THE SUBURBAN

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Rabbi Dr. Chaim Simons,
306/20 Kiryat Arba,
90100,
Israel.

Aug. 23, 1995

Re: Enclosures

Dear Rabbi Dr. Simons,

Thank you for your kind letter of Aug. 16 about our editorial and Dan Nimrod article which resulted in a complaint to the Quebec Press Council from a local pro-Arab propagandist.

At the time, our editorial and Mr. Nimrod's article resulted in controversy. But it wasn't until much later, nearly a year, that the complainant, John Dirlik, took his complaint forward. As yet, there has been no resolution by the council, which in any event, only expresses a well-publicised opinion and has no punitive powers.

I read your scholarly report on the Goldstein killings and found it interesting that our conclusions tended to converge, interesting, considering we were without the benefit of the information at your disposal.

I shall pass your letter and report on to Mr. Nimrod, as I send to you the editorial and article that you requested, as well as Mr. Dirlik's letter of complaint to the press council.

With our best wishes and regards,

Yours,

Christy McCormick,
Editor

פ"ס ד

306/20 Kiryat Arba
Israel

8 March 1994

Letters to the Editor
Jewish Chronicle
London

Dear Sir,

I cannot allow your remarks against Dr. Baruch Goldstein to go unanswered. I knew him personally - you didn't.

Dr. Goldstein was a neighbour of mine and also davened regularly in my Shool. For 24 hours each day he would have his "walkie-talkie" with him, so that he could deal immediately with any medical emergency that might arise. On Shabbat, Yomtov and Yom Kippur, he would even sit in Shool with his "walkie-talkie" beside him. How many doctors with such devotion to duty do you know of? The thousands of people from all over Israel who attended his funeral, despite the torrential rain, is sufficient testimony to his noble character.

With regard to the killing of Arabs in the Cave of Machpelah, this matter cannot be viewed in a vacuum. Since the signing of the Oslo agreement there have been continual brutal murders of Jews every few days. On a number of these occasions, Dr. Goldstein personally tried to save their lives, and last month he was very highly praised by the Israeli army for his service in this field. What is the Israeli government's response to all these murders of Jews? Releasing thousands of Arab terrorists from jail and supplying them with guns! One doesn't have to be a prophet to know who the intended target of these weapons is!

Much has been made of the fact that this attack took place during a prayer-service. However it is during these very same prayer-services in their mosques, especially on Fridays, that the Arabs incite their people against the Jews. More specific to this incident, during the days preceeding Purim, announcements were made in the mosques in Hebron that the Arabs should stock up with food in their homes in preparation for the curfew which would follow the imminent massive massacre of the Jews in the area. On the night before Purim, the Arabs present in the Cave of Machpelah started shouting that they would slaughter the Jews, but sadly the army did nothing whatsoever about it. Further confirmation of this intended massacre of Jews comes from the fact that when soldiers searched the Cave of Machpelah after the killings, they found 3 automatic weapons and a crate full of hatchets. It is therefore most probable that Dr. Goldstein's actions on that Purim morning saved the lives of many Jews.

CONTINUED

When we look back on the Holocaust, we ask ourselves why European Jewry did not act in the 1930s to prevent such a catastrophe occurring. There were in fact only a few individual Jews who took the law into their own hands to awake the world to the dangers posed by the Nazis to the Jewish people. These included Herschel Grynszpan, who, in 1938 killed a German embassy official in Paris. Two years earlier, a similar act had been undertaken by a medical student named David Frankfurter. Had the world at the time taken heed of the warnings given by these two brave men, the Holocaust might never have occurred. Today, the P.L.O. despite its "solemn undertaking" has done nothing whatsoever to amend its infamous charter. The P.L.O. Charter calling for the utter destruction of the State of Israel, stands in its entirety. The danger which loomed over European Jewry in the 1930s, today looms over the five million Jews living in Israel.

It is an unfortunate fact in war that civilians are killed. (Let us not kid ourselves that a state of war does not exist between Israel and the P.L.O.) However has anyone even so much as questioned the continuous bombing of German civilian population centres by the Allies during World War II?

In conclusion, let me ask whether there could be a more blatant example of hypocrisy than for the very same people who quite happily shake hands with the arch-terrorist and mass-murderer Yasser Arafat, to condemn the actions of Dr. Baruch Goldstein?

