ARTICLES

American Influence on Israel's Jurisprudence of Free Speech

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By PNINA LAHAV

This is a study of the role played by judicial development of the First Amendment to the United States Constitution in shaping the jurisprudence of free speech in Israel—a country without a bill of rights. Rivalry and contrast between opposing modes of legal thought, judicial styles, doctrines, and finally, models of democracy within Israel's Supreme Court are major themes. Most of the adversarial elements reflect competing ideas in the intellectual history of American free speech law. Thus, the tension within Israel's Supreme Court reflects the tension between American free speech jurisprudence as it now is and as it was in the early decades of the twentieth century.

When Israel gained independence in 1948, its newly established Supreme Court had little on which to rely in developing constitutional law. Although a vague commitment to democracy and liberal constitutionalism existed in the new nation, no enlightening debate by the founding fathers on the nature of the Israeli polity or the content of its constitutional principles had ever occurred.[1] Unlike Britain or the United States, Israel lacked any significant history of a local political struggle to attain free speech.[2] Furthermore, the legal system that Israel inherited from the British Mandatory Government offered little support for a regime of free expression, because that system was largely authoritarian and suppressive. In creating constitutional law, therefore, Israel's Supreme Court looked outward at other legal systems.[3]

In creating its jurisprudence of free speech, the Israeli Court has

1. *See generally* J. SHAPIRA, DEMOCRACY IN ISRAEL (1977) (in Hebrew); D. HOROWITZ & M. LISSAK, THE ORIGINS OF THE ISRAELI POLITY (1977) (in Hebrew); A. RUBINSTEIN, CONSTITUTIONAL LAW IN ISRAEL (3d ed. 1980) (in Hebrew). [Editor's note: Unless otherwise noted all materials denoted by "(in Hebrew)" are not available in English. The author has translated the Hebrew titles of these materials into English for reference purposes].

2. *See generally* Lahav, *Governmental Regulation of the Press: A Study of Israel's Press Ordinance* (pts. 1 & 2), 13 ISR. L. REV. 230, 489 (1978) (in English). That does not mean that claims to free speech were not invoked, but they were closely tied to the political struggle against the British and the Arabs. Suppression of Arab verbal attacks on the legitimacy of the Jewish enterprise in Israel was not considered illegitimate.

3. *See* Apelbom, *Common Law à L'Américaine*, 1 ISR. L. REV. 562 (1966) (in English); Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1954-55).

developed a deeply ambivalent relationship with American law. A basic similarity between the Israeli and American legal systems makes transplantation[4] of American law both attractive and feasible. Long before independence, the Israeli judicial process had been predominantly shaped by the common law.[5] Israeli law, therefore, shares with its United States counterpart a significant volume of legal terminology and respect for common law techniques of judicial decisionmaking. Israel further shares the United States' commitment to democracy and to the values underlying liberal constitutionalism.

Some crucial dissimilarities between the two systems, however, complicate the feasibility of transplantation. One critical difference is the supremacy of the Constitution in the United States compared with the supremacy of the Knesset (Parliament) in Israel. Since Israel has neither a constitutional text in which freedom of speech is asserted nor practice of judicial review by which statutes that infringe on that freedom are declared unconstitutional, the power of the Israeli Supreme Court to transplant American free speech law is considerably less than the power of the United States Supreme Court that has developed it. The feature of theoretical authority, however, should not be overemphasized. The barren language of the First Amendment, as important as it undoubtedly has been, has not by itself created American free speech law. Rather, its development has been heavily influenced by contemporary American legal thought, particularly by the ascendance of sociological jurisprudence over the trend of legal formalism or mechanical jurisprudence.[6]

Styles of judicial opinions are closely connected to these two schools of thought. Karl Llewellyn's terminology of Grand and Formal Styles illustrates the extremes on the continuum of judicial fashions.[7] Opinions leaning toward the Grand Style are those which reflect sociological jurisprudence, in that they articulate both legal and nonlegal arguments to explain and to justify the decision. Opinions leaning

4. For a definition of transplantation, see text accompanying note 19 *infra*.

5. Tedeschi & Zemach, *Codification and Case Law in Israel*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 272 (J. Dainow ed. 1974).

6. G. WHITE, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America* and *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, in PATTERNS OF AMERICAN LEGAL THOUGHT 99, 136 (1978). *See also* Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978). For a discussion of one component of sociological jurisprudence, the method of interest balancing in judicial decisionmaking, see text accompanying notes 66-111 *infra*.

7. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 35-41 (1960).

toward the Formal Style reflect legal formalism, in that they present the outcome as "following ineluctably or mechanically from preexisting rules."[8] In order to transplant American free speech law, therefore, Israel's Supreme Court had to harbor sympathy for sociological jurisprudence and the Grand Style. Legal formalism, however, strong in Britain, left its mark on Israeli legal culture.[9] This formalistic trend in Israel was reinforced by another important factor; many prominent figures in the legal profession were educated in continental Europe and brought to Israel their training in conceptualism,[10] a school of thought similar to legal formalism.[11] On the jurisprudential level, then, the development of Israeli free speech law can be characterized by a rivalry between sociological jurisprudence and the Grand Style, heavily influenced by American law, on the one hand, and legal formalism and the Formal Style, on the other.

This tension is manifest at the doctrinal level. American influenced opinions transplanted American free speech doctrines, including the clear and present danger[12] test and definitional balancing.[13] The Formal Style opinions relied on Lord Kenyon's maxim, dating back to 1799: "[T]he liberty of the press is dear to England, but the licentiousness of the press is odious to England."[14] Thus, rivalry also existed between high (Grand Style) and low (Formal Style) tolerance of free expression.

Analysis of the doctrines and the justifications advanced for them exposes still another tension—a tension between the participatory and

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8. Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629, 652 (1980).

9. The British legacy of legal formalism was a predicament shared by many ex-colonies. *See* R. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 31-34 (1978).

10. Conceptualism is the elaboration of legal concepts and categories. The assumption implicit in this type of juristic analysis is similar to legal formalism, *i.e.*, that legal concepts have a fixed and static meaning, hence that law is neutral, objective and apolitical. FRIEDMAN, LEGAL THEORY, 268-70 (1967).

11. Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968). 1 K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 133-43, 253 (1977). Notice particularly Zweigert and Kotz's assertion that schools of sociological jurisprudence, which did develop in France and Germany in the beginning of the twentieth century, "did not have the enormous response in all areas of legal life which the ideas of Pound and the Realists had in the United States." *Id.* at 253.

12. *See generally* text accompanying notes 66-90 *infra*.

13. *See generally* text accompanying notes 159-85 *infra*.

14. Trial of John Cuthell, 27 How. St. Tr. 642 (K.B. 1799). The licentiousness doctrine, under which the court is deferential to legislative and often times to executive determinations of the limits on free expression, was distilled from this phrase. For a discussion of the doctrine, see text accompanying notes 189-223 *infra*.

the elitist models of democracy.[15] The Grand Style opinions come closer to the participatory model, whereas the Formal Style opinions lean toward the elitist model. History is also an important factor in shaping the political theory used by the Israeli Supreme Court to select a preferred doctrine of free expression. The Grand Style opinions, perceiving a similarity between the American and Israeli revolts against colonial oppression, emphasize the struggle against authoritarianism and seditious libel. The Formal Style opinions, when they invoke extralegal arguments, emphasize recent Jewish history—the fall of the Weimar Republic and the rise of Naziism, which in turn brought about the Holocaust—and are less tolerant of speech which is critical of the nascent government. Thus, the Supreme Court's unintegrated view of Israeli history is intermittently yet powerfully influential in developing an indigenous concept of free speech.

These critical perspectives can be productively targeted at two landmark free speech cases in Israel: *Kol-Ha'am v. Minister of the Interior*[16] and *Ha'aretz v. Electric Company*.[17] These cases provide an historical overview of Israeli free speech jurisprudence from 1953, five years after independence, when *Kol-Ha'am* was decided, to 1978, when the final decision in *Ha'aretz* was announced. They represent the most intensive intellectual effort by the court to articulate a theory of free expression. Moreover, each exposes many facets of the tensions and themes suggested above. *Kol-Ha'am*, a unanimous opinion, is an effort to transplant instantly the entire corpus of First Amendment jurisprudence into Israeli law. In *Ha'aretz*, the tensions surface. In the first round, a two-to-one decision, American law predominated, and the rule in *New York Times v. Sullivan*[18] was incorporated into Israeli law. In the second round, following "further hearing," a four-to-one decision fiercely rejected American law.

Analysis of the cases also provides an opportunity to uncover the personal factor of individual judicial attitudes in transplantation. Indeed, a precise connection can be drawn between the justices' respective backgrounds and educations and their propensities toward one of the rivaling modes. This study reviews the opinions of four justices.

15. C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-44 (1970).

16. 7 Piskei Din [P.D.] [Law reports of Israeli Supreme Court] 871 (1953) (in Hebrew). [Editor's note: The official English translation of *Kol-Ha'am* appears in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90 (1948-1953). All subsequent citations to *Kol-Ha'am v. Minister of the Interior* will be made to the official translation only; hereinafter cited as 1 SELECTED JUDGMENTS].

17. 31(2) P.D. 281 (1974).

18. 376 U.S. 254 (1964).

Two justices, Agranat and Landau, are among the founding fathers of Israel's Supreme Court. Two justices, Ben-Porath and Shamgar, are new appointees. The conflicts, however, are both intra- and intergenerational. Justices Agranat and Shamgar opted for Grand Style and transplantation of American law. Justices Landau and Ben-Porath opted for Formal Style and rejection of American law.

Finally, the article explores an important concept in comparative law—transplantation. This author uses transplantation to describe the complex influence of one legal system over another—from general intellectual influence in the realm of ideas to adoption of a precise doctrine or rule. Transplantation, thus conceived, suffers from a measure of vagueness, but retains the richness which would be lost if it were reduced to a particular form or broken into subcategories with technical terms attached to each.

Ordinarily, discussions of transplantation focus on the importation of statutes from one country to another. Here we see a different brand—transplantation employed by judges. How is transplantation or rejection of the donor system brought about?—*i.e.*, what methods of "judicial craftsmanship" are utilized to adopt or reject foreign law? Further, the sources used for identifying foreign law are reviewed. To what extent, for instance, is foreign law "discovered" in Supreme Court opinions or in scholarly works which synthesize or criticize the donor system? Finally, the quality of transplantation is examined. Is it organic or mechanistic?—*i.e.*, does it attempt to tie the donor law into the fabric of the recipient system, or is it mechanical and therefore unlikely to "take"? What are the effects of transplantation on the development of indigenous constitutional law?[19]

The article has three parts. Part I analyzes the *Kol-Ha'am* case, the transplantation of American law into Israel's legal system. Part II is a discussion of the seeds of the emerging tensions, as they appear in *Kol-Ha'am*, and an overview of Israeli free speech decisions between 1953 and 1977. Part III analyzes the sequence of transplantation and rejection of American law in the *Ha'aretz* case.

I. 1953—Enter Probable Danger

A. The Case of *Kol-Ha'am*: A Brief Summation

Kol-Ha'am arose from the ever-prevalent Israeli preoccupation with foreign relations. In March 1953, the respected daily newspaper,

19. The debate about the feasibility of organic as compared with mechanic transplantation had begun with Montesquieu and continues to this day. *See* Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79 (1976).

Ha'aretz, reported that Mr. Abba Eban, then Israel's Ambassador to the United States, endorsed a statement by Mr. Henry Morgenthau that in the eventuality of war between the United States and the Soviet Union, Israel would supply the United States with a military force of 200,000 troops. Prime Minister Ben-Gurion dismissed the report as a "journalistic hoax," but Israel's Communist Party seized the occasion. The Party's two newspapers, one of which was *Kol-Ha'am* (The People's Voice), published hyperbolic editorials in standard Marxist-Leninist jargon denouncing the "anti-nationalist policy of the Ben-Gurion government which profiteers in the blood of Israeli youth."[20] Four days later, the Minister of the Interior suspended publication of the papers for periods of ten and fifteen days.

The power of suspension rested on section 19 of the Press Ordinance, 1933, which reads in part: "The [Minister of the Interior] . . . may, if any matter appearing in a newspaper is, in [his] opinion . . . *likely* to endanger the public peace . . . suspend the publication . . . *for such period* as he may think fit . . . ."[21]

The papers challenged the order in the High Court of Justice.[22] A

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20. 1 SELECTED JUDGMENTS at 90. The article in *Kol-Ha'am* concluded:

> "Despite the anti-Soviet incitement, the masses in Israel know that the Soviet Union is faithful to the policy of the brotherhood of peoples and peace. The speeches of Comrades Malenkov, Beria and Molotov have once more confirmed that. If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence, and are not prepared to give up the Negev in return for joining the 'Middle East Command.'
>
> "Let us increase our struggle against the anti-national policy of the Ben-Gurion Government, which is speculating in the blood of Israel youth.
>
> "Let us increase our struggle for the peace and independence of Israel." *Id.* at 93.

Kol-Ha'am was the Communist Party's Hebrew language newspaper. *Al-Ittihad*, its Arabic newspaper, carried an article that concluded:

> "And so all forms of surrender by the Ben-Gurion Government, and all her demonstrations of faithfulness, will not avail her with her American masters; moreover, her economic, political and state bankruptcy, internal and external, are beginning to be revealed to the masses, who have started to understand whither this Government is dragging them—not only to unemployment, poverty and hunger, but even to death in the service of imperialism, feeding them as fodder to their war machine, whilst those masses do not want that fate and will demonstrate their refusal.
>
> "If Ben-Gurion and Abba Eban want to fight and die in the service of their masters, let them go and fight by themselves. The masses want bread, work, independence and peace, will increase their struggle for those objectives, and will prove to Ben-Gurion and his henchmen that they will not allow them to speculate in the blood of their sons in order to satisfy the will of their masters." *Id.* at 93-94.

21. Press Ordinance § 19(2) (1933), *reprinted in* 2 R. DRAYTON, LAWS OF PALESTINE 1225 (1933) (emphasis added).

22. Israel's Supreme Court serves both as an appellate court and as the High Court of

unanimous panel of three justices[23] overruled the order. Justice Shimon Agranat, writing for the Court, began by declaring freedom of expression and freedom of the press to be basic principles of Israel's unwritten constitutional law by virtue of Israel's commitment to democracy.[24] Balancing the interest in free speech against the interest in national security, he then interpreted the word "likely" in Section 19 to mean "likely to produce probable danger to the public peace."[25] Rather than remanding the case to the Ministry of the Interior, the Court itself weighed the probability of danger and concluded that given the components of the probable danger test, the suspension order could not stand.[26]

B. The Recipient System on the Eve of Transplantation

The Press Ordinance was a British Colonial measure, designed primarily to enable the High Commissioner in Palestine to contain inflammatory Arab incitements against Jews.[27] In 1948, when the State of Israel was inaugurated, the bulk of Mandatory (pre-1948) law, including the Press Ordinance, was recognized as Israeli law.[28] In Israel, the suspension power had been used sparsely, yet it was considered a legitimate executive measure, not antithetical to the country's commitment to democracy and freedom of expression.[29]

It is surprising that the editors of *Kol-Ha'am* decided to challenge the suspension order. A few weeks earlier, the paper had contested

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Justice. In its latter capacity, it handles grievances of private persons against the various organs of the state as a court of first and last resort. Historically, this curious institution, which handles thousands of (sometimes trivial) cases per year, was conceived by the British to prevent adjudication of matters of state by the lower courts and the native judges. In Israel, it has developed into a powerful and prestigious institution, guarantor of democracy and the rule of law. Courts Law 5715-1957, at § 7, 11 LAWS OF THE STATE OF ISRAEL [L.S.I.] 157 (1956-1957) (in English) (replacing Palestine Order in Council § 43 (1922), *reprinted in* 3 R. DRAYTON, LAWS OF PALESTINE 2569, 2579 (1933)). *See* I. ZAMIR, ADJUDICATION IN ADMINISTRATIVE CASES 80-84 (1975) (in Hebrew), and references therein.

23. Unlike the United States Supreme Court, Israel's highest court typically sits in a panel of three, Courts Law, 5715-1957, at § 3, 11 L.S.I. 157 (1956-1957). In this case, Justice Agranat was joined by Justices Sussman and Landau. All three later served as Chief Justice.

24. 1 SELECTED JUDGMENTS at 95-96.

25. *Id.* at 102-03.

26. *Id.* at 120-21.

27. *See* Lahav, *supra* note 2, pt. 1, at 230.

28. Law and Administration Ordinance 5708-1948, 1 L.S.I. 7 (1948). Section 11 provides: "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities." 1 L.S.I. 11 (1948). *See generally* A. RUBINSTEIN, *supra* note 1, at 37-57.

29. *See* Lahav, *supra* note 2, pt. 2, at 513-20.

another suspension order only to be rejected on the grounds that "the question whether a certain publication endangers the public peace is delegated under this statute to the Minister of the Interior and not to this Court."[30]

The fresh "precedent," however, was not the most troublesome obstacle. Israel of the early fifties was ambivalent about the doctrine of *stare decisis*.[31] Even if, as a five-year-old institution, the Israeli Supreme Court wished to respect its own decisions in order to demonstrate stability and consistency, to consolidate its reputation, and to prove its affinity with the common law, it still could distinguish the previous decision and could justify a different route.[32] Instead, the major obstacles were of a more general political and legal nature. As in

30. Kol-Ha'am v. Minister of the Interior, 7 P.D. 165, 166 (1953). Justice Agranat participated in the unanimous decision of the Court, but it is not clear who wrote the opinion. Paradoxically, this decision may have triggered the subsequent change in judicial policy. Following the suspension of *Kol-Ha'am*, a Communist weekly began to appear in higher frequency. The Minister of the Interior suspended the weekly and responded in the Knesset, "[I]f [the Parliament member who complained about the suspensions] finds that I acted improperly from a formal-legal point of view, then there is the High Court of Justice; he can appeal there for revocation of the order. [An appeal to the Court] . . . had already taken place once, in connection with the suspension of *Kol-Ha'am* and he can get approximately the very same results," *quoted in* Shapira, *Self-Restraint of the Supreme Court and the Preservation of Civil Liberties*, 2 IYVNEY MISHPAT [Tel Aviv University Law Review] 640, 645 (1973) (in Hebrew). The reference is to the first *Kol-Ha'am* decision, which was apparently viewed by the Minister as a carte blanche to order suspensions. Maybe the Supreme Court had been alarmed by that result and therefore decided to try another approach.

31. Until 1954, the issue of whether or not the doctrine of *stare decisis* obtained in Israel was not resolved. Nothing in the Mandatory Law provided for it, and no Israeli statute regulated the matter. In 1954, a landmark decision of five justices (among them, Justices Agranat and Landau) decided that, subject to very minor qualification, the Israeli Supreme Court (also as High Court of Justice) *is bound* by its own precedents. Reem v. Minister of Finance, 8 P.D. 494 (1954). The Court thereby rejected the appeal of the Attorney General that the Court refrain from adopting a rigid doctrine of *stare decisis* in Israel. Interestingly, the opinion that the Attorney General sought to overrule was one of those "comprehensive and exhaustive" opinions by Justice Agranat, Amsterdam v. Minister of Finance, 7 P.D. 945 (1953). In 1957, § 33 of the Courts Law, *see* note 22 *supra*, provided that "[a] rule of law decided by the Supreme Court binds all courts with the exception of the Supreme Court." *See generally* Dror, *Some Recent Developments of the Doctrine of Precedent in Israel*, in STUDIES IN ISRAEL LAW 228 (B. Akzin ed. 1958); Tedeschi, *On the Principle of Stare Decisis*, in STUDIES IN ISRAEL LAW 114 (B. Azkin ed. 1960).

32. In the first *Kol-Ha'am* case, 7 P.D. 165 (1953), the Court merely denied the petition for temporary order nisi. It could be argued that the Court did not consider carefully the issue of the limits of the suspension power. Previously, the Court had delivered several decisions that asserted the right to free expression and free press, *see, e.g.*, Goraly v. Attorney General, 5 P.D. 1017 (1950); Bloy v. Minister of Interior, 4 P.D. 136 (1949). See Lahav, *Freedom of Expression in the Decisions of the Supreme Court*, 7 MISHPATIM [Law Review, Students and Faculty of Law, Hebrew University of Jerusalem] 375, 381-87 (1977) (in Hebrew).

Marbury v. Madison,[33] to which *Kol-Ha'am* bears a striking resemblance,[34] a daring result—revocation of the order—could mean a frontal confrontation between the Court and the government, the bureaucracy and the political elite.

The government put its case on grounds of national security[35]—a central raw nerve of Israeli being. Not a decade had passed since the horror of the Holocaust had been revealed; barely five years had passed since the bloody, desperate war of independence; Israel was subjected daily to terrorist attacks. To reject the government's judgment that certain expression would jeopardize the young Jewish state was not a task to be undertaken lightly by this Court. The Cold War, Israel's own strained relationship with the Soviet Union,[36] the fact that elsewhere in the West communist parties were held in disrepute,[37] and that the United States Supreme Court had recently reached a judgment[38] that in practical terms amounted to outlawing the American Communist Party could not invite tolerance by the Israeli Supreme Court. The Israeli bureaucracy, which internalized its predecessor's authoritarian predisposition and inherited its vast discretionary powers, was already fidgety about judicial contraction of its powers.[39] Finally, Israel's elite

33. 5 U.S. (1 Cranch) 137 (1803).

34. The two cases resemble one another both in their central message about constitutional principles and in the craftsmanship of the opinions. For an analysis of *Marbury v. Madison*, see A. BICKEL, THE LEAST DANGEROUS BRANCH 1-12 (1962).

35. The Attorney General argued that the articles amounted either to "an obvious call" to bring about a change in the government's policy through violence, or to "incitement to disobedience of the law by refusing to carry out the duty of enlistment for military service." 1 SELECTED JUDGMENTS at 120.

36. In November 1952, the Slansky trial was conducted in Prague. In January 1953, a "conspiracy" by Jewish physicians to murder Stalin was "discovered" in Moscow. Both episodes were heavily anti-Semitic and anti-Zionist. *See generally* CZECHOSLOVAK POLITICAL TRIAL 1950-1954 (J. Pelikan ed. 1971). In both, *Kol-Ha'am* sided with the Soviet position. In February 1953, the Soviet Union severed diplomatic relations with Israel, following an explosion in its consulate in Tel-Aviv. Between May and October 1953, however, relations with the Soviet Union improved, while relations with the United States cooled. One commentator has argued that the shift in Israeli-Soviet relations facilitated acceptance of the decision in the second *Kol-Ha'am* case by the executive and by public opinion. Shapira, *supra*, note 30, 642, 645-46.

37. *See generally* Sheldon, Constitutionalism and Subversion: A Comparative Study of Communist Parties and High Courts (1965) (unpublished thesis in Harvard Law School Library).

38. Dennis v. United States, 341 U.S. 494 (1951).

39. I. OLSHAN, LAW AND DELIBERATIONS: MEMOIRS 238-41 (1978) (in Hebrew) (Justice Olshan, retired, was one of the first appointees to the Supreme Court. He served as Chief Justice between 1954-1965). Generally, these were times of strife between the Israeli Supreme Court and the government, as each branch struggled to mould the contours of its powers and responsibilities vis-à-vis the other branch. *See* A. RUBINSTEIN, *supra* note 1, at 232-33. In an extraordinary case in 1951, the authorities proceeded to destroy an Arab vil-

generally upheld the values of a strong government and of social and political unity. It was believed, by and large, that only a strong government could contain the danger to national security, assimilate the recently arrived, diverse ethnic communities into "one" Israeli people, and construct both a durable political structure and a viable economy on the ruins left by the British and the recent war. Dissent, particularly hyperbolic and "unconstructive," was not regarded as a virtue and certainly was not worthy of blessing by the Israeli Supreme Court.[40]

The legal impediments were also discouraging. Clearly, the language of section 19 was calculated to invest wide discretionary power in the Minister of the Interior and to exclude judicial interference with his decisions.[41] Under these circumstances, a court wishing to protect freedom of the press would need first to assert the constitutional status of the principle of free expression so as to justify its power over the statutory language and, perhaps, even to assert powers of judicial review so as to nullify a statute which violates the constitutional principle. Yet without a written constitution, either to articulate the constitutional principles or, explicitly or implicitly, to allow for judicial review, "usurpation" of any powers of judicial review was impossible. Within months after its establishment, in the context of rejecting arguments that it should nullify statutes which violate Israel's Declaration of Independence, the Court explicitly accepted the doctrine of parliamentary supremacy.[42] By 1953, parliamentary supremacy had hardened into a major constitutional postulate. Upsetting it was unthinkable, and the

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lage despite a standing order by the Israeli Supreme Court to allow the inhabitants to return to their homes. *Id.* at 170.

40. *See generally* J. SHAPIRA, *supra* note 1.

41. Lahav, *supra* note 2, at 509-11.

42. The first part of the Declaration of Independence asserted the right of the Jewish people to its homeland. The second part asserted a commitment to representative democracy. The third part declared a commitment to civil and political rights and read:

"The STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."

The contention that the Declaration had normative constitutional powers was rejected in two of the first cases to be decided by the Court. Ziv v. Gubernik, 1 P.D. 85, 89 (1948); Alkarboutly v. Minister of Defense, 2 P.D. 5 (1948). It is worth emphasizing that at that time the Court, like many people in Israel, expected that a constitution would be adopted shortly. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245 (1969). *See also* Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217 (1970).

Court appeared to embrace it earnestly.[43]

Even the absence of judicial review, however, was not crucial. The Court could still construe section 19 in a way which would considerably contract the suspension powers. The availability of a legitimate constitutional principle of free expression, which would justify such statutory construction, was crucial. In the absence of a written constitution, the Israeli Supreme Court had to "create" the principle, and the difficulties of so doing were remarkable. The Declaration of Independence could be, and, as will be shown, was invoked, but it had already been stigmatized as lacking authoritative power.[44] Further, as a result of the undisturbed continuity between Mandatory and Israeli law, the content of Israeli public law was largely authoritarian. It provided for a very strong administration, with every conceivable legal power to snuff out any flame of liberty if the government wished to do so. For example, censorship, seditious libel, limitation on the right to demonstrate, and administrative detention were all part of the positive law.[45] Hence, it was impossible for the Court to distill a tradition of "fundamental liberties" from within its own legal system. Furthermore, there were few doctrinal tools for narrowly construing the broad statutory powers of section 19.[46]

This lack of internal limiting doctrines was compounded by the

43. There had been a possibility of recognizing limited judicial review, which would screen only Mandatory legislation. Such limited review would avoid confrontation with the Knesset, since it would not extend to genuine Israeli legislation. Law and Administration Ordinance 5708-1948, 1 L.S.I. 11 (1948), *see* note 28 *supra*. It had, moreover, the advantage of authority derived explicitly from an Israeli statute. Yet even this limited review had been rejected previously by the Court, which preferred an orthodox version of parliamentary supremacy. It could be argued that statutes which were fundamentally undemocratic could not survive in democratic Israel. The Court rejected such interpretation in the same group of cases where the validity of the Declaration of Independence was disposed with. In Lyon v. Gubernik, 1 P.D. 58, 69 (1948), the Court held that the "changes" stipulated by § 11 are technical only, *i.e.*, those "which do not necessitate the particular discretion required by the question if to drop a statute from the existing statutory system." The interpretation of § 11 was modified years later. Hougim Leoumiyim v. Minister of Police, 24(2) P.D. 141 (1968).

