ABHANDLUNGEN

Freedom of Speech in a Divided Society: Reflections after the Assassination of Prime Minister Rabin

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I. Introduction: The Uncertainties of Speech

The regulation of speech is an exercise in risk-management. It involves the appraisal of opposite uncertainties that affect fundamental rights. One uncertainty relates to the existence of a link between speech and violence: speech can incite to violent action, but it can also provide a cathartic outlet for aggression and thus abate violence. A different uncertainty relates to the social and political consequences of regulating aggressive or offensive speech. Sometimes violence may be ignited or exacerbated by attempts to curb speech. At other times, only a resolute institutional response to offensive speech will avert the violent reaction of those insulted and angered by that speech.

There is a link between speech and violence. On one level, language itself is a powerful weapon, manipulated in various ways to influence people's thoughts. History provides an abundance of examples for the intentional selection of metaphors and euphemisms to stigmatize minority or other targeted groups, to facilitate the distortion of their image as hu-

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man beings, to slowly instill hatred towards them.[1] On a more immediate level, speech may incite to violent action. Psychological findings have established a clear causal link between aggressive speech and violent action, and thus challenge Freud's observation regarding the cathartic effect of aggressive speech.[2] Speech influences thoughts, thoughts lead to action, and thus inciteful or offensive speech might sometimes lead to violent action.[3]

But the possibility of such a progression does not immediately lead to the conclusion that offensive or inciteful speech should be restricted as easily as other high-risk activities such as, for example, high-speed driving. There are pragmatic, institutional and normative difficulties involved with the regulation of speech. On a pragmatic level, such a regulation may be either ineffective or counterproductive. Speech that may be the most influential on people's thoughts comes in private contexts such as group discussions, local sermons, conversations, idle chatter and gossip. A recent sociological study supports this hypothesis. David Weisburd, who studied the process of socialization to vigilante norms among Jewish settlers in the West Bank, concluded that "[t]he level of support for vigilantism among others in an outpost is the most significant and powerful influence on individual vigilante attitudes."[4] The psychologists who estab-

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[1] As George Orwell observed, "[L]anguage can ... corrupt thought. [...] Political language ... is designed to make lies sound truthful and murder respectable ...," in: Politics and the English Language, reprinted in: 4 The Collected Essays, Journalism and Letters of George Orwell, 127, 137, 139 (Sonia Orwell/Ian Angus eds., 1968). See also Nachman Ben-Yehuda, Political Assassination by Jews 390–392 (1993) (on the rhetorical devices used in the estrangement process within the Jewish community in Israel).

[2] "Observing violence, participating in violence against inanimate objects, and engaging in verbal aggression or 'sounding off' about one's anger often increase the probability of subsequent violence through such processes as imitation, practice, and justification of violence." Valerian J. Derlega/Barbara A. Winstead/Warren H. Jones, Personality: Contemporary Theory and Research 473 (1991). I thank Gaby Horenczyk for making this point. For a description of experiments on the influence of verbal statements by bystanders on aggressive behaviour see Robert A. Baron, Human Aggression, 118–120 (1977). See also Russel G. Geen, Aggression and Television Violence, in: Aggression – Theoretical and Empirical Reviews Vol. 2, at 103–126 (Russel G. Geen/Edward I. Donnerstein eds., 1983). For a critical assessment of prior findings concerning the link between television violence and aggression see Thomas G. Krattenmaker/L. A. Powe, Jr., Televised Violence: First Amendment Principles and Social Science Theory, 64 Va. L. Rev. 1123 (1978).

[3] For an exploration of this link see Laraine R. Fergenson, Group Defamation: From Language to Thought to Action, in: Group Defamation and Freedom of Speech 71 (Monroe H. Freedman/Eric M. Freedman eds., 1995).

[4] David Weisburd, Jewish Settler Violence 91 (1989). The same was true with respect to potential anti-government resistance: support for anti-government violence varied among the different outposts (although many were exposed to the same education), but

lished the above-mentioned link between speech and violence have examined only this type of private speech.[5] Yet, such private speech is extremely difficult to regulate by law and to enforce by even the most efficient police, not to mention the problematique of interfering with personal privacy. Thus, restrictions on speech will necessarily be sporadic and largely ineffective. Moreover, sometimes the very effort to curb speech, speech which appears violent to some but cherished by other groups within the same society, would in itself increase tensions and the likelihood of violence.[6] In some cases, violent verbal protest will have a cathartic effect, whereas in other cases, catharsis will follow from a forceful institutional response to an offending speech which created public outrage.[7] Given these different possibilities concerning the link between speech, restrictions on speech, and violence, it is rather risky to formulate general rules as to whether the law should intervene at the first stage of this progression, attempting to prevent speech from influencing thoughts, or whether legal action should be deferred until the second stage occurs, as thoughts mature into violent action.

The institutional and normative dimensions of the problem add complexity. Speech is inherently ambiguous and can be intently equivocal.[8] The difficulty of establishing a clear line between benign and dangerous speech raises the question of how to restrict speech optimally, that is without curtailing too much or too little speech. This difficulty leads to the query whether law prescribing and enforcement institutions – legislatures, administrative agencies or courts – can be entrusted with prescribing and enforcing optimal restrictions on speech. Underlying these concerns is the normative dimension of speech regulation. Our subject-matter – freedom of speech – is a most basic human right, a prerequisite for promoting personal autonomy and for ensuring democratic processes. Moreover, any restriction on this freedom based on the likelihood of incitement to violence conflicts with the assumption underlying the idea of personal autonomy, since such a restriction sanctions a speaker not for his

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within the outpost, the environment significantly shaped the individual's attitude (at 123). These observations are made after discounting the factor that people select in which outpost to settle (*id.*).

[5] See *supra* note 2.

[6] In the Israeli case, this concern arises in relation to theological discussions: see *infra* text accompanying notes 26–28, 105–108.

[7] See Leonard Levy, Blasphemy, 4 (1993).

[8] Richard Abel, Speech & Respect 81 (1994) ("Law cannot deal with the irreducible ambiguity of symbolic expression.").

own violence, but for increasing the likelihood of a violent action by another person. The idea of personal autonomy, however, assumes that other person to be equally rational and autonomous, capable of making her own judgment.[9] Put differently, the idea of personal autonomy adds a heavy moral weight to the pragmatic doubts concerning the possibility and benefits of speech regulation. Thus, the normative and the institutional dimensions suggest that even if certain restrictions on speech were effective means to lower the potential of violence, only those means which are commensurate with the ideas of personal autonomy and freedom, and which address institutional concerns, would be appropriate.

The pragmatic, institutional and normative aspects of speech regulation are particularly problematic in the context of offensive or abusive speech directed at democratic institutions and political figures. To begin with, the linkage between political speech and thought, and then between thought and violent action is not easy to establish. First, such speech may be intended to stimulate lawful political action, rather than unlawful activities. Second, even when the potential link speech-thought-violence exists, it may often be possible to prevent the violent outcome by responding with more speech to influence people's thoughts and prevent their maturing into aggression. The objects of aggressive political speech, political institutions and even political figures, enjoy access to the media and thus can respond effectively to offending speech.[10] Further problems in this context are the unclear parameters for distinguishing legitimate political criticism from intolerable violent speech, and the suspicion as to the motives and possible biases of the institutions implementing such parameters. Finally, somewhat paradoxically, a certain measure of offensive speech does good service to democracy, as it provides an opportunity to recapitulate, and thus enlighten the general public, on the values of freedom of speech and democracy.

[9] On this link between personal autonomy and freedom of speech see T. Scanlon, A Theory of Freedom of Expression, 1 Philosophy & Public Affairs 204 (1972), rep. in: Ronald M. Dworkin, The Philosophy of Law 153 (1977). Prime Minister Ben-Gurion's fear (in 1948) that opposition expressions would "blind [...] the eyes of the masses" (*infra* note 30) does not sound compatible with the assumptions on which democracy is founded. Note that criminal law does treat a person provoked by mere words as a rational agent, and does not recognize verbal aggression as constituting provocation that would diminish liability: George P. Fletcher, Rethinking Criminal Law 244 (1978).

[10] On the issue of the appropriate degree of protection which politicians deserve, Israeli jurisprudence has sided with the U.S. attitude, granting politicians lesser protection than private individuals: *Avneri* v. *Shapira*, 43 (3) P.D. 840, 863–864 (1989), following *Gertz* v. *Robert Welch Inc.*, 418 U.S. 323, 344–345 (1974). Cf. *Castells* v. *Spain*, 14 E.H.R.R 445, 477 (1992).

