Fordham International Law Journal

Volume 31, *Issue* 1 2007 *Article* 5

The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law

Amnon Reichman*

*

The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law

Amnon Reichman

Abstract

This Article will examine two possible models that seek to resolve the tension in principle: The U.S. model, under which speech enjoys preeminence, and the Israeli model, that protects human dignity as the principal value. Section I will outline and analyze a recent Israeli case that led to the first criminal conviction for the violation of an Israeli statute prohibiting the infliction of harm on religious sentiments. This case will provide a reference point for a three-part comparative analysis of the U.S. and Israeli models. Section II will address the normative infrastructure that separates the two models, Sections III and IV will assess the institutional divergence between the two legal systems, and Sections V and VI will examine consequent doctrinal differences. Moving beyond comparative legal analysis, Section VII will put forward the hypothesis that the source of the difference in jurisprudence arises at least in part out of a different cultural perception regarding the core meaning of "speech" or "expression" in these two jurisdictions. Drawing upon this sociological, or cultural, understanding, Section VIII will suggest that perhaps it is passion, not merely reason, that organizes the realm of public discourse (at least in some jurisdictions and some cultures), and if so, legal doctrine and theory should be modified accordingly. Finally, Section IX will comment briefly on the value (and limits) of comparative law in light of the above understandings.

THE PASSIONATE EXPRESSION OF HATE: CONSTITUTIONAL PROTECTIONS, EMOTIONAL HARM AND COMPARATIVE LAW

*Amnon Reichman**

INTRODUCTION

What is it about the clash between religious beliefs and freedom of expression that sparks such a violent interaction? A recent chapter in this centuries-old battle occurred after a Danish newspaper published cartoons depicting the prophet Muhammad in an unfavorable light.[1] The cartoon offended segments of the Muslim community and provoked riots, killings, embassy attacks, boycotts of Danish produce and strained diplomatic relations between the Danish government and the Muslim community.[2] Freedom of speech seemed under siege; other European newspapers[3] and President Bush issued statements supporting

---

* Visiting Professor of Law, School of Law (Boalt Hall), University of California at Berkeley and Faculty of Law, University of Haifa. I wish to thank Edan Laron, Hadas Agmon and Shira Avnat from Haifa and Robert Studley and Alexis Kelly from Boalt Hall for the extensive research. I have benefited from the comments of the participants in the conference held by the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law on Comparative Examination of Hate Speech Protection. Also helpful were the comments of the participants in the seminar on the Perspectives on the Legal Theory of Jürgen Habermas, held by the European Institute in Italy. Lastly, I learned from the participants in the lecture series at the Center for the Study of Law and Society at UC Berkeley. All errors, of course, are mine.

1. The cartoons were published on September 30, 2005, in the Danish newspaper *Jyllands-Posten*. The text that accompanied the cartoons explained that the publication was intended to question self-censorship exercised on matters related to the prophet Muhammad. *See Muhammed's Ansigt*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, *available at* http://epaper.jp.dk/30-09-2005/demo/JP_04-03.html; *see also Q&A: The Muhammad Cartoons Row*, BBC NEWS, Feb. 7, 2006, http://news.bbc.co.uk/1/hi/world/4677976.stm.

2. *See* Hassan M. Fattah, *Caricature of Muhammad Leads to Boycott of Danish Goods*, N.Y. TIMES, Jan. 31, 2005, at A3; *see also* Salman Masood, *Two Die as Pakistan Cartoon Rage Turns Violent*, N.Y. TIMES, Feb. 15, 2006, at A6 (describing the Muslim community's outrage over the publication of this cartoon). The boycott forced the Danish government to become involved. The Danish prime minister refused to apologize on behalf of a private newspaper, but stated his personal discomfort with the publication.

3. The German newspaper *Die Welt* published the cartoons on February 1, 2006, and the French newspaper *France-Soir* did the same, but the editor who published the cartoons was later fired by the French-Egyptian owner of the newspaper. *See* Rachel Saloom, *You Dropped a Bomb On Me, Denmark: A Legal Examination of the Cartoon Contro-*

the freedom of the Danish press to depict the Prophet Muhammad in cartoons, including depictions that portray the prophet with bombs sticking out of his beard or head-cover. Later, as the Muslim outrage intensified, the message was modified to include a call for a "responsible" use of the freedom of the press.[4] The president of Iran replied by holding a contest soliciting cartoon depictions of the Holocaust, in the name of freedom of speech and the press,[5] and the leader of Hezbollah, before roughly 700,000 Shi'ite believers, suggested that the struggle will not end until an apology is issued and the laws in Europe are amended to prohibit such "insults to the prophet."[6] The editor of the Danish newspaper responded by issuing a dubious apology,[7] and the EU

---

versy and Response As It Relates to the Prophet Muhammad and Islamic Law, 8 RUTGERS J. L. & RELIGION 1, 1 (2006) (carefully outlining the sequence of events); *see also* Craig S. Smith, *Next Step by Weekly in Paris May be to Mock the Holocaust*, N.Y. TIMES, Feb. 9, 2006, at A14; *Muhammad Cartoon Row Intensifies*, BBC NEWS, Feb. 1, 2006, http://news.bbc.co.uk/2/hi/europe/4670370.stm (noting that "[t]he president of the French Council of the Muslim Faith ("CFCM"), Dalil Boubakeur, described *France-Soir*'s publication as an act of 'real provocation towards the millions of Muslims living in France.'").

4. *See* Joel Brinkley & Ian Fisher, *U.S. Says It Also Finds Cartoons of Muhammad Offensive*, N.Y. TIMES, Feb. 4, 2006, at A3 (regarding President Bush's position on this matter, a State Department spokesman said that freedom of expression "entails responsibility and judgment"). *But see* Jim VandeHei, *Bush Shifts on Muslim Protests*, WASH. POST, Feb. 9, 2006, at A1 (stating that Bush condemned the violence but not the cartoons).

5. The contest was held by the most popular newspaper in Iran, *Hamshari*. The editor said that the contest would test the Western world's commitment to freedom of speech. *See* Nazila Fathi, *Contest for Cartoons Mocking the Holocaust Announced in Tehran*, N.Y. TIMES, Feb. 8, 2006, at A10. Israeli cartoonists replied by holding a contest on the most offensive cartoon depicting Jews or Jewish religious symbols, asserting that a religion must accept self-ridiculing cartoons and humor in order to defend itself from bigotry and hatred. *See* Aaron Wenner, *TA Artist in Self-Denigrating Response to Holocaust Cartoons*, JERUSALEM POST, Feb. 16, 2006, at 1. A similar debate also took place in England concerning a bill that prohibited racial and religious jokes. *See, e.g.*, *Religious Jokes "Won't Be Crime"*, BBC NEWS, Dec. 7, 2004, http://news.bbc.co.uk/2/hi/uk_news/politics/4075831.stm; *see also* Anna Bluston, *Religious and Secular Dialogue Should Rule OK*, CHARTIST (U.K.), Apr. 2005, http://www.chartist.org.uk/articles/econsoc/apr05bluston.htm. The Racial and Religious Hatred Act 2006, Ch. 1. (U.K.), was enacted, following a lengthy parliamentary and public debate, in February 2006. *See* Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 34 (2007) (discussing the enactment of the Racial and Religious Hatred Act as a response to the United Kingdom's governmental "inertia" in the field of blasphemy).

6. *See Hezbollah Leader to Bush: "Shut Up"*, CBS NEWS, Feb. 9, 2006, http://www.cbsnews.com/stories/2006/02/09/world/main1300246.shtml.

7. On February 19, 2006, a handful of Arab newspapers published an apology in the name of the Danish newspaper editor. *See, e.g.*, *Saudi Newspapers Publish Jyllands Posten's Apology*, DAILY TIMES (Pak.), Feb. 20, 2006, http://www.dailytimes.com.pk/default.asp?page=2006%5C02%5C20%5Cstory_20-2-2006_pg7_34. Only hours after this publi-

dispatched a chief delegate to the Middle East to mend the rift.[8] The matter is still litigated in courts in Europe.[9]

At the same time, a Muslim cleric in Britain discovered that freedom of expression is far from an absolute right. From his pulpit he declared that death of non-Muslims can be, as far as Islam is concerned, an act that isn't necessarily condemnable even if such death was inflicted for no reason; that Jews should be removed from the face of the earth; and that Muslim dignity cannot "be regained unless with blood."[10] He was convicted for inciting racial hatred.[11]

Clearly, there is a difference between incendiary cartoons in a Danish newspaper and a call from the pulpit of a cleric to his followers that extols racially or religiously motivated violence. But the point is clear: The clash between freedom of expression and religious beliefs (and sentiments) is potent.

This Article will examine two possible models that seek to resolve the tension in principle: The U.S. model, under which speech enjoys preeminence, and the Israeli model, that protects human dignity as the principal value. Section I will outline and analyze a recent Israeli case that led to the first criminal conviction for the violation of an Israeli statute prohibiting the infliction of harm on religious sentiments.[12] This case will provide a reference point for a three-part comparative analysis of the U.S.

---

cation *Jyllands-Posten* issued a denial on the newspaper's website. A qualified apology was issued on January 30, 2006. The newspaper didn't apologize for the publication itself, only stated that the hurt to religious feelings was not intended. *See* Hassan M. Fattah, *Caricature of Muhammad Leads to Boycott of Danish Goods*, N.Y. TIMES, Jan. 31, 2006, at A3 (stating that the newspaper issued an apology, but Danish authorities have refused to take action because the government will not get involved in such matters).

8. *See* Brian Knowlton, *Rice Warns Muslims to Curb Violence; Fury Over Cartoons Shows Signs of Easing*, INT'L HERALD TRIB., Feb. 13, 2006, at 3.

9. A group of French Muslim organizations filed suit against the French newspaper that republished the cartoons. The suit was dismissed on March 22, 2007, but the plaintiffs may appeal. *See* Craig Smith, *French Court Rules for Newspaper that Printed Muhammad Cartoons*, N.Y. TIMES, Mar. 23, 2007, at 5.

10. *See In Quotes: Hamza's Preachings*, BBC NEWS, Feb. 7, 2006, http://news.bbc.co.uk/1/hi/uk/4690084.stm (quoting speeches of cleric). The jury watched hundreds of tape recorded speeches of Abu Hamza, which were the main basis for his conviction.

11. A jury of the Old Bailey court in London sentenced Abu Hamza al-Masri to seven years in prison for soliciting murder and inciting racial hatred during his sermons. Mr. Justice Hughes said to Abu Hamza, "You are entitled to your views, and in this country you are entitled to express them, but only up to the point where you incite murder or hatred." *Hamza Jailed for Seven Years*, GUARDIAN UNLIMITED (U.K.), Feb. 7, 2006, http://www.guardian.co.uk/terrorism/story/0,,1704304,00.html.

12. The statute has been on the books since the time of the British Mandate. It

and Israeli models. Section II will address the normative infrastructure that separates the two models, Sections III and IV will assess the institutional divergence between the two legal systems, and Sections V and VI will examine consequent doctrinal differences. Moving beyond comparative legal analysis, Section VII will put forward the hypothesis that the source of the difference in jurisprudence arises at least in part out of a different cultural perception regarding the core meaning of "speech" or "expression" in these two jurisdictions. Drawing upon this sociological, or cultural, understanding, Section VIII will suggest that perhaps it is passion, not merely reason, that organizes the realm of public discourse (at least in some jurisdictions and some cultures), and if so, legal doctrine and theory should be modified accordingly. Finally, Section IX will comment briefly on the value (and limits) of comparative law in light of the above understandings.

I. *THE ISRAELI APPROACH: THE* SUSZKIN *CASE*

On June 27, 1997, Tatyana Suszkin entered an area under the control of the Palestinian Authority in Hebron, carrying posters, designed and produced by her, depicting a hand-drawn pig wearing a Muslim head-dress (Kafia) with the name Muhammad in Arabic and English sketched on its torso.[13] The swine held a pencil with one of its hooves and appeared to be writing the Koran while stepping on it.[14] Suszkin carried glue and spray-paint, and was wearing a Kahana-Hai T-shirt.[15] Israeli soldiers detained

---

was originally enacted in 1936 as section 149 of the Criminal Code Ordinance (Palestine 1936).

13. *See Jewish Extremist Faces Jail,* GUARDIAN (U.K.), Dec. 31, 1997, at 14.

14. *See id.*

15. Meir Kahana formed a political party in Israel that advocated the strict application of biblical law towards non-Jews, primarily Arabs. Kahana's doctrines would result in the confiscation of all Arab property, the disenfranchisement of Arab voters in elections for the Israeli parliament (the Knesset), the invalidation and prohibition of any interfaith marriage between Jews and non-Jews, and, ultimately, the deportation of Arabs from Israel into neighboring Arab countries. After an unsuccessful challenge to its eligibility, Kahana's party ran for election in 1984 and secured one seat in the 120-member Knesset. In response, the Knesset amended election laws to prohibit parties that support a racist platform and/or endorse actions that are racist or designed to undermine the State of Israel as a Jewish and democratic state. Accordingly, Kahana's second bid for the Knesset was barred. In 1990 Kahana was murdered in the United States and his followers established a movement called Kahana-Hai (Kahana is alive). After his followers turned to actions against Arabs, the movement was declared a terror organization under Israeli law. For a review of these events, see EA 11280/02 Cent. Elections Commission for Sixteenth Knesset v. MK Tibby [2003] IsrSC 57(4) 1, 52-53.

her and handed her over to the Israeli police. The following day, while on bail, she threw a stone at a Palestinian vehicle driving in the Hebron area.[16] She was convicted in the district court *inter alia* for attempting to hurt religious feelings (§173 of the Israeli Penal Code) and received a sentence of three years in jail.[17] The Israeli Supreme Court, in a reasoned decision, denied her appeal.[18]

Justice Or, writing for the Supreme Court, stated that while the offense has been on the books since the British Mandate, this case represented the first time the Supreme Court had addressed a conviction for the violation of the prohibition against the infliction of harm on religious sentiments.[19] The conviction received considerable public attention.[20] The general outcry that followed the media reports of the provocation ("how could a Jew deface Muslim religious symbols, when we, the Jews, have been the victims of such actions for generations?") was countered by a double standard claim ("the Attorney General has chosen to ignore equally offensive depictions of Jews and Jewish religious symbols that can be found in Arab posters"). Some have even claimed that this prosecution amounts to the persecution of a specific viewpoint which the government seeks to suppress ("she was charged because she is a settler who merely tried to express her protest against the Arab propaganda by using similar methods").

Placing this case in a comparative perspective reveals the significant gap that exists between the U.S. and Israeli protections of freedom of speech. Had such a conviction been entered in

16. *See generally* CrimC (Jer) 436/97 Israel v. Suszkin, [1997] IsrDC 97(5) 730.

17. It should be noted that Ms. Suszkin was convicted of an attempt only, since there was not sufficient evidence that she actually distributed or posted the poster. She was also convicted for violating the prohibition against committing a racist act (§ 144D1(a) of the Penal Code – 1977), for attempting to deface property, for endangering life on a highway and for supporting a terror organization (§4(g) of the Prevention of Terror Ordinance – 1948).

18. *See generally* CrimA 697/98 Suszkin v. Israel [1998] IsrSC 52(3) 289.

19. *See id.*

20. Both *Ma'ariv* and *Yedioth Ahronoth* (the two major daily Hebrew newspapers), covered the story extensively, focusing mainly on the religious and political aspects. The strongest evidence for the public response is the formal apology issued by President Weizman to the mayor of Hebron. MA'ARIV, July 1, 1997. On the other hand, Geula Cohen, a former right wing Knesset Member ("MK") in her essay *Hebron on Fire*, expressed the opinion that the real victims in Hebron are the Jewish settlers and not the Palestinians. *See* Geula Cohen, *Hebron on Fire*, MA'ARIV, July 4, 1997.

the United States, it would, in all likelihood, have been quashed, primarily because the underlying statute criminalizing speech that harms religious sentiments would have been held as a violation of the First Amendment.[21] Such a gap in systems that presumably are both committed to basic democratic principles warrants a closer examination.

The issues raised by the case, such as the constitutionality of a law prohibiting speech that inflicts harm on religious sentiments, or its application to the facts of the case, have implications beyond a case-study in comparative law. Israeli legislators, judges, scholars and activists, and hopefully the public at large, are currently debating the proper scope of the constitutional protection of freedom of expression in Israel.[22] As the constitutional committee in the Israeli Parliament, the Knesset, drafts a proposal for a comprehensive and unified constitutional document,[23] the *Suszkin* case raises questions that merit serious con-

---

21. Such a statutory prohibition is content-based, and thus would be subjected to strict scrutiny. As stated by Justice Marshall in *Police Department of Chicago v. Mosley*, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 408 U.S. 92, 95 (1972); *see* Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576, 592 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); *see also* NAACP v. Button, 371 U.S. 415, 444-45 (1963); Wood v. Georgia, 370 U.S. 375, 388-89 (1962); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937). Further, the U.S. Supreme Court has reasoned that:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

Mosley, 408 U.S. at 95-96. But see *Beauharnais v. Illinois*, 343 U.S. 250, 271 (1952), sustaining a statute prohibiting exhibition in any public place of any publication portraying "depravity, criminality, unchastity, or lack of virtue" of "a class of citizens, of any race, color, creed or religion" that "exposes such a class of citizens to contempt, derision or obloquy" or which "is productive of breach of the peace or riots." The Court relied on the then-recent events of WWII and on the history of inter-racial violence in Illinois to uphold the criminalization of such group libel. The contemporary validity and scope of the *Beauharnais* decision is unclear, given the reluctance of the Court to review the matter in *Smith v. Collin*, 439 U.S. 916 (1978).

