dress the problem of offensive speech within a framework of
ie democratic legitimacy of regulation constitutes a serious
of democratic legitimacy brings to the surface the often
cercises that are at issue in free speech cases. Had the Court in
Otto Preminger Institut, *Murphy*, and *I. A.* looked to the
the respective acts of national censorship upon the speakers
his alienation against any 'silencing' of Christians in the UK,
the Austrian Tyrol, non-evangelicals in Ireland, or Muslims
ficult to see how any of these restrictions could have been
se of the Danish cartoons, allowing the offensive expression
len a number of those who claimed to be offended. Public
ie was inundated by a range of Muslim perspectives and
toons. Indeed, far from alienating Muslims from the state, or
ublic discourse, it could be argued that these participants in
)nstrated a healthy commitment to the idea that they could
)f public policy. In so doing, those protesting against the right
:h offensive to particular religious communities ironically
de that can be demanded of all of us in a pluralistic liberal

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Criminalizing Religiously Offensive Satire: Free Speech, Human Dignity, and Comparative Law

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1. Introduction

Should satire that ridicules a religious figure or the core tenets of a religious belief receive different constitutional protection than that afforded to political satire? As the on-going Danish Cartoons affair reveals, this is a difficult question involving a potential clash between the values underlying freedom of expression and those underlying freedom of religion. This chapter will examine two possible models that seek to resolve the tension in principle: the US model, under which freedom of speech enjoys pre-eminence, and the Israeli model, that protects human dignity as the principal value. In outlining the Israeli approach, the chapter will analyse an Israeli case that led to the first criminal conviction for the violation of an act prohibiting the publication of material calculated to outrage religious sentiments. The chapter will then address some normative and institutional features that separate the US and the Israeli approaches. Moving beyond comparative legal analysis, the chapter 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 cultural understanding, the chapter will suggest that perhaps it is passion, not merely reason, that organizes the realm of public discourse. The chapter will conclude with a brief comment on the possible limits of relying on foreign sources in some (passion-based) cases.

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2. 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 headdress (Kafia) with the name Muhammad in Arabic and English sketched on its torso. The swine—considered particularly vile and defiling by Islam—held a pencil in one of its hooves and appeared to be writing the Koran while stepping on it. Suszkin carried glue and spray-paint, and was wearing a Kahane Chai[1] T-shirt. Israeli soldiers detained her and handed her over to the Israeli police. The following day, while on bail, she hurled a stone at a Palestinian vehicle driving in the Hebron area. She was convicted in the district court, inter alia, of attempting to outrage[2] religious feelings (§173 of the Israeli Penal Code) and received a sentence of three years in jail.[3] The Israeli Supreme Court denied her appeal.[4]

Justice Or, writing for the Supreme Court, noted that while the offence has been on the books since the British Mandate,[5] this case represented the first time the Court had addressed and applied the criminal prohibition against outraging

[1] Rabbi Meir Kahane formed a political party that advocated the strict application of biblical law towards non-Jews, primarily Arabs, which would have resulted 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 neighbouring Arab countries. In 1990 Kahana was murdered in the United States and his followers established a movement called Kahane-Chai (Kahane 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 *Central Elections Committee for Sixteenth Knesset* v. *MK Tibby* [2003] IsrSC 57(4) 1, 52–3.

[2] The section as enacted by the British stated that it is a crime (carrying up to one year of imprisonment) for a person to publish any print, writing, effigy or image calculated or tending to outrage the religious feelings or beliefs of others, or to utter in a public place an in the hearings of another person any word or sound calculated or tending to outrage such feelings and beliefs. This provision was part of a chapter on offences relating to religious and public monuments. The Hebrew translation of this section of the Code, which became the official version upon the establishment of the State of Israel, carries a slightly different meaning, as the words 'calculated or tending to outrage' connote in Hebrew 'having the capacity of inflicting gross harm'. This essay will use the original British language, but it should be kept in mind that under Israeli law the notion of harm is explicit in the words of the statute.

[3] CrimC (Jer) 436/97 *Israel* v. *Suszkin*, [1997] IsrDC 97(5) 730. Suszkin was convicted of an attempt only, since there was no 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), as amended in 1980).

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

[5] The statute was originally enacted in 1936 by the British as s. of the Criminal Code Ordinance (Palestine). The statute was enacted by the High Commissioner—since the original design to have a local representative body as a legislature failed—and embodied provisions similar to those enacted in other parts of the empire. See N. Bentwich, 'The New Criminal Code for Palestine' (1938) 20 *J. Comp. Legis. and Int'l. L.* 71.

religious sentiments. The Court did not review the constitutionality of the section of the penal code on its face because the relevant Basic Law (Human Dignity and Liberty, enacted in 1992)[6] applies only with respect to prospective legislation. The Court nonetheless was called upon to interpret the section in order to ensure its application was consistent with the principles underlying the Basic Law. The Court upheld the conviction without committing itself to a narrow reading of the statute. It did not set a particularly high bar for 'outrage' (or in its Hebrew version, 'gross infliction of harm to sentiments') nor did it read the statute as requiring the showing of high likelihood of disturbance of the peace or violence which may result from such infliction. Placing this case in a comparative perspective reveals the significant gap that exists between the US and Israeli approaches to free speech. Had such a conviction been obtained in the United States, it would, in all likelihood, have been invalidated on the grounds that a statute criminalizing speech that outrages religious sentiments is invalid on its face under the First Amendment.[7] While it is unlikely that the Israeli legislature would have enacted this British Mandate-era statute today (if only because of the wide discretion it confers upon the prosecutors), the Knesset nonetheless did not see fit to revoke the Act or otherwise amend it after the conviction.[8]

3. Offensive Speech: Diverging 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 American systems. The Israeli system follows, as a general matter, Mill's teachings, according to which basic liberties are legally protected, subject to the principle of harm: I am at liberty to move my hands until I hit my neighbour's nose, at which point I cause her harm and therefore am not at liberty to proceed.[9] The principle of harm is not restricted, conceptually, to physical harm. Although Mill suggested that speech

[6] As amended by Basic Law: Human Dignity and Liberty, 1994, S.H. 90.

[7] 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. *Police Department of City of Chicago* v. *Mosley* 408 US 92, 95–6 (1972), but see *Beauharnais* v. *Illinois* 343 US 250 (1952), in which the court relied on the then recent events of WWII and on the history of interracial violence in Illinois to uphold the criminalization of group libel. The validity and scope of *Beauharnais* are unclear. In *New York Times Co.* v. *Sullivan* 376 US 254 (1964) the court ruled that contrary to *Beauharnais* libel is protected under the First Amendment, yet the case did not address the issue of group libel (as distinct from libel of a public figure) nor the issue of the likelihood for violence, both central to *Beauharnais*. The court was reluctant to review the matter in *Smith* v. *Collin* 439 US 916 (1978) (*cert denied*), and let the decision of the lower courts, according to which *Beauharnais* is no longer good law, stand.

