

FREE EXPRESSION AND THE LIMITS OF LIBERAL TOLERANCE

*Yossi Nehushtan**

Book review: Raphael Cohen-Almagor / *The Scope of Tolerance: Studies on the Costs of Free Expression and Freedom of the Press* (2006, Routledge) 264pp, not including index.

I. Introduction

This book discusses a familiar yet still troubling question. The question is, put simply, to what extent can and does a Western liberal-democracy defend itself against threats to its basic rationales, and indeed its existence, and still be considered a democracy?

As to threats to the rationales of democracy, Raphael Cohen-Almagor discusses the right to privacy and the limits of offensive speech, hate speech, and incitement. In regard to threats to the very existence of the democratic state, Cohen-Almagor discusses the role of the media in its coverage of terrorism. A discussion about the scope of tolerance and its moral reasoning, in the first chapter of the book, sets the conceptual and principled basis for all of the above.

Scholars often differentiate between old or stable democracies and new or unsteady ones when they evaluate the (undemocratic) means democracies may take in order to defend democracy itself. This distinction is meant to justify the differences in the manner democracies should treat anti-democratic threats. Cohen-Almagor does not limit himself to this distinction and rightly submits that “democracy in its modern,

* Lecturer in Law, Balliol College, University of Oxford.

Thanks are due to Barak Medina for his helpful comments on an earlier draft of this paper. I had the pleasure of reading Cohen-Almagor’s detailed and interesting response to this paper and I thank him for taking the time to reply to my review. I chose, however, neither to revise my review in light of his comments nor to directly reply to them, as it is only appropriate to allow the author of the reviewed book to have the last say.

liberal formation is a young phenomenon” and as such democracy “is uncertain with regard to the appropriate means to be utilized in order to fight down explicit antidemocratic and illiberal practices.”¹

This is not to say that old and stable democracies should respond to threats in the same way new and unsteady ones do, but to emphasize the difficulty that exists within every modern democracy to find the right balance between defending human rights and limiting them for the sake of the stability and continuity of the human rights regime itself. I suspect that all too often setting the wrong balance may be equally undesirable whether the diversion from the right balance is towards over protection of human rights or under protection of them. It is wrong to assume that it is always better to grant over protection to human rights than to allow others to harm them more than necessary. I suspect that various and changeable circumstances may lead to different answers in different cases. Therefore, formulating a general presumption in this context is implausible or at least undesirable.

Although Cohen-Almagor does not express this view, at least not explicitly, many of his arguments, as will be discussed shortly, can easily be used to support it.

This book offers a genuine commitment to liberalism without ignoring the vital fact that rights can be costly and therefore someone must be willing to pay for them. As a result the state should always weigh the reasons for protecting rights as well as the reasons for limiting rights and strike an appropriate balance between the two. From the theoretical point of view, these conclusions might be seen as too obvious. The importance of this book lies in taking the general need for balancing and implementing it in a principled, well argued, and detailed manner while exploring specific issues and test cases. Cohen-Almagor’s clear discussion fills the crucial theoretical and practical need to deal with the exceptions to the generally desirable liberal rules—exceptions that are actually based on the rationales of these rules themselves.

The book is part of a series of eight books about extremism and democracy. In the series editors’ preface to the book, examples are provided of extremism in the west and worldwide that put to question the common presumption of “universal victory of democracy.” These examples include: the extreme right, anti-globalization groups, green groups, animal rights groups, communist groups, and Islamic fundamentalism.²

¹ THE SCOPE OF TOLERANCE: STUDIES ON THE COSTS OF FREE EXPRESSION AND FREEDOM OF THE PRESS (2006) 2.

² *Id.* see the Series editors’ preface, at x-xi.

Notwithstanding the questionable decision to include all the above in one list, there is much justification to the claim that democracy has not achieved a universal victory. Moreover, democracy, perhaps more than any other political manner of governing, own characteristics and virtues that possess the same elements that can easily and quite rapidly be used by its enemies to destroy or distort it.

This is why this book, its subject, and the thesis it promotes are both relevant and important to whoever is worried about contemporary challenges to democracy. Too many liberal scholars and democratic governments are confused in the face of internal and external threats to the modern liberal democracy. Too many liberal scholars continue to praise human rights and to hold a naïve view about human nature and about the strength and stability of an overall secular, rational, human rights regime, at the expense of taking unreasonable risks to the public interest and to the safety and welfare of individuals and groups in the democratic state. Too many democratic states, on the other hand, are quick to abandon basic commitments to basic human rights because of real, imaginary, or exaggerated threats to its safety. Cohen-Almagor manages to offer a third way that by-and-large strikes a more desirable balance between the aspiration of the liberal-democracy to respect rights and the need of that democracy to protect its nature and existence— by limiting the very same rights.

I will refer to some of Cohen-Almagor's general theoretical arguments and to some of the more specific issues and examples he puts forward. Although I disagree with many of his general claims as well as with his more specific conclusions or suggestions, I will also try, throughout the following discussion, to evaluate the resemblance between the nature of my principled comments and Cohen-Almagor's thesis.