22. For such recent proposals, see A. Bendor, *A Proposal of a Constitution For the State of Israel*, 5 MISHPAT UMIMSHAL 23, 40-41 (2000); *see also The "Israel Democracy Institute" Proposal, in* CONSTITUTION BY CONSENSUS 95, 159-60 (Uri Dromi ed., 2005). Needless to say, these proposals all seek to guarantee constitutional protection for freedom of expression.

23. *See Protocols of the Constitutional Committee*, May 18, 2003, http://www.knesset.

sideration. Should the U.S. model be adopted? Should it be rejected, in favor of an alternative model? A comparative analysis can thus prove useful not only for scholars but also for those interested in the practical distinctions between the two models. Needless to say, the differences in culture and political context counsel against drawing simplistic lessons from any particular legal model standing on its own.[24] However, if acknowledged and addressed, these differences in social context may in fact enrich our understanding of the subject matter. Infusing the doctrinal differences with social meaning provides a potential basis for normative evaluation of the two approaches, since the doctrines may be assessed in light of the social conditions within which they are set to operate.

II. *FREEDOM OF EXPRESSION, EMOTIONAL HARM AND NORMATIVE JUSTIFICATIONS*

As a normative matter, the status of freedom of expression relative to other rights provides a key theoretical distinction between the Israeli and U.S. systems. Within a standard system of human rights protection, based on the insights articulated by John Stuart Mill, the principle of harm demarcates the boundaries of protected liberty: I am at liberty to move my hands until I hit my neighbor's nose, at which point I cause her harm and therefore am not at liberty to proceed.[25] The principle of harm is not restricted, conceptually, to physical harm, and may include intangible harms as well, such as harms to one's reputation and emotional harm, as long as such harms are measurable and verifiable (that is, contain a tangible element). Speech, therefore, may cause harm not only because it can prompt action, but also because it can degrade a person. And while a moral agent has the liberty to express her autonomy through deeds and speech, others have the right to be free from the harm caused by such expressions. This basic understanding results in a structure of rights that does not automatically place a premium on the pro-

gov.il/protocols (opening a series of discussions on different aspects of the constitution). The Knesset's preliminary draft is available at http://experts.cfisrael.org:81/~admin/proposals.pdf.

24. *See* David Nelken, *Comparing Legal Cultures*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 113 (Austin Sarat ed., 2004).

25. JOHN STUART MILL, ON LIBERTY 55-56 (Alburey Castell ed., Crofts Classics 1947) (1859).

tection of expression over other rights. While speech is instrumental to the pursuit of truth and for self fulfillment,[26] other rights play an equally instrumental role in furthering equally important values, such as the protection of the self and other aspects of autonomy.[27] It is therefore not surprising that most Western Democracies place limitations on freedom of expression where such expression amounts to defamation or infringes on privacy rights or intellectual property.[28] Critically, freedom of expression is not necessarily "weightier"—whatever that may mean—than these other rights.[29]

It is against that background that the U.S. constitutional structure is innovative. Entrenching the Millian approach into the Constitution would have meant granting constitutional protection to all basic human liberties, nothing more, nothing less. That would have meant that harmful speech—including speech that inflicts emotional harm—would not necessarily enjoy any a priori advantage vis-à-vis other rights (such as the right to be free from emotional harm). There would be no need to single out

---

26. The First Amendment justification based on the pursuit of truth was introduced into U.S. jurisprudence in Justice Holmes' dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919). Other justifications, such as the autonomy-based pursuit of self fulfillment, have not enjoyed a similar standing in courts. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 121 (1989). For criticism of the pursuit of truth justification as the sole principle behind First Amendment theory see Robert C. Post, *Free Speech and Community: Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 479-80 (1997). For an extensive discussion of philosophical justifications of free speech that both overlaps with, and differs from, the present discussion, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

27. For instance, private property is often seen as necessary to ensure self-fulfillment. *See, e.g.*, MARGARET J. RADIN, REINTERPRETING PROPERTY 35-40 (1993) (discussing a theory of property as personhood).

28. According to Professor Whitman, European privacy protections represent a manifestation of the fundamental "right to respect and personal dignity." This differs from American privacy protection which is derived from "values of liberty, and especially liberty against the state." James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

29. *See* DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 765-74 (2002). The way Feldman describes the scope of freedom of expression in the English law reflects the fact that it does not enjoy any special position. "English law recognizes that people are generally free to express themselves and to impart information in any way they please, in the same way that they are free to do anything else, except in so far as that freedom is restricted by particular legal constraints." *Id.* at 773. *See generally* RONALD J. KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006) (providing a comparative view of the weight given to free speech in Canada, Germany, Japan, and the United Kingdom).

freedom of expression by limiting explicitly the power of government to abridge freedom of speech (or of the press). Yet the U.S. Constitution protects speech specifically, and does not directly (and in unconditional language) protect, for example, the freedom from emotional harm, or the right to be free from libel.[30]

It would seem, then, that the basic assumption under the U.S. model is that the ordinary common law and legislative processes could provide adequate protection against conduct (or speech) that inflicts emotional harm (or any other "civil" or "private" harm). Therefore, these rights are protected at the common law or statutory levels.[31] The right to the free expression of ideas, however, receives specific protection from the legislative process itself, even if such protection entails limiting the protection the legislature (or the courts) could provide against emotional harm.

The fact that the U.S. Constitution does not view freedom of expression as one liberty co-equal with others, and instead views it as a constitutive element of democratic sovereignty, demands normative justification. Prominent scholars, such as Meiklejohn, Habermas, Fiss and recently Post[32] have argued that speech and deliberation are essential in at least two ways: 1) participation in the process of deliberation amalgamates individuals and the various communities that comprise a heterogeneous polity into a community of speakers—a "people"—without which the concept of (democratic) sovereignty is difficult to grasp; and 2) freedom of speech is a necessary condition for public deliberation and thus a defining element of any true democracy. Expanding on the theory behind these two claims will clarify the

30. The language of the First Amendment, U.S. CONST. amend. I, is markedly different from the language of the Fifth Amendment, U.S. CONST. amend. V. Not only does the First Amendment single out speech from other kinds of liberties, the Fifth Amendment subjects liberty and property to the due process of the laws, and thus even if emotional harm could be construed as an infringement of liberty or property, the constitutional protection is qualified.

31. *See, e.g.*, Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290 (1977) (emotional harm); Time, Inc. v. Hill, 385 U.S. 374, 397 (1967) (invasion of privacy); Beauharanais v. Illinois, 340 U.S. 250, 258-66 (1952) (group libel).

32. *See* JÜRGEN HABERMAS, LEGITIMATION CRISIS 8-17 (Thomas McCarthy trans., Beacon Press 1975) (1973); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 1-27 (Law Book Exch. ed., 2000) (1948); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1124-35 (1993).

difference between the U.S. approach and the alternative approach that grants equal protection to all rights.

As a conceptual matter, speech plays a critical role in the formation and justification of political sovereignty, especially in the case of democracies. Political sovereignty—at least in modern democracies—emanates from the "people." But how is the political unit—the people—formed and maintained? Surely, sociological factors such as shared history, identity, tradition, language and collective consciousness (or imagination) play a part.[33] Yet it is difficult to conceptualize the processes of constituting and re-constituting "peoplehood" without recognizing the expressive domain. The exercise of speech—or at least the perceived exercise—by members of "we, the people" is a necessary condition for there to be "we," because it is through the expressive domains that a sense of community is maintained (or redefined). Put bluntly, voice is an aspect of membership.[34] For the processes of "people-forming" to be viable, members of the people must have the option—or at least the perceived option[35]—to speak (at least on matters that define the people).[36] As a normative matter, the legally-entrenched ability of each individual to express herself on any matter of public concern is a component of the agency-principal relationship between a state and its citizens. By speaking to the other members of the collective and the collective itself, the individual infuses his or her autonomous power to choose right from wrong into the collective, thereby empowering that collective to form and apply values and priorities; needless to say, this normative dimension is highly significant in a polity that defines itself as a deliberative democracy.[37] Speech is therefore an essential ingredient in the social medium that connects individuals into communities, and more specifically, into the kind of communities that can be seen as an expression of self determination (and thus as deserving the rec-

33. *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

34. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970).

35. For a critical analysis of the difference between real and perceived freedom of speech, see generally OWEN FISS, THE IRONY OF FREE SPEECH (1996).

36. *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 716 (2004) (reminding us that "[t]he value of participation is central to . . . [the various] ways of justifying democracy.").

37. *See* MEIKLEJOHN, *supra* note 32, at 1-27.

ognition of sovereign powers over the individuals). Consequently, curtailing protections of free speech, especially within the political sphere, poses a challenge to the legitimacy of (democratic) sovereignty.[38]

This conceptual and normative argument also has sociological dimensions. The United States was formed as a nation of immigrants, not as an organic ethno-political unit, with shared history, customs and mores.[39] It is no surprise, then, that the protection of speech was necessary in order to generate "peoplehood." As Robert Post demonstrates, contrary to the common law model where speech is seen as a threat to solidarity, to the community mores and to loyalty to King and Country, speech in the United States—given its highly heterogeneous social fabric—is essential to the formation of a political community, and therefore the constitutional protection of speech can be seen as protecting that which binds the American meta-community (or community of communities) together.[40]

Yet, as mentioned above (and as demonstrated by nineteenth century liberal thinkers) deliberation, and the constitutional protection thereof, is not important just for the forming of a polity or for the legitimizing of sovereignty; freedom of speech is essential for the democratic process itself.[41] A cornerstone of our contemporary democratic theory is that without unfettered political speech—or more accurately, nearly unfettered[42]—democracy faces a crisis of legitimation. Since it is ulti-

---

38. *See generally* HABERMAS, *supra* note 32.

39. *See generally* Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988). Some claim that stemming from diversity of communities and values, the unique level of constitutional protection of freedom of speech in the United States rests on a distinct "American humanistic value." *See* Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 378 (2006).

40. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine*, 103 HARV. L. REV. 601, 684-86 (1990).

41. *See* MILL, *supra* note 25, at 55.

42. A governmental regulation absolutely necessary to achieve a compelling state interest (and narrowly tailored to achieve that interest) is compatible with a democratic constitutional structure, since in rare cases not regulating speech could lead to the collapse of the democratic state. *Cf.* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."). One possibility of addressing that danger is by carving out some expression—that which with certainty will cause the demise of the democratic structure—outside the scope of the constitutional protection of speech (for example,

mately up to the polity to see right from wrong, curtailing the process of such determination taints the legitimacy of any outcome. Put in instrumental terms, political speech is essential for the ability to critique power and promote change.[43] Without speech, democracy would lose the self-reflective ability to reform unjustified practices, thereby becoming deeply flawed. As scholars have noted, for such reform to occur, there has to exist an open public sphere where arguments are exchanged and justifications analyzed.[44] This sphere of debate and exchange of ideas is structured around the concept of public reason: We seek to convince each other by putting forward arguments that we believe resonate better with the principles of reason and best reflect our sense of justice as an expression of our experience.[45]

This reason-based sphere requires that communal norms of decency and respect to the established order be suspended, because if these norms are allowed to govern the public sphere, this sphere would become infused with the very same normative order which should be subject to critical analysis and evaluation in this sphere. For the sphere of public discourse to generate legitimacy within a community of speakers to which "we" all belong, it must be constructed around the notion of dispassionate critique;[46] a sphere where all share equal membership (regardless of their local community norms) and where all norms may

---

by defining such expression as "conduct"). Another option is to design a "strict scrutiny" test that ensures that in those rare occasions governmental regulation of speech will pass constitutional muster.

43. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11 (1966).

44. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970); Post, *supra* note 40 (discussing the domain of public discourse).

45. On the challenges facing the public reason argument, see Greenawalt, *supra* note 26, at 121. For a broader discussion of public reason, see generally GERALD F. GAUS, JUSTIFICATORY LIBERALISM (1996); Jürgen Habermas, *Reconciliation through the Public Use of Reason: Remarks on Rawls' Political Liberalism*, 92 J. PHIL. 109 (1995); Thomas McCarthy, *Kantian Constructivism and Reconstructionism: Rawls and Habermas in Dialogue*, 105 ETHICS 44 (1994); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); John Rawls, *Response to Habermas*, 92 J. PHIL. 132 (1995); Lawrence B. Solum, *Constructing the Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993).

46. As a practical matter, this structure requires sufficient agreement concerning what counts as a reason-based critique—as opposed, for example, to a passion-based argument—and that the culture supports reason-based debates, rather than passion-based decision-making processes. For further discussion of the reason-passion tension, see John L. Brooke, *Reason and Passion in the Public Sphere: Habermas and the Cultural Historians*, 29 J. INTERDISC. HIST. 43 (1998).

be equally and continuously criticized and evaluated. Libel, a perfectly legitimate limit on expression in the private sphere, is thus muted—or ought to be muted—when the speech is concerned with public figures and/or matters of public concern.[47] After all, the sense of indignation and insult, situated at the core of libel, is a product of our communal norms of decency: We feel insulted because some "traditional way" of treatment was violated. Yet such conventions ought to be kept at bay in this public sphere.[48] This is so not because indignation or decency are to be rejected in principle, but because public deliberation requires that we reflect on the arguments from all perspectives, without preferring "the way we do things" or granting special status to customs.[49]

Similarly, concern over harm caused to religious sentiments must yield within the deliberative process. The social space within which public deliberation takes place must be such that allows for critical evaluation of religious figures (including prophets), and what they stand for, even if such critical analysis offends and insults religious devotees. Otherwise, the sphere of public reason loses its ability to generate genuine legitimacy.

This two-prong argument corresponds to U.S. positive law. The U.S. protection of speech is primarily a protection of the political process, not necessarily an overarching protection of individual expressions of autonomy.[50] Nude dancing, as expressive as it may be, will therefore be subject to greater regulation than purely political speech.[51] The U.S. Supreme Court repeatedly treats libel of public figures or offensive speech related to matters of public concern differently than it treats libel and offensive speech towards "private" individuals or in the purely private sphere.[52]

---

47. *See* MILL, *supra* note 25, at 54; Post, *supra* note 39, at 301-05, 330-35.

48. By contrast, in Europe, "[e]verybody is protected against disrespect, through the continental law of 'insult,' a very old body of law that protects the individual right to 'personal honor.'" Whitman, *supra* note 28, at 1164.

49. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in The Common Law Tort*, 77 CAL. L. REV 957, 961 (1989); *see also* MILL, *supra* note 25, at 22-25; Post, *supra* note 47 (discussing individualism as compared to pluralism).

50. *But see* Fredrick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1808-09 (2004) (suggesting that political, sociological, and economic factors can be more useful in defining the boundaries of free speech than other theories, such as theories of legitimation).

51. *See* Young v. Am. Mini Theatres, 427 U.S. 50, 71-74 (1976).

52. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), sets the standard of a defa-

While not all U.S. scholars are convinced that the U.S. model is necessarily superior,[53] it is difficult to ignore its influence.[54] The Israeli legislature—in its deliberations regarding the structure of the Israeli constitutional bill of rights—and the Israeli courts—in interpreting existing legislation—are thus faced with the question of whether to adopt the U.S. approach as they address the tension between freedom of expression (and the press) and freedom of religion (or more accurately, the public interest in accommodating religious sentiments).

Yet for the time being, as a matter of positive law, the constitutional right that organizes the Israeli system is human dignity.[55] In 1992, this right was enacted in the Basic Law: Human Dignity and Liberty.[56] The Knesset deliberately omitted protection of speech from the Basic Law.[57] A possible explanation for this legislative choice rests on an assumption that, from the perspective of the Knesset, granting freedom of speech constitutional status would excessively limit governmental powers to balance (or appease) the different dignitary interests: Those of the "liberals," who would like to be able to criticize all edifices of power, and those of the "religious conservatives," who would like to ensure respect toward "basic values," including the dignity of

---

mation suit regarding a public figure. *See generally* Hustler Mag. v. Falwell, 485 U.S. 46 (1988) (holding that "actual malice" provides "breathing space" to First Amendment freedoms). A lower standard is set regarding a private figure in *Gretz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974).

53. Fred Schauer, for example, wonders whether the general-rights model, prevalent in modern constitutions, does not offer greater benefits than the U.S. model. *See generally* Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. REV. 1284 (1983).

54. For example, see the elaborated reasoning of Chief Justice Dickson of the Canadian Supreme Court, as he parts ways from standard U.S. free speech jurisprudence in *R. v. Keegstra*, [1996] 1 S.C.R. 458 (Can.).

55. The Basic Law: Human Dignity and Liberty enumerates only several specific rights such as dignity, property, privacy and liberty. It does not specifically mention expression. The Israeli Supreme Court is thus faced with interpreting the scope of the right to human dignity. This interpretative quest is not limited to the determination of whether freedom of expression is an element of human dignity. In HCJ 721/94 *El-Al Israel Airlines v. Danilovitz* [1994] IsrSC 48(5) 749, and HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94, the Justices suggest different models regarding the relation between the right for equality and human dignity. *See generally* Hillel Sommer, *The Non-Enumerated Rights: On the Scope of the Constitutional Revolution*, 28 MISHPATIM 257 (1997).

