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The offense to sensibilities argument as grounds for limiting free expression: the Israeli experience, Part Two (1). Raphael Cohen-Almagor.

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H. OFFENSE TO RADIO LISTENERS

An especially interesting case is that of Kidum. (2) "Kidum" is a company that deals with training students for the matriculation and psychometric exams, which condition acceptance to higher education institutions. It filed a petition against the Broadcasting General Director's decision to prohibit an advertisement, "Go Excel," on the grounds that the advertisement did not meet the required standards of "good taste." It was argued that the advertisement's slogan provoked a connotation of the curse "go flick yourself" in Hebrew. (3) Article 6 in the regulations of the Broadcasting Authority says:

The General Director of the Broadcasting Authority maintains the right not to broadcast any commercial that he thinks includes an offense to good taste or contradicts public order or harms the public (p. 13 of the opinion).

It was maintained that the advertisement's slogan offended the sensibilities of listeners, who constituted a captive audience. Commercials are broadcast within various shows or immediately before and after shows. Listeners who are interested in the show cannot avoid hearing the vulgar commercial (p. 8).

In a 2 to 1 decision, the High Court accepted "Kidum"'s petition. Justice Dalia Dorner argued that the respondents violated the petitioner's free speech. After declaring that freedom of speech held a special place with a superlative right, and hence allowing for restrictions only in specific instances, Justice Dorner addressed the question whether commercial speech was protected under the Free Speech Principle, and what degree of protection was extended. In her opinion, commercial speech was part and parcel of free expression, and a component of free trade that characterizes a democratic society (paragraph 8, pp. 10-11).

Yet, not all rationales of free expression apply to commercial expressions. Thus, for instance, the rationale of maintaining democratic procedures was deemed to apply only partially to commercial expressions. Therefore, it was possible to prohibit

commercial expression that offended public emotions, providing that the extent of the offense was severe and considerable enough to justify such restriction (p. 14).

Justice Dorner was not convinced that the slogan "Go Excel" seriously offended public sensibilities. In her view, other no-less offensive commercial items were broadcast on the airwaves. Furthermore, the petitioner's commercial clip that included the same slogan was being shown on television, and no petition had been made to stop it. Dorner remained unconvinced by the captive audience argument, thinking quite rightly that those who might be offended could avoid the offensive expression (paragraph 15, p. 16). The Broadcasting Authority did not adequately consider "Kidum"'s right to free speech and consequently failed to balance this right against the possible offense to listeners' sensibilities (paragraph 21, p. 17).

I would like to comment on one assertion made by Justice Dorner. While quoting President Shimon Agranat in the landmark Kol Ha'am decision, (4) she argued that freedom of expression enjoys the status of a "superlative right" (p. 9). I have always wondered about this sweeping wording of President Agranat that became popular in the language of the courts. In reality, however, free speech does not enjoy such a supreme status when it comes into conflict with other important values. Indeed, it should not categorically enjoy this supreme status. Freedom of expression is a most important right in democracies. Yet, it has boundaries and often there are times when the courts are required to balance it against other rights and liberties.

If we were to seriously hold that free speech has a superlative status from the outset, then free expression would have enjoyed a preferred position (5) as compared to other rights and liberties, and this is not the case. The balance is based on the particular circumstances, the conflicting values under consideration, and the damages and benefits that are expected. It would be right to abandon the sweeping and imprecise statement about "a superlative right" and instead use more precise descriptive language: Freedom of expression is a basic value in modern Western democracies, an important and primal one that constitutes an essential layer of democracy. Yet, we should not say that it enjoys a priori precedence in comparison to other values, such as the right to privacy, the right to personal security, the right to fair trial or the need to maintain state security. At times, balancing the scales may favor the conflicting interests, making it imperative that we examine each case separately. (6)

The most interesting and, I may say, strange opinion is that of Justice Mishael Cheshin. Cheshin opened his commentary with the famous quote from Voltaire: "I disapprove of what you say but I will defend to the death your right to say it," and then maintained:

Were we to ask Voltaire if he would protect till death the right of the petitioner to express the slogan "Go Excel"--while explaining to him well that we are dealing with freedom of expression--then he would have asked us to repeat the question: so far this is from what

Voltaire intended (paragraph 1, p. 18).

At this stage, the reader might think that Justice Cheshin agreed with his colleague Dorner, but this was not the case. As it becomes clear later in the judgment, Justice Cheshin actually supported the Broadcasting General Director's decision to curtail the advertisement of "Kidum." Would Voltaire have agreed with Justice Cheshin's opinion? I doubt it.

Cheshin continued the explanation of his illiberal position by attempting to convince us that we were not actually dealing here with free expression. In his opinion, using the Free Speech Principle to protect the broadcasting of the slogan "Go Excel" was nothing but an inappropriate use of the notion of liberty (p. 19). He considered the issue at hand to be minor, insignificant, "truly trivial," not something worthy of an appeal to the High Court of Justice. If his opinion were to be heard, said Cheshin, "we would dismiss this appeal and free our time to deal with true liberties" (p. 19).

If we were indeed dealing with such a minor "truly trivial" issue, and assuming that Voltaire would have allowed it under the Free Speech Principle, then why would Cheshin not allow it as well? How does he rectify his illiberal outcome with his liberal Voltairian introduction? Cheshin contends that commercial advertisement is included within the boundaries of free expression, but that it has relatively inferior status and hence can be restricted by "limitations that one will not introduce when 'classical' freedom of expression is concerned" (p. 27). Thus, thinks the reader, this is where the heart of the matter lies: commercial expression is different from non-commercial expression. This is an accepted position by many jurists in the United States (7) and in other parts of the world, (8) especially as one compares the appropriate immunity level afforded to political expression with that afforded to commercial expression. This is, indeed, my own position. It is generally agreed that political expression enjoys greater immunity because it concerns the public at large, whereas commercial speech is aimed to advance economic partisan interests. (9)

However, Justice Cheshin directly addresses the question whether free expression also protects commercial advertisement and answers in the positive. Cheshin writes in his figurative and poetic language: "We were born free, and free we will be able to speak and sing and publicize as we please" (p. 28). Again the reader is puzzled. So what is the crux of the matter?

In paragraph 21 of his reasoning, Cheshin finally begins to detail his logic, which consists of three layers. First, expressions that are rude and vulgar, curses and "other bad things that come from the mouth" will not be afforded protection. Second, commercial advertisement may be protected under the Free Speech Principle, but as a minor player in the kingdom of free expression (p. 29). Third, aesthetic considerations are appropriate to assess when deciding whether to air commercial advertisements (paragraph 23, pp. 31-32). The slogan "Go Excel" brings us, by way of association, innuendo and sound connotation directly to a popular

expression of obscenity, and undoubtedly this was the intention of "Kidum" in order to attract young audiences. Thus, the decision to prohibit airing of the slogan was within the discretion of the Broadcasting Authority and within the law, and there were insufficient grounds for the court to interfere (paragraph 24). After all, free expression is not equivalent to lawlessness in speech, and it does not protect the intention to offend: "We should stay away from bad smells--smell of smells and smell of talking" (paragraph 27, p. 33).

Justice Cheshin testified that he found it difficult to treat the case at hand as a free speech issue (paragraph 25). However "Kidum" anchored its petition on free expression rights and to this Cheshin responded: "We must be careful not to fall victim to the tyranny of free expression" (p. 32). For him, this was not the right context for dealing with this trivial, minor and non-aesthetic language.

It seems that Justice Cheshin was torn between his commitment to free expression and the disgust that he felt toward a specific expression, which he considered to be perverse. Clearly, he was not the least amused by the commercial trick designed to attract attention. While many would consider this slogan as a sinister wink to help mark "Kidum" in the minds of listeners, Cheshin was disgusted by the low level of sales promotion and thought it appropriate for the Broadcasting Authority to determine the boundaries of aesthetics. Blocking his nose to avoid the bad smell brought Cheshin to block the petitioner's mouth. Many liberals would disagree, thinking that it is better to block the nose while leaving the mouth free. Indeed, the use of such slogans as "the tyranny of free expression" may be unnecessary and damaging. Considering the case at hand, this was a misplaced and exaggerated statement by a Supreme Court justice, who is often called to secure free expression in the absence of a specific law that protects this essential right.