II. *About the Concept of Tolerance*

As I see it, this book is actually about the limits of tolerance. Therefore an account of tolerance is called for as a conceptual basis for the following discussion.³ It will

³ Parts of my comments to Cohen-Almagor's perception of tolerance and its limits are based on my account of these issues as was elaborated in Yossi Nehushtan, *The Limit of Tolerance: A Substantive-Liberal Perspective* RATIO JURIS (forthcoming 2007). Apart from mentioning this reference I will refrain from referring the reader to specific pages in that paper that deal in great detail with some of the issues that would be discussed hereinafter.

be quite meaningless to endorse Cohen-Almagor's view about the limits of tolerance and about the proper response to intolerant, illiberal, and undemocratic views or acts, without agreeing first to his perception of tolerance. This perception sets the criteria for defining the tolerant person as well as the intolerant one and as such it is of great importance for most of the following arguments in this book.

Cohen-Almagor rightly differentiates between tolerance and apathy or indifference. This is a point worth mentioning as this important distinction is still too widely ignored. He then continues to argue that tolerance is composed of three main components: "(1) a strong disapproving attitude toward a certain conduct, action or speech; (2) power or authority to curtail the disturbing conduct; and (3) moral overriding principles which may sway the doer not to exert his or her power or authority to curtail the said conduct."⁴

I find this description of tolerance too narrow in each of its three components. The need not to describe a concept too broadly at the cost of leaving peripheral cases outside its scope is well acknowledged. However, I suspect that Cohen-Almagor's description of the concept of tolerance excludes central cases that are important to any discussion about it and moreover—quite relevant to the topic of his book.

As to the first component ("a strong disapproving attitude toward a certain conduct, action or speech") Cohen-Almagor ignores what is sometimes called "personal-based tolerance" that is tolerance (or intolerance) of persons not because of their views or way of life but because of who they are or how they look, e.g., because of their color of skin, ethnic origins, physical appearance, sexual orientation—although it can be perceived as a mixture of both personal identity and a way of life—and the like). In other words, Cohen-Almagor's description of tolerance ignores the fact that one can tolerate or not tolerate others not just because of their acts, speech, values, ways of life and so on, but also because of their identity. Note that the fact that the latter is a personal-based (in)tolerance does not mean, of course, that this specific attitude could not be held by public institutions, political ones, and indeed by the state itself. Thus, personal-based tolerance that Cohen-Almagor excludes from the scope of tolerance as he perceives it is actually of great importance to any discussion about political tolerance, which is the main issue this book deals with.

As to the second component of tolerance ("power or authority to curtail the disturbing conduct"), I am afraid that neither power nor authority is required for

⁴ COHEN-ALMAGOR, *supra* note 1, at 26-27.

identifying one as tolerant or intolerant. The requirement of power ignores—but then all other descriptions of tolerance that I know of do—the possibility of the powerless to tolerate and indeed not to tolerate the powerful.

In my view, tolerance is the attitude of the person who is superior in his own eyes, even if, in spite of his superiority, he is powerless. The powerless superior's attitude is that of tolerance whether he holds the notion of tolerance as a right, i.e., he would tolerate were he to have the power, or whether he wishes to harm the powerful but is not able to do so for pragmatic reasons (i.e., lack of power). The powerless can also be intolerant towards the powerful by condemning or avoiding them. If the reason for the avoidance is the self-observation of the powerless as superior and if the avoidance intends to harm or offend individuals who are not part of the powerless group, then this attitude can be viewed as an intolerant one.

Cohen-Almagor's alternative demand is for the tolerant person or institution to have authority (rather than power) to curtail the disturbing act or speech in order to be considered tolerant.⁵ My view however is that having authority is irrelevant to the concept of tolerance. Having (legitimate) authority has to do with the justification or the legitimacy of one's tolerance or intolerance. It has nothing to do with the existence of tolerance, with the ability not to tolerate, with the attitude of the tolerator, or with the meaning of the concept. In other words, one can tolerate or not tolerate the other regardless of him having any authority over the other. Lack of authority may result in a conclusion that the intolerant attitude or behavior is unjustifiable, illegitimate, and sometimes illegal, but this is a completely different issue.

As to the third and last component of tolerance ("having moral overriding principles which may sway the doer not to exert his or her power or authority to curtail the conduct") I tend to the view that the overriding principles should not necessarily be moral ones in order for the person to be tolerant.

⁵ Here, and only for the purpose of this paper, I distinguish between having authority and having power, though there is no indication to such a distinction in Cohen-Almagor's discussion. According to this distinction "a person has authority either if he is regarded by others as having authority or if he should be so regarded": JOSEPH RAZ *PRACTICAL REASONS AND NORMS* 62-63 (2nd ed.1999). To regard a person as having authority is to regard at least some of his orders or advice as exclusionary reasons or, to put it differently, to regard some of his utterances as authoritative even if wrong on the balance of first order reasons (RAZ, *id.* at 64-65). Having power, on the other hand, is merely having the ability to coerce or to enforce one's will by physical means or by threat.

