

# CAN FREEDOM OF EXPRESSION SURVIVE SOCIAL TRAUMA: THE ISRAELI EXPERIENCE

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“It is the duty of the court to take care and ensure that, even in difficult hours of crisis, the status of human rights not be eroded, and the constitutional achievements, attained at great effort, not collapse.”<sup>1</sup>

This article aims to examine whether legal protection of political speech can survive social trauma. The United States is struggling with immense trauma in the wake of the horrible events of September 11, 2001. It is, however, too early to draw conclusions about the impact of the reaction to those events upon civil liberties in the United States. I will instead focus on two traumatic events in Israel’s recent history. The first is the assassination of Israeli Prime Minister Yitzhak Rabin on November 4, 1995 following a rally in support of the peace process initiated by the 1993 “Oslo Agreement.” The second event occurred nearly two years earlier on February 25, 1994, when 29 Muslim worshippers praying in the Tomb of the Patriarchs in Hebron were massacred.<sup>2</sup>

Both acts were perpetrated against a background of deep political tension and ensuing arguments that often deteriorated to violent speech. The assassination and the massacre were widely perceived as evidence of the danger inherent in incitement, and as proof of the re-

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The research for this article was made possible through the generous help of The Yitzhak Rabin Center for Israeli Studies, The Minerva Center for Civil Rights, The Faculty of Law of the Hebrew University of Jerusalem, and The Academic College of Law, Ramat-Gan. An earlier version of this article was presented at the luncheon speaker series of the Center for the Study of Law and Society, University of California, Berkeley. I would like to thank the participants for their helpful comments. Thanks are also due to my friends and colleagues Eyal Benvenisti, Alon Harel, Anat Horiwitz, Celia Fassberg, and Mordechai Kremnitzer for their helpful comments. I would also like to thank my research assistants, Moran Harrari and Anat Hulata-Sitbon, for their help in collating and preparing the material, and Avinoam Sharon for translating the article into English.

1. Cr.A. 334/96, The State of Israel v. Balachsán, para 26 (unpublished).

2. These events are described in more detail *infra* Part I.

relationship between violent speech and violent acts. Accordingly, there was a significant increase in the number of defendants charged with criminal offenses related to political speech. As a result there was a retreat from the liberal position that had, under the influence of U.S. law, provided broad protection of freedom of political speech.

Two years after Rabin's assassination, in light of the growing number of decisions imposing criminal law restrictions upon speech, the District Court of Jerusalem cautioned,

The burden of responsibility placed upon the courts following the murder of the late Prime Minister is heavier than ever. It is the duty of the court to take care and ensure that, even in difficult hours of crisis, the status of human rights not be eroded, and the constitutional achievements, attained with great effort, not collapse. We must be especially wary of public pressure directed at the prosecution and the courts, that urges them to make determined, massive and aggressive use of their authority in seeming "repentance" for their patient, tolerant conduct in the days prior to the assassination. We must continue to place our trust in Israeli democracy, and believe with all our hearts that it will endure the crisis.<sup>3</sup>

This article examines whether the Supreme Court of Israel ensured that "the status of human rights not be eroded" by closely analyzing the decisions in the *Jabrin*<sup>4</sup> and *Kahanae*<sup>5</sup> cases. These decisions were issued on the same day (November 27, 2000) by an expanded bench of the Supreme Court.<sup>6</sup> Neither case was directly related to the assassination or the massacre, but both decisions were expressly influenced by those events. Five years after Rabin's assassination, and seven years after the Tomb of the Patriarchs massacre, the *Jabrin* majority narrowed the scope of the offense of expressing praise for acts of violence. This offense had played a central role in imposing criminal law restrictions on speech relating to the assassination. In contrast, the majority in the *Kahanae* decision broadened the scope of the offense of sedition.

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3. *Id.*

4. Cr.F.H. 8613/96, *Jabrin v. The State of Israel*, 54(5) P.D. 193.

5. Cr.F.H. 1789/98, *The State of Israel v. Kahanae*, 54(5) P.D. 145.

6. The Supreme Court ordered a further hearing in these cases pursuant to the Basic Law (Judiciary), § 18, 1984, S.H. 78 ("In a matter adjudged by the Supreme Court by a bench of three, a further hearing may be held by a bench of five or more on such grounds and in such manner as shall be prescribed by Law"). For an English translation, see *Basic Law: The Judiciary*, at <http://www.mfa.gov.il/mfa/go.asp?MFAH00h00> (last visited Aug. 30, 2002). Note that the translation of § 18 mistakenly omits the words "or more."

Part I of this article explores the crucial events that led to broadening the criminal restrictions on political speech which were imposed following the massacre and the assassination. In that context, the distancing of Israeli jurisprudence and experience from the United States' model is emphasized. Part II presents the Israeli Supreme Court's decisions in the expanded bench hearings in *Jabrin* and *Kahanae*, and discusses the effect that the massacre and the assassination had upon the opinions of the judges. Part II also attempts to clarify the difference of opinion among the judges in regard to the distinction between the offenses of publishing praise for violent acts and sedition. Part III argues that the two offenses have a common purpose: the prevention of a "climate of violence,"<sup>7</sup> i.e., a social climate that is likely to give rise to future acts of violence. Part IV argues that there is no justification for imposing criminal restrictions on forms of expression that only contribute to creating a climate of violence, as opposed to expression that incites to violence. Part V returns to the distinction between the offenses of sedition and praise for violence acts, addressed in *Kahanae* and *Jabrin*, respectively. The section explains why the distinction between the offenses cannot be justified by a further distinction between a climate of violence in regard to sectors of the population (i.e., sedition), and a climate of violence targeting an individual (i.e., praise for violence). While doing so, Part V touches upon the special legal protection granted to sectors of the population against racial harassment. Part VI then addresses the unique character of the criminal law restrictions on racist speech. In that context, the appropriate relationship, under Israeli law, between the offenses of incitement to racism and sedition is also described. The Epilogue focuses on incitement to violence. It discusses the claim that public incitement should be distinguished from soliciting an individual, and arguing that no such distinction should be made. Finally, the epilogue examines the Israeli Penal Law (Incitement to Violence) (Amend. No. 66) 2002,<sup>8</sup> that was submitted to the Knesset in reaction to the *Jabrin* Court's narrowing of the offense of publishing praise for acts of violence. The argument here is that the prohibitions recommended in the amendment are too broad in scope.

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7. The term is the author's own.

8. Passed at the Knesset on May 15, 2002.

## I. THE EFFECT OF THE ASSASSINATION AND THE MASSACRE ON THE PROTECTION OF POLITICAL SPEECH IN ISRAEL

Israeli law's approach to freedom of expression was influenced by United States law.<sup>9</sup> Despite the lack of a written constitutional equivalent of the U.S. Bill of Rights<sup>10</sup> through much of Israel's history, the Israeli Supreme Court, inspired by the United States' First Amendment doctrine, established freedom of expression as a fundamental freedom that enjoys "supra-legal status."<sup>11</sup> Already in the 1950s, in the *Kol Ha'Am* case,<sup>12</sup> the Israeli Supreme Court had established the "near certainty" test for limiting freedom of expression. Justice Agranat wrote, "The guiding principle ought always to be: is it probable that as a consequence of the publication a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fulfill that requirement."<sup>13</sup> This test has primarily been applied in the framework of prior restraint.

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9. See David Kretzmer, *The Influence of the First Amendment Jurisdiction on Judicial Decision Making in Israel*, in CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 295 (S. Slonim ed., 1990); Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21, 23-24 (1981).

10. In 1992, the Basic Law (Human Dignity and Liberty), ICL Document Status, Mar. 9, 1994, was enacted. For an English translation, see *The Basic Law (Human Dignity and Liberty)*, at [http://www.uni.wuerzburg.de/law/is1200\\_.html](http://www.uni.wuerzburg.de/law/is1200_.html) (last visited Aug. 30, 2002). The basic "liberty" rights that are expressly protected by the Basic Law are the right to "personal liberty" (the right to be free from "imprisonment, arrest, extradition" (§ 5) and the right to leave and to enter Israel (§ 6)). The protection of freedom of expression can be derived from the general provisions, including Basic Principles (§ 1) and Purpose (§ 1a), stating that "[b]asic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom."

11. C.A. 723/74, "Ha'aretz" Newspaper v. Israel Elec. Corp., 31(2) P.D. 281, 295. See also Election Appeal 2/84-3/84, Neiman v. Chairman of the Cent. Elections Comm., 39(2) P.D. 234. For a discussion of the case in English, see Claude Klein, *The Defence of the State and the Democratic Regime in the Supreme Court*, 20 IS. L. REV. 397 (1985); H.C. 372/84, Klopfer-Naveh v. Minister of Educ. & Culture, 38(3) P.D. 233; Civil Service Appeal 5/86, Spiro v. Civil Serv. Comm'r, 40(4) P.D. 227, 241; the survey in Aharon Barak, *Freedom of Expression and its Limits*, 40 HAPRAKLIT 5 (in Hebrew); Aharon Barak, *The Tradition of Freedom of Expression in Israel and its Problems*, 27 MISHPATIM 223 (in Hebrew).

12. H.C. 73/53, "Kol Ha'Am" Co. Ltd. v. Minister of the Interior, 7 P.D. 871, in 1 SELECTED JUDGMENTS OF SUPREME COURT OF THE STATE OF ISRAEL 90 (E. David Goitein ed., 1968).

13. *Id.* at 115. For a discussion of the incorporation of United States' First Amendment doctrine in this case, see PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST COUNTRY 108-09 (1997).

The centrality of freedom of expression means that only a near certainty of a real danger to public safety can justify prior restraint of freedom of expression. To whatever extent that the criminal prohibition suffices with bad tendency . . . prevention of the expression is unwarranted, although criminal charges may be brought against the publisher.<sup>14</sup>

In the 1980s, the deterioration in public discourse brought about by the war in Lebanon, and the 1983 murder of Emil Grunzweig during a Peace Now demonstration, led to a growing call to employ the criminal law to combat “violent expressions.”<sup>15</sup> Then–Attorney General Itzhak Zamir resisted the demand, adopting a position similar to that of near certainty for the purpose of instituting criminal proceedings:

We should again emphasize the test that determines when things stated, orally or in writing, cross the boundary of freedom of expression and become criminal. It is the test of *serious and immediate danger* to the public peace. This test was established in the United States, and was adopted in Israel.<sup>16</sup>

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14. H.C. 399/85, Kahana v. Israel Broad. Auth., 41(3) P.D. 255, 299, para. 37; *see also* H.C. 14/86, Laor v. Film and Theater Review Bd., 41(1) P.D. 421; H.C. 680/88, Schnitzer v. Chief Military Censor, 42(4) P.D. 617, 9 SELECTED JUDGMENTS 77. For a discussion of the “near certainty” test as employed in the case law in regard to prior restraint of speech, *see* Pnina Lahav, *Freedom of Expression in the Decisions of the Supreme Court*, 7 MISHPATIM 375 (1977) (in Hebrew); Avner Barak, *The Near Certainty Test in the Israeli Constitutional Law*, 14 IYUNEI MISHPAT 371 (1989) (in Hebrew).

15. As attested to by then–Attorney General Itzhak Zamir. *See* Itzhak Zamir, *Freedom of Expression versus Defamation and Verbal Violence*, in SEFER SUSSMAN 149, 154–155 (1984) (in Hebrew).

16. *Id.* at 157 (emphasis added). The source of the demand for immediacy in United States law derives from the “clear-and-present danger” standard, as was held already in *Whitney v. California*, 274 U.S. 357, 377 (1927):

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so *imminent* that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence (emphasis added).

For a more modern statement of the demand for immediacy, *see* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (overruling in part the decision in *Whitney*, *supra*):

[C]onstitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action (emphasis added).

For a detailed examination of this decision, *see* Larry Alexander, *Incitement and Freedom of Speech*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 105 (David Kretzmer & Francine Kershman Hazan, eds., 2000) [hereinafter FREEDOM OF SPEECH AND INCITEMENT]; *see also* *Hess v. Indiana*, 401 U.S. 105, 108 (1973). According to Zamir, the source of the demand for immediacy in Israeli law is found in the Supreme Court’s decision in

Addressing the claim that Emil Grunzweig's murder proved that verbal violence may lead to violent acts, Zamir wrote,

Indeed, on one hand, it is impossible to say with certainty that extreme speech whether we call it verbal violence or otherwise, will not lead to extremism that will result in physical violence. But, on the other hand, one is also unable to say that there is a proximate possibility that extreme speech led or will lead to physical violence in a specific case or in general. For example, whoever tied the often crude and particularly extreme criticism of the "Peace Now" movement to the despicable murder of Emil Grunzweig said something that was unfounded, irresponsible, and as harmful as the criticism he sought to condemn.<sup>17</sup>

In the early 1990s, following the outbreak of the first *intifada*,<sup>18</sup> and amidst a climate of growing friction between Jews and Muslims in the Territories, altercations between Jewish and Muslim worshippers in the Tomb of the Patriarchs in Hebron intensified.<sup>19</sup> On February 25, 1994, Baruch Goldstein, an Israeli Jew, murdered 29 Palestinian Muslims praying in the Tomb of the Patriarchs. Two days later, the Israeli government established an official commission of inquiry, chaired by then-President of the Supreme Court, Meir Shamgar.<sup>20</sup> The commission of inquiry investigated the circumstances related to the massacre and made recommendations. Part of the commission's report pointed out deficiencies in law enforcement in both the Jewish and Arab sectors in the territories administered by Israel.<sup>21</sup> As a result of the commission's recommendations, an interdepartmental committee was established to coordinate, supervise, and ensure effective law enforcement.<sup>22</sup>

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the *Kol Ha'Am* case, *supra* note 12. It should be noted that the "near certainty" test established in *Kol Ha'Am* is a probability test that does not necessarily rely upon the immediacy of the realization of the danger like the American test.

17. Zamir, *supra* note 15, at 157–58.

18. "Intifada" is the term commonly used to refer to the Palestinian popular uprising.

19. The details of this period are included in the REPORT OF THE COMMISSION OF INQUIRY INTO THE MASSACRE IN THE TOMB OF THE PATRIARCHS 135–40 (1994) (in Hebrew). An English translation of the Commission's conclusions and recommendations can be found in *Commission of Inquiry Into the Massacre at the Tomb of the Patriarchs*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0a4c0> (last visited Sept. 15, 2002).