These complicated considerations are highlighted when compared to the context of racial speech. Restrictions on racial speech are less problematic due to several reasons. First, the link between racial speech and violence needs no probabilistic assessment: the harm to the member of the group addressed by racial speech is found in its very expression. Second, intolerable racial speech is easier to define than other forms of intolerable speech, since denigration along racial lines hardly serves a positive social purpose such as, for example, political criticism.[11] Third, enforcement institutions are not prone to abuse racially-based restrictions on speech to promote their political interests; in fact, they tend to under-use such restrictions.[12] Finally, the speaker is sanctioned for the harm he, rather than another person, has committed. Due to these reasons, many societies – Israel included – have found it appropriate to promulgate and enforce prohibitions on racist speech.[13]

Every society struggles with the management of risks involved with the regulation of speech, attempting to strike a proper balance between tolerable and intolerable speech. The political and legal branches in every democracy are engaged in an on-going deliberation of the risks involved, taking into consideration the specific conditions of each society.[14] Since this deliberation cannot base itself on exact scientific findings, but rather on vague assessments, each society tends to reflect on its past experience, and emphasizes negative lessons from its history. Germany and the United States provide two interesting examples of this historical attitude, which, curiously enough, has led the two societies to different conclusions. In Germany, despite admonitions against drawing hasty conclusions from past experience,[15] discussion of freedom of speech tends to

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[11] See Alon Harel, Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech, 65 S.Cal. L. Rev. 1887 (1992).

[12] Abel (note 8), at 82–86.

[13] For the Israeli statute, its background and interpretation see *infra* note 107 and accompanying text.

[14] Hence the appropriateness of the "margin of appreciation" used by the ECHR in the context of free speech. For a recent narrow decision concerning violent speech see the European Commission's decision in the case of *Zana* v. *Turkey* (10 April, 1996), at section 52. See also Eva Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, 56 ZaöRV 240, 264–267 (1996); R. St. J. Macdonald, The Margin of Appreciation, in: The European System for the Protection of Human Rights 83 (R. St. J. Macdonald/F. Matscher/H. Petzold eds., 1993). But cf. Clovis C. Morrison, Jr., The Dynamics of Development in the European Human Rights Convention System (1981).

[15] See Ernst Friesenhahn, Zur Legitimation und zum Scheitern der Weimarer Reichsverfassung, in: Weimar – Selbstpreisgabe einer Demokratie 81, 82 (Karl Dietrich Erdmann/Hagen Schulze eds., 1980).

emphasize the Weimar experience: the democracy whose erstwhile tolerance towards illiberal groups and inciteful speech brought about its extinction.[16] In the United States, the restrictive attitude towards political speech developed after World War I and later during the early Cold War era,[17] has drawn attention to the vices of institutional biases in enforcing restrictions on speech.[18] The results of the two processes are diametrically opposed: Germany has become more wary of offensive speech,[19] whereas U.S. jurisprudence has come to impose only very strict limitations on such speech.[20]

Israeli jurisprudence has had the opportunity of drawing from the historic experiences of both Germany and the United States. In fact, Israeli constitutional case-law is replete with references both to the Weimar experience and to U.S. law concerning civil liberties. In retrospect, one could trace an interesting "division of labor" between the "Weimar syndrome" and what may be called the "Schenck-Dennis syndrome" in judgments of the Israeli High Court. The "Weimar syndrome" looms large in cases relating to the Arab-Israeli conflict, whereas the more liberal American attitude characterizes the Court's approach in other contexts. The first type of cases involve restrictions on political freedoms of Arab citizens who sought, during the early 1960s, to further the cause of Palestinian self-determination by forming private associations and by participat-

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[16] Friesenhahn's lesson is quite different: "[E]ine demokratische Republik ohne den Konsens einer überwältigenden Mehrheit von demokratisch gesonnenen Bürgern konnte auf die Dauer keinen Bestand haben." (*id.*, at 108). The experience of president Friedrich Ebert also looms large with respect to the deemed necessity to respect the honor of politicians: Georg Nolte, Beleidigungsschutz in der freiheitlichen Demokratie, 240–241 (1992).

[17] *Schenck* v. *United States*, 249 U.S. 47 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Abrams* v. *United States*, 250 U.S. 616 (1919); *Dennis* v. *United States*, 341 U.S. 494 (1951).

[18] On "[t]he unfortunate American tendency to panic in the face of national crisis and to countenance infringements of civil liberties that would appear intolerable during times of repose," see William J. Brennan, Jr., The American Experience: Free Speech and National Security, in: Free Speech and National Security 10, 13 (Shimon Shetreet ed., 1991). For criticism of the early U.S. Supreme Court jurisprudence see Robert Cover, The Left, the Right and the First Amendment: 1918–1928, 40 Md. L. Rev. 349 (1981).

[19] Regulation of speech is effected through penal or civil sanctions. For comparative surveys see Nolte (note 16); Georg Nolte, "Soldaten sind Mörder" – Europäisch betrachtet, AfP 4/96 313 (1996); Petra Kretschmer, Strafrechtlicher Ehrenschutz und Meinungs- und Pressefreiheit im Recht der Bundesrepublik Deutschland und der Vereinigten Staaten von Amerika (1994).

[20] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

ing in the general Parliamentary elections.[21] Restrictions were also approved in cases involving pro-Palestinian, anti-Zionist voices, as the Court cited possible consequential subversive or terrorist action against the state and its Jewish citizens.[22] At the same time, however, the Court's jurisprudence in all other contexts of political freedoms, and in particular in free speech issues, draws its intellectual inspiration from decisions of the U.S. Supreme Court.[23]

After the assassination of the late Prime Minister Itzhak Rabin the liberal, U.S. inspired, approach toward speech has been called into question. As happened in Germany and the United States, there are currently voices in the Israeli public who would draw new lessons from history, which is conceived as proving an irresponsibly permissive approach toward free speech. It is too early to assess at this point in time whether the assassination will mark a new era for Israeli freedom of speech law, but certainly, the confidence in the possibility of preventing violent speech from maturing into violent action has been shaken.

This article begins with a concise background description of Israeli law concerning political speech as it stood on 4 November 1995, the day of the assassination. It will then examine the shifts of administrative and judicial policies on this issue in the wake of the Prime Minister's death. Finally, this article will offer a critical assessment of Israel's current free speech law.

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[21] The court denied the rights of these citizens to form private associations (*Jarais* v. *The Commissioner of the Haifa District*, 18 [4] P.D. [Piskey Din, *lit.* Judgments, the official Israeli Supreme Court case reporter] 673 [1964]) or to form a list that would participate in the general Parliamentary elections (*Yardor* v. *The Chairperson of the Elections Committee*, 19 [3] P.D. 367 [1965]).

[22] *El-Ard Ltd.* v. *The Commissioner of Northern District*, Nazareth, 18 (2) P.D. 340 (1964) (refusal to grant a permit for a weekly newspaper, without giving reasons); *Ein-Gil* v. *The Film and Theater Censorship Board*, 33 (1) P.D. 274 (1977) (refusal to permit a documentary accusing the Zionist movement of dispossessing Arab lands in Israel); *Makhoul* v. *The Commissioner of Jerusalem*, 37 (1) P.D. 789 (1982) (refusal to grant a permit for a newspaper for security reasons); *Asli* v. *The Commissioner of Jerusalem*, 37 (4) P.D. 837 (1983) (refusal to grant a permit for a bi-weekly newspaper due to connections with a terrorist organization).

[23] Two seminal cases on free speech relied heavily on the American attitude, although they did not adopt the prevailing American doctrines: *Kol-Ha'am* v. *Minister of Interior*, 7 P.D. 871 (1953) (involving political speech); *Haaretz* v. *The Electricity Company*, 31 (2) P.D. 281 (1974) (defamation law). See David Kretzmer, The Influence of the First Amendment Jurisdiction on Judicial Decision Making in Israel, in: Constitutional Bases of Political and Social Change in the United States 295 (S. Slonim ed., 1990).

II. The Legal Background: An Outline of Israeli Jurisprudence on Political Speech[24]

Since the early 1980s Israeli public opinion has been divided into two roughly equal political blocks. Between 1993 and 1995, Rabin government's peace policies were backed by a minority coalition consisting of only 56 out of 120 Knesset members. The additional 5 votes which prevented the government's downfall through recurring no-confidence votes came from parties associated with the Arab minority.[25] Thus, the "Oslo Process," which started off in September 1993 with the Israeli-Palestinian Declaration of Principles, was supported by a minority of the Jewish members of the Knesset. Opposition speakers called for "a Jewish vote" on the issue, and questioned the legitimacy of the government and the process it led. The two years that elapsed from the Oslo Accords to Rabin's assassination were marked by fierce public opinion campaigns against Rabin's policy and even against the legitimacy of his government.

Nevertheless, during this very tense period no institutional effort was made to curb anti-governmental speech. In fact, in the spring of 1994, the High Court of Justice approved a decision of the Attorney-General (AG),[26] not to prosecute a prominent religious figure, Rabbi Shlomo Goren, who publicly called on soldiers to disobey orders to dismantle settlements in the West Bank and Gaza should such orders be given. The Bible, said Rabbi Goren, is superior to evacuation orders. Although the call constituted an offence under two provisions of the Penal Law, the AG found it proper to refrain from prosecuting Goren on the basis of "lack of public interest."[27] In the AG's view, Goren's statement did not carry the potential harm that would render it intolerable. Even more importantly, the AG assessed, an indictment could polarize Jewish society even

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[24] For a general introduction to Israeli law on freedom of speech see David Kretzmer, Constitutional Law, in: Introduction to the Law of Israel 39 (Amos Shapira/Keren C. DeWitt-Arar eds., 1995); Asher Maoz, Constitutional Law, in: The Law of Israel: General Surveys 5 (Itzhak Zamir/Sylviane Colombo eds., 1995).