[8] The text of the statute was in fact amended by the Knesset in 1988 but not with respect to the 'tendency to outrage' section; the Knesset replaced the enumerated modes of publication (print, writing, etc.) with the generic term 'publication'.

[9] J. S. Mill, *On Liberty with the Subjection of Women and Chapters on Socialism* (Cambridge: CUP, 1989), 20, 56.

should be protected against the religious forces seeking to suppress it, it is clear that speech may cause harm to the individual, not only indirectly, such as through libel, but also directly, by harming one's mental state through verbal abuse. 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 actions and expressions. This basic understanding results in a structure of rights that does not automatically place a premium on the protection of expression over other rights. Nor does it necessarily distinguish between rights applicable to state action and rights applicable in the private realm. From the perspective of the victim, it matters less whether her right was infringed by the state or by a private actor acting under the laws of the state.[10] Under the 'general rights' model, speech is indeed instrumental to the pursuit of truth and for self-fulfilment, but other rights play an equally instrumental role in furthering equally important values, such as the protection of the self and other aspects of autonomy. It is therefore not surprising that in most of the common law world freedom of expression is not deemed as necessarily 'weightier'—whatever that may mean—than other fundamental rights.[11] Consequently, to the extent that constitutional bills of rights were enacted to protect fundamental rights—as is the case in Canada—and to the extent that the function of the state is to protect human rights or at least to govern while guarding against violation of human rights—as is the case in several post-WWII civil law and common law jurisdictions—freedom of expression is protected, but does not enjoy pre-eminence over other rights.

It is against that background that the US constitutional structure is innovative. The US Constitution protects speech specifically, and does not protect, for example, the freedom from emotional harm (to the extent that such harm may be caused by state action). Neither is the right to be free from libel specifically protected, so if the legislature revokes the statutory or the common law protections against libel, the US Constitution need not be directly engaged. It would seem, then, that the basic assumption under the US model is that the ordinary common law and legislative processes could provide adequate protection against emotional harm (or any other 'civil' or 'private') harm, and it is not the business of the Federal constitution to guard against harms the regulation of which could be entrusted to the ordinary structures of (accountable) governance, such as legislatures. 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.

[10] C. R. Sunstein, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' (1992) 92 *Colum. L. Rev.* 1; C. R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard UP, 1993), 71–5; L. M. Seidman and M. V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (New York: OUP, 1996), 89.

[11] See D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (Oxford: OUP, 2002), 765–74.

The fact that the US Constitution does not view freedom of expression as one liberty coequal with others and instead views it as a constitutive element of democratic sovereignty, demands normative justification. Traditional justifications, exemplified by Alexander Meiklejohn, highlight the importance of speech to the democratic voting process: speech is essential to informing people how to cast their ballot.[12] Yet these justifications are subject to the objection that voting is a rather crude and incomplete method of participation, and therefore a risk of alienation of social segments which values have not played a meaningful part *de facto* in the formation of policy on point is not insignificant. More recent and interesting justifications focus on the relationship between speech, values, and community more generally. According to these arguments, expressive participation—not only through voting but also, if not mainly, through the voicing of one's opinion—is central to the processes of establishing (and maintaining) the bonds between the various segments of heterogeneous societies, bonds which transform the various communities into a 'people' or a sovereign. Put bluntly: 'I am allowed to speak—therefore I belong.' Furthermore, scholars have noted that in heterogeneous societies a clash of values is almost inevitable, and thus it is almost inevitable that voicing some opinions would offend members of some communities. In order to avoid the risk of imposing values of one community on another by proscribing speech that offends one community but expresses the values of another, a sound policy would be to establish a public sphere where members of all communities may express their values and opinions in a nearly unfettered way. Such a sphere stands to mitigate the loss of loyalty by members of the community whose values would have been declared 'inferior' had the sphere allowed for content-based regulation. If the values of all communities are equally subjected to criticism, including ridicule, then the risk of fraying the social fabric—a risk which exists given the limited ability of the participatory voting processes to provide meaningful opportunity to influence the outcome of public debate—is lower. Moreover, such sphere allows—if not invites—participation by members holding diverse values, and in that respect, the claim is, the 'legitimacy' of the system is maintained (or enhanced). Such sphere enables members of the various communities to examine their values and determine whether (or not) to transform and adopt other values (or practices). In that respect, a public sphere where freedom of expression reigns is consonant with the underlying premise of democracy—the demand for the availability of mechanisms to curtail the exercise of state power and the promise of the potential for social transformation.[12a]

[12] *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948).

[12a] Robert Post, 'Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse', 64 *U. Colo. L. Rev.* 1109, 1124–35 (1993); Robert Post, 'Community and the First Amendment' 29 *Arizona State L. J.* 473 (1997); Robert Post, 'Between Democracy and Community: The Legal Constitution of the Social Form', in Democratic Community: *Nomos* XXXV 163–90 (John W. Chapman and Ian Shapir eds., 1993); Robert Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwel', 103 *Harv. L. Rev.* 601 (1990).

The upshot of these inter-related justifications is the constitutional protection of a sphere of debate and exchange of ideas 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. To the extent that public discourse is about 'legitimacy', then legitimacy, morally speaking, is an expression of reason.

Clearly, this 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. 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, plays an essential role in the formation of a political community. Therefore the constitutional protection of speech can be seen as protecting that which binds the American meta-community (or community of communities) together. Post also suggests that given the heterogeneous nature of the US society, the constitutional protection of speech allows members of various communities, with differing values, to maintain their faith in (or loyalty to) the American nation. As is apparent, under this sociological approach emotions play a role as central as reason, and therefore a tension arises between the normative justification for public discourse (which is centred around reason) and the sociological (or cultural) approach to the importance of public discourse which presumes a loss of legitimacy if passion-based claims are unprotected. The US jurisprudence is less than consistent on this point by protecting emotive speech[13] while highlighting the importance of public discourse as a reason-based instrument.[14]

While not all US scholars are convinced that the US model is necessarily superior,[15] it is difficult to ignore its influence. In contrast, for the time being at least, the constitutional right that organizes the Israeli system is human dignity. In enacting Basic-Law: Human Dignity and Liberty, the Knesset deliberately omitted the express protection of speech.[16] We can assume that this was so, at least in part, because the Knesset felt that granting freedom of speech constitutional status would excessively limit governmental powers to balance (or appease) the different interests at stake: those of the humanistic 'liberals,' who would like to be able to criticize all edifices of power by empowering individual critique (as an expression of human dignity), and those of the 'religious conservatives', who would like to ensure the respect toward 'basic values', including the dignity of religion (and of man, created in God's image).[17]

[13] *Cohen* v. *California* 403 US 15 (1971); *Hustler Magazine, Inc.* v. *Falwell* 485 US 46 (1988).