Justice Gabriel Bach, who testified that he enjoyed reading the opinions of his two colleagues, wrote the deciding opinion. Agreeing with Cheshin, he argued that the Free Speech Principle does cover commercial speech, but at the same time commercial expressions should not be accorded the same level of protection as political, moral, social and scientific expressions (paragraph 2, p. 37). Bach departed from Cheshin in his assessment of the importance of the case. Unlike Cheshin, he did not think that the issue was minor and trivial and therefore not worthy of consideration by the High Court of Justice. On the contrary, democratic principles are maintained by giving attention to "small" daily decisions concerning ordinary citizens and not necessarily by attending only to the "big" decisions concerning grand issues of importance (paragraph 5, p. 39).

Justice Bach opined that the correct test to apply was not the probability test of public offense, but rather a quantity test: A commercial advertisement can be prohibited if its content or manner of presentation offends good taste in a meaningful and substantial way (paragraph 6). He suggested four criteria that must be taken into account:

(a) The extent to which the advertisement offends good taste. This is a question that must be observed from the viewpoint of modern, enlightened and liberal society.

(b) Whether the advertisement offends the public or segments of the public. To this end, we should consider "the sensibilities of a significant minority, which does not represent a faction that is characterized by extreme opinions" (paragraph 9, p. 41). Justice Bach had reservations regarding Justice Dornier's claim that good taste, which is a competing value with freedom of expression, reflects the broad acceptable consensus in society and therefore "we should not consider minorities' sensibilities." Bach rightly thought that this claim was too broad and sweeping (paragraph 7, p. 40). It can be assumed that Justice Bach would also have had reservations regarding Justice Etzioni's opinion in Keinan.

(c) The extent of harm to the publisher as a result of refusing to air its advertisement. In this case, the expression "Go Excel" had become the symbol of "Kidum" and had been advertised in all of its promotional material. Hence, prohibiting its use might cause the petitioner significant damage.

(d) Certain side effects, such as the presence of this same offensive expression in other or previous advertisements. The logic of proportionality leads us to conclude that if the public were regularly exposed to the same advertisement in newspapers and on television, without a public outcry or severe reaction from viewers and readers, then there would hardly be a reason to object to airing it on the radio. This consideration is related to the assessment of the offense to good taste. If the offense had been serious and shocking, then all other considerations would have been minor in comparison, but this was not the case here. According to Justice Bach, the use of "Go Excel" was nothing but a publicity gimmick that would only elicit a light smile among listeners. As such, the expression should not be disallowed (p. 42).

In suggesting these criteria, Justice Bach took the first step toward formulating the Offense to Sensibilities Argument, concealed in this case in the consideration of offending good taste, separately from public order considerations. Therefore, I deem this verdict to be quite important. Bach explicitly argued that when we take actions to prevent danger to state security, to public safety or to foreign relations, the probability test assessing whether the danger might materialize is an appropriate one. However, this test cannot be applied when the concern is offense to good taste caused by a certain broadcast: "The decision-maker must determine whether or not offense to good taste exists, and it is difficult to agree with the conclusion that in this case there is 'probability of offending good taste!'" (paragraph 6, p. 40, exclamation mark in the opinion).

Another criterion should be taken into consideration, namely, the ability of those who might be offended by a particular slogan to avoid being exposed to it. As more options are open to the sensitive public to avoid exposure to the offensive broadcast, the easier it should be for us to approve its airing. In a reality of mass communication, with abundant radio and TV channels, cable,

satellite, Internet, etc., all that people need to do is switch to another means of communication in order to avoid offensive commercials and maintain peace of mind.

I. PORNOGRAPHY THAT OFFENDS PUBLIC SENSIBILITIES AND SOCIAL MORALS

It should be pointed out from the start that the importance of this case lies in the debate between President Barak and Justice Cheshin about the scope of judicial discretion and the appropriate extent of separation of powers. In another place I referred to this as a debate between the formalistic approach and the creative approach. (10) The issue of offense to sensibilities is completely secondary in this verdict.

The petition concerned a Japanese-French film called "Empire of the Senses." The Censure Council of Films conditioned its screening on cuffing out several pornographic segments likely to cause severe offense to the public sensibilities and social morals. (11) The distributors of the film responded that censoring the film would undermine its overall artistic-social value within which the questionable segments should be understood. Furthermore, the Council decided and the distributors of the film agreed that "Empire of the Senses" would be limited to an adult audience only. The audience is not captive, the public standards are geared to openness and permissiveness, and in any event, people have access to materials that include sex scenes similar to those included in the movie. The petitioners also noted that the film was screened on cable television and no proven offense had resulted (paragraph 4 in President Barak's opinion).

The petitioners maintained that the state should refrain from interfering in the decisions of adults to view films; that the Council's decision was undemocratically paternalistic and inappropriate; that they were discriminated against by the Council, which had approved the screening of other films with hard-core sexual scenes, such as "Clockwork Orange"; and that the Council did not give enough weight to freedom of expression, especially in light of Basic Law: Human Dignity and Freedom (1992), which is said to protect free expression. The aim of the law is to protect human dignity and freedom in order to anchor the values of Israel as a Jewish democratic state. (12)

The respondents claimed in response that the film included several scenes that abased and offended human dignity, including close-up shots of the amputation of a man's penis, the severing of women's genitals, and sexual abuse of minors and elderly people. The Council opined that those scenes lacked any artistic value, and even if their artistic value was to be proven, still this value should be overridden by the profound offense to public sensibilities and social morals that might result from showing the film in its uncensored format (paragraph 5).

In his judgment, President Barak avoided analyzing the offense argument and instead chose to speak yet again about public order. To his mind, pornographic expression could be restricted if

probability exists that it might severely, seriously and gravely harm public order (paragraph 11). Barak maintained that free expression (although I believe it was more appropriate to speak specifically of artistic freedom) could be restricted if it extends beyond the standards of social tolerance and rocks the foundations of reciprocal tolerance. According to President Barak, "Such an offense can justify restricting pornographic expression when the expression might humiliate the woman and portray her as a 'sexual slave.' Such a portrayal undermines--directly and indirectly--the equal status of women in our society and encourages violence in general and violence against women in particular" (paragraph 11).

Yet, Barak avoided developing a discussion about this complex issue. Instead he chose to deal with the question of whether the film was pornographic and thus lacked artistic value or, alternatively, was not pornographic and possessed artistic value. In addressing this question, Barak thought that we must consider the film as a whole. It might be that one or another part of the film will not be entitled for protection under the Free Speech Principle in one context, but will receive protection when viewed in the context of the integral artistic product: "Parts that might in and of themselves and when viewed separately be perceived as pornographic, lose this character when they are enveloped and integrated in the artistic piece or in a piece that has a different social value" (paragraph 14). This rationale was adopted from the American Roth case. (13)

Barak's remaining arguments are a bit confusing. On the one hand, he wrote that the Censure Council must decide "whether the film as a whole has an artistic value, and whether the alleged pornographic parts are necessary for the development of the plot and the message." On the other hand, Barak contended that "the Council should not become an artistic critic. It should not grade a film in determination of whether it is of high or low artistic standard" (paragraph 15). I am sorry to say that I do not fully understand how both statements could be reconciled, that is, how the Council can decide whether a film has artistic value without becoming an artistic critic. To my mind, such a decision entails a critique. Possibly what President Barak meant to say is that despite the negative criticism of the film, the Council should still be open to other critiques contradictory to theirs and try to apply neutral criteria without letting their own tastes dictate the ultimate decision. This could be inferred from his treatment of the court's role, which--like the Council itself--is not that of an artistic critic. Barak suggests that the court should ask itself whether, if based on the presented facts, the production has an artistic value even if the evaluation of value is controversial (paragraph 16).