Chaim Simons

(Rabbi Dr.) Chaim Simons

[NOTE: In view of the extensive coverage you have given to remarks against Dr. Goldstein, I feel it is only fair that you publish this letter in its <u>entirety</u>.]

JEWISH CHRONICLE MARCH 11 1994

Letters to the Editor

Dr Baruch Goldstein was a neighbour of mine and davened regularly in my shul. For 24 hours each day, he carried his walkie-talkie with him, so that he could deal immediately with any medical emergency that might arise.

On Shabbat, Yomtov and Yom Kippur, he would sit in shul with his walkie-talkie beside him. How many doctors with such devotion to duty can there be?

The thousands of people from all over Israel who attended his funeral, despite the torrential rain, are sufficient testimony to his noble character.

The killing of Arabs in the Cave of Machpelah cannot be viewed in a vacuum. Since the signing of the Oslo agreement, there have been brutal murders of Jews every few days. On a number of these occasions, Dr Goldstein personally tried to save their lives, and last month he was highly praised by the Israeli Army for his services in this field.

What is the Israeli government's response to all these murders of Jews? It has released hundreds of Arab terrorists from jail.

Much has been made of the fact that the Hebron attack took place during a prayer service. However, it is during these very same prayer services in their mosques, especially on Fridays, that the Arabs incite their people against the Jews.

On the night before Purim, the Arabs present in the Cave of Machpelah started shouting threats to slaughter Jews, but, sadly, the army did nothing about this.

Confirmation of this intended massacre of Jews comes from reports that, when soldiers searched the area after the killings, they found three automatic weapons. It is probable, therefore, that Dr Goldstein's actions on that Purim morning saved the lives of many Jews.

Despite its "solemn undertaking," the PLO has done nothing to amend its infamous charter, which calls for the destruction of Israel. The danger that loomed over European Jews in the 1930s today looms over the five million Jews living in Israel.

(Rabbi Dr) Chaim Simons,
Kiryat Arba, Israel.

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Is It Legitimate to Criticize the Supreme Court?

Evelyn Gordon

In August 1996, two haredi newspapers published editorials highly critical of the Israeli Supreme Court and its president Aharon Barak, assailing the court's increased involvement in matters outside its traditional purview. The editorials triggered a torrent of denunciations from Israel's political, legal and journalistic establishments: Complaints were filed with the police against the papers and their editors charging them with sedition, incitement and defamation of the court; there were calls in some quarters for the papers' closure, while prominent politicians from almost every party vied to produce the most vicious castigation of the crime. Then-finance minister Dan Meridor, in a typical example, branded the editorials "a severe incitement campaign that is unprecedented in the state's history, aimed at damaging not only senior justices but at undermining the basic values of society and the public's confidence in the justice system."[1]

After a brief lull, the issue resurfaced in late November, when an interview appeared in which Dror Hoter-Yishai, chairman of the Israel Bar Association, blasted the court for its intrusion into matters that were properly the province of the Knesset. Again, across-the-board denunciations were accompanied by police complaints and demands that Hoter-Yishai be

removed from his chairmanship of the Bar and his position on the government committee that appoints judges. The Bar's Ethics Committee recommended that he face disciplinary charges on account of his remarks.

The Israeli public is probably unique in the sanctity it affords its judiciary, and in its bilious intolerance to attacks on the court. Yet it is not for disrespect of the judiciary that many other democracies, most notably the United States, have assiduously protected debate over judicial activism. The question of the judiciary's proper role in explicating the basic values and principles that shape a nation is of vital importance to any democracy—especially one such as Israel, whose governmental structure is still somewhat in flux, and whose Supreme Court has over the past two decades dramatically increased its involvement in public life. By suppressing debate on one of the most vexing questions of democratic theory today, the political, legal and journalistic communities managed to bilk the Israeli public of one of its founding democratic privileges—the ability to define the role and powers of the institutions of government.

After appearing on intellectual and political battlefields around the world for decades, the debate over judicial activism has finally hit Israel. Yet if the events of last year are any indicator, the Jewish state has a long way to go before it can celebrate the establishment of a stable, mature democracy in the Holy Land.

II

While there is a broad consensus in western democracies about the legitimacy of judicial review—the right of courts to overturn laws that expressly violate a written constitution, or to annul government decisions that contradict laws—there is no such agreement on whether courts should be allowed to overturn laws or government decisions that violate principles whose protection under the law is only implicit.

