Offensiveness Analyzed: Lessons for Comparative Analysis of Free Speech Doctrines

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Introduction

This essay combines an observation of comparative law with a discussion of the issue of offensive speech. The clarifying example I will use is the comparison between the American and the Israeli doctrines of free speech.

One intricate question in the theory of free speech and its comparative study is whether offensiveness of speech may, by itself, be a *sufficient* basis for its being silenced. To use what became the paradigm of this dilemma, the "Skokie affair": how should a society respond to a request by neo-Nazis to parade wearing uniforms and swastikas in a town predominantly inhabited by Jews, when we foresee no violent incidents taking place?[1]

The Israeli and American doctrines of free speech diverge on this issue: offensiveness per se (albeit extreme offensiveness) may in Israel be a sufficient justification for prohibiting speech; in the United States it is not. This seems to be a significant difference. However, one of the central goals of this essay is to modify the interpretation we typically attach to such doctrinal differences. We tend to assume that important differences in legal solutions reflect different moral priorities, and, in that case, if one of the solutions is right the other must be wrong. This dichotomous way of thinking may result in a unitary, occasionally simplistic, perspective on appropriate legal solutions.

More concretely, this essay proceeds on two levels. On one level I present some claims regarding the components I find crucial for an effective comparative legal analysis. Since these claims are far from being common knowledge, I try both to validate them and to demonstrate

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their analytical potential by proceeding to a more concrete level. On this second converging level, I compare aspects of free speech jurisprudence in Israel and the United States, with an emphasis on offensive speech. The essay outlines the sociopolitical parameters that influence free speech in each country and the corresponding legal doctrines that have evolved. This comparison provides the background for a central question: is the doctrinal difference concerning offensive speech the result of differences in the two societies' moral priorities? I argue that the apparent difference attests less to a difference in moral priorities and more to the existence of certain, partly unique, stabilizing mechanisms of American free-speech jurisprudence and racial relations policy. I claim that these mechanisms structurally moderate harm to feelings in most types of offensive speech and thereby rationalize a legal rule in the United States, which does not accept harm to feelings as a sufficient basis for prohibiting speech.

Basic Claims Regarding a Comparative Study of Law

The essay is based upon two overall claims, neither is novel. First, a good analysis of comparative law demands a comprehensive perspective of law and society, i.e., a solid understanding of the interdependency between the legal system and the sociopolitical dimensions of the compared societies.

The second overall claim deals with the basic stages of comparative legal analysis. According to it there is an initial descriptive stage in which we try to identify, with regard to a certain subject matter, the central legal differences between the countries we are comparing. Then, still in this descriptive stage, we proceed by inquiring whether these differences are truly *meaningful,* either from a sociopolitical or a moral perspective. From a sociopolitical perspective we ask: do they differ in their function—in their social, political or economic ramifications, or in their efficacy in achieving certain goals? From the moral standpoint we inquire: how much do these legal differences actually testify to differences in the countries' value systems and basic

[1] *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

principles? Only when the differences reflect different moral priorities may we move to the normative stage, and ask which of the approaches is more desirable.

The first claim, the interplay between society and law, may be demonstrated in many ways. I will confine myself to a few examples drawn from the domain of freedom of speech.

Free speech doctrines deal with the "marketplace of ideas." Many of us conceive of the doctrine as the outline for justified or permitted state-restrictions upon speech, that is, as the precondition for a legitimate silencing of speech. But this understanding is too narrow a view of the issues involved. There are at least two other ways of influencing the marketplace of ideas besides simply the silencing of expression that the state considers to be harmful. One way this can be done is *non-intervention*—the choice not to act against powerful private actors in the civil society. The government may opt for passivity because these actors are pushing society in the direction the government prefers anyway, or because these actors are good enough at silencing 'problematic' views, thus letting the state sit idle and not 'dirty its hands.' Consider, for example, the issue of Spanish in the United States. The federal government does not have to impose an official "English-only" policy. The schools are overwhelmingly run in English, thus eliminating the language issue for the second generation; cultural and economic pressures do much of the rest of the job. Another important type of state intervention is also somewhat veiled. This is *affirmative support* of certain favorable views rather than the silencing of counter-views. Examples of such affirmative support include enlarging the function of the state as a speaker, making use of state-owned media, adopting decisions in the field of elementary and secondary education, and providing selective financial support or tax exemptions.

In addition, social arrangements, including legal ones, are contingent by nature. They are dependent upon historical and social circumstances, cultural norms and the like. Thus, for example, the existence of a well-developed censorship apparatus in one society and the lack of one in another, does not necessarily attest to deep differences in the two societies' values and priorities. Each society reflects its special circumstances, so that the censorship mechanism in the

first society may be a product, partly or wholly, of a state of emergency. (We should be careful however not to accept what is merely a pretext). Another important contextual/circumstantial difference might be the existence of a non-legal social mechanism that replaces the legal arrangements that appear in the other society.