Moving from the general to the particular, and bearing in mind that "Empire of the Senses" received many artistic rewards and the attention of some of the world's most important newspapers, it seems that the film does possess a serious artistic value negating its classification as a pornographic film. Barak contends, "where there is a reliable and serious foundation for the artistic nature of the film, it is enough to consider it as having artistic value, even if there are contrasting opinions on this matter, and even if the

contrasting opinion is that of the Council members themselves" (paragraph 19).

President Barak concludes that there was no escape from overruling the Council's decision and permitting the screening of the film without the requested censorship (except for the censorship of two segments involving minors, to which the petitioners agreed), while restricting the film to adults only (paragraph 21). Indeed, restricting the age of viewers is the appropriate solution. Restriction of the film to adults above a certain age prevents its exposure to minors and gives the privilege of viewing the film to those who willingly buy a ticket. Those who might be offended by the film's pornographic and violent parts can simply remain outside the cinema.

Justice Eliyahu Matza joined the opinion of his colleague Barak in a laconic statement ("I agree"), and this is where we arrive at another intriguing opinion of Justice Cheshin. He commenced by addressing the appropriate framework for the discussion, namely, a conflict between two interests: freedom of expression versus another interest that varies from one case to another and is imprecisely named "public order," "public good," "public sensitivity" and other names and nicknames that involve the public good (paragraph 2 in Cheshin's opinion). For a moment, readers may hope that Justice Cheshin would continue from where Justice Bach left us in the Kidum case and attend to the distinction between "public order" and "public sensibilities," but this hope was disappointed. Justice Cheshin did relate to Kidum, but only to emphasize his own words in that verdict by repeating Voltaire's immortal statement and explaining that what he had said about the slogan "Go Excel" applies also to "Empire of the Senses." That is, if we were to ask Voltaire whether he would defend till death the film distributors' rights to screen it, then he would have asked us to repeat the question: so far this was from Voltaire's intention. According to Cheshin, "the imposition of meta-expressions that concern free speech on a film that some consider as pornographic--and in any case, a film that involves much sex--diminishes the importance of free expression and makes those meta-expressions worn tokens" (paragraph 4).

I think that Voltaire, while considering the cultural context in which we now live, would have certainly defended this problematic artistic expression despite the fact that it is filled with pornography. Furthermore, this defense would not minimize the importance of free expression. Quite the opposite: The Free Speech Principle does not apply only to non-problematic expressions. Indeed, its strength stems from protecting questionable and gross expressions. The Principle does not cover only those expressions that are "qualitative" and "important." "Quality" and "importance" are subjective and controversial terms, and it is not the role of a judge or any other person to evaluate them. The role of a judge in a democracy is limited here to the examination of two questions: first, whether the court has authority to interfere in the considerations of a constitutional body that was appointed to critique films, bearing in mind that by such interference the court would--for all practical matters--take the place of that body; and

second, whether there are heavy enough considerations to prevent the controversial expression.

Justice Cheshin dedicated a considerable part of his discussion to the first question, and his decision was contrary to Barak's. President Barak does not flinch from juristic legislation and believes that it is within the court's authority to intervene in the considerations of constitutional bodies whenever it seems that the body in question is not operating appropriately (14) (as he did in Laor, Universal, and Indor). Justice Cheshin, on the other hand, is much more reluctant to interfere and prefers that the legislature decide the appropriate remedies. Accordingly, it is up to the legislature to determine whether the Censure Council is an obsolete body that should be dissolved. The court should not take the Council's role into its own hands and make a laughingstock of the Council's decisions.

Justice Cheshin avoids clarifying exactly what role the Council should assume. On the one hand, he says that because of the tolerant atmosphere toward sex boutiques and massage parlors, the Council today seems to be "a last Victorian island in the sea surrounding it." Cheshin asks rhetorically: "Is the Council these days more of an anachronistic institution, a clumsy dinosaur walking amongst us, a creature that belongs in a different time and era? What is the value of closing the front door to the uninvited guest if that guest can enter the house easily through the back door (which is also no longer much of a back door?)" (paragraph 9). On the other hand, Justice Cheshin does not deny social paternalism with regard to film critique. The opposite is true: "We shall remember and know that the term social paternalism does not always connote negation and is not necessarily a term of disgrace--and the question is only how far shall we go" (paragraph 10).

Justice Cheshin is much clearer about the court's boundaries of interference. In his opinion, the Council is composed of public representatives and their opinion is what counts (paragraph 15). Cheshin admits that were he a member of the Council, then he would have approved the film without any cuts. But this is not the question: "The authority is granted to the Council by the legislature--to the Council and not to the court. ... The principle of separation of powers requires us, in my opinion, not to interfere in the Council's decision" (paragraph 18).

According to Cheshin, "the work load share" between the Council and the court should be respected, and the Council's decision should not be ignored as if it did not exist. Cheshin expresses his concern that President Barak's approach might annul the Council (paragraph 29) and might be the Council's requiem (paragraph 48). Cheshin adds that the very existence of the Council is a question for the legislature to ponder, as the legislature is supposed to represent the public will. Until a change takes place in the existing law, judges should not impose on the Council norms that it does not accept (paragraph 46).

Furthermore, Cheshin objects to the test that Barak employed,

examining the artistic piece "as a whole." Whereas Barak avoids judging the segments that the Council wished to cut, Cheshin does not see how one cannot examine them if one contemplates interference in the Council's decision. Cheshin doubts the application of the Roth test to Israeli cases. (15) This is not only due to the differences between Israeli and American reality, or because of the different status assigned to free expression in the two countries, but also because the test was created for use in the area of punitive law. Therefore, its applicability to the examination of Censure Council considerations is questionable (paragraphs 26, 34). Accordingly, Cheshin thinks that it is possible to judge certain segments of a film and demand their removal. As evidence, Cheshin rightly contends, the film distributors themselves agreed to cut two parts that involved minors (paragraph 40). Furthermore, the Council enjoys the explicit authority to censor parts of films; therefore, the legislature anticipated the possibility that segments of films might require trimming (paragraph 30).

Justice Cheshin expresses surprise as to the lack of focus in Barak's opinion, and I join his astonishment. Although the issue is presented as a conflict between free expression and the offense to public sensibilities and morals, most of the discussion steers clear of the possible offense to sensibilities and morals. The test is not artistic, whether we are discussing a piece that is worthy of protection or "just" pornography, but rather a consequential test regarding the film's influence on those viewing it. Cheshin refers to "public order" and "public morals" as if they are one and the same (I believe that these two topics are different in essence, as is evident from the debate between Professor Hart and Lord Devlin regarding the place of homosexuality in society (16)), and he avoids analyzing the offense argument. Still, his conclusion is important: It is not the film's artistic value that should determine its offensiveness, but rather the outcome effects on its viewers. When we address the question of a certain film's influence on public sensibilities and morals, the artistic value is considered marginal. Adequate attention should thus be given to unfold the question of offense.

In sum, although Barak values the opinions of experts about the film's artistic merit, Cheshin does not see much importance in their opinion, he assumes that art experts and Council members have completely different considerations. Art experts are interested in art for art's sake and in general aesthetic values, whereas Council members and the court are interested in the film's effects on viewers, human dignity and respect, and social morals (paragraph 37). Again, Cheshin avoids addressing offense to the sensibilities as an issue worthy of protection. Apparently, maintenance of social morals is more legitimate in his eyes than consideration of offense to the sensibilities.

In any case, Cheshin thinks that the Council must not assign heavy weight to art experts' opinions and that Council members must not consider themselves as following in the experts' footsteps "because the role assigned to them by the legislature is different from the role of art experts." If we were to adhere only to artistic considerations, then we would allow the inclusion of segments

showing children in sexual activities because in judging the film as a whole, these segments might have artistic-aesthetic merit. Furthermore, the authority to consider films has been assigned only to the Censure Council by legal command. Thus, the Council should operate independently and should not delegate authority to others (paragraph 37).