20. In accordance with the Commissions of Inquiry Law, 1978.

21. See *supra* note 19, at 157–200. For the impact of the massacre on Israeli politics, see Ehud Sprinzak, *Israel's Radical Right and the Countdown to the Rabin Assassination*, in THE ASSASSINATION OF YITZHAK RABIN 96, 100–03 (Yoram Peri ed., 2000).

22. The Director of the Special Tasks Department of the State Attorney's Office, Ms. Talia Sasson, was appointed to chair the committee. According to Sasson, other members of the committee include representatives of the General Security Service, the army (including the

Barely two years passed before another trauma shocked Israeli society. On November 4, 1995, an Israeli citizen, Yigal Amir, murdered Prime Minister Yitzhak Rabin following a peace rally.<sup>23</sup> The assassination was preceded by intense acts of public protest, including verbal attacks against Rabin and his policies.<sup>24</sup> He was called a traitor, and a placard portraying him as an SS officer was held up at an opposition demonstration.<sup>25</sup> Protesters claimed that Rabin's government did not enjoy a "Jewish majority" and thus did not have the moral authority to surrender Israeli settlements in the territories (parts of the Promised Land).<sup>26</sup> Religious leaders ruled that soldiers should not obey orders to evacuate settlements.<sup>27</sup> A religious curse known as *Pulsa Denura*, calling on Rabin to cease his wrongful deeds, was recited in the presence of reporters outside the Prime Minister's official residence in Jerusalem.<sup>28</sup> An official commission of inquiry was established once again to investigate the murder of the prime minister. The commission was again chaired by the then-President of the Supreme Court, Meir Shamgar.<sup>29</sup> In addition, the government decided to expand the authority of the interdepartmental committee that had been established after the Tomb of the Patriarchs massacre, and instructed it to see that the criminal law was being enforced

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Deputy Advocate General), the military legal advisor for Judea and Samaria, the police investigations branch, and the district attorney's office. Interview with Talia Sasson, Director of the Special Tasks Department of the State Attorney's Office, Jerusalem, Israel (June 19, 2000).

23. For Amir's conviction in the murder, see Cr.C (T.A.) 485/95, State of Israel v. Yigal Amir, 5856(2) P.M. 3; Cr. A. 8019/96, Yigal Amir v. State of Israel, 53(4) P.D. 459.

24. See Ehud Sprinzak, *supra* note 21, at 103–20; Yoram Peri, *Introduction: The Writing Was on the Wall*, in *THE ASSASSINATION*, *supra* note 21, at 4–7; Benvenisti, *Freedom of Speech in a Divided Society: Reflections after the Assassination of Prime Minister Rabin*, 57(4) HEIDELBERG J. INT'L L. 805, 815–18; Ruth Gavison, *Incitement and the Limits of the Law*, in *CENSORSHIP AND SILENCING: PRACTICAL OR CULTURAL REGULATIONS* 43, 45–46 (Robert C. Post ed., 1998); Raphael Cohen-Almagor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE, ESSAYS IN MEMORY OF YITZHAK RABIN* 79–82 (Raphael Cohen-Almagor ed., 2000).

25. Peri, *supra* note 24, at 5; Benvenisti, *supra* note 24; Gavison, *supra* note 24; Cohen-Almagor, *supra* note 24, at 85–87.

26. *Id.*

27. Sprinzak, *supra* note 21, at 103–11; Gavison, *supra* note 24; Benvenisti, *supra* note 24.

28. Sprinzak, *supra* note 21, at 120; Cohen-Almagor, *supra* note 24, at 90–91.

29. The decision to appoint a commission of inquiry was made at the cabinet session of Nov. 8, 1995. For the details of the Commission's findings and recommendations, see *REPORT OF THE COMMISSION OF INQUIRY INTO THE MURDER OF THE LATE PRIME MINISTER YITZHAK RABIN* (Mar. 28, 1996); an English summary of the report can be found at *Report of the Commission of Inquiry into Murder of the Late PM Rabin*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01fo0> (last visited Nov. 7, 2002).

against persons involved in “incitement, sedition and harm to democracy.”<sup>30</sup>

Both the committee and prosecutorial authorities were guided by the conception that “incitement is a matter far more dangerous than was previously thought.”<sup>31</sup> In the wake of that conception, those who expressed praise for the assassination of the Prime Minister or the massacre in the Tomb of the Patriarchs were charged with the offense of expressing praise for acts of violence, contrary to section 4(a) of the Prevention of Terrorism Ordinance, 1948.<sup>32</sup> The section, titled “supporting a terrorist organization,” provides:

A person who (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; . . . shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding three years.<sup>33</sup>

Others were charged with sedition,<sup>34</sup> an offense which dates back to the British Mandate,<sup>35</sup> and which prohibits publishing or possessing “any publication of a seditious nature.”<sup>36</sup> “Sedition” is defined in section 136(4) of the Penal Law: “For the purpose of this article, ‘sedi-

30. Gov. Res. No. 6317 (Nov. 19, 1995).

31. Interview with Talia Sasson, *supra* note 22.

32. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76 (1948), available at <http://www.israel-mfa.gov.il/mfa/go.asp?mfah07tu0> (last visited Aug. 25, 2002). For convictions for praise of Prime Minister Rabin’s assassination, see Cr.A. (Jm.) 334/96, *The State of Israel v. Balachsan* (unpublished); Cr.C. (Jm.) 4779/97, *The State of Israel v. Askin*, 17 DINIM SHALOM 462; Cr.C (Jem) 557/96, *The State of Israel v. Bar Yosef* (May 26, 1998) (unpublished). For convictions for praise of the Tomb of the Patriarchs massacre, see Cr.C. (Jm.) 553-555/94, *The State of Israel v. Ben Yishai* (unpublished). The Prohibition of Erecting Monuments in Memory of the Perpetrators of Terror Law (1998) was enacted in response to Baruch Goldstein’s gravesite becoming a site of pilgrimage. Section 3 of the Law provides that “a gravestone the erection of which constitutes an offense under section 4 of the Prevention of Terror Ordinance, 1948, shall be removed.” The purpose—according to the explanatory notes to the draft bill—was “to prevent incitement and encouragement of criminal acts.” See H.C. 6195/98, *Goldstein v. OC Central Command*, 53(5) P.D. 317; H.C. 7583/98, *Bachrach v. Minister of the Interior*, 2000(3) TAKDIN ELION 3007.

33. *Id.*

34. Cr.C. (Jm.) 3996/95, *The State of Israel v. Feiglan* (unpublished); Cr.C. (Jm.) 108/98, *The State of Israel v. Askin*, 1999(3) TAKDIN MEHOZI 2289 (the defendant was acquitted of sedition, but convicted of other offenses); Cr.C. (Jm.) 3795/95, *The State of Israel v. Balachsan* (unpublished) (Balachsan was convicted of sedition by the magistrate court, but on appeal Balachsan was acquitted by the district court after the State had given her consent).

35. Originally defined in §§ 59–60 of the Criminal Code Ordinance, 1936, (now §§ 133–44 of the Penal Law, 1977), Special Volume L.S.I. 1, (1977).

36. § 134 of the Penal Law, 1977.

tion' means . . . to promote feelings of ill-will and enmity between different sections of the population.”

Another offense employed following the massacre at the Tomb of the Patriarchs, and even prior to the assassination of Prime Minister Rabin, was that of incitement to racism.<sup>37</sup> The offense, introduced into Israeli law in 1986,<sup>38</sup> provides, *inter alia*, “A person who published material with the intent to incite to racism is liable to imprisonment for five years.”<sup>39</sup>

“Racism” is defined in section 144(a) of the Penal Law as “persecution, humiliation, denigration, expression of hatred, threats or violence, or promoting feelings of ill-will and resentment towards a community or sections of the population, solely due to color or belonging to a particular race or national-ethnic origin.”

It should be noted that charges of sedition under sections 133–36 of the Penal Law have occasionally been brought in the past,<sup>40</sup> and more rarely charges for expressing praise for violent acts under section 4(a) of the Prevention of Terrorism Ordinance.<sup>41</sup> However, there was a significant increase in the filing of charges for these offenses following the assassination of Prime Minister Rabin<sup>42</sup> as was pointed out by the courts themselves:

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37. That charge led to the conviction of Rabbi Ido Elba for writing and distributing an article entitled “*An Examination of Religious Directions Concerning the Killing of Gentiles.*” See Cr.A. 2831/95, Elba v. The State of Israel, 50(5) P.D. 221 (heard before an expanded Supreme Court bench of seven justices).

38. Penal Law (Amend. No. 20), 1986, 40 L.S.I. 230, (1985–86).

39. *Id.* § 144b(a).

40. These charges were, from time to time, leveled against members of Israel’s Arab minority, whose calls for protest against government policy were viewed as hostile activity. See, e.g., Cr.A. 294/89, Aalia v. The State of Israel, 43(4) P.D. 627; Cr.A. 3788-3789/91, Amasha v. The State of Israel, 1991(3) TAKDIN ELION 2326; Cr.A. 1448/91, Anabtawi v. The State of Israel, 1991(3) TAKDIN ELION 2396. For a charge of sedition against a Jewish Israeli who was a member of an unlawful organization, see Misc. (T.A.) 1190/90, The State of Israel v. Adler, 1990(2) TAKDIN MEHOZI 856 (June 28, 1990). The charge in *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, which is examined in detail in this article *infra* Part II.B., was filed both before the assassination of Prime Minister Rabin and the massacre in the Tomb of the Patriarchs.

41. The charge in *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, which will be examined in detail *infra* Part II.A., was filed before the assassination of Prime Minister Rabin and before the massacre in the Tomb of the Patriarchs.

42. In the two months following the assassination, six charges were filed against persons who had expressed praise of the murder. For data in this regard, see Talia Sasson, *The Prosecution’s Enforcement Policy in Regard to Offenses of Incitement and Sedition*, in *THE RULE OF LAW IN A DEMOCRATIC SOCIETY, LEGAL, SOCIAL AND CULTURAL ASPECTS* 107, 116–21 (Eyal Yinon ed., 1999) (in Hebrew); see also the survey in Eyal Benvenisti, *Regulating Speech in a Divided Society*, 30 MISHPATIM 29, 43–48 (1999) (in Hebrew).

Little use was made of the [Prevention of Terrorism] Ordinance over the years since its enactment, due to the centrality given to the principle of freedom of expression in our legal system. The turning point was the murder of the Prime Minister, the late Yitzhak Rabin. Following the murder, the prosecutorial and law enforcement authorities have made more frequent use of the Ordinance, and this charge against the defendant before us is one example of it.<sup>43</sup>

Similarly, in the *Askin* decision the Court wrote,

[S]ection 4(a) [of the Prevention of Terrorism Ordinance] was not the subject of comprehensive legal discussion, and was considered in but a few cases. However, over the last decade two dramatic events affected the lives of the people and the state: the massacre in the Tomb of the Patriarchs by Dr. Baruch Goldstein . . . and the assassination of the Prime Minister of Israel, the late Yitzhak Rabin, by Yigal Amir. . . . These events led to reactions and acts that, in the opinion of the law-enforcement authorities, justified filing charges under the said section 4(a), as well as under additional sections of the Penal Law . . . that define other offenses, such as incitement to racism (section 144(b) of the Penal Law), sedition (section 133 of the Penal Law), and others.<sup>44</sup>

Sharing the assumption by the prosecution that both the Rabin assassination and the Tomb of the Patriarchs massacre were proof of the innate danger of violent speech, the Court in the *Lerner* decision emphasized that

[t]he greater the suspicion that incitement may yield results, the greater the readiness to take risks in regard to freedom of expression. Not long ago, the Israeli public witnessed *the contribution of incitement to the murder of the elected Prime Minister, the late Yitzhak Rabin*, and the said balance cannot but take account of that fact.<sup>45</sup>

Similarly in a previous decision re *Askin*, the Court wrote,

When the scales tip and we sense that the words can influence and bring about results that the [Prevention of Terrorism] Ordinance seeks to prevent, and when reality outstrips our predictions and the worst is realized, and the prime minister is murdered, the court must consider *to what extent the words expressed can cause results*

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43. Bar Yosef, *supra* note 32, at 12.

44. *Askin* decision, *supra* note 32, para. 7 (Gabai, J.).

45. Cr.A. (Jm.) 1517/98, *Lerner v. The State of Israel*, 1998(3) TAKDIN MEHOZI 431 (emphasis added).

that the Ordinance seeks to prevent, given the social fabric at the time the statement is made and judgment is given.<sup>46</sup>

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[O]f late, primarily after the murder of the Israeli prime minister, and having learned what the power of words can be, the prosecution has filed charges for offenses in violation of section 4(a) of the Prevention of Terrorism Ordinance, something that was not done for many years prior to that.<sup>47</sup>

Faced with a growing number of judgments imposing criminal law restrictions upon speech, and due to the differences of opinion among the justices of the Supreme Court, the Court ordered a further hearing before an expanded bench in the *Jabrin* and *Kahanae* cases.<sup>48</sup> In the *Jabrin* case, the majority limited the offense of publishing praise for acts of violence,<sup>49</sup> despite the prosecution's argument that by so restricting the offense, "[i]t will no longer be possible to charge a person with an offense for publishing, for example, praise of the massacre in the Tomb of the Patriarchs or the murder of Prime Minister Yitzhak Rabin."<sup>50</sup>

It may be assumed that limiting the scope of the offense that had played a central role in imposing criminal law restrictions upon speech relating to the Rabin assassination was only possible due to the passage of time<sup>51</sup> and the fact that the *Jabrin* case did not concern statements regarding the assassination.

In contrast to the *Jabrin* case, the *Kahanae* majority broadened the scope of the offense of sedition,<sup>52</sup> while expressly emphasizing the connection between that expansion and the traumatic events that had visited Israeli society.

Some of the worst of the prophecies of rage were fulfilled and became reality: . . . Arab worshippers were murdered while they were still bowed in prayer. The Prime Minister was murdered. We cannot, therefore, accept that expressions that comprise a violent message . . . do not seep into the public consciousness and lead to hostility. Indeed, the influence of such publications is primarily upon extremist fringe groups, and they and their members may, as a re-

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46. Cr.C. (Jm.) 827/96, *The State of Israel v. Askin*, 14 DINIM SHALOM 613, para. 9 (Billah Kahana, J.) (emphasis added).