[14] *Dun & Bradstreet* v. *Greenmoss Builders* 472 US 749 (1985) 787, Justice Brennan (dissenting): 'The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth' (citing *Bose Corp.* v. *Consumer's Union of the United States, Inc.* 466 US 485, 503–504 (1984); *Whitney* v. *California* 274 US 357, 375 (1927), Brandeis, J. concurring.

[15] See eg, F. Schauer, 'Must Speech Be Special?' (1983) 78 *Nw. U. L. Rev.* 1284.

[16] For the political background that led to the adoption of the basic laws, see J. Karp, 'Basic Law: Human Dignity and Liberty—A Biography of Power Struggles' (1993) 1 *Mishpat Umimshal* 323.

It could be argued that behind the choice to place human dignity, rather than expression, at the core of the Basic Law lies the realization that Israel is even *more* heterogeneous than the United States; the bonds that tie the various communities into a 'polity' are threatened by *truly* deep divides. Whereas the people of the United States share the American dream—the pursuit of liberty (and wealth)—the various communities that comprise the Israeli society have radically different notions regarding the identity of the state. Consequently, it is unclear that enshrining speech, rather than human dignity, will serve well as the uniting value over which the various communities form their loyalty to the polity. As courts interpret the Basic Law, they will have to decide whether the right of human dignity (situated at the constitutional level) also encompasses the protection of freedom of expression (already recognized as a fundamental right in Israeli administrative law), 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 the statute underlying *Suszkin* would fare better in Israel than it would in the United States: while freedom of expression could be derived from human dignity, so could the freedom from dignitary harm.[18] 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 expresses one's attitude, but one's dignity is equally (if not more directly) offended if one is shamed or humiliated (at least if dignity is taken to mean also 'honourable standing' or 'equal membership'). 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 appears to be separate the Israeli system from its US counterpart.

4. Offensive Speech: Is Religion Normatively Special?

The Israeli statute goes a step further in separating itself from the US approach: it singles out a certain class of speech—that which offends religious sensibilities—over other classes of offensive speech, and is thus content-oriented and

[17] Ibid. See also Justice Dorner in PPA (Prisoner Petition Appeal) 4463/94 *Golan* v. *Prison Services* [1996] IsrSC 50(4) 136.

[18] In the *Miller* v. *Minister of Defense* (1995) IsrSC 49(4) 94 at 131, Justice Dorner says that there is no doubt that the purpose of the Basic Law is to prevent humiliation.

discriminates on the basis of the speaker's viewpoint. Under Israeli law there is no offence that criminalizes infliction of emotional harm as such (other than torture, which includes emotional torture[19]). Do religion and religious feelings have an independent value? According to the standard liberal model, all rights deserve equal respect and thus the law should equally protect against harm to all types of sentiments, not just religious ones. Some Israeli scholars have indeed suggested that singling out harm to religious sentiments is problematic—a legal artefact left from pre-liberal times[20]—and that perhaps the court should interpret the statutory scheme to mitigate differences between types of emotional harm.

Others, in contrast, have suggested that religious beliefs are unique because religion is an institutionalized normative regime that competes with the legal regime of the modern state on a fundamental level.[21] On this view, 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 (namely, the authority of God). Just as state and religion may clash over issues such as service in the (secular) military, so could state and religion clash when religion contains duties to suppress certain types of speech (protected by the secular constitution). It is therefore no wonder that the British legislature saw fit to prohibit speech derisive to other religions: not only would such speech 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. This tension may be especially acute in Israel, a Jewish democracy that does not separate state and religion.

While the US Constitution, which does separate state from religion, can be seen as playing the role of an all-encompassing civil religion,[22] such a role in Israel would amount to a direct clash between state and deity-based religion.[23] While in the US public discourse is, as an essential part of this civil religion, taken to be the sacred domain of thought and critique, this may not be so in societies where a deity-based religion is not separated from the state and where public discourse is not sacred for the sake of discourse (thought, deliberation, etc.) but rather may be either sacred or sacrilegious, depending on whether the speech (and its regulation) force citizens to chose between their loyalty to God (and God's community) and

[19] The one exception is the s. 368c of the Penal Code (1977) that criminalizes emotional abuse among the offences against minors and helpless.

[20] D. Statman, 'Hurting Religious Feelings', in M. Mautner et al (eds.), *Multiculturalism in a Jewish and Democratic State* (Tel Aviv: Ramot Univ Tel Aviv, 1998).

[21] I. Englard, *Religious Law in the Israel Legal System* (Jersualem: Harry Sacher Institute For Legislative Research and Comparative Law, Hebrew Univ, 1975), 33–46.

[22] R. N. Bellah, 'Civil Religion in America' (1967) 96 *Daedalus: J. Am. Acad. Arts and Sci.* 1; R.N. Bellah and P. H. Hammond, *Varieties of Civil Religions* (San Francisco: Harper & Row, 1980). See also M. Cristi, *From Civil to Political Religion: The Intersection of Culture, Religion and Politics* (Waterloo, Ont.: Wilfrid Laurier UP, 2001), 47–89.

[23] G. Sapir, 'The Boundaries of Establishment of Religion' (2005) 8 *Mishpat Umimshal* 155.

their loyalty to the state (and fellow citizens). While the civil religion of the US encourages people to fight to protect the rights of all citizens to express their views, the various religions that comprise the religious fabric in Israel face certain explicit religious duties if certain statements are expressed, including the religious duty to suppress future expression of these sacrilegious views. The recent clashes with the Muslim world over the cartoons of Muhammad demonstrate this attitude. In light of human history, some would say that securing against such religious offences is also pragmatically wise.

Moreover, those who call for treating religion distinctively could remind us that in religion, speech plays a unique role by connecting a person to God positively (prayer) or negatively (blasphemy). It is not 'just an opinion'. Moreover, religious speech, such as prayer, is often a communal act and thus the community has a direct stake in the content of the speech. Such speech may bring good (blessing) or harm (curse) to others, and thus the others, namely the community, are directly involved in the act of religiously-relevant speech, if only because it is the religious duty of the community to care for its members.

Those who view the challenge posed by religion as unique suggest that the state, including the judiciary, should demonstrate extra-sensitivity to religious sentiments of all. According to this approach, the potential chill emanating from the prohibition against religiously offensive speech could be mitigated by sound prosecutorial policy to restrict prosecution to the most extreme cases (for prosecution would not only directly violate the liberty of the speakers but also risk further deepening social rifts by making martyrs out of the jailed speakers).