Cohen-Almagor argues, “acts of tolerance, carried out solely on prudential grounds, are not to be considered as tolerance in the genuine sense of the word as understood here. Only those people who tolerate others out of respect are conceived as tolerant beings.”⁶ He adds: “the overriding considerations that are applied by the tolerators should be directly connected to the phenomena that outrage them. Actors can be said to behave in a tolerant fashion only when they apply moral considerations....”⁷

Cohen-Almagor does not specify what these moral considerations might be, but from reading the first quotation above alongside further relevant discussion in his book, we can conclude that these considerations are actually of one kind, namely respecting the other. According to Cohen-Almagor’s view, if I understand it correctly, any reason or motive to put up with the other that does not include respecting him as a person falls outside the scope of tolerance.

Thus, Cohen-Almagor excludes pragmatic or prudential tolerance from the scope of tolerance. By insisting on having moral principles or reasons as opposed to any reason whatsoever as overriding reasons for tolerance, Cohen-Almagor ignores numerous important cases of political tolerance that are highly relevant to his discussion. If by “moral reasons” Cohen-Almagor refers only to cases in which one has a right to be tolerated, or to cases where one is being tolerated out of respect for his autonomy or personhood (as opposed to respecting his views), then he excludes the following reasons (or motives) for tolerance: believing that persecution is too expensive; not having enough power to succeed in the persecution; predicting that the harm to society as a whole, as a result of the persecution, will override the harm caused by the (intolerable) other; acknowledging the fact that recognizing the state’s power not to tolerate will lead to its misuse; that coercion is not effective in changing intolerable values or beliefs; that by tolerating today’s minority one increases the possibility of being tolerated if one finds oneself as tomorrow’s minority, and so forth.

I would prefer to classify all of the above as a special kind of tolerance, i.e. a pragmatic, prudential one, and not to exclude it from the scope of the concept or to argue that it does not reflect genuine tolerance.

One example which relies on a similar illustration Cohen-Almagor uses in a different context clarifies this point: a white academic participates in a conference

⁶ COHEN-ALMAGOR, *supra* note 1, at 8.

⁷ *Id.* at 28.

where the first speaker makes insulting racist remarks towards all white people as such. As it happens, the white academic is the following speaker. Assume that the white academic decides to put up with his colleague's racist remarks. He could do that for various reasons, e.g. being a junior scholar or because of personal characteristics he does not want to confront the racist academic or even to condemn his speech; he might fear that any intolerant response to the racist remarks would result in an intolerant response to his own speech regardless its content; he may wish for the racist remarks not to become the issue of the conference thus preferring to undermine its impact by ignoring it and so on. None of these reasons are moral reasons as Cohen-Almagor perceives them. They are all prudential or pragmatic reasons. Nevertheless I do believe they can form the basis of a tolerant behavior and attitude. It is a different kind of tolerance than the moral-reasons based one, but just as genuine.

To take another example, Cohen-Almagor describes the case of allocating a meeting room in a public library to a group of racist extremists and providing security and policing for the event at the expense of public funds. Cohen-Almagor describes these acts as acts of tolerance since they result from respect for persons regardless how much we disapprove of their opinions. Now, let us assume that the authorities have no respect either for the racists' views or for the racists themselves—as racist persons (and rightly so), thus the authorities allow them to express themselves only because they presume that this is the best way to increase awareness of racism and in the long run to succeed in fighting and abolishing racist views. Would Cohen-Almagor see these considerations as moral ones? On the one hand, they are directly connected to the phenomena that the authorities disapprove, yet on the other hand they have nothing to do with respecting the other but with egoistic motives and a consequentialist point of view that Cohen-Almagor rejects. If I understand Cohen-Almagor's perception of "moral considerations" correctly, I suspect he would refrain from describing the latter case as an example of tolerance and if that is true, and as I have already noted, it appears that he adopts a too narrow perception of the concept.

One final remark is left as to Cohen-Almagor's demand for having only moral reasons as overriding reasons not to harm or offend the other. Cohen-Almagor dedicates most of his book to different issues of freedom of speech in the context of tolerance. However, of the three classic rationales of freedom of speech only one qualifies as a moral reason if we follow Cohen-Almagor's view. Only the personal autonomy or the self-fulfilment rationale is to be considered, according to Cohen-Almagor, as a moral reason to tolerate what we perceive as an offending, subversive

or harmful speech. The second classic rationale, i.e. the democratic one does not have to entail respect for the speaker. The third classic rationale, i.e. the one describing the market place of ideas (in which truth prevails) has nothing, or very little to do with respecting the personality of the speaker, and surely not his views. These rationales have to do with “stability, tranquillity and any other desire value,”⁸ all of which are not moral considerations and cannot form the basis for true tolerance according to Cohen-Almagor.

This, of course, raises many problems. Suffice to note, that freedom of speech was always perceived as a paradigm case of tolerance, that Cohen-Almagor himself sees it as such, and that it is highly unlikely that freedom of speech was and still is perceived as a central example for tolerance based only on one of its three classic rationales, especially when this rationale does not underlie the importance of free speech on each and every case.