56. Basic Law: Human Dignity and Liberty, 1994, S.H. 90.

57. For the political background that led to the adoption of the Basic Laws, see Judith Karp, *Basic Law: Human Dignity and Liberty—A Biography of Power Struggles*, 1(2) MISHPAT UMIMSHAL 323 (1993).

religion.[58] Another explanation rests on the hyper-heterogeneity of the Israeli society. While the U.S. community (or communities) may seem heterogeneous compared with the relative solidarity and cohesion of Britain, it is still rather homogenous compared to Israel. The Jewish communities in Israel bring highly diverse cultures, languages and values to the Israeli social collage. At the time the state was founded, religious Jews from Yemen and secular Jews from Germany shared little beyond a rather ephemeral sense of Jewishness. While it would be a mistake to undermine the strength of the bond between Jews (as members of a Jewish people) it will be simply wrong to ignore the deep divides that separated the various Jewish "publics" that found their way to Israel. More critically, Israel is not comprised solely of Jews. Beyond the obvious national cleavage between Jews and Arabs, the religious and ideological divides are blatant. Muslims, Christians (Catholic and Greek Orthodox), Druz, Cherkess and Baha'i are some of the religious communities that predate the state. Active Communists live next to Libertarians, Nationalists next to Universalists, and Atheists next to devout believers. Under these social conditions, U.S. style freedom of expression, while providing a chance for the communities to generate a sense of identification with the state (and with the political decisions of the central government), also poses a risk of further fracturing the social bonds that keep the Israeli society together.

Historically, this risk was countered by three responses: First, freedom of expression has indeed received prominence. The Israeli Supreme Court did all that was within its power to limit the ability of administrative agencies to curtail expression by interpreting empowering legislation very narrowly.[59] Second, the legislature—British, and later Israeli—sought to entrench the value of human dignity as a basic foundation for generating solidarity, thereby mitigating the risks for greater rifts. This is exemplified in creating the offense of inflicting harm on religious sentiments. And third, the Court was *not* granted the power to exercise judicial review over legislation. Among other things, such an exercise may be perceived as posing a threat for deepen-

58. *See id.*; *see also* PPA (Prisoner Petition Appeal) 4463/94 Golan v. Prison Auth. [1996] IsrSC 50(4) 136, *available at* http://elyon1.court.gov.il/files_eng/94/630/044/z01/94044630.z01.pdf, at 27.

59. *See* HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of Interior [1953] IsrSC 7 871.

ing social divides.[60] This last component was altered by the "Constitutional Revolution": The Court interpreted the recent Basic Laws as empowering it to exercise judicial review.[61] However, at the core of these Basic Laws is the right to Human Dignity, and not freedom of expression.

As courts interpret the scope of Human Dignity, they will have to decide, either via a case-by-case method or as a matter of a general theory, whether the right of Human Dignity also encompasses the protection of freedom of expression, and if so, what the contours of protected speech are within the right of human dignity.

In any event, it is easy to see that cases like *Suszkin* would turn out differently in Israel than they would in the United States: While freedom of expression could be derived from human dignity,[62] so could the freedom from dignitary harm.[63] In fact, it seems that freedom from dignitary harm is at least as closely connected to human dignity as freedom of expression. After all, one's dignity is offended if one cannot freely express one's attitude; but one's dignity is offended in no lesser terms if one is shamed, humiliated, or otherwise expressively excluded from membership in the community, namely the community whose members' wellbeing (including emotional well-being) is cared for by the constitutional order. Speech, or an expressive act that humiliates Muslim worshipers, therefore, has a weaker claim to heightened constitutional protection in Israel because that very speech violates other aspects of the right of human dignity, such as a Muslim's right to be free from dignitary harm on account of their religious beliefs. A different ordering of democratic values, expressed in a different structure of rights, thus

60. *See generally* Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216 (1999).

61. *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. [1995] IsrSC 49(4) 221.

62. In HCJ 2481/93 *Dayan v. Jerusalem District Commander* [1994] IsrSC 48(2) 456, 468, Justice Barak states that the freedom of expression is a clear expression of human dignity. The same position is stated by Justice Matza in the *Golan* case, IsrSC 50(4) 136. Justice Matza doesn't ignore the fact that the freedom of expression is not specified in the Basic Law: Human Dignity and Liberty. In his opinion this is not determinative; the basic human liberty to hear and be heard is the essence of the human dignity, without which dignity has no meaning.

63. In HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 131, Justice Dorner says that there is no doubt that the purpose of the Basic Law is to defend from humiliation.

appears to be separating the Israeli system from its U.S. counterpart.

III. *CONSTITUTIONAL PROTECTION AND INSTITUTIONAL DESIGN*

Another dimension that may impact the level of protection of speech, including speech that may inflict harm on religious sentiments, is the institutional dimension. Placing the ultimate protection of speech in the hands of courts, the executive or the legislative branch may generate differing types of protection. This is so because the different branches of government face different generic institutional biases. Elected officials have an institutional tilt towards the suppression of dissenting political speech since, as mentioned, this speech is the main venue of criticizing their actions.[64] The rather simplistic understanding of this bias views speech, as threatening to elected officials because it may result in negative public opinion, which may result in these officials not being re-elected. A slightly more nuanced articulation of this bias suggests that legislators or members of the executive do not deliberately hinder democratic accountability for the sake of undermining critique. To the contrary; democratically elected officials derive their legitimacy from reasoned public discourse and its culmination in elections, and therefore it stands to reason that elected officials would be wary of destabilizing this prong of legitimacy. At the very least, it seems that elected officials would be just as careful to maintain the viability of public discourse—given that this discourse is an essential source of their legitimacy—as would unelected judges. Yet as institutional biases go, it is not at all far-fetched to assume that Miles' Law—stating that "where you stand depends on where you sit"[65]—applies. From the legislative seat, or from the executive office, the governmental goals may appear *really* pressing and the consequences of not achieving these goals may appear ominous. This, according to Miles, is because agencies put in

64. Owen Fiss, for example, describes the First Amendment as a shield that protects the individual speaker from the State, a shield originally designed for the preservation of democracy. According to this theory freedom of speech is a pre-condition for democratic elections. *See* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 12-30 (1996).

65. Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399 (1978).

charge of devising and enforcing policy in a given field tend to overvalue the importance of this policy and the dire consequences that may result if the policy is frustrated. Therefore, as seen from the legislative or executive perspective, speech that criticizes the governmental goals (or the means to their achievements) may appear sufficiently dangerous to the well-being of the collective to warrant its regulation, including its suppression.

The judicial branch, precisely because it is not in charge of devising and implementing policy for furthering the general welfare of the polity in most areas of life, is better situated to protect speech and restrict governmental power to regulate speech. Judges are less likely to over-value the weight of achieving a certain public goal at the expense of individual rights. After all, the institutional logic according to which courts operate is the logic of protecting individual rights, rather than promoting the maximization of the general welfare. Therefore, granting the judiciary with power to review the policies devised by agencies holds the promise of correcting, or mitigating, the institutional tilts embedded in the operational logic of these agencies.

Given that the formation of general-welfare promoting policies is what politics is about, when judges review such policies they risk being co-opted by the pressures of politics. The desire to maintain the differentiation of institutional biases demands that judges be shielded from party-politics. By ensuring that at least a segment of the judiciary is unelected, judges are somewhat isolated from pressures of public opinion,[66] opinion that may insist upon the achievement of the governmental goals. Other institutional factors come into play in order to maintain a degree of separation between the logic of the legal system and the logic of the political system: Judges must abide by legal rules and arguments rooted in professional discourse and are discouraged from engaging in straightforward public policy determinations.[67] Judges are also conditioned to view their role as the fa-

66. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). For a recent revisit on the relationship between courts and public opinion see Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. (forthcoming Nov. 2007); Christopher Schroeder, *Some Notes on a Principled Pragmatism*, 95 CAL. L. REV. (forthcoming Nov. 2007).

67. The relationship between legal discourse and other types of political discourse has received abundant attention since the famous Federalist 78 stated that the courts are the least dangerous branch, lacking both sword and purse. *See generally* Richard

mous umpires,[68] ensuring that the government does not regulate speech as speech (content neutrality) let alone favor one viewpoint over another (viewpoint discrimination).[69] They are thus less likely to be susceptible to the institutional biases of the executive or the legislature.

As mentioned, for its first forty-five years the Israeli judiciary was spared from the burden of exercising constitutional judicial review, and focused its resources on closely scrutinizing the exercise of discretion by executive agencies. As of 1995, the Israeli judiciary has joined its U.S. counterpart by receiving—or taking—the power to review primary legislation. Whereas the Israeli judiciary has been the primary proponent of freedom of expression vis-à-vis the administration (by instituting an equivalent of the strict scrutiny test for administrative action) it remains to be seen whether the Court will be able to maintain the degree of insularity necessary to exercise the same level of review vis-à-vis the legislature. In this respect, the U.S. model of granting federal judges with life tenure is not dramatically different from the current Israeli model that grants such tenure until mandatory retirement at the age of seventy.[70] Under both mod-

---

Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). While it is difficult to fully support Wechsler's plea for neutral principles, it is nonetheless interesting to see that judges still search for such a stance. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Such debates are not limited to the U.S. context. *See* Ariel Bendor, *Investigating the Executive Branch in Israel and in the United States: Politics as Law, the Politics of Law*, 54 U. MIAMI L. REV. 193 (2000).

68. President Aharon Barak considers judicial objectivity a precondition to realizing the proper judicial role. *See* Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 56 (2002) ("The judge must realize his or her role in a democracy impartially and objectively . . . . The purpose of objectivity is not to sever the judge from his environment. Rather, its purpose is to allow him to ascertain properly the fundamental principles of his time."). For a foundational discussion of the triadic role of the judge as an umpire see generally MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

69. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), a statute empowering a state to charge a demonstration fee proportional to the security costs was declared by the Court to be content-based and therefore unconstitutional. If we give the government the benefit of the doubt, this could be seen as an example of the tendency of the government to err for the side of achieving what it perceives as an important state interest, namely the judicious management of the public coffers. For a justification of viewpoint discrimination, see Cass R. Sunstein, *Half Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 26-27 (1993).

70. *See* Basic Law: The Judiciary, 1984, S.H. 78 (outlining the legal mandates of the judiciary).

els, judges are relatively insulated from party politics.[71] However, the lower procedural safeguards against amending the Basic Law: The Judiciary, which guaranties judicial independence and prescribes the appointment procedures, may place the Israeli Court in a weaker position.[72] A weaker Court might find it easier to protect human dignity than freedom of expression: The latter has adversity built into it, whereas the former is premised on inclusion. Freedom of expression is guaranteed in order to allow for an adversarial exchange of ideas; it is protected because the assumption is that the speech will need the protection on account of its offensive nature. A court striking down legislation that curtails speech is, in a sense, acting to foster disagreement. It takes a fairly insular court to be able to withstand the political pressures that would accuse the court of fomenting,

71. An argument could be made that the Israeli system achieves greater insularity, since the appointment mechanism in Israel does not vest the power of appointment solely in the elected branches. Rather, judges are appointed by the President of the State upon election by a judges' election committee. The Israeli president is not elected but appointed by the Knesset, since the position is primarily ceremonial, often awarded to a retired politician. More importantly, the judges' election committee is a nine member body comprised of representatives of the court, the bar, the Knesset and the government, so that the politicians (two members of the Knesset and two members of the government) are outnumbered by the profession (three judges and two members of the bar). *See id.*

72. On the other hand, the Israeli legislature has greater powers to amend the Israeli constitution in response to judicial interpretation. This allows the Court to act more freely, since it knows the legislature may still enjoy the last word. The Basic Law: Human Dignity and Liberty is not entrenched at all, and theoretically the Knesset may amend the law by a simple majority of two members to one. However, this Basic Law was amended in 1994 together with the amendment of Basic Law: Freedom of Vocation, which requires a majority of sixty one of the Knesset's 120 members for its amendment. This suggests that those parts of the law that were amended in 1994 can be amended now only with the majority of the house, not only the majority of those taking part in the vote. In any event, it is assumed that (as in other parliamentary systems) the government enjoys the support of the parliament (namely sixty one members), and thus may amend the law if it sees fit. However, as a matter of political reality, the Knesset is rather reluctant to amend the Basic Laws, which it sees as forming the foundation for a fully fledged and comprehensive constitution Israel will once have. While the independence of the judiciary is granted in both systems, the different structure governing the separation of powers suggests that Israeli judges who wish to avoid their decisions overturned by the legislature would pay closer heed to the legislative position on point. *Compare* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 4-17 (2002) (arguing that the attitudinal model of decision-making provides a more realistic tool for explaining and predicting the Supreme Court's decisions), *with* William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. ORG. 165, 165-89 (1992) (offering a game theoretic analysis to demonstrate the political dynamics of lawmaking).

or at least not containing, social clashes. Human dignity, on the other hand, rests on the opposite logic. It seeks not adversity, but accommodation. A court striking down legislation that violates the right to human dignity therefore protects a different version of pluralism—one based on securing a sense of belonging and care. It seems that it would be more difficult for a legislature to mobilize political support to retaliate against a court that seeks greater care for the members of the polity.

Insularity from popular processes, of course, has its risks. Some have suggested that the U.S. Supreme Court is too insular.[73] However, if viewed through long-range lenses—lenses that track judicial performance over longer periods of time—the lack of direct popular reaffirmation of the judicial determinations serves as a check on judicial discretion, thereby mitigating the dangers of greater insularity.[74] The legitimacy of the judiciary as a whole stands to suffer in the long run if judges exercise their restrictive powers in a manner perceived unreasonable and if their decisions consistently and substantially hinder the achievement of compelling governmental goals.[75] If this analysis is correct, judges may, on occasion, decide *not* to exercise judicial review, but rather exercise self-censorship (in the form of judicial restraint) if the expected public outcry might seriously undermine their social capital.[76]

In any event, in light of the typical institutional biases discussed above, it would make sense to place the protection of speech—whether as an "elevated" right or as a right subservient to human dignity—at the constitutional level and in the hands

---

73. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICAL REVIEW (2004); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

74. *See generally* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW COURTS SERVE AMERICA (2006).

75. Aharon Barak considers maintaining public confidence in the judiciary as one of the preconditions for realizing the judicial role. This does not mean that the judicial branch is accountable to the public as is the legislature, but it does mean that one of the boundaries of the judicial power is society's basic conventions. *See* Barak, *supra* note 64, at 53-62; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 123-27 (1980) ("Whether and to what degree the Justices, individually or collectively, are guided by perceived public attitudes is at least as complex a psycho-empirical problem as whether their constitutional interpretations are 'right' as a doctrinal matter.").

76. *See* CHOPER, *supra* note 75; SAMUEL KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 104-33 (1965).

of judges, since such an institutional design would address some of the concerns that may arise out of the representative processes of governance. Nonetheless, the judiciary will inevitably have its own institutional biases. First, as mentioned earlier, judges may fail to act if the stakes are too high. For example, if riots are on the horizon (or have actually taken place), speech—as other individual rights—may suddenly receive a colder shoulder.[77] Second, judges are less likely to protect speech that stands to undercut the social capital of courts. Thus judges (in Israel and in the United States) will be sensitive to speech that may appear to interfere with the processes of adjudication. Judicial determinations regarding issues such as secrecy of jury deliberation,[78] television cameras in courtrooms[79] and journalistic privilege of sources,[80] generate inherent conflicts of interest.

It seems that while some variations of institutional design exist between the U.S. judiciary and its Israeli counterpart, these variations are relatively minor. Over all, recognizing the insularity of judges highlights the similarity between the two models rather than the differences.

IV. *COURTS, CITIZENS, STATE AND SPEECH*

The distinction between the two systems comes into sharper focus when the institutional design is placed in a social context. The U.S. approach assumes some degree of adversity between citizen and state: While the three branches of government are there to govern on behalf of the people, the state is a source of concern for the individual. The leviathan is dangerous and it is natural and desirable that the people should distrust the exercise of power by its agents (as these agents may have an interest in broadening and consolidating power).[81]

---

77. *See* Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 54-58 (2005).

78. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004) (suggesting that the independence of the jury is a fiction which is maintained by the court because it allows the court to reach desirable results).

79. *See* William Wagner, *Justice in the Spotlight*, 21 T.M. COOLEY L. REV. 337, 367-71 (2004).

80. *See generally* Karl H. Schmid, *Journalistic Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeal's Decisions from 1973-1999*, 39 AM. CRIM. L. REV. 1441 (2002). The writer's conclusion is that whether intentionally or not, the outcome of the courts' approach is biased in favor of the government.

81. *See generally* THE FEDERALIST NO. 51 (James Madison).

This adversarial position is not necessarily shared in most common law democracies. The notion of responsible government—that we should trust the government (or its three branches) to carry out the public mandate granted to it—is rather prevalent in countries such as Canada.[82] The idea that representatives can be trusted to protect the rights and interests of their constituencies was often raised as an argument against the necessity of enacting a constitutional bill of rights,[83] and when one was adopted in Canada it was not a result of a crisis in the protection of human rights, but rather as a vehicle to establish common identity upon which all Canadians could unite.[84] The Canadian Charter of Rights and Freedoms—which enshrines all rights except, interestingly, property rights[85]—was not taken by the courts as necessarily establishing adversity between the government and the citizenry, but as reinforcing the basic structure of responsible government, including the fiduciary duty officials owe the public.[86] Under this design, speech does not enjoy any a priori advantage over other rights, including the freedom from emotional harm.[87] There is no reason to assume

---

82. While there is no formal basis for the principle of responsible government in the Canadian system, it is understood that the government is both responsive and responsible to the people. For a discussion of "responsible government" in Canada at the time the Charter was adopted, see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 189-213 (2d ed. 1985). It has also been argued that parliamentary systems, such as Canada's system, which evolved without "American-style judicial review," value "collective self-government" above all else. *See* Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1963-64 (2004).

83. *See* MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 39-46 (1994).

84. *See generally* ALAN C. CAIRNS, CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM (1992); Richard Gwyn, *Trudeau: The Idea of Canadianism*, *in* TRUDEAU'S SHADOW (A. Cohen & J.L. Granatstein eds., 1998); *see also* HOGG, *supra* note 82 (reviewing the various means through which rights were protected in Canada prior to the Charter of Rights and Freedoms of 1982).