44. In fact, the Declaration of Independence does not guarantee freedom of expression. In a debate about the Declaration in the Provisional State Assembly the representative of the Communist Party suggested the addition of freedom of the press and assembly to the Declaration. Prime Minister Ben-Gurion responded: "This is not a constitution; there shall be a constitution separately." *Protocols of the State Provisional Council* 20 (May 14, 1948) (in Hebrew).

45. Defense Emergency Regulations arts. 86-93 (Censorship), art. 111 (Administrative Detention) (1945), *reprinted in* PALESTINE GAZETTE, no. 1063 (Supp. II 1945). Criminal Code Ordinance arts. 59-60 (Seditious Libel), arts. 79-80 (Demonstrations) (1936) *reprinted in* PALESTINE GAZETTE no. 652 (Supp. I 1936).

46. At that time, there was no consistent line at the Supreme Court regarding broad administrative powers. Some decisions contained embryonic efforts to form limiting doctrines, Alkarboutly v. Minister of Defense, 2 P.D. 5 (1948). Others had no difficulty in

dependence of the Israeli legal system on British law. Israeli public law was promulgated in English and used British legal terminology. Statutes explicitly referred to British law as a tool of interpretation, and the Mandatory charter for Palestine stipulated that lacunae in local law should be filled with "principles of common law and equity."[47] Not only was reliance on British law legitimate, but bench and bar were psychologically conditioned to it. The Israeli Court would look reflexively to Britain for guidance in limiting the powers of the Minister of Interior to suspend newspapers.[48] The problem was that while the English legal system was relatively free of the oppressive Mandatory statutes, it was equally barren of more general doctrines about the legitimate limitation of speech in a democracy.[49]

These barriers were critical. Legitimacy was involved: By what authority could the justices of the Israeli Supreme Court *legitimately* import American law? Pride was involved: Should revived Israel imitate foreign sources, or should it develop its own independent tools, based on Jewish/Israeli heritage? Practicality was involved: Who knew enough American law to master the intricacies of doctrine?

C. Justice Agranat: An Anatomy of Transplantation, Grand Style

Kol-Ha'am is the story of how the Israeli Supreme Court confronted, skirted and resolved much of the complexity described above and emerged with the doctrine of probable danger. It is also the story of the man who wrote the opinion—Justice Shimon Agranat—the person who had the proper background, craftsmanship, courage, and creativity to write the Israeli version of a judicial opinion, Grand Style.

Karl Llewellyn defined the Grand Style as a "way of thought and work, not . . . of writing."[50] In it he saw a judicial strategy of developing, sometimes changing, doctrine, while at the same time maintaining a "touch with the past," a "craft-conscious mood," and "a clean line."[51] In other words, a style which allows for policy oriented, sometimes radical, results, while retaining conservative judicial tactics.[52] Writing in

sanctioning the broad discretionary powers of the executive, Ziv v. Gubernik, 1 P.D. 85, 89 (1948).

47. *See generally* Friedmann, *Infusion of the Common Law Into the Legal System of Israel*, 10 ISR. L. REV. 324, 357-77 (1975).

48. *See generally* Friedmann, *Independent Development of Israeli Law*, 10 ISR. L. REV. 515, 516-36 (1975). *But see* references there for deviation of the Israeli Court from British precedents.

49. *See* H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 201-37 (1972).

50. K. LLEWELLYN, *supra* note 7, at 36.

51. *Id.*

52. *Id.*

the Grand Style, therefore, requires a judge whose jurisprudence recognizes the policymaking function in judicial decisionmaking, but who, at the same time, masters the specific technique through which judicial policy is legitimately constructed. To these qualities should be added two which are unique to a study of transplantation: intimate familiarity with the donor system and the ability to assimilate organically its spirit and its techniques into the recipient system. Justice Agranat was the person for the task.

Born and educated in the United States, he felt at home with both its language and culture. A 1929 graduate of the University of Chicago Law School,[53] his legal education was distinguished and distinctively American. In law school, he was exposed to the revolutionary trend in American legal thought away from legal formalism and toward sociological jurisprudence.[54] His American background had also made him sensitive to the importance of free speech for a viable democracy, which may help explain his concern about the growing signs of governmental intolerance toward minority views[55] and his resulting strategy to anchor an elaborate conception of free expression in Israel's legal system.

His legal training was broad and rich. In Palestine,[56] he served both as a magistrate and as district court judge. He was among the first to be recruited to Israel's Supreme Court after independence. Justice Agranat was therefore intimately familiar with the three relevant legal systems: the American, the English,[57] and the Israeli (the former Palestinian). His judicial experience gave him a keen eye for the intricacies of judicial decisionmaking and an understanding of the common law techniques of legal reasoning.

Finally, Justice Agranat possessed a sense of mission—to build a solid body of case law suitable for making the dream of a free demo-

53. WHO'S WHO IN ISRAEL (Eng. ed. 1978).

54. In the early twenties, the University of Chicago Law School was known for its departure from pure law and formalism in legal education. The basic premise of the curriculum was that "[a] scientific study of law involves the related sciences of history, economics, philosophy—the whole field of man as a social being." F. ELLSWORTH, LAW ON THE MIDWAY 93 (1977). In an August 1980 discussion with the author, Justice Agranat acknowledged being influenced by Professor Ernst Freund, a leader of the social jurisprudence school of thought. *See also* note 181 *infra*.

55. In the early fifties, official intolerance applied both to the political left, *see* Shapira, *supra* note 30, and to the right, *e.g.*, Sheib v. Minister of Defense, 5 P.D. 399 (1950).

56. He immigrated to Palestine in 1930.

57. Because of the open pipeline to the British legal system, a Palestinian as well as an Israeli judge had to develop a high degree of familiarity with English law. *See* notes 47-48 and accompanying text *supra*.

cratic Jewish homeland come true.[58] Many of his decisions are essays, spelling out Israeli law clearly, extensively and methodically so as to educate the bench, the bar and the people. *Kol-Ha'am* is but one example of his legacy.[59]

The decision in *Kol-Ha'am* has three parts. The first presents the philosophical justifications for freedom of expression and clearly demonstrates Justice Agranat's ability to probe beyond the formal realm of the law and to comprehend and to state the relevant principles from political philosophy.[60] The third part of the opinion relates doctrine to the factual situation and revokes the suspension order. It is in the second part of the opinion—the subject of this chapter—that his judicial talents shine. In it, the complicated task of transplantation is performed.

The transplantation undertaken by Justice Agranat was performed in three steps. First, he imported the approach of interest balancing from American law.[61] Next, he imported a specific doctrine, probable danger, a diluted version of the clear and present danger formula,[62] as the correct definitional principle of interest balancing. In passing, Justice Agranat also managed to incorporate two other major First Amendment doctrines: the doctrine against prior restraint and the doctrine against seditious libel. Finally, in the postdoctrinal phase, he responded to the judicial and scholarly critique of the clear and present danger test by providing a set of guidelines for his preferred doctrine.[63]

A particularly interesting feature of the transplantation is the

58. The other members of the Court shared this sense of mission. *See* I. OLSHAN, *supra* note 39, at 215.

59. *See* Feller, *Foreword*, and Cohn, *On Shimon Agranat*, in 7 MISHPATIM 369, 371 (1977) (in Hebrew). Upon independence there was very little genuine Israeli law. Judicial opinions that purported to "discover" and "summarize" Israeli law amounted to judicial lawmaking.

60. He first presented the justification from democracy: "[T]he people . . . are entitled . . . at any time to scrutinize . . . [the rulers'] political acts, whether with the object of correcting those acts and making new arrangements in the state, or with the object of bringing about the immediate dismissal of the 'rulers,' or their replacement as a result of elections." 1 SELECTED JUDGMENTS at 95. Second, he presented the justification of the search for truth and the role played by a free marketplace of ideas in this process. *Id.* at 96. Third, he presented the individual's interest in self-fulfillment through expression. *Id.* at 97.

61. *See* G. WHITE, *supra* note 6; Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1321 (1979).

62. As announced by Chief Justice Vinson's plurality opinion in Dennis v. United States, 341 U.S. 494, 510 (1951). Apparently, Justice Agranat felt a need to compensate for the absence of a developed constitutional history and tradition by assimilating the entire American jurisprudence of the First Amendment.

63. Interestingly, First Amendment jurisprudence was imported under the umbrella of statutory and administrative law, and thereby the principle of parliamentary supremacy was preserved. *See* note 111 and accompanying text *infra*.

sources used to locate the substantive material. United States Supreme Court decisions were generously cited, but the dominant influence was scholarly. The jurisprudential and doctrinal sections bear the mark of Zechariah Chafee, Jr.'s book, *Free Speech in the United States*.[64] The postdoctrinal section was clearly influenced by Elliot Richardson's critique of *Dennis v. United States*.[65]

The method employed is fascinating. First, the scholarly influence is hidden behind a barrage of case law. Second, mindful of Israeli legal culture's suspicion of foreign sources other than English law, Agranat was careful to interweave American and English precedents. English case law was displayed in strategic corners, in order to convey an appearance of reliance upon it. In crucial links of his legal reasoning, where the *ratio decidendi* was presented, English law gave way to Israeli precedents and statutes, thus implying the local authenticity of the holding. All in all, *Kol-Ha'am* is a fine example of creative transplantation, Grand Style.

The complexity of transplantation in its three substantive phases is traced below. Also discussed within each phase are the sources relied upon and the technique of transplantation.

D. Jurisprudence: Interest Balancing as the Correct Method to Define the Limitations on Speech

1. The Substantive Material Transplanted

The foundations for the American jurisprudence of free speech were being laid[66] when Justice Agranat was a student in law school. At Harvard, Professor Chafee utilized both Roscoe Pound's sociological jurisprudence and his more specific efforts in the area of free speech to construct a theory for the First Amendment.[67] The theory was

64. Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (2d ed. 1969). The book was first published in 1920 under the title FREEDOM OF SPEECH. At that time, Chafee did not adopt the clear and present danger test, but *did use* the jurisprudential approach of interest balancing. Justice Agranat relied on the second edition.

65. 341 U.S. 494 (1951); *see* Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

66. The efforts took place at both the judicial and academic levels. *See* Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr., and Freedom of Speech*, 42 NEW ENG. Q. 511 (1969); Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971). *But see* Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56 (1980). Indeed, American positive law at that time was by and large unsympathetic to dissenting expression, yet there began a growing awareness that the bad tendency test was incompatible with the justifications for free speech, and a search was under way to give broader meaning to the First Amendment.

67. *See* Auerbach, *supra* note 66, for a discussion of Pound's influence on Chafee. In

presented in the first chapter of Chafee's seminal book, *Free Speech in the United States*.[68] Thirty-three years later, Justice Agranat used the theory of this chapter to adopt interest balancing in Israel.

Chafee began his theory with two basic premises: that freedom of expression played a significant role in the American polity and that, as a legal principle, it was not absolute.[69] He then proceeded with an historical inquiry. He examined two doctrines that were historically employed to distinguish between legitimate and illegitimate speech: the Blackstonian doctrine against prior restraint and the "licentiousness doctrine," which distinguished between liberty and license.[70] Although both were utilized by American courts well into the twentieth century,[71] Chafee rejected them as inconsistent with the central message of the First Amendment. The limitations on speech, he asserted, can be correctly discerned only by carefully balancing the societal interests involved, a process which would yield a "rational principle."[72] Because Chafee's immediate task was to assess the constitutionality of the Espionage Act, he posited the societal interests involved in the defense of free expression against the interest in national security. The process of balancing these interests yielded the "rational principle," clear and present danger.[73]

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the first chapter of Z. CHAFEE, JR., FREEDOM OF SPEECH (1920), Pound is mentioned twice. *Id.* at 8 n.9, 35 n.73. The latter reference is of particular interest because there Chafee invokes both John Chipman Gray and Roscoe Pound in his attack on legal formalism and his adoption of sociological jurisprudence: "It must never be forgotten that the balancing cannot be properly done unless all the [individual social] interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim." *Id.* at 35. *See also* text accompanying notes 314, 335-37 *infra*.

68. This was the book's title in the revised edition. *See* note 64 *supra*. The following analysis refers to the 1941 edition, which was used by Justice Agranat.

69. Z. CHAFEE, *supra* note 64, at 3.

70. *Id.* at 8-14.

71. *Id.* at 9.

72. "The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth." *Id.* at 35. *See also id.* at 8, 32-34. Because the term "rational principle" was used by Chafee himself and was later adopted by Justice Agranat, it will also be used in this essay. The contemporary equivalent would probably be an "accommodating principle" under the "principled balancing" or the "definitional balancing" approaches.

73. *Id.* at 35: "[T]he great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war."

In his first edition, Chafee did not recommend the clear and present danger test, yet he

Justice Agranat followed the same route, but he zigzagged along the way. He opened by transplanting Chafee's two basic premises into Israeli soil—freedom of speech is a living part of a free, democratic Israel, but that freedom is not absolute.[74] He then came to the heart of Chafee's analysis. Here, some interesting departures from Chafee's approach provide an insight into the intricate dynamics of transplantation. The licentiousness doctrine and the doctrine against prior restraint,[75] both rejected by Chafee as inadequate, were absorbed as organic parts of Israeli law. As if logic required, and as if no chimera[76] was thereby created, the balancing approach was joined, Chafee's societal interests were weighed, and the "rational principle" was found: probable danger to national security.

Justice Agranat began by incorporating the licentiousness doctrine into Israeli law and then proceeded to analyze "licentiousness" in terms of societal interests: "There is a difference between freedom and license . . . . [T]hat is to say, that certain interests also require protection and for the sake of these it is essential to place clear limits on the right to freedom of expression."[77] What are the interests to be protected? Justice Agranat distilled a list from the Israeli Criminal Code Ordinance of 1936[78] and concluded: "We do not intend to exhaust the list of those interests, and we shall mention only the most important of them, namely, the interest . . . [of] 'state security.' "[79] Thus, having placed the Court one hundred-eighty degrees from Chafee, Justice Agranat carefully navigated back again, using as his compass the inter-

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did utilize the balancing approach and the quest for a rational principle. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

74. 1 SELECTED JUDGMENTS at 98. "Nevertheless, the right to freedom of expression does not mean that a person is entitled to proclaim, by word of mouth or in writing, in the ears or eyes of others, whatever he feels like saying." *Id. Cf.* Z. CHAFEE, *supra* note 64, at 3 ("This book is an inquiry into the proper limitations upon freedom of speech, and is in no way an argument that any one should be allowed to say whatever he wants anywhere and at any time").

75. The incorporation of the doctrine against prior restraint appears later in the decision. 1 SELECTED JUDGMENTS at 106. It is mentioned here to provide a complete comparison with Chafee's analysis.

76. For a discussion of the relationship between licentiousness and balancing, see text accompanying notes 189-200 *infra*.

77. 1 SELECTED JUDGMENTS at 98.

78. One interest of this kind was previously hinted at: the need for protecting the good name of the citizen, Criminal Code Ordinance §§ 201 & 202 (1936). Other kinds of interests requiring the raising of a barrier against the effect of statements are: the securing of a fair trial and the doing of justice to parties before the courts, *id.* at §§ 126 & 127; the prevention of outrage to religious feelings *id.* at § 149; and the prohibition of obscene publications which offend against moral values, *id.* at § 179. *See* 1 SELECTED JUDGMENTS at 98.

79. *Id.*

est in national (state) security. This interest begot a lengthy analysis. Despite its extreme importance for society, excessive patriotic zeal could result in an unjustified suppression of ideas. Against national security Justice Agranat juxtaposed freedom of expression, emphasizing that beyond its individual value in permitting self-fulfillment, this freedom is of "great social value . . . add[ing] to the efficacy of the democratic process."[80] In conclusion, he quoted from Justice Frankfurter's opinion in *Dennis*: "[I]t would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion and so brought us down to their own level."[81]

The ground prepared, Justice Agranat performed a powerful *tour de force*. One page earlier, the licentiousness doctrine was incorporated into Israeli law, and national security was a valid interest under this very doctrine. Now, the analysis of national security completed and its relationship to freedom of expression explicated, a doctrinal shift occurred. Under the guise of an innocent and descriptive summary of the previous discussion, the balancing approach was introduced: "So far, we have dealt with the problem in a general way, *and have established that the solution must come by weighing the interests of state security . . . against freedom of expression . . . .*"[82]

Justice Agranat was mindful of the tension created by his shift to interest balancing. The licentiousness doctrine concerns the legitimacy of legislative discretion to limit liberty of expression. In spirit, at least, it implies legislative discretion to delegate broad discretionary powers to the executive, particularly in the area of national security where executive claims of special expertise are frequent. Interest balancing, by contrast, necessarily implies a more active judicial role in safeguarding the principle of free expression.[83] If licentiousness is the prevailing

80. *Id.* at 101. *See also* Chafee's distinction between the social and individual interest in free speech, *supra* note 64, at 33, and his conclusion: "The great trouble with most judicial construction of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety," *id.* at 34.

81. 1 SELECTED JUDGMENTS at 101. In fact, Agranat quotes Sir William Haley, Director of the British Broadcasting Corporation, *quoted in* Dennis v. United States, 341 U.S. 494, 553-54 (1951) (Frankfurter, J., concurring).

82. 1 SELECTED JUDGMENTS at 101 (emphasis added).

83. In a system that has a written constitution and recognizes the powers of judicial review, the tension between interest balancing and licentiousness is accentuated, since the legislature does not have discretion to limit free expression for whatever reason it wants. But the tension is still forceful where legislative supremacy obtains, because interest balancing lifts the veil of limitations on expression and requires a probing inquiry into the weight of the principles and considerations involved.

doctrine, why not allow the Minister of the Interior to combat "license" wherever he sees it?

Justice Agranat had already begun to resolve this tension by excising national security from the other interests.[84] Other interests, regulated by the Criminal Code Ordinance, did not invite judicial balancing, since the Code contained a "clear and defined" balancing formula for their protection.[85] National security, when it conflicted with free speech, produced a particularly "complicated" situation, and thus warranted more judicial attention.[86] He then adjusted Chafee's First Amendment analysis to the Israeli system, where parliamentary supremacy prevailed:

> [S]ometimes the legislator leaves the discretion . . . [to the] Executive . . . . [Then] the question must inevitably arise (particularly because that approach does embody a concise, narrow formula), as to what is the *rational principle* that ought to guide the Executive when engaged in the aforementioned process, in order to settle the question in favour of one or other of the two interests.[87]

Finally, Justice Agranat connected his theory of judicial control to the text of section 19, which allowed the Minister of the Interior to suspend a newspaper if in his opinion it was "likely to endanger the public peace."[88] Agranat omitted any reference to "in his opinion" and posed the following question: "[W]hat is the test which the Minister . . . should apply when he comes to decide whether the material that has been published is 'likely to endanger the public peace' . . .?"[89] The decisive legal issue was then further reduced to the interpretation of "likely," an interpretation which miraculously coincided with the "probable danger" formula of *Dennis v. United States*.[90]

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84. *See* text accompanying note 79 *supra*.

85. 1 SELECTED JUDGMENTS at 99.

86. "[T]he tests . . . [for other interests] . . . are . . . clear and defined . . . . But in speaking of the 'balancing' of the interests involved in maintaining . . . security on the one hand, and preserving . . . freedom of expression . . . the process of weighing up competing interests becomes more *complicated*." *Id.* at 99 (emphasis added). *See* Z. CHAFEE, *supra* note 64. "[E]ven in war time freedom of speech exists subject to a *problematical* limit." *Id.* at 8 (emphasis added).

The word "complicated" in Agranat's text is the choice of the translator from Hebrew, it could also be translated to "problematic." A counterargument could be as persuasive: The "problematic" nature of the balancing makes it more suitable for legislative, rather than judicial, discretion.

87. 1 SELECTED JUDGMENTS at 101 (emphasis added).

88. *Id.* at 102.

89. *Id.*

90. 341 U.S. 494, 509-10 (1951). *Compare* the formula in *Dennis with* the test articulated in *Kol-Ha'am*, 1 SELECTED JUDGMENTS at 102-03.

2. The Process of Transplantation

Both the process and the substance of the transplantation in *Kol-Ha'am* pose problems. First, there is the issue of the sources. Sociological jurisprudence and interest balancing were major intellectual trends, widely discussed in the legal literature. Was the importation of interest balancing merely a general flow of ideas from one culture to another, or was there a particular American source which actually influenced the Israeli analysis? If the latter, what American source most influenced this section—Chafee's work or United States Supreme Court decisions? Second, what methodology applied in using the foreign sources and why was it so employed?[91]

That ideas flow from one culture to another is a truism. Justice Agranat must have been familiar with the general tenets of sociological jurisprudence and did not need an actual source to lead him in this direction.[92] Indeed, in the section just reviewed, Chafee was cited only once, in the context of analyzing the interest in national security and in connection with a marginal point.[93] Yet beyond the general influence, beyond the structural similarity between Chafee's and Agranat's analyses, Chafee's words ring throughout the Israeli decision. For example, compare Chafee's description of the licentiousness doctrine[94] with that by Agranat. Chafee said, "A statement of the same view . . . was made by Judge Hamersley of Connecticut: 'Freedom of speech and press does not include the abuse of power of *tongue and pen*, any more than freedom of other action includes an injurious use of one's *occupation, business, or property* . . . .' "[95] Agranat changed the order of the sentences: "[J]ust as the right to freedom of action in other fields does not extend to the use of a man's freedom of *profession, business or property* in a manner injurious to others, so also the right to freedom of speech and the press does not entail the abuse of the power of the *tongue or the pen*."[96] Also, compare each author's analysis of the socie-

91. The latter part of this question is generally related to the choice between the two broad models—the organic and the mechanical models of transplantation. *See* text accompanying note 104 *infra*.

92. *See* note 54 *supra*.

93. "In his important book, Freedom of Speech in the U.S.A. [sic] Professor Chafee severely criticizes the Federal Courts in the United States for being led away into such error when interpreting the Espionage Act during the First World War." 1 SELECTED JUDGMENTS at 101.

94. An interesting question, central to our study of doctrinal transplantation, is whether or not Agranat understood that Chafee was rejecting the licentiousness doctrine. For a discussion of this issue, see note 189 *infra*.

95. Z. CHAFEE, *supra* note 64, at 12 (emphasis added).

96. 1 SELECTED JUDGMENTS at 98 (emphasis added).

tal interest in national security and its relationship to freedom of expression. Chafee said, "[L]et us recognize the issue as a conflict between two vital principles, and endeavor to find the basis of reconciliation between order and freedom . . . even in war time freedom of speech exists subject to a *problematical limit* . . . ,"[97] and "[T]he *great* interest in free speech should be sacrificed only when the interest in public safety is *really imperiled*."[98] Justice Agranat said, "But in speaking of the 'balancing' of the interests involved in maintaining state security on the one hand, and preserving the principle of freedom of expression on the other, this process of weighing up competing interests becomes more *complicated*,"[99] and "that the *great social value* of the principle which protects the latter interests is worthy of particular attention; and that preferring that former interest is justifiable only when the situation definitely calls for it."[100] Finally, compare their attitudes concerning the quest for a rational principle. Chafee wrote, "The question whether such perplexing cases are within the First Amendment . . . [can be solved] only by the development of a *rational principle* to mark the limits of constitutional protection."[101] Justice Agranat wrote, "But sometimes the legislator leaves the discretion in this field in the hands of others . . . the question must inevitably arise (particularly because that approach does embody a concise, narrow formula), as to what is the *rational principle* that ought to guide the Executive . . . ."[102]

It seems clear that the source which influenced Justice Agranat most in incorporating the interest balancing approach was not specific American case law, but Chafee's scholarly work. Transplantation, therefore, did not amount to incorporation of positive law from one system to another but to legal thought. Perhaps Justice Agranat was uncomfortable with this consequence, since while Chafee was hardly acknowledged, this part of the decision was peppered with a variety of

97. Z. CHAFEE, *supra* note 64, at 8 (emphasis added).

98. *Id.* at 35 (emphasis added).

99. 1 SELECTED JUDGMENTS at 99 (emphasis added).

100. *Id.* at 101 (emphasis added).

101. Z. CHAFEE, *supra* note 64, at 15 (emphasis added).

102. 1 SELECTED JUDGMENTS at 101 (emphasis added). *Compare* Z. CHAFEE, *supra* note 64, asserting the importance of breaking away from legal formalism in a quotation of Holmes: "The provisions of the Constitution are not *mathematical formulas* having their essence in their form; they are organic living institutions transplanted from English soil," *id.* at 30, *with* Agranat, adjusting it to the doctrine of parliamentary supremacy: "It is clear that this approach by itself does not amount to a mathematical formula which can be accurately adapted to every single occasion. The legislator does, in point of fact, sometimes do the work of weighing and balancing by himself, that is, he himself determines in advance the kind of material that is not to be published," 1 SELECTED JUDGMENTS at 101.

sources, many of which appeared in Chafee's first chapter.[103]

There may be, however, a deeper explanation for the internal structure and methodology of citation. Justice Agranat's probable discomfort with acknowledging the influence of foreign scholarship reveals both his conception of how Israeli constitutional law should be formed and his ability to manipulate the techniques of common law judicial decisionmaking. The "clean" appearance of the licentiousness and balancing doctrines, stripped of almost all foreign reference, reflect his view of Israeli law as a national creation which should be independent of, not parasitic on, foreign sources. It reflects an effort to make transplantation organic, not mechanical. Justice Agranat apparently wished to educate bench and bar in the methods of receiving foreign law. Israeli law could learn from foreign sources, but it would form its doctrines independently.[104]

There may also have been a tactical dimension to this structure. Since the analysis led to a novel doctrine—the limitation of executive discretion by judicially imposed standards in the sensitive area of national security—it needed to be cemented to conventional Israeli law in a way which would preempt criticism. Reliance on foreign sources, particularly American, would have invited the charge that the Court was making, not applying, law. In a judicial system heavily influenced by legal formalism, this would have been a charge of some significance. Hence the licentiousness doctrine was "discovered" in Israeli law, and Israeli precedents and statutes were invoked. This respectable, seemingly conservative attire was needed in order to perform the task which lay ahead.