To conclude, it seems to me that the essential criteria for seeing an attitude as a tolerant one is the existence of a negative judgment of the other or the other’s acts or speech; having that reason as a reason to harm or offend the other or to curtail his act or speech, and avoiding doing so because of any kind of overriding reasons. The existence of a burden that the tolerant person carries is, in my opinion, the central element of the concept of tolerance. The answer to the question of why the tolerant person chooses (if he has a choice) to carry that burden helps us to distinguish between various kinds of tolerance, all of which are equally genuine.

III. Tolerance and Intolerance: Two Ends of a Scale or a Rigid Dichotomy

As part of his interesting and helpful discussion about various forms of latent and manifest tolerance,⁹ on which I have no comment, Cohen-Almagor gives the example of walking out in protest as a reaction to an intolerable expression and wonders whether it can still be considered as an act of tolerance. He then concludes more generally that a liberal society should allow the pursuit of almost every concept and value, “but no requirement says that every view should be allowed to gain institutional

⁸ *Id.* at 33.

⁹ *Id.* at 29-33.

legitimization.”¹⁰ He adds that “this attitude shows a *qualified* tolerance, for it denies the right to equal respect.”¹¹

On the whole these conclusions seem quite sound. All I wish to point out is that Cohen-Almagor’s examples and conclusions lead us to a general and important observation according to which most people, most of the time, are not simply tolerant or intolerant but rather tolerant *and* intolerant towards the same phenomenon at the same time and to various degrees. Cohen-Almagor’s discussion leads to this conclusion and supports it but only indirectly. It is not said explicitly. Nevertheless it is highly important, both from a conceptual and a practical point of view, to acknowledge the falsity of the plain dichotomy of tolerance versus intolerance and thus to realize that one single act or omission can be tolerant and intolerant in various degrees at the same time.

If we come back to Cohen-Almagor’s question of whether walking out in protest is or is not an act of tolerance, the answer will be that it is both. It is an act of intolerance since it intends to send a negative message to the speaker because of the content of his speech. It is an act of tolerance to some extent—as the one who chooses to walk out refrains from taking harsher measures regarding the speech or the speaker—although he might have good reasons to take these measures—and because of what could be but does not have to be overriding moral reasons.

IV. *The Limits of Tolerance and the Democratic Process*

Cohen-Almagor is right in his observation that generally speaking, liberals prefer to speak of the general rules—liberty, tolerance, rights, equality, truth, justice, and so on. They feel less comfortable addressing the issue of exceptions.¹² However, the liberal and indeed the democratic project, not to say vision, will never be complete and will not be able to defend itself in a just and effective way without a clear and reasoned account of the limits of its general rules and principles. A great part of this task finds expression in one of the most basic questions of political philosophy: What are the limits of tolerance and more specifically, what is the proper response to intolerance.

¹⁰ *Id.* at 31.

¹¹ *Id.* at 31.

¹² *Id.* at 22 & 26 he provides interesting reasons for this phenomenon which I will not repeat here.

At the beginning of the introduction to his book, Cohen-Almagor uses the following quotation from Karl Popper's *The Open Society and its Enemies*: "Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them."¹³

The first part of Popper's statement is trivial. Few, if any, would argue for a general principle of unlimited tolerance. All agree that tolerance has to have its limits and the only and everlasting argument is about the nature of those limits. The second part however is more meaningful. Here Popper refers to the special case of tolerating—or not tolerating—the intolerant. No doubt unlimited tolerance towards the intolerant will result in the loss of tolerance and the victory of intolerance. Therefore, following Popper's argument, unlimited tolerance is specifically undesirable towards the intolerant, but this is not all Popper was arguing for. His full argument was that:

We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.¹⁴

Popper's view could be that there are cases where intolerance should not be tolerated—for the sake of tolerance itself. But Popper's view—or at least the logic of his argument—could also be interpreted in a broader manner, namely that intolerance should not be tolerated at all times—for the sake of tolerance itself.

Recently I have argued for the latter and I will refrain from elaborating my arguments here.¹⁵ Cohen-Almagor's view in this matter is not always clear. On the one hand, he does put forward a general principle according to which "it is contradictory to expect democracy to assist those who work against it and who wish

¹³ *Id.* at 1.

¹⁴ KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 265 (1945). This quotation is not mentioned in Cohen-Almagor's book.

¹⁵ See Nehushtan, *supra* note 4. .

to undermine its basic rights.”¹⁶ On the other hand, in many places in his book one can find arguments and conclusions that support the view that there is no place for a general principle of not tolerating the intolerant. To put it differently, major parts of this book explore the question of when is the state permitted not to tolerate intolerant, illiberal, or anti-democratic threats; yet there is no clear and principled discussion as to when the state is under a moral or a legal duty not to tolerate these kinds of threats or simply behavior.

Cohen-Almagor’s discussion about violent political parties exemplifies my doubts as to whether he holds the view that intolerance should never be tolerated.

Cohen-Almagor argues that: “as a matter of moral principle, violent parties who act to destroy democracy or the state should not be allowed to run for parliament.”¹⁷ With that, he differs from other philosophers who concentrate on the magnitude of the threat as a reason to deny political participation.