[25] See Dani Korn/Boaz Shapira, Coalition Politics in Israel 390 (1997, in Hebrew).

[26] For a discussion in English on the role of the AG as head of prosecution, and his discretion not to indict due to "lack of public interest" see Ruth Gavison, Custom in the Enforcement of the Law: The Power of the Attorney General to Stay Criminal Proceedings, 21 Is. L. Rev. 333 (1986); Reuven Yaron, Laws Disregarded, 6 Is. L. Rev. 188 (1971).

[27] This basis empowers the AG to decide not to press charges against any person who, it is suspected, has committed any offence: see *id.*

more severely than it was at that time. The Court did not find this policy unreasonable.[28]

The AG and the Court were following the U.S.-based legal attitude which assigned high priority to freedom of speech. This attitude had crystalized in the landmark case of *Kol-Ha'am*,[29] and withstood years of political unrest and even one case of political assassination in 1983. According to this 1953 decision, expression may be restricted for reasons of security and public order only when there is "near certainty" that a grave threat to such public interests will materialize. While this liberal policy referred to instances of prior restraints, namely issues of administrative censorship or orders to prevent the distribution of newspapers, it has also been practiced in the sphere of penal law. Despite the fact that Israel inherited from the British Mandate a penal code containing a number of vaguely-defined provisions prohibiting various kinds of expressions, these have been invoked only sparingly. Out of respect to freedom of speech, the AG found most cases of violent or offensive speech as raising no "public interest" in their prosecution. As a result, these penal sanctions have been left dormant, as relics of the non-democratic Mandate.

Kol Ha'am's strict "near certainty" test, as applied in later cases, reflects a strong popular belief in the Jewish public's commitment to democratic values and processes which will not digress into violence. Although early challenges of right-wing Jewish groups during the formative era of 1948 prompted the Provisional Council of State, the transitional Israeli legislature, to add to the British legacy more restrictions on speech,[30] opposition

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[28] *Shlanger* v. *The Attorney General*, 48(3) P.D. 40 (1994): "[The lack of] 'public interest' is a normative determination concerning the benefit which may accrue from ... indictment against the damage done by inaction." See also *Ha'etzni* v. *State of Israel*, 42(4) P.D. 406 (1986) (rejection of a petition against the AG's refusal to indict an Arab lawyer for "incitement").

[29] *Supra* note 23.

[30] The Prevention of Terrorism Ordinance of 23 September, 1948 (Official Gazette No. 24 [September 29, 1948], at 77). This Ordinance was promulgated to confront the activities of Jewish opposition, after the assassination by the *Lehi* group of the UN envoy, Count Bernadotte, and earlier, the refusal of the *Etzel* group to hand over weapons imported on the ship *Altalena*, which consequently was shot at and sunk. In discussing the bill, Prime Minister Ben-Gurion said: "The purpose of the law against terror is to uproot from our midst the shame of the existence of a group of murderers who speak highly of ostensibly noble and patriotic ideas, and enlist companions by false phrases." In his view, it was necessary to prevent these "murderers" from "blinding the eyes of the masses, and join to their circles people who cannot distinguish between the deceptive phrases and the truth." (Minutes of the Protocols of the Provisional Council of State 23.9.1948, at 17 [1949, in Hebrew]).

groups were soon integrated successfully into the Israeli body politic. Since then no major crises have occured which could cast doubt on the commitment to democracy by the Jewish society or by the political institutions.[31] The authorities have not expressed the same confidence towards the Arab citizens of Israel. Indeed, the few cases where the Court approved the curtailment of speech involved speakers, mostly Arab, who were deemed to engage in anti-Israeli, pro-Palestinian propaganda, or suspected of engaging in subversive anti-Israeli activities, including terrorism.[32]

This popular belief in Jewish commitment to democracy and non-violence withstood the challenges of the early 1980s, despite the intensification of internal political tensions regarding the war in Lebanon. During this period, the political left accused the Likud-led government for bearing responsibility for the massacres committed by the Christian militia in Palestinian refugee camps. In their demonstrations, there were slogans and calls labeling Prime Minister Menahem Begin and his Minister of Defence Ariel Sharon "murderers." At the same time the political right was referring to the left as "traitors," who betrayed the Zionist project.[33] In 1983, a grenade was thrown into a crowd of Peace Now demonstrators, killing one and wounding several. The attack shocked the Israeli public. Many believed that this was a clear case of political violence inspired by the tense atmosphere of a deeply polarized society. The murderer, Yonah Avrushmi, was a young uneducated man who hated the "leftists" for their attacks on the government.[34] Even before Avrushmi's arrest, the then President of Israel, Itzhak Navon, responded with the phrase "verbal brutality leads to physical brutality," capturing what many felt at the time. Yet even this tragic incident did not prompt a change of attitude toward freedom of speech. The then AG, Professor Itzhak Zamir, explained that his policy of toleration of speech, including at times offensive speech, was prompted by his fear of over-deterrence of this basic right.[35] Zamir expressly rejected the accusations that there was a causal link between the

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[31] Perhaps the only exception to this rule was the violent reaction to the government's decision to negotiate with West Germany: see Tom Segev, The Seventh Million, The Israelis and the Holocaust 194–204 (1991, in Hebrew).

[32] See *supra* notes 21–22 and accompanying text.

[33] On the various offensive expressions and provocations of the early 1980s see Itzhak Zamir, Freedom of Speech against Libel and Verbal Violence, in: The Sussman Book, 149, 154–156 (Aharon Barak et al. eds., 1984, in Hebrew).

[34] "Avrushmi Seeks Pardon", in: "Kol Ha'ir" (a weekly local newspaper, in Hebrew) 20.3.92 (interview with Avrushmi).

[35] Zamir (note 33), at 156.

statements of right-wing political leaders, including the Prime Minister himself, against the Peace Now movement and Avrushmi's crime. In his view, these accusations against the political right were "unfounded, irresponsible and virtually as damaging as the criticism [levelled earlier against the left]."[36]

Ultimately, Avrushmi's crime did not leave its mark on Israel's free speech jurisprudence. Perhaps the circumstances of this incident were deemed to be too unique to merit serious reconsideration. The murder did not suffice to call into question the strong belief in the fundamental unity of Jews which transcended political differences, and in popular commitment to democracy and democratic processes. The same belief provided the basis for the AG's and the Court's unyielding support of free speech even with respect to statements calling the Rabin government's very legitimacy into question.

III. Was Rabin A Victim of Speech?

Prime Minister Rabin was assassinated by Yigal Amir, a Jewish law student. Amir was born in Israel, grew up in a suburb of Tel-Aviv, and educated in one of the rabbinical academies associated with the nationalist-religious movement. He was not a member of an extreme right wing group. Before his crime, Amir could not have been regarded as unique or deviant under any objective criteria. He shared with many others in the political right the thought that the implementation of the Oslo process threatened the very existence of the Jewish people in the Land of Israel, and postponed the messianic redemption.[37] In the months preceding the assassination he took part with many others in a massive opposition campaign against the government's policies. Therefore, once his identity was made public, responsibility for his acts was immediately attributed by many in the political left to Amir's social group (associated with the national-religious parties) and the leaders of the Likud opposition. Their anti-Rabin protests and demonstrations were deemed to have inspired Amir to act.

Therefore, one of the immediate reactions in public opinion was to criticize the law-enforcement agencies for not taking seriously the threat to Rabin's life from Jewish opposition circles. This criticism assumed the

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[36] *Id.*, at 158.

[37] For a study of the perceptions of settlers of the Gush Emunim movement see Weisburd (note 4); Ian S. Lustick, For the Land and the Lord: Jewish Fundamentalism in Israel (1988). See also discussion *infra* text to notes 48–55.

existence of a clear chain of events, leading from the often violent opposition demonstrations and the harsh terminology used at these occasions, to the delegitimation of the government and of the very democratic process, to the decision of Yigal Amir (if not of others) to kill Rabin and thereby to derail the peace process. In hindsight, there were indeed many statements by political and religious leaders which had attempted to delegitimize the government and the very democratic process. The government was criticized as being dependent on Israeli Arabs, thus lacking the support of a "Jewish majority."[38] The state institutions were deemed by religious commentators as lacking the necessary moral authority to order a political settlement and the withdrawal from parts of the promised land.[39] Religious figures issued opinions calling on soldiers not to evacuate settlements if ordered to do so.[40] Settlers claimed the right of civil disobedience against evacuation orders, and in the meantime resisted soldiers' attempts to remove them from symbolic new settlements they purported to establish without permission.[41] The Rabin government and its head were constantly being accused of illegitimately robbing the Jewish heritage and jeopardizing the Zionist project, and this with the aid of the Arab-Israeli minority. The words "betrayal" and "traitor" were often used in this context in demonstrations,[42] and even appeared in print.[43]

On a more immediate and concrete level, Rabin was held personally responsible for the deteriorating security situation. Newspapers belonging to the political right accused Rabin of collaborating with Israel's worst enemies. Rabin was equated with French Marshall Petain, and with the *Judenrat*.[44] In one opposition rally just a month prior to the assassination, leaflets showed Rabin in SS uniform. He was dubbed a traitor, and promised to be prosecuted after his removal from power and to get the punish-

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[38] See, e.g., "Jerusalem Post", Editorial, 6.10.95 ("the fate of the Jewish State is being determined by a minority identified with its bitter adversaries.").