Considering these factors, it is possible to see that the pivotal axis for comparative law should be the *function* of legal arrangements, the key question being: Is a difference in the legal arrangements functional, or is it only a difference in appearance? If the difference is indeed functional, then we proceed to the additional question: Does the difference spring from different circumstances or from different values and basic principles?

Comparative analysis of aspects of the doctrines of free speech in Israel and the United States, therefore, requires an investigation of the major sociopolitical differences and similarities between the two countries.

Israel and the United States - The Principal Socio-Political Parameters

Israel combines a particularistic interest, namely its 'self'-identification as the state of the Jewish people, with a universalistic commitment defined by its allegiance to a liberal democratic tradition. Internally, Israel is a deeply-divided society.[2] There is both an ethno-national cleavage of Arabs and Jews within Israel, and a major religious cleavage expressed by the division between religious and secular Jews.[3] In addition, Israel must contend with significant geo-

[2] By "deeply-divided societies" I mean societies that contain extensive communal divisions along lines of an ascriptive nature, such as national identity, racial attributes, ethnic origin, or religion. These societies are naturally more prone to inner tensions and current or potential instability. AREND LIJPHART, DEMOCRACIES IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 3-4 (1977), and DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 31-32 (1985).

[3] The current population of Israel as of 1998 was estimated at 5.94 million, of which, approximately 80% were jews and 20% were non-jews (mostly members of the Arab minority). *See* ISRAEL MINISTRY OF FOREIGN AFFAIRS, ISRAEL AT 50: A STATISTICAL GLIMPSE, *available at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00MX0 (last visited Dec. 18, 2001). There are more cleavages within the Israeli society, but I will mention only a third important one – the division between Ashkenazi Jews (Jews of European descent) and Mizrahi or Sephardi Jews (Jews mainly from Mediterranean or North African countries).

political tensions. It must deal with the conflict between the Israelis and the Palestinians (especially those who live in the occupied territories—the West Bank and Gaza Strip—since 1967); and the conflicts between several Arab states and one Muslim non-Arab state (Iran). One has to remember that these tensions are augmented by one of the above-mentioned cleavages: the one vis-a-vis the Palestinian-Arab minority (the Palestinian citizens of Israel). This national minority is perceived as trapped in an irredentist situation—i.e., trapped in a conflict between its people and the country of its citizenship.[4]

How does Israel compare sociopolitically to the United States? The first point follows what has just been outlined: Israel must deal with greater geo-political pressures and a deeper sense of fragility. Since its inception, Israel has basically been under a state of emergency. One should be careful, however, not to overstate this point as the intensity of security problems fluctuates. Yet, one should remember that regardless of these fluctuations, there are genuine enduring tensions, which call for certain precautions (in the domain of expression, military censorship may be one example).

Another point is that both countries share at least two very important characteristics: both based on a democratic ethos and are deeply-divided or 'plural' societies. In the States the major cleavage is race; in Israel it is national identity. These commonalties are very significant indeed, but, at the same time, we must note that we encounter here two very different kinds of 'pluralism.' These two societies are using substantially different models for managing the basic cleavage that divides them.

The United States uses a *liberal integrative* model. The concept of America as a 'melting pot' is one variety of this model. In the liberal integrative model basic group identities are exposed to cultural and economic pressures that erode them. These identities are supposed to be

[4] During clashes which took place within Israel in October 2000 (simultaneously with the Palestinian second *Intifad*a), twelve Arab citizens were killed by the Israeli police.

replaced by an overarching loyalty, a common belongingness to the American society.[5] Even if American public policy were to become more multi-cultural in orientation, this would not represent a radical change of course. American culture will not become more tolerant to parallel cultures, only to subcultures. Subcultures are limited to not much more than the preservation of a few folkloric features of the ancestral culture. The two fundamental elements of the liberal-integrative attitude are, then, the strategic choice of integration of subgroups into one nation, and the formal neutrality of the state in terms of race, religion, and national origin. If instead of neutrality the state had a non-neutral character this would prevent the creation of the overarching common citizenship.

Israel manages its pluralism differently; it employs an *'ethnic democracy' model* to negotiate the Arab / Jewish inter-communal relationship.[6] First, the state is not neutral concerning the national cleavage, but rather, it takes a side, identifying itself with one of its communities. It openly adopts many of the symbols, values and priorities of the majority group. Second, the strategic choice is to keep the two communities separate. However, unlike the American South until the 1960s, the separation here is mutually preferred by overwhelming majorities within both communities.[7]

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[5] KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION, ch. 1 (1989). There are a few exceptions to this general pattern of inter-communal relationship. There is the kind of "autonomy" model provided to Native Americans, Puerto Ricans on the island, and arguably some religious sects, such as the Amish, Mennonites, and Hasidic Jews. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 12, 38-42 (1995).