At that point I found myself wondering whether Cohen-Almagor would reach the same conclusion regarding racist parties, theistic ones, ones that promote granting excessive powers, even legislative ones, to a sole ruler and so on, all of which do not have to preach violence and do not have to turn to violent means to gain political and popular support.

Indeed, throughout the book Cohen-Almagor adopts a moral, principled line of argument (rather than a consequentialist one). But when Cohen-Almagor argues that as a matter of principle, a democratic parliament has no place for those who wish to destroy the parliament or the state by violent means, a further reason is missing. The reader expects a clear explanation as to why it is a matter of principle, or more specifically, why, of all possible variants of extremist, anti-democratic and anti-human rights political parties, only violent political ones are to be excluded from the political process as a matter of principle. Is it only because they preach violence? Should we look for a special kind or degree of violence? Why should a violent party with minor support and with no prospects to apply its political platform be banned as a matter of principle whereas a theocratic, anti-human rights party that wishes to apply its political platform through the democratic process and by gaining popular support, and has good likelihood to do so, should not? Surely the “democratic catch” that Cohen-Almagor constantly refers to, applies in a similar manner in both cases.

¹⁶ COHEN-ALMAGOR, *supra* note 1, at 113.

¹⁷ *Id.* at 24.

For the sake of accuracy I must admit that when Cohen-Almagor refers to violent political parties he does bring forward one good principled argument, that of reciprocity:

Undoubtedly these movements do not accept the basic principles that underlie every democratic society, i.e., the principles of respect for others and not harming others. Those who betray these principles should not enjoy the capacity to use them in the name of liberal tolerance and freedom to undermine the legal basis of democracy.¹⁸

However, this line of reasoning, which is highly convincing in my view, should have led Cohen-Almagor to a broader conclusion as to the limits of tolerance in the political process, i.e., to support excluding not just violent political parties from the democratic process but any other party whose political platform undermines the legal and moral basis of democracy, regardless of the means it is planning to take in order to achieve its ends and of the prospects it has to succeed in reaching these ends.

V. The Limits of Offensive Speech

Cohen-Almagor's view is that the "offense to sensibilities" argument should take precedence over free expression "only in cases where severe and direct damage is inflicted upon the emotional system of individuals or a target group under circumstances in which the individuals or target group cannot avoid being subject to the offensive expression. Psychologists should be consulted to assess the severity of the offense."¹⁹ He also argues that the expression should be designed to cause severe psychological offense²⁰ (although in another place the requirement for having an intention to offend is omitted).²¹ Finally, it should be noted that Cohen-Almagor talks about "irreversible offense to the sensibilities of a person," about a "devastating and irreversible" one,

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 10 & *see also* 77.

²⁰ *Id.* at 107.

²¹ *Id.* at 118.

and about offense “so severe that it could be considered morally on a par with physical harm.” All are contrasted with speech that causes what he calls “mere discomfort.”²²

At this point I could not but wonder whether there is room for a third category of offense to sensibilities which causes more than mere discomfort yet not causing devastating and irreversible harm that could be considered morally on a par with physical harm. One may think that this missing category contains the most difficult cases as presumably many would agree that on the whole offensive speech that causes mere discomfort should not be curtailed and that offensive speech that causes severe and irreversible harm of damage should (at least in some special cases).

There are indeed scholars who think that speech that offends sensibilities should never, or almost never, be restricted and that Cohen-Almagor’s suggestions, or similar ones, would put freedom of speech in danger. I, on the other hand, think that Cohen-Almagor did not go far enough. I hold the view that there are non-peripheral cases where offensive speech should be excluded from the protection of freedom of speech, even when the damage it causes is not severe, irreversible and morally equivalent to physical harm, yet it is greater than mere discomfort. Such cases are, for example, where the speech relies on highly immoral values (e.g. racist ones), is highly offensive by its nature or context and when its obvious intention is to offend others.

Cohen-Almagor admits that speech can do harm, sometimes no less than an act causing physical harm.²³ Still, he submits that free speech should be prohibited in only exceptional cases. More specifically, Cohen-Almagor sets forth the following criteria for limiting offensive speech: the content of the expression; the manner of the expression; the intention of the speaker; and the circumstances in which the expression occurs. Of these four criteria, the first and last are the most important.²⁴

Cohen-Almagor’s test is a hybrid one. It contains neutral considerations (the last three) and a non-neutral one (the first). While the test includes the content of the expression there is nothing in the test that implies we should consider the content of the offended values. However, later on, and quite separately from the test as presented at the beginning of his discussion about offensive speech, Cohen-Almagor adds a more comprehensive, moral point of view that I find as highly important and desirable.

²² *Id.* at 79-81.

²³ *Id.* at 4, 79.

²⁴ *Id.* at 77.

Cohen-Almagor states that we must discriminate between different conceptions of good, that “some opinions do not coincide with the moral rationale at the base of liberal democracy,” and that “the Offense to Sensibilities Argument is designed to promote the values that underlie liberal democracy—respect for others and not harming others—rather than to assist those who wish to undermine them.”²⁵ Here he refers to the content of the values of the offended, a part that was missing from his initial test, and I could not agree more with this supplement.

