

## COURSE OVERVIEW



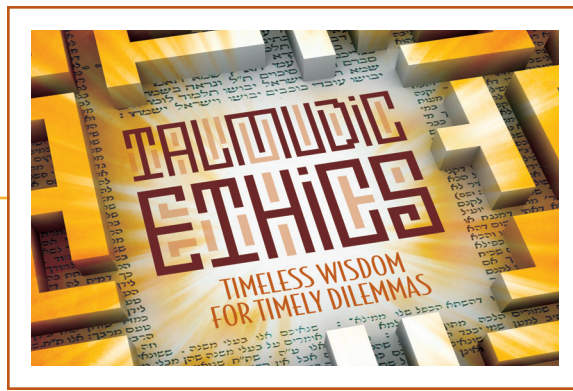
Talmudic law is a 3000-year-old system of jurisprudence that continues to develop organically and to be practiced today. In this course, we look at the classic books, codes, commentaries and responsa that are the sources of Jewish law and its thought, as well as contemporary cases in civil law that have come before the *beit din*, the court system of Jewish law. Although modern life brings many new dilemmas, the *beit din* decides law by taking into account precedent as found in the Talmud and other Jewish legal literature.

The focus of the course is ethics. The relation between law and its practice and ethics is a fundamental matter. Eminent legalists in the Western legal tradition speak of *Grundnormen*, fundamental principles that underlie all law and to which all law and practice of law must conform. Concepts of equity constantly redefine the rights and obligations of citizens that civil codes and torts seek to govern.

Jewish law has been wrestling with the relation between ethics and law for more than three millennia. It offers a rich storehouse of insight that can directly benefit any legal professional. Aside from the ever-larger role that comity plays in a very interconnected global economy, the characteristic emphasis of Jewish law on what the prophets call *tzedek*—righteousness—offers a unique model of how a system of law can maintain throughout time the allegiance and even the affection of those under its governance.

There is a deep willingness in these sources to raise fundamental ethical questions, such as: Is mere technical compliance with the rules sufficient? Are ethical imperatives not expressed in law enforceable? Are we constrained to use and practice the law in accordance with any greater principles? By what kind of authority?

As we examine these cases and the relevant sources that inform the decisions, we will compare the Talmud's underlying principles with the philosophic infrastructure of the American legal system. Not only will differences and similarities be revealed, but also a wealth of relevant insight into the importance of a sound ethical backbone to the health of American government and American law.



# COURSE SYLLABUS



## Lesson 1

### WHOSE RIGHT TO LIFE?

Life is the first thing protected by law. Without it, there is no liberty or pursuit of happiness. But whose life should be protected in a situation in which, in order for one person to live, another must die or be exposed to deadly danger? By what criteria can the law prefer one life to another? The ethical soundness of the law's answer to such questions will affect the respect commanded by the law as an authentic response to the need of people to be well-governed.

To this end, the course will examine the legal and ethical dilemma of persons who are faced with Choice of Evils: either kill or be killed. The course will examine the landmark criminal case *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884), in which shipwrecked sailors engaged in cannibalism in order to save themselves from starving to death. Famously, the English court held the sailors liable for the death of the innocent victim and held that the necessity doctrine was not a valid justification for murder in that case. We will also look at hypotheticals which illustrate the Model Penal Code position on Choice of Evils and Justification. (See MPC 3.02 and Commentaries.) We also examine a case from the Jewish responsa in which a father asks whether he can ransom his son from a Nazi roundup if as a result, another child will be taken in his son's place.

## Lesson 2

### ENDING LIFE

When confronted with grave, incurable illness or unbearable pain, sometimes hastening death seems to be a humane option. Can the law countenance any choice to end life in such situations? What are the underlying principles that enable us to decide whether active or passive methods of ending life can be employed? How can the law protect the helpless from those who would end their lives for their own advantage or comfort? With an increasingly aged population, and with the side effects of modern medicine, we are faced with end of life dilemmas with increasing frequency. What solid ethical principles guide law to respect and protect life while still maintaining humaneness?

