

# THE SCOPE OF TOLERANCE: RESPONSE TO NEHUSHTAN

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## **I. Introduction**

*The Scope of Tolerance*<sup>1</sup> is the third book in a trilogy that started with *The Boundaries of Liberty and Tolerance*,<sup>2</sup> and continued with *Speech, Media and Ethics: The Limits of Free Expression*.<sup>3</sup> All three books are concerned with boundaries and are interdisciplinary in nature. While the first was in the fields of political science, philosophy, and law; the second and third are in the fields of communication, applied ethics, and law. The three books supplement each other and together aim to establish a coherent and comprehensive study on the intriguing issue of limits to free expression.

Like every young phenomenon, democracy needs to develop gradually, with great caution and care. Lacking experience, democracies are unsure as to how to repress explicit antidemocratic and illiberal practices. Abundant literature exists about the pros of democracy, the value of liberty, and the virtue of tolerance. Liberal thinkers wishing to promote liberty and tolerance, urge governments not to apply partisan considerations that affirm principally their own interests and conceptions; seek ways to accommodate different conceptions of the good, to reach compromises by which democracy will respect variety and pluralism.<sup>4</sup> Much less in comparison has been

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<sup>1</sup> RAPHAEL COHEN-ALMAGOR, *THE SCOPE OF TOLERANCE: STUDIES ON THE COSTS OF FREE EXPRESSION AND FREEDOM OF THE PRESS* (2006).

<sup>2</sup> RAPHAEL COHEN-ALMAGOR, *THE BOUNDARIES OF LIBERTY AND TOLERANCE* (1994).

<sup>3</sup> RAPHAEL COHEN-ALMAGOR, *SPEECH, MEDIA AND ETHICS: THE LIMITS OF FREE EXPRESSION* (2nd ed. 2005).

<sup>4</sup> J. S. MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* (1948); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1965); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); J. S. MILL, *POLITICAL LIBERALISM* (1993); RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); FREDERICK SCHAUER, *FREE SPEECH—A PHILOSOPHICAL ENQUIRY* (1982); LEE C. BOLLINGER, *THE TOLERANT*

written in the field of political theory about the intricate issue of the appropriate scope of tolerance. This trilogy attempts to fill this lacuna and to offer tools for thinking and for practice in dealing with harmful expressions.

The underlying premises of the three books are:

- *First*, objection to the liberal assumption of universalism. The hypotheses advanced and the conclusions reached are limited to modern democracies emerging during the last century or so. Sociologically speaking we cannot ignore the fact that universal values do not underlie all societies. Some societies reject the moral notions of liberty, tolerance, equity, and justice that liberal democracies promote. Thus my concern is with liberal democracies which perceive human beings as ends and which respect autonomy and variety. The arguments are relevant to other countries, but because non-democratic countries do not accept the basic liberal principles, because their principles do not encourage autonomy, individualism, pluralism, and openness, and their behaviour is alien to the concepts of human dignity and caring, one can assume that the discussion will fall on deaf ears. Non-liberal societies, based on authoritative conceptions and principles, deserve a separate analysis.
- *Second*, free expression is a fundamental right and value in democracies.
- *Third*, one of the dangers in any political system is that the principles that underlie and characterize it may, through their application, bring about its destruction. Democracy, in its liberal form, is no exception. Moreover, because democracy is a relatively young phenomenon, it lacks experience in dealing

with pitfalls involved in the working of the system. This is what I call the “catch” of democracy.<sup>5</sup>