47. *Id.*

48. *See supra* notes 4 and 5.

49. § 4(a) of the Prevention of Terrorism Ordinance, *supra* note 32.

50. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, para. 11 (Orr, J.).

51. Five years intervened between the assassination and the decision in the further hearing.

52. §§ 133–36 of the Penal Law.

sult of such publications, come to real acts of violence. But that does not detract from the criminal character of the expressions.<sup>53</sup>

The following section explores the *Jabrin* and *Kahanae* decisions, as well as the disagreement among the Justices as to the distinction between the offenses in the two cases.

## II. THE *JABRIN* AND *KAHANA*E DECISIONS

### A. The *Jabrin* Decision

Between 1990 and 1991, Yusef Jabrin, a journalist from the Arab town of Umm El Fahm, published articles in Arabic newspapers that included expressions of praise and sympathy for the throwing of stones and Molotov cocktails by Palestinians during the first *intifada*. The Supreme Court approved his conviction for an offense pursuant to section 4(a) of the Prevention of Terrorism Ordinance,<sup>54</sup> explaining that

[i]n order to find the publisher guilty of the offense . . . the court need not be convinced that the *expressions* of praise, sympathy, or encouragement of acts of violence . . . were likely to lead to acts of violence that would cause the death or injury of a person. It is sufficient that *acts* of violence, that the publisher praised, expressed sympathy for, or encouraged, are of the sort that are likely to cause one of the said results.<sup>55</sup>

In the further hearing, held before seven justices of the Supreme Court, there was a 4-3 majority for acquitting Jabrin.<sup>56</sup> According to the majority,<sup>57</sup> section 4(a) of the Prevention of Terrorism Ordinance, which proscribes publishing expressions of praise for acts of violence

is a draconian section that is difficult to accept in a proper democratic society that values freedom of expression. The section does not comprise a probability test that ties the publication to a potential for any harm whatsoever. It attributes a presumption of danger to any publication that falls within its compass. As such, it severely infringes freedom of expression. The offense established in section 4(a) of the Ordinance extends, by its language, even to a publication that, for example, praises the Bar Kochba Revolt,<sup>58</sup> inasmuch

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53. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 34 (Orr, J.).

54. Cr.A. 4147/95, *Jabrin v. The State of Israel*, 50(4) P.D. 38 (Oct. 10, 1996).

55. *Id.* para. 3 (Matza, J.) (emphasis added).

56. *See supra* note 4.

57. Orr, J., joined by Barak, P., Dorner and Terkel, JJ.

58. Bar Kochba was the *nom de guerre* of Simon ben Kosiba (d. 135 C.E.), who led the Jewish rebellion against Rome in 132–35 C.E. The name Bar Kochba (“son of the star”) was

as such a publication comprises praise for acts of violence likely to cause the death or injury of a person.<sup>59</sup>

At this point it should be mentioned that the Israeli Supreme Court does not have a general power to strike down unconstitutional statutes that had been enacted prior to the Basic Law (Human Dignity and Liberty), 1992.<sup>60</sup> The main power of the Court in this context comes by way of interpretation. In the *Jabrin* case the majority's conclusion was that the offense under section 4(a) of the Prevention of Terrorism Ordinance should have been narrowly construed in accordance with the purpose of the Ordinance, rather than broadly as the wording of the section suggests. The Ordinance was designed to prevent danger inherent in organized terror.<sup>61</sup> The offense in section 4(a) of that Ordinance should be similarly limited to expressing praise for violent acts perpetrated by terrorist organizations; the offense should not be construed to include praise for the violent acts of an individual who does not belong to a specific terrorist organization. The minority<sup>62</sup> were of the opinion that

[t]here is no justification for a distinction between praise of the violent acts of the members of an organization and praise for acts of the same type perpetrated by persons who are not members of any organization, inasmuch as the purpose of the prohibition is to prevent carrying out acts of a terrorist nature, whoever the perpetrators may be . . . . The severe dangers inherent in the terrorist acts of an individual—who does not act on behalf of an organization—were recently brought to the nation's attention through the murder of the late Prime Minister Yitzhak Rabin by conduct of a terrorist nature by a person who did not act on behalf of a terrorist organization.<sup>63</sup>

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bestowed upon him by one of his prime supporters, the renowned scholar and compiler of Jewish law Rabbi Akiba ben Yosef, who was executed by the Romans in 135 C.E. The story of Rabbi Akiba's martyrdom is recounted, *inter alia*, in the Yom Kippur liturgy.

59. Kahanae, Cr.F.H. 1789/98, *supra* note 5, para. 36 (Orr, J.) (in the framework of his attempt to justify the distinction between that case and the *Jabrin* decision).

60. *See supra* note 10.

61. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, para. 12 (Orr, J.) (“The Ordinance deals with organized terror, not acts of violence undertaken by individuals. It treats of the danger inherent in the association of a group of people who undertake acts of violence that endanger human life. Such organizations, if they are not nipped in the bud, may spread like a cancer in the body of society, endanger its foundations and, possibly, undermine the foundations of government. In light of the severity of that danger, particularly in times of emergency, recourse to the severe methods employed by the Ordinance to root out that evil is understandable.”).

62. Kedmi, J., joined by Levin and Matza, JJ.

63. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, at 17 (Kedmi, J.).

## B. The *Kahanae* Decision

In 1992, the Kahanae Chai (“Kahanae Lives”) movement attempted to run in the elections for the Knesset. The party was prevented from participating in the election because its purposes included “incitement to racism,” contrary to section 7A(3) of Basic Law (The Knesset).<sup>64</sup> Before its disqualification, Binyamin Kahanae,<sup>65</sup> who headed the list of candidates, distributed a pamphlet that included the following language:

[W]hy is it that every time a Jew is killed we shell Lebanon and not the hostile Arab villages within the State of Israel? For every attack in Israel—shell an Arab village, a nest of murderers in the State of Israel! Only Kahanae has the courage to tell the truth! Give power to Kahanae, he will take care of them.<sup>66</sup>

Kahanae was charged with sedition under section 133 of the Penal Law and possession of seditious publications under section 134(c) of the Penal Law. It was argued that distributing the pamphlet was likely “to promote feelings of ill-will and enmity between” the Jewish and Arab populations as required by the definition of sedition in section 136(4) of the Penal Law. The courts considering the case reached contradictory conclusions. The trial court, which delivered its decision prior to the Tomb of the Patriarchs massacre and the

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64. Election Appeal 2858/92, *Mobashowitz v. Chairman of the Cent. Elections Comm.*, 46(3) P.D. 541; Basic Law (The Knesset) (Amend. No. 9), 39 L.S.I. 216, available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00h80> (last visited Sept. 13, 2002). Section 7A provides that: “a candidate shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include . . . negation of the existence of The State of Israel as the state of the Jewish people . . . negation of the democratic character of the State . . . [or] incitement to racism.” By its own admission before the Supreme Court, the Kahanae Chai movement viewed itself as the ideological successor of right-wing extremist Rabbi Meir Kahanae, as did the “Kach” party. “Kach” had previously been prevented from running for the Knesset in 1988, and was again prevented from running in 1992, because its platform violated section 7A. See Election Appeal 1/88, *Neiman v. Chairman of the Cent. Elections Comm.*, 42(4) P.D. 177, and Election Appeal 2805/92, “Kach” List for the Thirteenth Knesset v. Chairman of the Cent. Elections Comm., 92(2) TAKDIN ELYON 1587. “Kach” founder, Rabbi Meir Kahanae, was murdered in New York by an Arab assailant, El Sayyid Nosair, in November 1990. In January 1996, Nosair was sentenced to life imprisonment for the murder after a federal jury found him, Sheikh Omar Abdel-Rahman, and eight other co-defendants, guilty of charges of “seditious conspiracy” to wage a war of urban terrorism against the United States. *Moslem Cleric and Nine Others Sentenced in New York Terror Plot*, DEUTSCHE PRESSE-AGENTUR, Jan. 18, 1996.

65. Binyamin Kahanae was the son of Rabbi Meir Kahanae. On December 31, 2000, Palestinian terrorists opened fire on the Kahanae family car. Binyamin Kahanae and his wife, Talia, were killed in the attack, and five of their children were wounded. See *Mideast: Two Settlers Killed, Five Children Hurt in West Bank Attack*, BBC Worldwide Monitoring, Dec. 31, 2000.

66. See Cr.A. 6696/96, *Kahanae v. The State of Israel*, 52(1) P.D. 535.

Rabin's assassination, acquitted Kahanae.<sup>67</sup> Judge Zilbertal was of the opinion that the offense of sedition should be limited to conduct that undermines the proper functioning of government.

In order that we not strangle all public and political debate that bears the seed of promoting feelings of ill-will between different sections of the population, we have no choice but to add another element, which is not expressly stated in the provisions of the law. [The additional element] is that those seditious acts . . . be acts that have the potential to endanger public peace in a manner that involves endangering the proper functioning of government.<sup>68</sup>

The pamphlet distributed by Kahanae did not meet that criterion.

The pamphlet creates tension and enmity between those who stand behind it and the Arab residents of the State of Israel, but it does not have the potential to bring about that prohibited harm to the institutions of government. The pamphlet is not potentially "seditious" in the proper sense of the term. The pamphlet severely slanders large sections of the population. The pamphlet contains harsh criticism of what its authors and distributors view as the government's "powerlessness." The pamphlet's authors call the government to commit a manifestly unlawful act. The potential "victims" of the suggested act are certainly hurt by the very idea suggested in the said pamphlet. However, distribution of the pamphlet does not attest to a desire to undermine the political regime of the state, and is not, therefore, "sedition."<sup>69</sup>

The District Court heard the State's appeal after the Tomb of the Patriarchs massacre. The decision, handed down about a month after the Rabin assassination,<sup>70</sup> reversed the District Court's ruling and convicted Kahanae of both counts of sedition.<sup>71</sup> According to Judge Cheshin, the offense of sedition is applicable to "any activity undertaken with a purpose to cause enmity and ill-will toward any segment of the population, by reason of one difference or another . . . even if it

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67. Cr.C. (Jm.) 361/93, *The State of Israel v. Kahanae* (unpublished), Sept. 1994.

68. *Id.* at 23.

69. *Id.* at 40.

70. Cr.A. (Jm.) 243/94, *The State of Israel v. Kahanae* (unpublished), Dec. 1995.

71. On the assumption that the District Court's decision in *Kahanae* was influenced by the Rabin assassination, see Mordechai Kremnitzer, *Incitement not Sedition*, in HA'AYIN HASHEVI'IT 44 (Nov. 1998) ("In [the *Kahanae* decision] one can find signs of the influence of historical events upon the case law. Judge Zilbertal's very liberal decision in the Magistrate Court was delivered before the Rabin assassination. The decision of Judge Cheshin, a judge with a firmly liberal world view, was delivered after the Rabin assassination, and we can hardly assume that it was not affected by it.").

does not constitute harm to the political regime and the proper functioning of government.”<sup>72</sup>

The Supreme Court, in a majority decision, subsequently accepted Kahanae’s appeal and acquitted him of the charges of sedition. Justice Goldberg adopted the interpretation of the trial court, ruling that the offense of sedition should be limited to publications that endanger

the stability of the democratic regime . . . thus section 136(4) [of the Penal Law] should be construed as referring to a publication that has the potential to cause a deep social schism between broad segments of the population. Differences of opinion on political or social matters, strident as they may be, do not fall within the compass of the offense of sedition.<sup>73</sup>

On the basis of this narrow construction of the offense, Justice Goldberg found that the pamphlet that had been circulated by Kahanae did not qualify as seditious:

The said pamphlet contains slanderous statements about the Arab sector in Israel, but it is a long way from that to saying that this infantile pamphlet has real seditious potential, that is, that it poses a real danger to the structure of the democratic regime. The drivel in the pamphlet cannot be viewed as having such weight that it might raise doubts as to the strength of Israel’s democratic regime.<sup>74</sup>

In the further hearing, the result was again reversed. There was a 5-2 majority for convicting Kahanae. The majority (Orr, J., joined by Levin, D.P., Matza, Kedmi and Dorner, J.J.) ruled that the offense of sedition should not be limited to publications that endanger the structure of the political order. In their opinion, the offense of sedition is also intended to protect “the fundamental values of the regime,”<sup>75</sup> values expressed by the various alternatives laid out in section 136 of the Penal Law. The value underlying the alternative under section 136(4) is “social cohesiveness.”

[T]he purpose of this value is to guarantee that population groups that differ from one another in various aspects may live together under the shelter of a single state . . . . The value of “social cohesiveness” . . . is of special importance against the background of a society with a varied social mosaic like the state of Israel, in which minorities and members of different religious sects live side by side and in which the differences among the various population groups

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72. See Kahanae, Cr.A. (Jm.) 243/94, *supra* note 70, para. 13 (Cheshin, J.).

73. Kahanae, Cr.A. 6696/96, *supra* note 66, para. 21 (Goldberg J., Barak, P. concurring).

74. *Id.* para. 23.

75. See Kahanae, Cr.F.H. 1789/98, *supra* note 5, para. 21 (Orr, J.).

that live within it are significant. Its value is in protecting the existence of a multi-cultural, pluralistic society, and in preventing the disintegration of the social fabric.<sup>76</sup>

In the opinion of the majority, the purpose of “allowing for the continued existence of Israeli society, with all the many and varied population groups that live within it” is a proper purpose that justifies limiting freedom of expression.<sup>77</sup> That purpose requires that the offense of sedition be applied to the pamphlet distributed by Kahanae. “The expression in the said pamphlet was not a one-time expression, but part of a well-planned campaign of expressions intended to create a deep social schism between the Jewish and Arab populations and, in consequence, even acts of violence.”<sup>78</sup>

President Barak, joined by Justice Terkel, argued in the minority that the offense of sedition should be limited to “preventing harm to the stability of the regime.”<sup>79</sup> In Barak’s opinion, there is no fundamental difference between the offense of sedition addressed by the *Kahanae* case and that of expressing praise for a crime addressed in *Jabrin*.