85. Property rights are protected both in the U.S. Constitution and in the Canadian Bill of Rights (a Canadian statute that preceded the Constitutional Charter). These instruments predate the drafting of the Canadian Charter and, therefore, it is clear that the omission of property from the Charter was a deliberate act. *See* HOGG, *supra* note 82, at 745-46.

86. *See* MANDEL, *supra* note 83, at 60-68. In a recent article Professor Hiebert contrasts the Canadian parliamentary model with the American constitutional model and argues that the Canadian model allows a "broader spectrum of institutional actors" to review legislation in conflict with fundamental rights. *See* Hiebert, *supra* note 82, at 1979-80.

87. *See* Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 (Can.). The Court in

that the government can be trusted less with regulating speech compared to the trust it enjoys in regulating other matters, including matters affecting liberty and equality.

In this respect, the situation in Israel is even more complex. The Jewish people vied for sovereignty for years.[88] The establishment of the State of Israel, as a national home for the Jewish people, creates a special relationship between the community and the State: It represents the affirmation of dreams and aspirations rather than a dangerous Leviathan.[89] Approached from this angle, Israel is more Canadian than Canada. Nevertheless, for centuries Jews have learned to view the idea of government—the official branches of the state—as something that ultimately may be captured by forces that would harm the Jewish people.[90] Jews have insisted on maintaining social structures that are sepa-

---

this case states that reputation and free speech are twin values that have to be balanced. Roy Leeper claims that the differences between the U.S and the Canadian approaches to hate speech originate in the difference between the American liberal worldview and the Canadian communitarian worldview. These are reflected in the consideration of the effect of hate speech on the targeted group and on the society as a whole in Canada, while the U.S Supreme Court focuses on the damage caused to the speaker by regulating speech. *See* Roy Leeper, Keegstra *and* R.A.V.*: A Comparative Analysis of the Canadian and U.S. Approaches to Hate Speech Legislation*, 5 COMM. L & POL'Y 295, 295-313 (2000). Michel Rosenfeld places the source of the differences in the different approaches to dealing with multiculturalism and multiethnicism: While the United States has embraced an assimilationalist ideal symbolized by the metaphor of the "melting pot," Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an "ethnic mosaic." *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1542 (2003).

88. According to the Jewish tradition, even when the early Israelites were enslaved in Egypt, the promised land was a major source of hope and aspiration. *See* MICHAEL WALZER, EXODUS AND REVOLUTION 101 (1985). The State of Israel constitutes a form of secular and religious redemption for the Jewish people. *See* THE JEWISH POLITICAL TRADITION 465 (Michael Walzer, Menachem Loberbaum & Noam J. Zohar eds., 2000).

89. This notion is well demonstrated in the declaration of independence that emphasizes the historical bond between the Jewish people and Israel, and calls the Jewish Diaspora to join the historical act of building a Jewish nation. *See* The Declaration of the Establishment of the State of Israel, 1 LSI 3 (1948) (Isr.), *available at* http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel.

90. Fear and objection toward authority is a central motive of the Jewish Diaspora folklore. See the story "Hadrasha" about the Jewish history, HAZAZ HAIM, HADRASHA AND OTHER STORIES 127 (1991). *See generally* EHUD SPRINZAK, EVERY MAN WHATSOEVER IS RIGHT IN HIS OWN EYES: ILLEGALISM IN ISRAELI SOCIETY (2d ed. 1987). Sprinzak claims that historical and cultural origins constructed the phenomena that he describes as an instrumental attitude towards law and basic disrespect to the idea of legalism as a basic value of democracy.

rate from the state, and are often at odds with the state.[91] The Israeli Court must therefore steer a course between the attitude that the state is the manifestation of peoplehood (and thus cannot be viewed as "the enemy"), and on the other hand the remnants of diasporaic attitudes reflecting the culture of collective autonomy from the law and hints of illegalism (or disrespect to civil authority).[92] The ambivalent attitude in Israel toward law as "our" norms and law as "their" decrees thus adds a layer of complexity to the justifications the Court needs to provide for its doctrine and intervention.

The Court's early decision, in 1953, to adopt the U.S. model regarding the centrality of speech in the famous *Kol Ha'am* case[93] is regarded today as a watershed mark, allowing for strict review of *executive* discretion that affects freedom of expression.[94] The Court thus assumed the position of the guardian of democracy vis-à-vis the bureaucrats, including the (elected) ministers, on behalf of the legislature.[95] The Court adopted an interpretative presumption according to which the legislation, pursuant to which the executive agency operates, should be read to provide greater, rather than lesser, protection to basic democratic rights.[96] During Israel's formative years, the Court was reluctant to enter the thicket of constitutional judicial review over primary legislation, including when matters of speech were at stake.[97] It

---

91. This ambivalence toward the authorities is demonstrated by the attitude of the Religious Zionist Movement toward the Supreme Court. *See* Yisrael Katzover, *Who Broke the Rules*, HA'ARETZ (Isr.), Aug. 30, 1996; Beni La'o, *A Pragmatic Leadership Needed*, HA'ARETZ (Isr.), Feb. 14, 1999.

92. For example, see the contrasting opinions expressed by Justices Zamir and Cheshin in HCJ 164/97 *Conterm Ltd. v. Ministry of Fin., Department of Customs and VAT* [1998] IsrSC 52(1) 289, 320-21, 365-57, regarding the desirable relationship between the State and the individual, and especially the duty of honesty owed by the individual toward the State.

93. HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of Interior [1953] IsrSC 7 871, 876-78.

94. *See* A.E. Shapiro, *Self-Restraint of the Supreme Court and the Preservation of Civil Liberties*, 3 TEL AVIV U. L. REV. 640, 646-49 (1973).

95. With a notable but very limited exception in matters of elections, interpreting section four to the Basic Law: Knesset is exemplified in HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693. Yet even this narrow exception was not taken as resting on a superior, constitutional norm, only on a procedural entrenchment of that Basic Law, which required that acts infringing upon the equality of elections be passed by sixty one members of the Knesset. And indeed, pursuant to cases where the Court found such infringement, the Knesset re-enacted the law with the required majority.

96. *See* HCJ 337/81 Miterani v. Minister of Transp. [1981] IsrSC 37(3) 337, 356-58.

97. Justice Barak explains in HCJ 142/89 *Lao'r Movement v. Chairmen of the Knesset*

insisted on the British model of parliamentary sovereignty, under which the legislature is immune from judicial review but the executive is subjected to exacting review regarding the *vires* (and, in Israel, the reasonableness[98]). This allowed the Court to act as an agent of the people (representing "our laws") against the administration (and "their decrees").

As mentioned, in 1995 the Court found that the adoption of the Basic Laws in 1992[99] (and their amendment in 1994) altered the constitutional landscape by granting the judiciary the power to exercise constitutional judicial review over primary legislation.[100] It should be noted that the elected branches view the constitutional revolution as primarily court-made—or, in the words of the Chair of the Constitution Committee of the Knesset, a "unilateral move" by the Court.[101] It therefore remains to be seen whether the era of constitutional judicial review in Israel will allow the Court to retain the dual position as an organ of the dual state that nonetheless remains somewhat detached from the State.[102] Given the lack of express and unequivocal empowerment by the people or their representatives—and given the political reaction to the recent judicial move—it appears that the Israeli Court will find it difficult to act in a truly counter-

---

[1990] IsrSC 44(3) 529, 554, that the Israeli Court has the authority to invalidate a law in which content severely harms the basic values of the system, yet Justice Barak claims that using this authority will not fit the conventions of the Israeli public, and therefore should not be exercised by the Court at the time being.

98. The Israeli Court applies the "margin of reasonableness" with which to evaluate the exercise of administrative discretion. The doctrine would invalidate grossly or patently unreasonable decisions. *See* HCJ 389/80 Dapey Zahav (Yellow Pages) v. Israeli Broad. Auth. [1981] IsrSC 35(1) 421.

99. *See generally* Basic Law: Human Dignity and Liberty, 1994, S.H. 90; Basic Law: Freedom of Vocation, 1994, S.H. 90.

100. In CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, the Court was divided regarding the source of the Knesset's authority to establish a constitution; nevertheless, the majority of the Court agreed that the new Basic Laws provided the Court the power to exercise judicial review.

101. *See* Gideon Alon, *For—But Not By—The People,* HA'ARETZ (Isr.), Dec. 3, 2006 (quoting Michael Eitan, Chairman of the Knesset's Constitution, Law and Justice Committee, as stating that he believes the Knesset should "complete legislation of the Basic Laws" as opposed to "writ[ing] a constitution in a random manner, through the handing down of binding decrees and verdicts.").

102. For a general discussion of the institutional aspects of the constitutional revolution, see generally Zeev Segal, *Judicial Review of Statutes – Who Has the Authority to Declare a Law Unconstitutional?*, 28(1) MISHPATIM 239 (1997). Andrei Marmor claims that there is no theoretical justification for adopting the U.S. model in Israel. *See* Andrei Marmor, *Judicial Review in Israel,* 4(1) MISHPAT UMIMSHAL 133, 159 (1997).

majoritarian way. While the Court was a fierce gatekeeper against the executive, the effective protection it may provide against offensive parliamentary legislation remains to be seen.

The institutional design of speech protection is complicated for yet another reason: The decisions of the Court are in themselves also speech. The Courts' speech (about speech) is an essential component in the formation of the national ethos. As professor Weiler convincingly argued in the European context, judicial performance plays an important element in generating spheres of belonging.[103] While the Court's opinions inevitably address the aforementioned tension between responsible government and limited government, its main ethos-building thrust relates to the formation of membership in the community (and what this membership entails). Decisions about speech are particularly significant, in light of the aforementioned relationship between voice and membership. In deciding matters of hate speech, such as the *Suszkin* case, the Court is engaged not only in maneuvering between "our law" and "their decrees" but also between "us" and "them." In legal disputes over what constitutes hate speech and whether such speech is nonetheless protected, it is often the case that the Court informs us that hate should not be expressed at "them," because they are in fact (the Court argues) part of "us."[104] By making pronouncements on what it means to be a member of the Israeli community—and what rights and obligations come along with that membership—the Court thus impacts Israel's delicate politics of identity. In the *Suszkin* case it was important for the Court to highlight that Muslims deserve the equal protection of the Israeli law, and the fact that Hebron is not part of Israel does not lessen the degree of protection its residents deserve from Israeli authorities. The Court was careful not to "annex" Hebron to Israel, and at the same time, it accorded its residents the protection accorded to Israeli residents. By treating the value underlying the offense—

---

103. *See* J. H. H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 188-207, 324-35 (1999).

104. For an illuminating analysis see Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? - An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253 (1990); *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH L. REV. 2320, 2345-48 (1989). Matsuda says that the prohibition should guarantee that the minority can equally participate in public discourse.

human dignity—as an element of equal membership in a community of moral agents, the Court sidestepped legal and political mines as it further developed a vision of Israeli identity.[105]

However, the Court's evocative power is not unlimited. Since Israelis have yet to reach a shared understanding of the nature of the state (Jewish and/or Democratic), the Court's pronouncements regarding who, We, the People, are (what we stand for and what duties we owe our fellow citizens) stand to offend some and appear to others as illegitimate ventures into the sphere best left to political parties and the general populace.[106]

V. *BALANCING WORDS*

The third point that differentiates U.S. and Israeli approaches to speech in general (and to speech that inflicts harm upon religious sensitivities in particular) is a doctrinal point. Whereas in the United States the notion of balancing freedom of expression with other rights has met with notable opposition,[107] judges and scholars in Israel have wholeheartedly embraced this balancing methodology.[108] Understanding the U.S. doctrine of freedom of expression requires recognition of the

105. The educational role of the Court has long been recognized. *See, e.g.*, Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (1967); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992). In the context of hate speech, Martha Minow argues that education might be more effective than regulation. *See* Martha Minow, *Education For Co-Existence*, 44 ARIZ. L. REV. 1 (2002); Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393 (1990). While Minow refers specifically to expressions of hate in institutions (such as universities), her claim applies more broadly, and has implications regarding the constitutive function of the Court.

106. For a discussion of how Israel has struggled with the challenge of defining itself as both "the State of the Jewish people" and an "egalitarian democracy," see Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 65-67 (2004).

107. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 997-1002 (1987) (noting that the Court must recognize problems associated with balancing). The most prominent opponent in the U.S. Supreme Court was Justice Black. *See*, e.g., N.Y. Times Co. v. United States, 403 U.S. 713, 714-20 (1971) (Black, J., concurring); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 865-71 (1960).

108. In HCJ 153/83 *Levi v. Southern District Police Commander* [1984] IsrSC 38(2) 393, 400, Justice Barak says that balancing is recognized in the Israeli law as an expression of the non-absolute status of rights. *See* Eyal Benvenisti, *Regulating Speech in a Divided Society*, 30(1) MISHPATIM 29 (1999) (advocating broad standards of acceptable speech as opposed to specific rules which would not be fairly adaptable to each of Israel's subcultures).

line of jurisprudence that rejects balancing as methodologically unviable and instrumentally detrimental to speech. While in most cases this approach was not embraced—and today in most cases the U.S. courts use the language of balancing—the warning words of the "absolutists" still reverberate, and their influence on First Amendment culture cannot be ignored.[109]

Moreover, what is couched in a language of "balancing," is often applied in a manner that is not. Many of the "balancing" doctrines predetermine the resulting outcome[110] and thus, for practical purposes, judicial discretion is constrained and directed primarily to evidentiary matters.[111] This is most evident where the doctrine requires courts to examine the state's contention that the suppression of speech should be upheld because the speech undercuts a compelling state interest and the means deployed to curtail the harmful speech were narrowly tailored to protect this interest.[112] While it could be argued that

---

109. While the U.S. Supreme Court keeps reiterating that freedom of speech is not absolute, the warning words of Justice Black appear in all the main First Amendment casebooks. It thus stands to reason that most U.S. jurists engaged in First Amendment jurisprudence are well aware of the deficiencies and limits of balancing in the context of freedom of expression. *See supra* note 107 and accompanying text.

110. See, for example, *Boos v. Barry*, 485 U.S. 312, 315-21 (1988), where the Court analyzed a regulation of displays that "bring into public odium any foreign government . . . within 500 feet" of its embassy as content-based. "Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, [the law] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 321 (emphasis in original). Such a test almost always results in the invalidation of the violating provision.

111. For example, in the context of advocacy for the commission of a crime, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (invalidating a statute that punished speech advocating violence because it was not shown that the speech would cause imminent harm). Despite the spotted history of the Court in protecting communist speech, compare *Dennis v. United States*, 341 U.S. 494 (1951) with *Yates v. United States*, 354 U.S. 298 (1957), it seems that today the standard of evidence the Court would require would be rather high. *Compare* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (noting that the government had not met the heavy burden of proving the necessity of a prior restraint on the publication of the Pentagon Papers), *with* United States v. Progressive, Inc., 467 F. Supp. 990, 996 (W.D. Wis. 1979) (holding that the restriction on the publication of nuclear secrets is within the exception to the ban on prior restraint of a publication).

112. *See Boos*, 485 U.S. at 315-2; *see also* Carey v. Brown, 447 U.S. 455, 461-62 (1980). In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. In such quintessential public fora, for the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *See id.* at 461-62.

implicit in this doctrine is the relative "weight" of the state interest and the value of free speech, in fact the doctrine is set and applied so that only in limited circumstances will the court find that the state interest is compelling enough and that the means used by the state are narrowly tailored enough to ensure no incidental overburdening of speech.[113] In other words, in cases where the state interest is content-sensitive (and a-fortiorari viewpoint sensitive), the doctrine, as applied by the court, is quite restrictive. Such balancing is very different from an open-ended assessment of whether the overall harm expected to befall upon society (and its values) if the speech is not suppressed is greater, on balance, than the harm that would be caused as a result of suppressing the speech.

In Israel, the restrictive exercise of heightened scrutiny is referred to as "vertical" balancing.[114] Its "engineering" is rather straightforward: The core value (weight) of the state interest is placed "above" the core value (weight) of the right. Therefore, when the right and the state interest collide, the state interest will prevail (having a "weightier" value). National security, for example, is of greater value to society than the freedom of expression of an individual who wishes to disclose the names of secret agents. However, placing the state interest "above" the individual right is somewhat misleading. Since the harm almost always is expected to happen in the future, the court must determine the likelihood that the harm will in fact accrue if the right is not infringed, i.e. if the publication of the speech is allowed. Following Hand's formulation,[115] as the danger posed by the

113. For rare examples of statutes surviving strict scrutiny, see *Burson v. Freeman*, 504 U.S. 191, 211 (1992), where a state statute imposing 100-foot boundary restriction on distribution of campaign materials on election day was found constitutional under a strict scrutiny analysis. The statute constituted a compromise between competing fundamental rights. *See also* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding limits on corporate donations to political candidates because of the compelling government interest in preventing corruption).

114. The Israeli Court applies the vertical test whenever there is a clash between achieving a compelling governmental interest and protecting a human right. This technique is not restricted to expression. For example, in HCJ 448/85 *Daher v. Minister of the Interior* [1986] IsrSC 40(2) 701, the clash was between the interest of public safety and the freedom of movement.

115. Circuit Judge Learned Hand (as he was then), in *Dennis v. United States*, states: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d 201, 212, *aff'd*, 341 U.S. 494 (1951).

speech increases (i.e., as weightier state interests are threatened), the probability standard the state must meet decreases. A danger of a very serious harm requires a lesser showing that the harm will in fact materialize in order to allow the state to suppress the speech. If the harm is not colossal, the state must demonstrate with near certainty that the speech will cause the predicted harm before it may suppress the speech. In practice, very few utterances may bring colossal harm and therefore the court expects the government to demonstrate that it is nearly certain that the harm will in fact come about if the speech is left un-proscribed.[116] That almost always means that freedom of speech will prevail, since it is quite difficult for the government to meet that standard (in part because almost always other means are available for the state in order to foil the harm). While the court's language invokes the term "balancing," the court is engaged in a more formal doctrine precisely because it insists on both a compelling state interest and on demonstrating the high likelihood that it will be seriously harmed by the speech. The court does not really "balance" the interest versus speech; it just ensures that the interest is indeed compelling, and a strict deliberative standard is met, that is, that the government meets an exacting standard of proof before speech is suppressed.[117] As mentioned, in most cases, such standards cannot be met. Such a judicial approach, then, may be balancing in name only.