The principled debate between President Barak and Justice Cheshin, who hold polar opinions about the scope of judicial intervention, is also worthy of further attention. Barak does not flinch from judicial intervention when it seems necessary to protect such democratic values as free speech, even if this means taking upon himself legislative roles. This is the broad judicial approach ("everything can be judged") that Barak preaches in many of his writings. (17) Cheshin, in contrast, wishes that legislative-like decisions be left for the legislature. When the court enters the territory of other governmental bodies, then it delegitimizes those bodies and undermines the separation of powers, a notion that Cheshin considers crucial for the maintenance of democracy.

Now, it would be quite unwise to categorically state that one school is better than the other. Judges of the formalistic school can be liberal judges if they safeguard liberal principles by their reluctance to make illiberal changes, whereas creative judges can introduce illiberal changes if they think that the changes supply better answers to specific problems or coincide with illiberal public demands for change. Both approaches have rationales and criticisms. On matters of free speech, however, it would be wise to recommend a middle ground.

On the one hand, too much intervention on the part of the court into legislative decisions might arouse alienation and distrust between the legislative and the judiciary branches of government. The legislature might justly feel that the court has taken upon itself excessive power and might seek to weaken the people's trust in the judiciary. Such alienation and resentment between the legislature and the judiciary can only be detrimental to the workings of democracy. On the other hand, for partisan political considerations, the legislature might avoid addressing pressing social issues and might prefer to leave the "hot potatoes" for the judiciary. In this situation, the courts are pressed to enter into contentious realms that are better handled by public representatives.

The golden path that lies between the formalistic approach and the judicial approach may be called the creative interpretation approach. It does not advocate that the courts take legislative roles, which might undermine separation of powers, and at the same time it allows room for creativity. Judges in states like Israel, which lack a written constitution and specific laws to guarantee freedom of expression, may be required to resort to creative judgments in order to protect this right. The creative approach allows room for judges to express their opinions when it seems that free expression is not receiving due protection. At the same time, there are no values that stand above the law and no judge stands above the legislature. Judges must make fresh judgments

about the rights of parties who come before them. This does not mean that judges create rights, but rather that they acknowledge them. They are authors as well as critics. They are asked to assume, insofar as possible, that the law is structured by a coherent set of principles about justice, fairness and procedural due process, and then to enforce these principles anew in each case that comes before them. In this way, each case can be treated fairly and justly according to the same standards. (18)

CONCLUSION OF THE COURT CASES ANALYSIS

The offense argument must be treated with caution. In all the cases reviewed here, the upholding of this argument was very problematic. In all cases where it was rejected, it was rightly rejected. Yet, as we have seen, the rejection of the argument was grounded on consequential reasoning about insufficient offense to public safety or public order. Because no probability of such offense could be proven, freedom of expression won. The court avoided undertaking a thorough analysis of the argument's validity independent of public order considerations.

Liberal democracy puts the individual, not public order, at the center of attention. It is clear that the maintenance of public order is meant to protect the individual. Yet, we encounter a leap of logic over the individual to focus on the consequences that individuals who consider themselves offended might bring upon society. What happens to the individuals themselves? Are they not in need of protection?

My line of reasoning places the individual at the center in examining whether the individual needs protection from certain expressions because they might offend one's emotional and spiritual system. The Offense to Sensibilities Argument in and of itself can serve as grounds for restricting freedom of expression in extreme cases when the offense is severe and the target group (individual or individuals) cannot avoid being exposed to the offense. The factors that must be taken into account are four in number:

1. The content of the expression.
2. The manner of expression.
3. The intentions of the speaker.
4. The circumstances.

It is emphasized that we are dealing with an especially offensive expression that might damage the sensibilities of the individuals whom the speaker wishes to offend. In order to determine how offensive the expression is, we must examine its content and manner of expression. Sometimes, as for instance is the case with symbolic expressions, the content of the speech is included in the manner of expression. Thus, when people parade at the heart of a Jewish neighborhood wearing swastika armbands, they need not say anything. The message is loud and clear: no one can

mistakenly interpret this message of hate as something positive. As for the speaker's intention, we should be less tolerant toward offensive expressions when it can be proven that the speaker's intention is malicious and meant to hurt the target audience. This is the case when speakers announce beforehand that their aim is to hurt the sensibilities of their target group, as in the case of the Nazis who wished to demonstrate in Skokie. (19) As for the circumstances, these must be such that the target group cannot avoid being exposed to the expression. Following Joel Feinberg, this consideration is called "the reasonable avoidability standard." (20) The argument advanced is: Under the Offense to Sensibilities Argument, when the content or manner of expression is designed to cause severe psychological offense against a target group, and the objective circumstances make that group inescapably exposed to that offense, then the expression in question has to be restricted.

It is reiterated that the offensive speech should be restricted only if the target group finds itself in an impossible no-win situation. That is to say, if the target group were to confront the offending group, on the one hand, it would be exposed to the particularly offensive expression. On the other hand, if the target group were to choose to avoid the exposure, then this would mean a victory for the opponent--viewed as an equally noxious offense by the target group. The example I wish to use to illustrate the Argument concerns the attempts of Member of Parliament Meir Kahane to visit Arab villages.

APPLICATION: KAHANE'S VISITS TO ARAB VILLAGES

Immediately after Meir Kahane was elected to the Knesset in the 1984 elections, he began a series of visits to Arab villages in order to preach his Orwellian message about "emigration for peace," which he claimed would bring about a just and efficient solution to the national split in Israel. Kahane sent letters to Arab residents in order to promote the message, but did not stop at this and asked to deliver the message personally to the villages. The first visit was on August 30, 1984 to the village of Umm El Fahm. Kahane arrived with a group of people dressed in yellow shirts on which the Jewish Magen (Star of) David was drawn together with a clenched fist. The group was stopped by the police three kilometers outside the village. Kahane turned to the court to overrule the police action. However, Kahane himself cancelled the appeal on July 4, 1985 on the grounds that the issue was no longer relevant because of measures taken by the Knesset to stop the visits. In December 1984, the Knesset House Committee voted in a twelve-to-eight decision to restrict Kahane's parliamentary immunity, namely, the legal provision that secures members of the Knesset free access to any public place. The restriction was intended to enable the police to prevent Kahane from entering Arab communities in which his presence might provoke breach of the peace. (21)

The decision to restrict Kahane's immunity in order to prevent him from entering Arab villages was correct not only on grounds of disturbing the peace, but also on grounds of the Offense to Sensibilities Argument. (22) The main consideration here should

be the offense that such a visit could have caused to the Arabs in the village, not public order considerations, although such a danger certainly existed. The Arabs' likely hostile response should not serve as a critical consideration in this case. Expressions should not be prohibited merely because of a hostile audience. (23) It is further emphasized that we are dealing with offense to sensibilities, not with physical offense to the Arabs, as was the case in John Stuart Mill's example of the corn dealer. The Arabs were not in danger of immediate physical harm as a result of the demonstration, the goal of which was allegedly to explain to the Arabs the main points of Kahane's "emigration for peace" plan.

A careful examination of the case shows that the content of Kahane's expression was extremely problematic and offensive. Kahane wished to explain to the Arabs that their place is outside of Israel and that they had better leave now when they still can, rather than later when Kahane will "take care of them" with more drastic actions. In this context, it does not matter whether the content of the expression was true or false. The possible implications of the offensive expression that could have resulted from delivering the Kahanist message to the target group were extremely harmful.