Chief Justice Barak: Court Has the Right to Abrogate Law and Deal with Values

by E. Rauchberger

"Judges who have not been elected by the people can cancel laws of the elected legislature. This is a democratic act. In addition, the argument that the Court should not rule on values is unacceptable," said Chief Justice Aharon Barak in a lecture to the Israeli Association for Parliamentary Issues.

Barak spoke at length about the importance of the Basic Laws which are to constitute the Constitution of the State of Israel, and called for the completion of the Constitution as soon as possible, because it is currently incomplete — or, as he put it – "crippled and not very successful."

Barak was emphatic about the right and obligation of the Court to interpret laws.

"The need for judicial control of the legality of the law is evident. The supremacy of the Knesset and its special stature in the separation of powers does not empower it to function against the Basic Laws . . . The function of the Court in the separation of powers imposes upon it the necessity to interpret the Constitution and the laws."

In reply to a query whether it was democratic for judges who were not elected by the people to cancel laws of the elected legislature, Barak replied:

"The clear answer is: yes. Since the Constitution is a democratic document, judicial criticism, which is meant to enforce the Constitution, is democratic."

Alongside this, he stressed: "The Court has to display judicial restraint. It can cancel a parliamentary law only as a last resort . . . It must make every interpretive effort to arrive at a result in which the law and the constitution coincide. The cancellation of a law is a serious matter. However if, after all of this self-restraint has been applied, there is no choice but to cancel law, such activity must not be regarded as undemocratic. The opposite is true. This is democracy at its highest level. This is the formal and the essential rule of law at its highest level."

Barak attacked the concept of a "Court bypass law" and said that the Knesset can change a law as it sees fit, and disagree with the interpretation given it by the High Court, and this in no way undermines the Court.

However, what must be examined is whether the amendment is appropriate.

"If the interpretation does not seem correct to the Knesset, it has a right to amend the law," he said. Making an amendment is within the authority of the Knesset. When it does so, it doesn't undermine the authority of the Court. The Court interprets the law which a legislature has formulated. If the legislature doesn't agree with this interpretation, it has the right to legislate a new law. The legislature doesn't, thereby, assume judicial authority. Interpretation and legislating are two different things . . . Therefore the talk in Israel about a "Court bypass law" is irrelevant. The rhetoric about a "Court bypass law" should stop. We must focus on the content of the law: its legality and the question of appropriateness according to social and judicial parameters, he said.

Aharon Barak fervently defended the right and obligation of the Court to rule on values, and firmly rejected all criticism directed against him on this issue.

"Interpretation isn't a mechanical activity. It begins with the language of the Constitution and the laws, but is not confined to them. Every interpretation requires attention to values and principles."

He cited proofs from the wording of various laws to show that the Court must deal with values and ideologies, and that without doing so, it cannot make decisions according to the will of the legislature.

Barak also related to claims that judges issue decisions according to their own individual values and those of their social groups.

"In his judicial activity, the judge must not reflect his own subjective values. . . . He must behave objectively. The judge was not elected. He is permitted and obligated to deal with values which do not necessarily coincide with his own values, but rather reflect the values of the society in which he lives. The judge doesn't 'represent.' He 'reflects' and 'expresses.' The Court, unlike the Knesset, is not a representative body. It is an nonpolitical, independent, objective body. Its power stems from its ability to clarify the values of the system as they arise in his judicial work."

Barak defended the procedure whereby judges serve in office until the age of 70 and need not undergo additional selection during their careers, unlike the political system, where representatives are elected every four years. "A politician is obligated to keep his constituents abreast of his activities and to conduct himself in accordance with the needs and wants of various sectors. As a result," he said, "professional judges, who are not elected, are best suited for the objective examination of values."

In concluding his remarks, Barak once more stressed the right and obligation of the Court to cancel laws which contradict the Basic Laws:

Barak surprised his audience by focusing on criticism leveled against the High Court.

"Criticism of the Court is vital. Who will guard the guard? Who will oversee us? We are prepared for criticism. We need criticism. But it must be presented in a restrained, relevant and respectable manner. Criticizing us is legitimate as long as the criticism is based on a knowledge of reality and the facts. We look forward to such criticism."