A different kind of balancing is what the Israeli Court calls "horizontal" balancing:[118] Resolving the clash between two rights by way of "weighing" the importance of each right (i.e., the value it protects) and by measuring how much of each right is being infringed by the state action. This judicial equation should lead the Court to determine the equilibrium point be-

---

116. The demand to prove the *near certainty* of a *substantial and imminent danger* to the public interest was first used in HCJ 73/53 *Kol Ha'am Co. v. Minister of the Interior* [1953] IsrSC 7 871 (emphasis added). In that case the Minister of Interior failed to prove that public safety was most likely to be substantially impaired if the publication of two communist daily newspapers was not halted.

117. In the words of Justice Dorner: "The vertical balance—implemented when a contradiction occurs between a human right and a public interest—is designed to minimize as possible the damage to the right even when it is outweighed by the interest." HCJ 1514/01 Gur-Aryeh v. T.V. & Radio Second Auth. [2001] IsrSC 55(4) 267, 284.

118. *See* HCJ 2481/93 Dayan v. Jerusalem Dist. Comm'r [1994] IsrSC 48(2) 456, 480.

tween the two clashing rights.[119] This is indeed true balancing, since the Court is seeking a "margin of accommodation" for both rights, a "compromise" between the two rights[120] that reflects their exact weight under the circumstances. Despite the scientific precision the test implies, it is not clear whether the Court's balancing acts can be effectively measured and evaluated, given the lack of established methodology (namely, scales) with which rights can be "balanced."[121] All in all, horizontal balancing risks the obvious critique of ad-hoc, result-oriented decision-making.[122]

The lines between vertical and horizontal balancing in Israel are sometimes blurred, depending on whether the Court phrases the matter as a clash between rights or a clash between a right and a state interest. For example, in dealing with restricting reports from judicial proceedings, the Court could be balancing a right (freedom of expression) versus a state interest (maintaining confidence in the judicial process), or a right (freedom of expression) versus a right (the right to a fair trial). The line-blurring problem is further apparent when we examine the probability standard the state must meet before the speech is infringed. Rather than applying the exacting test associated with

---

119. Justice Dorner says in *Gur-Aryeh*, IsrSC 55(4) at 285, that "the purpose of the horizontal balance is to minimize the infringement of both rights" by allowing a minimal infringement of each right by the other. "If the co-existence isn't possible, the right that will outweigh the other is the one that the consequence of its infringement inflicts greater harm for the individual."

120. Compare, in the U.S. context, the conflicting rights of "the right to engage in political discourse" with "the right to vote." *See* Burson v. Freeman, 504 U.S. 191, 198 (1992).

121. *See* Michael D. Birnhack, *Constitutional Geometry: The Methodology of the Supreme Court in Reaching Value Judgments*, 19(2) BAR-ILAN L. STUD. 591, 603 (2003) (noting that the balancing tests may not necessarily lead to a definite conclusion); *see also* Aleinikoff, *supra* note 107, at 974-76 (discussing the problem of formulating a "common scale" for balancing rights).

122. Such critique is not unique to Israel. In Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994), it appears the U.S. Supreme Court was engaged in a similar exercise, rousing Justice Scalia's scathing critique. *Madsen*, 512 U.S. at 785 (Scalia, J., dissenting) ("Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment."). *Madsen*, it seems, could have been decided even under strict scrutiny, given the lack of options to ensure women rights for safe abortions, yet the Court insisted on framing the issue as a content neutral time, place, and manner regulation. The Court applied a standard of review that was less stringent than strict scrutiny but more exacting than intermediate scrutiny, requiring a "significant government interest" and infringing on a right to "no more speech than necessary." *See id.* at 765.

vertical balancing (i.e., that the speech will "almost certainly" harm the public confidence in the judiciary), in some cases the Court demands only that the state shows the speech "is likely" to cause a certain harm.[123] By blurring the lines between rights and public interests, the Court, in effect, is conducting a variation of a horizontal balancing: It determines the weight of the state interest (or the right of the individual) vis-à-vis the weight of speech, so as to find a "compromise" as to how much speech (and under what conditions) should be allowed to stand and how much of the governmental interest (and under what conditions) should be allowed to suffer. Such balancing, it seems, is a matter of pure assessment, and is susceptible to the institutional biases outlined in the previous sections.

Armed with these doctrinal tools, it is worthwhile to examine the Court's decision in the *Suszkin* case. The Court inquired what should be the relationship between the speech at hand and the harm sought to avoid. Ms. Suszkin was not charged with violating an ordinary "breach of the peace" offense, and thus the Court was not required to examine whether her expressive conduct would bring about riots and whether such riots, under the circumstances, would not be a form of a heckler's veto.[124] Rather, the harm the specific offense is set to

123. *See* CrimA 126/62 Dissenchick v. Attorney Gen. [1963] IsrSC 17(1) 169, 180; ACA 4708/03 Lili Chen v. Israel [2005] (unpublished); CrimA 696/81 Azoulay v. Israel [1983] IsrSC 37(2) 565. Compare with the explicit requirement by the Canadian Court for a "real and substantial risk of trial unfairness" as justification for a publication ban concerning judicial proceedings. Deganis v. Canadian Broad. [1994] 3 S.C.R 835, 880 (Can.). This approach mainly stems from the Canadian judiciary's view that publicizing court proceedings is essential in ensuring judicial fairness and legitimacy. *See* D. Stepniak, *A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings*, 40 IDAHO L. REV. 315, 336 (2004). Canadian courts also consider publicity of judicial proceedings in criminal matters as a price that the "accused must pay in the interests of ensuring the accountability of those engaged in the administration of justice." Vickery v. Nova Scotia Supreme Court, [1991] 1 S.C.R. 671, ¶ 32, 64 C.C.C. (3d) 65, 68 (Can.).

124. Compare to HCJ 2481/93 *Dayan v. Jerusalem District Commissioner* [1994] IsrSC 48(2) 456, HCJ 153/83 *Levi v. Southern District Commissioner* [1988] IsrSC 38(2) 393, and HCJ 148/79 *Sa'ar v. Minister of the Interior* [1980] IsrSC 34(2) 169, all addressing, directly or indirectly, whether opposition from the possible audience is a legitimate concern for not providing a permit for a demonstration. Compare, in the United States, to *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating a county ordinance that allowed for a varying level of fees to be assessed based on the expected amount of security necessary for the county to provide during a parade). Perhaps the most famous U.S. case on point concerns the Skokie affair, dealing with the rights of Neo-Nazis to march in the streets of the village of Skokie, where the majority of the

prevent is the harm to religious feelings.[125] Recall that under standard "balancing" doctrine, the harm caused by the speech needs to be balanced against the harm caused by suppressing speech. But how can we determine the net present value of the harm that might be caused by the speech? Such harm is "calculated" by multiplying the "weight" (or "importance") of the governmental interest—i.e., the interest that stands to suffer injury if the speech is not proscribed—and the probability that such speech will indeed cause such an impingement.[126] Note that this should be a vertical balancing, between a right (freedom of speech) and a governmental interest (avoiding harm to religious sentiments). The Court wondered whether the prosecution should show that it is nearly certain that the speech will cause such harm, or whether the prosecution should show only that it is probable, or highly probable, but not necessarily nearly certain, that upon publication religious sentiments will be hurt.[127] The answer to that question depends on the relative weight (or importance) of the governmental interest.[128] What is the weight of religious sentiments? In Israel—perhaps in all democracies, but certainly in Israel—that may be a hard question to answer.[129]

---

population was Jewish (and among which many had relatives who perished in the Holocaust). *See* Collin v. Smith, 447 F. Supp. 676 (1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978) (enjoining the town from preventing public assembly objected to on grounds of the racist objectives of the marching group).

125. Recall that Ms. Suszkin was convicted for violating § 173(a)(1) of the penal code, which criminalizes publication that has the potential to severely harm the beliefs or the religious feelings of others on the penalty of up to one year in prison. The Court had to determine the meaning of "hurting religious feelings." The answer, based on an article by Daniel Statman, *Hurting Religious Feelings*, in MULTICULTURALISM IN A JEWISH AND DEMOCRATIC STATE 133 (M. Ma'utner, A. Sagi & R. Shamir eds., 1998), was that "one hurts another person's religious feelings when his behavior causes anger, frustration, insult, etc., and these feelings were not stirred hadn't the other person been religious."

126. *See* HCJ 2481/93 Dayan v. Jerusalem Dist. Comm'r [1994] IsrSC 48(2) 456, 475.

127. *See* CrimA 697/98 Suszkin v. Israel [1998] IsrSC 52(3) 289.

128. For example, publishing a list of undercover secret agents in a local newspaper may result, should this information get into the wrong hands, in endangering their lives and in endangering national security, two rather hefty values. It is therefore not necessary to demonstrate that it is nearly certain that releasing this information will in fact reach the enemy, only that it is probable.

129. For a discussion of the theoretical problems associated with favoring free expression over religious expression in the United States, see Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does The Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 456 (2006). These theoretical problems would likely be more pronounced in Israel. For a creative attempt to

In order to determine the proper balancing in *Suszkin*, the Court turned to a neighboring offense—sedition. The Court found that the value at the core of sedition—the protection of a legitimate government against rebellion—is more important than the value at the core of the offense in *Suszkin* (ensuring that religious sentiments are not hurt as part of maintaining public order).[130] In proving a sedition case, the prosecution, as a matter of established law in Israel, needs only to demonstrate that a certain speech will "probably" incite people (i.e., that there is "substantial likelihood").[131] The Court suggested that since the value at the core of inflicting harm on religious sentiments is less weighty, the prosecution will need to establish a higher degree of probability that such harm will indeed result on account of the speech being spoken.[132] This conclusion points toward adopting the "near certainty" standard in cases such as *Suszkin*.

On the other hand, the Court noted that the offense at hand—afflicting harm on religious sentiments—is regulated through a "subsequent punishment" (and not a "prior restraint") regime. Influenced by U.S. jurisprudence,[133] the Court views "prior restraint" regimes with greater suspicion, and therefore the demands placed on the state in such cases is the strictest, namely to show "near certainty." "Subsequent punishment" regimes, in contrast, do not mandate the strictest standard.[134] The fact that inflicting harm on religious sentiments is proscribed solely by way of subsequent punishment should point, under the Court's analysis, towards adopting the "substantial

---

untangle the Gordic Knot, see generally CHRISTOPHER L. EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

130. *See Suszkin*, IsrSC 52(3) at 307. Although it is not considered an interest of the highest importance, the Court emphasizes the significance of tolerance for the stability of a diverse democratic State like Israel.

131. Penal Law, s.134, 5737-1977, Hok ha-'onashin 52 (Isr.), makes it a crime, punishable by up to five years in prison, to publish a statement that may bring about sedition.

132. *Suszkin*, IsrSC 52(3) at 306-07. This approach, according to Justice Or, seeks to maximize the protection of freedom of speech, whereas a lower standard raises the concern that expression might be criminalized without real justification.

133. *See generally* Near v. Minnesota, 283 U.S. 697 (1931).

134. *Id.* Subsequent punishment limits the expression but doesn't prevent it totally; the damage caused to the freedom of expression is considered by the Court as less severe. *See* Fiss, *supra* note 61, at 130. Needless to say, in practice, subsequent punishment can be as chilling as prior restraint. *See* Amnon Reichman, *The Voice of America in Hebrew—The US Influence on Israeli Freedom of Expression Doctrines*, 3 L., SOC'Y & CULTURE 185 (2005) (Hebrew).

likelihood" standard to state prosecutions of the offense dealt with by the *Suszkin* case.

The Court ended up leaving this matter under consideration, since it found that in any event, the "near certainty" test was met: It was nearly certain that had the posters been posted or handed to Palestinians in Hebron, harm to religious sentiments would have been inflicted.[135]

The difficulty in the Court's act of "balancing" is clear. First, from a liberal point of view, it is not clear that the value of protection against emotional harm "weighs" less than the protection of a legitimate legal order (i.e., the core value at the basis of sedition). As mentioned above, the Court chose to deem the infliction of emotional harm as an ingredient of public peace, and thus suggested that since the very existence of the legitimate legal order weighs more than a mere disturbance to public peace, sedition should require a lower probability standard than infliction of harm on religious sentiments. Still, substantial violation of someone's emotional integrity, just like seriously violating his bodily integrity, his dignity or his liberty, is not analogous to disturbing public peace. Treating the claim to be free from emotional harm—including religious grounds—as a mere public interest of a lower standing is far from trivial.

The matter becomes even murkier when we take into consideration that attempting to balance all the values raised in the case would probably entail according "weight" to the fact that it is not "ordinary" emotions that the offense protects, but religious sentiments.[136] What is the core value that is protected by

135. Furthermore, the Court rejected the claim of Suszkin's lawyer that only an expert can determine the intensity of the suffering or the harm caused to the religious feelings of Muslim believers. The Court declared that under the circumstances the potential of the publication to cause severe harm is obvious and does not require any further proof. *See Suszkin*, IsrSC 52(3) at 311. It should be noted that many criticize the reliance on probabilities in matters of afflicting harm to public sentiments. Some judges say that this is not a matter for probability analysis: either a certain statement *does* offend sentiments, or it *doesn't*, and the court, like any member of society, is equipped with the necessary basic social understandings to determine one from the other. *See* HCJ 806/88 Universal City Studios Inc. v. Film & Play Review BD [1989] IsrSC 43(2) 22, 42.

136. Daniel Statman suggests a historic explanation to the unique protection granted to religious feelings. According to his theory, criminalizing the act of inflicting harm on religious sentiments is a preserved remnant of a prohibition that originated in the context of a religious society and lost its justification. He calls for granting a general protection against emotional harm. *See* Statman, *supra* note 125.

such an offense? Under Israeli law there is no offense that criminalizes affliction of emotional harm as such (other than torture, which includes emotional torture).[137] Do religion and religious feelings have an independent value? According to the standard liberal model, referred to above, all rights deserve equal respect and we should equally protect against harm to all types of emotions. Singling out harm to religious sentiments is problematic, and perhaps the Court should interpret the statutory scheme to down-play the unique protection accorded to religious sentiments.

Some have suggested that religious sentiments are in fact unique, because religion is a normative regime that competes with the legal regime of the modern state.[138] Therefore, it is prudent to accord religious sentiments a greater margin of tolerance, so as not to push believers into having to choose between the authority of the state and the authority of their religion. This tension between the competing claims of authority—legal and religious—may be especially acute in Israel, a Jewish democracy that does not separate state and religion, and where a considerable minority of non-Jews (including atheists) live. In this context, the state, including the judiciary, should demonstrate extra-sensitivity to religious sentiments of all. Others make the opposite point: Religious sentiments should *not* be accorded special status, because co-existence requires a sphere where it is accepted that all are free to express their sentiments, including (religious) sentiments that offend the (religious) sentiments of others. Stifling the expression of such offensive sentiments—for example: the Jews are the chosen people and are therefore "superior," the Jews have sinned for not accepting Jesus, Muhammad is the bearer of truth and the last prophet that ought not be ridiculed—would only lead to alienation of some (if not all) religious groups. Attempting to chart a "correct" balance between religious sentiments, sentiments in general, and free speech appears ever more elusive.

We should also recall the host of methodological difficulties that arise when a balancing test is applied. How does the Court

137. The one exception is s.368C of the Penal Code, which criminalizes emotional abuse among the offenses against minors and the helpless. Penal Law, 5737-1977, Hok ha-'onashin 104 (Isr.).

138. *See* IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 33-46 (1975). But see, in the American context, EISGRUBER & SAGER, *supra* note 129.

ascertain the appropriate weight to assign to each right or interest? After all, it is quite difficult to measure the harm done if the speech is suppressed. Is it the harm to Ms. Suszkin? To those who hold similar views? To the public at large? (The Israeli? The Palestinian?) To the overall legitimacy of the system?

We see, then, that the balancing approach—at least the balancing that departs from strict vertical—leaves much to be desired. Perhaps it might be worthwhile to revisit Justice Black's admonition of the balancing test and the subsequent line of U.S. jurisprudence, which could be understood as treating the act of balancing as a last resort, to be used only when no non-balancing doctrine or theory can prove helpful. The "clear and imminent danger" test,[139] the strict scrutiny articulation applied to non-neutral regulation in a public forum[140] or the "actual malice" requirement,[141] are all examples of attempts to sidestep direct balancing, at least in part, given the methodological difficulties inherent in the act of "pure" value-balancing.

Horizontal balancing is problematic not only due to the inherent methodological difficulties alluded to above, but also to the institutional dimension within which such balancing is to take place. Setting a "balancing test" that requires judges to balance the competing values and principles means that multiple judges, in multiple courts, would have to confront these issues. Since the balancing test is methodologically taxing, it is reasonable to expect different approaches to the cases that may arise in various courts.[142] This lack of uniformity and coherence within the judicial branch itself may have detrimental consequences not only to speech but to the legitimacy of judicial review as a whole.[143] This problem is of less importance in Israel, since the Supreme Court sitting as a high court of justice retains original jurisdiction over the matter, thus its doctrine does not have to guide lower courts. It is therefore not surprising that the Israeli Court approves of horizontal balancing, knowing that such balancing grants it with greater latitude to reach the desired bal-

139. *See* Brandenburg v. Ohio, 395 U.S. 444, 450 (1969).