[6] For a thorough treatment of this model, *see* Sami Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUDIES 389 (1990).

[7] Other examples of ethnic democracies might be Northern Ireland as reflected in the relationship between the Protestant majority and the Catholic minority, at least until 1972, and Malaysia at least since the end of the 1960s vis-a-vis its Chinese and Indian minorities. *See* Paul Bew, *The Belfast Agreement of 1998: From Ethnic Democracy to a Multicultural, Consociational Settlement*?, (Paper presented in the conference on "Multiculturalism and Democracy in Divided Societies", University of Haifa, March 17-18, 1999), and Diane Mauzy, *Malaysia: Malay Political Hegemony and `Coercive Consociationalism*', *in* THE POLITICS OF ETHNICS CONFLICT REGULATION 106 (J. McGarry and B. O'Leary eds., 1993).

Besides the ethno-national schism and its resultant societal tensions, Israel must also find a mode for accommodating the intracommunal relationship between religious and secular Jews. To handle this internal relationship Israel uses a third model, which may be called *consocionationalism*. The paradigmatic examples of this model are Switzerland, Belgium, and Canada, all vis-a-vis their lingual, Francophone, minority. Under consocionationalism communities choose, or except, separation over integration, while at the same time the state maintains neutrality, i.e., non-affiliation with either community. This separation is not necessarily represented by physical isolation, but rather through an active watchfulness and guarding of the communities' unique identities and characteristics. However, consocionationalism does not function as an ideal system of harmony, peace and fraternity. It functions as a partnership with intensive and sometimes fierce bargaining at its core.[8]

History also plays a role influencing political and moral positions, including those concerning freedom of speech. More specifically, history has significantly affected positions regarding tolerance towards non-democratic views. The United States carries with it the traumatic memory, the ghost, of the McCarthy Era's overly zealous silencing of radical leftist positions. For the Israeli Jews there is a polar recollection of a society that was recklessly unassertive towards totalitarian movements: the traumatic memory of the fall of the Weimar Republic and of the rise of the Nazis, who came to power while taking advantage of democratic processes.[9]

After this brief acquaintance with the influencing factors that act upon the two societies' legal systems, we are better equipped to handle the comparative analysis of their doctrines of freedom of speech.

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[8] See LIJPHART, supra note 2, at 158-161, and Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism vs Control*, 31 WORLD POL. 325 (1979).

[9] For examples of how this historical trauma played a role in Israeli jurisprudence, *see* Yardor v. Central Elections Committee for the Sixth Knesset, 19(iii) P.D. 365, (1965); Jiryis v. District Commissioner, 18(iv) P.D. 673 (1964); The Electric Company v. Ha'aretz, 32(iii) P.D. 337, (1977).

The American Doctrine of Freedom of Speech

There is something very impressive and thought provoking about the American doctrine of freedom of expression. It is probably the most libertarian free speech doctrine in modern times. It is remarkable that such libertarianism appears within a society that is much less homogeneous and tranquil than, say, the Scandinavian countries. This has made the American doctrine a role model, a kind of a normative standard.

This role has also made the doctrine an object of criticism. The deep libertarian nature of the doctrine, which is mainly a product of the firm endorsement of the principle of "content neutrality," is highly controversial. Content neutrality is the rigorous objection to regulation of speech based on the content or the communicative impact of the message conveyed. This principle, which will be further discussed in a short while, draws attack from within and without. Feminists object to what they see as a blind adherence to the doctrine even in the field of pornography. Former President Bush wanted to amend the Constitution to protect the honor of the flag, by prohibiting symbolic actions in the form of flag desecration. Some scholars, minority leaders, and organizations advocate the restriction of hate speech.[10] Simultaneously parts of the international community criticized the U.S. for being late to join (and for entering a reservation when it joined) the International Convention on the Elimination of all Forms of Racial Discrimination. America has entered a reservation to this important convention primarily because of Article 4, which requires that countries penalize the dissemination of racist ideas and incitement to racial discrimination. This policy runs contrary to the American doctrinal principle of strict content neutrality in the field of restrictions on speech.

The uniqueness of the American doctrine as a comparative model is somewhat compromised by the fact that at various times in recent American history, for example, during the period of the Cold War and the McCarthy era, there was substantial erosion of freedom of speech

[10] For one prominent criticism, *see* Mari J. Matsuda, *Public Response to Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320 (1989).

and association of unpopular political groups, especially on the left. In addition, there continues to be a significant gap between the doctrine of free speech and the actual scope of the marketplace of ideas in the United States.[11] This criticism, with all its validity, does not undermine the importance of the American doctrine, but rather sheds a more realistic light on the condition of freedom of speech in America. The doctrine remains impressive in its libertarian nature, affording constitutional protection from state intervention even to political minorities who choose to engage in expression that severely offends the majority. The American doctrine is also thought provoking because of its insistence that the offensiveness of the speech can never be, by itself, a sufficient basis for silencing speech.