[39] See Aviezer Ravitzky, Messianism, Zionism and Jewish Religious Radicalism 193–194 (1993, in Hebrew).

[40] "Haaretz" (Israeli daily, in Hebrew) 13.7.95.

[41] A number of these statements were published in "Nekuda" (a bulletin of settlers in the Gaza Strip and the West Bank, in Hebrew) see, e.g., issues of March and September, 1994. On the reaction of settlers and settlers' organizations to the peace process see Ehud Sprinzak, Political Violence in Israel 108–130 (1995, in Hebrew).

[42] See, e.g., reports of demonstrations, in: "Haaretz" on 22.8.95, 6.10.95. One Knesset Member, Rehav'am Zeevi, used these terms often in his public statements, in: "Haaretz", 25.7.95, 6.10.95.

[43] See, e.g., E. Haetzni, Civil Strife Now, in: "Nekuda," September 1994, at 26; "Hashavua" (an ultra-Orthodox newspaper, in Hebrew) 21.9.95, 5.10.95.

[44] See "Hashavua" (note 43).

ment traitors deserved.[45] A few have even resorted to Kabalistic rites praying for his death.[46]

Amir, however, has rejected this "chain-of-events" theory. He testified that he had decided that it was necessary to kill the Prime Minister to stop the "peace process" shortly after the signing of the Declaration of Principles in September 1993.[47] He finally decided to act personally since no one else seemed to volunteer for this task. The demonstrations, he claimed, were ineffective, and played no part in his decision to act and on his preparations for the deadly attack. As can be expected, the "chain-of-events" theory was vehemently rejected by the political right as politically inspired by the left.

A deeper analysis would posit both the assassination and the various violent expressions that preceded it as diverse manifestations rooted in the same religious and ideological position of the settler society concerning the illegitimacy of a political compromise over the West Bank, or "Judea and Samaria" in their Bible-inspired terminology. David Weisburd's study published in 1989 had found a "potential for serious antigovernment violence,"[48] against any Israeli government that would be ready to compromise in the West Bank, and thus betray the cause of Zionism and the religious commandment to persevere in the holy land. Settlers speculated that assassinating the Prime Minister was one of the possible violent reactions.[49] The same potential for radicalism and political violence was analyzed by Aviezer Ravitzky as stemming from the existing conflict between the real and the ideal State of Israel in the ideology of the National Religious Jews,[50] and what they view as a central religious commandment requiring retention of the Holy Land.[51] These studies highlight the ideological cleavage within the Jewish society in Israel, and the potential for political violence, but they do not present all settlers as potential

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[45] "Jerusalem Post", 6.10.95: "Zion Square Flooded with Oslo Protestors".

[46] "Haaretz", 3.10.95.

[47] Amir's testimony is quoted in the decision of the Tel-Aviv district court which convicted him for murder: *State of Israel* v. *Amir*, 5756 (2) P.M. (Psakim Mekhoziim, *lit.* Opinions of District Courts) 3, at 20 (1996, in Hebrew).

[48] *Supra* note 4, at 134.

[49] One of them was quoted for saying: "There are in the settlements enough crazies ... not many but we have them. There are enough people in Samaria that are ready to kill Peres if he [were to propose a territorial compromise]," (*supra* note 4, at 114–115).

[50] Ravitzky (note 39), at 188–200.

[51] See *id.*, 193–195; according to Weisburd, this commandment "provided the younger national religious generation with a normative perspective that allowed them to define the government of Israel as deviant," (Weisburd [note 4], at 24).

assassins. Weisburd's findings do indicate that settlers who, like Yigal Amir, studied in rabbinical academies, were equally committed to the importance of the bonds that tie all Jews together and were passionate about not spilling Jewish blood.[52] These studies suggest that it is rather superficial to claim that the aggressive and offensive speech and the violent demonstrations throughout 1994 and 1995 were a direct cause of the assassination. It was the Oslo process which exposed the potential for violence, whose roots lie much deeper and precede the demonstrations.

In fact, another contemporary research indirectly vindicates the AG's appeasing policy towards the violent demonstrators. In a sociological study of political assassination by Jews,[53] Nachman Ben-Yehuda examined the social conditions that have led to assassinations within the Jewish society (mostly during the British Mandate period). He concluded that assassinations within the Jewish community had involved a process of estrangement between the perpetrator and target groups.[54] Prosecuting Rabbi Goren[55] and many other offensive speakers could have intensified the social cleavage within Jewish society, escalating the process of estrangement and thus would have increased the potential of internal violence.

Nevertheless, during the immediate period after the assassination, the theory that "verbal violence led to physical violence" was clearly a prevalent view which also served the government's political purposes. The next Section describes the immediate legal implications of this theory.

IV. Judicial Reassessment of the Limits of Speech

(a) Immediate reactions to speech in the wake of the assassination

The days following the assassination saw an immediate, almost hysterical, surge of anti-speech activities. The AG, the police, the army, and individuals actively reacted to various speakers. Two teenagers who had prepared leaflets showing Rabin in SS uniform, and a person who expressed during a short CNN interview his joy at the assassination, were detained

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[52] *Supra* note 4, at 125.
[53] *Supra* note 1.
[54] *Id.*, at 390.
[55] The *Shlanger* case (note 28).

by the police, their detention later extended in court pending trial.[56] In addition, a soldier who had failed to show up to a military commemoration was detained.[57] A teacher was discharged from work because she called Rabin's assassin a "saint,"[58] as was an employee in a privately owned factory, who had expressed satisfaction with the murder in private discussions with colleagues.[59] The AG sent a letter to the editors of all media sources, informing them that they could be indicted if they were to interview or quote people issuing inciteful expressions.[60] A lower court, upon deciding to extend the detention period of one speaker until the end of his legal proceedings, reasoned that a more lenient attitude would be interpreted as judicial acquiescence to such terrible acts.[61] Politicians belonging to Rabin's coalition began calling for new laws that would restrict freedom of speech. The media, both public and private, immediately responded by restricting their own coverage. Many journalists shared the feeling of remorse, were afraid of amplifying the voice of extreme groups, or simply bowed to public pressure. But this attitude did not last long. Within a few days the media regained self-confidence regarding the legitimacy of anti-government criticism. Likud and other opposition leaders drew parallels with the anti-government expressions issued during the Lebanon war in 1983 which labelled the then Prime Minister and Defence Minister "murderers."[62] They criticized the restraints on expression as partisan policy pursued for political reasons. Opposition leader Benyamin Netanyahu called the new policy "thoughts-police."[63] Limitations on free speech thus became the focus of political debate.

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[56] The former two were indicted for "insulting" public officials (for the text of the provision see *infra* note 77) and pleaded guilty in a plea-bargain; the latter was indicted and convicted for "praise" for violent acts (text *infra* note 78).

[57] "Yediot Aharonot" (Israeli daily, in Hebrew), 8.11.95.

[58] "Haaretz", 6.11.95.

[59] "Jerusalem Post", 10.11.95.

[60] "Haaretz", 9.11.95.

[61] See, e.g., *State of Israel* v. *Balakhsan* (decision of 17.11.95) (decision of a lower court extending Balakhsan's detention period until the end of his trial). Balakhsan was released after an appeal to the district court, after 21 days in detention (*Balakhsan* v. *State of Israel* [decision of 28.11.95]). In the latter decision, the judge warned against the court's bowing to public pressure.

[62] "Haaretz", 7.11.95 (an interview with Rabbi Waldman).

[63] "Haaretz", 19.11.95: "Netanyahu: We see in the country the beginning of thoughts-police."

About a month after the assassination, as the hasty reactions subsided, the AG explained his policy with respect to intolerable political speech. He asserted that Israeli society had changed. According to him this was a period of deep cleavage in Israeli society, a time of mistrust and suspicion among different parts of the people, when verbal violence was being used by extreme groups to eradicate the rule of law and public order, to provoke physical violence and thus to create a certain threat to the very existence of democracy. He concluded by accepting the then popular "chain-of-events" theory, as he wrote that "[r]ecently we have witnessed publications and statements challenging the legitimate right of an government elected by the Knesset to determine and implement policy. We have witnessed publications calling for systematic and organized disobedience to the rule of law and public order. To my sorrow, these publications and expressions led to deeds. I therefore found it necessary to change the prosecution policy against those behind those publications."[64] This change was, in his view, commensurate with the *Kol-Ha'am* "near certainty" test. The changing realities in the Israeli society, argued the AG, proved that some expressions indeed created a near certain threat to public order and democracy, and therefore they should be restricted.

Two weeks later, the President of the Supreme Court, Justice Barak, took the opportunity of a swearing-in ceremony for judges to emphasize:

> "[T]he difficult events that recently transpired upon ourselves must increase our sensitivity to the components of this balance [between freedom of speech and public security]. Things that in the past were not considered to create a near certain threat for the occurrence of a real harm may at present be regarded as such, as a consequence of the changing circumstances of life. Circumstances change. A new reality unfolds, and with it the probability of a near certain occurrence of a threat might change as well. Nevertheless, the change of circumstances must not obliterate the balancing principle itself."[65]

In what may sound to be criticism of recent lower court decisions concerning detention of speakers,[66] President Barak added: "Our judicial independence gives us the power and the authority to express these fun-

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[64] (My translation). This explanation was given in a letter of 10.12.95, sent to the author, who was then the Chairperson of the Association of Civil Rights in Israel.