Notwithstanding the arguments raised above, it is far from clear that religion should indeed receive special treatment. Beliefs as strongly held as religion—such as ideological commitments—may also clash and pose an equal threat to the social fabric, and some ideologies may include a moral duty to suppress speech detrimental to its core values. Moreover, it is not clear that heightened civility is the only logical solution to religious clashes. It could still be the case that a sphere where it is accepted that all are free to express their sentiments, including (religious) sentiments that offend the (religious) sentiments of others would allow for co-existence without fracturing society. Stifling the expression of offensive sentiments—for example: the Jews are the chosen people and are therefore 'superior'; the Jews have sinned for not accepting Jesus; or that Muhammad is the bearer of truth and the last prophet that ought not be ridiculed—may equally lead to alienation of some (if not all) groups. Attempting to chart a 'correct' balance between religious sentiments, sentiments in general, and free speech appears ever more elusive. As the debate regarding the appropriate protection speech (and religious beliefs) should be accorded continues, the law on the Israeli books remains, and amending it or declaring its application unconstitutional would require marshalling good enough reasons. Thus far, the practical solution in Israel has been to leave the law on the books but to enforce it only in the rarest circumstances (*Suszkin* being the only documented one in recent memory).

5. Citizens, State, and Speech

The regulation of speech—and in particular hate speech—also calls to our attention the different attitudes regarding the relationship between state and citizen. The US approach to the protection of speech (and constitutional rights in general) 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 nonetheless remains a threat individual liberty. The Leviathan is dangerous and it is natural and desirable that the people should distrust the exercise of power by state agents (as these agents may have an interest in broadening and consolidating their power).

This adversary position is not necessarily shared in other common law democracies. The notion of responsible government—that we should trust the government to carry out the public mandate granted to it—is prevalent in countries such as Canada.[24] The idea that the 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 in Canada,[25] and when one was adopted 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 would unite.[26] The Canadian Charter of rights—which enshrines all basic civic and political rights, except, interestingly, property rights—was not taken by the courts as necessarily establishing adversity between the government and the citizenry but rather as reinforcing the basic fiduciary duty officials owe the public.

In this respect, the situation in Israel is even more complex. The Jewish people struggled for sovereignty for years. 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.[27] Approached from this angle, Israel is more Canadian than Canada. Nevertheless, centuries of living in the Diaspora have taught Jews to view the official branches of the state as something that ultimately

[24] P. W. Hogg, *Constitutional Law of Canada* (Scarborough, Ont.: Carswell, 1997), 251; J. L. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' (2004) 82 *Tex. L. Rev.* 1963, 1963–4.

[25] See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994), 39–46.

[26] See Hogg (n. 24 above), 694; A. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal; Buffalo: McGill-Queen's UP, 1992); R. Gwyn, 'Trudeau: The Idea of Canadianism', in A. Cohen and J. L. Granatstein (eds.), *Trudeau's Shadow: The Life and Legacy of Pierre Elliott Trudeau* (Toronto: Random House of Canada, 1998).

[27] Israel's declaration of independence emphasizes the historical bond between the Jewish people and the state, and calls the Jewish Diaspora to join the historical act of building a Jewish nation. Official Paper (1) 14.5.1948, 1 (14 August 1948).

may be captured by forces that would harm the Jewish people.[28] Jews have therefore insisted on maintaining social structures that are separate from the state, and are often at odds with the state. 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 state law and hints of illegalism (or disrespect towards civil authority).[29] 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 provides for its doctrine and intervention. Put differently: if in the United States the court acts on behalf of the Constitution as embodying the values and symbols of 'We, the People' by protecting the individual members of the people from the power of the executive and the legislature—on behalf of whom, and against whom, does the Israeli Court act?

Until 1995, the Israeli Court positioned itself as protecting the people against the executive by acting as the agent of the legislature in reviewing the acts of the bureaucracy. The Court refrained from exercising constitutional judicial review of statutes and restricted itself to administrative review (which included the development of a judicially created bill of rights). Although the Basic Laws enacted in 1992 did not expressly provide for judicial review of legislation, in 1995 the Court construed these laws as conferring such authority upon it, and consequently the tension between the Court as the agent of the state and the Court as an agent of the people intensified. More specifically, in exercising judicial review for the protection of speech the Israeli Court faces the following dilemma: on the one hand, it could portray free speech as a fundamental civic value (and thus portray itself as acting in the name of the people against the state). This position is problematic, however, because the values of the Jewish people may be noble and just, but free speech is not prominent among them. Therefore the Court might be perceived as imposing civic values which are not home-grown, thereby placing itself in an even greater adversarial position vis-à-vis the State of the Jewish people. If, on the other hand, the Court portrays itself as a formalist agent of the state and its laws, it would require some creative rhetoric to justify striking down laws of the state on behalf of the state, especially given the legislative silence on the matter of judicial review and its decision not to enumerate speech as a protected right.

[28] The objection toward civil authority is a central motive of the Jewish Diaspora folklore and was central in the clandestine efforts to bring Jews to Israel and settle the land under British rule. See the story 'Hadrasha', in H. Haim, *Hadrasha and Other Stories* (Tel Aviv: Dvir, 1991), 127. See E. Shprinzak, *Every Man Whatsoever Is Right In His Own Eyes: Illegalism In Israeli Society* (Tel Aviv: Sifriat Poalim, 1986).

[29] Eg, see the contrasting opinions expressed by Justices Zamir and Cheshin in HCJ 164/97 *Conterm Ltd.* v. *Ministry of Finance, Department of Customs and VAT* [1998] IsrSC 52(1) 289, regarding the desirable relationship between the state and the individual, and especially the fiduciary duty owed by the individual toward the state.

The relationship between citizen, state and speech is complicated for yet another reason: the decisions of the Court are themselves also speech. The court's speech (about speech) is an essential component in the formation of the national ethos. While this ethos addresses the aforementioned tension between responsible government and limited government, its main thrust is the formation of membership in the community, including the formation of what this membership entails. Put differently, in deciding matters of hate speech, such as the *Suzskin* case, the court is engaged not only in manoeuvring 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'.[30] 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. The court's legally binding speech is therefore a factor in establishing the shared beliefs that bind the different factions of the Israeli society into a polity. However, 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) are bound to offend some and appear to others as illegitimate ventures into the sphere best left to political parties and the general populace. The vagueness of the term 'human dignity' allows the court to navigate between a universalist notion of a community of moral agents to which all belong—and which the court protects against the state—and a particularistic notion of the Israeli community, where group membership matters, where accommodation of the various groups is central, and where the court plays the role of a state agent in ensuring such accommodation.