It is not just the content of the expression that was problematic and offensive. The manner in which it was intended to be delivered also contributed to the stimulation and excitation of emotions. In his loud speeches, in his violent actions against Arabs, in his arrogant manner, and in his offensive outfits, Kahane delivered a message of threat and hatred. To a great extent, the yellow shirt with the clenched fist transmitted to the Arabs a message that resembled what the swastika conveys to Jews. Both messages communicate deep-seated hatred between the conflicting sides that cannot be overcome through the democratic means of debate and discussion, mutual tolerance and compromise. These require reciprocity and cannot exist or be promoted when they are accepted by only one of the sides. What compromise would be acceptable to a Nazi? Babbi Yar instead of Auschwitz? And what compromise would be acceptable to a Kahanist--transfer to Jordan instead of Lebanon as a first step?

As for the speaker's intention, it is difficult to imagine that the message Kahane wished to deliver was truly intended to convince the Arab citizens of the righteousness of his ideology. Clearly, Kahane did not really and truly expect the Arabs to become convinced of the truthfulness of his messages and consequently adopt them. Only a complete cynic could claim that Kahane was hoping that the Arabs would greet him by saying, "Ahalan and Sahalan, tomorrow we will leave our homes," homes in which they had lived for generations, long before Kahane's arrival in Israel in 1971. To a certain extent, the situation that Kahane wished to stage may be compared to a discussion between Nazis and Jews about the advisability of the Nazi doctrine. The Arabs could not realistically hold a debate with a person who preached to banish them or kill them. This was exactly the solution that the Nazis espoused at the beginning of the Madagascar plan, later to be replaced by the "final solution."

Kahane preached his opinions all over the country and publicized them in a series of books and in numerous pamphlets and articles. (24) The message about the appropriate place for the Arabs was delivered via hundreds of communication channels. The visits were conducted for no other reason than to offend the public that was exposed to them directly, in a way that they could not ignore. One can draw an analogy between a Kahanist march in Umm El Fahm and a Nazi march in a Jewish neighborhood, such as Skokie, which is mostly populated by Jews, most of whom are Holocaust survivors. (25) If we resort to Thomas Scanlon's theory, it is clear that Kahane did not wish to create a "good environment" in which to promote and shape the opinions of the Arab citizens. (26)

Another factor that must be examined is the circumstances. The analysis of the court cases *supra* emphasized that free expression should not be restricted if the audience who might be offended by the expression can avoid the exposure to it. In the case at hand, Kahane's intended visits to Arab villages created a unique situation. The audience that was targeted by Kahane, the residents of Umm El Fahm, could not have avoided the offense and would have found themselves in a situation where either way they would suffer. Were they to choose to confront Kahane so as to say that Kahanism would not be accepted in their vicinity, then they would expose themselves to hatred, to offensive expressions, to yellow shirts and clenched fists. Alternatively, were they to choose to ignore the Kahanists coming into their village, then this might imply that they were allowing Kahanism to exist, even in an Arab village. With the latter alternative, they would have played into Kahane's hands, leaving him the stage for victory. This is an impossible no-win situation for the residents of Umm El Fahm or any other Arab village. (27)

This form of expression could not be permitted because the extent of the possible offense was very high and because the Arabs lacked ability to avoid the offense. The criteria of the content of the expression, its manner, the speaker's intent and the circumstances together supply valid grounds to restrict free expression under the Offense to Sensibilities Argument. It is emphasized that one should not conclude from this rationale that Kahane's visits to Jewish cities also should have been prohibited. One cannot compare a visit to an Arab village, which is in a sense the backyard (or front yard) of the target group, to a visit to any city in Israel. Furthermore, the scope of tolerance would entertain Kahane's public meetings in mixed cities where Arabs and Jews reside, such as Lod and Jaffe (but not in front of mosques in those cities), or in campuses and halls of universities, such as Jerusalem and Haifa. Only in Arab cities and villages, the Offense of Sensibilities Argument may serve as a trump card (in the words of Ronald Dworkin (28)) that is superior to the Free Speech Principle.

Liberals might advance a number of arguments against the Offense to Sensibilities Argument. They might say that it was most logical for Kahane to transmit his message in Umm El Fahm of all places because this was, from his point of view, the optimal stage. It was logical for him to choose a place where he could receive the public resonance that he was seeking. I agree that, indeed, this

would be logical on his part, but then--while acknowledging the "democratic catch"--a question arises: Does this consideration justify a grave offense to the sensibilities of the target audience? Democracy is not required to provide those who preach hatred with the optimal stage to transmit their hateful messages. Rather, it should protect weak groups who cannot avoid exposure to such hateful messages.

A second argument would ponder whether the prohibition of the Kahanist parade in Umm El Fahm might serve as grounds for prohibiting a civil rights parade in the Kahanist Jewish settlement of Kfar Tapuach thus drawing the scope of tolerance too narrowly. People might argue that were we to prohibit Kahanist parades in Arab villages, then by the same token we should also prohibit liberal demonstrations in the Kahanist fort. They would maintain that it is better to permit both demonstrations than to prohibit both; consequently, they would side with the right of the hate mongers to march and demonstrate in any place, including in Arab villages.

However, this argument leads to moral relativism, as if people are unable to distinguish between good and evil, between respect and concern for people on the one side and hate and discrimination on the other. It must be reiterated that democracy is based on two background rights: respect for others and not harming others. Those who reject these principles find themselves in a dilemma and pose a problem for society. It is contradictory to expect democracy to assist those who work against it and who wish to undermine its background rights.

The analogy between Kahane's group and the Civil Rights Movement is flawed because the rules that guide each group are essentially different and thus impair the supposedly equal treatment each deserves. Kahane and his followers in Kfar Tapuach base their ideology on hating non-Jews and on disrespecting and harming them. This ideology stands in stark contrast to the principles of democracy. At the same time, activists of the Civil Rights Movement seek to protect democracy and to promote the principles of not harming others and of respecting others in every place, including in Kfar Tapuach.

Even if we assume that the people of Kfar Tapuach are indeed greatly offended by the "hurtful" message evinced by civil rights marchers and that the intensity of the offense does not fall short of that which the Arabs might feel upon encountering the Kahanist message, we must still concede that democracy does not operate within a moral lacuna. It does not operate in a relativist space where good is bad and bad is good. Democracy operates under certain cherished values. The people of Kfar Tapuach do not have a problem with the Civil Rights Movement alone, but rather with democracy itself. If we truly wish to protect them from liberal values, then we must annul democracy completely and accept their "values," which would be too high a price to pay in the eyes of most liberals.

A third argument that liberals might raise is the slippery slope argument. According to Lackland H. Bloom, who examines how

American courts have addressed offensive speech appeals, there are so many different types of offensive speech claims pressed on society and the courts by aggrieved groups and individuals that it would be legally and politically difficult to resist the granting of exceptions for all once relief is accorded to some. (29) How can we frame the Offense to Sensibilities Argument in a way that would not open the door to prohibiting any speech that some might consider offensive? In response, let me first say that the slippery slope argument does not really address the Offense to Sensibilities Argument and does not question its core rationale. All it does is to warn against employing it carelessly. (30) Indeed, we must be strict with the formulation of this Argument and narrowly define it so as to prevent its cynical misuse in prohibiting freedom of expression. Prescribing boundaries to freedom of expression requires a painstaking effort, involving careful consideration and lucid articulation, so as to avoid sliding down the slippery slope and allowing room for illiberal interpretations that would broaden it unnecessarily.

Thus, it is reiterated that the Offense to Sensibilities Argument is applicable only when it concerns speech that might cause profound psychological offense to the unwilling target group, resulting in dejection and shock. The concern here is not with just any offense. Society is full of "sensitive" people, such as racists who are offended by the mere sight of a Jewish woman and an Arab man holding hands. However, the Offense to Sensibilities Argument is not meant to assist those "sensitive" people or to equip them with instruments to fight against democracy. It is also clear that we are not talking about mere annoyance or feelings of discomfort. Life is full of expressions that make us uncomfortable, but only fascists would seriously demand their censorship. Here we are dealing with expressions that might cause an unwilling target group severe emotional trauma that is morally on a par with physical harm. Deep emotional distress that undermines one's psychological system may be no less harmful than bodily injuries.