In the civil context, we look at *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990) where the Supreme Court held that the Constitution allowed a

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state to require clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment. We will also examine *Washington v. Glucksberg*, 521 U.S. 702 (1997), where the Court explained that its decision to ban physician-assisted suicide was fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide in a democratic society."

### Lesson 3

## THE BEGINNING OF LIFE

What is the status of the unborn? Does fetal life enjoy the full protection of someone who has been born? If not, what sort of protection does it enjoy? By virtue of which principles can we make these distinctions? How does Jewish law and precedent compare to contemporary American law? What does its ethic of responsibility offer to a system that focuses on rights? The debate over abortion continues to divide the American body politic. Exploring the ethic of the protection of unborn life can offer the possibility of a stable legal consensus that commands public allegiance.

The course will examine the landmark decision of *Roe v. Wade*, 410 U.S. 113 (1973), as well as the cases that have both limited and explained *Roe's* holding. We look at *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as well as the most recent decision upholding the Federal ban on partial-birth abortion in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). While the dissent in *Casey* argued that "although a State may permit abortion, nothing in the Constitution dictates that a state *must* do so," we ask whether, from an ethical perspective, a state *should* do so.

### Lesson 4

## ETHICS OF SPEECH

Slander is a recognized offense both in American and Jewish law. What considerations must we make to protect privacy and reputation? Is adherence to truth the only consideration that we need to make, or must we actively take into account the effect of the communication upon the person being talked or written about? How does this affect the practice of law and the transaction of business? The power of speech is fundamental to our humanity. An ethic of the use of speech strengthens the reputation of individuals of the institutions they represent. Especially in the case of those who are agents of the court and the face of the law to the world, there is a great responsibility to use speech in a responsible way.

In the comparative arena, we look at the intersection of Rule 1.6 of the Model Rules of Professional Conduct and its staunch protection of client confidentiality, and Rules 3.3 and 4.1 which require lawyers to disclose certain information to courts, as well as third parties. Additionally, the fairness requirements of Rule 3.4 suggest an overarching ethic of fairness in speech that we will explore.

Finally, we look to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the court addressed the intersection of freedom of the press and how abuse of that freedom resulting in destruction of personal reputation may be limited by law. We will also look at the common law elements of

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libel and slander, and discuss whether a remedy should be available even where the published material is not false, but is nevertheless injurious to an individual.

## Lesson 5

### FALSEHOOD

Must the truth always be told? Much as truth is a foundation of justice, are there situations in which it is permissible or even meritorious to stray from the truth? What are the kinds of considerations that might trump truth? Or might truth have several dimensions? If so, by what criteria can we prioritize which dimension of truth we must first honor? Finding an ethic of truth frees us from those who would use the display of petty truths to escape criticism and restraint in human affairs.

In this context we look at Rule 3.3 of the Model Rules of Professional Conduct where an attorney's zealous advocacy of his client may run afoul of the Rules' imposition of a Duty of Candor. For instance, were an attorney to know that his client intended to engage in criminal conduct, the Rules would require disclosure to the court. However, where do we draw the line between candor and client advocacy? What is the lawyer's duty where the situation is not black and white, but gray?

Our examination touches the ethical heart of Rule 8.4 and its insistence on conduct free of "dishonesty, fraud, deceit or misrepresentation." The insights gleaned will clarify the meaning of these terms as they are meant to be applied.

## Lesson 6

### INFRINGEMENT

Copyrights and trademarks encourage inventive and creative people to invest their time, effort and fortune in their work. The assurance that they will reap a reward from their success, that the fruits of their labors will not be ripped away by someone else, encourages the kind of economic activity that we find valuable as a society. The openness of the Internet has raised debate about how far such protection should extend and posed the right of the public to be served as a competing interest also deserving protection of law. What principles offer guidance in resolving this conflict? Jewish traditions characteristic analysis of interweaving responsibilities offers guidance in this complex and developing area of legal concern.

We will look at Locke's Labor Theory as well as the legacy of *International News Service v. Associated Press*, 248 U.S. 215 (1918), and how that case may effect Internet-era allegations of infringement. We also look at *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), where the Supreme Court held that file-sharing companies could be sued for inducing copyright infringement for acts taken in the course of marketing file-sharing software.