6. The Cultural Significance of Speech

A fuller explanation for the different approaches to the protection of free speech adopted in the United States and Israel requires us to delve even deeper by exploring the meaning of speech itself. Each society may have a different collective conception of what it means to 'speak'. As alluded to earlier, the cultural understanding of 'speech' raises the possible singularity of religious speech. But there are other cultural elements that suggest that 'speaking' in the United States may not necessarily be the same as 'speaking' in Israel. Although scant reliable empirical data on point exists, it is nonetheless submitted that in Israel, the

[30] M. J. Matsuda, in 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Mich. L. Rev.* 2320, 2345–8, says that the prohibition should guarantee that minorities can be an equal and safe part of society.

meaning of words—spoken and written—is different; this is so 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 may perceive a stronger justification for regulation). Words are seen as having the power to constitute reality.[31] In the United 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. Public discourse, therefore, is not only about a political exchange of ideas based upon persuasion; rather public discourse in infused with transformative speech acts. 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 believes, 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—a prevailing narrative is that people define themselves through their own speech, and, to an extent, take pride in having a 'thick skin' that allows them to tolerate disagreeable and even offensive expressions of others. In Israel, on the other hand, the prevailing narrative—again, grossly generalizing—is that the status of a person and her belonging in the collective is determined in no small degree by what people say about her. Thus, in Israel, 'thick skin' means detachment, alienation, and perhaps uncaring, a position seen as reflecting negatively on the moral fibre of the person.

While in a rather heterogeneous society like the United States speech forms the common ground which citizens as speakers share, speech in Israel, a hyper-heterogeneous society, is often perceived as a threat to the complex mechanism of keeping the various social units together. At least as far as political speech is concerned, the American system acts as if there exists an 'all-American' sphere

[31] The Biblical saying: 'Death and life are at the behest 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 Rabin and Sharon. See A. Balint et al., 'A "pulsa de-nura" ritual was held for Prime Minister Sharon: "If he dies there will be no disengagement" ', *Ha'aretz* 28 July 2005. See also S. Ilan, 'Curse and tell', *Ha'aretz* 28 July 2005, noting that the ritual had become a media event without much religious content.

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. In Israel, 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 causes. If this is the case, the Court would be hard pressed to fully adopt the US 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.

If these hypotheses indeed capture a glimpse of the social reality, they provide further insights into some of the differences between Israel and the US discussed above. As mentioned, 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' but also with respect to its own role, given the tension between the civil religion (liberalism) and the deity-based religions of Judaism and 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. 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 US model of separation of powers—is seen not only as unrealistic by some, but as undesirable in Israel.[32] In the final analysis, all the organs of the state are burdened with the collective mission of creating and sustaining a Jewish democracy; the courts should get no leave of absence. The idea that the court is disengaged and detached would strike at least some as heresy: is a court in Jewish democracy just like a court in any other liberal democracy? From its inception, Israel sought to be more than yet another nation-state; it sought to express Jewish values. 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

[32] According to Daphne Barak-Erez, the identification of the Israeli Supreme Court with the national ideology is the source of the public confidence in it. See her *Milestone Judgments of the Israeli Supreme Court* (Tel Aviv: Ministry of Defense and the Broadcast UP, 2003), 128.

developing.[33] Comparative law, while informative and inspirational, is therefore only 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.

7. Legal Cultures—Balancing Words

Paying attention to the rhetorical tools available to judges in addressing offensive speech reveals another significant difference between US and Israeli doctrine: the use of 'balancing'. Whereas in the US the notion of balancing freedom of expression with other rights has met with notable opposition,[34] judges and scholars in Israel have wholeheartedly embraced the balancing methodology.[35] Moreover, what resembles in the US the language of 'balancing' is often applied in a manner that is not. Many of the doctrines that imply a balance of sorts (between the 'price' of suppressing speech and the weight of the governmental interest) predetermine the resulting outcome. This is most evident with respect to the 'strict scrutiny' that the Court applies to content-based restriction on public discourse which requires the state to show that the regulation serves a 'compelling' state interest and is narrowly tailored to achieve this interest.[36] While it could be argued that implicit in this doctrine is the relative 'weights' of the value underlying the state interest and the value of free speech, in fact the doctrine is set and applied so only in very limited circumstances will the Court find that the state interest is compelling enough and that the means used by the state are narrowly

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

[34] See T. A. Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale L.J.* 943. The most prominent opponent of balancing on the US Supreme Court was Justice Hugo Black. See eg, *New York Times Co.* v. *United States* 403 US 713, 714–20 (1971), Black, J., concurring; H. L. Black, 'The Bill of Rights' (1960) 35 *N.Y.U. L. Rev.* 865.

[35] In HCJ 153/83 *Levi* v. *Southern Dis. Commissioner* [1988] 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 also G. Pessah, 'Freedom of Speech and the Legal Foundation of the Press' (2000) 31 *Mishpatim* 895; E. Benvenisti, 'Regulating Speech in a Divided Society' (1999) 30 *Mishpatim* 29.

[36] *Boos* v. *Barry* 485 US 312 (1988); *Carey* v. *Brown* 447 US 455, 461 (1980). But see *Burson* v. *Freeman* 504 US 191(1992); *Austin* v. *Michigan Chamber of Commerce* 494 US 652 (1990). This type of balancing was referred by scholars as 'definitional' or 'principled' balancing, contrasted with 'ad-hoc' balancing. See M. B. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment* 2-15–2-24 (1984); S. H. Shiffrin, *The First Amendment, Democracy and Romance* (Cambridge, MA: Harvard UP, 1990), 32. The 'definitional' v. 'ad-hoc' are similar to the Israeli 'vertical' v. 'horizontal' but are not identical. Eg, 'ad-hoc' balancing implies an 'all things considered' decision, whereas 'horizontal' balancing may entail a principled analysis of the relative 'weight' of the rights at stake (as well as a principled analysis of the alternative ways available at minimizing the overall infringement of the clashing rights).

enough tailored to pass muster. In Israel, this is referred to as 'vertical' balancing:[37] the public interest is placed 'above' the right—or is 'weightier' than the right—but it will trump the right only if the state demonstrates that there is near certainty that the interest will sustain a serious injury if the speech will not be suppressed. The term 'balancing' notwithstanding, the Court in these cases is engaged in a formalistic methodology that provides rule-like protection to certain types of speech.