Having said that, it is important to note that the examples that Cohen-Almagor chose to make his point about not defending sensibilities of those who hold appalling values, show, according to Cohen-Almagor himself, no more than an existence of mere discomfort to those who hold these values (to racists—by watching a white woman holding hands with a black man; to male misogynists—by having a girl shouting commands at them; and to a homophobe—by the mere suggestion of homosexuals as equals).

The problem is that Cohen-Almagor thinks that mere discomfort is not sufficient to limit offending speech at all times regardless of the views of the offended people; thus there is no point to add to the equation offended people who are offended because of their immoral and indefensible values. To make his point, which is, again, a very good one, Cohen-Almagor should have brought examples of cases in which people who hold immoral and indefensible values suffer (because they strongly hold these values) severe, devastating, and irreversible damage that may even harm their human dignity, and to argue that despite the offensive speech causes this harm, it should not be limited or punishable.

As a general rule examples are extremely important as they clarify the exact meaning of principled and general arguments. Fortunately, later on Cohen-Almagor does give a good and relevant example to his general argument by saying that:

Even if we assume that the people in [a certain place that it is populated only or mainly by racists] are indeed greatly offended by the ‘hurtful’ message evinced by civil rights marches and that the intensity of the offense does not fall short of that which the Arabs might feel upon encountering the [racist] message, we must still concede that democracy does not operate within a moral lacuna.²⁶

²⁵ *Id.* at 80.

²⁶ *Id.* at 113.

But again, this might be an easy case, at least in my view. I wonder what Cohen-Almagor would think about the following case. Cohen-Almagor justifies the religious outcry against a ballet show that was supposed to take place at the central celebration of the 50th Israeli Independence Day, in which the performers were supposed to act while parts of their body (not those parts that may be called “sexual parts”) are exposed.²⁷

Cohen-Almagor suggests that “the special historical circumstances of the occasions and the magnitude of the event... required special and sensitive consideration of all public sectors.”²⁸ Thus the performers should not have performed as planned, even if we assume that the expected offense to religious sensitivities was not as severe as Cohen-Almagor usually requires it to be. I hold a different view on the appropriate way to handle this case, but the question that interests me is what would have been Cohen-Almagor’s view had religious people objected to women singing in that event or to women performing in it. Let us make it an even harder case—let us assume that had women sung or performed in the event, the offense to religious sensitivities would have been devastating and severe.

Answers to these kinds of complicated and hard cases could have clarified a bit more how rigid Cohen-Almagor’s criteria for limiting offensive speech actually are or how often they allow exceptions to them. This is not to say that Cohen-Almagor’s discussion suffers from a lack of relevant examples. In fact, it is quite the opposite. This is only to say that even a detailed account of the limits of freedom of offensive speech as given by Cohen-Almagor leaves us truly wondering about his expected answers to boarder line cases. This is, of course, an inherent drawback of any sophisticated view of freedom of expression and thus cannot be seen as a drawback in his theory and reasoning in any way.

In his discussion about the limits that should be put on offensive speech Cohen-Almagor shows great importance to the question of the existence of a captive audience.

I have strong doubts as to the necessity of the captive audience criteria in all cases. The lack of a reasonable option to avoid exposure to an offensive speech might help in deciding the limits of that speech. But should it be a necessary condition? Should not we at least consider limiting offensive speech even if the target group can avoid being

²⁷ For some reason Cohen-Almagor describes it as “indecent exposure of their bodies,” a description that is, in my view, highly controversial. See COHEN-ALMAGOR, *supra* note 1, at 121-122.

²⁸ *Id.* at 122.

exposed to it while suffering minimal or almost no costs? This might be the case where the speech is highly offensive by its nature, content and context; where there is an intention to offend; where it contributes to creating a hostile atmosphere towards the target group by influencing other people's attitudes; and when it is expressed in the public sphere in such circumstances where not limiting it can be fairly interpreted as legitimizing its content or the offense it causes (a comment supporting the latter consideration was given to Cohen-Almagor by Jack Pole).²⁹

It seems that Cohen-Almagor does perceive the captive audience criteria as a necessary one for limiting offensive speech but his response to Pole's (and my) doubts as to its necessity is not satisfactory. All Cohen-Almagor argues for is that even if we know that a certain speech might offend some people it is still not a sufficient argument to prohibit that speech.³⁰ No doubt this is true, but neither Pole nor I think that the speech being offensive should be a sufficient reason for limiting it. Speaking for myself, all I am arguing for is that the fact that people can easily avoid direct exposure to an offending speech should not always exclude all reasons to prohibit that speech. We should look into other considerations, some of which I have mentioned above.

In that aspect, the example Cohen-Almagor uses to demonstrate the importance of the captive audience consideration might help to clarify my doubts as to the necessity of this consideration. Cohen-Almagor rightly argues that a Jewish, anti-Arab, racist group should not be allowed to advocate its racist messages within an Arab town in Israel. Some liberals, normally American or American-oriented ones might not agree with his view. I, on the other hand, see it as an easy case that surely justifies prohibiting the offensive speech. What might make it a harder case is taking the captive audience factor out of the equation. Assume that the Jewish racist group expresses its racist views in a Jewish town in Israel when no Israeli-Arabs are present. Should the speech now be allowed? I suspect Cohen-Almagor would think that it should. I, for general reasons regarding offensive speech that I have already mentioned, and for specific reasons regarding the uniqueness of the racist speech, think otherwise.