In announcing his doctrine of limited executive discretion, Justice Agranat was confronting not only the most dangerous branch—the executive—in an area where it universally claims expertise, but he was also facing problems from within the legal system. His argument certainly was not watertight. First, it was not clear why the interest in national security deserved a different treatment from that accorded other interests such as the right to reputation or the right to a fair

103. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Schenk v. U.S., 249 U.S. 47 (1918); Ronnfeldt v. Phillips, 35 T.L.R. 46 (C.A. 1918).

Furthermore, in presenting the licentiousness doctrine, Justice Agranat used Israeli sources, with the single exception of his reference to Lord Kenyon. 1 SELECTED JUDGMENTS at 98. His analysis of national security and its relationship to free expression was a collection of early twentieth century English and United States Supreme Court decisions. *Id.* at 100-01. The balancing approach and the search for a rational accommodating principle appeared *incognito*—as if logically derived from the previous discussion. *See id.* at 101.

104. *But see* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1045 (1979).

trial.[105] The fact that balancing was "complicated" did not explain why it should be self-delegated to the judiciary, nor why the legislative judgment[106] that the executive would best be able to do the balancing should not be honored.[107] Further, in emphasizing that the Criminal Code Ordinance of 1936 provided for a "clear and defined" test to balance free expression with other societal interests, Justice Agranat ignored its provisions about national security, which also contained "clear and defined" tests.

Justice Agranat's seeming loyalty to statutes and precedents helped befog the gaps in his argument and thereby deter criticism. Moreover, his historical survey of the dangers that an overzealous care for security had posed to two of the most revered democracies—England and the United States—served as a tactful warning to the Israeli government and was geared to disarm any contention that the issue of national security should be excluded from judicial intervention.[108] In addition, his scientific,[109] logical and legally grounded analysis was designed to force the executive to swallow the change in the *status quo ante*.[110] Finally, Justice Agranat cleverly neutralized one front: the legislature. He stopped short of positivizing the principle of free ex-

105. *See* note 78 *supra*.

106. There is a complicating factor here, since the relevant law (Press Ordinance) was passed by the High Commissioner in Palestine, who possessed both executive and legislative powers. *See* Palestine Order in Council art. 17 (1922), *as amended by* Palestine [Amend.] Order in Council § 3 (1923), *reprinted in* 3 R. DRAYTON, *supra* note 21, at 2590, 2591.

107. A persuasive justification exists. A politically independent judiciary is the best guarantor of the democratic process and the political rights that will keep it viable, but the theory has to be developed and cannot be taken for granted. *See generally* J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980). In fact, that is precisely what Justice Agranat tried to do, to assert as much judicial power to review abuse of political rights as can be consistent with the doctrine of parliamentary supremacy.

108. The warning is also issued to the Knesset. For while his doctrine is limited to executive action and thus formally leaves intact the Knesset's power to tamper with free expression, his analysis clearly implied that any such action will poison the heart of Israel's commitment to democracy.

109. That is, by being the product of "scientific" legal analysis, it was apolitical and therefore should not be subjected to political criticism.

110. The novelty and potential radicalizing effect of this new doctrine cannot be overemphasized. As a consequence of incorporating the entire body of Mandatory law, which reflected the stormy political conditions in Palestine prior to independence, the Israeli legal system was saturated by provisions vesting the executive with unlimited discretion in matters of national security. *See, e.g.*, Defense Emergency Regulation, *reprinted in* PALESTINE GAZETTE no. 1442 (Supp. II 1945); Press Ordinance §§ 34-35, *reprinted in* 2 R. DRAYTON, *supra* note 21, at 1231-34. Imposition of standards by the Court, rational as they might be, meant a significant contraction of executive power. From the executive's point of view, that the criminal law remained intact was of no great moment, since it is always easier to handle matters administratively, free from the slow judicial process which necessarily takes place in the public eye.

pression. He distinguished executive from legislative discretion. And where are there legislators who would deny that they alone are the legitimate creators of standards?[111]

E. Doctrine: Transplantation of Probable Danger and the Doctrines Against Prior Restraint and Seditious Libel

The search for a concrete formula in *Kol-Ha'am* was couched in terms of statutory interpretation: What is the meaning of "likely" as used in section 19 of the Press Ordinance?[112] Justice Agranat predetermined the outcome by forcing the Court to choose between either the "bad tendency" test or the "probable danger" test.[113] As a justification for the choice of probable danger, he marshalled two other basic First Amendment doctrines, the doctrine against prior restraint and the doctrine against seditious libel. Thus, in one stroke he incorporated into Israeli law[114] three basic layers of First Amendment jurisprudence: the eighteenth century Blackstonian doctrine against prior restraint, the early nineteenth century aversion to seditious libel attributed to the Framers[115] and the "modern" probable (clear and present) danger test.

Again, Chafee's influence is unmistakable. Having rejected both the licentiousness doctrine and the doctrine against prior restraint and

111. Indeed, in so doing he formally reaffirmed the power of the Knesset to suppress political liberties, but the doctrine of legislative supremacy had already filled the vacuum of Israeli constitutional law, and at least the Agranat doctrine made detailed rational standards of statutory suppression a necessary condition for legitimacy. Besides, he could reasonably expect that his analysis of the relationship between free expression and democracy would deter legislative action in this area.

112. *See* text accompanying notes 88-90 *supra*.

113. "But section [19(2)] says, *'likely* to endanger.' What is the purport of the term 'likely'? The answer to that question depends on the choice of one of two possible approaches. According to one approach it is sufficient, in order to satisfy the condition stated in the section in question that the publication reveals only a tendency—even a slight or remote tendency—in the direction of one of the consequences that we included in the notion, 'endangers the public peace'; while according to the other approach, the Minister of Interior must be convinced beforehand that there has been created, having regard to the circumstances in which it takes place, a link between the publication and the possibility of one of the said consequences occurring, which must lead to the inference that the occurrence of that consequence is probable. We think that the second approach represents the intention of the legislator in section [19(2)]." 1 SELECTED JUDGMENTS at 102-03.

Other tests were available, *e.g.*, the incitement test and the *ad hoc* balancing test, and Justice Agranat must have been familiar with them. The conscious limitation to only two possibilities reflects Chafee's influence.

114. At least as *obiter dicta*.

115. That was before L. Levy came out with his seminal book, *Legacy of Suppression: Freedom of Speech and Press in Early American History*, in 1960. Both of the sources consulted by Justice Agranat on this issue, Z. CHAFEE, *supra* note 64, and Dennis v. United States, 341 U.S. 494 (1951), espoused the version that the historical *raison d'être* of the First Amendment was to drop seditious libel from American law.

having opted for a balancing approach, Chafee looked into the history of the First Amendment in order to ascertain the weight of the interest in free expression. He saw the First Amendment as one manifestation of the effort to turn the American polity from an oligarchy into a republic.[116] In his view, an oligarchy rejected prior restraint but allowed suppression of dissent by applying the laws against seditious libel. The American republic, on the other hand, has allowed neither,[117] because open and uninhibited political expression was vital for representative democracy. On the basis of this analysis, Chafee rejected the "bad tendency" test[118] and arrived at a balancing formula—"rational principle."

Justice Agranat used the same ingredients but mixed them differently. He echoed Chafee in stating that a republican polity was allergic to *both* prior restraint and seditious libel and therefore could not tolerate the bad tendency test. But he replaced Chafee's concluding formula with the Vinson-Hand version, announced in *Dennis v. United States*.[119]

The transplantation of the three doctrines and the reasons why the Israeli Supreme Court preferred the probable danger to the clear and present danger test are analyzed below.

1. Transplanting the Doctrine Against Prior Restraint

As for the second sign[120] . . . it has long been recognized that

116. "Two different views of the relation of rulers and people were in conflict. According to one view, the rulers were the superiors of the people, and therefore must not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspapers or pamphlets, but only through their lawful representatives in the legislature, who might be petitioned in an orderly manner. According to the other view, the rulers were agents and servants of the people, who might therefore find fault with their servants and discuss questions of their punishment or dismissal, and of governmental policy." Z. CHAFEE, *supra* note 64, at 18-19.

117. "In short, the framers of the First Amendment sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions." *Id.* at 22.

118. The bad tendency test clearly emanated from the law of seditious libel. *Id.* at 24-26.

119. 341 U.S. at 510 (Chief Justice Vinson's plurality opinion adopted Circuit Judge Learned Hand's articulation of the rule. *Id.* at 510 (quoting 183 F.2d 201, 212 (1950)).

120. Justice Agranat referred to the doctrine against prior restraint and seditious libel as "*signs*" which proved the superiority of probable danger over bad tendency. He also advanced a third "sign": the Oxford Dictionary. 1 SELECTED JUDGMENTS at 108. The dictionary definition of "likely," Agranat observed, was "seeming as if it would happen . . . probable, . . . that may reasonably be expected to happen." Thus, a neutral, respectable, scientific (compared with his quest for a rational principle in the first section of *Kol-Ha'am*, 1 SELECTED JUDGMENTS at 106) and last, but not least, perfectly English source, pointed at the very same direction of interpretation. Mindful of the value of such "evidence," Justice

> that . . . "preventive measure"[121]—which is . . . nothing more than censorship . . . is . . . most powerful. "The censor," says Chafee, "is the most dangerous of all the enemies of the liberty of the press. . . ." [H]aving regard to the drastic character of that power, one should not attribute to the Israeli legislator an intention to authorize . . . suspension . . . only because the matters published seem . . . to disclose a mere tendency to endanger the public peace. . . .[122]

Once again, Chafee's scholarly analysis was the main vehicle for transplanting a doctrine into Israeli law.[123] Again, Justice Agranat varies Chafee's analysis. Chafee considered the distinction between prior restraint and subsequent punishment as antiquated and dangerous to a meaningful protection of free speech.[124] Had Justice Agranat followed Chafee mechanically, he would not have given this doctrine a central place in Israeli free speech law. By resting his case on the doctrine against prior restraint, Justice Agranat proved his ability to transcend temporal criticism and to grasp the functional importance of the doctrine against prior restraint to the dynamics of free expression.

The doctrine against prior restraint was not transplanted in its

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Agranat presented it as the last of his arguments—a triumphant finale to his scientific expedition.

Still, this was no more than cosmetics. Justice Agranat was fortunate to find the very term "probable" under the definition of likely, but surely the dictionary definition could persuasively support a bad tendency test. Further, the decision to opt for "probable" had *already* been made; it was inherent in the opening question: should "likely" be interpreted as bad tendency or as probable danger? Scientific make-up was needed in order to disguise the appearance of radical English and American notions on the Israeli scene and to deflect criticism. But it should not be given more weight than it deserves. The original order of the signs is: (1) seditious libel, (2) prior restraint, and (3) the dictionary definition of "likely." The sequence is changed here to emphasize the historical layers incorporated.

121. Here he tied the power of suspension to censorship. "In . . . the present case, we are concerned with a preventive measure, which bears no criminal character in the regularly understood sense, seeing that its primary and immediate purpose is to secure the non-publication of the newspaper, because it is likely to contain similar improper material in the future." 1 SELECTED JUDGMENTS at 105.

122. *Id.* at 105-07.

123. Chafee is cited twice in the section discussing the perils of censorial devices. *Id.* at 105-06. In addition, he is cited as a reference to the assertion that censorship was rarely invoked in modern British history. *Id.* at 106. A quotation of Jefferson's warning against allowing "the civil magistrate to intrude his powers into the field of opinion" also refers to Chafee as a source. *Id.* at 107. The two other sources relied on by Justice Agranat are 4 W. BLACKSTONE, COMMENTARIES *151-52, and Chief Justice Hughes' opinion in Near v. Minnesota, 283 U.S. 697 (1931). Both sources appear in, but are not quoted from, Z. CHAFEE, *supra* note 64, at 9, 375. Again, the balance between English and American law is manifest.

124. Chafee, while reviewing the Blackstonian theory, *spoke against* understanding freedom of expression in terms of the prohibition of prior restraint and permission of subsequent punishment. "The Blackstonian theory dies hard, but it ought to be knocked on the head once and for all." Z. CHAFEE, *supra* note 64, at 9.

crude form. The scholarly influence of Chafee gave way to the influence of the donor system's case law; the formula for prior restraint stated by Justice Agranat was the sophisticated dictum announced by Chief Justice Hughes in *Near v. Minnesota*.[125] It took enormous courage to present the doctrine as Israeli, for if ever there was a system honeycombed with prior restraints, it was Israel's. The press was doubly licensed, both by the Press Ordinance and by the Defense (Emergency) Regulations.[126] Military censorship conferred broad discretion to the censor, and its use was rampant.[127] A statute authorized censorship of movies and theater;[128] radio operated under the exclusive monopoly of the government.[129] Furthermore, section 19 was couched in broad discretionary terms.[130]

One could claim that in fact there was no justification for the aversion to prior restraint in Israel. Where was the hook to hang either Blackstone, the First Amendment or *Near v. Minnesota* on Israel's legal system? Justice Agranat transcended these apparent difficulties by tying the legal system to certain aspects of the political order.[131] He invoked the negative role of censorship in Jewish history[132] and

125. 283 U.S. 697, 716 (1931). Justice Agranat says: "Finally, the American judge, too, recognized the nonapplication of that limitation in extraordinary instances, such as in time of war, when there exists a need for preventing the obstruction of recruiting for military service, the publication of the sailing dates of transports or the disclosure of the number and location of troops; and also, at all times, when we must defend ourselves against the publication of matters inciting to acts of violence or the overthrow by force of the lawful regime." 1 SELECTED JUDGMENTS at 107 (citation omitted).

126. For a discussion, see Lahav, *supra* note 2, at 491-501.

127. *Id.* at 505-06.

128. Cinematographic Films Ordinance, *reprinted in* 1 R. DRAYTON, *supra* note 21, at 135.

129. Broadcasting Authority Law 5725-1965, 19 L.S.I. 103-12 (1964-1965). At that time there was no television broadcasting in Israel.

130. There is no doubt that the drafters of § 19 chose words that they thought would preclude judicial review of administrative action. Since broad administrative discretion was a trend in Mandatory public law, it seems very likely that Justice Agranat, a former district court judge in Palestine, would be well aware of this trend. *See* Lahav, *supra* note 2, at 511-13.

131. 1 SELECTED JUDGMENTS at 105-06.

132. "The history of many peoples, and of the people of Israel first and foremost, is full of examples without number, of men who have dared and ventured, without being deterred by the fear of punishment, to publish what their conscience dictated, notwithstanding its prohibition on the part of the ruling authorities. However, it is clear that such display of courage has never been, nor is it today, any sufficient guarantee against the effective stay, by preventive measures, of disseminating views or thoughts that are entirely novel." *Id.* This, in fact, is not an argument from democracy but an argument from the search for truth. For the role of censorship in Jewish history, see M. CARMILLY-WEINBERGER, CENSORSHIP AND FREEDOM OF EXPRESSION IN JEWISH HISTORY (1977).

separated the Mandatory regime from the Israeli legislature.[133] The latter was committed to democracy. Thus, aversion to prior restraint was part of Israel's legal order because democracy needed a fair measure of free press and a climate hostile to censorship. Justice Agranat took the shift in the political order, from authoritarianism to democracy, to be of crucial importance for the legal system. He tried to give the legal system a new identity, both independent and reflective of its ties to western political tradition and culture. This was constitutional law in the making.

2. *Transplanting the Doctrine Against Seditious Libel*

> The approach of a "a bad tendency" is perhaps suitable to a political system employed in a state based on an autocratic or totalitarian regime, but it obstructs, or at least renders inefficient, the use of that process which constitutes the very essence of any democratic regime, namely, the process of investigating the truth.[134]

As in the transplantation of the doctrine against prior restraint, Chafee's influence was again both apparent and acknowledged.[135] In his presentation of this "sign," Justice Agranat converted Chafee's rhetoric and observations from American history into Israeli terms. Chafee discussed the process by which Americans came to dread seditious libel and concluded that "[t]he First Amendment was written by men . . . who intended to wipe out the common law of sedition . . . [and make it] forever impossible in the United States of America."[136] Justice Agranat borrowed Chafee's framework and into it injected Israeli content. Freedom loving America was replaced by freedom loving Israel,

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133. "[O]ne should not attribute to the Israel legislator an intention to authorise . . . suspension [on grounds of bad tendency]. . . . To attribute such intention is quite out of the question since . . . Israel is a State . . . based on the fundamentals of democracy and freedoms." 1 SELECTED JUDGMENTS at 107.

134. *Id.* at 104.

135. Justice Agranat's presentation of this "sign" opens with a review of old English seditious libel cases, John Drakard's Trial, 31 How. St. Tr. 495 (Ex. 1811), Leigh Hunt's Trial, 31 How. St. Tr. 367 (K.B. 1811). Both opinions are quoted at length and Z. CHAFEE, *supra* note 64, is acknowledged as the source. 1 SELECTED JUDGMENTS at 103-04. A third opinion, Trial of Thomas Muir, 23 How. St. Tr. 117 (High Ct. Justice 1793), is quoted from Sutherland, *British Trials for Disloyal Association During the French Revolution*, 34 CORNELL L. Q. 303, 314 (1949). 1 SELECTED JUDGMENTS at 104. Agranat also relied on Chafee's condemnation of the doctrine of indirect causation. "And the most powerful weapon in their hands (*i.e.*, of those who oppose freedom of the press), Professor Chafee once stressed, 'is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts.' " 1 SELECTED JUDGMENTS at 104.

136. Z. CHAFEE, *supra* note 64, at 21.

and Israel's Declaration of Independence was substituted for the First Amendment:

> The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State "on the foundations of freedom" and the securing of freedom of conscience, mean that *Israel is a freedom loving State*. It is true that the Declaration "does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" . . . , but insofar as it "expresses the vision of the people and its faith" . . . , we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State, including the provisions of a law made in the time of the Mandate and adopted by the State after its establishment, . . . *for it is a well-known axiom that the law of a people must be studied in the light of its national way of life*. Thus, here we have a first sign indicating that we must interpret the term "likely," . . . in the sense of "probability" rather than in the spirit of the view which favours the doctrine of the "bad tendency" and "indirect causation."[137]

This was a major moment for Israeli constitutional law. Hitherto it was a shapeless body of norms wandering aimlessly in space. Here begins the process of transforming Israeli law, through judicial decisions, into a system with a fixed, coherent underlying theme: democratic constitutionalism.[138] It was a powerful break from legal formalism. Formalism had raised a wall between law and the political system and had led the court to deny the Declaration any role in the legal system. Justice Agranat cracked the wall by holding the executive, and to a large extent the legislature as well, to the principles of democratic constitutionalism.[139] To give these principles concrete meaning, he tied them to the very document which gave Israel life—the Declaration of Independence.[140]

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137. 1 SELECTED JUDGMENTS at 105 (emphasis added). *Cf.* Z. CHAFEE, *supra* note 64. "The judges [who held that sedition was a common law crime in the federal courts] forgot the truth emphasized by Maitland: *'The Law of a nation can only be studied in relation to the whole national life.'*" *Id.* at 20 (emphasis added & citations omitted).

138. This does not mean that the process has been or can be completed.

139. Indeed, he does not overrule the former precedents which denied the Declaration a role, but his interpretation, in fact, disarms them. *See* note 42 *supra*. Investing constitutional power in the Declaration also ties the hand of the legislature since the latter is now presumed to uphold the principles emanating from that Declaration. The legislature, still supreme, may violate these principles, but the task is so much harder. It will have to concede that it clearly wishes to do so and technically spell out the details of the limitation.

140. There is a problem here, since the very principle of freedom of expression is not

As in the case of transplanting the doctrine against prior restraint, witness the stubborn determination to force the grim reality into conformity with the national dream. Like censorship, seditious libel was a part of Israeli positive law.[141] It would not do to provide a technical way out by stating that the court meant to exclude seditious libel from consideration only when construing section 19. Justice Agranat's analysis exposed a fundamental incompatibility of seditious libel and democracy, an incompatibility which would have to spread throughout the entire legal system. While powerless to deny the validity of seditious libel in Israeli criminal law, he could and did subvert its legitimacy.

3. Why "Probable Danger"?

Whereas Chafee concluded his analysis by adopting the clear and present danger test,[142] Justice Agranat preferred another formula for the law of Israel. Clearly, Justice Agranat's methodology does not demonstrate why the probable danger test should be preferred to the clear and present danger test. His very gambit—the limitation of choice to either bad tendency or probable danger—reveals his bias and forecloses the issue.[143] Furthermore, on close examination, none of his three "signs" supports his choice. The dictionary definition could be interpreted to support even a bad tendency test.[144] The doctrine against seditious libel and the doctrine against prior restraint both justify a rejection of the bad tendency test, but they entail no preference for any particular "danger" formula. We must therefore look elsewhere for Justice Agranat's reasons to prefer "probable" over "clear and present" danger. Justice Agranat's own explanation somewhat illuminates his preference. He observed that the statutory term "likely"

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explicitly mentioned in the Declaration. In this sense, Justice Agranat's doctrine transcends the text of the Declaration. Whether Justice Agranat meant to incorporate "fundamental principles" or just those principles essential to a viable democratic process, shall not be discussed. *But see* J. ELY, *supra* note 107, at 43-104. The Israeli Supreme Court perhaps has been unaware of this dichotomy. Yet a case could be made that Justice Agranat thought of the democratic process rather than of "fundamental values," since his entire analysis gravitates toward the democratic theme. Such an orientation is also more in keeping with the doctrine of parliamentary supremacy.

141. Criminal Code Ordinance § 59 (1936), *reprinted in* PALESTINE GAZETTE no. 652, at 285, 306 (Supp. 1 1936). Seditious libel was also part of the Press Ordinance that Agranat was interpreting. Press Ordinance § 23, *reprinted in* 2 R. DRAYTON, *supra* note 21, at 1227-28.

142. Z. CHAFEE, *supra* note 64, at 35.

143. *See* note 113 *supra*.

144. *See* note 120 *supra*.

better fit a probable rather than a clear and present danger formula.[145] Yet this is just the tip of the iceberg. Here again, one witnesses a transplantation process which juxtaposes the donor system's scholarly source with the donor system's case law.[146]

Probable danger was Judge Learned Hand's version of the clear and present danger test, created during the course of upholding the convictions of the Communist Party leadership in *Dennis v. United States*.[147] *Dennis* was decided ten years after Chafee had published the second edition of his book. In 1953, *Dennis* was one of the freshest authoritative versions on the limitations of free speech in the United States. Clearly, Justice Agranat understood that he would have to choose between Chafee and the Vinson-Hand formula.[148] Chafee's work, although highly respected, was a scholarly reference in a legal system which placed an overriding premium on judicial decisions. Hence, there should be little wonder that Agranat, a judge himself, would gravitate toward the most recent authoritative version of the "danger" test. As a common law judge in a newly independent state he may have equated the "modern" version with the "better" approach.[149] He also may have been influenced by the general rules about reception of foreign law, the requirement that foreign law upheld by a local court be updated.[150]

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145. 1 SELECTED JUDGMENTS at 113.

146. The process occurred first when Justice Agranat preferred *Near v. Minnesota* over Chafee's rejection of the doctrine against prior restraint. *See* text accompanying note 125 *supra*.

147. 341 U.S. 494, 510 (1951). *See also* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JOURNAL REVIEW 95-105 (1966); Gunther, *supra* note 73.

148. "[S]ee also the judgments collected on this point in the addendum to the judgment of Justice Frankfurter, in the case of Dennis v. U.S. . . . (*cf. the new approach of the majority opinion in the last-mentioned case*). Now, it is very evident, in view of the approach we have indicated above, that we cannot go to the extreme of demanding that the Minister of the Interior be satisfied, before ordering the paper to be suspended, that the danger to the public peace created in consequence of the publication is also proximate in time." 1 SELECTED JUDGMENTS at 113 (emphasis added & citations omitted).

149. The official translation from the Hebrew refers to *Dennis v. United States* as the "new" approach. *Id.* It is better translated as the "modern" approach. In the fifties, "modern" was also "better," and Justice Agranat's analysis may reflect the assumption that law develops progressively. *See also* note 151 *infra*.

150. *See* Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23 (1957). In a way, this transplantation technique amounts to a triumph for those who see judicial decisionmaking as a process distinct and separate from other lawmaking processes and, for some, to a vindication of the Grand Style. Here, law is made, but within the classical constraints, respect for *stare decisis* (indeed, even, of the donor system's), respect for tradition and authority, and respect for the statutory terms. In other words, while law was both transplanted and made, the basic rules of judicial decisionmaking were still controlling and affecting the final choice made by the judge.

His choice of "probable danger" had important political and legal dimensions. Politically, the tighter clear and present danger formula was likely to intensify bureaucratic antagonism. From the legal viewpoint, adoption of clear and present danger could also expose him to the criticism that he was importing a formula already discarded in its mother country. But beyond the tactical considerations lay thoughtful inquiry into substance. Chafee was influential, recent decisions of the United States Supreme Court were influential, yet Justice Agranat also looked deeper into the critique of the clear and present danger test. The final part of his decision, the "postdoctrinal" portion, reveals an effort to synthesize the donor system's case law and scholarly critique in order to give Israel a more polished formulation of the legitimate limitations on expression.[151]

F. The Postdoctrinal Stage: A Synopsis of Components for "Probable Danger"

In the last section of his decision, Justice Agranat breaks the formula for properly restricting free expression into components. Together, these components amount to detailed instructions to the Minister of the Interior and to the courts as to how and when expression may be curtailed.[152] On reflection, there may be two reasons for this structure: one theoretical, the other institutional.

The theoretical reason may be an attempt to take into consideration the critique of the clear and present danger test. Justice Agranat was concerned primarily with Justice Frankfurter's critique[153] of Chief Justice Vinson's plurality opinion in *Dennis*. Since Justice Agranat had borrowed the probable danger formula from Chief Justice Vinson's opinion, he was particularly sensitive to this critique. He therefore at-

151. In a way, the synopsis of the elements of probable danger in the postdoctrinal stage provides for another explanation of Justice Agranat's preference of the probable danger test over the clear and present danger test—that upon reflection there is little difference between the two formulas. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 113-16, (1970).