[65] Speech made on the occasion of the nomination of new Justices to the Supreme Court, on 24 December, 1995. Published in 23 The Judicial Branch – A Bulletin for the Judges in Israel 5 (1996, in Hebrew) (my translation).

[66] See, e.g., the *Balakhsan* decision (note 61).

damental values and this proper balancing principle, even if they are not popular."[67]

A few days after Rabin's assassination, the High Court of Justice had an opportunity to reconsider its "near certainty" doctrine. The Court was asked to review the police's refusal to allow a rally commemorating the fifth anniversary of the assassination of Meir Kahane, having issued permits for such rallies in previous years. The police based the refusal not on the "near certain" likelihood of violence, but on the fact that the organizers of the rally were members of the outlawed Kahanist groups.[68] Since such outlawed groups did not enjoy democratic freedoms, the Court did not have to apply the "near certainty" test. Nevertheless, in its full decision, issued on 12 December 1996, the Court referred to the test, emphasizing that

> "the near certainty test ... is an attentive and sensitive test, which responds to the developing circumstances. Therefore, with the change in time or in place, the same test may produce different outcomes in ostensibly similar cases. Accordingly, it is possible that a certain expression, which withstood the near certainty test yesterday, will not pass the same test tomorrow."[69]

Unlike the deadly grenade throwing in 1983, a politically motivated crime which had barely left a mark on Israeli freedom of speech jurisprudence,[70] the months following Rabin's assassination demonstrated that this tragic event could not be dismissed as an exceptional incident. After the terrorist bombings of civilian targets in February and March 1996, renewed opposition rallies saw demonstrators carrying signs aimed at acting Prime Minister Shimon Peres saying "Peres, you are the next."[71] Bumper stickers carried the statement "good-bye friend II" or "good-bye friends,"[72] clearly hinting at the widely popular sticker "good-bye friend" echoing U.S. President Clinton's Hebrew farewell words to the slain Prime Minister. A furious mob shouted "death to the Arabs, death to Peres" after a fatal attack on a public bus in Jerusalem.[73] During the election campaign, the slogan "Netanyahu. It's good for the Jews." recalled the delegitimization of the Arab vote and of Labor's reliance on Arab support.

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[67] *Supra* note 65, *id.*

[68] On 13 September 1994, the Israeli Government announced that the splinters of the Kahane movement were "terrorist organizations" as defined in the Ordinance for the Prevention of Terrorism, 1948, *supra* note 30.

[69] HCJ 6897/95 *Kahane* v. *The Israeli Police* (unreported).

[70] *Supra* note 33.

[71] "Haaretz", 4.3.96.

[72] "Yediot Aharonot", 26.2.96.

[73] "Haaretz", 26.2.96.

Violent speech was not only the province of the political right. On the day Netanyahu's government was sworn in, a front-page newspaper advertisement, paid for by a private association named "We shall not forget," quoted a portion of the Bible, which ends with God's question: "Hast thou killed, and taken possession?"[74] Thus, violent political expression has not receded after the assassination. To the contrary, after a few weeks' respite, it became even more widespread, indeed almost banal.

Despite the increased public awareness to the potential harmful effects of violent speech, there has been no parliamentary effort to impose harsher restrictions on speech. In fact, there was no need to, as the existing, and hitherto practically dormant penal provisions were so widely and vaguely defined, that they were deemed adequate to address violent speech. And indeed, as will be detailed in the next section, courts were soon called upon to develop a new jurisprudence on free speech in the context of the penal law.

(b) Enforcing penal sanctions against political speech

Unconfirmed press reports indicated that in the weeks following the assassination and the immediate and sometimes thoughtless reactions to certain expression in its wake, the AG had established an unofficial task force in charge of sifting through the media to detect the offensive speech which should be the subject of prosecution.[75] As a result, a number of pre- and post-assassination expressions were found to be so offensive as to constitute criminal offences. Consequently, the following charges were made:

(a) The leaders of an opposition group called "Zo Artzenu" ("this is our land"), who had called for civil disobedience and had invited the public to participate in demonstrations for which they had intentionally sought no permit were indicted for violating Section 133 of the Israeli Penal Code, which proscribes "sedition."[76]

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[74] "Haaretz", 18.6.96, quoting Kings I:21;19.

[75] "Haaretz", 18.8.96.

[76] Section 136 of the Penal Law (formerly Section 59 of the Mandatory Criminal Code Ordinance of 1936) defines "sedition" rather broadly: "(1) to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities, or (2) to incite or excite inhabitants of Israel to attempt to procure the alteration otherwise than by lawful means of any matter by law established, or (3) to raise discontent or resentment amongst inhabitants of Israel, or (4) to promote feelings of ill-will and enmity between different sections of the population," (Laws of the State of Israel [L.S.I.], special volume, 1977, at 45). Note that Section 137 provides that truth is not a valid

(b) Individuals who sprayed graffiti with slogans such as "Rabin is a murderer" and "Rabin is a traitor," or printed and distributed leaflets showing Rabin in SS uniform, were indicted for violating Section 288 of the Penal Law, which proscribes "insults to public servants."[77]

(c) Individuals who performed a Kabalistic prayer for the death of Rabin, expressed satisfaction with the death of Rabin, sprayed graffiti such as "Peres is next" and "Peres the follower of Hitler," or expressed the hope that Peres and Arafat would die, were indicted under Section 4(a) of the Prevention of Terrorism Ordinance of 1948, which proscribes "praise for acts of violence."[78]

These indictments posed new challenges for the courts. The Supreme Court had had no previous opportunity to interpret these provisions, simply because the AG, devoted to free speech, had made little use of them. Thus the applicability of the near certainty test to the field of penal law, where criminal punishment can result from speech, had been hitherto an open question.[79] The near certainty test had been judicially constructed to serve in reviewing administrative restrictions on speech in prior restraint situations.[80] There had been no Supreme Court pronouncement on the appropriateness of this test in the sphere of criminal law. None of the criminal provisions mention this test, nor do they expressly require any causal link between the statement and the occurrence of actual harm. Yet only the text of one provision, Section 4(a) of the Prevention of Terrorism Ordinance concerning "praise for acts of violence,"[81] expressly precludes

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defence. Section 138, however, provides that positive intention on behalf of the speaker (such as an intention to provide constructive criticism of the government) will be a valid defence.

[77] Under Section 288 of the Penal Law (formerly Section 144 of the Mandatory Criminal Code Ordinance of 1936), "A person who by gestures, words or acts insults a public servant ... whilst engaged in the discharge of his duties or in connection with the same is liable for imprisonment for six months," (L.S.I., Special Volume, at 79).

[78] Section 4 reads: " A person who – (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; ... shall be guilty of an offence ..." (*supra* note 30). The Israeli Penal Law contains even broader provisions that were invoked after the assassination in the context of violent speech. Thus, the distribution of leaflets showing Rabin in SS uniform was deemed by the prosecution to constitute a violation of Section 216(a), under which it is prohibited to "behave [...] in a disorderly or indecent manner in a public place," (L.S.I. Special Volume, at 63).

[79] There have been only a handful of indictments based on the above-mentioned provisions, and they have reached the Supreme Court only recently.

[80] Note that in the US, this approach was developed in the cotext of criminal prohibitions on speech.

[81] See *supra* note 78.

the application of the "near certainty" test linking speech and violence as a necessary condition for conviction.

At the time of writing, none of the above-mentioned indictments related to Rabin's assassination have reached the Supreme Court. However, as these indictments are being deliberated in the lower courts, the Supreme Court has had two opportunities, unrelated to Rabin's assassination, to interpret one of the penal provisions related to verbal violence. The first of these two cases involved a pamphlet circulated by Rabbi Edo Elba which the court held to be racist expression directed against Moslems in Hebron.[82] The second case dealt with articles published in an Arab newspaper which, the court determined, praised the Palestinian *intifada*.[83] In both decisions the Court found the "near certainty" test precluded by the text of the relevant provision.

Although not directly connected to Rabin's assassination, these two decisions were written in the wake of his death. One cannot dismiss the thought that the post-assassination public questioning of overbroad freedom of speech had an impact on the judges. Admittedly, the text of the relevant penal provision rendered the near certainty test irrelevant. But the departure from a test which previously was deemed to provide the pillar of freedom of speech in Israel, required the Supreme Court to pronounce a new guiding principle that would delimit the widely and vaguely defined criminal prohibitions on speech. This was an opportunity and, in light of the post-assassination litigation, a pressing necessity, to pronounce a doctrine comparable to *Kol Ha'am*[84] in the sphere of criminal law. The Court, however, failed to do so. Despite the Court's general philosophy that every text must be interpreted in light of the fundamental values of the legal system, it resorted to a narrow textual interpretation without referring to any ramifications in the sphere of constitutional rights. The opinions did not provide any guidance to lower courts and other decisionmakers for evaluating the criminality of specific expressions. Given that the texts of this or other provisions could not be interpreted as requiring a "near certainty" test, other safety measures – such as close scrutiny of the meaning of the expression, the effects on the audience, etc. – should have been established to prevent over-deterrence of

[82] Crim. App. 2831/95 *Elba* v. *State of Israel* (26.9.96) (unreported).
[83] Crim. App. 4147/95 *Jabarin* v. *State of Israel* (20.10.96) (unreported).
[84] *Supra* note 23.

speech.[85] Indeed, the Court's approach may give the impression that it sought to avoid responsibility for ensuing violence, and that by relying on a technical and cursory analysis of the text of the law it shifted this responsibility to the legislature.