How can we identify a serious offense as distinguished from a relatively minor offense? It would appear that certain expressions stand out under specific circumstances and that it is possible to logically deduce that they should not be tolerated. This is the case when Kahanists wish to "pay a visit" to Arab villages or when pornography lovers attempt to advertise their merchandise in religious neighborhoods. In less striking situations, judges are advised to consult psychologists and other experts for advice in order to assess the seriousness of the harm in pertinent cases. This is not to say that psychologists should replace judges. All I say is that we should encourage judges to seek psychologists' advice before reaching conclusions. (31) Just as the courts seek the advice of art critics and professionals in assessing the artistic quality of questionable productions, so the courts are advised to consult professionals in assessing psychological damage.

Having said that, psychology, like most (if not all) sciences is not precise. However, psychologists are better equipped than any other profession to examine and assess offenses to the soul. As is the case with medicine, here too it is advisable to ask for a second

opinion. When the two opinions are in agreement, then judges will have another central criterion to consider before writing their judgment. If there is a conflict between the two opinions, then the judges will decide which one is more appealing, or they may disregard both opinions or ask for a third opinion. In any case, it would be unwise to discard this procedure from the outset.

Thus far, most liberals have avoided addressing this complex issue because of the difficulty in assessing emotional offenses. Finding themselves unable to reach an appropriate solution, they had choose instead to throw away the baby with the bath water, that is, not to deal with the issue at all. This is not a solution. As soon as we are convinced of the authenticity of the problem and of the seriousness of the issue, there is little wisdom in ignoring it simply because of the difficulties involved in assessing offenses. On the contrary, these difficulties should press us to dedicate more thought to the issues rather than to disregard them.

Lastly, some might claim that the combination of factors mentioned above under the Offense to Sensibilities Argument presents such a high standard to fulfill that it would be almost impossible to use it at all. If this is indeed the feeling, then the goal set in this essay is achieved. This essay wishes to present a narrow argument that would justify prohibiting free expression only in exceptional cases. While reviewing the court cases, I argued that it was right to reject the offense argument when it had been rejected and expressed my dissatisfaction with the cases in which it had been accepted. There is a significant difference between the use of the offense argument in the above cases and the example of Kahane's visits to Arab villages.

Having said this, the situation of Kahane's visits to Arab villages was special, but not unique. We can imagine other similar cases in which the Offense to Sensibilities Argument would provide grounds for limiting free expression. The Skokie case was mentioned as a situation in which it would have been appropriate to make use of the Offense to Sensibilities Argument to restrict free expression to the neo-Nazis. Similarly, the scope of tolerance should not include hate speech of an anti-homosexual preacher in a gay neighborhood in San Francisco, or the burning of a cross by the Ku Klux Klan outside the home of an Afro-American family in Harlem. (32) In contrast, the preacher, the neo-Nazis and the KKK still enjoy the right to express their homophobic and racist opinions in other places, where the target groups will not feel compelled to stand against and suffer the offense. (33)

Likewise, it is one thing to allow the publication of The Satanic Verses and quite another to grant Salman Rushdie permission to promote his book in a religious Pakistani neighborhood in England, should he wish to do so. The point of coming to that neighborhood could only be to assault the psyche of the Muslim-Pakistani population. Even if Mr. Rushdie himself were willing to take the risk and bear the consequences of his questionable book promotion, the offense to the relevant neighborhood involved in such an act remains too great to be overridden by his right to free speech. (34)

CONCLUSION

The Offense to Sensibilities Argument provides valid grounds to limit expression when the content and/or manner of expression causes severe psychological offense to a certain target group, and the objective circumstances are such that the target group cannot avoid subjection to the offense. In December 1996, the Association of Widows and Orphans of the Israeli Defense Forces petitioned against the decision of the Cable Broadcasting Authority to screen a movie entitled "Sex, Lies and Dinner," claiming that the movie greatly offended feelings of IDF widows. Justices Shlomo Levin, Yitzhak Zamir and Tova Strasberg-Cohen, in a laconic decision, denied the petition. (35) The Justices said that while acknowledging the debt each and every citizen owes to the soldiers who sacrificed their lives--a debt that entails respect and appreciation to the widows and orphans of these soldiers--this debt was not enough to decide the principled issue presented before the court. Although the court is usually reluctant to interfere in the decisions of bodies authorized by law, the Justices recognized that sometimes exceptions can be made--however, this was not the case here.

The Offense to Sensibilities Argument does not stand in such cases, even if the offense is serious and severe, because the reasonable avoidability standard is not satisfied. Those who might be offended by the film's content could easily avoid it by clicking the remote control. My position would be different were we to talk about the state-controlled public channel (Channel 1), which is expected to show a higher level of sensitivity regarding such problematic messages that concern soldiers. However, there is certainly no room to restrict the screening of cable films just because a certain sector of the public might be offended. The Israeli television viewers have more than enough channels from which to choose, and they are not obligated to view a film that offends their sensibilities. Note that it is not suggested that the Offense to Sensibilities Argument is applied differently to public or state broadcasting than it does to private commercial radio or television. What is suggested is more responsibility and respectability on part of public broadcasting, showing more sensitivity to the public. Not all people are connected to cables and satellite. Some people have access only to the two public channels, 1 and 2. Public broadcasting, I feel, should be more cautious about what is aired.

In his comments on a draft of this article, Jack Pole writes that he is uneasy about the view that a person who does not want to listen or see a certain program can just simply switch it off. In cases where the program is gravely offensive or damaging, the knowledge that it is influencing other people, possibly one's neighbors, can itself lead to fear and suspicion. (36) I do not find this line of argument very convincing because then the line-drawing of the scope of tolerance would become an impossible task. It gives too much room for speculations and suspicions. How can one know what is influencing one's neighbors? It might entail inquiring about the character of our neighbors, what might influence and what not, this in an age when many people do not

even know their neighbors (or, at least, many of them). If this would serve as a rationale for limiting free speech, then we might end with no speech at all.

Another pertinent matter concerned the screening of a film entitled "Good Holocaust." This film documents the activities of a Holocaust survivor who visits different places, where he talks about his experiences during that dark period in Europe. The controversy was not related to the film's content, but rather to its oxymoron title "Good Holocaust"--a tasteless, offensive title to which Holocaust survivors objected. Eventually, the court was not required to decide the case because the petitioners withdrew their appeal. For my part, I do not know what the possible effects of this title might have been on Holocaust survivors exposed to it through newspapers and public billboards. It can be assumed that they would find it difficult to avoid the advertisements. In this and similar cases, it is advisable that the courts consult psychologists about whether the Offense to Sensibilities Argument may serve as possible grounds for restricting free expression. (37)

The sensitivity of Holocaust survivors was at the center of another controversy regarding the question of whether to play the music of anti-Semitic composers. For many years, various symphonies in Israel have wished to play the music of Richard Wagner and every time have faced criticisms and objections of Holocaust survivors, claiming that Wagner--whose works accompanied the suffering of the Jewish people during the Holocaust--should not be played. Wagner, the official composer of the Third Reich, was often played in Nazi assemblies, in the concentration camps, and on the way to the mass killings. He also wrote anti-Semitic tracts from which Hitler drew inspiration. For their part, speaking of the need to distinguish between an anti-Semitic person and his appreciated works of art, the various symphony orchestras claim that any self-respecting orchestra includes in its repertoire some of Wagner's works.