There [the *Jabrin* case] as here [the *Kahanae* case] what is needed is an approach that restricts the law’s broad language, in order that its construction be consonant with the fundamental concepts of Israeli democracy, among them freedom of expression and the legality principle . . . I am aware, of course, that the *Jabrin* affair involved section 4(a) of the Prevention of Terrorism Ordinance, 1948, while in the *Kahanae* affair before us, we are concerned with section 136(4) of the Penal Law. Despite the difference in the language of the two sections, they raise a similar interpretive problem, and warrant a similar constructive technique. For my part, it would seem to me that the *Kahanae* affair before us is even “stronger”—in terms of the possibility for limiting the harmful speech—than the *Jabrin* affair, inasmuch as the term “seditious,” when construed against the background of the legislative history and the fundamental values of the system, suggests an act of rebellion that endangers the governmental regime . . . .<sup>80</sup>

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76. *Id.* paras. 21–22.

77. *Id.*

78. *Id.* para. 35.

79. *Id.* para. 1 (Barak, P.).

80. *Id.* In Cr.A. 3338/99, *Pakowitz v. The State of Israel*, (Dec. 20, 2000), delivered after the decision in the *Kahanae* case, the Court refrained from resolving the dispute as to the question of the scope of the value protected by the offence of sedition, inasmuch as under the circumstances of the case, the threatened schism between sectors of the population was likely to harm the stability of the regime (as was the position of the minority in *Kahanae*). According to the opinion of Judge Beinisch,

Like the minority, I too believe that there should be no fundamental difference between the offense of publishing praise for acts of violence and the offense of sedition that were the subjects of the *Jabrin* and *Kahanae* decisions. I shall, however, use a different line of argumentation from that of Barak to demonstrate that the offense of sedition should also be more narrowly construed.

The next part of this article argues that accepting the position of the majority in the *Kahanae* decision as to the value protected by sedition offenses entails justifying the offense of expressing praise for acts of violence, contrary to the position of the majority in the *Jabrin* decision. In both contexts, the purpose of the offenses is to prevent what I term as “a climate of violence,” i.e., social climate that may produce violent acts in the future. Following, Part IV argues that, as a rule, the legal system should not impose criminal sanctions upon expression that contributes to the creation of a climate of violence.

### III. THE COMMON PURPOSE OF THE OFFENSES OF SEDITION AND PRAISE OF VIOLENT ACTS— PREVENTION OF A CLIMATE OF VIOLENCE

As stated earlier, the majority in the *Kahanae* decision emphasized the importance of the value of “social cohesiveness” for the protection of “a multi-cultural, pluralistic society, and in preventing the disintegration of the social fabric.”<sup>81</sup> However, the majority is not of the opinion—and rightly so—that protection of the multi-cultural character of society justifies, in and of itself, the criminal offense of sedition. “The role of imposing tolerance, love and good neighborliness among people is clearly reserved to the educational and cultural institutions that are supposed to be constantly diligent in inculcating these values in society.”<sup>82</sup>

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Realizing the plan to throw a pig’s head onto the Temple Mount could have resulted, as a reasonable, and even nearly certain possibility, in a particularly deep social schism between Muslims and Jews. Such an act, based upon crude religious provocation, in a place holy to millions of Muslims, and which is at the heart of a difficult, bitter religious and nationalistic dispute, concurrent with a Muslim religious holiday when many worshippers were expected to be at the site, was likely, as a reasonable, and even nearly certain possibility, to lead to rioting and violence, and to bring about severe harm to public order to the point of undermining the proper functioning of government.

*Pakowitz*, Cr.A 3338/99, para. 32 (Beinish, J.).

81. See *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, paras. 21–22 (Orr, J.).

82. *Id.*

In contrast, the role of criminal law in the framework of sedition offenses is to prevent

[p]ublications which, even if they do not have the potential to cause immediate acts of violence, *have cumulative influence upon the social climate*, and by the enmity and hostility that they raise toward segments of the population, may lead to such acts at some time that cannot be foreseen in advance. The purpose of section 134(c) of the Penal Law, (like all of section 134) includes, therefore, the purpose of *stopping at the outset a process that is likely ultimately, though not immediately, to end in violence.*<sup>83</sup>

The emphasis is, therefore, upon preventing a “climate of violence” that may lead to violent acts in the future. If that is indeed the point, then the offense of expressing praise for acts of violence is not materially different.<sup>84</sup> The idea behind this offense is that expressions of praise have the opposite effect of the criminal condemnation of violent acts.<sup>85</sup> The expressions of praise legitimize the violent acts thereby contributing to the creation of a social climate that may produce violent acts in the future. If we seek to nip the process of violent outbursts in the bud—as the majority proposes—then we should prohibit the publication of praise for violence.

Indeed, some legal systems do criminally prohibit publishing praise for violence.<sup>86</sup> The prohibition in those systems is more limited, however, than the Israeli law, as defined in section 4(a) of the Prevention of Terrorism Ordinance, which prohibits “words of praise, sympathy or encouragement for acts of violence calculated to cause

83. *Id.* para. 24 (emphasis added).

84. In examining the offense of praising a crime, as defined in Section 140 of the German Criminal Code—see *infra* note 86—Eser emphasizes that the offense is intended to prevent a “psychological climate of willingness to commit crime.” See Albin Eser, *The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective*, in FREEDOM OF SPEECH AND INCITEMENT, *supra* note 16, at 143–44.

85. “The imposition of criminal liability on the perpetrator communicates public condemnation and denouncement of the crime . . . while public expressions of acclaim for a criminal act represent the antithesis of this. Thus, a society which tolerates such expressions effectively permits the neutralization of the corresponding criminal law and its penal discipline, and as such undermines public trust in the socio-legal order and in the validity of the criminal-law prohibition itself.” Mordechai Kremnitzer & Khaled Ghanayim, *Incitement Not Sedition*, in FREEDOM OF SPEECH AND INCITEMENT, *supra* note 84, at 177. See also Eser, *supra* note 84, at 143–45.

86. See § 140 of the German Criminal Code; § 282 of the Austrian Criminal Code; § 414 of the Italian Criminal Code. English translations of these provisions can be found in Kremnitzer & Ghanayim, *supra* note 84, at 205–07, app. I. Kremnitzer & Ghanayim also propose enacting a similar offense in Israeli law. See *id.* at 176–81. For a draft of the proposed offense, see *id.* at 208–09, app. II.

death or injury to a person.”<sup>87</sup> Rather, it is limited to *praise* as opposed to *sympathy*, and it applies only to praise of a *crime* (generally one of violence) already committed and not to any act of violence. However, the majority in the *Kahanae* case did not attempt to limit the prohibition in that manner. It was of the opinion that the offense of publishing praise for acts of violence was, as a whole, a draconian offense that was inappropriate in a democratic society.<sup>88</sup> To that end, the example of expressing praise for the Bar Kochba Revolt was cited.<sup>89</sup> That example is misleading. It does not fall within the scope of the protected value that the offense is intended to defend. Praise of historical events such as the Bar Kochba revolt does not contribute to a “climate of violence” created by a weakening of the criminal condemnation of violent acts. Interpreting the offense in accordance with its purpose prevents its application to such historical events.

Another difference that, according to Justice Orr, justifies the distinction between the offense of sedition and that of praise for violence is to be found in the result-based test.<sup>90</sup> Section 4(a) of the Prevention of Terrorism Ordinance, which defines the offense of publishing praise for acts of violence, “does not comprise a probability test that ties the publication to a potential for any harm whatsoever.”<sup>91</sup> Rather, in the case of sedition, “a probability test is firmly grounded in the language and purpose of section 134(c)” of the Penal Law.<sup>92</sup> “The term ‘that has the potential of causing sedition’<sup>93</sup> testifies to the existence of this test,”<sup>94</sup> and similarly, “section 133 comprises an element of probability.”<sup>95</sup> Indeed, in this regard, Justice Orr leans toward adopting the “near certainty” test.<sup>96</sup>

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87. *See supra* note 33.

88. *See Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 36 (Orr, J.).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* para. 30 (Orr, J.).

93. SPECIAL VOLUME LAWS OF THE STATE OF ISRAEL (1977). The authorized L.S.I. translation of section 134(c) refers to “a publication of a seditious nature,” but a more literal translation of the Hebrew would be “a publication that has the potential of causing sedition.” Indeed, no English translation can fully reflect the language of the provision, inasmuch as the law employs the Hebrew term for “sedition” as a verb.

94. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 28 (Orr J.).

95. *Id.* para. 31 (Orr, J.).

96. *Id.* para. 34 (Orr, J.).

The near certainty test is intended to minimize infringement on the freedom of expression.<sup>97</sup> However, it is a consequentialist test that applies in relation to future danger or harm. In the context of our discussion, it is important to note that Justice Orr does not examine the probability that the publication might ultimately lead to violent acts. The probability addressed is in regard to a “climate of violence.” In his opinion, “*The cumulative effect of the content of expressions . . . (such as those that appear in Kahanae’s pamphlet), is likely, to a degree of near certainty, to contribute to fanning hatred among segments of the Jewish population against the Arab population of the State of Israel.*”<sup>98</sup> And this, even if publication of the pamphlet itself does not have “the potential to cause immediate acts of violence.”<sup>99</sup>

The probability test—even to a degree of near certainty—loses its value as a limiting factor when it is applied to the relationship between a publication and its contribution to a climate of violence and to fanning hatred. No single publication creates the violent climate. Its contribution is in its cumulative influence upon the creation of a social atmosphere that may fan hatred. The contribution of a single publication to such an atmosphere is directly related to its content. If that content includes expressions of hatred, then the publication has the potential to contribute to an atmosphere that may encourage violence.<sup>100</sup> It is, therefore, hardly surprising that Justice Orr was of

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97. What is termed the “near certainty” test in Israeli law derives from the *Kol Ha’Am* case, *supra* note 12. As explained there, the test was established in the framework of prior restraint of expression. There is some dispute as to whether the test should appropriately be applied to criminal limits upon expression. For the view supporting adoption of the test within the criminal law, see Benvenisti, *supra* note 42, at 52–66. For the opposing view, see Kremnitzer & Ghanayim, *supra* note 85, at 187–95; Mordechay Kremnitzer, *The Elba Case—The Law of Incitement to Racism*, 30 MISHPATIM 105, 106–09 (1999) (in Hebrew); Sasson, *supra* note 42, at 111–13. For a discussion of result-based tests for assessing the danger inherent in expression in United States law, see Frederick M. Lawrence, *Violence-Conducive Speech: Punishable Verbal Assault or Protected Political Speech?*, in FREEDOM OF SPEECH AND INCITEMENT, *supra* note 84, at 12. The author is of the opinion that criminal-law doctrines that emphasize the importance of guilt must abandon the result principle in regard to imposing criminal responsibility for expression. On the difficulty in employing probability tests to assess the relationship between violent speech and violent acts, see Frederick Schauer, *Speech Behavior and the Interdependence of Fact and Value*, in FREEDOM OF SPEECH AND INCITEMENT, *id.* at 48–61.

98. Kahanae, Cr.F.H. 1789/98, *supra* note 5, para. 35 (Orr, J.) (emphasis added).

99. *Id.* para. 24 (Orr, J.).

100. In this regard, see Alon Harel, *The Regulation of Speech: A Normative Investigation of Criminal Law Prohibitions of Speech*, 30 MISHPATIM 69, 82–96 (1999) (in Hebrew). In Harel’s opinion, “At times, the harm, or the harmful potential that the law seeks to prevent is harm that derives unavoidably . . . from the existence of a text that has unacceptable characteristics.” *Id.*

the opinion that “the publication before us meets even the most strict probability test of ‘near certainty.’”<sup>101</sup> It is also not surprising that the other members of the majority, Justices Kedmi, Dorner and Matza, who concurred with Justice Orr’s ultimate conclusion, were of the opinion that no probability test should be necessary in regard to the offense of sedition, but rather that the seditious content of the publication should be examined.<sup>102</sup>

If, indeed, the emphasis is upon the publication’s contribution to the climate of violence, I see no material difference between sedition offenses and the offense of publishing praise for violent acts. In both cases, the contribution to a climate that might lead to future acts of violence derives from the content of the publication. When we are concerned with publishing praise for violence, the assumption is that the *content* of the publication—expressing praise for acts of violence—is what detracts from the power of the criminal denunciation and contributes to an atmosphere that legitimizes violence.<sup>103</sup>

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at 84. In such cases, “we can forgo the possibility-of-realization test and employ . . . the meaning [of the expression] as an accurate substitute for directly assessing the harm deriving from the expression.” *Id.* at 85. According to his approach, that category would apply to cases where “the expression is part of a broader phenomenon of expressions and conduct that lead to harm. In other words the harm is the result of the simultaneous existence of a large number of racist or violent expressions—expressions that bring about an erosion of the fabric of social relationships.” *Id.*

101. Kahanae, Cr.F.H. 1789/98, *supra* note 5, para. 31 (Orr, J.). As opposed to this, President Barak, who concurred with Orr’s tendency toward the view that the offense of sedition is contingent upon the application of the near certainty test, examined “the probability that Kahanae’s publication—which calls upon the government to bomb Arab villages—will indeed lead to ill-will and enmity between different sections of the population.” *Id.* para. 2. Because the probability examined by Barak referred to the realization of hostile acts as opposed to a violent climate, he concluded that such a danger was “under the circumstances—distant and not real.” *Id.*

102. See Kahanae, Cr.F.H. 1789/98, *supra* note 5, para. 2 (Kedmi, I.); *Id.* paras 2–6 (Dorner, I.); and the opinion of Justice Matza and Deputy President Levin, concurring with the result, without expressing a view as to whether an element of probability was required in the framework of sedition.