- Thus, the *fourth* premise holds that—generally speaking—there is a need to strike a balance between the right to freedom of expression and the harms that might result from a certain speech.
- In this context, the *fifth* premise notes that in the liberal framework, the concept of “rights” is understood in terms of a need that is perceived by those who demand it as legitimate and, therefore, the state has the responsibility to provide it for each and every citizen. Rights are primary moral entitlements for every human being. However, the claim that citizens have rights that the state or the government is obligated to guarantee does not mean that the state may not, under certain circumstances, override these rights. Citizens have a right to freedom of expression, but the state can limit that right in order to prevent a threat to public order, the security of the state, or third parties in need of protection (such as children).
- *Sixth*, democracy and free media live and act under certain basic tenets of liberty and tolerance from which they draw their strength and vitality and preserve their independence. Two of the most fundamental background rights underlining every democracy are respect for others and not harming others. They should not be held secondary to considerations of profit and personal prestige of journalists and newspapers. Each individual is conceived as a bearer of rights and a source of claims against other persons, just because the resolution of the others is theirs, made by them as free agents. To regard others with respect is to respect their right to make decisions regardless of our opinions of them. We simply assume that each of us holds that our own course of life has intrinsic value, at least for the individual, and

<sup>5</sup> This, indeed, is the title of my forthcoming book, to be published by Ma’ariv Publication House (2007) [in Hebrew].

we respect the individual's reasoning, so long as she does not harm others.

- *Seventh and finally*, indeed, the role of the media is not merely to report what "is there" and to "further truth." Along with the power the media possess come responsibilities of the media to their audience, their profession, and to democracy that enables their functioning.<sup>6</sup>

*The Scope of Tolerance* is about the limits of tolerance and the costs of freedom of expression. The concept of tolerance and its legitimate scope lies at the centre of analysis. It considers problematic expressions that require society to pay a certain price if tolerated. The analysis includes discussions on media invasion into one's privacy, offensive speech, incitement, hate speech and Holocaust denial, and finally media coverage of terrorism.

The book's primary aim is to formulate precepts and mechanisms designed to prescribe boundaries to freedom of expression conducive to safeguard democracy. This interdisciplinary study combines theory and practice, examining the issues of contention from philosophical, legal and media perspectives. Its methodology involved extensive literature survey (books, journal and newspapers articles, classified documents), study of law and precedents as well as interviews with experts in media ethics, constitutional law and political extremism in Israel, the United Kingdom, Canada, and the United States.

Yossi Nehushtan limits his review to four of the ten book's chapters (including the Conclusion). The bulk of his discussion concerns the scope of tolerance and its moral reasoning (chapter 1). He also addresses the issue of offense to sensibilities (chapters 4 and 5) and the issue of incitement (chapter 6). At the end of the review he describes my rationales for the role of responsible media in a free democracy. With his review, Nehushtan has forced me to rethink complicated issues and to address some difficult questions. For this I am grateful.

<sup>6</sup> Raphael Cohen-Almagor, *Exploring the Boundaries of Freedom*, 3(1) ETHICAL SPACE 12-4 (2006).

## II. *On Tolerance*

Nehushtan takes issue with the three components of tolerance, as I define the concept. I argue that tolerance is composed of (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 sway the doer not to exert her power or authority to curtail the said conduct.<sup>7</sup>

As for the first component, Nehushtan makes a good point, that I ignored tolerating people whose looks, identity, and/or way of life evoke negative feelings. I acknowledge that tolerance may involve a strong disapproving attitude toward people's race, culture, or way of life.

Nehushtan goes on to refute the second component of the definition of tolerance: power or authority to curtail the disturbing conduct. He argues that the requirement of power ignores the possibility of the powerless to tolerate and indeed not to tolerate the powerful. Furthermore, for him, having authority is irrelevant to the concept of tolerance. One can tolerate or not tolerate the other regardless of him having any authority over the other.

First, non-toleration is not at issue. Of course the powerful as well as the powerless can decide not to tolerate. This is merely to state the obvious, an obvious that lies outside the scope of my discussion. Then the further question is: how can we differentiate between someone who opts for forbearance although she could reveal her disgust and curtail the disliked conduct, and another who shares the same feeling, would have liked to curtail the conduct, but simply lacks the power or authority to do something about the disturbing conduct? If one lacks ability to stop a certain phenomenon, does this mean that one is tolerating that phenomenon? Can the deer be said to "tolerate" the lion and his conduct?