The primary example of the doctrine's libertarianism is indeed the consistent adherence to the principle of content neutrality in the last decades. Consider a few examples. In *Texas v. Johnson*,[12] the defendant burned an American flag during a political rally. Using a standard of "strict scrutiny," the Supreme Court found that Texas was actually prosecuting Johnson because it found his message offensive. Therefore, the criminal charge against him was held to be unconstitutional. Even though the Court deemed preserving the honor of the flag a compelling interest, it stated that the state could have found other means besides silencing its citizens to protect this interest. In *Cohen v. California*,[13] the Supreme Court held that profane, offensive language is nonetheless speech in the eyes of the First Amendment. In that case, Cohen was charged with offensive behavior for wearing a jacket bearing the inscription 'fuck the draft.' The Court affirmed, however, that the Constitution does protect offensive speech. It does not condone

[11] One does not have to adopt the following criticisms in their entirety in order to appreciate the validity of the point they are making. A major argument, and to my mind a valid one, is that in the United States there are indeed not many official restrictions upon speech, but that there are very powerful censorship mechanisms within the American "civil society," mechanisms that are ideological, economic or both. *See*, *e.g.*, the criticism of critical legal studies scholar, DAVID KAIRYS, *Freedom of Speech*, *in* THE POLITICS OF LAW (1982) 140; *see also*, NOAM CHOMSKY, AMERICAN POWER AND THE NEW MANDARINS (1969).

[12] Texas v. Johnson, 491 U.S. 397 (1989).

[13] Cohen v. California, 403 U.S. 15 (1971).

a filtering of language that allows for some speech as palatable, while silencing other speech as perverse. In *American Booksellers Ass'n v. Hudnut*,[14] the court responded to a feminist attack on pornography. The court rejected the attack as an attempt at 'thought control,' holding it unconstitutional to dictate some expression as acceptable because it presented an endorsed viewpoint, and other expression as illegal because it expressed a repugnant viewpoint. Finally, in *Doe v. University of Michigan*,[15] the court held that public universities usually cannot prohibit student use of offensive racist speech.

In general one can say that in the last decades whenever the government has tried to silence speech, based on the content or the communicative impact of the message conveyed, the Supreme Court has insisted that the restrictive conditions of *Brandenburg v. Ohio*[16] be met. The balancing test in *Brandenburg* is very demanding: it requires a narrowly tailored restriction that serves a compelling governmental interest. The case indicates what will be accepted as compelling: "[A] state [should not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[17] One should note that further jurisprudence (including the Supreme Court cases mentioned above) has clarified that the components of the *Brandenburg* test require a high probability and imminence of the danger of use of force, not merely the danger of harm to feelings. In other words, emotional harm by itself cannot serve as a basis for silencing speech. Thus America does subscribe to the general concept of ensuring against harm, but limits the definition of harm in most cases to an imminent outburst of violence.[18] Although the breadth of speech that is protected is immense, the protection is not

[14] American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

[15] Doe v. University of Michigan, 721 F. Supp. 852 (E.D.Mich. 1989).

[16] Brandenburg v. Ohio, 395 US 444 (1969).

[17] *Id*. at 447.

[18] There are only few exceptions to this requirement of imminent violence. These are mainly, "captive audience" situations (which I will discuss promptly), defamation, and obscenity. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988), 849-856, 904-928.

absolute. The United States might be the most extreme in terms of the type and magnitude of harm it demands as a justification for state-restrictions upon speech, but all the same, a boundary, namely imminent violence, does exist, along with a few exceptions.

One should not be misled, however, into mistaking content neutrality for moral indifference. There are core moral values at the basis of any liberal democracy. The doctrine simply holds that more than the falseness of the idea is required in order to restrict it.[19] Thus the state can affirmatively support its core values and at the same time be extremely prudent in silencing views it considers evil.

To illustrate the difference between content neutrality and moral indifference, observe the First Amendment itself. Its first part deals with religion, the second part with expression. The main difference between the two parts lies in the "establishment clause,"[20] which provides that the government is more restricted when it comes to religion. The Constitution prohibits the government not only from restricting religion, but also from endorsing a favored one. In other words, as opposed to the sphere of expression, where the government can affirmatively support favored stances, when it comes to religion the government is compelled to practice not only content neutrality in restrictions, but also official moral indifference in terms of rival creeds.