152. One may limit the holding in *Kol-Ha'am*, as applying only to open-ended statutes and may argue that the instructions obtain only when a broad discretion is granted to limit free expression. Although this purpose undoubtedly was both central and immediate, it seems that the decision should be read more broadly. The attempt to anchor the principle of free expression in Israel's legal system implies, at least, judicial advice to the Knesset not to transcend these boundaries lest the democratic character of the state be injured.

153. 341 U.S. at 542-43. Justice Agranat referred several times to Justice Frankfurter's concurring opinion; *see, e.g.*, 1 SELECTED JUDGMENTS at 101, 102, 113. Some observe that Justice Frankfurter's criticism was misdirected because Chief Justice Vinson's opinion did in fact balance the principles of free expression and national security. *E.g.*, J. ELY, *supra* note 107, at 108.

tempted to elaborate a more comprehensive doctrinal theory to provide Israeli law with a version more solid and less vulnerable to attack than the American original.

The second reason for the detailed elaboration relates to the self-perceived role of Israel's Supreme Court. The Court was creating constitutional common law,[154] principles of democratic constitutionalism for a system which revolved around parliamentary supremacy. This required that the Court assume an educative function.[155] The detailed synopsis was a way of educating and of sensitizing the bureaucracy and the courts to the workings of the constitutional principle. Two interesting aspects of this synopsis, both atypical of Israeli judicial opinions, reveal its underlying educative mission. First, Justice Agranat separates the checklist from the discussion of its application to the instant case. Future decisionmakers are thus spared the burden of distilling the rules from the opinion. Second, the synopsis provides the decisionmakers with factors relevant to a determination of whether or not "probable danger" exists, identifies factors which are generally irrelevant, and provides a perspective which the decisionmaker should adopt when reaching a decision.

From the point of view of transplantation, the most interesting aspect of this section is the foreign sources used.[156] Whereas in previous sections the predominant influence had been Chafee's, now the sources are more diverse. United States Supreme Court opinions, particularly those of Justices Brandeis and Holmes and Chief Justice Vinson, are quoted.[157] Yet scholarly work again is closely consulted. This time the primary source is postdoctrinal—an article published in the *Harvard Law Review* by Elliot Richardson that examines *Dennis*.[158]

The springboard for the Richardson critique, Justice Frankfurter's

154. For a discussion of the concept of constitutional common law, see Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

155. Rostow, *The Democratic Character of Judicial Review*, in JUDICIAL REVIEW AND THE SUPREME COURT 74, 88 (L. Levy ed. 1967).

156. Another interesting aspect, which already appeared in the first part of *Kol-Ha'am* (transplantation of interest balancing) is the technique of transplantation. Israeli doctrines are ostensibly created as original derivations of Israeli law, not as imitations of foreign sources. To the extent that the synopsis relies openly on foreign sources, it invokes the great classic authorities: Justices Holmes and Brandeis. Scholarly works, however critical in actuality, are formally subdued.

157. 1 SELECTED JUDGMENTS at 113. These opinions, *e.g.*, Dennis v. United States, 341 U.S. at 507 (Vinson, C.J.), have by now acquired considerable authoritative weight.

158. Richardson, *supra* note 65. The article is quoted by Justice Agranat, 1 SELECTED JUDGMENTS at 97, 114, in connection with the justification of the search of truth in free expression.

opinion in *Dennis*,[159] characterized the clear and present danger formula as an ossified "uncritical libertarian generality" which is empty of analytical content.[160] Justice Frankfurter cited the celebrated passage from Professor Paul Freund's book, which became the banner for conservative opposition to clear and present danger:

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[161]

From this passage came the inspiration to look for structuring factors.

1. Content

Those in power, said Justice Agranat, may suppress speech "only when the publication has left the framework of the mere explanation of an idea and takes on the form of advocacy." This requirement is "a sine qua non for applying the drastic power of suppressing the views of others."[162] The requirement that speech amounts to advocacy of unlawful action before it can be legitimately suppressed was the most central achievement of American twentieth century free speech law, since it undermined the notion that speech which is intuitively perceived to be "bad" may be legitimately suppressed.[163]

By 1950, the advocacy requirement had penetrated so deeply into the legal consciousness that Chief Justice Vinson and Justice Frankfurter expressed agreement about its theoretical centrality.[164] By making it the *sine qua non* requirement of Israeli law, Justice Agranat again

159. 341 U.S. at 517.

160. *Id.* at 527, 543.

161. P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949), *quoted in* 341 U.S. at 542-43 (Frankfurter, J. concurring).

162. 1 SELECTED JUDGMENTS at 109.

163. *See* Gunther, *supra* note 73; Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

164. *See* 341 U.S. at 502 (Vinson, C.J., plurality opinion); 341 U.S. at 544 (Frankfurter, J., concurring). Later opinions have strengthened this trend. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969).

displayed both a keen understanding of the dynamics of suppression and an ability to locate the jugular of American free speech doctrines.

2. *Circumstances*

One of the major debates about the limitations of free expression focuses on the weight to be assigned to either of two variables: content and circumstances.[165] Justice Agranat merged the two. Having incorporated "content" as the first factor in his synopsis, he proceeded to transplant the consideration of circumstances. "[What is expected of the Minister of the Interior is] an estimation that a proximate (and not necessarily a certain) result will follow if he does not make prompt use of his said powers. . . . [That means] an estimation made *according to the circumstances surrounding the act of publication*."[166]

The requirement of circumstances partially resembles Chief Justice Vinson's opinion in *Dennis*.[167] Justice Agranat's analysis of which circumstances count seems to rely on Richardson's article.[168] For example, Justice Agranat's emphasis on the relationship between content and circumstances and the legitimacy of judicial consideration of either "immediate" or "general" circumstances echoes Richardson's effort to loosen the requirement of "direct causation" by permitting judicial considerations of national security and foreign affairs.[169] Richardson

165. Some have argued that content should be the predominant variable while others have focused on the circumstances. *See, e.g.*, Gunther, *supra* note 73. In later years, an attempt to recognize the importance of both variables for certain categories has developed. *See* J. ELY, *supra* note 107, at 105-16; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-88 (1978).

166. 1 SELECTED JUDGMENTS at 110 (emphasis in original). For a description of these circumstances, see note 169 *infra*.

167. 341 U.S. at 505.

168. Richardson, *supra* note 65.

169. *Compare* Richardson's view on the interaction between content and circumstances *with* that of Justice Agranat. Richardson says, "Irrespective of whether the surrounding circumstances make the existing probability of the apprehended evil great or small, evidence that the utterance in question made some contribution toward increasing that probability seems essential." Richardson, *supra* note 65, at 11. Justice Agranat says, "that the test to be applied always consists of some preestimation . . . as to whether, as the result of the interaction of publication and *circumstances*, a probability is created that the public peace will be adversely affected." 1 SELECTED JUDGMENTS at 111 (emphasis in original).

Or compare the two on "immediate" and "general" circumstances. Richardson states, "Among the circumstances which may affect the probability is the existing state of opinion, local, national, and international . . . [in] 'emergency' situations, . . . not merely the *immediate* environment of the speaker but the entire state of world affairs . . . may be relevant." Richardson, *supra* note 65, at 9-10 (emphasis added). Justice Agranat holds, "It is important to stress that the circumstances which the Minister of Interior is entitled to take into account are liable to be varied and of different nuances. For instance, he must consider not only the *immediate* external facts . . . but also the general background, such as the state of emer-

identified factors which in general should not be considered by courts as relevant, in order to forestall a growth of loose and overbroad requirements and a return to the bad tendency test and indirect causation. These factors were incorporated into Israeli law.[170]

3. Proximity in Time and Gravity of Evil

The clear and present danger test, particularly as developed by Justice Brandeis, focused on the danger's imminence. Speech could be suppressed only when there was no time for the marketplace of ideas (more speech) to counteract.[171] In *Dennis*, the effort to prosecute the leaders of the Communist Party successfully would have collapsed in the face of a requirement of an imminent danger. The Vinson-Hand formula provided the grounds for a legitimate conviction by concentrating on the nature of the danger as reflected in international politics (the "general circumstances"), while simultaneously diluting the time component. According to the formula, one should consider "the gravity of the 'evil' discounted by its improbability."[172] Justice Agranat followed suit:

> But if the Minister of Interior becomes aware, in the light of circumstances, that the publication makes it possible, amounting almost to a certainty, that serious harm will be caused to the public peace, then there is nothing to prevent him from exercising the power given him by section [19(2)] even where he estimates that it is not a case where harm will be caused forthwith.[173]

Justice Agranat openly acknowledged his deviation from the Holmes-Brandeis opinions.[174] His explanation was legalistic: the statutory language prevented him from imposing a requirement of imminence.[175] Unquestionably, he was strongly influenced by the "modern" *Dennis* approach.[176] Tactically, it was a clever finale to the lengthy process of transplantation. Open rejection of the American approach,[177] accompanied by an open reliance on the Israeli statute, demonstrated the Israeli Supreme Court's loyalty to the letter of the law. At the end of a long opinion, the Court proved that it was en-

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gency existing in the country . . . or the tension prevailing in international relations at that moment." 1 SELECTED JUDGMENTS at 111.

170. *See* text accompanying notes 180-85 *infra*.

171. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

172. Dennis v. United States, 341 U.S. at 510.

173. 1 SELECTED JUDGMENTS at 113.

174. *Id.*

175. *Id.*

176. *Id.*

177. Conformity with the "modern" American approach was underplayed. *Id.*

gaged in a legitimate exercise of statutory interpretation rather than in an imitation of foreign law. Moreover, this approach sufficed for accomplishing the strategic ends sought: considerable circumscription of the powers of the Minister of the Interior in general, and revocation of the suspension order in particular.

In both *Dennis v. United States* and the Richardson analysis, the fall of the imminence requirement was compensated by a rise in the danger's gravity.[178] Justice Agranat did likewise:

> Finally, in cases in which there exists no danger of causing *immediate*, or even *probable*, harm to the public peace, it would be best to weigh very carefully the gravity of the danger which the Minister of Interior sees in the offing as a result of the publication in question . . . [and] to consider whether the gravity of the danger that the Minister of Interior foresees as the result of the publication of the matters objected to, is indeed so great as to be comparable to the public harm to the other public interest, that is, the harm to the interest of freedom of expression.[179]

4. Factors Not to be Considered: A Perspective for Balancing

So far the synopsis for the probable danger test had been lukewarm toward the principle of free expression. Although thoughtful consideration of all the variables and insistence that each be assigned substantial weight could lead to protection of expression, one cannot overlook the fact that the period of the early fifties was a low point for First Amendment values in general. Hence, Agranat's postdoctrinal transplantation into Israel lacked the force that could be found in Holmes, Brandeis, and Chafee. Justice Agranat, either because he perceived the dissonance or because he was genuinely interested in a comprehensive balancing, or both, went further. Following Richardson, he attempted to counteract the possibility of reading "bad tendency" into "circumstances" by listing factors, the consideration of which would be generally illegitimate.[180] The "bad" intention of the speakers,[181] the

178. *See* Dennis v. United States, 341 U.S. at 509-10 (Vinson, C.J.); Richardson, *supra* note 65, at 9-12.

179. 1 SELECTED JUDGMENTS at 114 (emphasis in original). Both Chafee and Richardson are briefly mentioned in the omitted material, but the *Dennis* plurality opinion is not.

180. This method of framing a rule, which consists of listing the positive and negative factors of decisionmaking in a matter-of-fact style, devoid of rhetoric and carefully attentive to the psychological dynamics of suppression, reflects his determination to educate the bureaucracy. Further, realizing the strong tendency to justify suppression in light of precisely these factors, he lists them as "observations, for guidance only and without setting up any strict rules," thus neutralizing strong executive opposition to his decision. *See* 1 SELECTED JUDGMENTS at 111.

181. The origins of the Israeli analysis of intent are interesting. The *Dennis* plurality opinion, 341 U.S. at 515, which followed Justice Holmes opinion in Abrams v. United

"offensive" quality of the language or its emotional tinge[182] and, finally, the personality or character of the speaker[183] should, "generally speaking," not be taken into consideration.

While Holmes' and Brandeis' imminence requirement was compromised, their careful analysis of the dynamics of free expression in society was not. From their analysis, Justice Agranat distilled guidelines which the Minister of the Interior was "advised" to weigh. For example, speech should be fought with more speech.

> As a general rule, there is a good chance that truth, in the end, will prevail; so that, if only there is enough time to spare, it is better to act through discussion, education and counter-explanation, in order to cancel out the effect of the false information published in the newspaper in question or in the article for which space was found.[184]

Suppression is also instrumentally unwise. It may prove to be a two-edged sword.

> It often happens that the very act of oppression—the actual suspension of the newspaper in which the matters objected to have been published—endows them with an exaggerated value in the eyes of the public. Where "the enemies of liberty are met with a

States, 250 U.S. 616, 627-29 (1919), specifically rejected the contention that consideration of evil intent would be unconstitutional. Professor Freund opined that "perhaps the specific intent with which the speech . . . is launched" should be taken into consideration. P. FRUEND, *supra* note 161. Justice Agranat heeds to the "perhaps" while adopting Richardson's analysis of the intent requirement in the Holmes' free speech opinions which concluded that "[i]ntent, or its absence, should thus be relevant *only in so far as it supplies evidence* of the *probable effect*, or lack of it, *of utterances otherwise colorless or ambiguous*." *See* Richardson, *supra* note 65, at 15. *See also* Agranat's expression of this analysis: "[G]enerally speaking, there will be no need to consider the bad intention . . . [for] . . . only the possible effect of the published matters . . . is of importance . . . . [Yet] in certain conditions, the intention . . . may be of great assistance . . . . [For] example, where the matters published may be understood in different ways ." 1 SELECTED JUDGMENTS at 111-12 (Agranat did not cite Richardson here).

182. "Moreover, in certain circumstances and in certain conditions, it would not be out of place to take into consideration the strong tone, the offensive language and the emotional tinge in which the contents of the article or the piece of information published have been clothed." 1 SELECTED JUDGMENTS at 112 (citing Z. CHAFEE, *supra* note 64, at 43).

183. "Finally, it will not, *generally speaking*, be right for the Minister of Interior to take into account, among his considerations, the personality or character of those responsible for the improper publications. The observations of Lord Chatham when supporting the struggle of John Wilkes . . . , a person of the most dubious past, for the freedom of the press in England, are most enlightening on this point: 'In his person though the worse of men, I contend for the safety and security of the best.' (Chafee, p. 242, *et seq.*)" I SELECTED JUDGMENTS at 112 (emphasis in original & citation omitted).

Notice the citation to Lord Chatham, which serves to fasten the analysis to the old and respectable English common law.

184. 1 SELECTED JUDGMENTS at 113, 114 (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

> denial of liberty, many men of goodwill will come to suspect that there is something in the proscribed doctrine after all. Erroneous doctrines thrive on being expunged. They die if exposed."[185]

G. Conclusion

The decision in *Kol-Ha'am* is a fine example of transplantation. It shows how foreign law, broadly conceived to include scholarship,[186] can be creatively utilized to build constitutional law into a system without a constitution.

Kol-Ha'am was the beginning. Judged by the results of the particular case, it was a spectacular success—never again did the government of Israel invoke section 19 of the Press Ordinance.[187] Yet *Kol-Ha'am* was not simply a result-oriented decision, but an effort to construct Israeli constitutional law. As such, it contained reactionary and authoritarian as well as liberal and progressive elements. Twenty-five years later, in another seminal decision, Lord Kenyon's licentiousness doctrine emerged at least partially triumphant, and the rule in *New York Times v. Sullivan*[188] was explicitly rejected.

Before turning to this decision, a brief discussion of the inner tension in *Kol-Ha'am* and a sketch of the doctrinal development in the area of free speech during these twenty-five years are in order.

II. Between Licentiousness and Interest Balancing

A. Inner Tension Within *Kol-Ha'am*

Justice Agranat began his analysis of the legitimate boundaries of free speech by adopting Lord Kenyon's licentiousness doctrine as an adequate reflection of Israeli law. He then shifted to Pound's theory of interest balancing.[189] Thus, a fundamentally incompatible union be-

185. 1 SELECTED JUDGMENTS at 114 (Justice Agranat credits this idea to Sir William Haley, *quoted in Dennis*, 341 U.S. at 553-54 (Frankfurter, J., concurring), *see* note 81 *supra*, and to Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 624 (1919).

186. This point raises a practical question of access. Did the Israeli Supreme Court, in 1953, have adequate access to United States Supreme Court opinions, or was the scholarly influence simply a reflection of poverty in library materials?

187. Yet the government did use another suspension power in its arsenal. *See* Lahav, *supra* note 2, at 519.

188. 376 U.S. 254 (1964).

189. This theory of balancing is part of sociological jurisprudence and fundamentally opposes the *ad hoc* balancing approach advocated by Justice Frankfurter. *See* text accompanying notes 159-61 *supra*; M. SHAPIRO, *supra* note 147. Why Justice Agranat did adopt the licentiousness doctrine, which Chafee rejected, is unclear. This instance is different from the adoption of the doctrine against prior restraint, also rejected by Chafee, since prior restraint is an important step in the struggle for protection of free expression. Licentiousness is not. Justice Agranat's background and personal gifts render the possibility that he found

tween the Lord Kenyon doctrine[190] and the Pound-Chafee analysis was created. This chimera, made up of diametrically opposed political philosophies, accompanies Israeli free speech case law to this day, and Lord Kenyon's doctrine oftentimes militates toward rejection of American doctrines now transplanted into Israeli law.

On its face, the licentiousness doctrine seems compatible with both the principle of free expression and interest balancing, at least where there is parliamentary supremacy. If licentiousness is taken to mean that some speech is illegitimate, then it lives in harmony with the principle of free expression, which all concede is not absolute.[191] The question becomes one of determining which branch of the government legitimately ought to draw the line between protected and unprotected speech. Under the doctrine of parliamentary supremacy, the legislature retains the power to balance the various interests at stake and to decide which speech is to be legitimately suppressed.[192] From this angle, Justice Agranat's doctrine is at least formally reconcilable with licentiousness: only when the legislature delegates broad discretion to the executive is judicial interest balancing activated. But this analysis ignores both the actual process of judicial decisionmaking and the substance of licentiousness.

It is easy to say that the doctrine of probable danger obtains only where the legislature has failed to provide clear statutory guidelines. It is another matter to see it working in reality. "Perfectly clear" statutes are rare—rarer still where political rights are regulated. Interpretation

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Chafee unpersuasive. There may be other reasons. Having spent his adult life as a judge in Palestine, sensitized to authoritarian-colonial and English law, he might have harbored at least some sympathy for this doctrine. Perhaps, here is the spirit of the first *Kol-Ha'am* decision, *see* note 30 *supra*, so cleverly repressed in the second *Kol-Ha'am* opinion.

He might also have considered it a necessary lip service to those whose conception of the separation of powers in government was rigid and dogmatic and who opposed an active liberal court. Most importantly, it was a useful device to further institutionalize, through administrative law, the principle of free expression in the Israeli legal system. The licentiousness doctrine, distilled from Israeli statutes and cases, implied that these sources were the legitimate *exception* to protected speech; therefore, it pointed to a core of an inviolable right to free speech. It implied that there was a core of constitutional liberty in Israeli law.

190. *See* note 14 *supra*.

191. Even proponents of the expression/action formula concede this proposition, but they draw the line at the point where expression is classified as action within the parameters of their theory. *See generally* T. EMERSON, *supra* note 151.

192. Where a written constitution prescribes a principle of free expression and judicial review obtains, the power of the legislature necessarily shrinks. Chafee rejected the licentiousness doctrine partially on these grounds. *See* Z. CHAFEE, *supra* note 64, at 14. For a discussion of the legislature's role in suppressing expression which is viewed as endangering national security, see Linde, *"Clear and Present Danger" Re-examined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970).

is inevitable, and judicial standards creep back through interpretation.[193] Hence, either the doctrine of licentiousness is hardly relevant, since most statutes are subject to interpretation, or it carries substantive standards and is therefore relevant to substantive decisionmaking.

There is little doubt that the licentiousness doctrine does imply substantive limitations on speech. First, the very polarization between "liberty" and "license" implies authoritarianism. Professor Martin Shapiro has put it succinctly:

> [A] morass opens when we seek to distinguish liberty from license, and "true" freedom from . . . abuse of freedom. Whenever freedom pops up in the course of Western philosophy true freedom is not far behind. And true freedom almost always ends up meaning doing what is good for us, not doing what we want to do. This in turn usually means not doing things that somebody else, sometimes labeled God and sometimes the general will, tells us not to do.[194]

Clearly, such results disagree with Justice Agranat's libertarian theories of free speech.

Second, licentious speech is speech that is "hostile or offensive to accepted standards."[195] Therefore, commonly used, the distinction between liberty and license rests on the distinction between acceptable and unacceptable community standards. The distinction is intuitive and does not penetrate into the philosophical and political justifications of free expression. In contradistinction, Chafee's interest balancing calls for a review of the justifications advanced for each principle in order to achieve rational accommodations between them.

Moreover, twentieth century American analysis of the justifications for free political expression rejects the notion that acceptable community standards should provide the line between legitimate and illegitimate speech.[196] Freedom of expression for minority views is essential, even when they are anathema to accepted standards either in

193. This was also part of Chafee's critique of licentiousness. "To a judge obliged to decide whether honest and able opposition to the continuation of a war is punishable, these generalizations [the distinction between liberty and license] furnish as much help as a woman forced, like Isabella in *Measure for Measure*, to choose between her brother's death and loss of honor, might obtain from the pious maxim, 'Do right.' What is abuse? What is license? What standards does the law afford?" Z. CHAFEE, *supra* note 64, at 14.

194. M. SHAPIRO, *supra* note 147, at 92-93.

195. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (Unabridged 1969).

196. *See* the Holmes-Brandeis opinions in Whitney v. California, 274 U.S. 357, 372 (1927) (concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (dissenting); Z. CHAFEE, *supra* note 64, ch. 1. This idea was particularly crystallized during the sixties, *see* Cohen v. California, 403 U.S. 15 (1971); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 16-25 (1967). *But see* 1 SELECTED JUDGMENTS at 112. The justification known as the free market-

form or in substance. Both the probable (or clear and present) danger doctrine and the content-based doctrine, which distinguishes between incitement and advocacy,[197] break from the notion of "acceptable speech" and focus on *concrete* harms to the society.

In contradistinction, the licentiousness doctrine at its worst draws the line between standards acceptable to the aristocracy or another political elite and those below it. At its best, it legitimizes popular standards as perceived by a majority of the legislature or by the court.[198]

For Israel's legal system, the tension created by transplanting both the Kenyon and Chafee approaches was operative on two levels. First, because Parliament is supreme, it can reject the principle of minority rights and suppress any view which the majority dislikes or fears. The Court, on the other hand, if it internalizes the American doctrines transplanted by *Kol-Ha'am*, would act according to a different political philosophy, which would not accept the legitimacy of suppression because an idea or its expression is feared or disliked. Each branch would then espouse a political theory that is incompatible with the other.

The second locus of tension is of more immediate concern. The intuitive method of balancing, inherent in the licentiousness doctrine, contradicts Chafee's method of interest balancing. Its substantive component—legitimizing only views which either in form or in content comply with acceptable community standards—is irreconcilable with the justifications of the now transplanted American doctrines.[199] Thus, an Israeli court, after *Kol-Ha'am*, may apply the licentiousness doctrine and believe that it is following *Kol-Ha'am*'s legacy, while in fact it would be rejecting its rational methodology and its libertarian theory. Indeed, the Israeli Supreme Court has done exactly that. Below is a brief review of the Court's concept of free expression over the twenty-

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place of ideas is particularly relevant here. All ideas should fight in the marketplace, unacceptable ideas included.

197. Both appear in Justice Agranat's synopsis, 1 SELECTED JUDGMENTS at 108-15.

198. The historical context of Lord Kenyon's remark corroborates this view. The licentiousness doctrine was advanced to legitimate counterrevolutionary suppression in the late eighteenth century and early nineteenth century aristocratic England. Its conversion, under conditions of democracy would change aristocratic into popular taste—but the legitimacy of suppressing minority views remains constant. The same period gave birth to the Alien and Sedition Act in the United States, 1 Stat. 570, 596 (1798). *See* A. GOODWIN, THE FRIENDS OF LIBERTY: THE ENGLISH DEMOCRATIC MOVEMENT IN THE AGE OF THE FRENCH REVOLUTION (1979). *See also* R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 459 (1979).

199. *See* M. SHAPIRO, *supra* note 147, at 89 (critique of *ad hoc* balancing).

five years which separated *Kol-Ha'am* from *Ha'aretz v. Electric Company*.[200]

B. From 1953 to 1977: The Development of Israeli Free Speech Law After *Kol-Ha'am*

A comprehensive analysis of Israeli Supreme Court opinions[201] reveals that the transplantation of American doctrines in *Kol-Ha'am* was only partially successful. Generally, the cases fall into one of two broad categories: cases in which the Court failed to recognize that the principle of free expression was implicated, and cases in which it did. The first category, while not interesting from the doctrinal point of view, is of crucial importance. The cases reflect a superficial notion of the licentiousness doctrine: once the legislature[202] indicated that there should be some limits on expression, even if it delegated broad discretion to the executive, the Court would not intervene. The Court's failure reveals that the core postulates of *Kol-Ha'am* have not yet been internalized in Israel's jurisprudence.[203]

The second category can be portrayed as containing two circles: an inner circle of cases where one type of expression, political speech, was held to be inviolable; and an outer circle, of borderline cases.

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200. 31(2) P.D. 281 (1974) (*Ha'aretz I*), *rev'd on rehearing*, 32(3) P.D. 337 (1977) (*Ha'aretz II*).

201. For a more extensive discussion, see Lahav, *Freedom of Expression in the Decisions of the Supreme Court*, 7 MISHPATIM 375, 403-22 (1977) (in Hebrew).

202. The Court did not usually recognize a difference between genuine Israeli statutes (post-1948) and statutes inherited from the Mandatory regime (pre-1948). *See, e.g.*, Forum Films v. Cinematic and Plays Review Bd., 15 P.D. 611 (1960).