140. *See* Boos v. Barry, 485 U.S. 312, 312 (1988).

141. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 289-98 (1964).

142. *See* Birnhack, *supra* note 121.

143. See Justice Stewart's strong opinion in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400 (1973) (unfolding the dangers of "balancing" in the context of freedom of expression).

ance in each case without having to supervise the exercise of such discretion by other segments of the judiciary. However, this institutional fact is in the process of changing, as the jurisdiction over public law matters is being transferred, slowly but surely, to the district court level (the intermediate level in Israel, above the courts of the peace).[144] One can expect that unless matters of constitutional law are restricted solely to the Supreme Court sitting as a constitutional court—an idea that is being discussed but which raises a host of problems[145]—the application of the balancing doctrine in lower courts in Israel is likely to raise serious issues of uniformity.[146]

VI. *COMPARATIVE LAW: DIFFERENCES VS. SIMILARITIES*

Thus far this Article has focused upon the differences between the U.S. and the Israeli legal systems. It has been assumed, without discussion, that the statute at hand would have been struck down by the courts had it been adopted in the United States. The statute criminalizes protected speech, and does so in a vague and overbroad manner. It singles out a certain class of speech—that which offends religious sensibilities—over other classes of offensive speech, and is thus content-sensitive and is discriminating on the basis of a viewpoint.[147] But more fundamentally, it seeks to proscribe speech simply because it is offensive to some, and thus clashes with the cornerstone of

144. *See generally* Meni Mazuz, *Reform in Administrative Law: The Administrative Court Law, 2000*, 6(1) MISHPAT UMIMSHAL 233 (2001).

145. Law proposals to establish a constitutional court were raised often in the last few years. *See* The Knesset, http://www.knesset.gov.il/privatelaw/Plaw_display.asp?law tp=1 (last visited Sept. 29, 2007). The impetus behind these ill-advised proposals is the claim that the Israeli Supreme Court does not represent a wide enough range of sectors in the society and therefore does not enjoy sufficient public confidence when dealing with sensitive constitutional issues. *See* Yoav Dotan, *Does Israel Need a Constitutional Court?*, 5 MISHPAT UMIMSHAL 117 (2000); *see also* Symposium, *On the Proposition to Establish a Constitutional Court*, 6(2) MISHPAT UMIMSHAL 315 (2003).

146. Such issues might burden the appellate docket of the Supreme Court and may require the Supreme Court to "discipline" lower courts of differing views. Given the diverging opinions among Israeli jurists, including judges, regarding the proper balance between values, the Supreme Court might in fact lose some of its institutional capital as a result of such strife.

147. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the conviction was reversed because the prohibiting statute was overbroad. In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the majority reversed the conviction because the prohibition was "content based" and the minority reversed because of the prohibition being over-broad.

First Amendment principles.[148] Even in matters of Hate Speech, which raise issues of intimidation, silencing and discrimination, the U.S. jurisprudence favors the protection of speech.[149] Does that mean that Tatyana Suszkin would have fared better had her matter been brought before a U.S. court? Would U.S. courts allow a conviction for charges based on a general disturbance of the peace or breach of public order offense?

U.S. courts have long since concluded that in some cases—rare but identifiable—speech should be viewed as an act or as conduct.[150] Since this conclusion is analytically curious—isn't all speech conduct?—it is worthwhile to examine these "islands" of unprotected speech in greater detail, and in particular, the doc-

148. *See* Cohen v. California, 403 U.S. 15 (1971).

149. For critical analysis see, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (favoring restrictions on hate speech); Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 285 (1995) (same); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987) (same); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) (same); Matsuda, *supra* note 104 (same); Rosenfeld, *supra* note 87, at 1533-38 (discussing a four stage model for justifying the tolerance of hate speech); *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (favoring tolerance for expressions of hate); Susan Gellman, *Hate Speech And A New View Of The First Amendment*, 24 CAP. U. L. REV. 309 (same); Marjorie Heins, *Banning Words: A Comment on "Words That Wound"*, 18 HARV. C.R.-C.L. L. REV. 585 (1983) (same).

150. The "clear and present danger" test, as described by Justice Holmes in *Schenck* reflects the apprehension that words are action in the world in the sense that they have real effect, and therefore should sometimes be treated as an act. *See generally* Schenck v. U.S., 249 U.S 47 (1919). On the "speech-conduct" distinction, see JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16-19 (1969); William B. Fisch, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463 (2002). *See generally* Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953 (2004). Eberle says that a careful separation of speech from conduct may assist in regulating hate speech within the boundaries of the First Amendment; for this it is required to distinguish between the content (that can be hateful) and the conduct itself (threatening, intimidating, etc.). Eberle sees a difference between cross burning in a Ku Klux Klan rally (protected speech) and cross burning in the back yard of an African-American (conduct, and therefore not protected to the same degree). This approach rests on our ability to differentiate content from the conduct: Is not a rally also threatening conduct, at least when the march traverses in predominantly black neighborhoods? See also, in a different context, JUDITH BUTLER, EXCITABLE SPEECH 72 (1997). For a broader view of the treatment of speech as conduct, especially with respect to speech promoting criminal activity, see Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

trine known as "Fighting Words."[151] In the famous *Chaplinsky* case,[152] taking place during WWII, the Supreme Court stated, ignoring the rather shaky factual basis of the case, that the Constitution does not protect curses, namely speech that when uttered does nothing but offend the person to which it is directed or which will by its very nature cause an immediate violent reaction.[153] It is usually the case that the Fighting Words doctrine will apply when four conditions are met: (1) the speech is directed against a specific person or a specific, present audience; (2) both speaker and audience understand the content of the utterance as a direct offense;[154] (3) under the circumstances in which the speech was uttered the utterance was indeed, according to accepted conventions of language, a direct provocation;[155] and (4) it is highly likely that the utterance would invoke the

---

151. For possible uses of the doctrine see KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1995). For a discussion of the development of the Fighting Words doctrine in the United States, and its influence, see Claudia E. Haupt, *Regulating Hate Speech: Damned If You Do And Damned If You Don't: Lessons Learned From Comparing The German And U.S. Approaches*, 23 B.U. INT'L L.J. 299, 318-21 (2005).

152. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

153. *Id.* In Justice Murphy's words in *Chaplinsky*:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72.

154. *See* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 390-91 (2005). A famous example to the contrary is the case of the Israeli student who referred to a group of African Americans in the University of Pennsylvania as behemoths (in Hebrew), after these students raised noise in the dorms and disturbed his studies. The student was convicted for violating the code of conduct that governs expression on university premises and prohibits racist or derogatory speech that refers to others on racial grounds. The student claimed that this code violated his First Amendment rights, while the University claimed that the speech amounted to Fighting Words, even if the black students did not fully understand the meaning of the word behemoth in Hebrew. Technically speaking, this word refers to water buffaloes, as a translator that was brought by the defense testified. However, its everyday usage includes reference to rude, fat and crude people, as Israelis know. *See* ALAN C. KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY IN AMERICAN CAMPUSES 9-33 (1998). For analysis of freedom of expression on campuses, see also Minow, *supra* note 104.

155. *See* Friedlieb, *supra* note 154, at 385-91.

violent reaction of the offended addressee.[156] The logic behind the doctrine seems to be that the utterance of some words or expressions may, in some circumstances, be outside the scope of what we call "dialogue," "discourse," "debate" or any other deliberative activity.[157] The content of these words, when uttered in a certain context and a certain manner, may be equated to a punch, which would, in all likelihood, prompt a response in actual violence.[158] If this is indeed the logic, the anticipated reaction—a fight—is only one element of the doctrine; its core lies in the analysis of the nature of the utterance (discursive or not) and the context of the utterance (again, discursive or not). The paradigmatic Fighting Words would be uttered without an intermediary medium; the words are thrown at the designated addressee face-to-face. Another characteristic of a paradigmatic instance of Fighting Words is that the audience—individual or group—is captive, in the sense that the addressee finds herself a part of an interaction without ever asking to be part of the exchange, and the ability to ignore and disengage is often not realistic, under the circumstances.[159]

It is interesting to note that the language supporting this doctrine is the language of balancing: The Court finds the value of the expression to be substantially lower than the damage the expression is likely to cause. The contribution of the utterance

156. *But see* GREENAWALT, *supra* note 151, at 35. "But suppose five white males shout racial and sexual epithets at a lone black woman in the park . . . I believe deep offense should sometimes warrant restrictions on speech, but probably only when there are immediate, identifiable victims." It seems to me that the *Suszkin* case would still qualify as a justified restriction.

157. As the Court emphasizes in *Chaplinsky*: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572 (citation omitted). *See also* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 814-16 (1993); R. George Wright, *Hermeneutics and Critique in Legal Practice: Traces of Violence: Gadamer, Habermas and the Hate Speech Problem*, 76 CHI. KENT L. REV. 991, 998-1004 (2000).

158. This also means giving weight to the intentions of the speaker; Lasson suggests that speech which is aimed to cause contempt to a racial group should be prevented. Kenneth Lasson, *Group Libel vs. Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 123-27 (1984).

159. *See* Cohen v. California, 403 U.S. 15, 20-21 (1972). For a comparative discussion of the evolution of the Fighting Words doctrine through "case by case jurisprudence that strikes a balance between individual rights and interests of the community," see Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 232 (2005).

to the discovery of truth is so infinitesimal that it cannot be considered "useful" to society.[160] However, properly conceived, the justification under-girding the Fighting Words doctrine does not represent a balancing test: As a general matter, judges are not asked to determine whether a certain utterance is "useful" or its value exceeds the damage it causes. Judges must determine whether, under the circumstances, the speech contained a claim that could conceivably be a part of a dialogue, or whether it was merely an act of aggression, committed through words.[161] Conceptually, cursing another human being is not a mode of communication of ideas, thoughts, facts or opinions that is protected under the normative apparatus discussed above any more than shoving that person aside.[162] It is true that a fight word conveys "information"—otherwise it will not have the power to provoke a violent reaction—but conveying information in and of itself is not necessarily a discursive enterprise: a commander orders his soldiers to attack; the mind orders the muscles to contract; the stop sign informs the drivers to stop. While all are acts that convey information, they are not discursive, in the sense that they are not an element of a conversation. Therefore, rather than "balancing" competing interests, or having judges evaluate whether a certain utterance is "useful" (as if it was a commodity or a service), applying the Fighting Words doctrine requires judges to classify types of human interaction into "discursive" and "non-discursive".

The Fighting Words category of interaction falls outside the scope of the First Amendment not only because of the nature of the message (in context) but because of the nature of the Constitution. As mentioned, the theory underlying the First Amendment focuses on the protection of speech from governmental regulation of a certain communicative medium or of a certain communicative content.[163] The Constitution is not there in or-

160. *See* Gooding v. Wilson, 495 U.S. 518, 528 (1972).

161. In *Gooding v. Wilson*, 495 U.S. at 528, the Court emphasizes the requirement for proof that an immediate breach of peace is likely to come about in response to the expressive conduct.

162. The threats exception to the First Amendment has also generated a number of cases that illustrate this distinguishing principle. *See generally* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006).

163. *See* HABERMAS, *supra* note 32, at 8-17; MEIKLEJOHN, *supra* note 32, at 1-27. *See generally* Post, *supra* note 40.

der to protect a person from a valid claim of another individual for breaching a duty owed under private law towards that individual. So, as a general matter, if one person breaches a private law duty towards another individual—for example, commits a tort of aggression—the Constitution will not be implicated. Private law will, as mentioned earlier, deal with the case under the standard common-law model.[164]

However, criminal offenses, including a prohibition against breach of the peace or public order, do raise constitutional questions, since the government resorts to the use of coercive state power.[165] Yet since these offenses on their face are not designed or aimed at any medium for the communication of ideas nor are they content-sensitive, the First Amendment need not invalidate the law.[166] The criminal statute itself would pass constitutional muster. The *application* of the law, however, in a concrete case involving speech, must nevertheless pass judicial scrutiny in order to ensure that the criminal code does not trespass into the protected medium of deliberation or regulate the content of such deliberation. Thus, we could expect that if (and only if) the expression in question is not part of any discourse or dialogue but is rather, under the circumstances, an utterance of intimidating hate—a curse—a criminal prosecution for breach of the peace would be held constitutional.

In light of the above, we see that while it is unclear whether the First Amendment jurisprudence would have allowed the survival of the underlying statute,[167] at least on the doctrinal level a conviction could have been reached (and allowed to stand) in the United States, despite the wide gap discussed in the earlier

---

164. *See generally* Amnon Reichman, *A Charter-Free Domain: In Defense of Dolphin Delivery*, 35 U.B.C. L. REV. 329 (2002).

165. When the claim is that a statute or a regulation violates a constitutional right, it is an obvious case of state action, i.e., the involvement of the government is sufficient to apply a constitutional provision. For an illuminating discussion of the use of the private/public divide in the First Amendment context, see Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches To The First Amendment*, 1990 DUKE L.J. 375 (1990).

166. This is not to say that we should ignore the effect of the statute, even if this effect is merely "secondary". *See* Steven H. Shifrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 53 (1994).

167. *Cf.* Beauharnais v. Illinois, 343 U.S. 250 (1952). While *Beauharnais* was not directly overturned, it is difficult to reconcile its holding with feature cases and with the underlying principles of the marketplace of ideas, evidenced, for example, in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

chapters of this Article. If calling a police officer a Fascist amounts to a Fighting Word,[168] it is not far-fetched to suggest that the doctrine applies to Suszkin's distribution of her posters, especially given the social context of hostility between the Arabs of Hebron (living under the regime of belligerent occupation) and Jewish settlers, and the fact that by affixing the posters to the homes of Palestinians in this area, an unmediated confrontation with the inhabitants (as a captive audience) was highly likely to ensue.[169] Interestingly—and this Article will speculate on a possible reason for this[170]—the Israeli Court did not take the time to consult comparative law in this case, notwithstanding the clear comparative tendencies of the Court in freedom of expression cases.[171] As a result, the Fighting Words doctrine is not yet an official part of Israeli law on point. However, it seems that the underlying rational behind the analysis of the Court is compatible with the premise of the doctrine.

In order to avoid an unnecessary chilling effect, and in order to ensure that the state action (the prosecution of the offense) is narrowly tailored to protect only against an act of aggression committed by one individual against another (either as an individual or as a member of a group) without inhibiting protected speech, it is recommended that this doctrine should be adopted in Israel.[172] The prosecution would need to demonstrate actual intent to harm, not only an awareness of the nature of the act (or, in this case, the speech). By raising the bar, we would allow the courts to match the specific intent of the speaker with the objective understanding of the meaning of his

168. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

169. The legal status of Arabs in Israel makes the Israeli Court's position particularly difficult. One observer has noted that "within Israel, inherently discriminatory provisions disadvantage not only Palestinian Arabs but to a significant extent citizen Israeli Arabs in access to land, and effectively, to the full panoply of citizens' rights." Andrew Grossman, *"Islamic Land": Group Rights, National Identity and Law*, 3 UCLA J. ISLAMIC & NEAR E.L. 53, 88 (2003).

170. *See infra.* Part VII.

171. HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior* [1953] IsrSC 7 871 is the most significant example of this. *See also* HCJ 2481/93 Dayan v. Jerusalem Dist. Comm'r [1994] IsrSC 48(2) 456; HCJ 606/93 Kidum Entr. & Pub. (1981) Ltd v. Broadcasting Authority [1994] IsrSC 48(2) 1.

172. Israel will thus join other common law democracies. For a discussion of how the Australian High Court has recognized "a Fighting Words-type exception," see William Buss, *Constitutional Words About Words: Protected Speech and "Fighting Words" Under the Australian and American Constitutions*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 489, 497 (2006).

or her speech.[173] This standard, if applied to the case of the Danish cartoons mentioned at the opening of this Article, will likely prohibit prosecution of the cartoonist or the paper, if indeed no intent to harm was present.[174]

In *Suszkin*, the judges in the lower courts, having established the facts and upon these facts having reached a conviction, stated that it was proven that Suszkin intended nothing but to "retaliate" against the Arabs, insult for insult.[175] She had no intention of engaging anyone in dialogue or debate. She was not trying to make a point through satire, or provoke thought and reflection; only to hurt the other side, akin to throwing a stone at these members of the Muslim community whose houses would serve as billboards. This subjective intent matches the objective meaning of her action. Under the circumstances,[176] posting this

173. Of course, the objective understanding of the speech can serve as an evidentiary tool to prove the speaker's intent: If a speaker expected—or would be hard pressed not to expect—that his speech would in all certainty cause injury to feelings, one may presume that he meant to cause this injury. In the case of CrimA 2831/95 *Rabbi Iddo Elba v. Israel* [1996] IsrSC 50(5) 221, the Justices debated whether for the offense of inciting racism (Penal Law, s.144, 5737-1977, Hok ha-'onashin 56 (Isr.)) this presumption could serve as a substitute for the actual intent required by the offense. A final decision was not made since on the facts of the case, actual intent could be proved. *See* Benvenisti, *supra* note 108; Mordechai Kremnitzer, *Elba Case: "Clarification of the Laws of Inciting Racism"*, 30(1) MISHPATIM 105 (1999). Compare also to Statman, *supra* note 125, at 141-49. I am leaning towards requiring actual intent that is not satisfied by the common-sense presumption of the natural effects of one's actions, but in the Israeli case it is too soon to conclude whether insisting on specific intent would produce the desired regime.

174. It could be argued that in the Danish case there was foreseeability of harm, and perhaps even an intent to cause harm, in the quest of demonstrating that such harm should be tolerated in a modern liberal democracy. I am not sure that this is in fact the case on either count; I actually doubt that there was intent, or that one could have expected the harm (and/or its degree). But in any event, it seems to me that the medium of communication does make a difference: Cartoons in newspapers are different than posters placated on houses of a captive audience. Moreover, the content of the cartoons was thought provoking—as is the case in much of satire—whereas we would be really hard pressed to find the thought provoking element contained in Suszkin's poster (beyond the pure insult).