There are very few instances when speech can be regulated on the basis of its content even though the conditions set out by the *Brandenburg* case have not been met. If we check these cases carefully, we will see that they contain more harm, an additional kind of harm, beyond that of emotional distress. Thus, we must be careful not to confuse them with situations (such as sometimes occur in Israel) where emotional harm is deemed sufficient justification for the regulation of speech. The two main exceptions to the *Brandenburg* standard are 'fighting words' and 'captive audience.' The 'fighting words' exception shares the same basis as the *Brandenburg*

[19] *See*, *more generally*, the lucid discussion in Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 238-239 (1993).

rationale, namely the fear of an imminent, violent incident as the outcome of speech; albeit in this situation the feared incident is not violent action by the supporters of the advocated views, but rather the action of the person who has been provoked by the harsh insult directed against him or her.[21] This exception applies only to words that would likely provoke the average person to retaliate in an immediate fight.

The second principal exception to the *Brandenburg* conditions is the 'captive audience.' With careful observation we find that here too the harm caused is not purely emotional injury. Instead, it is a matter of an additional harm, namely, an essentially intolerable invasion of substantial privacy-interests. The Supreme Court, though, implements this exception sparingly and is reluctant to classify situations where the 'captive audience' exception would apply too broadly. We become a 'captive audience' when speech is directed towards us and we cannot reasonably avoid exposure to it. Thus, on the one hand, in *Madsen v. Women's Health Center*,[22] the Supreme Court held that noise limits could be placed on anti-abortion protesters so that women receiving treatment inside the clinic would not be subjected to an onslaught of unwanted messages during their examinations and medical procedures. But on the other hand, in *Cohen v. California* , the people inside a Californian courthouse were not considered a 'captive audience' because they could have looked the other way and thereby avoided further contact with the unwanted expression.[23] The important point is that the 'captive audience' exception can be seen as a situation in which emotional harm is augmented by a severe privacy infringement. In addition, the captive audience justification for restricting speech is a non-content based restriction. It applies to any speech, regardless of viewpoint.

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[20] "Congress shall make no laws respecting an establishment of religion, or restricting the free exercise thereof", U.S. CONST. Amend. I.

[21] Fighting words doctrine originated in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[22] Madsen v. Womens' Health Ctr., Inc., 114 S.Ct. 2516 (1994).

[23] Cohen v. California, 403 U.S. 15, 21-2 (1971).

Ultimately, although both these exceptions — 'fighting words' and 'captive audience' — incorporate an element of emotional harm, the necessary factor from a regulatory perspective is either violence or privacy interests. Now let us turn to the defining characteristics of the Israeli doctrine.

The Israeli Doctrine of Freedom of Speech

Because of Israel's essence as an ethnic democracy, because of its security concerns, and because of recent Jewish history (especially the Holocaust), the doctrine of free speech in Israel has been under pressure for a long time.

Being an ethnic democracy means that the state is partial; it has a favored community and it operates a biased policy towards non-favored groups, including discriminatory practices especially in the allocation of public goods. These hierarchical features of an ethnic democracy carry with them the potential for an open conflict. They usually cause resentment in members of the minority. These reactions, in turn, often make the majority feel threatened, and for perceived needs of stability and security, it often subjects the minority to 'control' measures. These control measures are a mixture of manipulation and restrictions, and they obviously spread to the fields of freedom of speech, demonstration, association, participation in elections, access to mass media, hiring of teachers and other state employees, and the like.[24]

I would like to expand a bit more on the dialectic and ambivalent nature of ethnic democracy, because these features are crucial to the understanding of certain developments that have occurred in the last two decades in the domain of free speech in Israel. Ambivalence and

[24] Notice the vicious circle that exists here: hierarchy feeds resentment, resentment by the minority feeds fear in the majority, this fear sustains the control measures, which in turn perpetuate resentment, and so on. For comprehensive analyses of the control measures directed at the Arab minority in Israel, especially until the 1970s. *See* IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980); SABRI JIRYIS, THE ARABS IN ISRAEL (1976); Sami Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. SOC'Y & HIST. 256 (1980).

dialectics are a reasonable outcome of simultaneous pressures, i.e., serving the particularistic goals of the majority community, while being under the command of certain universal commitments and a demanding need to guard political stability. Overt and emphasized ethnocentric goals and/or too many restrictions upon liberties will easily lead society to a 'crisis of legitimacy.' This is why a sophisticated ethnic democracy often prefers more oblique and subtle measures vis-a-vis its minority, and why it tries to accompany restrictions upon the minority with similar ones inflicted upon extreme elements within the majority group.