203. Lahav, *supra* note 201, at 403-06. In Forum Films v. Cinematic and Plays Review Bd., 15 P.D. 611 (1960), a distributor challenged a conditional permit of the Cinematic Board stipulating that the script of a German documentary be read in Hebrew, since "a movie about Israel should not be presented in the German language." *Id.* at 613. The Court (per Justice Silberg) held that "if the Board considered the German language as unfit for the content and purpose of that film, we are not prepared to opine that that consideration was unreasonable." *Id.* at 613. In Shalom Cohen v. Minister of Defense, 16 P.D. 1023 (1962), the Court sustained the repeal of a permit to a reporter to serve as military correspondent because the journal which employed petitioner "acts consistently against the educational spirit of Israel's Defense Forces." Chief Justice Olshan, speaking for the Court, held that petitioner had "no right recognized by statute." *Id.* at 1033. There was no statutory basis for the established practice of the Defense Ministry to grant permits to reporters. In Itzhaki v. Minister of Justice, 28(2) P.D. 692 (1973), a retired public employee wrote a book on the 1948 Battles of Latroun. The book was *cleared* by the military censorship, but the Minister of Justice withheld permit for publication. The decision was sustained by the Court, again without consideration of the right to free expression herein implicated. None of these decisions attempted to explore the due process requirements of free speech claims. *See* Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970). These decisions also reflect the Formal Style in Israeli decisions, which goes together with the licentiousness doctrine.

1. The Inner Circle

In a handful of decisions, the Court recognized a core of expression which it considered inviolable under Israeli law. This line of decisions clearly reflects the legacy of *Kol-Ha'am*, in terms of both the content of expression and the justification for its protection.[204] Political expression, open, robust and often offensive, should be protected. The justification for this unequivocal protection was derived from the democratic character of the state. Adequate processes of democracy cannot function without the guarantee of free speech.

2. The Outer Circle

The common denominator of those cases falling into the outer circle is a conscious effort by the Court to outline the boundaries of free speech in situations where it perceived the expression as falling outside the inner circle. While none of these cases attempted to follow the route carved by *Kol-Ha'am*, its elements are present in all of them.[205] In these cases, the Court shifts among three doctrines—bad tendency, variations of *ad hoc* balancing, and probable danger—without explaining why one test is preferred to another.

a. The Bad Tendency Test

Despite the fact that the bad tendency test was unequivocally rejected by *Kol-Ha'am* and several other cases,[206] it was utilized by the Court in two significant cases, both of which sprang from a general campaign by the government to outlaw a nationalist organization of Israeli Arabs.[207] In *Jiryis v. Haifa District Commissioner*,[208] the Court

204. Lahav, *supra* note 201, at 407-11. *See, e.g.*, Israeli Communist Party v. Mayor of Jerusalem, 16 P.D. 723 (1961). The Mayor of Jerusalem refused to grant the Communist Party a permit to display an advertisement which criticized détente between Israel and West Germany, saying, *inter alia*, "[W]ill Hitler's successors educate the teachers of Israel?" The Court, vacating the denial of permit, said, "No municipal authority in Israel will find it hard to allow amiable messages of its own Party or Parties which support it, but a true democracy is measured by the voicing and publication of criticism, without which the democratic parliamentary regime will be destroyed." *Id.* at 728 (Sussman, J.). In Livneh v. Prisons' Authority, 28(2) P.D. 686 (1974), a prisoner challenged denial of permit to purchase and read Marxist literature. The permit was denied on the grounds that "reading these books will cause debates on public matters which are directly or indirectly related to national security, in the broad sense of the term." *Id.* at 689. The Court, vacating the denial of permit, found: "These are books which are studied—and which ought to be studied . . . ." *Id.*

205. Lahav, *supra* note 201, at 413-21.

206. Dissenchik v. Attorney General, 17 P.D. 169, 180 (1962); Ulpaney Hasrata v. Garry, 16 P.D. 2407, 2418 (1962); Companies Registrar v. Kardosh, 16 P.D. 1209 (1961); *Kol-Ha'am*, 1 SELECTED JUDGMENTS at 104.

207. The movement, called "El-Ard" ("The Land" in Arabic), listed among its goals the finding of "a just solution to the Palestinian problem—through its consideration as an indi-

employed the two elements of the bad tendency test—constructive intent and indirect causation—to sustain denial of a permit to form an association.[209] In *Yardor v. Central Elections Commission to the Sixth Knesset*,[210] members of the same group, joined by Israeli Jews, submitted a list of candidates to run in the 1965 elections to the Knesset. Despite the conceded fact that no statute authorized such denial, the Court sustained the permit denial on the grounds that the list's initiators "deny the integrity of the State of Israel and its very existence."[211] Unquestionably, Israel's vulnerability in terms of national security triggered the Court's aversion to this type of speech.

b. The Balancing Test

All cases that discussed balancing, with one exception,[212] employed a simple *ad hoc* balancing test. The Court juxtaposed the interest in free expression against another social interest and intuitively decided which was weightier. One such example, from the pen of Justice Landau, suffices.[213] Petitioner challenged denial of a permit to show his play. Sustaining the denial, the Court said:

> Indeed, there is a consensus that one purpose of the theatre is to criticize negative social phenomena, and satire is a known means to do so. But under Israeli law even a playwright is not absolved of the duty not to hurt the feelings of others. This duty stems

visible unit—according to the will of the Palestinian Arab people." There was no evidence of an attempt to engage in illegal or terrorist activities, and such intent was denied by the organizers.

208. 18(4) P.D. 673 (1964).

209. The Court said: "This goal [of El-Ard] denies resolutely and absolutely the existence of the State of Israel in general and the existence of the State in its present borders in particular . . . and it is *natural* that those who support the association's goal disregard the existence of the State and the rights of the Jewish People in it . . . who will be fooled to believe that this plan may be augmented through peaceful means and persuasion and that it will not eventually lead to subversive activities and hostility." *Id.* (per Witkon, J.; Landau & Berinson, JJ., concurring). In responding to the petition, the State relied on foreign Arab broadcasts and classified material not presented to the Court. For elements of the bad tendency test, see Z. CHAFEE, *supra* note 64, at 23-24.

210. 19(3) P.D. 365 (1965).

211. *Id.* at 369. The Court did not analyze the slate's platform and relied on the "fact" established in *Jiryis* that El-Ard's goals were illegal. Justices Agranat and Sussman wrote opinions for the majority. Justice Cohen dissented. The fact that Justice Agranat was in the majority proves that he himself did not completely internalize his own theories presented in the *Kol-Ha'am* case. One explanation for his opinion may be the pervasive Israeli fear of Palestinian nationalism.

212. Omer v. State of Israel, 24(1) P.D. 408 (1969), held that pornographic material is that which (1) is likely to influence the reasonable man, not those particularly vulnerable, and (2) has no redeeming social value. This type of balancing resembles the approach known as definitional balancing.

213. Keynan v. Cinematic Review Bd., 26(2) P.D. 811, 814 (1972).

> directly from the reciprocal obligation of tolerance among free citizens of different creeds, without which a pluralist democratic society like ours cannot survive. So important is this obligation, that even the basic principle of free expression must be withdrawn.[214]

c. The Probable Danger Test

Despite the fact that probable danger was adopted as the proper test in *Kol-Ha'am*, it was subsequently utilized only twice by the Israeli Supreme Court. Both cases sprang from the denial of a permit to show a film or a play. In one case, involving a newsreel about police brutality in a Tel-Aviv slum, the Court overruled the Board's decision.[215] In the other, involving a play the plot of which resembled a bribery trial against a judge while the trial was still pending, the Court decided that a permit should be denied.[216]

These opinions point out several important facets of Israeli free speech jurisprudence just prior to *Ha'aretz* in 1977.[217] The core message of *Kol-Ha'am*, that political speech is crucial for the survival of democracy, had been partially internalized. This does not mean that the Court had made a conscious effort to protect political expression whenever such expression came before it. Indeed, the contours of protected political expression are rather narrow.[218] But the recognition that there is such a core, whatever its boundaries, along with the justification from democracy, have become a part of Israeli constitutional law.

Intellectually, however, Israeli free speech jurisprudence can be characterized as rather unsatisfactory. None of the opinions reviewed matches the formidable task accomplished by Justice Agranat in *Kol-Ha'am*. On the theoretical level, no effort was made to pursue in any depth the variety of justifications for free speech offered by *Kol-Ha'am*,[219] or to analyze their implications for establishing doctrine. On the doctrinal level, fragmented thinking characterized the opinions. It is not clear why a particular doctrine was applied in a particular case or if the Court perceived any difference between the doctrines. Rather, it seems that the opinions were written on an *ad hoc* basis, without a

214. *Id.* at 814. *See also* Wagner v. Attorney General, 18 P.D. 29 (1964); Dissenchik v. Attorney General, 17 P.D. 169 (1962).

215. Ulpaney Hasrata v. Garry, 16 P.D. 2407 (1962).

216. Attorney General v. Cinematic Review Bd., 20(4) P.D. 75 (1966).

217. 32(3) P.D. 337 (1977).

218. *See, e.g.*, Keynan v. Cinematic Review Bd., 26(2) P.D. 811 (1972); Yardor v. Central Elections Comm., 19(3) P.D. 365 (1965).

219. *See* note 60 *supra*.

sense of intellectual continuity. Justice Agranat clearly foresaw the possibility of such a development and therefore outlined detailed instructions for decisionmaking in this area,[220] but the post-*Kol-Ha'am* opinions made little use of his effort.

If there is a guiding theory in the Israeli opinions, particularly in those contained in the outer circle, it is the licentiousness doctrine. The process component of this doctrine—abstention from principled interest balancing—is clearly there. Deference to executive, as well as to parliamentary judgment, in the realm of both national security and morality, is evident.[221] Where the Court undertakes a substantive review of the speech involved, legitimate speech oftentimes coincides with acceptable community standards, as intuitively perceived by the Court.[222]

Thus, the tension created in *Kol-Ha'am* between interest balancing and the licentiousness doctrine has accompanied Israeli free speech opinions since 1953. The next intellectual effort to confront this subject occurred in 1977, in *Ha'aretz v. Electric Company*.[223]

III. 1977—Exit: *New York Times v. Sullivan* Rejected

A. *Ha'aretz v. Electric Company*: A Brief Summation

Between 1965 and 1967, Israel underwent a sharp and distressing recession. During that time, the Electric Company, one of Israel's largest governmental enterprises, purchased a luxury car for its director general. The press was alerted, the purchase was criticized, and the director soon announced that he would sell the car. Months passed, the car was not sold, and the press resumed the attack. *Ha'aretz*, one of Israel's most respected dailies, published an article asserting that "in fact the . . . Company has no interest in selling the car."[224] At that

220. For a discussion of the doctrinal and postdoctrinal stages, see text accompanying notes 162-85 *supra*. In the *Yardor* opinion, 19(3) P.D. 365, Justice Agranat himself failed to follow these guidelines.

221. *E.g.*, Avidan v. Cinematic and Theatricai Review Bd., 28(2) P.D. 766 (1973); Yardor v. Central Elections Comm., 19(3) P.D. 365 (1965); Jiryis v. Haifa Dist. Comm., 18(4) P.D. 673 (1964).

222. *E.g.*, Ulpaney Hasrata v. Garry, 16 P.D. 2407 (1962).

223. 32(3) P.D. 337 (1977). A similar tension exists within American free speech jurisprudence between the methodology of interest balancing advocated by Chafee and *ad hoc* balancing advocated by Justice Frankfurter (the latter echoing the licentiousness doctrine). *See* M. SHAPIRO, *supra* note 147, at 76-104.

224. The article is cited by Justice Shamgar: "On 10.26.1966 Ha'aretz published that the Electric Co. had purchased a Chevrolet Impala model 1966 for its director general Mr. J. Pelled. The car cost 33,500 IL.

"Following letters from readers and articles in the press, which protested this 'spending habit' of a public company which suffers deficits, raises prices and is unable to distribute

time, some tension must have existed between the director general and *Ha'aretz*. Before publication, the reporter who investigated the case sought the company's reaction, but its spokesman "refused to answer, apparently following a general order from the [director] . . . not to give any information to *Ha'aretz*."[225] The Electric Company and its director brought a libel suit.[226] Years passed. In 1974, the newspaper appealed the final judgment against it to the Supreme Court in *Ha'aretz v. Electric Company*.[227] First, an ordinary panel of three Supreme Court justices overruled the district court decision against *Ha'aretz* by a two-to-one vote (*Ha'aretz I*). Justice Shamgar, one of the majority, rested his analysis on a 1964 decision by the United States Supreme Court, *New York Times v. Sullivan*.[228] The Electric Company, encouraged by

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dividends, Mr. Pelled's press release was published on 11.8.66. It said: '[A]lthough I disagree with those who see a connection between replacing the car and the recession policy, I decided to sell the new car and keep the old car—only in order to remove any ground for dissatisfaction, even though unjustified.'

"Mr. Pelled (70), who is expected to retire in October, returned to his old car. Chevrolet Impala 1963.

"The new car, in which Mr. Pelled drove some 6,000 km., was returned to the Tel-Aviv agent, Mr. Leo Goldberg, to be sold and its value returned to the company.

"It is already more than 4 months that the car is supposedly on sale, at the Goldberg Agency in Tel-Aviv, but in fact the Electric Co. has no interest in selling the car. It hopes that after a while, when the public forgets about this story, the car will be returned to serve the retiring director, because by then it will be a used car, model 1966, whereas the model year 1967 nears its end.

"The Goldberg Agency was instructed to sell the car, but on the condition that the Company first approves the deal. After much efforts the Agency managed to find a buyer who offered 24-25 thousand IL. The official in the transportation department of the Electric Co. refused to approve. He said that even if they get an offer of 28,000 IL. (which they will never get) they will still have to receive his approval before closing the deal.

"And thus, the people at the Goldberg Agency conclude that the Electric Co. is not interested in selling the car, that all it wants is to gain time, until public indignation withers. Because if they decided, for reasons of public hygiene, to sell the car, what difference does the price make? All one has to ascertain is that the car gets the right price in the used cars market.

"It is not so easy to sell a luxurious Impala, such as was ordered by the Electric Co. for its Director, Mr. Pelled; with an automatic shift, a foreign-made radio, electric antenna and other luxurious devices which raise its price some thousands ILs. above the standard.

"The Ministry of Development should instruct the Electric Co. to sell the car without duplicity." Ha'aretz v. Electric Co., 31(2) P.D. 281, 286-87 (1974).

225. *Id.* at 289.

226. Shortly thereafter the car was sold. *Id.* at 289.

227. 31(2) P.D. 281 (1974). [Editor's note: There is no official translation of Ha'aretz v. Electric Company, 31(2) P.D. 281 (1974) (*Ha'aretz I*). The author has prepared her own translation of *Ha'aretz I* and all quotations from that case are taken from her unofficial translation. All citations, however, to *Ha'aretz I* are made to the official report in 31(2) P.D.].

228. 376 U.S. 254 (1964). Sullivan, an Alabama police commissioner, brought a libel suit against the *New York Times* for having published an allegedly defamatory advertise-

the strong dissent, petitioned for a further hearing. In 1978, by a four-to-one vote, Israel's Supreme Court reversed itself and reinstated the libel verdict (*Ha'aretz II*).[229] As it did before the previous panel, *Ha'aretz* argued that two defenses absolved the publication from charges of defamation: truth and fair comment. There was a consensus among the justices that the defense of truth did not apply.[230] The various opinions accordingly focused on the defense of fair comment. The relevant portion of the Defamation Law was section 15(4):

> In a criminal or civil action for defamation, it shall be a good defense if the accused or defendant made the publication in good faith under any of the following circumstances:
>
> . . .
>
> (4) the publication was an expression of opinion on the conduct of the injured party in a judicial, official or public capacity, in a public service or in connection with a public matter, or on his character, past actions or opinions as revealed by such conduct[231]

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ment. The United States Supreme Court reversed the Alabama Supreme Court decision. Justice Brennan, writing for six members of the Court, held that state libel laws which protect public officials must conform to the principles embedded in the First and Fourteenth Amendments. Hence, "constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

229. Electric Co. v. Ha'aretz, 32(3) P.D. 337 (1977). [Editor's note: There is no official translation of Electric Company v. H'aretz, 32(3) P.D. 337 (1977) (*Ha'aretz II*). The author has prepared her own translation of *Ha'aretz II* and all quotations from that case are taken from her unofficial translation. All citations, however, to *Ha'aretz II* are made to the official report in 32(3) P.D.]. Court Law 5717-1957, at § 8, 11 L.S.I. 157 (1956-1957), provides for a further hearing by a bench of five or more justices to reconsider a case already decided by a panel of three justices, "if in view of the importance, difficulty or novelty of the rule . . . there is . . . room for a further hearing."

230. Defamation Law 5725-1965, at § 14, reads: "In a criminal or civil action for defamation, it shall be a good defense that the matter published was true and the publication was in the public interest, provided that the publication did not exceed what was necessary from the point of view of that interest. This defense shall not be denied by reason only that the truth of an incidental detail which is not actually injurious has not been proven."

The factual errors in the *Ha'aretz* article, on which the district court relied in denying the defense of truth were: a) three-and-one-half (rather than four) months had passed since the car was returned; b) the model year of American cars is calculated according to the Gregorian calendar (unlike European cars)—hence it was not true that the model year was about to expire; c) it was not true that the Goldberg Agency did not make efforts to sell the car; d) the Goldberg Agency made the decision to store the car in the warehouse—hence it was erroneous to attribute to respondents an intent to hide the car. *Ha'aretz I*, 31(2) P.D. at 291-92. For two opposing interpretations of the entire factual situation, compare the Shamgar opinion, *see* notes 251-92 and accompanying text *supra*, with the Ben-Porath dissent, *see* notes 293-316 and accompanying text *supra*.

231. Defamation Law 5725-1965, at § 15.

Section 15(4) deals directly with public officials and therefore could be interpreted as recognizing the role of free expression in democracy. The meaning of "opinion" in section 15(4), however, is not clear. It could be distinguished from "fact," or it could be interpreted more loosely as applying to all expression the predominant nature of which is "commentary." Section 16 of the Defamation Law, constructing a presumption of "good faith," could be utilized to support either interpretation:

> (a) If the accused or defendant proves that he made the publication under any of the circumstances referred to in section 15 and that it did not exceed what was reasonable under such circumstances, he shall be presumed to have made it in good faith.
> (b) The accused or defendant shall be presumed to have made the publication otherwise than in good faith if—
>
> (1) the matter published is not true and he did not believe it to be true; or
>
> (2) the matter is not true and he had not, prior to publishing it, taken reasonable steps to ascertain whether it was true or not;
>
> (3) he intended to inflict greater injury by the publication than was reasonable in defending the values protected by section 15.[232]

One could read the *New York Times v. Sullivan* standard of fault—knowledge of falsehood or reckless disregard of the truth—into sections 16(b)(1) and (2). Section 16(a)'s requirement that the expression "did not exceed what was reasonable under such circumstances" supports this interpretation by referring to standards generally employed by journalists in researching and publishing. In contradistinction, a court wishing to define opinion narrowly could interpret the phrase "the matter published is not true" in sections 16(b)(1) and (2) as a condition that all facts upon which the publisher relies be true before good faith is recognized.[233]

Justice Shamgar's interpretation in *Ha'aretz I* was inspired by the justification for free speech in democracy, particularly in the context of criticism of public officials. This led him to conclude that where a publication involves both facts and opinion, whether or not it falls under section 15(4) should be determined in light of the predominant nature

232. *Id.* at § 16.

233. As a matter of statutory construction, this interpretation is unsatisfactory. First, it implies that the defense of fair comment applies only when the defense of truth also applies, which may nullify the fair comment defense. Moreover, such an interpretation forces the court into an artificial definition of "good faith," since the "good faith" of the journalist and the fact that reasonable standards of research are employed are not sufficient, and the "facts" must still be true. *See* note 312 *infra*.

of the publication. Once the publication is classified as "opinion," the defense of good faith obtains unless the elements mentioned by section 16(b) are proven. That is, the defense of fair comment is operative even though some erroneous facts were interlaced in the text. Applying this formula to the instant case, Justice Shamgar held that the predominant nature of the publication amounted to *opinion*, and because none of the conditions of section 16(b) were proved, *Ha'aretz* was protected under the defense of good faith.[234]

Justice Landau's majority opinion in *Ha'aretz II*, following Justice Ben-Porath's dissent in *Ha'aretz I*, preferred the interest of protecting the reputation of the public official over the interest in free expression and rested on a firm distinction between facts and opinion. A court must classify the content of publications into either facts or opinion. Facts can enjoy only the defense of truth. Opinion can enjoy the defense of good faith, provided that the facts upon which it was based were clearly presented and true. Justice Landau then classified crucial parts of the *Ha'aretz* article as facts. Since untrue, they could not enjoy the defense of section 15(4). *Ha'aretz* thus was held liable for having published a defamatory article.[235]

B. The Recipient System on the Eve of Rejection

Before analyzing the opinion further, it is helpful to contrast the Israel of 1953 with that of 1977-1978. When the probable danger test appeared in 1953, Israel was a nascent state with fledgling institutions. By the time that *Ha'aretz* was decided, a quarter of a century had passed. Israel had evolved into a more mature entity, and the history of its growth included the intoxicating feeling of omnipotence following the 1967 Six Day War and the sad, sober disillusionment following the War of 1973. Its political processes were already structured. The

234. *Ha'aretz I*, 31(2) P.D. at 305-06. In other words, the presumption of good faith created by § 16 is not rebutted only because some facts are untrue, since proof of the other elements mentioned in § 16 is still required. Justice Berinson, concurring in the result, opined that the facts presented in the article were only marginally incorrect and that since the good faith of the reporter was evident, the defenses of § 15(4) and § 16 should obtain. 31(2) P.D. at 314-15.

235. Three justices concurred in the Landau opinion, Justices Kahan, Etzioni, and Ben-Porath. Justice Shamgar dissented. It should be emphasized that in terms of the result, the decision could not be read as having a chilling effect on the press. The Electric Company was awarded the symbolic sum of 1 IL., worth 7 cents in 1977 (because of its spokesman's refusal to communicate with *Ha'aretz*).

See text accompanying note 225 *supra*. The Director General was awarded 10,000 IL. *But see* New York Times v. Sullivan, 376 U.S. 254 (1964), where the damages awarded at the state level amounted to $500,000. *See also* Kalven, *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 196.

constant anxiety over national security did not erode the basic commitment to democracy. Moreover, the establishment press[236] developed a sense of self–identity. Differentiated from the government, the press became a watchdog of the power holders.[237]

The legal culture was transformed. There was a constitution of sorts and a draft of a bill of rights was pending in the Knesset.[238] The issue of Israel's dependence on British law was debated at length, and a consensus had emerged about the necessity of developing independent modes of legal thinking. New statutes replaced old Ottoman and English law.[239] In 1965, after ten years of turbulent debate in which public opinion, the press and the bar were heavily involved, the Knesset had passed a new Defamation Law.[240] Thus, the statute to be interpreted by the Israeli Supreme Court in 1977 was not the archaic product of a colonial government but the creation of the sovereign Israeli legislature, one considered suitable to modern Israel.

Last, but not least, the Supreme Court largely had accomplished the task it was laboring to achieve in 1953. It had developed into a symbol of justice and the rule of law. The Court had delivered coura-

236. *Ha'aretz* was an independent daily, catering to the middle class and the intelligentsia. *Kol-Ha'am* was the voice of the Communist Party and was therefore at the fringe of Israeli politics.

237. Until independence, the establishment Hebrew press generally viewed itself as a partner, often as the voice, of the Jewish leadership in Palestine. The sociopolitical upheaval surrounding the passage to sovereignty slowed somewhat the differentiation process. Notice the difference between the article in *Kol-Ha'am* (hyperbolic editorial attacking the legitimacy of the government) and the article in *Ha'aretz* (investigative reporting exposing alleged corruption in an otherwise legitimate government).

238. Because of the inability of the Knesset to reach a consensus concerning the content of a constitution, it was decided to enact a series of basic laws which together would eventually form a constitution. So far, seven basic laws have been passed. *See* Lahav, *Israel's Constitution*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz, eds.) (Supp. 1979). In July 1980, "Basic Law: Jerusalem" was added as seventh to the list. In coining the term "basic law," the drafters were probably influenced by the fact that in the German Federal Republic the constitution was termed "basic law" (*Grundgesetz*, rather than *Verfassung*). The Grundgesetz, however, is a comprehensive constitution. The Bill of Rights, pending in the Knesset since 1973 (whether or not it will ever be enacted is unclear), recognizes the principle of free expression and provides for judicial review only for statutes passed *subsequent* to the passage of the Bill. For the text of the Bill of Rights and commentary, see Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373 (1978). *See also* note 284 *infra*.

239. The "Fundamentals of Law" statute, 1980 SEPHER HA-HOUKIN 163 (in Hebrew), cuts the formal Israeli ties to England, substituting therefor "the principles of liberty, justice, fairness and peace of the heritage of Israel." For a discussion of the process of creating an independent Israeli positive law, see Friedman, *Independent Development of Israeli Law*, 10 ISR. L. REV. 515 (1975).

240. *See* note 230 *supra*.

geous decisions which directly affected Israeli political culture, had attempted to exercise the powers of judicial review, and had developed administrative law to curb caprice and bias in the bureaucracy.[241]

All the above does not necessarily suggest that transplantation, particularly of American law, became easier. To be sure, a strong, confident Supreme Court, presiding over a more developed legal system with an increased level of societal tolerance and broader recognition of the principle of free expression, could readily lead to a rather sympathetic attitude toward the *New York Times v. Sullivan* formula. The actual exposure of corruption among high government officials could be expected to strengthen faith in the "checking value of a free press."[242]

Yet the legal milieu within which the *Ha'aretz* case had to be decided presented formidable obstacles to transplantation. Legal formalism, the rival of sociological jurisprudence, was still strong in Israel. In *Ha'aretz*, legal formalism created two major obstacles to transplantation of American case law: the distinction between private and public law, and the rigid separation of fact from opinion, epitomized in the nineteenth century British conception of fair comment.

The distinction between private and public law is an aspect of legal formalism[243] that has been strong in Israel. *Ha'aretz* was a tort case, of private law, even though criticism of official conduct was involved.[244] When the United States Supreme Court applied the First Amendment to the law of defamation, it turned the defamation of public officials into a matter of constitutional law, thereby relaxing the orthodox, common law division between public and private law.[245] It could do so not only because it had a Constitution to expound, but also because it was part of a pragmatic, intellectually curious legal culture, which did not fear the exploration of law's interrelationship with politics and society. Israel's Supreme Court operated in a milieu spellbound by analytical positivism. The Court generally, although not exclusively, took "legal formalism" as the legitimate standard for ap-

241. *See generally* A. RUBINSTEIN, *supra* note 1; Shetreet, *Reflections on the Protection of the Rights of the Individual: Form and Substance*, 12 ISR. L. REV. 32 (1977).

242. *E.g.*, Yadlin v. State of Israel, 32(1) P.D. 31 (1977). For the checking value of the press, see Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 529-44.