Despite the fact that the decisions were unanimous on these issues, the President of the Court has recently approved a petition for a rehearing of the issue before an enlarged panel. It is to be hoped that the rehearing will provide an opportunity for in-depth examination of the relationship between the right to free speech and the wide and vaguely defined penal provisions proscribing speech.

(c) Whither the "near certainty" test?

Current Israeli penal law regarding aggressive or inciteful speech seems somewhat schizophrenic. On the one hand, there are widely-defined penal provisions proscribing any words of praise to violent action, or any insults to public officials. These provisions, prescribed before or during the war of independence of 1948, hardly reflect a commitment to freedom of speech. On the other hand, a strict approach to limitations on speech, embedded in the judicially-prescribed "near certainty" test, informs the discretion of the AG in deciding whether there is public interest in pressing criminal charges.[86] So far, the AG's policy has been to subject this "public interest" test to the constitutional test regarding freedom of speech, and therefore to refrain from pressing criminal charges against speakers whose expressions did not create a "near certainty" threat to public order.[87] This policy is the only meaningful check against undue criminal curtailment of speech: it is only the AG who examines whether

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[85] Compare the attitude of the Court with respect to the disqualification of parties from participating in the general elections. Based on the legislation that bars certain parties, the Court adopted a contents-based criteria rather than its previous consequentialist approach: El. Ap. 2/88 *Ben Shalom* v. *Central Elections Committee*, 43(4) P.D. 221, 246 (1988). Compare also the cautious approach of the *Bundesverfassungsgericht* in the "soldiers are murderers" cases.

[86] Under Israeli law, the Attorney General has discretion to decide whether to prosecute or not: even when there is sufficient evidence to prove a person's culpability, the AG may decide not to indict him due to "lack of public interest." (see Zamir [note 33], at 152: in most cases, despite the technical violation of the law, the interest in free speech is upheld, and no indictment is made). Such decisions are reviewable by the High Court of Justice.

[87] See the *Shlanger* case (note 28); the AG's letter (note 64). The AG reiterated this policy despite the Court's decisions in *Elba* (note 82) and *Jabarin* (note 83) (in a lecture of Mr. Ben-Yair, at the Hebrew University, 12.11.96).

an expression praising violence constituted "near certainty" of causing serious harm and is then worthy of criminal prosecution. In light of the recent decisions of the Supreme Court,[88] the judge hearing the case will have no opportunity to second-guess this assessment. Although this discretion is subject to the review of the High Court of Justice, the court will intervene only if the AG's decision to prosecute is manifestly unreasonable or not proportional, not if the decision seems unwise to the judges.[89] Therefore, despite the fact that Israeli criminal law proscribes aggressive and insulting speech in very broad terms, the discretion of the AG, reviewed by the High Court, will determine the scope of protection of freedom of speech in Israel. The result is that criminal sanctions on speech depend more on the AG's discretion than on the text of the statutes.[90]

Ultimately, then, the most pertinent question is whether the assassination changed the meaning of the near certainty test. In one sense, nothing has changed. The near certainty test was never understood as requiring a showing beyond reasonable doubt of the significant harm as the outcome of the expression. This test provides the administrative authorities with discretion to assess the specific circumstances and existing conditions. The AG's adherence to this test can therefore be regarded as the continuation of the same policy despite the assassination. But in another sense, the post-assassination use of the near certainty test is different. Instead of emanating from a strong theoretical endorsement of the value of free speech, as reflected in the *Kol Ha'am* decision,[91] it now reflects a more cautious attitude, which recognizes the potentially harmful effects of speech. As Justice Holmes' application of his "clear and present danger" test demonstrates, the same test may produce different results, depending on the philosophy underpinning its application.[92] Thus, it remains to be seen how the Israeli courts will apply this test in future cases.

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[88] *Elba* (note 82) and *Jabarin* (note 83).

[89] See the *Shlanger* case (note 28).

[90] On the tension between this outcome and the principle of legality see *infra* text to notes 95–99, 111–113.

[91] *Supra* note 23.

[92] The recognition of speech as the marketplace of ideas has led Justice Holmes to apply the "clear and present danger" test quite differently in his dissent in *Abrams* (note 17, at 630) than in his previous decision (*Shenck* [note 17].)

V. Appraisal: Societal and Institutional Considerations in Choosing the Proper Penal Restrictions on Free Speech

The current status of free speech protection in Israeli law, as described above, may be found to be objectionable since expression is restricted by widely and vaguely defined criminal prohibitions; these prohibitions can be activated at the AG's discretion; and, finally, this discretion, based on the "near certainty" test, does not provide predictable results. This section will assess the vices and virtues of this approach. First, I examine whether an approach that leaves room for administrative and judicial discretion is preferable to a system where the restrictions on speech are defined more carefully by the legislator. Second, in light of my conclusion that for the Israeli society the first approach is generally more suitable, I discuss which type of discretion is preferable.

(a) A preference for a standard-based approach

As mentioned earlier, each society must manage the risks involved with speech and its regulation.[93] Initially, there are two basic approaches open to any society with respect to the institutions entrusted with managing these risks. A society may prefer an a-priori legislative prescription of the restrictions on speech with carefully defined provisions on, for example, racist speech, or flag desecration, that would constrain judges in their application. Such restrictions would reflect a democratically-determined realization that certain expressions are inherently dangerous, repugnant or offensive and therefore must not be tolerated. Alternatively, the same society may opt for more open-ended standards that would leave room for administrative and judicial discretion in examining each and every "problematic" expression, on an *ad-hoc* basis. Such an approach would imply that society cannot define the potential harms of certain types of speech in a general manner, and hence must delegate decision-making authority to the courts.[94] Of course, a combination of the two strategies might also

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[93] See discussion in Section I *supra*. As Abel points out, there is no escape from the regulation of speech: *supra* note 8, Chapter 2.

[94] While standards provide open-ended criteria for decision-making, rules restrict the scope of the decision-maker's discretion. These are two strategies for deciding two different questions: first, what action is to be restricted, and second, which institution is entrusted with deciding the first question. On the rule-standard dichotomy see Fredrick Shauer, Playing By the Rules (1991); Symposium, 14 Harv. J. L. & Pub. Pol'y 615–852 (1991). On the trade off between rules and standards see Meir Dan-Cohen, Decision Rules and Conduct

be deemed appropriate. Thus, for example, one strategy may be adopted for one type of speech, such as racist speech, while another strategy may be used for a different type of speech.

The Israeli judicial approach, which so far emphasized the "near certainty" test for speech, epitomizes the standard-based approach. Authority is delegated to the administrators and judges who are to weigh several considerations in assessing whether a certain expression should be tolerated. Admittedly, it is a problematic and even risky strategy. It is problematic in the normative sense, due to the principle of legality, which requires that a norm which delimits constitutional rights, especially if it involves also the assignment of criminal sanctions, be "adequately accessible," and "formulated with sufficient precision to enable the citizen to regulate his conduct."[95] The Israeli citizen cannot assess correctly his or her scope of freedom of expression by looking only at the statutory provisions. There is in fact a discrepancy between Israeli criminal provisions and the actual norms as delineated by the AG's exercise of discretion. This strategy is risky, because it relies on administrative discretion. The statement made by the Israeli AG following Rabin's assassination[96] exposes the potential misuse of the consequentialist test of "near certainty." This test may be but a fig-leaf disguise of unsubstantiated fears of a weak or panic-striken government. Worse, it could be a manipulative tool of a government seeking to silence its opposition. Conversely, the AG may also err by underrating the potential risk of speech. Majority-led institutions might not be sufficiently sensitive to inciting or racist speech against opposition groups, or against minorities. True, a finding of a "near certainty" of harm and consequent decision to prosecute following a specific statement is reviewable by the administrative court. But the review is limited. The test requires a showing of an increased risk, namely an increased potential for the occurrence of harm, which need not occur. Indeed, if a harm occurred, this test will not require a proof of a "but for" causal link between it and the expression, because such a link may be im-

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Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984); Isaac Ehrlich/Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Studies 257 (1974); Gillian K. Hadfield, Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 Cal. L. Rev. 541 (1994); Richard Craswell/John E. Calfee, Deterrence and Uncertain Legal Standards, 2 J.L.Econ. & Organization 279 (1986); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L. J. 557 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harvard Law Rev. 1685 (1976).

[95] *Sunday Times* v. *United Kingdom*, [1979] 2 E.H.R.R. 245, 271.