A different kind of balancing is what the Israeli Court calls 'horizontal' balancing:[38] the balancing between two rights, when the court actually has to 'weigh' the importance of each right (ie, the value it protects) and how much of each right is being infringed by the state action.[39] This is indeed true balancing, since the court is seeking a 'margin of accommodation' for both rights, a 'compromise' between the two rights[40] that reflects their exact weight under the circumstances. Despite the scientific precision the test implies, horizontal balancing is subject to the obvious criticism of the absence of a shared metric[41] and that this amorphous process allows the court to reach ad hoc, result oriented decisions. As obvious as the methodological difficulties of horizontal balancing may be, the Israeli legal culture expressed, until recently, little or no reservations regarding its application.

In *Suzkin,* the need to balance arose as the Court tried to determine whether the lower courts had struck the right balance between freedom of expression and the value of tolerance of religious beliefs. Recall that Ms. Suszkin was not charged with violating an ordinary 'breach of the peace' offence, 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 be a form of a heckler's

[37] The Israeli Court applies the vertical test when faced with a clash between a compelling governmental interest and a fundamental human right. In HCJ 448/85 *Daher* v. *Minister of Interior* [1986] IsrSC 40(2) 701, the clash was between the interest of public safety and the freedom of movement. In CrimA 126/62 *Disenchik* v. *Attorney General* [1963] IsrSC 17(1) 179, the clash was between the interest of maintaining an independent judiciary (that ensures due process to all) and the freedom of expression. This could be compared to the language the US courts use in applying the strict scrutiny standard when the government uses race as a criterion for its action: such action will be allowed to stand only if it is absolutely necessary for achieving a compelling state interest and the use of race is narrowly tailored to such an achievement. See *Korematsu* v. *US* 323 US 214 (1944), where the court ruled that exclusion of citizens of Japanese ancestry from certain West Coast areas was justified because of the compelling need to prevent sabotage.

[38] See HCJ 2481/93 *Dayan* v. *Wilk, Jerusalem District Commander* [1994] IsrSC 48(2) 456, 480.

[39] Justice Dorner says in HCJ 1514/01 *Gur-Aryeh v. Second Television and Radio Authority* [2001] 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.'

[40] Compare, in the US context, the clash between the right to vote and the right to speak in *Burson* v. *Freeman* 504 US 191(1992).

[41] See Aleinikoff in n. 34 above.

veto.[42] Rather, the harm the specific offence set to prevent is the harm to religious feelings.[43] The Court wondered whether the prosecution should show that it is nearly certain that the speech will cause such harm, or whether the prosecution need show only that it is probable, or highly probable, but not nearly certain that the publication would outrage religious sentiment.[44] The answer to that question depends on the relative weight (or importance) of the governmental interest. The more compelling the interest is, the greater the harm its frustration would impose, and therefore the longer the leash the Court would accord the state in demonstrating the likelihood that the harm would in fact materialize. What is the weight of outraging religious sentiments? In Israel—perhaps in all democracies, but certainly in Israel—that would be a hard question to answer. After somewhat serpentine reasoning, the Court left the matter undecided. 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, serious harm to religious sentiments would have been inflicted.[45] Yet the Court expressed no reservations in principle to go down the path of horizontal balancing, had the evidence been different.

Part of the Court's relative comfort with horizontal balancing rests on an unusual institutional feature which was not present in *Suszkin,* a criminal appeal, but which is present in almost all administrative and constitutional cases. In Israel, the Supreme Court sitting as a high court of justice has original jurisdiction in petitions against the state, and therefore its balancing doctrine is rarely applied in lower courts. It is therefore not surprising that the Israeli Court approves of horizontal balancing, knowing that such balancing grants it greater latitude to reach the desired balance in each case without delegating such discretion to lower courts. In the US, in which the Supreme Court exercises exclusively appellate jurisdiction in free speech cases over myriad lower courts, horizontal balancing might prove unmanageable and undermine the law's duty to treat like cases alike.

[42] HCJ 2481/93 *Dayan* v. *Wilk, Jerusalem District Commander* [1994] IsrSC 48(2) 456; HCJ 153/83 *Levi* v. *Southern District Commander* [1984] IsrSC 38(2) 393, and HCJ 148/79 *Sa'ar v. Interior Minister* [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 US *Forsyth County Georgia.* v. *Nationalist Movement* 505 US 123 (1992). Perhaps the most famous US case on point is the Skokie affair, dealing with the rights of Neo-Nazis to march in the streets of the village of Skokie, a town with a large Jewish population including survivors of and those who had relatives who perished in the Holocaust). See *Collin* v. *Smith* 447 F.Supp. 676 (N.D. Ill. 1978), affirmed 578 F.2d 1197 (7th Cir, 1978).

[43] In determining what outrage to religious feelings is, the Court relied on an article by Statman in n. 20 above, and stated that 'one outrages another person religious feelings when his behaviour causes anger, frustration, insult, etc and these feelings were not stirred hadn't the other person been religious.'

[44] CrimA 697/98 *Suszkin* v. *Israel* [1998] IsrSC 52(3) 289, 306–7.

[45] The Court rejected Suszkin's claim that only an expert can determine the intensity of the suffering or the harm caused to the religious feelings of Muslim believers (*Suszkin* IsrSC 52(3) at 311). Some criticize the reliance on probabilities in this context: either a certain statement *does* offend sentiments, or it *does not*, and the court, like any member of society, is equipped with the necessary social understandings to make this determination. See HCJ 806/88 *Universal City Studios Inc.* v. *Film & Play Review BD* [1989] IsrSC 43(2) 22, 42.

This unusual institutional feature of the Israeli system is, however, 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). 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—the application of the balancing doctrine in lower courts in Israel is likely to raise serious issues of uniformity.[46]

8. Beyond Differences: The Doctrine of Fighting Words

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 US. The statute criminalizes protected speech, and does so in a vague and overbroad manner. But more fundamentally, it seeks to proscribe speech simply because it is offensive to some, and thus clashes with the cornerstone of First Amendment principle against content discrimination. But what would have been the result if Suszkin had been charged not under this statute but for breach of the peace or breach of public order? US courts have long concluded that in some cases—rare but identifiable—offensive speech is proscribable as a breach of the peace if it constitutes 'fighting words'—'abusive remarks directed to the person of the hearer'.[47] Conceptually, face-to-face cursing at another human being is not a mode of communication of ideas, thoughts, facts, or opinions deserving of much constitutional protection. In *Suszkin* the judges in the lower courts found that Suszkin intended nothing but to 'retaliate' against the Arabs, insult for insult.[48] She had no intention of engaging anyone in dialogue or debate, nor was she trying to make a point through satire by provoking thought or reflection. This subjective intent matches the objective meaning of her action. Under the circumstances,[49] posting this pamphlet in Hebron, and thereby making the residents of houses on which the posters would be glued a captive audience, constitutes an act of aggression (albeit committed through words). Had Suszkin been indicted on a general breach of the peace offence, and had the Court resorted to the doctrine of 'fighting words', it could

[46] 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 regarding the proper balance between values, the Supreme Court might in fact lose some of its institutional capital as a result of such strife.