Barak then criticized those who say that it is impossible to criticize the High Court, and said that precisely the opposite is true, and that the Court is interested in criticism.

He then stressed that judges are human beings, and also fallible. "We also admit our errors," he said. He even suggested that if a High court were appointed above the current High Court, it is likely that it would overturn some 30% of the current High Court's rulings.

YN

ואני אומר לכם, אני ראיתי גם את הדברים שנאמרו, שהם לא פשוטים, הייתי אומר, לאוזן הלא-דתית. לא פשוטים. כי מה בעצם הטענה, שחוזרת על עצמה? הטענה היא שבית המשפט האזרחי, החילוני, הממלכתי, הוא נגד הדתיים. זו טענה שחוזרת בטון כזה או אחר, ואני אומר לכם, שהאמירה הזו - -

נסים דהן (ש"ס):

סליחה, נאמר שהוא נגד התורה, בפירוש - -

שר המשפטים י' ביילין:

נגד התורה, כן. יפה. או.קיי.

ואני אומר לכם, שגם אם יכול להיות שמישהו יכול לגזור את זה ממה שנאמר או ממה שנכתב, האמירה הזו היא אמירה מאד לא פשוטה, כי הרי בית המשפט בוודאי לא רואה את עצמו כמי שפועל נגד התורה. מי שהוא דתי, או חרדי, יכול ללמוד מהפסיקה שלו, שהיא לא עולה בקנה אחד עם המשפט העברי. אבל כאשר אתה אומר, לאוזן ה "לא מוזיקלית" של הציבור הרחב, מין אמירה כזאת, כמו שכאן נאמר קודם, שבית המשפט הוא נגד התורה, זה לא דבר פשוט. זה לא ויכוח. אם שואלים על קווים אדומים, זה לא הוויכוח האם בפסק דין מסויים או בבג"ץ נאמר דבר שהוא טעות, ואי אפשר לקבל אותו. זה לגיטימי לחלוטין. זו ביקורת שלא רק צריכה להיות, היא לא רק מותרת, היא לגיטימית. אבל כשאתה אומר דבר כללי, מהסוג שבית המשפט הוא נגד התורה, אני אומר לכם, אתם בוודאי מבינים את זה. אני לא יודע האם אנשים שעוסקים כל ימיהם רק בתורה ויותר מרוחקים מהציבור, מבינים את זה באותה צורה. אני בטוח שזו לא הכוונה שלהם, אך זה בהחלט נתפס מאד מאד בעיתי. אתה יוצר את העימות. יש הבדל בין "שהוא לא פוסק על פי התורה" לבין "שהוא נגד התורה". נגד התורה? נגד התורה? אני צריך להילחם בו. בוודאי. אדם שרוצה להאמין, שלא רוצה שיהיה כאן משהו שהוא נגד התורה, שהוא שומע שיש איזשהו גורם שהוא נגד התורה, יכול בהחלט להגיד - נגד תופעה כזו חובה עלי להילחם.

ואני אומר לכם - -

The Jerusalem Post Friday, June 16, 2000 page B 9

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Calling a spade a spade

Jonathan Rosenblum

One of the greatest challenges confronting judges in any properly functioning democracy is that of separating their personal views from their role as interpreters of the law. That distinction between one's private opinions and one's duties as a judge, however, escapes our current Supreme Court justices, who often seem to be guided by little other than their own ideology.

The court veers wildly between cases of judicial hyperactivity in which it substitutes its views for those of other governmental branches to cases in which it shows the greatest deference of the other branches. Yet a bright thread runs through the court's selective judicial activism: Whether it is being active or passive, the court ultimately reaches the result supported by Meretz.

Immediately prior to the last elections, for instance, the Supreme Court enjoined the government from closing Orient House for violations of the Oslo Accords, even though the closure decision was an exercise of the executive branch's authority over foreign policy.

In a dangerous precedent, Justice Dalia Dorner speculated (probably correctly) on the government's political motivations. Imagine an American court ordering a halt to American bombing of Iraq on the grounds that the president was motivated by a desire to distract attention from the Monica Lewinsky scandal. In a democracy, the price for such shenanigans is exacted by voters at the polls, not by the courts acting as their guardians.