A major example of the influencing character of an ethnic democracy in Israel is section 7A of the Basic Law: the Knesset, which regulates the rights of parties to participate in parliamentary elections. This section encapsulates the above mentioned pressures that affect ethnic democracies. It provides:

> A candidates' list shall not participate in elections to the Knesset if among its goals or deeds, either expressly or impliedly, are one of the following:
>
> (1) The negation of the existence of the State of Israel as the State of the Jewish People;[25]
>
> (2) The negation of the democratic nature of the State;
>
> (3) The incitement to racism.

Section 7A expresses the restrictive facet of ethnic democracy (as well as its innate ambivalence). However, as explained above, the expressions and needs of an ethnic democracy are dialectical. This is reflected in Israel by two major features of its 'marketplace of ideas': the state's active role as 'a speaker' and the liberalization of freedom of speech in Israel. In its active role as 'a speaker,' the state speaks forcefully through the contents of its 'symbolic order.' In other words, the Jewish community's values, narratives, and views receive favorable treatment in the

[25] Section 7A(1) was the focus of discussion in a major court case. *See* Ben Shalom v. Central Election Committee for the Twelfth Knesset, 43(iv) P.D. 221 (1989). *See also* Erlich v. The Central Election Committee, 53(iii) P.D. 38 (1999). *Cf*. Eisikson v. The Parties Register, 50(ii) P.D. 529 (1996).

educational system, in the national symbols and in the allocation of access to the nationalized mass communications. This symbolic order calls for fewer problems of legitimacy (when compared to restrictions), and is colored in Israel by the ambivalent synthesis of nationalism and democracy, both of which are subsumed within the dominant ideology of Israeli society, Zionism.

The last two decades also show a liberalization of freedom of speech in Israel. The scope of free speech has expanded following certain changes in the doctrine of freedom of speech, in the social circumstances, and in the structure and diversity of the mass media. While the reasons for these phenomena are complex, it can be fairly said that they are consistent with a sophisticated ethnic democracy, one that understands that by upholding certain liberties, stability is served.

The Israeli Supreme Court has been an important player in bringing doctrinal changes in the domain of free speech. It has pushed the Israeli doctrine considerably in the direction of the American doctrine. However, there are still important differences between the two. Outlining all the differences is beyond the scope of this paper; I will elaborate upon the one difference that is my focus here: the issue of whether harm to feelings (offensiveness) is a sufficient reason for restricting speech.[26]

Thinking about Emotional Harm

As outlined concisely above, the two countries diverge on the issue of offensive speech causing only emotional harm; i.e., they are faced with the same basic dilemma but differ in the choices they make. On the one hand, emotional harm can hurt and damage as much as physical

[26] For a comprehensive analysis of the American influence on the Israeli doctrine of free speech until the end of the 1970s, *see* Pnina Lahav, *American Influence on Israel's jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981-1982). For more recent accounts, *see* David Kretzmer, *The Influence of the First Amendment Jurisprudence on Judicial Decision Making in Israel*, *in* THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES (S. Slonim ed., 1990); and GARY J. JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES, ch. 6 (1993).

harm; on the other hand, emotional harm is an intangible and subjective harm, and as such, it is more prone to abuse, including selective use by the government.

Recall that in the United States the offensiveness of ideas conveyed is not a valid basis for their suppression; by comparison, in Israel severe emotional harm may be a sufficient basis for restricting speech. This doctrinal choice is one of the main reasons that the United States is very tolerant of hate speech, while Israel and most of the rest of the world regulate against it. It is true that many of the American states have enacted anti-hate speech laws, but they have been interpreted to be restricted to the 'fighting words' exception, and moreover, their constitutionality is questionable.[27]

This difference is an important doctrinal dissimilarity. It is not simply a matter of applying a similar balancing test to two different societies and getting different answers due to different circumstances. Rather, we are dealing with a society (America) in which the basic legal doctrine dictates that no matter how certain the occurrence of emotional harm and no matter how serious it is, restrictions on the offending speech will not be justified.

This unique aspect of the American doctrine—this basic willingness to never make emotional harm a sufficient basis for silencing speech—has intrigued me. I was very puzzled by the question of 'who is right'—the Americans, with their attitude that emotional harm is never sufficient to silence speech or most of the rest of the world? More specifically, I was troubled and confused by the painful illustration of this dilemma in the Skokie affair.[28] The decision in the Skokie case, as mentioned above in the discussion of *Collin*, was to permit neo-Nazis to parade wearing uniforms, with swastikas, in a town predominantly inhabited by Jews, including many survivors of the Holocaust. Was this decision right or wrong?

There is something misleading about the way I first put this question to myself. Questions in the structure of 'who is right' tend to direct us to a dichotomous answer: side A is right and

[27] R.A.V. v. St. Paul, 112 S.Ct. 2538, 2543-4 (1992).