Cohen-Almagor does acknowledge the possibility of having exceptions to the necessity of the criteria of a captive audience. He argues, for example, that the Israeli Philharmonic Orchestra should avoid playing Wagner, a composer whose work is

²⁹ *Id.* at 118.

³⁰ *Id.* at 119.

identified with the Third Reich and who was adopted as its official composer. Cohen-Almagor reaches that conclusion regardless of the criteria of a captive audience because of the representative status the Israeli Philharmonic has, and because it is sponsored by public funds (it is not clear though whether Cohen-Almagor supports a legal prohibition on playing Wagner by the Israeli Philharmonic or is it merely a matter of ethics). Either way, acknowledging one exception to the necessity of the captive audience criteria opens the door to other exceptions. If this is true then a greater effort should be put in order to find their nature and justifications.

To conclude, the captive audience criterion has its importance. However, it should not mean that every time a captive audience is exposed to devastating and offensive speech, one that the damage its causes is morally equal to physical damage, the speech should be prohibited (e.g. when the offended group was offended because it holds immoral values). Accordingly, it should also not mean that in every case where there is no captive audience present, there are no overriding reasons for prohibiting the offensive speech (e.g. the Wagner case and extreme racist, offensive speeches in public places, perhaps even in some private ones).

One last comment regarding Cohen-Almagor's discussion about offensive speech, throughout the book, when Cohen-Almagor refers to racist or intolerant and anti-democratic groups and individuals, he discusses their "sensitivities,"³¹ their "values,"³² the "offense" caused to them (or even "so-called offenses"),³³ and so on—all originally in between inverted comma, as if these sensitivities, values and offenses are not genuine. Accordingly, he refers to expressions that offend the racist as "hurtful,"³⁴ again, in between inverted comma.

I suspect that as a matter of conceptual analysis, the inverted comma are uncalled for. This has nothing to do with style, of course, but with substance. A pro-democratic or pro-human rights speech can be truly hurtful to some, and to genuinely offend their sensitivities that rely on sincere and deeply held values, however immoral or merely illiberal. There is no principled or prudential reason to deny it. All we are saying, and by "we" I refer to perfectionist-liberals such as, I suspect, Cohen-Almagor himself, is that some values are not worthy of respect, therefore sensitivities that are truly

³¹ *Id.* at 114.

³² *Id.* at 113.

³³ *Id.* at 80.

³⁴ *Id.* at 113.

offended by a hurtful speech should not be protected if they rely on abhorrent values that run into the rationales of a liberal democracy. It is one thing not to respect some people's values. It is another thing to deny that they have values and that they have sensitivities that can be offended, even severely, by what we perceive as a legitimate and even desirable speech. There is no need for the latter in order to support the former.

VI. What is "Incitement" and why Should it be Prohibited

When trying to describe what incitement really means, Cohen-Almagor claims "those to whom incitement is addressed are being urged to perform some mischievous act now or in the immediate future... and the circumstances are such that might transform the speech into harmful action," whereas advocacy or teaching urge people "merely to believe in something."³⁵

I would add to this description another kind of speech that is a speech that urges people to perform harmful acts although not necessarily in the immediate future or not under circumstances that might transform the speech into harmful action.

Take for example the call "death to the Arabs" that every so often is heard from the crowd during football matches in Israel. This is more than merely offensive speech. I also find it hard to treat it as "teaching" or "advocating." Yet, it is also not incitement according to Cohen-Almagor's perception of the concept. If we use Cohen-Almagor's central test case, it does not incite to murder in the same way many people incited to the murder of Israeli Prime Minister Yitzhak Rabin in the months prior to his assassination.

My point is that incitement should include, as a starting point and in principle, almost every call to perform a harmful act, whether explicitly or implicitly, with no requirement for the act to be imminent and with no requirement for it to be under such circumstances that transform it from speech into a harmful act.

This perception of incitement acknowledges the significant and harmful influence

³⁵ *Id.* at 127.

it has as a speech that creates an atmosphere of incitement in the field related to its content and context.

Cohen-Almagor is indeed sympathetic to the argument about “the atmosphere of incitement,” and he is aware that it does not coincide with his perception of what incitement is, but he does not explain why his support in the “atmosphere of incitement” argument does not lead him to describe what incitement is in a different way.

Furthermore, I am not convinced that Cohen-Almagor chose the right example when he discusses the argument of the “atmosphere of incitement.” Cohen-Almagor focuses on the months prior to the assassination of PM Rabin and describes cases of stickers carrying the slogan “Rabin should be killed,” portraying Rabin wearing a black SS uniform, and cases of religious incitement to kill Rabin. Cohen-Almagor criticizes, and rightly so, both the media and the law enforcement authorities for mistreating these cases i.e. for not taking them seriously.