By contrast, when archaeologists petitioned the court in January to order the government to halt the destruction of precious archaeological sites on the Temple Mount by the Moslem Wakf, the court deferred completely to the government.

Justice Yitzhak Zamir admitted that the Wakf had violated Israel's planning and antiquities laws, but found that because of the political sensitivity of the Temple Mount, extra-legal factors had to be taken into account and the matter should be left to the government. Thus, when Binyamin Netanyahu was replaced by Prime Minister Ehud Barak, the court switched from activist to passive mode.

This past week, Zamir summarily rejected a petition seeking the courtmartial of a soldier who proudly told the national media how, out of ideological opposition to the army's presence in Lebanon, he had delayed entering a battle in which three of his officers were killed. Zamir lashed out at the petitioner's attorney for seeking the intervention of the court in a "military matter" and for running to "the court for every single thing."

The court, however, showed no such deference for internal army procedures in the Galili case, where the court blocked the promotion of a general who had already been punished by the army for an improper sexual relationship with a female soldier. Justice Tova Strassburg-Cohen felt no compunction about second guessing two chiefs of staffs and two defense ministers, and offering her own view that no officer could be that important to the army's fighting ability.

WHEN the petitioner is a wronged young woman the court turns activist and substitutes its judgment for that of the army, but when the petitioner is an army officer living in the West Bank, he is sent home after a tongue-lashing for trying to involve the court in matters beyond its competence The pattern that emerges from a comparison of these cases reveals an underlying ideological tilt to the court. No wonder the court's opinions so often read like op-eds devoid of traditional legal analysis.

Justice Ya'acov Kedmi's opinion, creating a right for teenage homosexuals to have their lifestyle celebrated on Educational TV was devoid of any legal citation. And Justice Dorit Beinisch's opinion in the recent "spanking decision" could have been entitled, "my philosophy of modern child-rearing." Even where the court cites traditional legal materials, the legal reasoning is a mere patina covering the ideological agenda. Thus in overruling the parole board's decision to parole Yoram Skolnik, the Supreme Court made a retroactive end-run around the pardon power of the president, who had twice commuted parts of Skolnik's sentence.

To do so, Justice Aharon Barak concocted an argument that Skolnik remains an ongoing danger to society based on nothing more than Skolnik's continued adherence to a nationalist-religious ideology. The court brushed aside the General Security Service's finding that the danger of Skolnik's release would be "nearly zero." The court thus gave macabre confirmation to Skolnik's pre-hearing quip that his only chance would be to remove his kippa and join Peace Now.

The court wore an even flimsier legal fig leaf when it ordered the government to allow women's prayer services at the Western Wall involving the wearing of tallitot and the public reading of the Torah. With Orwellian flourish, the court unblushingly declared such services "traditional" within the meaning of the governing administrative regulations.

According to the court's reading of "traditional," egalitarian minyanim and Jews for Hare Krishna will also inevitably find their place at the Kotel. And all in the name of tradition.

A constitutional court on the model of many European countries would be infinitely preferable to the current situation in which justices, largely selected by the court president, and representing a very tiny slice of society, impose their values on the society. Justices of constitutional courts are typically selected through the political process and represent a broad cross-section of society.

In many European countries, the justices of constitutional courts need not even be lawyers, since, as in Israel, so little of what they do involves interpretation of traditional legal texts. If courts are going to willy-nilly substitute their policy judgments for those of the executive branch, far better that the justices be drawn from many disciplines and represent a broad cross-section of society.

In addition, a broadly representative constitutional court would be much more suited to ruling on such value issues as the status of the Wall. No longer would the form of worship at the Wall be determined by justices who empathize more easily with the feelings of Moslem worshipers on the Temple Mount (whom they protect from the Temple Mount Faithful) than with those of the vast majority of Jewish worshipers at the Wall. Never having prayed at the Wall or even knowing many people who do so regularly, they cannot grasp the sensitivities of Jewish worshipers.

A constitutional court's great advantage is that it is overtly political, and would at least allow us to call a spade a spade without pretense.

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The 'unreasonable' Supreme Court

DAVID WEINBERG

I'm a reasonable guy, but I'm just about fed up with our Supreme Court.

It has gone beyond the limits of "reasonable" intervention in Israeli political and public life with its ever-expanding scope of super-subjective decision-making.