175. *See* CrimC (Jer) 436/97 Israel v. Suszkin, [1997] IsrDC 97(5) 730. Suszkin herself told a psychiatrist that her purpose in drawing the posters was to "show the Muslims the true face of their religion and by that hurt their religious feelings like they hurt Jewish feelings."

176. 100,000 Palestinians and 500 Jews live in Hebron, which is probably the most sensitive point of friction between Jewish and Palestinian civilians in the occupied territories. The peak of the tension was the massacre of Muslim worshipers in the Tomb of the Patriarchs (burial site of Abraham, Isaac, Jacob, Sara, Rebecca and Leah according to tradition) in February 1994 by a Jewish settler. The situation in Hebron is described

poster in Hebron by gluing it to doors and walls constitutes an act of aggression, committed through words; her words are thus "Fighting Words." Had the Court resorted to the doctrine of Fighting Words, it could have sidestepped the quagmire of hate speech altogether, thus keeping true to first principles under which irritating speech is still protected. Furthermore, the judges would not have had to go down the slippery slope of probabilities—whether it was likely, probable, highly probable or nearly certain that feelings would be hurt.[177] In addition, they would not have needed to determine the "degree of pain" or the extent of emotional harm suffered (or likely to be suffered) by the audience.

After all, Suszkin was convicted of a criminal offense, and the act of establishing such probabilities or assessments would introduce an element of uncertainty to the application of offenses that regulate speech. Such uncertainty may lead to a chilling effect and to selective enforcement. The facts of the *Suszkin* case were such that the lower courts could establish that a reasonable Muslim exposed to this poster directly—if since it was handed to her or placated on her walls—would be not only outraged and offended but see the poster as cursing her as a pig-follower.[178] It is difficult to see any other message conveyed by the poster, especially given the context of its distribution and the fact that the pig is considered vile by Islam (and Judaism).[179] Since it is difficult to see how distribution of such posters in Hebron, given the social context of occupation, would not lead to riots, the state can properly treat Suszkin's actions as an attempt

---

in THE REPORT OF THE OFFICIAL INVESTIGATION COMMITTEE FOR THE MASSACRE IN CAVE OF MACHPELA (1994).

177. It should be recalled, though, that in the usual case where a claim of hurt feelings is raised, the question to be asked is not whether the speech is likely—and in what likelihood—to hurt feelings (religious or other): In most cases the injury to feelings is the underlying premise. The right question to be asked as far as probabilities and balancing are concerned is whether—and in what likelihood—public order or peace is likely to be disturbed as a result of the speech in question. But if public order is not the question, only hurt feelings, then no question of probabilities should be raised. *See* HCJ 806/88 Universal City Studios Inc. v. Film & Play Review BD [1989] IsrSC 43(2) 22, 41. The important question is therefore what are we protecting: The injured feelings of the individual, or the public order.

178. *Suszkin*, IsrDC 97(5) at 730.

179. The Court in *Suszkin* relied on judicial notice for the fact that under Islam the pig is defiled. CrimA 697/98 Suszkin v. Israel [1998] IsrSC 52(3) 289, 300. If a "damned fascist" is a curse, as *Chaplinski* tells us, so is a "pig follower".

to violate order and peace of the kind that should not be protected by the constitutional order.

The unique facts of *Suszkin* differentiate the case from other cases where arguably equally offensive speech was posted on internet sites, in newspaper caricatures, as part of art shows, dance shows and exhibitions, or as part of a motion picture. The Israeli Court realized that although the speech is offensive, the social context is such that warrants the protection of the offensive speech. In all of the latter cases the Israeli Court has systematically ruled in favor of freedom of expression, despite the fact that feelings were hurt, sensibilities offended and emotions injured.[180] In these cases, the Israeli Court was sensitive to the centrality of expression in a democratic regime, even when such speech may have infringed upon other rights. Between vying to maintain solidarity—by minimizing the infliction of harms to any groups' feelings—and managing conflicts through allowing expression (including harsh or insensitive expressions), the Court chose the latter (as long as no specific legislation on point ordered differently).[181] It seemed the Court, in applying administrative review through statutory interpretation, came to the conclusion that in Israel's deeply divided society, insisting on decorum in mainstream media for the sake of solidarity might eventually lead to less cohesion, since the stifled speech might

180. In HCJ 14/86 *Laor v. Film & Play Review BD* [1987] IsrSC 41(1) 421, the Court ruled in favor of displaying a play that was claimed to offend the feelings of the Jewish public, because it compared the Israeli army to the Nazis. In CA 316/03 *Bachri v. Movies' Review Council* [2003] IsrSC 58(1) 249, the Court struck down the decision of the Council to refuse a license to the movie "Jenin Jenin" by Bachri. Under Israeli law, a license must be obtained for public showings. The film, which described the events in the refugee camp in April 2002, was allowed to be screened despite the fact that according to the Court it depicted events "in a distorted way that hurt the feelings of soldiers and families of slain soldiers." In HCJ 606/93 *Kidum Entr. & Pub.* (1981), *Ltd. v. Broadcasting Authority* [1994] IsrSC 48(2) 1, the Court allowed the broadcasting of an advertisement that had a sexual double-entendre, despite its offensive character. In HCJ 1514/01 *Gur-Aryeh v. T.V. & Radio Second Authority* [2001] IsrSC 55(4) 267, the Court ruled in favor of broadcasting a T.V. show on Saturday despite the injury to the religious feelings of participants in the show. All of these decisions were based on the assertion that the injuries caused by the speech fall within the margin that a democratic society should be able to tolerate.

181. For example, Non-Profit Organizations Law, 1980, S.H. 210, gives the registrar the authority to refuse registering an association that uses a deceiving or offensive name. In several cases the courts favored the decision of the registrar rather than the freedom of expression of the association. *See* CA 9/86 Ass'n of Religious Court Prisoners' v. Non-profit Org. Register [1986]; OM (Jer) 362/00 Attorney Gen. v. Hilel Ass'n [2001].

find other outlets, less favorable to Israeli society's sense of solidarity.[182] It may, of course, be the case that the Court did not need to confront a stream of highly insidious satire delivered through conventional media, because self-censorship was exercised effectively. Thus far very few cartoons that were purely spiteful have made it to publication (at least in the mainstream papers).[183] As an observer, it seems to me that most cartoons involve true satire, and thus it would have been difficult to challenge their print in court.[184] In any event, the *Suszkin* case reveals the outer limits of the judicial (and statutory) tolerance to offensive speech. As applied, the case is sensitive not only to the content of the satirical communication—depicting Muhammad as a pig, and thus meeting the criteria of "pure offense"—but also to the non-mediated, captive dimension of the offensive interaction.

It would seem, then, that the different social context—the different medium of communication—makes a difference. Time, place and manner play a role not only in the usual cases of demonstrations and parades,[185] but also in determining whether the speech rises to the level of Fighting Words or not. Unlike

---

182. See the opinion of Justice Barak in EA 11280/02 *Central Elections Committee for Sixteenth Knesset v. MK Tibly* [2003] IsrSC 57(4) 1, 21. Barak emphasized the point that it is better for democracy that un-democratic pressures would be relived in the democratic channels, rather than other non-democratic channels (that might be violent). According to Barak, such an attitude is not only pragmatically sound, but also reflects democracy's resilience. Compare, in a different context, to Justice Brennan's opinion in *Texas v. Johnson* 491 U.S. 397, 419 (1989):

> [W]e are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength.

But see Fredrick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992). Schauer claims that we should be aware that only particular groups (and usually weak ones) are carrying the burden of free speech: "All too often, those who defend the existing approach by saying 'this is the price we pay for a free society' are not the ones that pay very much of the price." *Id.* at 1355.

183. It could very well be that in retrospect, cartoons from the fifties, sixties and seventies would seem to us imbued with stereotypes; but it is still generally true that the Israeli media, both Jewish and Arab, didn't truly test the limits of tolerance, whereas these limits were further pushed in books, pamphlets and shows.

184. *See, e.g.*, NOAH BEE, IN SPITE OF EVERYTHING!: HISTORY OF THE STATE OF ISRAEL IN POLITICAL CARTOONS (1973); E. KISHON & DOSH, SO SORRY WE WON (1967); RA'ANAN LURIE, BEST CARTOONS FROM ISRAEL (1962).

185. The "time, place and manner" doctrine established in *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), was adopted in Israel in HCJ 153/83 *Levi v. Southern District*

the allocative use of time, place and manner in the famous doctrine, in the context of Fighting Words, no balancing is necessary. Time, place and manner are indicia to the nature of the "speech act"—communication of an idea or the hurl of a verbal punch.

VII. *BEYOND DOCTRINE: COMPARATIVE LEGAL CULTURES*

Distinctive normative conceptions, institutional designs and organizing doctrines provide only a partial explanation for the different approaches to the protection of free speech adopted in the United States and Israel. A fuller explanation requires exploration of two additional factors. First, each society may have a different collective conception of what it means to "speak." Second, religion plays significantly different roles in the two countries. While the United States seeks to define itself as a sovereign separated from religion, Israel explicitly recognizes the role religion plays in official public life.[186]

Although scant reliable empirical data on point exists, it is nonetheless submitted that in Israel, the meaning of words—spoken and written—is different from their meaning in the United States, not because the content is different, but because the power of the word is different. According to this hypothesis, in the United States, the word is the opinion of the speaker to which he or she is entitled. In Israel, words have an independent force; nearly mystical. Somewhat paradoxically, words are taken more seriously in Israel than in the United States, and therefore receive lower legal protection. In Israel, words are more dangerous—not necessarily because of the reaction they may elicit from others but because of their very nature—and therefore the speaker should beware (and the State might ensure that others are protected from such speech). Words are seen as having the power to constitute reality.[187] In the United

---

Commissioner [1984] IsrSC 38(2) 393, 412; *see also* HCJ 2481/93 Dayan v. Jerusalem Dist. Comm'r [1994] IsrSC 48(2) 456, 481.

186. *See generally* Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47 (2004).

187. The biblical saying, "Death and life are at the behest of the tongue" (*Proverbs* 18:21), is used frequently. The importance of words in the Israeli public sphere is reflected in the high interest and public reaction to the mystical-religious "pulsa de-nura" rituals held by national religious extremists in order to bring a curse upon Prime Ministers Yitzhak Rabin and Ariel Sharon.

States, one person's word does not necessarily have substantial weight when it clashes with another person's word. Not so in Israel. Each speaker is taken as having a formative power, and once a word is spoken it cannot be taken back. As if the speaking of the word has a role both in reflecting and constructing the world around us, where images and symbols, rationality and emotions, passion and reason, truths and beliefs, past and future, human autonomy and divine intervention are all interlaced.

From the perspective of an informed observer, it seems that words spoken by a person regarding another person in the Israeli society tie both the speaker and the subject of the speech to the collective, in a different manner than in the United States. In the United States—to the extent that we may talk about the United States in singular terms—people define themselves through their own speech, and take pride in having a "thick skin" that allows them to tolerate disagreeable and even offensive expressions of others.[188] Speech thus connects individuals to other individuals by stressing their individualism. In Israel, on the other hand, the status of a person and his belonging in the collective is determined in no small degree by what people say about him or her. In Israel, "thick skin" means detachment, alienation and perhaps uncaring, a position seen as reflecting negatively on the moral fiber of the person. In Israel, speech connects members of the community to a greater relational whole.

While in the United States—a rather heterogeneous society—speech forms the common ground which citizens share—they are all speakers—speech in Israel, a hyper-heterogeneous society, is often perceived as a threat to basic solidarity, a tool capable of further dividing society into tribal units.[189] At least as far as political speech is concerned, the U.S. system acts as if there exists an "all American" sphere, slightly removed from the

188. Compare to Adam Liptak, *A Bit of Thin Skin Peeks Out of the Robes*, N.Y. TIMES, May 7, 2007, at A17, decrying the sensitivity of judges against critique launched against their craft by other judges or lawyers. The point of the article is clear: Thick skin is a virtue, at least for anyone holding an official position.

189. Tribalism poses significant threats to the solidarity of the Israeli collective. The problem is particularly acute for Palestinians whose group identity "hinges on the experience of dispossession and exile throughout the twentieth century." Dan Rabinowitz, *The Common Memory of Loss: Political Mobilization Among Palestinian Citizens of Israel*, 50 J. ANTHROPOLOGICAL RES. 27, 28 (1994).

organic characteristics of the different communities, where speech is not only the emblem of individual liberty, but its protection serves to unite the different individuals (and the different communities) into members in that all-American collective.[190] In Israel, given its highly diverse composition (all packed into a small piece of land), this all-national sphere is infused with identity symbols that do not necessarily sanctify each individual as a speaker in the democratic discourse, but rather value the collective and the struggles it is facing: "We are all Israelis since we all face the same challenges and missions; inflicting harm on the mosaic of beliefs that form the Israeli fabric would thus endanger maintaining the ensemble." Moreover, this all-Israeli sphere—to the extent that it exists—would not necessarily be governed by reason; it could well be in the domain of passion, where the common currency is one of deep commitment to ideologies and desire to promote beliefs. If this is the case, the Court would be hard pressed to fully adopt the U.S. approach towards community-building through free speech. While it might be the case that the Court would urge all members of the society to view the commitment to free speech as the bedrock principle upon which to establish membership, the different meaning of speech itself might limit the success of such efforts.

This difference is reinforced once other sociological dimensions are recognized, primarily the centrality of religion and the lack of separation between state and religion in Israel.[191] While in the United States, the Constitution can be seen as forming the role of a civil religion,[192] such a role in Israel would amount to a direct clash between state and religion.[193] As mentioned earlier, it is no wonder that the British legislature (during the Mandate period accorded to Britain following WWI) saw fit to prohibit

190. As Paul Stern has noted, in the realm of American public discourse, "unrestrained debate" allows Americans to "deliberatively define both their collective *and* individual purposes." Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 929 (1990) (emphasis in original).

191. One of the effects of Israel being a Jewish State is that to some extent the public sees it as legitimate if some basic liberties are limited in order to maintain the Jewish character of the State. These limitations concern marriage and divorce statutes, Shabbat and holidays etc. *See* AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF ISRAEL 339 (6th Ed. 2005).

192. *See generally* ROBERT N. BELLAH, CIVIL RELIGION IN AMERICA (1967); *see also* MARCELA CRISTI, FROM CIVIL TO POLITICAL RELIGION 47-89 (2001).

193. *See* Gideon Sapir, *The Boundaries of Establishment of Religion*, 8(1) MISHPAT UMIMSHAL 155 (2005).

speech derisive to other religions;[194] such speech would likely result in actual violence, but of equal importance, such speech would bring the foundation upon which the modern state (and the rule of law) rests into direct conflict with the foundation upon which religion (and religious law) rest, to the detriment of both.

While in the United States public discourse is taken to be the sacred domain of thought and critique, this may not be so everywhere. In societies where religion is not separated from state and not based on the notion of a civil society unified by faith in the civil constitution—but rather on the notion of a deity and a god-given religious order—public discourse is not sacred for the sake of discourse (thought, deliberation, etc.) but may be either sacred or sacrilegious, depending on whether the discourse clashes with direct religious commands, thereby prompting a religious duty to reset the boundaries of public discourse. In such heterogeneous societies, civility is essential. While the civil religion of the United States encourages people to fight to protect the rights of all citizens to express their views, the various religious groups that comprise the religious fabric in Israel believe there is a duty to fight to purge from public discourse speech which utterance violates a specific religious duty placed on the listeners as participants in a conversation (beyond the general duty to avoid profane speech). For example, if the holy name of the Jewish God will be printed by Jews on leaflets and distributed to other Jews in a manner that clearly violates the commandment not to carry God's name in vain, Orthodox Jews will be compelled, as a matter of religious duty, to act in order to curtail such publication. The recent clashes with the Muslim world over the cartoons of Muhammad demonstrate a similar approach. Viewed from the liberal civil religion, these duties present a claim of freedom of religion.[195]

Moreover, in religion, speech connects a person to God positively (prayer) or negatively (blasphemy). And since God acts towards all members of the faith, both prayer and blasphemy are communal acts, and thus the community has a direct stake in the

194. Criminal Code Ordinance 285.559-60 (1936) forbids sedition. Seditious intention includes "[promoting] ill-will and hostility between different sections of the population of Palestine." The ordinance was the law of the British mandate, and remained in force until 1977.

195. *Cf.* Feldman, *supra* note 129.

content of the speech. Since speech exists in this metaphysical domain, it may bring good (blessing) or harm (curse) to others, and thus the community is yet again directly involved in the act of speech, since it is the duty of the community to care for its members.[196]

If these hypotheses indeed capture a glimpse of the social reality, they provide further insights into some of the differences between Israel and the United States. On the ground, as anybody who has spent time in Israel can attest, speech on all subject matters is vigorous, if not rambunctious; but institutionally, the courts in Israel and the United States operate under different social conditions.

The Israeli court, as an organ of the State, has to chart its course not only between opposing attitudes towards the state as "ours" or "theirs" (discussed above) but also with respect to its own role, given the tension between the civil religion (liberalism) and the deity-based religion (Judaism, Islam). On the one hand, the court is expected to appear as a neutral body, devoid of any value-laden tilt toward one conception of the state or another, let alone one ideology over another. Public confidence rests on the assumption that judges separate themselves from the passionate battle of ideals, energetically fought in the Israeli public sphere.[197] On the other hand, the notion that the court is fully separated from the other organs of state governance or from a certain ideology—a virtue, under the U.S. model of separation of powers—is seen not only as unrealistic by some, but as undesirable in Israel.[198] In the final analysis, all organs of the state are burdened with the collective mission of creating and sustaining a Jewish democracy; the courts should get no

196. Kenneth Lasson, *supra* note 77, presents the different meaning of "speech" in a secular and religious context. Lasson claims that religious speech, being more powerful, requires other standards from those used when regulating secular Fighting Words.