[96] *Supra* note 64.

possible to establish in most cases (including Rabin's assassination).[97] Since courts generally tend to defer to their governments' assessment of existing national emergency situations, and such assessment can, and in fact, did influence the courts' protection of speech,[98] we must realize the potential threat to free speech that stems from the "near certainty" test, especially at times and contexts when the protection of speech is most needed.[99]

Yet despite its problematique and risks, this standard-based approach manages to avoid some of the problems associated with the rule-based approach which depends on general prescriptions of the legislature. The major problem associated with the latter approach is the threat of over- or under-inclusive limits on speech. The more the restrictions on speech are clearly defined in law, the less the judge can exercise her discretion in weighing the gravity of a particular utterance. Sometimes this exercise of discretion is not necessary, and legislative generalizations as to the potential harm of speech can be made. This would be the case particularly when the harm of speech is ingrained in the very expression, as in racist speech, Holocaust denial, or child pornography. These expressions do not require specific appraisal of the harm they did or could cause. But in many other contexts, such generalizations are problematic. In those contexts, due to the manipulative character of implicit, explicit, and artistic forms of speech,[100] it is necessary to provide the judge with discretion to assess whether or not a certain statement should be tolerated. Such discretion is granted by standards, such as the near certainty test which allows for a case-specific assessment of the potential harms of a certain expression.

It is my view that in general it is the standard-based approach which suits a multicultural society such as Israel. Despite the integrative forces that have created a "melting-pot" for Jews immigrating from all parts of the world, Israeli society remains pluralistic. Various social groups communicate in their distinct language, whether Arabic, Amaharic, Russian, Yiddish or many other. Among the Arabs, there is a different discourse conducted in a higher, literary language, which is not accessible to all.[101]

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[97] On the doubts concerning a "causal link" between speech and the assassination see *supra* text to notes 48–55.

[98] See the post-Wars American jurisprudence, *supra* notes 17–18.

[99] See John Hart Ely, Democracy and Distrust 107–108 (1980).

[100] See Abel (note 8), at 97–102.

[101] In the *Jabarin* case (note 83), it was argued that the literary expressions were accessible only to a small highly educated audience, not likely to be incited to violence, but the Court did not consider the argument (see the written argument, on file with the author).

These social groups keep their distinct vocabulary, have their own set of metaphors, symbols and connotations, and use their unique idioms and style for expressing their views and ideas. They also have their own fora for communications, usually newspapers and recently also radio-stations in their language which address and reach only their group. These groups include ultra-orthodox Jews, orthodox Jews, diverse groups of immigrants, and different groups of Palestinians. Thus, there is no one market place of ideas, but several market places, many of which enjoy almost total acoustic separation from the others. Indeed, not only are these groups different in their discourse, but they also differ in their perception of what constitutes abusive or aggressive speech. What is usual parlance for one group may be offensive and provocative to other groups. As a result, it is difficult, if not impossible, to codify a definition of illegal speech.

In a "multi-discoursive" society such as Israel's, a rule-based approach would be problematic also because certain minority groups might not be properly represented in parliament. Underrepresented minorities may be wary of rule-based limitations on speech, prescribed without their input, which thus may not be attentive enough to their perspectives and sensitivities.[102] Since they may have a relatively stronger voice in courts,[103] their interests may be better served by a standard-based approach.[104]

The recent case of *Elba*[105] may serve as an example to highlight the consequences of prescribing rule-based restrictions on speech in a multi-discoursive society. Rabbi Edo Elba, a teacher at a religious educational institution in Hebron, circulated among his students offprints of a study he authored entitled "An examination of the rules on the killing of gentiles." A sub-titled caveat read: "Not a statement of the law, but an analysis for deliberation and scrutiny only among scholars of the Bible." The study discussed under which conditions Jewish law allows the killing of

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[102] See Words that Wound (Mari J. Matsuda et al. eds., 1993).

[103] See my National Courts and the International Law on Minority Rights, 2 Austrian Review of International and European Law (forthcoming, 1997).

[104] Altough judges "by and large are drawn from the same political and social ranks as elected officials, and are subject to many of the same anxieties," (Ely [note 99], at 112) the opportunity they have in presenting their case before the court may be more effective than the parliamentary procedures allow. Indeed, the different treatment of the Arab dissident voice by the Israeli courts (*supra* notes 21–22) underscores Ely's point, but it does not preclude the suggestion that the courts may offer a relatively better institutional protection of the minority's voice than the parliament.

[105] *Supra* note 82.

non-Jews.[106] This study was circulated in April 1994, barely one month after the massacre of Moslem worshippers in the Tomb of the Patriarchs in Hebron. In a 5 to 2 decision, the Supreme Court upheld the conviction of Rabbi Elba under the statute proscribing incitement to racism (Article 144A of the Penal Law).[107] Elba's defence was based on a clear rule absolving expressions involving theoretical theological deliberations. His expression, claimed Elba, elaborated a question of Jewish law, witness the caveat "for deliberation only", and thus was a legitimate deliberation rather than a racist incitement. The majority, composed of secular judges not conversant with such deliberations, rejected Elba's defence, refusing to assign any weight to the caveat. In contrast, the two judges of the minority, more acquainted with religious writings, were convinced by this caveat of the theoretical aspirations of Elba's "study," and therefore would have acquitted him.[108]

The *Elba* decision underscores the fact that in a multi-discoursive society, even when there is widespread support for a clear rule-based proscription of incitement to racism, there would still be a dispute as to what constitutes such incitement, and the dispute would reflect different cultural perceptions. What may seem patently clear to one culture, may be perceived entirely different by members of another culture. Therefore, in such societies, a delegation to the courts of the power to determine what

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[106] Among the conclusions of Rabbi Elba's 19 page study were the following: it is a religious duty to kill Moslems who believe in *Jihad* (the holy war against non-Moslems); it is an obligation to kill gentiles who threaten Jewish interests; the individual is under these obligations even when his community fails to act.

[107] Section 144b of the Penal Law, added in 1986, proscribes the publication of materials "with the intent to incite to racism." Racism is defined in Section 144A as "persecution, humiliation, denigration, expression of hatred, threats or violence, or promoting feelings of ill will and resentment towards a community or sections of the population, solely due to color or belonging to a particular race or national-ethnic origin," (L.S.I vol. 38 [1986], at 230). On this offence, and the background of its enactment see David Kretzmer, Racial Incitement in Israel, in: Group Defamation (note 3), at 175 (also appeared in 22 Israel Yb. Human Rights [1992]); Amos Shapira, Confronting Racism by Law in Israel – Promises and Pitfalls, 8 Cardozo L. Rev. 595 (1987).

[108] Justice Tal, of a religious background, testifies on his personal understanding of the text: he read the entire study and is confident that it contains no permission to kill non-Jews but the opposite, a prohibition on such killings (*supra* note 82, at page 126 of the decision). Justice Tal emphasizes also the crucial difference in Jewish literature between theoretic deliberation and actual judgment (*id.* at 131). Justice Tirkel concurs with this approach in a separate opinion. In view of the conflicting viewpoints as to the interpretation of Elba's expression Justice Tirkel says: "[t]he potential [incitement to racism] of the expression must be examined only with respect to the type and character of the audience on which the expression could have influence," (*id.*, section 7 of his opinion).

speech is potentially risky will be a better strategy to avoid over- and under-inclusive legislative restrictions on speech. Indeed, as the *Elba* case suggests, in multicultural societies it may be futile to invest in prescribing clear rules which are ultimately enforced by judges who can hardly overcome their own cultural biases.

Theoretically, such a delegation, through vague or widely-defined statutory prohibitions on speech, might restrict too much tolerable speech, because risk-averse speakers, aware only of the text of the statutes and not of the AG's policy, would tend to restrict their speech beyond necessary. But this theoretical assumption should not be regarded as conclusive: most speakers will tend to rely on societal practices and perceptions which are inspired by the practice of the prosecution and decisions of the courts, rather than on the vague letter of the law.[109] Moreover, while the relative clarity of the rule-based approach would make it easier on risk-averse speakers, it would also enable the offensive speakers – who seek the risk of criminal charges to amplify their intently offending messages – to test the limits of the proscriptions using sophisticated hyperbolic expressions to convey their offenses.[110]

Risk-averse speakers will guide themselves by the same standards that guide the official decision-makers' discretion.[111] These standards, which are adequately accessible, will provide such speakers with reasonable certainty. Although not precise, the relative vagueness of the standard will be necessary to ensure a proper protection of free speech in many societies including Israel.[112] If we recall that the principle of legality stems from the constitutional values of liberty and autonomy, we can accept the desirability of vague provisions, when vagueness actually promotes the same values.[113] This is clearly the case when the law as enforced is more protective of speech than the statutory prohibitions.[114]

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[109] See Ehrlich/Posner (note 94), at 262–263; Hadfield (note 94), at 544–545.

[110] Abel (note 8), at 86–93.

[111] Judge-made law is also considered "law" capable of delimiting speech and other constitutional rights: *The Sunday Times* case (note 95), at 270.

[112] *Id.*, at 271 (absolute certainty is unattainable, and vagueness is sometimes inevitable). See also *Canada* v. *Pharmaceutical Society (Nova Scotia)* (1992) N. R. 241, 280; Aharon Barak, Interpretation In Law, Volume III: Constitutional Interpretation 506 (1994, in Hebrew), ("Social objectives, important for the protection of human rights, must not be frustrated only because their regulation necessitates general language.").