In normal democratic societies, you see, they have elected parliaments which set legal norms, based on society's limits of acceptable or reasonable behavior and the communal values that lie behind them. Not so in Israel. We have Court President Aharon Barak.

Justice Barak's Supreme Court has effectively stripped Israeli law of any inherent meaning and created complete legal mayhem. There are no truths, no absolute values, no clear-cut legal precedents. Past legal experience is no guide; political decisions have no intrinsic validity.

Everything is subject to the reproach of the Supreme Court; to the subjective whims, personal prejudices and individual inclinations of Justice Barak and his enlightened colleagues.

Indeed, "balance of interests" and "the boundaries of reasonableness" are the mumbo-jumbo, elastic, infinitely pliant terms that run like a computer virus through the High Court's decisions over the past decade.

"Reasonability" is authoritarian jargon which allows our Supreme Court justices, especially when sitting as the High Court of Justice to substitute their own sensibilities for the law or for government decision-making. The power to set the "boundaries of reasonability" which the court has arrogated to itself, essentially empowers Barak, in his own words, to "socially re-engineer" Israeli society. In his "enlightened" image, of course.

In recent years, Barak's High Court has ruled that it "unreasonable" of the government to order the closing of Orient House, despite the affront to our sovereignty in Jerusalem occasioned by its operation and despite the PA's violation of agreements in this regard. The court ruled it "unreasonable" to compromise and close Rehov Bar-Ilan in Jerusalem for several hours on Shabbat, despite the fact that a public committee of prominent religious and secular Jews – far more representative of Israeli society than the Supreme Court! – had found otherwise.

Justice Barak will decide what is reasonable

It was unreasonable of the Prisons Service's parole board and the president of Israel to shorten the sentence of Yoram Skolnik, a Jew who murdered an Arab. "I suspect political motivation here," Barak outrageously wrote in his judgement.

Barak, of course, has ruled it perfectly reasonable to free Arab murderers, on more than one occasion, as part of our Oslo deals with the PA. No suspect "political motivation" there, I guess.

It is unreasonable to spank kids, the court has ruled, or to uphold standards of uniformity on monument inscriptions in military cemeteries.

When there were 8,000 or 10,000 haredi men getting draft deferments the court ruled this reasonable, several times. But when the number grew to 12,000 or more this became "unreasonable" and was ruled illegal.

It is reasonable to allow the Women of the Wall to pray in a manner offensive to most worshipers at the Western Wall, despite the disturbance involved and the massive police presence require to make this feasible. On the other hand, the demand of religious Jews to pray on the Temple Mount is unreasonable because this would disturb the Arabs and require a massive police presence. Get it?

It was unreasonable to give distinguished editor Shmuel Schnizter the Israel Prize because of one offensive column he wrote over the course of a sterling 30-year career in journalism. But it was reasonable to give Shulamit Aloni the Israel Prize for public service, despite a 30-year career focused on attacking and offending the religious public.

WHAT'S next? Well, was the government decision to pull out of Lebanon a "reasonable" decision, given the risks and costs involved? Would a decision by the prime minister and IDF chief of General Staff to dismantle West Bank settlements be a "reasonable" decision, given the penalty incurred to people living there? How about a cabinet decision to cut off relations with the United States? Would that be "reasonable?"

Justice Barak will decide.

There are no limits, at present, to Barak's ability to intervene in all these matters as he sees fit. Everything is judiciable (a Barak innovation) and everything is subject to Barak's personal Richter scale of propriety.

Israeli political and legal life thus has become completely unpredictable, because what is right and what is wrong depends on Aharon Barak's personality. As the recent Katzir decision shows, Barak feels perfectly fine about changing his mind or mood or conscience every once in a while, and concomitantly reordering – in a flash – significant tracts and principles of Israeli law or national policy.

I think that it would be reasonable for the Knesset to legislate limits on the High Court's reach. Don't you?

JERUSALEM POST
25 JUNE 2000
page 6

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Inconsistent justice

Jonathan Rosenblum

I was fortunately exposed in my impetuous youth to the Yale Legal Realists. This school taught that judicial opinions can best be understood in light of the judge's educational and class background – "What the judge ate for breakfast," in the words of the Realists' critics – rather than by recourse to neutral legal principles. I say fortunately, for without the Realists' insights much of the work of the Israeli Supreme Court is unintelligible.

