well to focus on actual harms suffered by individuals following a speaker's speech. As it stands, at least in regards to this issue of incitement, the rabbis developing *halakhah* apparently were more concerned to protect the dignity and

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92. Cf., U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

integrity of the *halakhic* system as a whole than of individual Jews. Encouraging idolatry undermines the theocentric nature of the Judaic religious system. And ruling contrary to the Sanhedrin thwarts the Judaic legal system's efforts to coordinate behavior. Directly harming others and encouraging audiences to harm others, by contrast, injures individuals but not the system *per se*. This is not to say that individual harms were not taken seriously in *halakhah*. On the contrary, the rabbis spilled a great deal of ink developing the principles and listing the codes for adjudicating such injuries within established legal apparatuses such as courts and arbitration. Nevertheless, speech inciting harms to individuals thus far does not warrant punishments as severe as those meted out for speech that potentially harms the system as a whole. Insofar as delineating punishment is a key element to *halakhah's* definitional project, it could do well to articulate actionable punishments for those who articulate incitement to individuals as well as harms to the system.

At least in theory, Anglo-American law could revisit its notions of responsibility when deciding incitement cases. Both systems consider the speaker of incitement to be legally responsible for a crime. What about moral responsibility? The *halakhic* system differentiates moral from legal responsibility and stipulates that only legal error is actionable by human courts. It is therefore conceivable in this system to be morally responsible for inciting others to illegal behavior without being legally culpable. Even though Anglo-American law does not include moral opprobrium in its arsenal as such, perhaps courts could censure speakers of incitement in ways that would function akin to legal or penal punishment. This suggestion is not to put the courts in a position of adjudicating morality *per se*. Rather it suggests that such admonishment could further clarify the boundaries between speech the system protects and content that cannot go unfettered, for though such content may be thought, it should remain unsaid.<sup>93</sup>

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93. When determining a sentence, federal courts in America are obliged to "consider the need for the sentence imposed to reflect the seriousness of the offense, [and] to promote respect for the law." (18 U.S.C. § 3553(a)). Assessing an offense's seriousness is achieved in part by considering it in juxtaposition to other offenses as well as in light of society's values generally.

Alternative sanctions could well serve as expressive measures to condemn the offense. The suggestion of alternative sanctions has been put forward (and later retracted) by Dan M. Kahan, among others. See Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). For a critique, see Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385 (May 2007). See also critique of Martha Nussbaum's reservations of shame as a legitimate form of punishment in Thom Brooks, *Shame on You, Shame on Me? Nussbaum on Shame and Punishment*, 25 J. APPLIED PHILOSOPHY 322-34 (2008).

Both legal traditions agree that there are statements that should not be uttered. Both systems work hard to define what these statements are, who says them, in which contexts, under what circumstances, and how to quell them from occurring at all. Paradoxically, this definitional project of the unspeakable is itself a process requiring speech insofar as it requires articulating for citizens and judges alike what is and is not unfettered speech.