243. W. FRIEDMAN, LEGAL THEORY 285 (5th ed. 1967). *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); note 294 *infra*.

244. In contradistinction, *Kol-Ha'am* was a case of administrative (public) law and focused on the power of the government to interfere directly with press activity.

245. New York Times v. Sullivan, 376 U.S. 254. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 819 (1971); L. TRIBE, *supra* note 165, at 634-46.

propriate judicial decisionmaking. For this Court, it was much more difficult to make a connection between the doctrine of seditious libel and a private tort action.

The second barrier to transplantation is the doctrine of fair comment. The nineteenth century distinction between fact and opinion has strong appeal for formalists, not only because of its ostensibly scientific aura, but also because the Israeli statute itself speaks of "opinion" and "fact."[246] Transplantation of *New York Times v. Sullivan* would require relaxation of this distinction—at least with respect to criticism of public officials. This barrier contained a variable which is also part of the private-public law dichotomy, but which is more pronounced here; that is, the attachment of Israeli legal thought to the common law world, particularly to England. *New York Times v. Sullivan* was a radical departure from the traditional fair comment doctrine. Outside the United States, the fact-opinion dichotomy in the defense of fair comment was still strong.[247] Transplantation of the American doctrine, therefore, meant a painful separation from the rest of the common law world. Justice Agranat, in *Kol-Ha'am*, did not have to confront such a major rupture.[248]

Added to these major barriers is the basic attitude toward free expression. In *Ha'aretz*, the distinction between the doctrine of licentiousness and interest balancing creeps back into the picture. In *Kol-Ha'am*, Justice Agranat preferred the balancing approach. He left licentiousness dormant, yet breathing. In *Ha'aretz I*, Justice Shamgar adopted the Agranat position. Justice Ben-Porath, in her dissent, revived the spirit of licentiousness, and Justice Landau's majority opinion in *Ha'aretz II* restored it to a predominant position.[249]

None of the justices involved in *Ha'aretz* had the asset which made transplantation of American law so smooth for Justice Agranat in *Kol-Ha'am*: a solid American legal training. Yet, even in the absence of an American trained judge as an active participant in this controversy, it is apparent that American law played a substantial part in

246. *See* text accompanying note 231 *supra*.

247. This, at least, was the perception of the Israeli Supreme Court. *Ha'aretz II*, 32 (3) P.D. at 355 (Landau, J.).

248. In *Kol-Ha'am* no sophisticated common law doctrine competed with the American approach.

249. It may be argued that the Landau/Ben-Porath approach is further consistent with *Kol-Ha'am* because Justice Agranat explicitly left the regulation of speech about reputation to the legislature, *see* notes 78-79 and accompanying text *supra*. Yet, the Defamation Law needed interpretation which necessarily depended upon the Court's conception of free expression.

the Court's disposition of the case.[250]

C. The Shamgar Version of Grand Style

1. Jurisprudence and Doctrine in Justice Shamgar's Opinion

Policymaking, through the method of interest balancing, dominates Justice Shamgar's opinion. The "problematic" nature of the question before the Court, he says, springs from the conflict between the interest in privacy on the one hand and the interest in free expression on the other.[251] He solves this conflict by juxtaposing three possible approaches: a "horizontal" balancing approach that considers all interests as equal in worth and weight; a "vertical" balancing approach, that assigns a preferred status to certain interests; and a two-tiered approach that "consider[s] the law of defamation as an exception to the right of free expression."[252]

Justice Shamgar selected the "vertical" approach as the most appropriate. First, the vertical approach was presented as the one which is generally preferred over the other two:

[W]ith regard to defamation addressed toward those holding an

250. Chief Justice Agranat had retired in 1976, one year before *Ha'aretz* was decided. By then, the Court had some new members, including Justice Shamgar, appointed in 1975, and Justice Ben-Porath, appointed in 1976. These two justices represent the cleavage in the new Court. Justice Ben-Porath, formerly President of the District Court, represents the formal style in judicial opinions and a dogged loyalty to English law. Justice Shamgar, formerly Attorney General, displays Grand Style policy-oriented activism as well as sympathy for American doctrines. The confrontation between the two was temporarily solved by a veteran member of the Court, Justice Landau (now Chief Justice). His opinion is a mixture of styles: Formal Style, to plant firmly the fair comment doctrine into Israeli law, and Grand Style, to buttress his conservative bias and to oust "radical" American free speech doctrines from the shores of Israel.

251. *Ha'aretz I*, 31(2) P.D. at 293. "The *problematic* nature of this area of law . . . [stems from the fact] . . . that with regard to both the prohibitions on defamation and the protection of privacy, the question arises concerning the proper boundaries between the protection of these rights and the protection of free expression." *Id.* (emphasis added). *But see* Justice Agranat's gambit in *Kol-Ha'am*, *supra* notes 91-102. Why Justice Shamgar linked the right of privacy to the right of reputation becomes apparent when his source is consulted. He refers to T. EMERSON, *supra* note 151, at 517 (libel and privacy). Justice Shamgar, like Justice Agranat before him, borrows the analysis of an American scholar in order to develop Israeli law.

252. *Ha'aretz I*, 31(2) P.D. at 293-94. "The relationship between the prohibition of defamation and freedom of expression was defined in a variety of ways and approaches. The difference between the approaches lies principally in the assertion of the statuses of the two areas, one against the other, *i.e.*, . . . separate and equal areas or values one of which deserves preference and therefore outweighs the other, either generally or depending on particular circumstances. Some considered the law of defamation as an exception to the right to free expression, and defined it as a prohibition which circumscribes this right and narrows its decisiveness." *Id.* (citations omitted). The terms "horizontal" and "vertical" are taken from Justice Landau's opinion in *Ha'aretz II*, 32(3) P.D. at 343.

> official or public position, the approach which considers defamation as an exception to free expression was long abandoned in the United States, for example, and there the principle was established, which assigns a preferred position to the right of free expression [opinion] in matters of public interest which involve those holding official or public positions.[253]

Justice Shamgar then buttressed the applicability of the vertical approach in Israeli law. He interpreted Israel's commitment to a democratic form of government as endowing the principle of free expression with special status in its constitutional law.[254] Criticism of public officials was seen as the essence of a thriving democracy.[255] The importance of public criticism cannot be overlooked merely because a case involves defamation and thus nonpublic law.

> [T]he right to free expression may easily deteriorate, if . . . the road to *direct* governmental intervention be barred, but at the same time the individual be exposed to defamation suits as a result of negative criticism of a public official concerning his official conduct, which blemishes [the official] in the eye of public opinion.[256]

Here Justice Shamgar encountered an obstacle. In the United States, a preferred position for the First Amendment could arguably lead to a nullification of a statute if that statute assigned another conflicting interest, such as the interest in reputation, a heavier weight. In Israel, the principle of parliamentary supremacy obtained: the Knesset could prefer any interest over free expression. Justice Shamgar circumvents this obstacle by invoking the technique used by Justice Agranat

253. *Ha'aretz I*, 31(2) P.D. at 294. Notice that the United States is presented as an example, thus implying that the preferred position is also accepted elsewhere.

254. The crucial role of free speech in safeguarding other fundamental rights further enhances this special status. "[T]he basic liberties, and first and foremost among them the principle of free expression, are anchored in our basic legal approach, and they are an integral part of Israeli Law. It is well known that these rights have been woven into our legal system as a result of the political system which we chose for ourselves. However, the obligation to maintain them in practice is not only political, or socio-moral, but also legal.

"The basic right of free expression is of decisive importance to ascertainment of the nature of the regime, which obtains in a given political or social framework. Furthermore, it is the very foundation and precondition for loyal safeguarding of most other basic rights; *i.e.*, other basic rights such as the right of free exercise of religion lose their stability and their materialization in actuality is threatened. Furthermore, the described character of free expression as a right among constitutional basic rights gives it a superior legal status." *Id.* at 295 (citation omitted).

255. "The possibility and opportunity to air political, social and other criticism of the conduct of the regime, its institutions, companies, their agents and employees, is a sine qua non for the maintenance of a working democracy." *Id.* at 296.

256. *Id.* at 296 (emphasis in original & citations omitted).

in *Kol-Ha'am*, by holding that a statute cannot impede free expression unless it is couched in clear, explicit terms:

> Every limitation of this right and its scope, which stems from a statute, should be narrowly interpreted, with the purpose of giving this right maximum living space, and not limiting it one bit beyond what is clearly and explicitly required by the statutory language . . . . Freedom of expression and a statutory provision which comes to limit it do not have an equal and identical status.[257]

Having thus established his premises, Justice Shamgar turned to Israel's defamation statute. The components of the defense of fair comment, he asserted, should be the following: a) the defamatory text should be read as a whole; b) the opinion expressed therein can be harsh and robust (the opinion need not be "objective" and need not satisfy the taste of a moderate and balanced reader); and c) the classification of the content of the publication as either "fact" or "comment" depends on its predominant nature. A defamatory text can still be classified as comment even if some inaccurate facts are interpolated.[258] Justice Shamgar summarizes the defense of fair comment in Israeli law in these terms:

> [T]he purpose is to open the door before criticism, and protect it against defamation suits, even if it is found that the comment is not based upon truth and even if the mode of thinking which was expressed in that comment does not fit with the logic acceptable to the court. Sections 15 and 16 do not create a judicial censorship over the truth in writing, and the logic of drawing conclusions; rather, they are *a system of cumulative conditions the purpose of which is to deny the defense of good faith to malicious expression only, i.e., false expression which is aired either knowingly or recklessly, as delineated in section 16(b).*[259]

Justice Shamgar then applied his doctrine to the case before him, and held that the defense of fair comment absolved the newspaper of tort liability.[260]

257. *Id.* at 295. Both Justices Agranat and Shamgar use Dicey's formula of clear statutory statements in order to protect an unwritten constitutional principle against legislative encroachment. Justice Shamgar, it should be noted, goes one step further than Justice Agranat, since he is limiting not the power of the executive branch (as was done in *Kol-Ha'am*), but the power of the courts to protect private individuals who are also public officials. See A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 62-63 (1885).

258. *Ha'aretz I*, 31 (2) P.D. at 300-10.

259. *Id.* at 310 (emphasis added).

260. *Id.* at 310-14.

2. Transplantation: American Influence on Justice Shamgar's Opinion

Like Justice Agranat's opinion in *Kol-Ha'am*, the Shamgar opinion reflects both a general influence of American jurisprudence and a particular imprint of American doctrines.

a. Jurisprudence

American jurisprudential influence on Justice Shamgar is manifest on three levels: the general characterization of the problem as calling for interest balancing, the three approaches toward balancing the interest in free expression against other interests, and the justifications for protecting free expression in a liberal democracy.

The dominance of interest balancing in American constitutional law and its influence in Israel has been discussed above.[261] As for the method of balancing, two of the three approaches mentioned by Justice Shamgar also appear in Justice Brennan's opinion in *New York Times v. Sullivan*—the two-tiered approach and the preferred freedom approach.[262] What is particularly interesting here is the intellectual development of the balancing approaches in American First Amendment jurisprudence and their connection to the development of free speech law in Israel.

It was Chafee who first articulated First Amendment doctrines in terms of interest balancing. Balancing by the United States Supreme Court was not merely result oriented. Rather, the Court had to enunciate a "rational principle" which mediated the conflicting interests.[263] Chafee applied his theory to the conflict between free expression and national security by concluding that clear and present danger was the proper "rational principle" for the particular situation, but his theory could apply to any conflict of interests. However, courts generally did not see the connection between principled balancing and clear and present danger. When Justice Frankfurter offered his *ad hoc* balancing test as an alternative to the prevailing doctrine,[264] it became accepted dogma that "balancing" was something different from clear and present danger. Balancing à la Frankfurter also had an instrumental tinge; it sought to give additional weight to the interest in national security.

261. *See* text accompanying notes 67-111 *supra*.

262. *Ha'aretz I*, 31(2) P.D. at 293-94. The two cases cited by Justice Shamgar to illustrate the two-tiered theory, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), and Beauharnais v. Illinois, 343 U.S. 250, 266 (1952), also appear in Justice Brennan's opinion, New York Times v. Sullivan, 376 U.S. at 268.

263. Z. CHAFEE, *supra* note 64.

264. *See* Dennis v. United States, 341 U.S. 494, 546-52 (1951) (Frankfurter, J., concurring).

In this respect, it differed from Chafee as well as from the Holmes-Brandeis opinions, which assigned a preferred status to the principle of free expression.[265]

In *New York Times v. Sullivan*, Justice Brennan restored Chafee's theory of interest balancing. The particular emphasis on the pivotal role of the principle of free expression reflected both a thoughtful balancing process (the kind advocated by Chafee and Pound) and a reaction against Justice Frankfurter's *ad hoc* balancing. The "actual malice" formula was none other than the "rational principle" advocated by Chafee.[266] In *New York Times v. Sullivan*, Justice Brennan rejected both the *ad hoc* balancing test and the two-tier formula, at least insofar as it applied to the defamation of public officials, and instead instituted Chafee's theory of balancing, or the "preferred position" method of balancing.

The connection between this development and Israeli case law is clear. Justice Shamgar did not have to travel to America to discover preferred balancing.[267] The Chafee-Brennan approach was transplanted into Israel in 1953, in *Kol-Ha'am*. This direct borrowing from *New York Times v. Sullivan* reflects either a failure to see that the local law provided an identical approach or an attraction to the foreign. In either case, the 1977 transplantation does indicate that while the transplantation of 1953 did not fail, it was not fully integrated into Israeli law.

The influence of Justice Brennan's opinion is also manifest in the content of the justifications for free expression advanced by Justice Shamgar—the relationship between free expression and the nature of the polity, and the function of free speech as guardian of other rights—both of which appeared in *New York Times v. Sullivan*.[268] But what is

265. *Id.* at 517. *See also* note 196 *supra*. Under Justice Frankfurter's analysis, the careful explication of the interests at stake gave way to a casual assessment and the quest for a "rational principle" gave way to an *ad hoc* approach. *See* J. ELY, *supra* note 107, at 108. For a similar historical analysis of the respective roles of interest balancing, the clear and present danger test, the preferred position, and *ad hoc* balancing, see M. SHAPIRO, *supra* note 147, at 76-104.

266. *See* Z. CHAFEE, *supra* note 64, at 279-80.

267. Indeed, Justice Brennan did not use the term "preferred position," but in the literature following *New York Times* v. *Sullivan* his approach was labeled the "preferred position" approach as well as definitional balancing or categorization. *See, e.g.*, M. SHAPIRO, *supra* note 147, at 76-104; Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

268. "The basic right of free expression is of decisive importance to ascertainment of the nature of the regime." *Ha'aretz I*, 31(2) P.D. at 295. *See* Justice Brennan's statement, "[The American] form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects. is it not natural . . . under such

most striking is the omission of Justice Brennan's seditious libel argument. It was not presented, despite the fact that *Kol-Ha'am* did absorb the rejection of seditious libel,[269] despite the centrality of this argument in Justice Brennan's opinion, and despite the persuasiveness that this argument could lend to the Shamgar approach.[270]

b. Doctrine

In order to transplant the *New York Times v. Sullivan* formula, Justice Shamgar first had to overcome the formal separation between private and public law. Again, Justice Shamgar relied on the redefinition of the boundary line between tort action and constitutional law in *New York Times v. Sullivan*.[271] Then, relying extensively and openly on the Brennan analysis of the inadequacy of the defense of fair comment to protect criticism of public officials,[272] he transplanted Justice Brennan's formula verbatim as the correct interpretation of section 16 of Israel's Defamation Law:

> Sections 15 and 16 do not create a judicial censorship over the truth in writing and the logic of drawing conclusions; rather, they are a system of cumulative conditions, the purpose of which is to *deny the defense of good faith to malicious expression only, i.e.,*

different circumstances . . . that a different degree of [press] freedom . . . should be contemplated?" 376 U.S. at 274-75 (quoting Madison).

Justice Shamgar's opinion continues, "[I]t is the very foundation and precondition of loyal safeguarding of most other basic rights, *i.e.*, other basic rights such as the free exercise of religion." *Ha'aretz I*, 31(2) P.D. at 295. *See* Justice Brennan's statement, "[The right] of free communication . . . has ever been justly deemed the only effectual guardian of every other right." 376 U.S. at 275 (quoting the Virginia Resolution of 1798). The connection to the First Amendment is clear.

269. 1 SELECTED JUDGMENTS at 94-95.

270. *See* text accompanying note 287 *infra*.

271. *Ha'aretz I*, 31(2) P.D. at 295-96. "The described approach is indeed generally accepted by all, during assessment of the interrelationship between freedom of expression and governmental powers in their entirety, but the maximal restraint upon governmental powers in the areas of criminal law and administrative law is only part of the means designed to protect . . . democracy . . . . It is needless to emphasize the importance of the correct application of the yardstick referred to above, even in circumstances of the second type [tort law], because the right to free expression may easily deteriorate, if indeed the road for *direct* governmental intervention be blocked but at the same time the individual is exposed to litigation within the defamation law as a result of negative and critical expression against a public official, concerning his official conduct, which blemishes his status before public opinion (§ 1(3) Defamation Law)." *Id.* (emphasis in original). *See* New York Times v. Sullivan, 376 U.S. at 254, 297 (Brennan & Goldberg, J.J.; joined by Douglas, J.).

272. *Ha'aretz I*, 31(2) P.D. at 296-97, 305. Justice Brennan also discussed the need to modify the common law defense of fair comment in order to protect public debate. New York Times v. Sullivan, 376 U.S. at 271-72 (Brennan, J., plurality).

false expression which is aimed either knowingly or recklessly, as delineated in Section 16(b).[273]

3. *Grand Style: Strategy and Tactics of Making Law in General and Making Law Through Transplantation in Particular*

The message in *New York Times v. Sullivan* was radical;[274] the message in *Kol-Ha'am* was radical;[275] yet both were widely acclaimed as important achievements of the particular legal system within which they were conceived. Not so the message of Justice Shamgar; his message was radical, and it was radically rejected. Upon rehearing, the Israeli Supreme Court dropped his interpretation of the defense of fair comment, the basic doctrinal approach of preferred freedoms, and the theoretical justifications for the defense of free expression in democracy.

The explanation for rejection cannot rest on a mere defense of the positive law. Surely the language of the Israeli statute was subject to interpretation. Technically, both the American approach and the common law approach could serve as the "correct" interpretation of the law.[276] Furthermore, had the rejection rested primarily on the "correct" interpretation of the law, it would not have ignited the wrath unleashed by Justice Landau in *Ha'aretz II*. More must have been at stake.

The rejection emanated from both the strategy and the tactics of the Shamgar opinion. In the *Ha'aretz* litigation, the struggle between the liberal (American) conception of free expression and the doctrine against licentiousness finally came to the surface. As is discussed below, both the Ben-Porath dissent and the Landau majority opinion embrace the licentiousness doctrine as the proper conception of free expression. On this level, the rejection of Justice Shamgar's opinion simply reflects refusal to stomach the proposition that the press should be "uninhibited, robust, and wide open," and that expression "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[277]

The other explanation for the massive rejection of Justice Shamgar's analysis involves a concept of judicial decisionmaking. Through

273. *Ha'aretz I*, 31(2) P.D. at 310 (emphasis added). *See* Justice Brennan's statement, note 228 *supra*.

274. The word "radical" is used here in the sense that the common law doctrine of fair comment was replaced by a doctrine applying the First Amendment and the rule against seditious libel to tort law. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194.

275. *See generally* text accompanying notes 90-151 *supra*.

276. *See* text accompanying notes 246-48 *supra*.

277. New York Times v. Sullivan, 376 U.S. at 270.

the method of interest balancing, Justice Shamgar was making policy. Clearly, the Court in *Ha'aretz II* rejected the substance of that policy;[278] but the uprising against Justice Shamgar's opinion reveals more. Here legal formalism clashed with sociological jurisprudence, which considers factors external to formal rules in the process of delineating doctrine. The Court, as the opinions of Justices Ben-Porath and Landau illustrate, did not look kindly at the "Grand Style" of judicial decisionmaking.

Justice Shamgar made his opinion an easy target for the legal formalists. His opinion failed to demonstrate the judicial craftsmanship which legitimizes the policymaking function of judicial opinions. It is impossible to speculate whether in different form the Shamgar opinion could have prevented the final outcome of the *Ha'aretz* case, but it seems plausible that a different and more sophisticated craftsmanship could have softened the Court's reaction.

Opinions which conscientiously engage in lawmaking generally harness all the great work horses to the carriage—history, tradition, precedents, and the statutory language. Effort is made to present novel doctrine as evolving from the great body of autonomous law. Policy considerations are tied to the mainstream of the "law." Consider Justice Brennan's opinion in *New York Times v. Sullivan*. The decision is replete with references to the Founding Fathers, First Amendment history and doctrine, and state law.[279] Transplantation presents an additional problem: To present obviously foreign doctrine as part of autonomous local law. Justice Agranat did this well in *Kol-Ha'am*. He carefully aligned the history of Israel with the general history of the freedom loving West. He carefully balanced American and English precedents and demonstrated that his particular brand of the clear and present danger test was homemade.

Justice Shamgar, on the other hand, stripped the Grand Style of these attributes. His opinion was predominantly policy oriented. His preference for American law went unconcealed. He transplanted *New York Times v. Sullivan* but failed to perceive and transplant its style.

278. It thus rejected the substantive aspect of interest balancing as advocated by Chafee, *see* note 64 *supra*; Justices Holmes and Brandeis in their opinions in Whitney v. California, 274 U.S. 357, 372 (1927) (concurring), Gitlow v. New York, 268 U.S. 652, 672 (1925) (dissenting) and Abrams v. United States, 250 U.S. 616, 664 (1919) (dissenting); Justice Brennan in New York Times v. Sullivan, 376 U.S. 254; and Justice Agranat in *Kol-Ha'am*. *See* text accompanying notes 189-223 *supra*.

279. 376 U.S. at 268-80. *See also id.* at 280 & n.20 (listing ten state cases as having adopted a rule similar to the actual malice formula. Immediately following the footnote the text reads, "The consensus of scholarly opinion apparently forms the rule that is here adopted").

His opening premise set the tone for the entire opinion. He began by discarding the two-tiered approach: "However, in matters concerning defamation of persons holding an official or public office the approach which considers defamation as an exception to free expression was long abandoned in the United States, for example."[280]

Justice Brennan also distinguished the two-tiered approach as inapplicable.[281] So did Justice Agranat in *Kol-Ha'am*.[282] Indeed, this approach, when closely examined, is nothing but a remnant of the licentiousness approach.[283] Yet Justices Agranat and Brennan skillfully avoided confrontation with this doctrine. Justice Shamgar demonstrated accurate understanding of the foreign material but not enough sensitivity to the method by which new doctrine must be carved.

Justice Agranat in *Kol-Ha'am*, aware that not much "freedom loving tradition" was available in Israel proper, was careful not to rely too heavily on the American experience. He diversified his sources and thus achieved both independence and alignment with a heroic past. Not so did Justice Shamgar. Except for alluding to the draft of Basic Law—the Right of the Person—he referred only to the "political system of government which we chose for ourselves."[284] *Kol-Ha'am* was

280. *Ha'aretz I*, 31(2) P.D. at 294. His imprudence was revealed in an earlier paragraph where he presented three approaches as possible alternatives. Then, having discarded the two-tiered approach, he asserted that only the preferred freedom (vertical balancing) approach was left. He did not explain why he left out of the analysis the horizontal balancing approach, which assigned equal weight to all principles.

281. New York Times v. Sullivan, 376 U.S. at 268. "Respondent relies . . . on statements . . . to the effect that the Constitution does not protect libelous publications. *Those statements do not foreclose our inquiry here." Id.* (emphasis added).

282. 1 SELECTED JUDGMENTS at 98.

283. The two-tiered approach set forth categories of speech that are outside the protection of the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). All are "hostile or offensive to accepted standards" and thus fall under the definition of licentiousness. *See* text accompanying note 195 *supra*.

284. *Ha'aretz I*, 31(2) P.D. at 295. "The new draft Basic Law comes to mold principles and delineate their contours . . . . But even now the basic liberties, and first and foremost among them the principle of free expression . . . are an integral part of Israeli law. It is well known that these rights have been woven into our legal system as a result of the political system which we chose for ourselves." *Id.*

The reliance on the draft Basic Law, Rights of the Person, was a tactical error. Formally, it was a political document, irrelevant in adjudication. Also, the protection which the Law grants to free expression is dubious. Section 11 reads, "(a) Every person has the right to express his opinions, to publish them, to disseminate and impart them to others . . . . (b) None of these rights may be limited except by a law whose purpose is to insure the existence of a democratic rule, to safeguard the defense of the State and the public peace, to safeguard moral values or to prevent desecration of religion, to safeguard the rights of others, or to guarantee proper legal proceedings." 1973 HATZAOT HOK [Bills before the Knesset] at 448 (in Hebrew). *See also* note 332 *infra* (Justice Landau's interpretation of the Law's guarantees).

cited as reference for this democratic commitment, but the wealth of other sources used there, including Israel's Declaration of Independence, went unnoticed. Also unnoticed were the substantial number of Israeli cases that asserted the right to free expression as basic and vital.[285] Furthermore, only one case was cited for the doctrine that every statute should be narrowly construed so as to allow maximum breathing space to the unwritten constitutional principle.[286]

Most curiously, the doctrine of seditious libel was not invoked. *New York Times v. Sullivan* traced the origin of its own formula directly to the antipathy toward seditious libel in American constitutional thought. Justice Agranat incorporated the same antipathy into Israeli law. The prestige of Justice Agranat, together with the age of the *Kol-Ha'am* decision and the wealth of its contents, could have helped. Yet Justice Shamgar preferred to go his own way.

These were not the only bold steps taken by the newly appointed judge. In his solitary journey to adopt a better policy for Israeli law, Justice Shamgar was not hesitant to awaken some foes. Israeli precedents and English law served as primary targets. Not only did he fail to align his case with previous precedents, he also attacked one of them. In a previous eight-year-old decision emanating from the same *Ha'aretz* case, Justice Witkon, an eminent veteran of the Court, ruled that the press did not enjoy a privileged status under Israeli law.[287] Justice Shamgar clearly, and in all probability knowingly, diverted from his subject matter to comment:

> I shall not deal here with the specific question, whether the press has a special . . . status vis-à-vis the Defamation Law, since in our case the question was already decided. . . . Undoubtedly, this is an important question every examination of which can only contribute to its further clarification. . . . I would only like to reflect that maybe there is room to regret . . . that . . . there was no opportunity to examine all the defenses together . . . .[288]

Justice Shamgar's treatment of English law was equally belligerent. English law was still revered in Israel.[289] Justice Shamgar did not have to confront it any more than he had to confront Justice Witkon. He could have averted the confrontation by concentrating exclusively

285. *See* notes 204 & 215 *supra*.