197. Barak views the obligation of the Court to maintain the public confidence as one of the foundations of the judicial power. *See* Aharon Barak, *Supreme Court and Public Confidence*, *in* SELECTED WRITING 965, 970 (Haim H. Cohen ed., 2000). Haim Cohen represents the contrary view, claiming that the conception of public confidence is unnecessary and possibly damaging. *See* Haim H. Cohen, *Denial Thought About "Public Confidence"*, 14 MISHPAT 9 (2002).

198. According to Dafna Barak-Erez the identification of the Israeli Supreme Court with the national ideology is the source of the public confidence in it. *See* DAFNA BARAK-EREZ, MILESTONE JUDGMENTS OF THE ISRAELI SUPREME COURT 128 (2003); *see also* Alexandre Kedar et al., *Interview with Justice Dalia Dorner*, 1 DIN UDVARIM, HAIFA L. REV. 15, 51 (2004).

leave of absence. The idea that the court is disengaged and detached would strike at least some as heresy: Is a court in a Jewish democracy just like a court in any other liberal democracy? Is Israel not unique? If it is not, why do we fight for its existence? It is therefore no wonder that the Court, while striving to ensure the robust sphere of the exchange of ideas, ideologies and beliefs as the tenets of liberal democracy everywhere demand, is nonetheless careful to note that it is a genuinely Israeli constitutional law that the Court is developing.[199] Comparative law, while informative and inspirational, is nonetheless a limited source of law according to the Israeli Court, not only because it lacks formal authority, but because its origins are rooted in systems with different social conditions and legal conceptions.[200]

VIII. *SOME HERETICAL REFLECTIONS ON SPEECH THEORY AND THE ROLE OF PASSION*

The general baseline in relation to which current (and most of the historic) debate concerning freedom of speech rests is the baseline of public reason. When Habermas writes on the importance of speech and discourse in modern democracy, he assumes at least a minimal level of knowledge of the facts, competence to analyze them and the use of a reason-based methodology with which to achieve a decision and convince others.[201] The same applies for similar theories of Rawls and Meiklejohn.[202] The primary justifications for the supremacy of freedom of speech over other rights and freedoms—as mentioned earlier—are reason-based.[203] These justifications are based on the correlation between community and communica-

199. See Chief Justice Barak in HCJ 1715/97 *Lishkat Menahaley Hashka'ot v. Minister of Finance* [1997] IsrSC 51(4) 367, 403:

> Indeed, comparative law reassures the judge that the interpretation given to the legal text is accepted and works well in other jurisdictions. However, comparative inspiration ought not lead to imitation and disparagement. The ultimate decision must always be "local." Moreover, we should also be aware of the limitations of comparative law. The law reflects the society, and our society is different from other societies.

200. *Id.*

201. *See* JÜRGEN HABERMAS, Knowledge and Human Interests (Jeremy Shapiro trans., 1971) (1968).

202. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1965); JOHN RAWLS, JUSTICE AS FAIRNESS 90 (Erin Kelly ed., 2001).

203. *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute, in* TEACHER OF FREEDOM 248-50 (Cynthia Stokes Brown ed., 1981).

tion, democracy and deliberation.[204] Thus, the speech protected by the First Amendment is, at its core, speech that conveys a discursive message, speech that begins (or is a part of) a conversation which is based on—and which fosters—reasoned arguments. Fighting Words reside outside the scope of the First Amendment protection precisely because they cannot be justified as part of the reason-based sphere of public discourse.[205] Similarly, according to Post, libel against public figures should be suspended (or restricted to cases of actual malice) because the public sphere should be detached from the norms of the organic communities that comprise the United States, so as to allow (dispassionate) critique by members of all communities.[206] It is through such processes of critique that the members of the different communities can identify with the "all American" entity, the governance of which is often beyond their practical control. This baseline is challenged once the assumption is no longer that people assess the facts, debate rationally over matters, or engage in reason-based self-reflection over values. If a competing baseline is identified, where reason and reason-based critique resides alongside passion and passion-based argument, then the traditional justifications of constitutional protection for freedom of speech need re-examination.

Modern research in various fields acknowledges that reason and rationality might in fact not be the sole, or dominant, feature of public (and private) decision-making or reflection.[207] Additionally, some claim that moral judgment cannot be fully separated from moral sentiment, such as passion (or outrage).[208]

---

204. See LAURA BETH NIELSEN, LICENSE TO HARASS: LAW HIERARCHY, AND OFFENSIVE PUBLIC SPEECH 28 (2004), for a critique of how traditional legal justifications for free speech "do not consider the relative positions of power among those involved in speech interactions."

205. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942). For a more nuanced analysis see GREENAWALT, *supra* note 151.

206. *See* Post, *supra* note 44, at 642.

207. *See, e.g.*, SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING 252 (1998); ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1995); DANIEL KAHANEMAN, PAUL SLOVIC, & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

208. For such a statement in a different context see WILLIAM J. BENNETT, THE DEATH OF OUTRAGE (1999) (claiming that U.S. President Bill Clinton's affair with Monica Lewinski must enrage us precisely because it offends our values). Without subscribing to the actual arguments made, their structural logic is important: It calls for a moral sense of indignation.

It could very well be the case that we are convinced, at the end of the day, by what we *feel.* Moreover, as Weiler argued, nation-states are constructed, at least in part, around what he identifies as "eros": a sense of passionate solidarity.[209] If indeed reason-based deliberation is not the sole mode governing interpersonal ethical engagement with public (and private) matters, and if indeed it is also through the expression of passion that we form our values, we must further inquire into the scope of the constitutional protection of speech.[210] If speech is an expression of passion, should we grant it less protection, because it does not further the quest for truth or the Habermasian notion of legitimacy-generating discourse?[211] Or perhaps the other way around: If at the end of the day moral judgment is a matter of sentiment, should we not be more tolerant of passion-based expression, and allow passion a longer leash? Suszkin's expression was certainly passionate; should we strive to rein such expression in, as I suggested earlier, through the doctrine of Fighting Words? Or should we develop a sphere where passion is recognized as an important element in moral judgment, and thus view Suskin's expression as deserving protection since it provoked us into the type of moral engagement which cannot be divorced from passion? This, of course, is *not* to say that the moral outrage the poster incident raises should prevent or forestall an unequivocal moral denunciation of Suskin's act. Such denunciation is indeed called for. But on first impression, accepting passion as an organizing matrix of public discourse—alongside reason—should accord it greater breathing room.[212] On the other hand, if passion is taken seriously, can we maintain the faith—the passionate faith—in a constitutional order that bars any criminal prosecution of Suskin's provocation? Solidarity

209. WEILER, *supra* note 103, at 324-355.

210. *See* Martha Nussbaum, *The Discernment of Perception, in* LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 81-82 (1990) (arguing that "theorizing needs to be completed with intuitive and emotional responses"); *see also* ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGIN OF THE SOCIAL CONTRACT 44 (1990).

211. Jürgen Habermas, *Morality and Ethical Life: Law and Social Theory,* 83 NW. U. L. REV. 38 (1988).

212. *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (holding that in the absence of showing that serious violent activity followed the speeches, organizer who made impassioned speeches which contained references to violence against those who did not participate could not be held liable), *with* NAACP v. Button, 371 U.S. 415, 433 (1963), *and* New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

(fraternity, or sisterhood) could be understood as an element of passion: We feel strongly towards "our people" and therefore are willing to act in order to defend threats against our people or its members (whereas we might not act in order to defend others). It could very well be the case that in a society where passion is central, the Court would have been perceived as acting illegitimately had it *not* convicted Suszkin. After all, the Court itself must perform its role in passionately rejecting a passionate challenge to the very fabric of co-existence between Muslims and Jews in Israel (especially given the fact that the offense occurred in Hebron). Perhaps the *Suszkin* case provides a rare example of a passionate articulation of values by the Court itself, intended to sustain the passionate belief in the constitutional order in Israel.[213]

As can be seen, re-organizing the sphere of public discourse to accommodate for passion along with reason-based critique might lead to a significantly different understanding of the regulation of speech. Much is still to be explored in this field, and the above only marks the starting point.

IX. *EN LIEU OF CONCLUSION – COMPARATIVE SCHOLARSHIP, PUBLIC DISCOURSE AND THE LIMITS OF COMPARATIVE LAW*

Inflicting harm on religious sensibilities is an offense most courts would be wary of implementing. It places the court in the predicament of defining what religious sentiments are, what hurts them, why these feelings deserve protection greater than protections other sentiments receive, and above all, it places the court in the position of taking sides in what may often be a heated debate about speech versus religion, a position from which most courts would stay away at nearly all costs.[214] *Suszkin*

213. Compare Justice Brennan's passionate plea in the context of the clash of symbols apparent in the flag-burning cases in the United States. Texas v. Johnson, 491 U.S. 397 (1989).

214. The conflicting claims of Muslims and Jews to pray on the Temple Mount, as well as the issue of archeological digging there, forced the Court to deal with the weight of religious feelings in what seems to be the most symbolic and sensitive place to all three religions. The Supreme Court adopted in those cases the doctrine of institutional non-intervention, meaning that in situations that are of typical political nature, the Court would refrain from exercising substantial review and defer to other authorities. In other cases the Court was willing to intervene, but eventually back-tracked when it came to the question of remedy. *See* HCJ 3358/95 Hofman v. Director Gen. of the

is thus a unique case. This Article suggests that the best way to understand *Suszkin* is under the U.S. doctrine of Fighting Words, despite the fact that the Israeli Court made no mention of this doctrine.

In any event, the case and the offense demonstrate the possible tension between relying on the concept of human dignity to protect freedom of expression—as the situation is now in Israel—and relying on an explicitly enumerated right that enjoys a superior status, as is the case in the United States. This Article suggested that even if the Knesset adds freedom of expression to the list of enumerated rights in the Israeli Basic Laws, the Knesset, and subsequently the courts, will have to decide whether to grant freedom of expression the special status it enjoys in the United States over other liberties, or whether to adopt the competing, "general rights" model, prevalent, for example, in Canada. Such a decision is not restricted to Israeli jurisprudence; the same applies to the debate now raging in Europe, regarding religious sentiments and hate speech.[215] This Article hinted that the language of human dignity, which stands at the foundation of the general rights model, not only demarcates a line more favorable for restricting group-based offensive speech, but is also sensitive to arguments resting on passion, since the concept of dignity, and the ways in which dignity may be offended, are not necessarily divorced from passion.

In this context we should note the Court's own judgments—speech-acts in and of themselves—have a hand in shaping the sphere of public discourse because they contain an ethos-building element.[216] Equally, if not more importantly, the judgments

---

Prime Minister's Office [2000] IsrSC 54(2) 345, 367. The contrary example is HCJ 1514/01 *Gur-Aryeh v. Television & Radio Second Authority* [2001] IsrSC 55(4) 267, in which Justice Barak and Justice Dorner debated whether airing interviews with religious Jews on TV on Shabbat (they were filmed during the week) violates a religious precept (and therefore infringes freedom of religion) or "only" hurts their religious sentiments. Similar judicial determinations regarding the scope of religious obligations were addressed by the Court in CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464 and CA 6024/97 *Shavit v. Rishon-lezion Community Burial Society* [1999] IsrSC 53(3) 600. In both cases the Court ruled to allow writing Gregorian dates on tombstones in a Jewish cemetery despite the injury to religious feelings of others.

215. *See, e.g.*, Racial and Religious Hatred Act, 2006, c.1 (U.K.) (and the surrounding debates).

216. The "message" conveyed by the Court should be taken in context of its previous decisions. While Suszkin is to be arrested, a racist member of Parliament nonetheless deserves the protection of freedom of expression for expressing racist views. *See*

shape this sphere because the judges' arguments influence the nature of this sphere: reason-based or passion-based. Thus far, the Israeli Court has been treading on both mills. The Court's jurisprudence contains rhetoric rich with values and identity-shaping pathos, extolling the centrality of basic democratic values as a national ideology.[217] This line of reasoning resonates with the early American cases, where judges, like Brandeis, told the American people what its forefathers fought for, thereby resting the decision primarily on passion and identity arguments.[218] Another line of argument that the Israeli Court attempts, on occasion, to follow adopts a "colder" approach that places speech as part of a rather formal system of constitutional protections, emphasizing institutional roles, structures and conceptual fit in a somewhat dispassionate tone of reason and critique.[219]

At a higher level of abstraction, this paper advances the position that comparative law is not just about comparing different legal arrangements, and even not about seeking to organize the different experiences into paradigms, or "families."[220] Beyond the normative claim embedded in comparative law—that each nation's rules are measured not only by its citizens but also by other nations for their justificatory power—comparative scholar-

---

HCJ 399/85 Kahana v. Broad. Auth. Mgmt. Bd. [1987] IsrSC 41(3) 255. And a television show can falsely portray national heroes who fought the Nazis as if they cracked under interrogation and gave their friends away even though, in so doing, it humiliates the heroes and their surviving families. *See* HCJ 6126/94 Senesh v. Broad. Auth. Mgmt. Bd. [1999] IsrSC 53(3) 817.

217. In the *Senesh* case, Justice Barak writes about the Jewish heritage of freedom of expression, beginning in the days of the bible. *Senesh* IsrSC 53(3). As to other democratic values being in fact Jewish values, see Justice Barak in HCJ 6698/95 *Qa'adan v. Israel Land Administration* [2000] IsrSC 54(1) 258, 280.

218. "Those who won our independence believed that the final end of the state was to make men free to develop their faculties." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

219. In HCJ 651/03 *Association for Civil-Rights in Israel v. Chairman of Central Elections Committee for Sixteenth Knesset* [2003] IsrSC 57(2) 62, 72, Justice Procaccia emphasized the necessity of free speech for the democratic election process. In CA 316/03 *Bachri v. The Movies' Review Council* [2003] IsrSC 58(1) 249, Justice Dorner says that censoring the movie on the ground of falsehood will hurt the democratic process by giving the authorities the power to choose right from wrong instead of the "market place of ideas." Dorner states another reason: Expressing un-popular opinions releases pressures in a non-violent way. Both are written in a rather "technical" language.

220. *See generally* Ruti Teitel, Book Review, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004) (discussing different approaches to comparative law).

ship also participates in the shaping of "the rules of game," namely shaping what counts as a convincing argument in the different domains of discourse.[221] Comparative scholarship is speech as well and thus how we treat "foreign law" can be seen as either an exercise in reason or in passion. The former would call upon judges and scholars to reason with foreign cases, to elucidate their underlying rationale so as to understand the domestic system better,[222] or to inquire whether a certain principle is universal.[223] Alternatively, comparative law may be conceived of as an exercise in passion-based identity politics. Recently, passionate arguments were voiced about the (in)adequacy of relying on "foreign law" in domestic courts.[224] It seems that at least some judges view a serious engagement with foreign systems as undermining the national identity—or even the sovereignty—of the domestic system.

It is therefore a challenge for the comparativists to establish the sphere of trans-national discourse so that "debates about the debate" can be conducted in a manner sensitive to method and sensitive to the choices embedded in advancing a certain position regarding comparativism. Are we in the business of establishing a trans-national domain of public reason—assuming such a domain is tenable as more than an ideal type—or are we in the business of developing a dimension of identity politics?

In this sense, *Suszkin* is more than a case about a Jewish settler distributing offensive posters in Hebron. If we read the Court decision carefully, it is a about the role of passion in the

---

221. In her book review, Teitel suggests that *Comparative Constitutionalism* "holds out the aspiration of defining *a normative constitutionalism that is universal.*" This aspiration is motivated by the idea that "if there were a universal ideal of constitutionalism, then *all constitutions could be evaluated according to the same criteria.*" *Id.* at 2577 (emphasis added).

222. *See id.* at 2570–96; Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L.J. 819 (1999).

223. *See* JOHN RAWLS, THE LAW OF PEOPLES 54-58 (1999).

224. As Justice Scalia said in *Roper v. Simmons*, 543 U.S. 551, 624-27 (2005):

> [T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it . . . To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.

See generally Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004).

emerging global discourse on human rights.[225] The Court has made it clear that its decision is informed by the outrage Suszkin's posters raise—the sense of indignation all Israelis must feel—given the unique history, culture and religious sensitivities of the place (and its politics).[226] The Court's rejection of the type of sectarian passion expressed by Suszkin itself rests on passionate grounds. It has also made it clear that in so doing it is not willing to rely on external sources, even though it often turns to such sources, and even though such sources could have proven helpful. Perhaps the Court thought that an explicit dialogue with foreign law would have clashed with its strong emphasis on core elements of Israeli identity. In other words, relying on First Amendment jurisprudence would have entailed reliance, at least in part, on a trans-national, if not universal, basis. In so doing the Court would have been tripped by the underlying challenge put forward by Suszkin, namely that the jurisprudence the Court was developing was not sensitive enough to the Jewish character of Israel. The Court thus answered Suszkin in her own terms, basing the decision on domestic Jewish values and symbols. To the extent that comparative law is seen as resting on universal or trans-national reason, the Israeli judicial move can thus be seen as delineating the limits of the comparative enterprise. Locally generated passion may, on occasion, chill the tendency to engage with jurisprudential sources emanating from other jurisdictions, despite the otherwise strong intellectual affinity between the systems.

225. For the emerging global discourse between judges and across jurisdictions, see generally Ann Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Ann Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

226. *See* CrimA 697/98 Suszkin v. Israel [1998] IsrSC 52(3) 289, 318.