In one case, two Holocaust survivors filed a petition against the Rishon LeZion Symphony in the Tel Aviv District Court, arguing that playing the music of Richard Wagner and Richard Strauss profoundly offended the feelings of Holocaust survivors and would do damage to the image of the state of Israel. The Symphony claimed that free speech had precedence over the possible offense to the sensibilities of some people, and that the courts should avoid interfering in artistic freedom as they do in decisions of academic institutions. (38)

Judge Yehuda Zafet wondered about why the petitioners appealed to the court only nine days before the scheduled concert in October 2000, when the symphony had presented its controversial program for the concert season in March 2000. Judge Zafet spoke of the importance of free expression as a basic right that should be restricted only sparingly, maintaining that the controversy over playing the music was fundamentally ethical and not a matter for the courts. Zafet was not convinced that playing the controversial music would seriously offend the petitioners and hence denied relief. The petitioners then appealed to the High Court of Justice. In

a laconic decision, Justice Yaacov Tirkel did not find enough justification to overturn the District Court's decision. He expressed regret that no solution was found "to this painful controversy by way of agreement," and that the court was asked to intervene. (39)

In 2001, this issue was again put on the public agenda when the former Israeli conductor, Daniel Barenboim, announced his wish to play Wagner in the Israel Festival. Holocaust survivors protested against Barenboim's intention, saying that playing Wagner during the most important public music festival would greatly offend their sensibilities. Barenboim, director and chief conductor of the Berliner Staatsoper (State Opera of Berlin), explained that he has the greatest understanding and compassion for all Holocaust survivors and their terrible associations with Wagner's music. He said that he also understands that some people cannot forget these strong associations and that they should never be forced to listen to Wagner's music in a concert. Therefore, Wagner's works should not be played during concerts for regular season ticket-holders, when faithful subscribers would be confronted with music that raises painful memories. However, the question must be asked whether any person has the right to deprive any other person who does not have these same associations of the possibility of hearing Wagner's music. This, argues Barenboim, would indirectly serve the misuse of Wagner's music by the Nazis. Moreover, Israel must act as a totally democratic state, which entails not preventing people who are free of these associations from listening to Wagner's music. (40)

Barenboim's viewpoint was not accepted. After pondering the issue for some months, on May 30, 2001 the management of the Israel Festival decided that the time is not yet ripe to play Wagner. Barenboim agreed to perform instead musical pieces of other composers. This decision was reached after receiving many appeals of Holocaust survivors and of other concerned citizens, among them President Moshe Katsav, Minister of Science, Culture and Sports Matan Vilani, and Mayor of Jerusalem Ehud Ullmert. (41)

Based on the above criteria, the petition of the Holocaust survivors would only be appropriate if they, as orchestra subscribers, were required to listen to Wagner. However, this was not the case. The festival repertoire is broad and varied. It includes more than enough concerts in which Wagner is not played. Accordingly, all that Holocaust survivors would have to do is remain outside the concert hall. The mere knowledge of the Wagner concert is not weighty enough to cause profound offense to sensibilities. At the same time, this rationale has one single exception: the Israeli Philharmonic Symphony. Because of its importance and rank in Israel as first among equals and its representative status as the State orchestra, it is appropriate for the Israeli Philharmonic to avoid playing Wagner as long as Holocaust survivors are still amongst us. State bodies, sponsored by the public, are expected to exhibit more restraint and sensitivity than other bodies.

The same rationale of restraint that is expected of a state representative body is true also for other public bodies that are

expected to be more considerate toward social pluralism. For instance, the public TV channel should not screen the film "The Last Temptation of Christ" so as not to offend the Christian public. The film can be broadcast on cable channels that are subsidized by subscribers' fees or on channels sponsored by commercials. Broadcasting this film on the state channel transmits a symbolic message to the offended group: We do not care about you and we are not sensitive to your feelings.

In 1998, when Israel celebrated 50 years of independence, many resources were invested in staging a ballet performance called "Jubilee Bells." A leading ballet group, "Bat Sheva," chose to perform a production called "One Who Knows," involving indecent exposure of their bodies. Because this was the main event of the 1998 Independence Day and because it was broadcast live by the two main channels--the public channel (Channel 1) as well as the commercial channel (Channel 2)--religious people asked to censor the performance on the grounds that it offended their feelings.

I believe that it could have been possible to prevent the "cultural war" that ensued if thought had preceded action. "Bat Sheva" is a prominent ballet group with a rich and varied repertoire, and it could have easily chosen a beautiful performance that would not have offended any public sector. After all, the performance was meant to be for the enjoyment of all sectors and not only for the secular. Unfortunately, the planning of the 50th anniversary celebration was not characterized by much thought. Hasty thinking caused a heated atmosphere that could have been prevented.

From this viewpoint, it seems that the religious outcry was justified because the choice of performance did offend their sensibilities. Those who object to my conclusion might say that the offense was not severe enough as to rock the sensibilities of religious people. Yet, here the special historical circumstances of the occasion and the magnitude of the event--the main celebration of the year of independence--required special and sensitive consideration of all public sectors. (42) The avoidability standard in this case was not reasonable because we cannot expect religious people to avoid the major event of this important holiday and to shut themselves off from the two major television channels that broadcast the special live performance.

NOTES

(1.) Part One was published in IJPE 2(2).

(2.) H.C. 606/93 Kidum (1981) v. Broadcasting Authority, PD. 48 (2), 8.

(3.) "Go excel" in Hebrew is "lech titzayen." "Go flick yourself" is "lech tizdayen."

(4.) H.C. 73/53 87/53 Kol Ha'am v. Minister of the Interior, PD. 7, 871.

(5.) On the American preferred position doctrine, see Justice Stone

in *United States v. Carolene Products Co.* 304 U.S. 144 (1938), fn. 4. See also *Jones v. Opelika* 316 U.S. 584 (1942); *Murdock v. Pennsylvania* 319 U.S. 105 (1943); *Thomas v. Collins* 323 U.S. 516 (1945).

(6.) For further discussion, see Aharon Barak, "Freedom of Expression and Its Limitations," in R. Cohen-Almagor (ed.), *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin* (London: Ashgate Publishing Ltd., 2000), 167-488.

(7.) A central judgment on this topic is *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), esp. 566. See also William Van Alstine, "Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech," *UCLA L. Rev.*, Vol. 43 (1996), 1635; Robert Post, "The Constitutional Status of Commercial Speech," *The Nimmer Lecture*, UCLA (2000). For opinions that downgrade the value of commercial expression, see Ronald K. L. Collins and David M. Skover, "Commerce and Communication," *Texas L. Rev.*, Vol. 71(1993), 697, esp. 710-726; Steven Shiffrin, "The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment," *Nw. Un. L. Rev.*, Vol. 78 (1983), 1212, esp. 1223-1251; *Board of Trustees v. Fox*, 109 5. Ct. 3028, 3033 (1989); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 340 (1986). Dissenting opinions are expressed by Justice Brennan in *Posadas* (minority opinion) and by Rodney A. Smolla, "Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech," *Texas L. Rev.*, Vol. 71(1993), 777-804; David F. McGowan, "A Critical Analysis of Commercial Speech," *California L. Rev.*, Vol. 78 (1990), 359-448.

(8.) A. Shiner, "Freedom of Commercial Expression," in W.J. Waluchow (ed.), *Free Expression* (Oxford: Clarendon Press, 1994), 91-134; Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), esp. 54-63; *7805/77 X & Church of Scientology v. Sweden*, 16 D. & R. 68.

(9.) For an extended discussion, see C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989), 194-224.

(10.) See Cohen-Almagor, *Boundaries of Liberty and Tolerance* (Gainesville, FL: University Press of Florida, 1994), esp. chapter 10.

(11.) *H.C. 4804/94 Station Film Company v. Censure Council of Films* (decision granted on January 9, 1997).

(12.) *Book of Statutes 1391* (March 25, 1992).

(13.) *Roth v. U.S.* 354 U.S. 476 (1957). In *Miller v. California*, the American Supreme Court formulated its obscenity test. Three factors should be examined: whether the average person, applying "contemporary community standards" would find that the work in question, taken as a whole, appeals to prurient interest; whether the work depicts or describes, in a patently offensive way, sexual

conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If the answer to all three questions is positive, then the speech is considered obscene and is not protected under the First Amendment. Cf. *Miller v. California* 413 U.S. 15 (1973).