286. "Hilron" v. Council for Growing and Marketing of Fruit, 30(3) P.D. 645, 653 (1976) (Shamgar, J., dissenting).

287. Ha'aretz v. Electric Co., 23(2) P.D. 87 (1969).

288. *Ha'aretz I*, 31(2) P.D. at 298.

289. Recall the kid glove treatment it received from Justice Agranat in *Kol-Ha'am*. *See generally* text accompanying notes 20-189 *supra*. Israel's formal ties to English law were severed in 1980. *See* note 239 *supra*.

on the language of the Israeli statute, but he chose to kick the English precedents off Israel's shores once and for all: "[I]t is necessary to classify and examine very carefully, before applying English precedents or treatises, part of which are outdated even in Britain."[290] He continues:

> It is not surprising that in view of the inconsistency in the case law, the British jurists are dissatisfied with the degree of clarity of their defamation law. Lord Diplock says in the Slim case: "[T]he law of defamation . . . has passed beyond redemption by the courts." These words, constituting testimony of the baker about his goods, should advise us to use extra caution when we come to interpret our statutory law, with its clear principles in light of British case law.[291]

By thus barring the flow of influence from Britain, Justice Shamgar, intentionally or not, emphasized the American influence over his opinion and thus made it even more vulnerable.[292] Judge made law in America was exposed as a nontraditional policymaking method which foregoes the familiar approval of the ancient English common law.

One should not criticize Justice Shamgar too harshly, however, there are strong elements in his opinion. He perceived clearly and correctly that law was part of the social fabric. He understood the central importance of public criticism, especially criticism of public officials. He analyzed perceptively the dynamics of a free press. His basic policy line—broadening the contours of free expression in Israel—and his concern for the impact of an adverse decision on the press should be commended. From this point of view, his straightforward style was an important addition to the general structure of Israeli Supreme Court decisions. Yet, either because he was inexperienced or because he underestimated the power of "craftsmanship," Justice Shamgar failed to take from American law its depth, did not make use of landmark Israeli decisions and did not root properly the transplanted formula into the local soil. He appeared instead to be utilizing a radical method to transplant a radical formula. It is therefore unclear whether it was the substance or the method which was more responsible for the failure of his analysis.

290. *Ha'aretz I*, 31 (2) P.D. at 299.

291. *Id.* at 309.

292. Ironically, even he could not get away from the English influence. In discussing the particular details of the fair comment doctrine, he referred to English precedents, sometimes using them in response to the Ben-Porath dissent. *Id.* at 308-09. Since the Israeli Bar is still influenced by England, the briefs in this case are likely to have relied mostly on English case law.

D. Formal Style: Justice Ben-Porath's Dissent

In the Ben-Porath dissent,[293] we finally confront a classic example of the other pole of the typology of judicial opinions in Israel: the Formal Style.[294]

Justice Ben-Porath's opinion was essentially a treatise on the English defense of fair comment, interlaced with an extensive analysis of the evidence which demonstrated that the article's factual structure was false, and therefore the defense could not stand. It shunned policy analysis and interest balancing and "discovered" the law in the nineteenth and twentieth century English precedents. Thus, the Ben-Porath dissent reflected not only an opposing jurisprudential and doctrinal trend but was also a work of transplantation. This time, however, the donor system was not the United States but the United Kingdom.

1. The Fair Comment Doctrine: Legal Formalism and the Bias Against Free Speech

Analytically, the defense of fair comment rests on the premise that any reasonable person can separate fact from opinion. Judges are thought particularly adept at making the distinction. Since facts are not value judgments, the principle of free expression is of limited relevance. Facts should be true if they are to receive the protection of the law. By contrast, opinions, once separated from the facts, receive substantial legal protection. If uttered in good faith, they may be "exaggerated, stubborn and prejudiced."[295]

The problem with this analysis is its formalist epistemology. Language is subjective and imprecise; "fact" and "opinion" are at best two poles between which lies a continuum of many shades.[296] By ostensibly

293. *Ha'aretz I*, 31 (2) P.D. at 315. In part, Justice Ben-Porath made me what I am today. While this article is a critique of her work, it also recognizes and respects her substantial contribution to the development of Israeli law.

294. Contrasting the Grand Style with the Formal Style, Llewellyn said: "[The Grand Style's] very existence has been obscured and buried by the incursion later of a way of work in which the appellate judges *sought* to do their deciding without reference to much except rules, *sought* to eliminate the impact of sense, as an intrusion, and *sought* to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court. I call that way of work the Formal Style." K. LLEWELLYN, *supra* note 7, at 5-6 (emphasis in original). *See also* H.L.A. HART, THE CONCEPT OF LAW 120 (1961); M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 253-66 (1977).

295. *Ha'aretz I*, 31(2) P.D. at 315. About the fair comment doctrine generally, see W. ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 193-215, 634-36 (1911), *cited in Ha'aretz I*, 31(2) P.D. at 320 (Ben-Porath, J., dissenting).

296. Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 276-81 (1978). *See also* Titus, *Statement of Fact versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

deciding what is "fact" and what is "opinion," judges exercise immense control over the content of freedom of the press. If they tend to consider the specific publication as worthy of protection, they may be prone to see the disputed statement as involving opinion. If of a contrary tendency, they may classify the statement as "fact" and will demand full proof of its truth before granting protection.

A particular aspect of the common law defense is that the speaker is expected to separate fact from opinion. Said Justice Ben-Porath, "Another logical requirement is that the publication should clarify sufficiently what is asserted as fact and what is a comment."[297] Yet if people ordinarily do not think and speak in such logical sequence, the question is whether or not they should be expected to do so, particularly in political debate. Legal formalism, striving toward the neat elaboration of rules, ignores the reality, which is that fact and opinion are frequently mixed, especially when the speakers feel very strongly about something or wish to make their message powerful and moving rather than dry, technical, and logical.[298]

The defense of fair comment, both in its distinction between fact and opinion and its insistence on the separation of fact from opinion, conceals a potent weapon against free expression. Justice Ben-Porath's application of the "fair comment" defense to the *Ha'aretz* case exemplifies the danger:

> The article presented . . . [the Company and its Director's] intention to deceive the public as a given fact, not as a writer's opinion based on the facts which he disclosed. The words "supposedly" and "in fact," which are not qualified in any way, appear in the first paragraph of the article . . . and were tied and inter-related with the facts which were brought before and after them.
>
> I have no ground to assume, as a realistic possibility, that the

297. *Ha'aretz I*, 31(2) P.D. at 320. Then she elaborates: "In this case I do not find it necessary to decide whether there is an obligation to detail *all* the facts which support the critic's opinion. At least from Lord Oaksey's opinion in the *Kemsley* case [Kemsley v. Foot & Others, [1952] 1 All. E.R. 501] it follows that such an obligation does not exist . . . . Absent an explicit provision . . . I am prepared to assume (without deciding in this matter) that also here there is no obligation . . . . Yet, at the same time the great difference between the defense of truth and the defense of fair comment should be remembered . . . . The justification for the broad protection of the latter defense stems from the proper opportunity which is given the readers . . . to judge for themselves if the publication's description of the facts indeed leads to the opinion expressed on the basis of these facts. Hence, [the defendant should] . . . first describe at least the primary facts . . . and secondly clarify sufficiently to the ordinary readers that the part which damages the person's reputation is merely an opinion. Therefore, if the general impression . . . is that the damaging part states a fact . . . the defense of fair comment will not obtain . . . . *Id.* at 321 (emphasis in original).

298. Schauer, *supra* note 296, at 276-81.

> newspaper's readers to whom the article was presented, understood or could have understood, through reading the piece as a whole, that there is room for doubt concerning the bad intention of the respondents.[299]

A shrewd and experienced judge, she did not rest her case merely on this ground. She fortified her opinion with two more layers; in each, she assumed *arguendo* that she was wrong on the former conclusion, yet proceeded to show that nevertheless the law mandated that the defense should fail. First, she assumed *arguendo* that the imputation of a bad motive indeed amounted to opinion. English precedents, however, teach that another component of the doctrine should be met: "There must always be some reciprocal relationship between the facts and the opinions . . . . Absent such minimal relationship, the text which posed as an opinion turns into a fact; the truth of which should be proven."[300] Her analysis of the record showed that, in this case, no such "minimal relationship" existed.[301] Next she assumed *arguendo* that the article's attribution of deception was indeed an opinion and further that it was not necessary to provide "even a minimal factual infrastructure which [would] enable the reader to judge for himself if the opinion rested on reliable facts."[302] Still, one more condition had to be met: "provided that during the trial the defendant proved . . . supplementary facts which together form an adequate factual basis."[303] Then, demonstrating an admirable mastery and manipulation of fact and doctrine, she utilized the trial record to prove that the "supplementary facts" did not amount to "an adequate factual basis."[304]

2. *Political Vision in Justice Ben-Porath's Opinion*

Justice Ben-Porath's opinion presents a seemingly watertight case against the newspaper, exclusively based on logic and legal analysis. Yet the fair comment doctrine reflects the licentiousness doctrine, this time directed at the form rather than the substance of speech. The licentiousness doctrine proscribes speech that fails to conform to accept-

299. *Ha'aretz I*, 31(2) P.D. at 322-23.

300. *Id.* at 324-25. She relied on Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 424 (1910), and on Lord Denning's opinion in London Artists, Ltd. v. Littler, [1969] 2 All E.R. 193 (C.A.). For a comment on her usage of the American source, see note 313 *infra*.

301. *Ha'aretz I*, 31(2) P.D. at 325.

302. *Id.* at 326.

303. *Id.* at 329. These "supplementary facts," she claimed, are facts that were known to the reporter *before* he wrote the article because facts unknown to him could not play a role in forming his opinion.

304. *Id.* at 329-31. The extensive utilization of the trial record reveals Justice Ben-Porath's own background. *See* note 250 *supra*.

able societal standards (as articulated by the courts). Justice Ben-Porath prescribes standards for editors and reporters: separate facts from opinion, make sure to present an "adequate minimal factual structure," take care to keep in the record "supplementary facts," and choose words very carefully.[305] A judge may see a fact where the speaker means opinion. Clearly this is policy — to make the press conform to certain structured, rather rigid standards of reporting.

The value choice of the Ben-Porath opinion lies not only in her adoption of the English doctrine but also in the disclosure of a political vision antithetical to that advanced in *Kol-Ha'am*. This is apparent in her rejection of Justice Shamgar's interest balancing. She opened her opinion by positing the "fair comment" defense as "much more liberal" than the defense of truth:

> [T]he legislature's approach toward a comment made in good faith in a matter of public interest is very liberal, since freedom of expression and debate in public matters are among the fundamental principles of a progressive society. Any unjustified limitation of free expression necessarily violates this sacred principle which should be protected with the utmost care.[306]

Why is "fair comment" a more permissive defense? "An *explanation we find in the ancient case law* in England, that a person who claims 'fair comment' must bring to the reader's attention the factual basis on which he relies—and that those facts should be true."[307]

The upshot is that Justice Ben-Porath refused to see the defamation of public officials as a matter influenced by considerations drawn from public law. Courts do not make policy. Courts balance neither interests nor values. All the necessary balancing had already been done in the ancient case law of Britain, from which, presumably, Israel's Knesset had taken its cue. This approach explains why her entire opinion mentioned the principle of free expression only once,[308] and why Justice Shamgar's opinion was treated in only two paragraphs, both highly technical. Implicitly, the bulk of his policy oriented analysis was dismissed as irrelevant.[309]

Still, Justice Ben-Porath had a political vision. At the very end of

305. *Ha'aretz I*, 31(2) P.D. at 326-27.

306. *Id.* at 318.

307. *Id.* at 319 (emphasis added).

308. *Id.* at 318.

309. *Id.* at 332. "By now I had the opportunity to read Justice Shamgar's opinion and I wish to comment that the *Campbell* case . . . is still considered to the best of my knowledge as a valid authority in England and it is cited, without reservation, in the *Kemsley* case decided by the House of Lords. As to the *Walker* case, I do not think, with all due respect, that it changes anything but it only adds a dimension. It is cited, *inter alia*, in the *London*

her opinion, referring to the Director's announcement, made shortly after the press began to criticize the purchase, that he would sell the car,[310] she said:

> I have already clarified above that a solemn pledge in public constitutes *strong presumptive evidence* about its sincerity and it is not refuted—by past sins of the company which employed him [the Director] if there were such. It is also hard to believe that they would *dare* resume usage of the car, when the press was monitoring their steps.[311]

So, government is trustworthy.[312] There is a direct correlation between what government officials pledge to do and what, in fact, they will do. The "*strong presumption*" in favor of the trustworthiness of official pledges implies a less significant role for the press, for if public officials are trustworthy, there is no need specially to protect the freedom of the press in order to monitor their conduct.

This political vision is related to legal formalism. The government is a government of laws, not of men. Men (sometimes also women) are needed to breathe life into the business of government, but they are presumed to be law abiding. The mere statement of the law guides the conduct of public officials.

Clearly, this vision flies in the face of Justice Shamgar's philosophy. Thus, the conflict in *Ha'aretz* was not only between Grand and

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Artists case on which, in any event, I did rely, and the conditions specified therein were not met in our case, in my opinion.

"Also, I regret that I have to express reservations concerning the description of facts in . . . [Justice Shamgar's opinion], a description which is based on an evaluation of the evidence which totally differs from the evaluation of the District Court." *Id.*

The opening sentence implies that she did not see Justice Shamgar's opinion when she wrote her dissent. Even so, it cannot explain her declining to respond to the policy analysis. She must have known of the general trend (interest balancing) of his opinion. The technical tone of her comments also supports the view that her judicial philosophy shuns policy considerations.

310. About which Justice Ben-Porath earlier wrote: "Also in my mind there is no doubt, that a public announcement by a Director of a public institution, that he decided to sell the car . . . while only pretending to place it for sale, and planning to resume driving it when the episode is forgotten, amounts to an inadequate, irresponsible behavior . . . ." *Id.* at 318.

311. *Id.* at 333 (emphasis added).

312. Her inclination, to "trust" the good will of public officials, was apparent in her evaluation of the trial record. *See, e.g., id.* at 331 ("The fact that an almost new car was not tendered, could . . . perhaps become a target for public debate and criticism, *although it can be seen as an exceptional case which also needs exceptional treatment*" (emphasis added)).

Also, note her reaction to the fact that the Company's spokesman was instructed not to speak with *Ha'aretz*: "Despite some doubts which spring from the factual inaccuracies of the text, I am prepared to conclude that Mr. Kotler published the article in good faith on the basis of the fact that he sought the company's response prior to publication . . . but good faith is not enough." *Id.* at 331-32.

Formal Styles, but also American and English law. At a deeper level, it was a conflict between two distinctive political visions of democracy. Yet, while the Grand Style openly bespeaks its political vision, the Formal Style is silent about it. This silence creates the perils of transplantation, Formal Style.

3. The Perils of Transplantation, Formal Style

While Justices Agranat and Shamgar transplanted American doctrines as the proper interpretation of Israeli statutes, Justice Ben-Porath relied almost exclusively on English treatises and English case law.[313] Her technique in transplanting English law to the Israeli statute took the following form:

> The defense known in England as "fair comment" is similar to ours, although when we refer [to English law] we should remember that we have before us an original Israeli statute which should be interpreted in light of its text. Therefore, we may use [English] decisions only insofar as their holdings fit our statutory guidelines and are acceptable to us as interpretations of its instructions.[314]

Notice that there was no exploration of whether English cases indeed fit "our statutory guidelines." Her mechanical transplantation not only reflects the decisive influence of the English common law on Mandatory and Israeli law, but also reflects the training of Israeli lawyers who, long before the defamation statute was enacted, were taught to look at the English common law for guidance.[315] The habit of mechanical reliance on England is hard to shake off, particularly in view of the wealth of doctrinal material in English law and the similarity in legal thought. For a judge who has neither Justice Agranat's American background nor Justice Shamgar's penchant for policymaking, Britain seems the natural place from which to draw inspiration. Moreover, the connection between the Israeli statute and English com-

313. Her opinion makes no reference to American law except for a citation to Veeder, *supra* note 300. The Veeder article is characterized by Justice Brennan, in New York Times v. Sullivan, 376 U.S. at 280 n.20, as a "scholarly opinion which . . . favors the rule that is here adopted." The other scholarly sources used by Justice Ben-Porath are Odgers, *see* note 295 *supra*, and G. GATELY, ON LIBEL AND SLANDER 223 (7th ed 1974). Not surprisingly, these are orthodox works geared to synthesize black letter law. Compare these sources with the different style and orientation of Chafee, *see* note 64 *supra*, and Emerson, *see* note 151 *supra*, that influenced the Agranat and Shamgar opinions.

314. *Ha'aretz I*, 31(2) P.D. 318.

315. Justice Ben-Porath received her legal education in the Palestine Law Classes. She was one of the best trial lawyers at the Ministry of Justice and was President of Jerusalem's District Court (original and appellate jurisdiction) prior to her appointment to the Supreme Court.

mon law proves the neutrality of law—the great pillar of legal formalism. If law is neutral, there should be little difference between the law of defamation of England and that of Israel, and we can use "their" decisions to guide "our" law. If law is neutral, it is also ahistorical. An "ancient" explanation deriving from nineteenth century aristocratic England is good enough for modern law, modern society and democracy.

The deficiency of this mode of transplantation is readily apparent when we compare it with the Grand Style. That constitutional lawmaking, or at least constitutional-common-lawmaking,[316] is involved here is clear, for the interpretation of the defenses of defamation depends upon judicially held postulates about the relative freedom of the press to criticize the government. Because both Justices Agranat and Shamgar considered interest balancing and policy analysis as legitimate functions of judicial decisionmaking, they were able to recognize the impact of their doctrines and the particular result of the case on the Israeli polity. On the other hand, transplantation, which is combined with legal formalism and delegitimizes policy considerations, runs the risk of shaping political life without clearly recognizing its action for what it is. Transplantation of this type does *make* policy, but it reduces its visibility so that open debate of the court's action becomes more difficult.

Yet the Ben-Porath dissent was a powerful one—especially so in the Israeli milieu where legal science is still identified with formal logic. The authoritativeness of her opinion undoubtedly influenced the Supreme Court's decision to reconsider the case in a further hearing.

E. *Ha'aretz II:* Justice Landau and the Formal Style

If you bring an electric appliance from the United States into Israel and force its plug into an outlet, odd shrieks will emanate, sparks of fire will fly, and with the scorched plug in your hand you will realize that this electric system is hostile to your appliance. Think of the Landau opinion as representing Israeli electrical current, and you will understand how it treated American law.

Justice Landau (then Deputy Chief Justice and presently Chief Justice of Israel's Supreme Court) wrote the majority opinion in *Ha'aretz II*, with short concurrences by three other justices.[317] Unlike Justices Ben-Porath and Shamgar, Chief Justice Landau has been on the Supreme Court since the early fifties. Interestingly, he was one of

316. For a development of this concept, see Monaghan, *supra* note 154.

317. *Ha'aretz II*, 32(3) P.D. at 337 (1977).

the two remaining justices who joined Justice Agranat's unanimous opinion in *Kol-Ha'am*. He also authored at least one landmark free speech decision in Israel as well as the first decision in Israeli history which declared a statute invalid.[318] His opinion, therefore, represents ripened judicial philosophy based on years of thoughtful experience on the Supreme Court. To what extent his education in Gdansk and London has shaped his judicial philosophy we cannot tell, but he clearly represents judicial self-restraint combined with the Formal Style.[319] His opinion, however, is not merely a variation of the Ben-Porath dissent, for Justice Landau did not utilize transplantation to formulate either the Israeli conception of free speech or the doctrine of fair comment. The absence of a conscious reliance on another legal system, in turn, is helpful in exploring a further question: To what extent can the Formal Style develop indigenous constitutional concepts in a country that has no written constitution?

Justice Landau's articulation of the Israeli doctrine of fair comment and his concept of free speech are reviewed below.

1. The Doctrine of Fair Comment, Israeli Style

In essence, Justice Landau agreed with the Ben-Porath epistemology. Fact should be separated from opinion and a judge will decide which is which. Journalists should present the facts first, then their opinion, because ordinary readers cannot easily separate the two and are susceptible to what they read first. It is irrelevant that the "dominant nature" of the publication is opinion or that, on the balance, the correct facts weigh more than the incorrect assertions. All material facts should be true. Justice Brennan's celebrated observation that speech about public matters should be "uninhibited, robust and wide-open"[320] is good for opinion but not for facts.[321]

318. Ulpaney Hasrata v. Garry, 16 P.D. 2407 (1962) (free speech) and Bergman v. Minister of Finance, 23(1) P.D. 693 (1969) (invalidating a statute). For an English translation and commentary of *Bergman*, see Elman, Klien & Akzin, *Judicial Review of Statute: Bergman v. Minister of Finance*, 4 ISR. L. REV. 559 (1969).

319. A study of the judicial philosophy of Chief Justice Landau (or any other Israeli judge) has not yet been undertaken. Therefore, this article does not attempt to reconcile *Ha'aretz II* with other decisions authored by Chief Justice Landau. Occasionally, he did deliver policy oriented decisions, *e.g.*, Bergman v. Minister of Treasury, 23(1) P.D. 693 (1969).

320. *Ha'aretz II*, 32(3) P.D. at 349-51.

321. *E.g.*, "[I]n my opinion every publication which seeks the defense of § 15(4) should clearly separate between the facts and the comment on these facts. Mixing the two may blur the publication and allow defamatory false facts to 'stealthily' infiltrate into the comment. The writer must point to the facts on which he relies—and these must be true (except marginal details which constitute no actual injury). Once the facts were described he is permitted

As emphasized above, the Israeli statute in question was open to interpretation.[322] The doctrine adopted by Justice Landau clearly reflected the common law doctrine of fair comment. What is interesting, then, is the technique employed by Justice Landau to derive the doctrine from the statutory text. Justice Landau began his analysis by observing that Israeli law provides a "full answer" and "a fair solution" to "the problems of balancing the competing values of free speech and the protection of one's honor and reputation."[323] Furthermore, he believed the "statutory provision should be interpreted in accordance with its language and its spirit, and foreign authorities may enlighten us, but we should not assign to them more than their due weight."[324]

The clue to the "language and spirit" of the statute was found in technical rules of interpretation and "legal" logic. He disagreed with Justice Shamgar's position that statutes limiting speech should be narrowly interpreted: *"[T]his provision, as any other statutory provision*, should be interpreted first and foremost *in light of the ordinary meaning of the words*."[325] Specifically, he found that section 15(4) was applicable when the publication consisted of (a) reference to the conduct of the public official and (b) a comment by the defendant about such conduct. "There is a fundamental difference between these two components. Component (a) must refer to correct facts, whereas under (b) the publisher has a . . . defense, even if there was no truth in the comment."[326] Justice Landau did not explain why the "ordinary meaning" of the term "comment" was "opinion," rigidly divorced from "fact," rather than the looser meaning assigned to it by Justice Shamgar.[327]

There are two important aspects to Justice Landau's opinion, as

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to draw his conclusions by way of a comment, but provided that he classifies and separates fact and conclusion. In this matter, I join Ben-Porath, J., in adopting Odger's [position]. On the other hand, there is a distinction between a presentation of the facts and a commentary by way of drawing conclusions from these facts." *Id.* at 350 (citation omitted).

322. *See* text accompanying notes 230-33 *supra*.

323. *Ha'aretz II*, 32(3) P.D. at 347, 348.

324. *Id.* at 347.

325. *Id.* (emphasis added).

326. *Id.* at 348-49.

327. *See* text accompanying notes 258-59 *supra*. This question could be answered only were Justice Landau prepared to go beyond legal formalism. To evaluate the role of "fact" and "opinion" in expression, one needs to explore their meaning in philosophy and sociology. Dicey's rule of clear statement (a statement restricting a constitutional principle such as free expression will be interpreted narrowly unless the legislature makes its intention clear and explicit), *see* note 257 *supra*, which was followed by Justices Agranat and Shamgar, enables the Court to do just that: explore the meaning of free expression and its justifications, and then interpret the statutory language. Justice Landau did make a policy choice to restrict free expression and was not unaware of it, *Ha'aretz II*, 32(3) P.D. at 347, but he did not open his inner deliberations to critical scrutiny.

reviewed thus far. First, Justice Landau did not use transplantation in formulating his doctrine. Although he consulted and cited foreign sources and his bias toward the British way is obvious, he rejected explicit transplantation.[328] His approach represents an important step toward autonomy and self-determination in Israeli law. Second, unlike Justice Agranat, Justice Landau was not prepared to make an open policy choice. What then becomes of constitutional or administrative law constructed in the Formal Style?

2. The "Purification" of Israeli Free Speech Doctrines

a. The Tension Between Interest Balancing and Licentiousness Temporarily Resolved

The second part of Justice Landau's opinion, discussed above, was formalistic and rule oriented. Its end result was to marry the common law doctrine of fair comment to the modern Israeli defamation statute. But while this may be the *ratio decidendi* and technically the more important segment of his opinion, it seems that the Israeli Supreme Court did not convene in further hearing for this purpose alone.[329] The unusual decision to rehear the case was clearly aimed at providing an authoritative overruling of Justice Shamgar's intellectual framework. While doing so, the Court proceeded to resolve the tension between interest balancing and licentiousness, created twenty-six years earlier by *Kol-Ha'am*.

Justice Landau's main concern was to reject Justice Shamgar's holding that free expression enjoyed a preferred position in Israeli con-

328. Ironically, even Justice Landau's opinion bears the marks of American influence. His opinion seems to have been influenced by Justice White's dissent in Gertz v. Welch, 418 U.S. 323, 369 (1974). *Compare* Justice White's assertion that the Court in *Gertz* is not writing on *tabula rasa*, *id.* at 389, *with* Justice Landau's identical assertion, *Ha'aretz II*, 32(3) P.D. at 347; and their reliance on Professor Barron's critique, *see* 418 U.S. at 400 (White, J.); text accompanying note 346 *infra* (Landau, J.); and on Riesman's article, 418 U.S. at 400 (White, J.); note 359 *infra* (Landau, J.). In contradistinction to Justice Landau, however, Justice White endorsed the *New York Times v. Sullivan* rationale, 418 U.S. at 387. The perils of transplantation are again evident in this context, since Justice White's dissent relied heavily on the division of powers between the federal and state governments, an issue of no relevance in the present Israeli context.