[47] *Cantwell* v. *Connecticut* 310 US 296 (1940); *Chaplinsky* v. *New Hampshire* 315 US 568 (1942).

[48] CrimC (Jer) 436/97 *Israel* v. *Suszkin* [1997] (unpublished), 9.

[49] 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 Tomb of the Patriarchs on February 1994 by a Jewish settler. The situation in Hebron is described in *The Report of the Official Investigation Committee for the Massacre in Cave of Machpela* (1994).

have sidestepped the quagmire of selectively protecting religious sensibilities. 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. Nor would they have needed to determine the 'degree of injury' or the extent of emotional harm suffered (or likely to be suffered) by the audience. Had Suszkin been indicted for attempting to breach the peace it is not far-fetched to assume that her indictment would have been allowed to stand even in the United States. If calling a police officer 'a damned Fascist'[50] constitutes fighting words unprotected by the First Amendment, than it stands to reason that so would gluing these highly offensive posters on Muslims' houses in Hebron.[51]

The unique facts of *Suszkin* differentiate the case from other cases—and, for that matter, from the Danish cartoons incident—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. In such cases the Israeli Supreme Court has systematically ruled in favour of freedom of expression, despite the fact the feelings were hurt, sensibilities offended and emotions injured.[52] In all 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 maintaining solidarity—not hurting any groups' feelings—and managing conflicts through allowing expression (including harsh or insensitive expressions), the Court developed the Israeli administrative law doctrine in favour of the latter (as long as no specific legislation on point ordered differently).[53] As these examples reveal, the Israeli Court realized that the media through which satire was communicated—precisely because it was mediated—was an integral part of public discourse, whereas in *Suszkin* the speech was directed at individuals in their domicile and in a manner that did not seek to provide them with any meaningful information or engage them in any conversation. It would

[50] *Chaplinsky* v. *New Hampshire* 315 US 568 (1942).

[51] In *R.A.V.* v. *City of St. Paul, Minnesota* 505 US 377 (1992) the United States Supreme Court was willing to assume that the burning of a cross in the yard of a black family with the intention to intimidate would constitute fighting words. The situation in *Suszkin* is not that dissimilar.

[52] In HCJ 14/86 *Laor* v. *Film & Play Review BD* [1987] IsrSC 41(1) 421, the court ruled in favour of showing of a play even though it offended the feelings of the Jewish public since 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 show the movie 'Jenin Jenin' by Bachri, even though the film described the events in the refugee camp in April 2002 'in a distorted way that hurt the feelings of soldiers and families of slain soldiers'. In HCJ 606/93 *Kidum Enterprise and Publishing (1981) Ltd* v. *Broadcasting Authority* [1994] IsrSC 48(2) 1, the Court again allowed the broadcasting of an advertisement that had a sexual *double-entendre*. In *Gur-Aryeh* in n. 39 above, the Court ruled in favour of broadcasting a TV show on Saturday (the Jewish Sabbath) despite the injury to the religious feelings of participants in the show. All these decisions were based on the assertion that the injuries caused by those expressions should be tolerated in a democracy.

[53] Justice Barak in EA 11280/02 *Central Elections Committee for Sixteenth Knesset* v. *MK Tibby* [2003] IsrSC 57(4) 1, 21 emphasized that it is better for democracy that undemocratic pressures would be relieved through democratic channels of expression, than through non-democratic channels that might include violence.

seem, then, that the different social context—the medium—makes a difference. In other words, it could very well be the case that had the *Suszkin* poster been published in the satire section of a newspaper, the Court might have found the indictment unconstitutional as applied, in part because such publication would not amount to 'fighting words' given the lack of proximity.

In any event, faced with an indictment based on a rather peculiar and very rarely used statute, the Israeli Court did not attend to comparative law in this case—notwithstanding the clear comparative tendencies of the court in freedom of expression cases—and thus the fighting words doctrine is not yet an official part of Israeli law.

9. Some Heretical Reflections on Speech Theory and the Role of Passion

The general normative 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 analyse them and the use of a reason-based methodology with which to achieve a decision and convince others.[54] According to Habermas, and to Rawls, reason is the basis for moral legitimacy. As mentioned earlier, the primary justifications for the supremacy of freedom of speech over other rights and freedoms are reason based. These justifications are based on the correlation between democracy and deliberation. It is not surprising, therefore, that 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. 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 reexamination.

As mentioned above, some scholars recognize the centrality of emotive speech, and thus base First Amendment jurisprudence on a quest for social legitimacy achieved by providing a space for members of the various sub-communities to participate by expressing their passionately held values. Under this conception, public discourse is a sphere where communication sustains the quilt of communities from disintegration and participation maintains a sense of loyalty to the overall

[54] J. Habermas, *Knowledge and Human Interests* Trans. J. Shapiro (London: Heinemann, 1972).

constitutional order.[55] This analysis, however is almost by definition society-specific, not only because various societies may be more or less heterogeneous (and therefore more or less threatened by emotionally challenging dissenting speech) but also because perceived as such, legitimacy is a social fact (nothing more, nothing less). As such, the people of Canada, Israel, or Germany, may either view their system as legitimate, or may not, and their attitude may be formed regardless of whether the US speech doctrines were adopted in these jurisdictions or not, or whether they found its underlying rationale convincing or not. We may only speculate on the possible explanation for the degree of legitimacy any given system enjoys, with little to say about possible alternative explanations (lacking the alternative universes in which to test out our hypothesis) or, worst, lacking a foundation from which to engage in a normative critique. An attempt to bridge the sociological and the normative approaches—the facts and the norms—is conceptually taxing, and perhaps unattainable. Yet it seems that a deeper examination into sociological legitimacy and normative legitimacy is nevertheless required. One possible way to do that would be to look closer at moral legitimacy as based also on passion.

Modern research in various fields acknowledges that reason and rationality might in fact not be the sole, or dominate, feature of public (and private) decision-making or reflection.[56] Additionally, it may very well be that moral judgment cannot be fully separated from moral sentiment, such as passion (or outrage). It could very well be the case that we are convinced, at the end of the day, by what we *feel*. 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 identity, we must further inquire into the scope of the constitutional protection of speech.[57] 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? Or, conversely, 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 in such expression, as I suggested earlier, through the fighting words doctrine? Or should we develop a sphere where passion is recognized as an important element in moral judgment, and thus view Suszkin's

[55] R. C. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v. Falwell*' (1990) 103 *Harv. L. Rev.* 601, 642.