Two cases dealing with the proper balance between free speech and public order decided at the end of November provide grist for the Realists' mill.

In the first case, Justice Theodore Or, writing for the court, overturned the conviction of Israeli Arab journalist Mohammed Jabarin for having written at the height of the first intifada: "When I throw a Molotov cocktail, I feel I have found my identity and that I am defending that identity. I feel that I am someone worthy of living an honorable life."

That same day, the court reversed its own previous decision acquitting Binyamin Kahane for distributing a poster that asked: "Why, when three Arabs from Umm el-Fahm slaughtered three soldiers, did the government bomb Hizbullah in Lebanon instead of the viper's nest in Umm el-Fahm?" Justice Or again wrote the opinion of the court.

A comparison of the two statements shows that Jabarin's posed a much more immediate threat to public order. A celebration of violence as a way to find one's identity at the height of the intifada was sure to find a responsive audience among his readers. Kahane's statement, by contrast, explicitly called for government, not individual, action and was assured of falling on deaf ears.

More important, the statute under which Jabarin was charged provides much clearer guidelines for what constitutes free speech than does the statute under which Kahane was charged. Jabarin was charged with "publicizing words of identification with or praise for acts of violence capable of causing death or injury to a person."

Kahane, on the other hand, was charged with "arous[ing] strife and hatred between different groups of the population." The breadth of this statutory language could refer to half the political discourse in Israel. It leaves citizens with no way of knowing what is proscribed and prosecutors with vast discretionary latitude in determining what speech to prosecute. In traditional free-speech analysis, the statute, on its face, has a "chilling effect" on the exercise of free speech.

Despite the fact that the threat to free speech was greater in Kahane's than in Jabarin's case and the danger to public order less, the court ruled against Kahane and for Jabarin.

The court's understanding of free speech is almost entirely determined by the identity of the speaker and the target of the offensive speech

JUSTICE Or employed a diametrically opposed methodology in the two cases. In Jabarin's, he reread the plain language of the statute to refer exclusively to "praise for acts of violence" by terrorist organizations. In doing so, he relied on the history surrounding the enactment of the statute.Or also relied on adjacent paragraphs in the statute that refer explicitly to terrorist organizations.

Such narrow statutory readings are common in free-speech cases, but even Or had to admit that his was a substantial stretch given the clear language of the statute, which referred to praise for certain actions, not to praise for particular perpetrators. Even if the statutory purpose was to combat terrorist organizations, the logical means of doing so is to prohibit praise for the types of actions typically perpetrated by terrorist organizations, and not to require specific reference to the organizations themselves. That is especially true in a situation, like the intifada, where both individuals and well-organized terrorist groups are engaged in identical actions.

In contrast to the forced and narrow reading of the statute in Jabarin's case, Or gave an extremely expansive reading of the statute in Kahane's, without finding any free-speech infirmity. He did not require, for instance, the traditional showing that the statements in question constituted "a clear and present danger" of leading to violence. It was sufficient that the statement in question could, in conjunction with other such statements, lead to a climate of hatred.

The court did not read the statute in light of the adjacent provisions that explicitly referred to actions undermining the stability of the established government alone, even though the statutory title referred explicitly to "rebellion," i.e., attacks on the government. Or also ignored the statute's history indicating that the statute was aimed solely at threats to the governing authority.

Faced with such judicial inconsistency, we are forced to fall back on the Legal Realists and to conclude that the court's understanding of free speech is almost entirely determined by the identity of the speaker and the target of the offensive speech.

For instance, no Jew or Arab has been, or ever will be, charged with statements arousing hatred towards religious Jews. Professor Uzi Ornan was not charged for advocating that haredim be "hung from lampposts [and] sentenced to death"; or Am Hofshi's Ornan Yekutieli for suggesting, "We should go into Mea She'arim with army vehicles and exterminate them"; or Yonatan Geffen for calling for an "intifada" against the haredim.

Tatiana Susskind was sentenced to two years in jail for an offensive caricature insulting to Islam, but I cannot think of a single instance of a Jew or Arab charged for the most offensive statements about traditional Judaism.

The court's decisions in the Jabarin and Kahane cases are best viewed as part of a judicial policy designed to show Israeli Arabs that they are more than equal and extremist Jews less than equal.

Free speech that depends on who is speaking and who is attacked is no free speech at all.

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