329. "Justice Shamgar introduced important innovations to the libel law, whereas Justice Berinson limited his opinion to narrowly considering the application of the Defamation Law of 1965, to the facts of this case, without commenting upon the broad questions of principle which appeared in Justice Shamgar's opinion. As far as these questions were concerned, therefore, Justice Shamgar's opinion was not binding on the court; yet it might, because of its scope, become a leading decision which will guide the public in their behavior and litigation, unless we reach here different conclusions." *Ha'aretz II*, 32(3) P.D. at 339-40. *See also* note 229 *supra*.

stitutional law.[330] For this purpose, he invoked *Kol-Ha'am* as an authoritative precedent:

> Indeed . . . [Justice Agranat] later refers to the right of free expression as a "superior right . . . constituting the precondition to the materialization of almost all other rights" but immediately he adds "*one should distinguish between freedom and licentiousness*" and he refers to . . . Lord Kenyon: "*Freedom of the press is dear to England, but licentiousness of the press is odious to England.*"[331]

Justice Landau then put forward his own view of balancing:

> Therefore: not a superior status to free expression over other fundamental rights, but as Justice Agranat said: "a process of balancing competing interests; and weighing their relative value." Not a vertical grading of a superior right against an ordinary right, but a *horizontal approach to equally important rights, without preference of one right, as defined in a statute, over another right*. Hence, the statutory right should be interpreted in accordance with the *letter of the law* and the legislative intent without imposing upon it a right which does not appear in the law books."[332]

As discussed above, the "definitional balancing" approach[333] was already transplanted and explicated in *Kol-Ha'am*. Justice Landau, therefore, not only misrepresented the central message of *Kol-Ha'am* by arbitrarily focusing on Lord Kenyon's observation there,[334] but also, by linking Lord Kenyon's licentiousness doctrine to horizontal balancing and by further reducing this type of balancing to mere deference to the statutory text, Justice Landau, in fact, rejected the substantive component to interest balancing and picked the process component of the licentiousness test, or *ad hoc* balancing, in its stead. In essence, this approach holds that since the Knesset already did all the balancing, the Court need not invoke the principle of free expression when it interprets the word "comment." The Court may thus prefer the interest of public officials in their reputation over the interest of the press in ex-

330. *See* note 329 *supra*.

331. *Ha'aretz II*, 32(3) P.D. at 343 (emphasis added).

332. *Id.* (emphasis added). "To be precise, we have here the liberty of the citizen against the right of the citizen, *i.e.*, his *liberty* to express his heart and listen to what others have to say, against his right not to have his honor and reputation violated. And if there is room, at all, to grade the two, I would put the right above the liberty. It seems that this is the approach of the draft Basic Law. *Id.* (footnotes omitted).

333. *See* text accompanying notes 74-90 *supra*. Had Justice Shamgar emphasized the connection between the *Ha'aretz* and *Kol-Ha'am*, he could have made it tactically more difficult for Justice Landau to drop interest balancing or perhaps have forced Justice Landau to explicate his own balancing process.

334. Indeed, Justice Agranat did quote Lord Kenyon approvingly, but the structure of his entire opinion, as well as the contents of his discussion of free speech, clearly show a deep commitment to both interest balancing and the "special value" of free speech. *See generally* text accompanying notes 20-188 *supra*.

posing governmental corruption, without pondering any of the justifications which sustain either principle in a liberal democracy.

The connection between the rejection of interest balancing and legal formalism becomes obvious as we review the authority chosen by Justice Landau to buttress his position—none other than Chafee himself:

> I am satisfied to conclude by citing a lovely fable which I found in Chafee, Free Speech in the United States, page 31, about a person who was brought before the judge for having raised his arm and hit his neighbor's nose. He asked if he had no right to raise his arm as he wished in a free country and the judge answered: "Your right to raise your arm ends precisely where your neighbor's nose begins."[335]

Chafee's first chapter, from which the quotation is taken, was largely incorporated into *Kol-Ha'am* by Justice Agranat. Chafee used this "lovely fable" as an illustration to an approach which is diametrically opposed to his own—an approach he considered inadequate:

> [I]t is *useless* to define free speech by talk about rights . . . . [Here the "fable" is quoted]. To find the boundary line of any right, we must *get behind rules of law to human facts* . . . . That is, in technical language, there are . . . interests . . . which must be balanced against each other . . . in order to determine which interest shall be sacrificed . . . and which shall be protected and become the foundation of a legal right.[336]

Whether aware of it or not in 1978, Justice Landau was confronted with two major trends in early twentieth century American jurisprudence: interest balancing and mechanical jurisprudence. He chose the latter.[337]

b. The Landau Offensive on American Law

> I suggest that we not be lured by the American decision in *New York Times*, which inspired my honorable colleague.[338]

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335. *Ha'aretz II*, 32(3) P.D. at 344.

336. Z. CHAFEE, *supra* note 64, at 31-32 (emphasis added). In a footnote, Chafee acknowledged the source of his analysis, John Chipman Gray, one of the first critics of American legal journalism. *Id.* at 32 n.68.

337. In *Kol-Ha'am*, Justice Agranat had also adopted doctrines that Chafee rejected. Yet there is both a technical and substantive difference between Justice Agranat's and Justice Landau's treatment of Chafee's analysis. Justice Agranat did not mention Chafee as a source when adopting a doctrine that Chafee considered and rejected. Justice Landau at least implied that Chafee used the "lovely fable" approvingly. Substantively, Justice Agranat manipulated Chafee's material in order to transplant Chafee's major contribution, principled interest balancing in free speech interpretation, whereas Justice Landau adopted a doctrine opposed to Chafee's core approach.

338. *Ha'aretz II*, 32(3) P.D. at 344, (Landau, J.). Perhaps some psychological insight can

The lure of American law for Israelis like Justice Shamgar and Justice Agranat lay not only in its break with legal formalism, but also in the intense development of justifications for free expression. *New York Times v. Sullivan* epitomized American emphasis on the political justifications for free speech. By rejecting *New York Times v. Sullivan*, Justice Landau was making policy: entrenching the licentiousness doctrine in Israeli law. But his policymaking had an interesting twist; he did not make a positive effort to develop a theory of free speech.[339] He made policy indirectly, by negating the value of American law.[340]

Justice Landau's critique of American law is fascinating both because it exposes his image of the donor system and more particularly because of the intensity of his feelings against American law. The offensive against American law proceeded along several fronts: the inconsistency in American defamation law, the theory of the free marketplace of ideas, Justice Black's absolutism, the normative content of the Bill of Rights, and last, but crucial for Justice Landau, the American treatment of the episode in *Skokie v. National Socialist Party*.[341]

In condemning the inconsistency in American defamation decisions, Justice Landau stated, "The truth is that the American decisions are so diverse and lack a clear unifying line. In *Gertz v. Welch* . . . the majority started to withdraw from the *extreme* position—but the inconsistency and confusion of the decisions is still considerable."[342] In a way, this was primarily a tactical reply to Justice Shamgar's analysis, which mentioned the inconsistency in English defamation law as one reason for its weakness as a reliable model.[343] Perhaps it also reflected a conservative prudence—an adherence to the old "fair comment"

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be gained by comparing the ways in which Justices Landau and Shamgar consistently referred to *New York Times v. Sullivan*. Justice Landau calls it the *New York Times* decision (focusing negatively on the newspapers?), whereas Justice Shamgar calls it the *Sullivan* case (focusing negatively on public officials?).

339. Thus, he did not explicitly reject the justifications of free speech embedded in Justice Agranat's opinion in *Kol-Ha'am*. He rejected them only indirectly, by rejecting American law.

340. The licentiousness doctrine conflicts with the twentieth century American approach to free expression on both the level of substance and that of process. The common law doctrine of fair comment, at least where the defamation is directed at public officials, is a derivative of the licentiousness doctrine. *See* text accompanying note 305 *supra*. Justice Landau's adoption of the common law doctrine amounted to a rejection of the substantive American doctrines and justifications of free speech and thus a rejection of the material transplanted by Justice Agranat in *Kol-Ha'am*.

341. 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

342. *Ha'aretz II*, 32(3) P.D. at 344-45 (emphasis added & citation omitted). He observed that "none [of the other common law systems] has adopted the American holding." *Id.* at 345.

343. *See* text accompanying note 291 *supra*.

privilege as long as the more innovative solutions were not yet integrated and solidified in the donor system. Yet there is more in this criticism, for it seeks to negate the justification for political speech. If there is a unifying theme in the American decisions, it is to allow uninhibited criticism of official conduct.[344] This theme was directly relevant to the Israeli case which dealt with a public official; and it was precisely this theme which Justice Landau wished to avoid.[345]

Justice Landau then invoked American scholarship to support his distrust of American law:

> In the American legal literature one finds reflections and reservations concerning the *New York Times* ruling. J.A. Barron, in his *Access to the Press—A New First Amendment Right* . . . questions the main principles and considers as "romantic" and unrealistic the [United States] Supreme Court's belief that the First Amendment is the guarantee of a free market of ideas. He points out that the . . . communications media . . . do not constitute a free market but a monopoly of the few.[346]

Here, then, is an outright disparagement of the central justification of free speech theory—the free marketplace of ideas—as romantic and utopian. Indeed, this critique substantially supports the assertion that Justice Landau sought to reject not only American law but also the theoretical justifications underlying it.[347] To do so, however, he had to stand Professor Barron on his head. While Professor Barron did advocate a "new First Amendment right," he did not discard the "old right" to criticize the government. The "new right to access" was designed to help the marketplace function better by counteracting press power accumulated in private hands. It is crucial to emphasize that Professor Barron does not relax the basic suspicion of governmental power except in the sense that he trusts the government to open up the marketplace without introducing its own bias. His critique calls for a modification of the theory, so as to prevent *both* public and private powers from interfering with the marketplace of ideas.[348] Plainly, the Barron critique is not relevant.[349]

344. W. PROSSER, *supra* note 245; L. TRIBE, *supra* note 165, at 632.

345. The theme, it should be recalled, was adopted by Justice Agranat in *Kol-Ha'am*.

346. *Ha'aretz II*, 32(3) P.D. at 345.

347. The justification based on the marketplace of ideas theory was explicitly adopted by Justice Agranat in *Kol-Ha'am*, 1 SELECTED JUDGMENTS at 96.

348. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656-60 (1967).

349. Here is an instance of the perils of relying on segments of foreign scholarship. Criticism of the symptoms may be taken erroneously to apply to the core element, if one is not familiar with its context. Also, there is an interesting contradiction between the message behind the "fable" quoted above. *See* text accompanying notes 335-36 *supra*; and the Bar-

Next Justice Landau critiqued Justice Black's interpretation of the First Amendment and the Bill of Rights. The critique begins with an attack on the legalistic interpretation of the First Amendment, then shifts to a positivist attack on the normative content of the Bill of Rights. It revolves around the concurring opinions in *New York Times v. Sullivan*: "Justices Black, Douglas and Goldberg even went as far as saying that . . . [the result] . . . should obtain even if the publication were done maliciously—all for the purpose of safeguarding the First Amendment which became an unlimitable iron rule for the fundamentalist jurists of Justice Black's school."[350]

Beyond the sneer at the "fundamentalist jurists" and their "unlimitable iron rule" and beyond the caricature of the Black approach[351] is an effort to show that *New York Times v. Sullivan* is the result of an orthodox legalistic interpretation particular to the American legal system. To buttress this view, Justice Landau comments on the Bill of Rights: "I am certain that had the American Bill of Rights contained a clause . . . [about the right to reputation] . . . —and I do not know why they omitted the person's right to reputation from their Bill of Rights—the American Supreme Court would not have reached such an extreme position."[352]

Again, one can detect a trace of sneering. Again, a mechanical conception of balancing emerges and this legalistic approach is projected to the American scene in an effort to separate the two legal systems as incompatible. This remark, combined with his other observations, reveals a deep misunderstanding of the jurisprudence underlying free speech doctrines in the United States. His observation about the Bill of Rights, if not interpreted as the unfortunate side effect of temporary verbal puissance, is disturbing. The American Bill of Rights was not conceived as a comprehensive charter of individual or human rights.[353] Rather, it sought to constitutionalize certain rights against the government.[354] Therefore, it did not include the right to

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ron message as interpreted by Justice Landau, text accompanying notes 346-49 *supra*. The "fable" assumes a sphere of individual freedom upon which neither the government nor one's neighbor may encroach. Thus, it reflects an aversion to government intervention akin to the aversion underlying the free marketplace of ideas theory. *See* Kennedy, *supra* note 243.

350. *Ha'aretz II*, 32(3) P.D. at 344.

351. *See, e.g.*, Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967).

352. *Ha'aretz II*, 32(3) P.D. at 344.

353. In contradistinction to the contemporary bills of rights, such as the Basic Law of the Federal Republic of Germany, GRUNDGESETZ arts. 1-19.

354. *See* L. TRIBE, *supra* note 165, at 2-4, and references therein.

reputation, conceived as a right of one individual against another. The point is particularly poignant in the context of consulting a foreign system for purposes of either transplantation or rejection, but it is also central to the understanding of the development of political rights in the western constitutional liberalism with which Israel seeks to identify.

Thus far, Justice Landau had advanced the wisdom of the common law (do not adopt a yet "unformed" rule), the utopian nature of the justification of the free marketplace of ideas and the distinctively positivist content of the Constitution in order to reject American law. He concluded his offensive with an historical argument, which at once illustrates the contradiction between the undercurrents of policy making beneath his Formal Style, crystallizes the gap between American and Israeli law, and unveils the Nazi trauma, a crucial factor in the shaping of the Israeli legal concept of political rights.

A central theme in American free speech jurisprudence, starting as early as Chafee and the first Holmes-Brandeis dissents and continuing in full force in *New York Times v. Sullivan*, is the aversion to seditious libel.[355] This aversion was framed both analytically, as seen in the incompatibility between seditious libel and republicanism, and historically, as seen in the utilization of seditious libel as a means of political oppression in eighteenth century England and America.

Justice Agranat adopted both the analytical and historical components of seditious libel in *Kol-Ha'am*.[356] Israeli legal culture, however, was dominated by a far different historical experience: the fall of the Weimar Republic, the rise of Naziism, and the ensuing Holocaust. This experience nurtured a deep-seated fear—not of abuse of power by government, but of weakness in government: a fear not of majority oppression of helpless minorities, but of vile minorities who may destroy democracy and install the reign of terror. Justice Landau observed, "It is not superfluous to mention that one of the most efficient instruments used by Hitler . . . to destroy the Weimar regime was unrestrained defamation of the elite . . . the circulation of lies about their behavior. The courts did not react properly during the defamation trials . . . ."[357] And now comes the writing on the wall, compelling re-

355. New York Times v. Sullivan, 376 U.S. at 277; Abrams v. United States, 250 U.S. 616, 630-31 (1919); Z. CHAFEE, *supra* note 64, at 28.

356. *See* text accompanying notes 134-41 *supra*. Justice Shamgar, on the other hand, adopted only the analytical component and did not utilize the concept of seditious libel.

357. *Ha'aretz II*, 32(3) P.D. at 346. Indeed, Justice Landau's fears were shared by other justices on the Court, including Justice Agranat, as Justice Landau pointed out: "In [*Yardor*, *see* text accompanying notes 210-11 *supra*] Justice Agranat cited approvingly from Justice Witkon's opinion in [*Jiryis*, *see* text accompanying notes 208-09 *supra*] that '[i]n the history of countries with adequate democratic regimes it oftentimes happened that Fascist

jection of American law:

> These words constitute a warning to all those who are prepared to be too permissive and disregard defamation of public officials for fear of violating the absolute principle of free expression. We have to fear that history will repeat itself. I have before me the Illinois Supreme Court decision [in *Skokie* v. *National Socialist Party*] where the court allowed a Nazi parade, including the wearing of swastikas in the midst of a Chicago suburb, populated by Jews. It was so decided because the Justices saw themselves bound by the First Amendment. We should better reflect on that phenomenon.[358]

Would the result in *Ha'aretz* have been the same had *Skokie* never happened? Probably yes, but maybe this fervent *j'accuse* would have been less emotional.

Methodologically, Justice Landau's analysis is questionable. The claim that free expression brought about Naziism is both oversimplified and reductionist. Did free expression play a leading role in bringing about the fall of the Weimar Republic? Without carefully ascertaining its relative role, and without analyzing the content and context of the anti-Weimar expression, can the conclusion soundly follow that free expression should be curbed, lest it bring about totalitarianism?[359]

But there is more here. Admittedly, there is a common denominator between Skokie and Germany—Nazi ideology. Yet the analogy to the United States and American law is revealing on several levels: Justice Landau's perception of American political reality, his ambivalence about legal formalism and finally, his emerging political vision.

First, is the reality of American politics in the context of the *Skokie* episode. "There is reason to fear that history will repeat itself,"

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and totalitarian movements rose against them, and used all those rights of free expression, press and association, that the state gives them, in order to conduct their subversive activity under their banner. Whoever saw it during the days of the Weimar Republic will not forget the lesson.'" *Id.*

358. *Ha'aretz II*, 32(3) P.D. at 347.

359. In his analysis, Justice Landau relied on the observations of his brethren, *see* note 357 *supra*, and on an article by David Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085 (1942). Riesman discussed criminal group libel laws and opined that "in Germany libel law was one of the *cumulative factors* in the Nazi triumph." *Id.* at 1090 (emphasis added). Riesman's explanation focuses on the *application* of the German libel laws rather than on their substantive content, *i.e.*, it was the identification of the political elite (Ministry of Justice, courts) with fascist culture, rather than the legal norms, which contributed to the destruction of the Weimar Republic. *See also* O. HALE, THE CAPTIVE PRESS IN THE THIRD REICH 39-67 (1964), in which the author observes that the Nazi press, the primary tool for spreading Nazi propaganda, was negligible and insignificant prior to Hitler's rise to power. It was Hitler, as Führer, who made it into a powerful tool.

said Justice Landau.[360] But Naziism was not in the ascent in the United States of 1977. What in the context of *Skokie* so disturbed Justice Landau? To permit Nazis to roam free in American streets? The brutal violation of Jewish sensitivities? The pervasive anxiety over anti-Semitism and its potential translation into final solutions? As significant as these undoubtedly are, how do they justify the protection of officialdom from criticism? Even the ban on Nazi ideology could not prevent an anti-Semitic regime. And once the regime is remotely anti-Semitic, the Jewish minority will clearly need free expression—necessarily unlimited by official criteria of what is "constructive" speech—in order to expose the evil.[361]

These difficulties, although obvious, were not worked out by Justice Landau. It seems quite clear that the confusion in his opinion arises from the tremendous aversion to Naziism, an aversion so powerful in Jewish existence as to generate an impulsive repulsion of anything tolerant of it.

The most astounding feature of this analysis is Justice Landau's emphasis on orthodox formalism to explain the result in the *Skokie* case. According to Justice Landau, American courts were compelled to reach that result because it was mandated by the First Amendment. The purpose of this assertion, presumably, is to reemphasize the normative gap between Israeli and American law. Justice Landau's view of *Skokie* reflects both the same staunch refusal to concede that First Amendment law is about substantive interest balancing and an indirect attack on the American political justifications for free speech. The result in *Skokie* was reached not because the courts concluded that the *language* of the First Amendment was compelling, but because they concluded, correctly or not, that the *underlying political justification* was compelling.[362] By thus twisting the constitutional meaning of *Skokie*, Justice Landau was able, one more time, to evade the theory behind the principle of free expression in democratic society.

And yet, ironically, his analysis contains the seeds of destruction of the Formal Style. When Justice Landau projected legal formalism into American law, he did not like what he saw. Between the lines of the *Skokie* analysis, one reads a complaint about the failure of American courts to transcend legal language and to inject into the letter of the law historical experience, values, and a responsible policy to guide the fu-

360. *Ha'aretz II*, 32(3) P.D. at 347.

361. *But see* J. ELY, *supra* note 107, at 181-82.

362. *See* Collin v. Smith, 447 F. Supp. 676, 686-88 (N.D. Ill.), *aff'd*, 578 F.2d 1197, 1203 (7th Cir.), *cert. denied*, 436 U.S. 953 (1978). *See also* A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979).

ture. In other words, courts should consider policy when they interpret the law. Grand, not Formal, Style is needed to outline the limits on free speech. The next two paragraphs in Justice Landau's opinion illustrate a measure of awareness of this inner conflict. First, in the only paragraph in his opinion which acknowledged the importance of free speech he conceded the role of policy:

> Indeed, we should find the right balancing point between this principle and the protection of the honor of a public official. I do not want, God forbid, to underestimate the importance of a free press and its role in criticizing governmental activity . . . . But I reject the premise that a responsible press cannot perform this role unless granted the liberty to defame under the guise of "fair criticism."[363]

And then the resumption of legal formalism: "We have section 15(4) . . . which includes a full solution to the issue of the defense of fair comment . . . this provision . . . should be interpreted first and foremost in light of the regular meaning of the words."[364]

Finally, Justice Landau's analysis, despite its formalistic tenor, also disclosed a vision of the Israeli polity. Roughly speaking, political theory posits two models of representative democracy: classical and elitist. The classical model of democracy places high normative value on individual participation. The elitist model delegates a minimal role to the concept of participation; the people should elect their government and elections ought to be periodic, but substantive policymaking is the business of the political elite.[365] Historically, the elitist model was greatly influenced by "[t]he collapse of the Weimar Republic, with its high rates of mass participation, into fascism, and the postwar establishment of totalitarian regimes based on mass participation."[366] Consequently, the elitist model places a high value on governmental stability and authority and admits little faith in the ability of the ordinary citizen to contribute actively to political decisionmaking.[367]

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363. *Ha'aretz II*, 32(3) P.D. at 347.

364. *Id.*

365. *See generally* J. LIVELY, DEMOCRACY 53-87 (1975); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-44 (1970).

366. C. PATEMAN, *supra* note 365, at 2.

367. "The basic assumption is that most men are incapable of understanding the complexity of governmental decisions, of adhering with any steadiness to liberal humane values, or even of sustaining with any enthusiasm democratic procedures. Fear of the people and in consequence a desire to restrict their entry into the political process has replaced the old liberal faith in the innate virtue of the common man." J. LIVELY, *supra* note 365, at 78. Whether or not Israeli political culture generally, and its legal system particularly, corresponds to the elitist model merits another paper. At least one Israeli scholar has argued that it does. J. SHAPIRA, *supra* note 1, at 34-46.

Justice Landau's analysis reflects this elitist model. It stems from the same historical experience, the fall of the Weimar Republic.[368] It emphasizes the value of authority by asserting the importance of safeguarding the "honor of the attacked official."[369] Implicitly, Landau's analysis emphasizes stability by expressing the fear that "unchecked" criticism will bring about the collapse of "good" government.[370] It is elitist when it argues that broadening the common law defense of fair comment will "tend to deter *sensitive and honorable* men from seeking public positions of trust and responsibility and leave them open to *others who have no respect for their reputation*."[371] Finally, it slights the ordinary reader:

> [T]he ordinary newspaper reader does not carefully analyze what is presented to him, but the general impression is decisive, and this impression is very much influenced by the textual structure: if a certain impression is formed in the beginning of the text, it will not be easily erased by other things which appear later. At least we may observe that in this article fact and opinion were mixed in a way that the reader cannot separate them . . . .[372]

Along the continuum of participatory/elitist democracy, it seems that American free speech law, at least as it emerges from the rhetoric of the United States Supreme Court and from legal scholarship, gravitates toward the classical model.[373] The rejection of American law, by Justice Landau and the three concurring justices, reflects not only legal formalism, a different positivist normative structure and a measure of unfamiliarity on the technical level, but it goes deeper, into a different conception of democracy. While the principle of free expression is clearly recognized in both systems, in post-*Ha'aretz* Israel its breathing

368. For Justice Landau, the experience is also inextricably tied to the terrifying trauma of the Holocaust.

369. *Ha'aretz II*, 32(3) P.D. at 347.

370. *Id.* at 346. Ironically, a law which criminalized "unconstructive" criticism of public officials was passed by the Nazis as soon as they usurped political power. Kommers, *The Spiegel Affair*, in POLITICAL TRIALS 15 (1971).

371. *Ha'aretz II*, 32(3) P.D. at 345-46 (emphasis added) (citing with approval G. GATELY, ON LIBEL AND SLANDER 223 (7th ed. 1974)).

372. *Ha'aretz II*, 32(3) P.D. at 354. The elitist model of democracy also explains a seeming inconsistency between Justice Landau's opinion in *Ha'aretz* and his authorship of the first decision in Israeli history which declared a statute void. In Bergman v. Minister of Finance, 23(1) P.D. 693 (1969), the Court invalidated a statute which would allow campaign financing only to incumbent parties. The Court reasoned, *inter alia*, that the statute would impair the right of voters to elect new parties. Participation during elections was significant enough to merit the unprecedented step of nullifying a statute.

373. *See* Cohen v. California, 403 U.S. 15 (1971); Whitney v. California, 274 U.S. 357 (1927); J. ELY, *supra* note 107, at 105-66; T. EMERSON, *supra* note 196; A. MEIKLEJOHN, POLITICAL FREEDOM (1965); L. TRIBE, *supra* note 165, at 578-79. *But see* Blasi, *supra* note 242, at 561-64.

space is considerably narrower than it is in the United States, at least partially due to a different understanding of the meaning of democracy.

Conclusion

American free speech jurisprudence has been a powerful catalyst in forming Israeli free speech law. Whether embraced or rejected, American law provides an irresistible challenge to Israel's Supreme Court. The Court's decisions after the *Ha'aretz* case prove that American legal influence persists.[374]

Transplantation of American law, however, has been less than successful. The transplantor's solid knowledge of the donor system, sensitivity to the need of organic integration of foreign law into the recipient system and mastery of judicial decisionmaking techniques, may help in building resistance to rejection, but they are not enough. It is one thing to compress the jurisprudence of the First Amendment into one Israeli decision and weave it into the local system so that it gains a potential to become an organic part of it. It is another thing to persuade other judges to follow the same route. Judicial philosophies—legal formalism or sociological jurisprudence—are decisive determinants. Political visions, as molded by the particular history of the recipient, inevitably affect the choice of the transplantor.

In the thirty-third year of its life, Israeli free speech law is still struggling for self-identity. This article is not intended to advocate any particular solution to the problem faced by the Israeli court. Rather, it is an attempt to identify and to clarify the nature of the forces at work in building constitutional law for a new democracy.

374. *E.g.*, Katalan v. Prison Authority, 34(3) P.D. 294 (1980) (Barak, J.); Bourkan v. Minister of Finance, 32(2) P.D. 800, 803 (1978).