103. As opposed to this, Harel—*supra* note 100—is of the opinion that a probability test should also be applied in the framework of the offense of publishing praise for violent acts, defined under section 4(a) of the Prevention of Terrorism Ordinance. This is in light of his conclusion that “the section is intended to prevent acts of violence . . . [and] this is harm that is relatively distant from the expression.” *Id.* at 94. However, as explained, that is not the purpose of the offense of praise for acts of violence. Harel is aware of the possibility “that the purpose of the section is not to prevent acts of violence, but to prevent the injurious public atmosphere—which is the unavoidable byproduct of repetitive expressions calling for violence. Such an atmosphere may, ultimately, lead to violence, even if it is difficult to establish the specific contribution of any particular expression to acts of violence.” *Id.* In his opinion, “this argument does not support the conclusion that we should reject the possibility-of-realization test (i.e., the prob-

The proposed analysis poses a fundamental question in relation to both sedition and publishing praise for acts of violence: can criminal restrictions justifiably be applied to speech in order to prevent a climate of violence? The next part of this article argues that, as a rule, the reply to that question must be in the negative. In this regard, it is important to emphasize that the conclusion is restricted to expression that contributes to creating a “climate of violence,” i.e., a social atmosphere conducive to the outbreak of violent acts in the future, as opposed to expression that *incites to violence*, i.e., expression intended to and capable of bringing about violent acts. The difference between the two will be explained in the following section, and at greater length in the epilogue.

#### IV. CAN LIMITING EXPRESSION IN ORDER TO PREVENT A CLIMATE OF VIOLENCE BE JUSTIFIED?

Arguments related to both the nature of criminal liability and freedom of expression support the conclusion that, as a rule, it is inappropriate to impose criminal restrictions upon expression in order to prevent the creation of a climate of violence.

##### A. Arguments Deriving from the Nature of Criminal Liability

As a rule, criminal law prohibits behavior that harms others and that endangers a protected social value. In our context, the purpose is to prevent violent conduct that threatens life or limb. This purpose is achieved, first and foremost, by imposing criminal liability upon violent conduct itself. In general, criminal liability is also extended to the stages preceding the violent conduct, if that earlier conduct, which was intended to lead to the violent conduct, deviated from mere preparation and constituted a criminal attempt.<sup>104</sup> The assumption in such cases is that the injury to life or limb, as an abstract social value, has occurred even if the actual harm to a particular individual has been prevented. In other words, the assault upon the social value intended to protect life and physical integrity has begun, and must be

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ability test). The contribution of an expression to the creation of an injurious public atmosphere also depends upon the circumstances in which the expression is uttered, and particularly upon the social and political circumstances.” *Id.* at 94–95. But is this statement consonant with what was quoted *supra* note 100?

104. See the definition of “attempt” and commentary in 2 MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) 295–364 (1985).

answered even if there were no casualties.<sup>105</sup> Although criminal liability is typically applied to the perpetrator who has committed the offense, the law of complicity extends that liability to the accomplices—the solicitor, the aider and the abettor.<sup>106</sup> Expanding criminal liability to solicitation involves imposing criminal restrictions upon freedom of expression when that expression leads others to commit criminal activity.<sup>107</sup> The solicitor is an accomplice in the offense of violence, and in any other offense committed by the principal offender, because he was the one who convinced the actor to commit the offense. In such cases, adopting the idea expressed by the solicitor is what leads the principal offender to perpetrate the violent conduct.<sup>108</sup> Criminal liability may be further extended by imposing liability upon expression intended to influence another to commit a crime (including one of violence) even where the persuasion was unsuccessful and the other did not commit the offense. This is the separate crime of “criminal solicitation,”<sup>109</sup> also termed as “incitement,”<sup>110</sup> and under Israeli law, called an attempt to instigate.<sup>111</sup>

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105. The assault metaphor in regard to criminal attempts is taken from R.A. DUFF, *CRIMINAL ATTEMPTS* 364–65 (1996).

106. Section 2.06 of the MODEL PENAL CODE, which defines the “Liability for Conduct of Another: Complicity,” states,

- (2) A person is legally accountable for the conduct of another person when:
  - (c) he is an accomplice of such other person in the commission of the offense.
- (3) A person is an accomplice of another person in the commission of the offense if:
  - (a) with the purpose of promoting or facilitating the commission of the offense, he
    - (i) solicits such other person to commit it, or
    - (ii) aids or agrees or attempt to aid such other person in planing or committing it.

For the analysis of the law of complicity as stated in the Model Penal Code, as opposed to the common law doctrine of accomplices, see S. H. KADISH & S. J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES—CASES AND MATERIAL* 603–44 (2001).

107. For the discussion of the free speech problems that are being raised by solicitation, see KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* 110–29 (1989).

108. MODEL PENAL CODE, *supra* note 106. In Israeli law, § 30 of the Penal Law emphasizes the causal relationship between instigation and the commission of the offense by the principal offender: “A person who causes another to commit an offense by persuasion, encouragement, demand, entreaty or by any means that comprises an element of applying pressure is an instigator of an offense.” The section was added by Penal Law (Amend. No. 39) (Preliminary and General Part), 1994 S.H. 348. For the English translation, see A. GREENFIELD, *PENAL LAW 5737–1977, VERBATION ENGLISH TRANSLATION INCORPORATING ALL AMENDMENTS UP TO AND INCLUDING AMENDMENT NO. 40* (2d. ed. 1994).

109. “Criminal solicitation” is defined in MODEL PENAL CODE § 5, “Inchoate Crimes.” Section 5.02 states:

- (1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime . . .

Criminal liability for unsuccessful solicitations, i.e., “incitement,” is attached to expressions intended and likely to lead others to commit acts of violence.<sup>112</sup> In such cases, the inciting expression is intended to influence the *audience’s conduct*. In contrast, criminal liability for both sedition and expressing praise for violent acts, is imposed upon expression intended to influence the *audience’s attitudes* when such attitudes create a social climate that might lead to violent conduct *in the future*. Seditious expressions fan feelings of hatred, and expressions that praise violent acts influence the beliefs of the audience as to the legitimacy of acts of violence. The distinction between creating a climate of violence on the one hand and *incitement* on the other is like the distinction between expression intended to influence beliefs or opinions (i.e., a climate of violence) and expression intended to influence conduct (i.e., incitement). Violent conduct clearly falls within the scope of the criminal law; opinions or beliefs do not. Therefore, criminal law restrictions upon expression aimed to bring about violent conduct may be justified; expression aimed to influence opinions and beliefs should be countered with opposing opinions or beliefs, not by the criminal law. This last claim is supported by the various justifications for freedom of expression, discussed in the following section.

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(2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

For commentary, see *supra* note 104, at 365–82.

110. The nature of incitement under the common law will be touched upon in the epilogue, *infra* Part VII. See *infra* notes 185–187 and accompanying text.

111. PENAL LAW, *supra* note 108, § 33.

112. In *Brandenburg* and *Hess*, *supra* note 16, a requirement of *imminence* was added to these conditions: “[The] advocacy is directed to inciting or procuring *imminent* lawless action and is likely to incite or produce such action.” *Brandenburg*, *supra* note 16, at 417. The imminence requirement was omitted from the characterization of solicitation under MODEL PENAL CODE § 5.02, quoted *supra* note 109. According to the commentary to the Model Penal Code, the imminence requirement in *Brandenburg* and *Hess* should be understood in light of the special protection afforded political expression: “It would be difficult to make similar arguments about private solicitation to commit ordinary crimes made on wholly nonpolitical grounds and it seems unlikely that the Supreme Court meant to afford protection in such cases.” MODEL PENAL CODE AND COMMENTARIES, *supra* note 104, at 378. On the problematic nature of the demand for imminence as established in *Brandenburg*, see Alexander, *supra* note 16, at 109–10. On the characteristics of criminal solicitation under the Model Penal Code, see discussion *infra* note 188.

## B. Arguments Deriving from the Justifications for Freedom of Expression<sup>113</sup>

The proper way to combat a “climate of violence” created by expressions of hatred towards sections of the population (sedition) or expressions praising acts of violence is by attempting to create a counter-climate of tolerance in which opposing views, even those that are emotionally charged, can be aired. A tolerant social atmosphere can be achieved through “explanation and education” rather than by “oppression” of speech.<sup>114</sup> In this regard, we should bear in mind that the true test of freedom of expression is “when beliefs, opinions and views are expressed that provoke our anger and disgust.”<sup>115</sup> Allowing the opportunity to express provocative opinions and beliefs obliges those who are offended to denounce them and voice contrary opinions.<sup>116</sup> The contrary opinions will help to expose the truth<sup>117</sup> and thereby contribute to creating a different social climate.

The violent climate in the context we are examining is the result of political speech, which enjoys a special status in democratic society.<sup>118</sup> In Israeli society, differences of opinion concerning political is-

113. For a general discussion of the justifications for freedom of expression, see RICHARD ABEL, *SPEECH AND RESPECT* (1994); LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); K. GREENAWALT, *supra* note 107, at 9–76; A.F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* (1982); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); David Kretzmer, *Freedom of Speech and Racism*, 8 *CARDOZO L. REV.* 445, 467–91 (1987); Guy Pessach, *Freedom of Speech and the Legal Foundations of the Press*, 31 *MISHPATIM* 895 (2001) (in Hebrew).

114. “[P]unishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power . . . as far as we are concerned and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation or fines.” EMERSON, *supra* note 113, at 8. *See also* Dennis v. U.S., 341 U.S. 494, 503 (1951) (Vinson, C.J.).

115. Neiman case, *supra* note 11, at 277 (Shamgar, P.).

116. See the analysis in Kretzmer, *supra* note 113, at 476. Kretzmer is of the opinion that the arguments in support of freedom of expression are insufficient to rule out prohibiting racist speech. I shall consider racist speech *infra* Part VI.

117. The argument that freedom of expression is a necessary condition for discovering the truth is identified with John Stuart Mill. *See* JOHN STUART MILL, *ON LIBERTY* 18–45 (D. Spitz ed., 1975). For criticism of the assumption underlying the discovery of truth argument, see GREENAWALT, *supra* note 107, at 17; SCHAUER, *supra* note 113, at 22; Alexander Tsesis, *The Empirical Shortcoming of First Amendment Jurisprudence, A Historical Perspective on the Power of Hate Speech*, 40 *SANTA CLARA L. REV.* 729, 768–69 (2000).

118. [R]ule by the people, which by definition is the essence of democracy, implies two things:

(1) there should be a free flow of ideas and information among the people so they can make fully informed decisions (such as the decision for whom to vote), and (2) govern-

sues run deep, reflecting conflicting views as to fundamental values and ideologies. These positions are, at times, powerfully emotional. In order that political discourse not become “abstract and alienated”<sup>119</sup> it must also be allowed to reflect the emotional force that accompanies a view.

The multi-cultural character of Israeli society, which is central to the majority argument in the *Kahanae* case, requires that political discourse be restricted only with the utmost caution. Restricting such speech because of the emotion it generates contributes to fanning hatred and may result in intervention in expression that reflects the opposing views of segments of the population.<sup>120</sup> Silencing the expression of opposing worldviews will likely lead to divisiveness and separatism. Bringing criminal charges for expressing the views of minorities may well be understood as persecution, and lead to further alienation of those minorities and to greater reticence in assuming an active role in the democratic process.

It is important to bear in mind that the multi-cultural character of a society necessarily influences the language and culture of its component groups.<sup>121</sup> There is always the fear that the majority will not be sufficiently sensitive to all the connotations of the discourse of

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ment holds the power to serve the people—and should therefore receive a free flow of ideas, criticism, and information from those whom it serves.

Kretzmer, *supra* note 113, at 476. On the special status of political expression, see STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1991); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1890–98 (1992); Benvenisti, *supra* note 24, at 808; Pessach, *supra* note 113, at 901–08.

119. The expression is borrowed from Alon Harel. He writes, “Political discourse is not intended solely to transmit an abstract political position to the audience, but the emotional power that hides behind it, as well. Political discourse is not merely a discourse about ideas; it is also a discourse of sentiments, loves and hates. Excessive use of legal provisions threatens to deprive political discourse of its emotional intensity and make it abstract and alienated.” *Permissible but Illegitimate*, HA’ARETZ (Feb. 7, 2001).

120. *Id.*

121. Different social groups employ different languages: Arabic, Russian, Yiddish, Amharic and many others. A different language culture distinguishes the secular population from the various shades of the religious community. Within the Arab community, there are different levels of language, while Classical Arabic is not approachable for most of the population. Each community has its own unique universe of metaphors, symbols and associations. And each community has its own special way of expressing its ideas. The various groups have even developed their own communications media, such as newspapers, legal and pirate radio stations, and even special television channels for each. Therefore, there is no ‘marketplace of ideas’ but numerous marketplaces, and to each its own currency.

Benvenisti, *supra* note 42, at 53.

minority groups.<sup>122</sup> The construction that the majority places upon the unique discourse of certain minorities may be mistaken, and may contribute to greater feelings of alienation and persecution by the minority.

As stated earlier, widening the scope of the offense of sedition was motivated by the fear that expressions of hatred directed at segments of the population may, at some unknown time in the future, result in acts of violence against those people. But there is also the fear that it is the restriction of expression that will ultimately lead to acts of violence.

[R]estricting expression can lead to violence due to the loss of a verbal channel for releasing anger, and due to the fact that the establishment's attempt to silence expressions that it regards as violent or injurious can fan the fury of groups in society that view such expressions to be an important part of their culture or religion.<sup>123</sup>

It is doubtful that we can decide which situation presents a greater threat of violence:<sup>124</sup> will the voicing of expressions of hatred increase the probability of the outbreak of acts of violence, or will silencing expression bring about such violent acts?<sup>125</sup> In the absence of the ability to decide, and bearing in mind that the danger of an outbreak

122. *Id.* at 34–35; see also Harel, *supra* note 119.

123. Benvenisti, *supra* note 42, at 32.

124. See *id.* at 806–11.

125. The assassination of Prime Minister Rabin greatly amplified public debate over the question of the relationship between the violent climate that preceded the murder and the murder itself. The question was addressed in a conference sponsored by the Ministry of Justice's Institute for In-Service Training of Attorneys and Legal Advisors and the Israel Democracy Institute on February 17, 1988, entitled "The Rule of Law in a Democratic Society, Legal, Social and Cultural Aspects." It is interesting to note the opposing positions of two of the speakers, both from non-legal disciplines. N. Friedlander was of the opinion that the greatest probability for recourse to violence arises "when part of those involved in the dispute distances or detaches itself, as a group or as individuals, from the open, public debate . . . it would seem that allowing the internal debate, as sharp and extreme as it may be, may delay the process of detachment and conceptual seclusion of certain groups. *Psychological Speculations on Incitement*, in *THE RULE OF LAW IN A DEMOCRATIC SOCIETY*, *supra* note 42, at 103. In contrast, T. Libbes explained that,

As opposed to the belief that the lie is more dangerous when it is suppressed (than when it is voiced), and that exposing deviations from the norm is the first step toward their eradication by the authorities, researchers contend that the appearance of racial inciters on television gives them status . . . provides legitimacy for the interviewees in their group, increases their legitimacy in the eyes of potential supporters, and most importantly, may undermine the norms and place them in doubt, rather than strengthen them.