[113] See in this context, Meir Dan-Cohen's discussion of the virtues of vague definition of criminal offences, or defences, such as the defence of duress: M. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Har. L. Rev. 625, 667–673 (1984).

[114] *Id.*, at 671.

(b) Content-based or consequentialist approach as the standard for restricting violent speech

This review of the reasons for preferring a standard-based approach to a system of clear rules in multicultural societies, still leaves open the need to find the suitable type of standards. There are two types of standards. The standard could be a consequentialist one, such as the "clear and present danger" or the "near certainty" tests,[115] or it could be a widely defined content-based test which would proscribe, for example, "insults" of public servants, "sedition," or "praise" of violent acts.[116] To either of these standards one could add the factor of the speaker's intent as an additional condition for criminal responsibility.

Our discussion so far concerning the multicultural society has shown that in such societies a certain expression may not have one objective meaning. Yet, the search for an objective meaning is the essence of the content-based approach, which is based on the view that the text of the message determines its legality. Accordingly, this approach calls for an objective textual interpretation of the specific text. In multicultural settings, such an objective textual outlook would fail to perceive the potentially harmful contents and consequences of a certain expression. In fact, in multicultural settings, it is virtually impossible to undertake an objective textual interpretation, of the "Leser mit normalem Durchschnittsempfinden,"[117] the "normal denkenden Mitglieds unserer Gesellschaft,"[118] or the "unvoreingenommenen und verständigen Publikums."[119] There are few shared societal conceptions or values that will be able to nourish an objective meaning of an expression. In such communities there is no one public, but many discoursive "publics," and each of them could interpret the speech differently, taking into consideration, in addition to the con-

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[115] Note that the consequentialist test, although presented as value-free test, cannot be divorced from normative considerations. An expression cannot be restricted simply because the audience is too sensitive and prone to violence, and some measure of toleration is expected from this audience. Hence, the Israeli Court has determined on a number of occasions whether certain expressions, although offensive, did not necessitate a "near certainty" analysis because the potential harms involved – emotional harms – did not justify the restriction of the expressions: *Laor et al.* v. *Film and Play Supervisory Board et al.*, 41(1) P.D. 421 (1986); *Station-Films Ltd.* v. *Film and Play Supervisory Board et al.* (1997, unreported).

[116] As defined in the Israeli Penal Law, see *supra* notes 76–78.

[117] OLG Braunschweig, NJW 1978, 2044 (2045) (the *Buback-Nachruf* case).

[118] Fritz Ossenbühl, JZ 1995, 633 (640), see also Walter Schmitt Glaeser, NJW 1996, 873 (874).

[119] See BVerfG, Beschl. v. 10.10.95, NJW 95, 3303 (*Soldaten sind Mörder*).

tents of the message, the method chosen for conveying the message,[120] the identity of the speaker,[121] and the unique sensitivities (or lack thereof) of the targeted audience.[122] The presiding judge, who cannot resort to an objective test, has thus the formidable if not impossible task of overcoming his own cultural biases and perceptions in trying to assume the outlook of the relevant group.[123] But perhaps the most difficult task is indeed deciding which group's perspective is relevant: the speaker's group, or that of the targeted audience. The content-based standard does not provide a hint regarding the answer to this last question. The consequentialist test, in contrast, does provide a clear answer. Since it is concerned with the possibility of violent action, it instructs the judge to take the perspective of each of the audiences and assess whether the expression increased the probability of a violent reaction.

This analysis implies that the content-based approach, which assumes the possibility of an objective assessment of the meaning of the specific expression does not suit a society deeply-divided by cultural cleavages. Its application could restrict innocent speech, or fail to restrict offensive and provocative speech. The consequentialist approach, which assumes no *a priori* determinations of what constitutes harmful speech, is more appropriate for such multicultural societies. It may be no coincidence that immigrant societies like the United States and Israel have adopted the consequentialist approach for the management of the risks of free speech.

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[120] Sometimes the choice of different means of communications can in itself convey different meanings to the same text. Since diverse groups maintain acoustically separate marketplaces of ideas, the speaker's choice of a forum in itself dons its speech a specific message. When the speaker uses his in-group language, or the media used only by that group (such as in the *Elba* case [note 82]) his message is quite different from the message he conveys when he uses the language of the other group, or symbols or caricatures which that other group understands, conveyed it through the media of that group.

[121] The identity of the speaker may convey a different message. The message conveyed, for example, by burning the Israeli flag will depend on the group-membership of the "speaker." If he is an Arab citizen, this act might mean an incitement for an armed opposition to the state. An ultra-orthodox "speaker" would convey a message of protest against the secular state. But when the flag burner is a young secular person, the message will have to be corroborated by other indicia.

[122] The sensitivity of the targeted audience is also important, if, for example, one has to determine whether a certain expression qualifies as an "insult." A group less tolerant to criticism may be "insulted" whereas a different group will not.

[123] In Anglo-American jurisdictions, juries could reflect the different perspectives, and therefore their selection process would have to be carefully attended. For an opinion that "[j]uries might seem the best institutions to fight over and resolve the overlapping norms of a multitude of pluralistic communities" see Aviam Soifer, Law and the Company We Keep 161 (1995).

Since we are discussing criminal responsibility for speech, it is necessary to conclude by briefly considering the possibility of taking the speaker's intent as an additional, or as a substitute, condition for assigning criminal liability to speakers. The insistance on requiring the speaker's intent as a condition draws its normative support from the idea of personal autonomy discussed earlier:[124] the speaker should be held responsible for what he did or intended to do, not for the potential influence the speaker would have on other persons, and thus only his knowledge and desire that others would be incited to act can link the speaker to the action of his audience.[125] But the idea of personal autonomy has its limits. When a person is in a commanding or influential position regarding a certain audience, such as a spiritual leader or a mentor, the direct influence – indeed control – he has over his audience should be recognized by the law, by way of assigning criminal liability for provoking his audience to act, although he was only reckless or indifferent, having no intention of provoking them.[126] Therefore, adding the speaker's intention to the consequential test as a condition for assigning criminal liability for speech, as done in *Brandenburg*,[127] may absolve provocative speakers who should be held responsible due to their influential status. On the other hand, as a sole condition for liability, this test may be too restrictive, since it would prohibit speech that the particular audience found innocuous. Ultimately, it would be extremely difficult to prove the speaker's intention. In fact, when this issue came up in Israeli courts with respect to proving an intention to incite to racism,[128] the courts resorted to the doctrine of presumed intention, accepted in Israeli penal law, under which a person is presumed to intend to achieve the probable consequences of his or her acts.[129] Thus, at least in the context of Israeli criminal law, the resort to the test of intention will lead ultimately back to the consequentialist test.

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[124] *Supra* note 9 and accompanying text.

[125] This is the essence of the general theory of incitement or instigation to criminal action see Fletcher (note 9), at 654–655, 681.

[126] On hegemony as the explanation for assigning criminal liability for another person's crime see Fletcher (note 9), at 658–659. On control over people as a basis for criminal responsibility for their acts see in re *Yamashita*, 13 International Law Reports 255 (U.S. Military Commission, 7.12.1945) (failure of the Japanese Commanding General in the Philippines to prevent lawless acts accorded by his troops constituted "criminal neglect").

[127] *Supra* note 20.

[128] See the cases of *Elba* (note 82) and *Jabarin* (note 83).

[129] In fact, the Penal Law uses the same phrase, "near certainty," to describe the type of knowledge that amounts to criminal intent: see Section 20 (b) of the Penal Law.

VII. Conclusion

In a sense, both proponents and opponents of unlimited speech can refer to the assassination of the Prime Minister and its aftermath as strengthening their respective cases. Restrictionists can point to the "proven" link between speech, thought and action, while pro-speech advocates, who may doubt this link with equal force, would emphasize the ensuing institutional reaction as the realization of the very evil which freedom of speech struggles to avoid. Both claims have more than a grain of truth: there is some causal link between speech, thought and action, and on the other hand, political institutions can be biased in enforcing restrictions on speech.

The question is therefore a question of risk-management. Each society must deal with this question in an attempt to tailor for itself the most appropriate policy given the various constraints facing it. Each society must find responses to two main issues: first, what risks is it ready to take in tolerating potentially harmful speech, and second, who should be entrusted with deciding that. In general, it was suggested that in multicultural societies such as Israel, the employment by judges of a consequentialist-based standard is less likely to interfere with speech beyond what is necessary as compared to other types of constraints on speech.

Looking back on the troubled year of 1996, it can be said that the Israeli democratic institutions withstood the initial impulse to curb speech beyond the necessary limits. It was the AG's office, responding to popular and media criticisms, which resisted this impulse within weeks after the assassination. While at first the lower courts issued detention orders quite liberally, ultimately their decisions reflect restraint and commitment to freedom of speech. There is certainly more awareness now to the harms and potential harms of speech, but at the same time widely-shared appreciation of the problematique of restricting this freedom. It does seem that Israel will continue to "muddle through" in an *ad hoc* balancing of the pros and cons of speech, in which prosecution, courts and the media, rather than the legislature, will take part as major actors.