[28] For the Skokie case, *see* Collin v. Smith, *supra* note 1.

side B is wrong. But reality often evades dichotomies. For example, there may be other options, better than either of the two we have chosen to examine. In that case we might be able to conclude that A and B are both partly right and partly wrong as compared with option C. Another possible direction is to say that option A is quite right in society X, but option B is preferable in society Y. This context-related or society-related direction is the one that is most applicable here.

My contention is that American Law and American reality contain mechanisms that structurally moderate harm to feelings, thereby enabling the existence of a legal rule that does not recognize harm to feelings as a sufficient basis for silencing speech. Hereinafter I unfold this argument.

Looking at Hate Speech

When we focus on the issue of the emotional harm of hate speech, we notice that there are various levels of emotional harm, differing in magnitude and type.[29] Consider the following: Imagine being a minority group member encountering racist speech directed against you or against a member of your group. You would probably feel emotions of rage, fear, and sometimes humiliation. However, an extremely important dimension of your emotional harm depends on the social reaction to the racist position expressed.[30] This is the lesson of *Brown v. Board of Education*.[31] When there is an endorsement, even if it is only implied, of racist positions by the wider society, the magnitude of the harm reaches a completely different level. Moreover, the

[29] One has to keep in mind, though, that hate speech often embraces various potential harms, which go beyond emotional harm alone. The literature here is vast. For a comprehensive analysis of the harms associated with hate speech, especially racist speech, *see*, *e.g.*, David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Alon Harel, *Bigotry, Pornography, and the First Amendment*, 65 S. CAL. L. REV. 1887 (1992); and Matsuda, *supra* note 10.

[30] For an extended discussion of this general point, *see* Lee Bollinger, *Notes Toward an Idea: Freedom of Speech and Minorities in the United States,* 20 ISR. Y.B. HUM. RTS. 181 (1991); Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. OF LEGAL STUD. 303 (1991); and Matsuda, *supra* note 10.

type of harm changes. Black children in segregated schools were affected by public stigmatization. Their self-perception was affected: they acquired feelings of inferiority, which probably caused long-term harm and may have been irreversible. In addition, when the state seems sympathetic to the racist position or even if it is merely perceived as ambivalent toward racism, there is a metamorphosis in the basic situation. It is no longer a situation in which a vocal political minority is posited against an ethnic or racial minority, it now becomes an inter-communal issue. A new situation is presented where the immense powers of the state apparatus seem to have no concern or less concern for the defense of the vulnerable ethnic minority. This change causes deep feelings of alienation among the minority members and creates a much more acute existential fear. Notice, however, that this metamorphosis in the type and magnitude of harm happens only when the minority interprets the situation as revealing a state endorsement, implied endorsement, or ambivalence toward the racist claims.

The interesting question concerns the parameters that effect the interpretation that the minority gives to the state's inaction towards hate-speech. The answer is complex. In the case of hate-speech and minorities, important interpretive factors are: the status of the minority in the relevant society and the doctrine and practice of free speech in that society. To illustrate the interplay of these parameters let us return to the Skokie affair. It is my assessment that the major portion of the Jewish minority in America and even a substantial portion of the Black minority (both targets of neo-Nazi activities) have not interpreted the permit given to the Nazis as showing ambivalence on the part of United States authorities toward racist positions. There are three main reasons why this showing of content neutrality in the domain of speech activity has not been interpreted as moral indifference toward racist positions. First, as mentioned above, at least since the mid-1960s the United States has firmly subscribed to the liberal-integrative model of inter-communal relationship. Second, there is an official policy against racial discrimination itself (as opposed to racist speech), not only in state action, but also in private action. These policies

[31] Brown v. Board of Education, 347 U.S. 483, 494 (1954).

include the Fourteenth Amendment, anti-discrimination laws, and (modest) affirmative action programs operating since the 1960s and 1970s. The third parameter that acts against a deeply offensive interpretation of the state's inaction in the domain of speech is the doctrine of free speech itself. The very fact that the content-neutrality principle plays such a dominant role in the doctrine, and the fact that since the 1960s it has been implemented in a basically consistent and non-selective way, prevents the state from being identified with the unsilenced speech. In order to detect the position of the state we look mainly at the actions that the state *chooses* to take or not to take as the case may be. Choice reveals preferences. The American freedom of speech doctrine is the most extreme in *forcing* the government not to silence speech, thereby preventing the government from using speech regulation as a means of illustrating its preferences.

If, by comparison, we look at societies with less content neutral doctrines of free speech the story changes. Consider, for example, Israel and the dilemma posed by Rabbi Meir Kahane during the 1980s. Kahane was an ultra right wing leader of the Kach party who incited racist views against the Palestinian-Arab minority. A closer examination of Israeli law in the domain of speech is essential to understanding the state's action in response to Kahane.