For example, suppose that I deeply resent the way my superior handles her affairs. I would love to alter her position and expose her vile ways in public. The brute reality, however, is that I lack the power to do so, and I am afraid that any explicit sign of resentment might worsen my position in the company. Still, there is no doubt in my mind that my qualities and abilities far exceed those of my superior's qualities and abilities. However, I keep quiet for partisan motives, i.e., to keep my job. Am I

<sup>7</sup> COHEN-ALMAGOR, *supra* note 1, at 26-7.

tolerant? I do not think so. I am powerless. It is not that I like to tolerate. I am forced to keep quiet. This is not tolerance at issue. Instead it is calculated prudence guided by egoistic reasons, i.e., keeping my job.

That is to say that tolerance is oddly out of tune with equality and does not lend itself easily to egalitarianism. Tolerance suggests an act of generosity from those who have the power to interfere but refrain from doing so. This indicates that there is already some inequality of power between the tolerant and the tolerated; and as Phillips recognizes, it also implies an inequality of virtue. For it is the tolerant who come out covered in glory. The tolerated end up with what many of them will feel as a poor second best, for toleration is a poor substitute for recognition, and particularly so when identities as well as opinions are at issue.<sup>8</sup>

Nehushtan may still insist that one can tolerate the other regardless of him having any authority over the other. For him, it is possible to ignore power relations and then opt for tolerance. I hasten to think that people do not have the ability to strip themselves of such calculations regarding their position in the hierarchy and in *abstractum* make decisions whether or not they tolerate a disturbing person and/or his conduct. People are well aware of their position, and when they decide “to tolerate” something they simply acknowledge their limitation. To tolerate is to sacrifice. It is to acknowledge that you have the power to fight against a disturbing phenomenon but still acknowledge its place in society, suffer and allow it to happen. In Hebrew, the words “tolerance” and “suffering” come from the same root: S.B.L. This is no coincidence. The powerless does not suffer when he “tolerates” his superior. He does not feel that he forfeits something. Instead, he suffers because he has very few alternatives that might impair his position. He suffers because of the power relations, not because he “tolerates.” As Michael Walzer writes: “[t]o tolerate someone else is an act of power; to be tolerated is an acceptance of weakness.”<sup>9</sup>

Nehushtan then proceeds to refute the third component of the definition of tolerance, that the tolerator employs *moral* overriding principles and allows the conduct in question. Let me briefly explain the context. Between philosophers exists a disagreement whether the motive that persuades the tolerator to opt for

<sup>8</sup> Anne Phillips, *The Politicisation of Difference: Does this Make for a More Intolerant Society*, in *TOLERATION, IDENTITY AND DIFFERENCE* 128 (John Horton & Susan Mendus eds., 1999).

<sup>9</sup> MICHAEL WALZER, *ON TOLERATION* 52 (1997). See also SUSAN MENDUS, *TOLERATION AND THE LIMITS OF LIBERALISM* (1989).

tolerance should be grounded in morality, and whether this motive should be directly connected to the phenomenon or conduct that she resents. In *The Scope of Tolerance* I explain my stance on this issue. I argue that the overriding principles which may sway the doer not to exert his or her power or authority to curtail the said conduct should be moral in essence, and that they should be directly related to the conduct in question.<sup>10</sup> Nehushtan takes issue with this line of reasoning. For him, the overriding principles should not necessarily be moral ones in order for the person to be tolerant. This is the result of his simplistic, general and light-weight framing of the concept of tolerance. Tolerance seems to encompass any and every act of abstention.