At the end of the discussion, Cohen-Almagor says the following: “Prime Minister Rabin’s assassination forced us to think harder than before about the limits of liberty and tolerance in our democracy.”³⁶ From this point he continues to draw two different conclusions. The first is that the legal authorities were mistaken in their lenient attitude to inciters. The second is that the security forces did not give ample consideration to existing threats which mentioned the likelihood of assassination. There is no doubt the latter is true and not only in retrospect. The former conclusion however is not as solid.

In different places in his book, Cohen-Almagor assumes a connection between the incitement to kill Rabin, expressed either explicitly or implicitly, and the assassination itself.³⁷ More specifically, Cohen-Almagor says that the environment created by the incitement directly moved the assassinator to take action.³⁸ Four points can be put forward in response.

First, Cohen-Almagor does not support this conclusion with actual evidence. The mere facts that the incitement to kill Rabin did exist and that the assassination did take place do not necessarily mean that the incitement directly or even indirectly led to the assassination. It might be the case that the assassination would have taken place

³⁶ *Id.* at 148.

³⁷ *C.f. id.* at 10 & 22.

³⁸ *Id.* at 22.

in the absence of prior incitement. Moreover, according to the assassinator himself, he would not have been able to put his plan into effect without religious-Rabbinical-authoritative approval. Apparently, having one or few authoritative permissions to act had more influence on him than the general atmosphere of incitement had (though obviously we cannot evaluate what the real influence of the incitement on him was).

Second, the difficulty to prove a direct or indirect connection between incitement to harmful acts and committing the acts themselves is insignificant. As Cohen-Almagor himself says, incitement to murder is not protected speech, and in my opinion so are “sophisticated,” indirect incitements to murder, supporting it, praising it and so on. Cohen-Almagor rightly suggests that as to incitement we can only assess the danger, but we are unable to know for sure when the harmful action might occur, and I would add—if it ever occurs.

In other words, incitement to harmful acts should not be protected both because it might increase the possibility for harmful acts to occur and because it creates an atmosphere of incitement that is harmful for itself regardless of the possibility that any harmful acts will occur as a result of it. If we come back to Rabin’s assassination, the various expressions of incitement prior to the assassination were wrongful on some occasions and illegal on others. Being wrongful or illegal expressions they were indeed mistreated by the authorities, yet these conclusions have nothing to do with the fact that eventually the assassination did take place.

Third, it can be argued that taking legal measures against ideological-political inciters will only increase the likelihood that wrongful acts will eventually take place. I do not have great sympathy for this line of argument for freedom of speech but I do think it was worth mentioning and needed direct confrontation.

Fourth, and perhaps less importantly, having in mind the connection Cohen-Almagor makes between the incitement and the assassination, and his appreciation of the “atmosphere to incitement” factor, it is surprising he does not discuss the political incitement against Rabin. By “political incitement” I refer to the incitement made by formal political organs and individuals. In the months prior to the assassination, political leaders and members of parliament attacked Rabin himself and the policies he promoted in a way that, in my opinion, has contributed to the “incitement to death/violence atmosphere” more than any other element prior to the assassination, apart from specific authoritative, religious commands or permissions in that context. If we ignore the issue of parliamentary privilege I do believe few examples of highly

intolerant political expressions and incitement prior to the assassination would have strengthened Cohen-Almagor's general argument about this subject.

VII. *A Word about the Role of the Media*

I have not said much about one of the main themes of this book which is examining the role of the media in shaping the scope of human rights and in monitoring the effects of applying human rights—or its role in keeping the delicate balance between protecting rights and limiting them—all for the sake of democracy. The following is no more than a description of how I perceive the rationales that ground Cohen-Almagor's main thesis in this important issue.

In exploring the important roles the media has in the context of this book, Cohen-Almagor rightly differentiates between legal duties or prohibitions and moral or ethical ones. The main guidelines of the numerous and detailed suggestions and recommendations Cohen-Almagor has for promoting a more responsible media are twofold. First, not everything that the media is legally allowed to show and report should be shown and reported, and second, the media should be more aware of the way it chooses how to report. Any decisions the media might make as to these two issues may enhance human rights and interests of some, harm human rights and interests of others and enormously affect the public sphere and the atmosphere in which human rights are exercised.

In light of these conclusions, the principled as well as practical suggestions Cohen-Almagor brings forward throughout his book regarding the role of the media in promoting and protecting democracy, are of great importance. They may benefit both academics who wish to better understand the role of the media in that aspect, and obviously the media itself that all too often ignores, or is simply unaware of the implications of its decisions about what to report and in what way.

VIII. *Conclusion*

I have commented only on part of the topics that Cohen-Almagor explores in his book. I chose to refer to the major conceptual basis of the book i.e., to Cohen-Almagor's

view about the scope of tolerance and its moral reasoning, and to a few central cases that he presents and uses as examples for how a democratic state should treat anti-democratic and intolerant threats.

As I have mentioned quite a few times throughout this review, I believe that even further and more radical exceptions to liberal rules than those suggested by Cohen-Almagor are needed in order to find the right balance between promoting and defending liberal rules, principles and rights, on the one hand, and protecting them from being misused by anti-liberal, anti-democratic groups, on the other hand. This is a tricky task but also one we cannot avoid.