*Mediated Incitement—The Media's Dilemma*, in *THE RULE OF LAW IN A DEMOCRATIC SOCIETY*, *supra* note 42, at 137.

of violence is not imminent<sup>126</sup>—we are, after all, concerned with a climate that may yield acts of violence in the *future*—we should permit expression even if it contributes to a climate of violence, and allow opposing expression to do its part in creating a different climate. Should it transpire that the counter-speech was not sufficiently effective and that the violent potential was realized in violent acts, criminal liability would be imposed for the violent acts themselves. One may hope that the imposition of criminal liability will serve to deter further violent behavior.<sup>127</sup>

From the arguments elaborated in this section, we may conclude that, as a rule, there is no justification for imposing criminal sanctions upon forms of expression that contribute to creating a climate of violence. The possible exception to that rule will be presented in the following section while reassessing the distinction drawn under Israeli law between the offense of sedition aimed at a group and that of praising violent acts targeting an individual.

#### V. CAN A CLIMATE OF VIOLENCE AIMED AT A GROUP (SEDITION) JUSTIFIABLY BE DISTINGUISHED FROM A CLIMATE OF VIOLENCE TARGETING AN INDIVIDUAL (PRAISE OF VIOLENT ACTS)?

Up to this point in my analysis, I have ignored a characteristic addressed in the *Kahanae* and *Jabrin* cases that some would view to be central in distinguishing the offense of sedition from that of praise of violent acts. A government's intent in prohibiting sedition is to prevent the growth of hostile climates that, in turn, might lead to violent outbursts against certain sectors of the population. Thereby, a sedition claim can only arise where the statements pose a potential threat to an entire sector of the population, and not merely where, "the statement comprise[s] potential to arouse hatred between one individual and another."<sup>128</sup> The majority in the *Kahanae* case based their decision on the assumption that the ability of heterogeneous groups to live together without the fear of violence is a central value of democratic society.<sup>129</sup>

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126. On the imminence requirement in United States law, see *supra* note 16.

127. See Benvenisti, *supra* note 42, at 809.

128. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 25 (Orr, J.).

129. *Id.*

In contrast, the climate of violence discussed in the *Jabrin* case in relation to the offense of praise of violent acts is not directed at a population group and does not rest upon the differences among the groups.<sup>130</sup> Therefore, it may be argued that the climate of violence in this regard does not similarly undermine the foundations of democracy.

Sectors of populations enjoy special criminal law protection through prohibitions relating to racism. The widest protection in this context is granted by international law in Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966.<sup>131</sup> The article requires the signatory states, *inter alia*, “[to] declare an offense punishable by law *all dissemination of ideas based on racial superiority or hatred*, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin . . . .”<sup>132</sup>

As opposed to the other prohibitions listed in the article (incitement to racial discrimination, incitement to racially motivated acts of violence, or commission of violent acts), the prohibition upon the dissemination of racist ideas is intended to prevent a racist climate. It applies to expression that is likely to influence the audience to adopt racist opinions, even if the expression is not intended to cause them to act in accordance with those opinions. A combination of reasons are offered to justify such an exceptional prohibition.

First, history teaches us the terrible consequences that may result from a racist climate “based upon the distortion of the image of the other.”<sup>133</sup> Those consequences are the result of a gradual process that leads to the inculcating of racist ideas over an extended period of time.<sup>134</sup> Second, the very dissemination of racist expression causes harm<sup>135</sup> that, at times, is more severe than physical injury. Dissemi-

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130. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4. The emphasis is upon the offense itself, rather than the facts of the specific case.

131. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 1996, art. 4(a), 660 U.N.T.S. 195. For an analysis of art. 4 of the Convention, see N. Lerner, *Incitement in the Racial Convention: Reach and Shortcoming of Article 4*, 22 ISRAEL YEARBOOK ON HUMAN RIGHTS 1 (1992).

132. *Id.* (emphasis added).

133. Benvenisti, *supra* note 42, at 35. See also Kretzmer, *supra* note 113, at 458.

134. Tsesis, *supra* note 117.

135. The harm of racist speech is analyzed in depth by Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 271–77 (1991).

nating racist expression harms the human dignity of persons who are, usually, members of minority groups. The harm is expressed in “denying human characteristics to people because of their racial origin (in the broadest meaning of the term).”<sup>136</sup> The injury to dignity causes psychological harm that is expressed in low self-esteem, seclusion and alienation.<sup>137</sup> Imposing criminal liability for disseminating racist ideas is, therefore, similar to imposing liability in order to prevent harm to others. Third, as distinct from other political ideologies, which may be the subject of contention among nations or even among different sectors of a state, racism is the only political ideology that has been formally denounced by the international community.<sup>138</sup> Finally, racial origin is not a matter of choice. One cannot choose one’s race, nor can one abandon it.<sup>139</sup>

Even if we accept the above reasoning, it might have been possible to justify the distinction between a climate of violence aimed at population groups and one directed at individuals, were we concerned with the possibility of creating a racist climate. In the opinion of the majority in the *Kahanae* case, however, the offense of sedition “extends its protection to promoting ill-will and enmity between different sections of the population on the basis of difference that does not fall within the compass of the offense of incitement to racism, such as ideological, sociological, and sexual difference and so forth.”<sup>140</sup>

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136. Mordechai Kremnitzer, *supra* note 97, at 109. In Kremnitzer’s opinion, the value protected by prohibiting racist expression can be characterized differently. Rather than a single protected value—injury to basic dignity—he suggests “a group of values that comprise the basic rights (life, physical integrity, equality, dignity, reputation, economic welfare) to which members of society of different racial origin are entitled, as such, particularly those who are members of minority groups.” *Id.*

137. Post, *supra* note 135; Kretzmer, *supra* note 113, at 466.

138. Kretzmer, *supra* note 113, at 458.

139. *Id.* at 467.

140. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 9 (Orr, J.). In saying this, Orr adopted the view of District Court judge David Cheshin in *Kahanae*, Cr.A. (Jm.) 243/94, *supra* note 70, para. 12. An essentially similar stand was taken by the majority in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In that case the Supreme Court struck down a prohibition under the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), which provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.* at 38. According to the majority (Scalia, J., joined by Rehnquist, C.J. and Kennedy, Souter, and Thomas, JJ.), the prohibition was not equal because it placed limits only upon certain

Once we deviate from racial difference to include “ideological” differences, the justification for distinguishing between a climate that may lead to violent outbursts against groups (sedition) and a climate that may lead to such violence against individuals (publishing praise for acts of violence) disappears entirely. It is the duty of every society to ensure the welfare and safety of the individuals that comprise it, whether or not they are members of a defined cultural group. The arguments presented *supra* Part IV, however, established that this does not justify imposing criminal limitations upon expression that contributes to creating a social climate that may produce future acts of violence. Those arguments require a distinction between expressions that contribute to the creation of a “violent climate,” which should be left outside the scope of the criminal law, and expressions that “incite to violence,” which can justifiably be restricted by the criminal law.

The conclusion reached up to this point does not necessarily entail the conclusion that the opposite results in the *Jabrin* (acquittal of praise of violence) and *Kahanae* (conviction for sedition) cases were unwarranted. The pamphlet distributed by Kahanae contributed, according to the majority view, “to fanning hatred among segments of the Jewish population against the Arab population of the State of Israel.”<sup>141</sup> Such a pamphlet could indeed contribute to the creation of a racist climate. The question whether the result in the *Kahanae* case was justified must, thus, turn on the scope of criminal law restrictions regarding racism. This issue is addressed in the following section. In addition, that section examines the relationship between the offense of sedition and that of incitement to racism under Israeli law.

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opinions, e.g., racism, but did not similarly limit expressions of hate on other grounds, like political affiliation or sexual preference. *Id.* at 382–90. The minority (White, J., joined by Blackmun and O’Connor, JJ. and in part by Stevens, J.) recognized that the special character of racist speech justified its restriction. *Id.* at 406 (White, J.). However, they concurred with the view that the specific statute was unconstitutional, finding it too broad and ambiguous. *Id.* For criticism of the majority view that it did not recognize the special character of racist expression, see Tesis, *supra* note 117, at 776, and see also Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1379–81 (1998).

141. See *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 35 (Orr, J.).

## VI. ON INCITEMENT TO RACISM

As detailed *supra*,<sup>142</sup> Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 requires Member States “to declare an offense punishable by law all dissemination of ideas based on racial superiority.”<sup>143</sup> Such an additional offense, however, undermines the various justifications for freedom of expression,<sup>144</sup> which requires allowing expression of “beliefs, opinions and views . . . that provoke our anger and disgust.”<sup>145</sup> It enables the imposition of punishment upon mere racist ideas, regardless of their impact. Racist opinions will be eliminated from the market of ideas and, as a result, there will be no opportunity to critically discuss those ideas. Without such discussion, there will be nothing to stop the underground, gradual process that might lead to racially motivated acts of violence.

It is therefore not surprising that the United States signed the convention with a reservation as to Article 4. This reservation was reemphasized by the Senate upon ratification:

[T]he Constitution and laws of the United States contain extensive protection of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that the Constitution and laws of the United States protect them.<sup>146</sup>

Even where the protection of freedom of expression is not as extensive as in the United States, the significance of freedom of expression should not be abandoned readily. A balance is required between freedom of expression on the one hand, and protection from racial discrimination and incitement on the other. When seeking such a balance, international law itself provides a more limited protection against racial discrimination. For example, Article 19 of the International Covenant on Civil and Political Rights, 1966<sup>147</sup> (enacted less than a year after the Convention on the Elimination of Racial Dis-

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142. See *supra* text accompanying notes 131–133.

143. Int'l Convention, *supra* note 131, at 195.

144. The justifications for freedom of expression were elaborated upon *supra* Part IV.B.

145. Neiman case, *supra* note 11.

146. U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 148, 149 (2001).

147. G.A. Res. 2200A, 21 GAOR Supp. (No. 16) 952, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966).

crimination) grants the right of freedom of expression. Article 20 of the Covenant grants protection against racial discrimination by stating: “Any advocacy of national, racial, or religious hatred *that constitutes incitement* to discrimination, hostility or violence shall be prohibited by law.”<sup>148</sup>

Article 20 does not impose criminal law restrictions upon the mere dissemination of racial ideas. Rather, the prohibition is upon racial incitement. Incitement is intended to motivate an audience to *act* upon racist ideas.<sup>149</sup> The distinction in this context is akin to the difference between expression intended to influence conduct (racial incitement), and expression intended to influence beliefs or opinions (dissemination of racial ideas). It should be noted, however, that unlike incitement to violence, the actions that racial incitement is intended to prompt need not be unlawful; it is sufficient that they take the form of “discrimination or hostility.” The prevailing view under international law is that every person has the right to live in a society in which he or she will not be the object of incitement to racial discrimination.<sup>150</sup> The unique character of racial incitement in this context can be justified by the combination of historical, psychological, political, and biological reasons, which were clarified in the previous section.

Various legal systems impose criminal restrictions on incitement to racism.<sup>151</sup> In Israeli law, the offense of incitement to racism was in-

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148. *Id.* art. 20 (emphasis added).

149. *See also* Kremnitzer, *supra* note 97, at 125–26.

150. *See* Decision of the United Nations Commission on Human Rights, CCPR/C/58/D/550/1993, Faurisson v. France (Dec. 16, 1996). Note particularly the separate opinion of E. Evatt and David Kretzmer, § 4, at 76. *See also* Kretzmer, *supra* note 113, at 466–67. The legal basis for this position already exists in article 7 of the Universal Declaration of Human Rights (G.A. Res. 217A(III), Sess. Supp. U.N. Doc. A/810, at 710 (1948)), which provides: “All are entitled to equal protection against any discrimination in violation of this Declaration and against any *incitement to such discrimination.*” (emphasis added). This position is grounded in even more express language in article 20 of the International Covenant of Civil and Political Rights, *supra* note 147.

151. Several American states proscribe racial incitement in the framework of prohibitions upon group defamation or group libel. *See* Kretzmer, *supra* note 113, at 495–96. In *Beauharnais v. Illinois*, 343 U.S. 250 (1951), the U.S. Supreme Court ruled that a state is not enjoined from prohibiting criminal libel directed at a defined group. The prohibition approved in that case provided that under Illinois law:

[i]t will be unlawful for any person . . . to . . . publish . . . in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication . . . portrays depravity, criminality, unchastely, or lack of virtue of a group of citizens of any color, race, creed or religion which said publication . . . exposes the citizens of any color, race, creed or religion to contempt, derision, or obloquy . . . .

troduced in 1986.<sup>152</sup> The offense requires proof of “intent” as one of its elements.<sup>153</sup> It applies to publications that were made “*with the intent to incite racism*,”<sup>154</sup> or to possess a publication “*in order to incite racism*.”<sup>155</sup> Requiring “intent” significantly limits the scope of offense: it might be impossible to attribute intention to incite to racism where sophisticated or manipulative expressions were used.<sup>156</sup>

The *Kahanae* case exemplifies the limited scope of the offense of incitement to racism in this context. The prosecution argued, and the majority accepted, that Kahanae’s pamphlet had the potential “to contribute to fanning hatred among segments of the Jewish population against the Arab population of the State of Israel.”<sup>157</sup> In spite of this contention, Kahanae was not charged with the offense of incitement to racism. This omission was not coincidental. It would have been practically impossible for the prosecution to prove that Kahanae distributed the pamphlet with the intention of influencing those who read it to act in a racist manner. After all, the pamphlet was distrib-

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*Id.* at 251 (quoting § 224a ILL. CRIM. CODE DIV. ILL. REV. STAT. 1949, C.38, § 471). In *R.A.V. v. City of St. Paul*, *supra* note 140, however, the Supreme Court struck down a similar prohibition under the St. Paul Bias–Motivated Crime Ordinance. See elaboration *id.* The British Race Relations Act, 1965, Ch. 73 (U.K.) will be discussed *infra* note 156.