(14.) See Aharon Barak, *Interpretation in Law* (Jerusalem: Nevo, 1994), three volumes (Hebrew), esp. Vol. 3 concerning constitutional commentary.

(15.) *Roth v. US*. 354 U.S. 476 (1957).

(16.) H.L.A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

(17.) See, for example, Aharon Barak, *Interpretation in Law*, Vol. 1 (Jerusalem: Nevo, 1992) and "The Role of the Supreme Court in Democratic Society," in R. Cohen-Almagor (ed.), *Basic Issues in Israeli Democracy* (Tel Aviv: Sifriat Poalim, 1999), pp. 129-141 (both in Hebrew).

(18.) I follow the law-as-integrity theory, as developed by Ronald Dworkin in his various writings and especially in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). See also Dworkin, "The Model of Rules," *University of Chicago L. Rev.*, Vol. 35 (1967), 14-46; "Hard Cases," *Harvard L. Rev.*, Vol. 88 (1975), 1057-1109; "No Right Answer?," *New York University L. Rev.*, Vol. 35 (1978), 1-32; "Natural Law Revisited," *University of Florida L. Rev.*, Vol. 35 (1982), 165-188; "Law's Ambitions for Itself," *Virginia L. Rev.*, Vol. 71(1985), 173-187; Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, chapters 10-13.

(19.) Cf. *Skokie v. NSPA*. 373 N.E. 2d, 21 (1978); *Village of Skokie v. NSPA*. 366 N.E. 2d 347 (1977); *Collin v. Smith* 578 F 2d. 1197 (7th Cir. 1978); R. Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave, 2001), chap. 1; Richard Delgado and Jean Stefancic, *Must We Defend Nazis?* (New York: New York University Press, 1997); David Goldberger, "Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech," *Brooklyn L. Rev.*, Vol. 56 (1991), 1165, at 1168-1174. Goldberger shows that while American courts have held that racist speech was entitled to constitutional protection, many state courts developed the tort of the intentional infliction of emotional harm and applied it to racist insults.

(20.) Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), 1-26.

(21.) Cf. Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, chap. 12.

(22.) There are those who would claim that these visits should be restricted because of other reasons associated with the racial

character of the message that Kahane wished to deliver. David Kretzmer and Justice Eliyahu Matza hold the opinion that racial expression constitutes special expression that does not deserve democracy's defense. See Eliyahu Matza's words in H.C. 2831/95 Rabbi Ido Elba v. State of Israel (September 24, 1996) and H.C. 6696/96 Benjamin Kahane v. State of Israel, especially paragraph 18 of his opinion. Also, David Kretzmer, "Freedom of Speech and Racism," *Cardozo L. Rev.*, Vol. 8 (1987), 445-513.

(23.) See H.C. 153/1983 Levy v. Commander of the Southern District of Israeli Police, P.D. 38 (2), 393, 404.

(24.) See, for instance, Meir Kahane, *They Must Go* (New York: The Institute of the Jewish Idea, 1981); *Listen World, Listen Jew* (New York: The Institute of the Jewish Idea, 1983); *Uncomfortable Questions for Comfortable Jews* (Secaucus, New Jersey: Lyle Stuart, 1987); *The Challenge--the Chosen Land* (Jerusalem: Center for Jewish Consciousness, 1973, Hebrew); *Forty Years* (Jerusalem, 1978, Hebrew).

(25.) Cohen-Almagor, "Harm Principle, Offense Principle, and Hate Speech," in *Speech, Media and Ethics: The Limits of Free Expression*, pp. 3-23.

(26.) Thoman Scanlon, "A Theory of Freedom of Expression," in R. Dworkin (ed.), *The Philosophy of Law* (Oxford: Oxford University Press, 1977), 153-171; idem., "Freedom of Expression and Categories of Expression," *Un. of Pittsburgh L. Rev.*, No. 3 (1979), 519-550.

(27.) The point about not being able to avoid the offensive speech is made by a US Supreme Court case, which allows the state to ban picketing around private residences. Cf. *Frisby v. Schultz*, 487 U.S. 474 (1988). 108 S. Ct. 2495 (1988). For discussion of this case, see R. Cohen-Almagor, "The Right to Demonstrate v. the Right to Privacy: Picketing Private Homes of Public Officials," in *Speech, Media and Ethics: The Limits of Free Expression*, pp. 24-41.

(28.) Ronald Dworkin, "Liberalism," in *A Matter of Principle*, pp. 181-204.

(29.) Lackland H. Bloom, "Fighting Back: Offensive Speech and Cultural Conflict," *Southern Methodist University L. Rev.*, Vol. 46 (Summer 1992), 145, at 160.

(30.) Cf. Frederick Schauer, "Slippery Slopes," *Harvard L. Rev.*, Vol. 99 (1985), 361.

(31.) Those who oppose my suggestion would do so on two grounds: first, it is not democratic for psychologists to decide the law; second, at issue here are values, so why should we accept the opinions of psychologists? As for the first claim, I reiterate that the last word will be that of the judges. All I suggest is to seek expert opinion. As for the second claim, I do not agree that we are dealing with values, but rather with assessing the potential offense

to people's psychological system. I do not suggest a test for moral determination, but assistance in assessing possible damage to the target group in question.

(32.) In his comments on the first draft of this article, Jack Pole wrote: "Only in Harlem? I cannot see a case for permitting it anywhere since it is a notorious incitement to hatred and violence." Letter dated August 13, 2001. Many American lawyers and scholars would disagree, believing that the First Amendment should protect such political speech, despite its offensive character. After all, pleasant speech does not need protection. It is the harmful speech that requires exercising tolerance. As Fred Schauer puts it, the values underlying the right to free speech are values not themselves derived from the fact of speech's harmfulness and are not therefore undercut by the fact of speech's harmfulness on particular occasions. Cf. Schauer, "The Cost of Communicative Tolerance," in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance* (Ann Arbor, MI: University of Michigan Press, 2000), p.29.

(33.) Cf. *R.A.V. v. City of St. Paul* 112 S.Ct. 2538 (1992). For further deliberation, see Edward J. Eberle, "Hate Speech, Offensive Speech, and Public Discourse in America."

(34.) Other examples might be advertising abomination to a captive audience that would be offended because of its religious or conscientious beliefs (for example, advertisement of pornographic material to a captive feminist audience).

(35.) H.C. 9447/96 *Association of Widows and Orphans of IDF Soldiers v. Cable Broadcasting Authority and Others* (December 26, 1996).

(36.) Pole's personal communication (August 13, 2001).

(37.) See Robert C. Carson, James N. Butcher, and Susan Mineka (eds.), *Abnormal Psychology and Modern Life*, Tenth Edition (New York: HarperCollins, 1996).

(38.) File 001442/00, 27228/00 *Podlovski and Others v. Rishon-LeZion Symphonic Orchestra and Others*, Tel Aviv District Court (October 24, 2000). Also see Dorit Gabai, "The Court Decided: It is Allowed to Play Wagner," *Ma 'ariv* (Israeli daily) (October 25, 2000).

(39.) Civil Appeal 7700/00 *Podlovski and Others v. Rishon LeZion Symphonic Orchestra and Others* (October 26, 2000).

(40.) Daniel Barenboim, "A Rationale for Performing Wagner," *Los Angeles Times* (May 22, 2001).

(41.) Iléal Shachar and Yigal Avidan, "Finally: Wagner Will Not Be Played in the Israel Festival," *Ma 'ariv* (Israeli daily) (May 31, 2001), at 19.

(42.) An essentially different line of reasoning was expressed by

Ohad Naharin, the creator of "One Who Knows." See Avner Bernheimer, "I Did Not Come to Demonstrate, I Came Only to Work," an interview with Naharin in the 7 Days supplement of Yedioth Ahronoth (Israeli daily) (May 8, 1998), pp. 22-30, 81.

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