Israeli law has shown less content neutrality in the domain of speech. There exist, for example, provisions in the penal code against offending of religious feelings. Also, the Israeli Supreme Court has shown willingness to authorize prior-restraint of speech on the basis of severe harm to feelings of members of various groups, among them survivors of the death camps and families who lost a child in one of the wars.[32] The Palestinian-Arab minority, if not given equal protection in this regard, could then pose this valid question concerning the Israeli public policy:

[32] Noah Films v. The Film Censorship Board, 30(i) P.D. 757 (1975); Yosha v. The Film Censorship Board, 35(iii) P.D. 421 (1981).

why are their feelings protected and ours not when we are subjected to racist rhetoric? Is it not an indication of Israel's ambivalence towards the racist positions?[33]

These questions are further sharpened by the other important influencing factor I have pointed to: the sociopolitical background of the state. Because Israel is structured as an ethnic democracy, there is already a strong, deeply rooted ambivalence regarding the status of the Arabs; and the Palestinian-Arab minority holds a deep-seated sense of vulnerability.[34] Both factors—the lower adherence to content neutrality in the Israeli doctrine of freedom of speech and the ethno-democratic character of the state—converged to pressure the state when Kahane appeared on the Israeli political scene. Israel had to make an explicit effort to demarcate sharply the differences between itself and Kahane; to show unequivocally that Kahane and his ideology are far beyond the pale of acceptability. Consequently, in the mid-1980s legal changes were introduced in the Israeli Knesset, by which Kahane and his party were excluded from the elections, and racial incitement became a distinct crime in the Israeli penal code.[35]

Conclusion

In this essay, I have attempted to make certain observations regarding comparative law, which may help us draw more realistic and meaningful lessons from the comparisons we make, especially in the domain of free speech. One observation deals with the criticism the United States has faced for its hesitation in adopting certain international instruments aimed at eradicating racial discrimination because of the presence of anti-hate speech clauses in these instruments. This criticism springs from the misguided assumption held by many jurists, that

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[33] During the Rushdie affair Muslims in England advanced similar arguments. This was because the English offence of blasphemy had been interpreted to apply only to offences against Christian creeds. *See* Sebastian Poulter, *Towards Legislative Reform of the Blasphemy and Racial Hatred Laws*, PUB. LAW 371 (1991).

[34] *See also* Ruth Wedgwood, *Freedom of Expression and Racist Speech*, 8 TEL AVIV UNIV. STUD. IN LAW 325, 336 (1988)

[35] For a survey of these developments, *see*, *e.g.*, David Kretzmer, *Racial incitement in Israel*, 22 ISR. Y.B. HUM. RTS. 243 (1993).

countries that share moral principles must use the same legal means to achieve these principles in their respective societies. Such an assumption is problematic because it does not differentiate between a society's 'strategic lines' and the means used to realize those lines. The means, among them the legal arrangements, have greater flexibility and variation than is generally presumed. They are also contingent upon the specific circumstances of the particular society and they are often interchangeable. I have tried to illustrate this point by comparing the American and Israeli doctrines of freedom of speech.

We could interpret the absence of anti-hate speech laws in the United States and conclude either that this phenomenon is a clear indication that the United States is not greatly concerned with protecting vulnerable minorities, or that it reflects the exaggerated libertarian nature of the American doctrine of freedom of speech. Both conclusions would be rather superficial. Instead, if we examine things through the prism that was unfolded above, we reach a third, more realistic interpretation. The combination of the content neutrality tenet of the American doctrine of freedom of speech (and its non-selective application), together with the American mode of racial relations policy, creates conditions that constantly moderate harm to feelings: they dissociate the state from the offensive positions. This structure, thus, enables the doctrine of free speech to uphold a rule by which harm to feelings, by itself, is not a valid basis for silencing speech. This moderating mechanism on harm to feelings is a functional alternative to the content-based prohibition on hate speech which other countries, lacking such a mechanism, have been almost compelled to impose.

In addition to being an important lesson for comparative law analysis, the comparison between the American and the Israeli doctrines regarding offensive speech raises two other points. First, the American example demonstrates how "content neutrality" can indeed perpetuate the justification for its own use in the domain of speech. This is because it illustrates how 'more speech' (the non-intervention of the state in terms of restrictions) may indeed be a realistic remedy for potential harm caused by speech. Put differently, content neutrality weakens the

likelihood that legitimacy might be attributed to extremist views simply because they were allowed to be part of the public discourse.

The second, prudential point is that the content neutrality principle and its comprehensive and consistent implementation *is not easily exportable*. This is because the effects of content neutrality depend upon other, *non-universal,* sociopolitical circumstances, especially the ethnic relations policy of the relevant society. Israel's ethnic democracy (and the derived sensitivities of its Palestinian-Arab minority), as opposed to the liberal-integrative model of the United States, has illustrated this point.