152. See Penal Law (Amend. No. 20), *supra* note 38.

153. *Id.*

154. *Id.* § 144b.

155. *Id.* § 144d.

156. See David Kretzmer, *Racial Incitement in Israel*, 22 ISRAEL YEARBOOK ON HUMAN RIGHTS 243, 250–51 (1992); Amos Shapira, *Confronting Racism by Law in Israel—Promises and Pitfalls*, 8 CARDOZO L. REV. 595, 606–07 (1987); Mala Tabory, *Legislation against Incitement to Racism*, 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 270, 281–83. In the *Elba* case, *supra* note 37, the justices expressed different opinions on the question of whether the “knowledge rule” defined under section 20(b) of the Penal Law could substitute for intent to incite. Section 20(b) states: “For the purpose of intent, foreseeing the occurrence of the results as a nearly certain possibility is equivalent to a purpose to cause them.” For an analysis of the various views expressed in this regard, see Mordechai Kremnitzer, *supra* note 97, at 126–36. On the knowledge rule in Israeli law, see Shneur Zalman Feller, *The ‘Knowledge’ Rule*, 5 IS. L. REV. 352 (1970). British experience also attests to the difficulty in enforcing prohibitions upon incitement to racism that are contingent upon intent. In its original form, section 6(a)(1) of the Race Relations Act, 1965 prohibited publications made “with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origin . . . .” When it became clear that, in practice, intent could not be proved, the law was amended and the requirement of intent was replaced by an objective requirement that “having regard for all circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.” Race Relations Act, 1976, § 70(2). See Kretzmer, *supra* note 113, at 501. For an analysis of the provisions proscribing incitement to racism in British law, see Stephen J. Roth, *Curbing Racial Incitement in Britain by Law: Four Times Tried—Still without Success*, 22 ISRAEL YEARBOOK ON HUMAN RIGHTS 193 (1992).

157. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 35 (Orr, J.).

uted in the course of a political election campaign, and was calling upon the *government* to bomb Israeli Arab villages, rather than Lebanese villages, in response to terrorist attacks.

Kahanae was convicted of sedition as a result of the Court's broad interpretation of the offense, according to which the sedition offense was intended to "prevent hostile acts and ill-will between these populations, as an end in itself."<sup>158</sup> Such a broad interpretation of the offense of sedition might have been justified as long as Israeli law did not incorporate a specific offense of incitement to racism. It allowed recourse to the offense of sedition "in order to punish expressions of incitement to racism,"<sup>159</sup> which became necessary "in light of the sensitive sociopolitical situation . . . between the Jewish and Arab nations."<sup>160</sup> However, when in 1986 the Israeli legislature enacted specific provisions prohibiting incitement to racism,<sup>161</sup> the "purpose" that justified such a broad construction of sedition disappeared, laying the groundwork for a narrow construction of the offense. Under such a narrow construction, the offense of sedition should have been limited to protecting the stability of the political regime, as was argued by the *Kahanae* minority.<sup>162</sup>

The Kahanae majority itself acknowledged that the legislative history of the offense of sedition, which dates back to the British Mandate, supports the position that the offense of sedition was intended only to protect the stability of the political regime.

From historical perspective, it would indeed seem possible that the primary purpose contemplated by the Mandatory Legislator in enacting the sedition provisions was to prevent harm to the political regime . . . [inasmuch as] in the Criminal Code Ordinance, 1936, the offense of sedition was situated in the chapter, which was titled "Treason and Other Offenses against the Authority of the Government" . . . [and in] English law, which is the forbearer of this offense, English case law limited the protected value of the offense of sedition to the structure of the regime.<sup>163</sup>

A literal construction of the language of the provision also supports this narrow approach. "[T]he term 'seditious,' when construed

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158. *Id.* para. 11.

159. *Id.* para. 9.

160. *Id.* para. 11, adopting the view of District Court Judge David Cheshin in *Kahanae*, Cr.A (Jm.) 243/94, *supra* note 70.

161. Penal Law (Amend. No. 20), *supra* note 38.

162. *See supra* text accompanying note 79.

163. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para 11 (Orr, J.).

against the background of the legislative history and the fundamental values of the system, suggests an act of rebellion that endangers the governmental regime . . . .”<sup>164</sup>

The necessary conclusion is that following the enactment of the 1986 offense of incitement to racism, racial expressions that do not threaten the stability of the political regime should not be punishable as sedition. This conclusion is further supported by the rule *specialia generalibus derogant*, a specific statute takes precedence over a general one.<sup>165</sup> This rule stands for the principle that, once the legislature has chosen to create a special regime for a particular phenomenon (i.e., incitement to racism), that phenomenon no longer falls within the compass of the general rule (sedition).

This above conclusion constraining the scope of criminal limitations on racist expressions has been narrowed in Israeli law. The current prohibition applies only to racist expression intended to influence the audience to act in a racist manner. Because no such intention was proven in the *Kahanae* case, he should have been acquitted.

## VII. EPILOGUE—INCITEMENT TO VIOLENCE

Part I of this article described the intensive use that has been made of Section 4(a) of the Prevention of Terrorism Ordinance since the assassination of Prime Minister Rabin and the massacre in the Tomb of the Patriarchs. In *Jabrin*, the prosecution argued that a construction of the offense which limited it to expressions of praise for acts of violence perpetrated by terrorist organizations “would leave the prosecution without tools for contending with the phenomenon of incitement to perpetrate severe acts of violence of a terrorist character by individuals.”<sup>166</sup>

This argument was accepted by the minority, who opined that “It effectively terminates the options for conviction . . . for an offense of

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164. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5, para. 1 (Barak, P.). It should be noted in this regard that the Hebrew term for “sedition” employed by the statute is derived from the word rebellion and can be understood literally to mean “to cause rebellion.”

165. On the significance of this rule and its application, see Reuven Behar, *The Relation between Lex Generalis and Lex Specialis*, 9 MISHPATIM 59 (1999) (in Hebrew).

166. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, para. 11 (Orr, J.). Following the *Jabrin* decision on April 28, 2001, the prosecution consented to the acquittal by the Supreme Court of Balachsan and Bar Yosef, as well as to the acquittal of Askin by the district court, who were each convicted under section 4(a) of the Prevention of Terrorism Ordinance for praising the murder of Prime Minister Rabin. See *supra* text accompanying note 32.

severe incitement to acts of violence . . . when there would appear to be no recourse to any other legal source in order to convict a person who commits the act.”<sup>167</sup> The majority responded, “[I]f such be the case, it is a matter for the legislature to address, and to provide for the prohibition of incitement in its various forms.”<sup>168</sup> In reaction an offense of incitement to violence was enacted as an amendment to the Penal Law.<sup>169</sup> This part of the article will first examine the assumption that the Israeli law lacks a “legal source” for prohibiting incitement to violence. For this purpose, it is important to recall the distinction between expressions that praise acts of violence and expressions that incite to violence. Expressions that praise acts of violence influence the beliefs or opinions of the audience as to the legitimacy of such acts, and thereby contribute to the creation of a social climate that may produce violent acts in the future. Expressions that incite to violence, on the other hand, are intended and likely to influence the audience to act violently. The *Jabrin* decision did away with the legal basis for prohibiting expressions praising violent acts committed by an individual. The prohibition of expressions inciting to violence, however, can be based on the law of complicity. This will be demonstrated by refuting the claim that complicity, in the form of solicitation, does not apply to incitement directed towards a large, unspecified, audience, i.e., “public incitement.”

Following this argument, the specific offense of incitement to violence added to the Israeli Penal Law will be examined. The argument will be that even if the legislature chooses to adopt a special legal arrangement for incitement to violence, the added offense is too broad.

#### A. Should Public Incitement Be Distinguished from Soliciting an Individual?

As noted earlier,<sup>170</sup> the law of complicity, defining solicitation, imposes criminal restrictions upon speech intended to influence another to commit a crime. The solicitor will be held liable as an accomplice in that offense on proof that the actor was indeed influenced by the solicitor’s speech, adopted the idea, and perpetrated the crime.

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167. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, para. 3 (Levin, D.P.).

168. *Id.* para. 13 (Orr, J.).

169. Penal Law (Incitement to Violence and Terror) (Amend. No. 66), passed at the Knesset on May 15, 2002.

170. *See supra* text accompanying note 107.

Unsuccessful solicitation occurs when the solicitor's speech does not motivate another to perpetrate a crime. The description also properly characterizes public incitement, inasmuch as it is intended to influence its audience to commit acts of violence. Liability as an accomplice in the violent crime is appropriate in those rare cases in which it can be shown that the incitement actually resulted in violent acts. Unsuccessful solicitation will be applicable to the more common cases in which the incitement does not lead to violence, or where it cannot be proven that the ensuing violence was caused by the incitement.

However, despite the prosecution's search for appropriate legal tools to combat inciters to violence since the Rabin assassination,<sup>171</sup> not a single attempt has been made to employ the law of complicity. It may be assumed that the reluctance to resort to complicity with regard to incitement was influenced by the view, expressed in the legal literature, that "the instigatee (i.e., the person solicited) must be either a particular individual or an identifiable, specific group,"<sup>172</sup> while incitement is "directed towards a large, unspecified audience."<sup>173</sup> This distinction is rooted in German law,<sup>174</sup> and its doctrinal basis has been elaborated by Kremnitzer and Ghanayim.<sup>175</sup>

The primary reason for adopting the distinction between public incitement and soliciting an individual (as well as a specific group), has to do with the effectiveness of solicitation. The assumption is that the influence exerted by a solicitor, or "instigator," as being termed by Kremnitzer and Ghanayim, is more effective than the influence of an inciter on a public audience. The assumption is based on the following reasoning:

Instigation is characterized by the influence of the instigator on the instigatee and the effectiveness of the act of instigation upon the instigatee. It is generally based upon the instigator's familiarity with, or knowledge of, the instigatee (i.e., his weak points), in addition to personal contact and surveillance which allows the instigator to

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171. See *supra* text accompanying note 166.

172. Kremnitzer & Ghanayim, *supra* note 85, at 160.

173. *Id.* at 161; see also 2 SHNEOR ZALMAN FELLER, ELEMENTS OF CRIMINAL LAW 226 (in Hebrew): "The concept of instigation . . . expresses a relationship between individuals—the instigator and instigee—and not that between an individual and an audience, in cases where the individual incites, provokes and foments an unspecified audience—with no distinction as to the particular identity of those composing that audience—to commit a criminal offense."

174. See Kremnitzer & Ghanayim, *supra* note 85, at 160–65 and sources cited therein. See also Eser, *supra* note 84, at 124.

175. Kremnitzer & Ghanayim, *supra* note 85, at 160–209.

adapt the instigation to the instigatee in a protracted manner, adjusting it according to the latter's responses and to the ensuing interpersonal dynamic which occurs between them . . . .

The situation is different, however, in the case of public incitement . . . . The impact of an inciter upon a crowd of incitees is not the same as it would be upon an individual, due to both the absence of a personal connection between inciter and incitee and the opportunity for opposing responses from the audience which public incitement provides—factors that can actually neutralize the effect of incitement. Neither is public incitement limited exclusively to those present: public figures and the media can make statements in public fora that are liable to detonate the explosive potential of incitement in a broader arena.

[A]dditionally, in cases of public incitement the inciter generally does not have protracted influence over the incitees, nor can he monitor their responses and activities without limitation.<sup>176</sup>

Even were these descriptions usually correct, they would not accurately characterize every situation. The instigator does not always have “protracted influence” over the individual instigatee, while it is possible that an inciter, addressing an audience of unspecified individuals, may have more protracted access to the incitees, in which case even Kremnitzer and Ghanayim concede “the greater effectiveness of the incitement.”<sup>177</sup> Furthermore, bearing in mind that, according to Kremnitzer and Ghanayim, incitement of a specific, defined group constitutes instigation, it is not at all clear that their description is appropriate even to the majority of cases. When instigation is aimed at a defined group, there can be “opportunity for opposing responses.”<sup>178</sup> The larger the group, the greater the possibility that the matter will be leaked to the media, thus providing the opportunity for the media to air views that may neutralize the incitement's harmful potential. It is also not generally possible to keep tabs on every member of a group. It is therefore somewhat doubtful that the effective influence of speech can serve to distinguish between instigation aimed at an individual or a defined group of people and incitement aimed at an unspecific audience.

Even were we to accept the generalization with regard to the relative influence of instigators as opposed to public inciters, the necessary conclusion would be that an inciter could not be assigned criminal liability as an accomplice. This would be true even in regard

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176. *Id.* at 162–63. See also GREENAWALT, *supra* note 107, at 117.

177. Kremnitzer & Ghanayim, *supra* note 85, at 164.

178. *Id.* at 159.

to a crime that had actually been committed. Why should the inciter not be held liable for an attempt to instigate i.e., an unsuccessful solicitation? After all, attempted instigation assumes the ineffectiveness of the instigator's influence over the instigatee. Although Kremnitzer and Ghanayim argue that even attempting to instigate should be limited to "a single individual or a defined group,"<sup>179</sup> they do not expressly examine the special character of public incitement as opposed to attempted instigation. Whether a distinction can be drawn between the two—public incitement and attempted instigation—on the basis of "the unique character of public incitement," as Kremnitzer and Ghanayim suggest, is examined *infra*.

According to Kremnitzer and Ghanayim,

[t]he rationale for adopting the position that public incitement is separate from the notion of instigation centers both upon the independence of public instigation from the perpetration of an offence, and the concept of the social value protected thereby. The main harm caused by public incitement is done to the social order and the rule of law by undermining public confidence in their validity. As a result, the public not only fears realization of the crime that is encouraged by the incitement, but their confidence in the values subverted by the incitement itself is weakened. In addition, public incitement disrupts the lives of its potential victims and violates their right to security and peace. They are forced to live in fear and the calls to harm them or their values may actually be acted upon, which further subjects them to the heavy burden of adopting precautionary measures against potential assaults.<sup>180</sup>

All that this argument requires is that the public and the potential victims be aware of the incitement, but it is not clear why this would justify the conclusion that "[p]ublic incitement, therefore, only occurs in cases where the incitees are non-specific."<sup>181</sup> Moreover, one of the rationales for punishing criminal attempts—in general, and an attempted instigation provides no exception—is to bolster public confidence in the socio-legal order, as Kremnitzer points out elsewhere, while relying on a German legal theory developed in this regard. "Public confidence in the legal order, as a designed, objective realiza-

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179. *Id.*

180. *Id.* at 164. Elsewhere, Kremnitzer & Ghanayim emphasize that the potential harm to victims posed by incitement is less than that posed by instigation, inasmuch as "governmental authorities and law enforcement agencies can theoretically act to protect those endangered, given their awareness of the incitement, a potential that does not exist in the case of individual incitement secretly carried out between two individuals and removed from public scrutiny." *Id.* at 163.