[56] D. Kahneman, P. Slovic, and A. Tversky (eds.), *Judgment under Uncertainty: Heuristics and Biases* (Cambridge: CUP, 1982); A. R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Putnam, 1995); S. Blackburn, *Ruling Passions: A Theory of Practical Reasoning* (Oxford and New York: OUP and Clarendon Press, 1998), 252.

[57] See M. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford and New York: OUP, 1990), 81–2, arguing that 'theorizing needs to be completed with intuitive and emotional responses'. See also R. C. Solomon, *A Passion for Justice: Emotions and the Origin of the Social Contract* (Reading, MA: Addison-Wesley, 1990), 44.

expression as deserving protection? Assume for the sake of argument that Suszkin handed out leaflets, instead of seeking to glue a poster on private property; would it not follow that her speech should be protected as the kind of speech that provokes the polity into moral debate (which itself 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 Suszkin's act. The content of the poster (as well as the attempt to glue it uninvited on private property) should be condemned. But on first impression, accepting passion as an organizing matrix of public discourse should accord it greater breathing room.

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 Suszkin's provocation? 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 *Suszkin* 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. This of course should not be read as implying that because we protect passionate speech of individuals we should necessarily invite (or accept) passionate speech by judicial state institutions. Yet if passion matters, we should explore its contours.

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 normative principles underlying the regulation of speech. Much is still to be explored in this field, and the above discussion only marks a possible starting point in the comparative domain.[58]

10. Conclusion

Outraging religious sensibilities is an offence most courts would be wary of implementing. It places the court in the thicket of defining what religious sentiments are, what outrages them, why these feelings deserve greater protection than do other sentiments, and above all, it places the court in the position of taking sides in what may often be a heated debate about the values underlying freedom of speech versus the values underlying a given religion (and the values underlying freedom of religion in general), a position from which most courts

[58] For an extensive debate in the US see J. Weinstein, 'Democracy, Sex and the First Amendment', a response by A. Koppelman, 'Free Speech and Pornography' and a reply by J. Weinstein, 'Free Speech Values, Hardcore Pornography, and the First Amendment' (2007) 31 *N.Y.U. Rev. L. & Soc. Change* 865, 885–8, 921.

would stay away at nearly all costs. *Suszkin* is thus a unique case. This chapter suggests that the best way to understand Suszkin is under the US fighting words doctrine, though the Israeli Court made no mention of this doctrine.

This chapter 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 US over other liberties, or whether to adopt the competing, 'general rights' model, prevalent, for example, in Canada. This chapter also suggests that the language of human dignity, which stands at the foundation of the general rights model, is more favourable for restricting group-based offensive speech than is the US model.

Furthermore, the chapter pointed to the tension between normative justifications for freedom of expression, resting primarily on the concept of public reason, and cultural justifications of freedom of expression, resting on the notion of social legitimacy in heterogeneous societies 'blessed' with diverse values. In that context, the fact that human dignity is placed as the core constitutional legal right in Israel invites the Court and its students to examine to what extent passion-based speech, which may be an expression of dignity but which almost by definition offends the dignity of others, deserves as strong a constitutional protection as reason-based speech. Human dignity, as a feature of the moral universe, is inalienable on account, or as an expression of, humans possessing the capacity to reason right from wrong. Seen as closely related to the capacity to reason, human dignity could be interpreted as protecting reasoned-based arguments, and granting less protection to passion-based speech. This conclusion may be reinforced given that people may perceive their dignity infringed by passion-based speech. On the other hand, failing to protect speech, including passion-based offensive speech, is also an infringement of the expression of human dignity. The Court thus could reach a conclusion that recognizing the importance of passionate speech might lead to protection of religiously outrageous speech even on a human dignity model. As we have seen, the Court in *Suszkin* chose to sidestep this issue by treating human dignity as the foundational value upon which Israel's hyper-heterogeneous society rests. In so doing the Court found that the state may prosecute speech which seeks to deeply fracture the co-existence between members of the various faiths, all deserving the protection of fundamental human rights.

In this context we should note the Court's own judgments have a hand in shaping the sphere of public discourse including its nature as 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, and thus participates in constituting national ideology, akin to the US civil religion.[59] This line of reasoning resonates with the early American cases,

[59] In HCJ 6126/94 *Senesh* v. *Broadcasting Authority Management.Board* [1999] IsrSC 53(3) 817, Justice Barak writes about the Jewish heritage of freedom of expression, beginning in the days of the

where judges like Brandeis told the American people what its forefathers fought for, thereby resting the decision primarily on passion and identity arguments.[60] Another line of argument that the Israeli Court follows on occasion 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.[61]

In the final analysis, *Suszkin* is far more than a case about a Jewish settler distributing offensive posters in Hebron. If we read the decision carefully, it is a about the role the forum state's unique history, culture, and religious sensitivities play in the decision of a domestic court, and consequently, about the inference we can draw from such a decision regarding the dynamics of the emerging global discourse on human rights. Significantly in this regard, the Israeli Court was 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 undermined its strong emphasis on core elements of Israeli identity. Specifically, the Court may have feared that relying on First Amendment jurisprudence would have invoked, at least in part, a transnational, if not universal, basis for its decision. If it had relied on such external sources, the Court would have been tripped by the wire weaved into Suszkin's claim, namely that the jurisprudence the Court was developing was not sensitive enough to the Jewish character of Israel. The subtext of Suszkin's argument was that Israel's Jewish character is under threat, and that Jews should fight back; relying on US jurisprudence would have only highlighted the threat. The Court thus answered Suszkin in her own terms, basing the decision on domestic (ie, Jewish) values and symbols. It stressed the importance Judaism places on respecting human dignity of all those created in God's image and referred to the harassments Jews experienced in other countries on account of their belief.

Bible. As to 'other values', see Justice Barak in HCJ 6698/95 *Qa'adan* v. *Israel Land Administration*, [2000] IsrSC 54(1) 258, 280.

[60] *Whitney* v. *California* 274 US 357, 375 (1927), Brandeis, J, concurring.

[61] In HCJ 651/03 *The Association for Civil Rights in Israel* v. *Chairman of Central Elections Committee for Sixteenth Knesset* [2003] IsrSC 57(2) 62, 72, Justice Procaccia sidestepped the charged issue in that case by relying on the formulaic necessity of free speech for the democratic election process. In CA 316/03 *Bachri* v. *Movies' Review Council* [2003] IsrSC 58(1) 249, Justice Dorner similarly stated 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 such truth emerging from the 'market place of ideas', suggesting that this market place is the domain of analytical and rational reasoning.

PART IV

RELIGIOUS SPEECH AND EXPRESSIVE CONDUCT THAT OFFEND SECULAR VALUES