181. Kremnitzer & Ghanayim, *supra* note 85, at 165.

tion of social life, will be harmed if a person who decides to commit a crime and begins to do so remains unpunished.”<sup>182</sup>

Where attempt is concerned, the assumption is that public confidence will be undermined even if the perpetration of the attempt does not become public knowledge, and even if the completion of the offense is objectively impossible, inasmuch as

the effect and impression of the act upon the public are examined on the basis of the assumption that the public is aware of all the details that are actually known of the matter *ex post factum*, as opposed to a test [based upon] the impression of an observer of the event . . . .<sup>183</sup>

If that, indeed, is the assumption, then not only does failing to punish public incitement undermine public confidence in the validity of the legal order, but failing to punish attempted instigation of an individual does so as well.

The hierarchy of protected values, as presented by Kremnitzer and Ghanayim in this regard, seems problematic as well. In their opinion, “[t]he primary social value protected by the prohibition against public incitement is public trust in the validity of the socio-legal order, as well as societal peace and security, whereas the social value violated by the target offense is secondary.”<sup>184</sup>

Public confidence in the validity of the legal regime ought not be an independent value,<sup>185</sup> and it should not be given the status of a “primary” social value. The main justification for imposing criminal liability lies in the degree of danger posed to the value that the criminal prohibition is designed to protect. In the case of incitement to violence, that is human life or physical integrity. The decision as to whether a particular form of conduct endangers the protected social value to an extent that warrants imposing criminal liability depends upon the nature of the conduct and its attendant mental element. Conduct can be prohibited if, and only if, the danger that it poses to the protected social value justifies imposing criminal liability. In such a case, the penal response to the prohibited conduct serves to reinforce public confidence in the validity of the legal order, while a fail-

182. Mordechai Kremnitzer, *Criminal Attempt from a Comparative Legal Perspective*, 12 IYUNEI MISHPAT 393, 399–400 (1987) (in Hebrew).

183. *Id.* at 400.

184. Kremnitzer & Ghanayim, *supra* note 85, at 165.

185. Except, of course where the prohibited behavior itself harms the political and social order, as is the case for offenses under Chapter Eight of the Israeli Penal Law (“Offenses against the Political and Social Order”), which is where we find the offense of sedition.

ure to respond might undermine that trust. If the conduct is not of a sufficiently dangerous character, however, it cannot be prohibited merely to bolster public confidence. Imposing criminal liability in such cases might even lead to the opposite result of public indignation and shake public confidence in the legitimacy of the legal order.

The conclusion from the above reasoning is that in principle, there is no reason not to employ the law of complicity defining instigation (solicitation) and attempted instigation (unsuccessful solicitation) with regard to incitement directed at an unspecified audience. Practically speaking, we may assume that only rarely will successful instigation be attributed to incitement of an unspecified audience even when the commission of the proposed offense followed it. This is, however, because of the difficulty associated with proving that the crime was committed *under the influence of the incitement*.

The difficulty is not merely evidentiary. In some instances, the problem may derive from the more limited influence that an inciter has over an unspecified audience, as described by Kremnitzer and Ghanayim. In other cases, the problem may lie in the actor's inability to reconstruct where he encountered the idea of committing the crime and precisely what influenced him to decide to carry it out. This is particularly true where the incitement was the product of a climate of violence that might have led to the commission of the violent act even without the mediation of the incitement. We should note, however, that when we are concerned with instigation of an individual, proving the instigator's influence upon the actor's decision is not a simple matter either. Here, also, the actor does not always consider the question of what motivated his decision to commit the crime. The actor's desire to preserve his self-image may even lead him to suppress the fact that he acted under the influence of others. Thus, practically speaking, most cases of either public incitement or instigating an individual, will be viewed as attempted instigation.

In support of the above conclusions it should be mentioned that contrary to German law, the common law does not distinguish between an appeal to an individual and an appeal to an unspecified audience with regard to the offense of incitement. The offense of incitement proscribes conduct, including speech, intended to influence another to commit a crime.<sup>186</sup> The common law does distinguish be-

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186. See SIR JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 267-68 (9th ed. 1999); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 384 (2d ed. 1978); GLANVILLE WILLIAMS, CRIMINAL LAW—THE GENERAL PART 612 (2d ed. 1961) (1953). As early as 1881,

tween incitement cases in which the appeal reaches the intended audience, and attempted incitement cases in which the appeal is not received.<sup>187</sup> The Model Penal Code expressly abolished the latter distinction. The definition of Criminal Solicitation under section 5.02 includes “Uncommunicated Solicitation” as well.<sup>188</sup>

The conclusion that the law of complicity defining instigation and more importantly, attempted instigation can be applied to an appeal directed at an undefined audience, provides the prosecution with a tool to combat inciters to violence. This tool makes further legislation superfluous. However, inasmuch as a specific offense of incitement to violence or terror has recently been added to the Israeli Penal Law it is examined below.

#### B. Penal Law (Incitement to Violence) (Amendment No. 66), 2002.

The Penal Law (Incitement to Violence) (Amendment No. 66), 2002 repeals the offense of publishing praise for acts of violence, as defined in section 4(a) of the Prevention of Terrorism Ordinance,<sup>189</sup> and adds to the Penal Law an offense of Incitement to Violence and Terror.<sup>190</sup> The offense provides:

(a) Any person who publishes either a call to commit a violent act or terror, or a praise, support or encouragement of violent acts or terror (for the purpose of this section—“an inciting publication”), and according to its content and the circumstances in which it was published there is a real possibility that it will lead to a violent act or terror, shall be liable to imprisonment for five years.

(b) For the purpose of this section “a violent act or terror” – offense that harms or endangers human life or bodily integrity.

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we find a conviction for incitement for a newspaper publication in the *Queen v. Most*, 7 QBD 244 (1881). More recently, in *Invicta Plastics Ltd. v. Clare*, in [1976] CRIM. L. REV. 131 (1976), we find that the owner of a company was convicted of incitement for advertising a detector that would warn drivers of police radar. In the case of *R. V. Marlowe*, in [1997] CRIM. L. REV. 897 (1997), we find a conviction for incitement, albeit contrary to the statutory offense defined under section 19 of the Misuse of Drugs Act, 1971, for publishing a book explaining how to produce illegal drugs.

187. See JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 24–25 (Lewis Frederick Saturge ed., 9th ed. 1950) (1877); SMITH & HOGAN, *supra* note 186, at 269; ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 481 (3d ed. 1999).

188. See *supra* note 109, § 5.02.

189. See Prevention of Terrorism Ordinance, *supra* note 32.

190. Penal Law (Incitement to Violence), *supra* note 169, § 144d.

(c) Publishing a fair and accurate report of a publication unlawful under the provisions of subsections (a) and (b), does not constitute an offense under this section.<sup>191</sup>

As opposed to the offense of praising acts of violence under section 4(a) of the Prevention of Terrorism Ordinance, and even as distinct from the manner in which the offense of sedition under section 136 of the Penal Law was construed by the majority in the *Kahanae* case, the offense of incitement to violence or terror does not prohibit speech that contributes to creating a climate of violence, unless “according to its content and the circumstances in which it was published there is a real possibility that it will lead to a violent act or terror.” In principle, this is a welcome development. The offense, however, is still too broad in scope.

On the factual level, the existence of a *real possibility* that based upon its content and the circumstances of its publication, the publication will lead to the commission of violent acts or terror, is required. The requirement of “a real possibility” was added to the definition of the offense after the Draft Bill<sup>192</sup> had been submitted to the Knesset. We may assume that the term was chosen as a compromise between those who argue that a degree of “near certainty” is required to justify criminal bans on speech and those who suffice with “a reasonable possibility” that the publication will lead to violence.<sup>193</sup>

As we are dealing with criminal liability imposed for conduct of an anti-social nature, it would be appropriate to place primary emphasis upon the actor’s intentions. Thereby, the offense of incitement to violence can only be justified where it would require a level of intent signifying a real possibility (as opposed to a near certainty) that a violent act will be committed. However, the scope of the mental ele-

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191. *Id.*

192. There were two Draft Bills, proposing to add a specific offense of incitement to violence. The first, Penal Law (Incitement to Violence) (Amend. No. 58), Draft Bill, 2001 (H.H. 2974, Jan. 9, 2001). Significant changes were introduced to the second Draft Bill, Penal Law (Incitement to Violence) (Amend. No. 63) Draft Bill, 2001 (H.H. 3017, July 2, 2001).

193. See references *supra* note 97. Under the Model Penal Code, there is no requirement of “possibility” in this context: “There is no requirement that the solicitation result in action by the person solicited or even that such action seem likely at the time of solicitation.” Comments to § 5.02 MODEL PENAL CODE AND COMMENTARIES, *supra* note 104, at 370. Only when the solicitation “is so inherently unlikely to result . . . in the commission of the crime,” may the Court exercise its power to mitigate the sentence or “in extreme cases, may dismiss the prosecution.” *Id.* § 5.05(2). For a criticism of the Model Penal Code in this context, see GREENAWALT, *supra* note 107, at 112–13. Greenawalt’s opinion is that “. . . pure requests or encouragement should be punishable only when they propose serious crime and have a *substantial likelihood of being successful.*” *Id.* (emphasis added).

ment of the offense of incitement to violence or terror is overly broad. As opposed to both instigation and attempted instigation, which require intention to bring about the commission of the offense<sup>194</sup> (including an offense of violence), the offense of incitement to violence or terror can be established upon proof of any level of *mens rea*, including recklessness.<sup>195</sup>

The practical significance of this is that a person who is sufficiently sensitive to the possibility that her words might lead someone to violent action must refrain from expressing her views. If we believe, as the drafters proclaim, that one should refrain from “unnecessarily infringing . . . the freedom of expression granted to every citizen as a fundamental freedom in the state,”<sup>196</sup> we should limit the prohibition to instances in which it is the speaker’s intention to motivate others to commit violent acts.<sup>197</sup>

The draft bill stated expressly that “the proposed offense of incitement to violence is not contingent upon the occurrence of a violent act as a result of the inciting statements prohibited by it.”<sup>198</sup> Such a clarification was ultimately omitted from the amendment, probably because the occurrence of a violent act is not required by the definition of the offense.

In this context it is important to emphasize what I have argued before: if it is proved in a particular case that a violent crime was committed due to the *influence* of the incitement, there is no reason not to charge the inciter as an accomplice for solicitation to the violent crime. Under the law of complicity, solicitation bears the same penalty as the violent act itself. In light of past experience, however, where not a single attempt has been made to employ the law of complicity to cases of public incitement to violence, an explicit clarification is needed. It would be necessary to make it clear that the specific offense of incitement to violence does not preclude recourse to the

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194. In the Model Penal Code, both sections 2.06(3)(a), which defines the accomplices (*see supra* note 106) and 5.02, defining criminal solicitation (*supra* note 109), expressly require the “purpose of promoting or facilitating the commission of the offense.” In Israeli law, the requirement of purpose expressly appears in the definition of attempt (§ 25 of the Penal Law), which also applies to attempted instigation.

195. “Recklessness” is defined, *inter alia*, in section 20(a)(2)(ii) of the Penal Law as “assumption of an unreasonable risk as to the possibility of bringing about the consequences, hoping that it will be possible to prevent them.”

196. *See* Explanatory Notes of the Draft, (No. 58), *supra* note 192, at 490.

197. In the same spirit, see GREENAWALT, *supra* note 107, at 123–25.

198. Draft Bill (No. 58), *supra* note 196, at 4.

law of complicity in the, admittedly rare, cases in which the causal connection between the incitement and the violence committed can be proven.

Finally, it should be noted that the offense of incitement to violence or terror does not distinguish between an appeal to a defined group and an appeal to an undefined audience—and rightfully so.<sup>199</sup> The drafters chose to employ the term “publishes,” so as “not to detract from the broad definition of this term under section 34X of the Penal Law for the terms ‘publication’ and ‘publish’ that apply to every criminal offense . . . .”<sup>200</sup> Under section 34X of the Penal Law, the term “publish” applies to any expression that may be heard or seen “by persons in a public place.”

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Five years after the assassination of the Israeli Prime Minister Rabin, the Israeli Supreme Court made it clear that the criminal restrictions that had been imposed on political speech in Israel following the assassination, were “difficult to accept in a proper democratic society that values freedom of expression.”<sup>201</sup> The majority opinion in the *Jabrin* case<sup>202</sup> limited the scope of the offense of praising violent acts, which had played a central role in imposing the restriction upon speech relating to the Rabin assassination.

However, the traumatic events of the assassination of the Israeli Prime Minister and the massacre in the Tomb of the Patriarchs, still affect the scope of freedom of expression in Israel. In response to the abolition of the legal basis for prohibiting speech praising violent acts committed by an individual under *Jabrin*, an offense of incitement to violence or terror was added to the Israeli Penal Law.<sup>203</sup> The offense is too broad: it requires a person who is aware of the possibility that her words might lead someone to violent action to refrain from expressing her views.

Further restrictions upon speech in Israel are being imposed by the offense of sedition, the scope of which was broadened by the majority in the *Kahanae* case,<sup>204</sup> in order to protect the “social cohesive-

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199. See discussion *supra* Part VII.A.

200. See Draft, *supra* note 192, at 5.

201. *Jabrin*, Cr.F.H. 8613/96, *supra* note 4, para. 36 (Orr J.).

202. *Id.*

203. See Penal Law (Incitement to Violence and Terror), *supra* note 169.

204. *Kahanae*, Cr.F.H. 1789/98, *supra* note 5.

ness” of Israeli society. The expansion of the offense of sedition was expressly connected to the traumatic events that had visited Israeli society.