Nehushtan quotes from *The Scope of Tolerance*: “[o]nly those people who tolerate others out of respect are conceived as tolerant beings,”<sup>11</sup> and in the next paragraph writes that I do not specify what the moral considerations might be. Still, soon after he reaches the conclusion that these considerations stem from respecting the other. For Nehushtan, this is a very narrow view of tolerance. It excludes all kinds of partisan motives that sway a person to abstain from negative action vis-à-vis the undesired phenomenon at issue. As mentioned, Nehushtan paints tolerance in a wide brush, the widest it can be. All abstentions of negative actions against undesired conduct are forms of tolerance. While I view the crucial point in this context is respect for others,<sup>12</sup> for Nehushtan respect for oneself, with no regard to the other, may suffice to describe abstention as “tolerance.” Thus, for him believing that persecution is too expensive, or not having enough power to succeed in the persecution are good enough reasons to be “tolerant.” Nehushtan thinks these are pragmatic, prudential forms of tolerance. His example of the white academic who “tolerates” racist slurs against whites because of pragmatic reasons is, for Nehushtan, “a different kind of tolerance than the moral-reasons based one, but just as genuine.”<sup>13</sup> For me, calculated reasoning that results from egoistic interests may be called practical reasoning, egoism, or forbearance. However, it is not tolerance.

<sup>10</sup> See COHEN-ALMAGOR, *supra* note 1, at 27-9.

<sup>11</sup> See *id.* at 8.

<sup>12</sup> For discussion on the ideals of respect for others see Albert Weale, *Tolerance, Individual Differences and Respect for Persons*, in ASPECTS OF TOLERATION esp. 28-34 (John Horton & Susan Mendus eds., 1985).

<sup>13</sup> Yossi Nehushtan, *Tolerance, Free Speech and the Paradox of Democracy*, Book Review, 40(1) Isr. L. Rev. 255, 261 (2007).

In my book I make a distinction between manifest and latent tolerance, and differentiate between stronger and weaker forms of tolerance.<sup>14</sup> One of the examples concerns Doug Christie, a lawyer known for defending white supremacists, anti-Semites, and neo-Nazis.<sup>15</sup> The Vancouver Public Library rented a meeting room to Christie in the name of free speech and tolerance and enabled him to hold a public event. I describe this as a latent form of tolerance. The authorities respected Christie's right to free expression. Building on this example, Nehushtan asks: what if the motive for allowing Christie to hold his event in a public building did not stem from respect but rather was in order to expose his vile ideas and to increase awareness of racism? These considerations are certainly moral ones, and they are directly connected to the phenomena that the authorities disapprove of, yet they have nothing to do with respecting the other but with egoistic motives. Can this conduct can still be described as tolerance?

In the book's introduction I argue for the distinction between *moral* overriding principles and general overriding principles, explaining that acts of tolerance, carried out solely on prudential grounds, are not to be considered as tolerance in the *genuine* sense of the term.<sup>16</sup> Nehushtan's little twist to my example suggests the obvious, that tolerance may not necessarily stem from genuine reasons but from practical reasoning. Still after the twist, the example complies with the three components of tolerance, as defined previously. It is a weaker form of latent tolerance, the result not of respect for people, as I wish tolerance to be, but of societal general interests. While Nehushtan thinks that this different kind of tolerance is "just as genuine" as tolerance that stems from respect for people, I beg to differ. The result is similar. The reasoning is different. The extent of genuinity is dissimilar.<sup>17</sup>

Let me illustrate: Dana wishes to rent an apartment. She cannot decide between two beautiful apartments. Everything being equal, both have similar advantages and negative aspects. To resolve the dissonance, she decides to invite herself to the next door neighbors of both apartments. She knocks on the first door and is invited in for a coffee by Mr. Goshen. They sit down and have a conversation. Dana asks her prospective neighbor whether he saw *Natural Born Killers*, a film that is notoriously

<sup>14</sup> See COHEN-ALMAGOR, *supra* note 1, at 29-33.

<sup>15</sup> Available at [http://en.wikipedia.org/wiki/Doug\\_Christie\\_%28lawyer%29](http://en.wikipedia.org/wiki/Doug_Christie_%28lawyer%29) (last visited February 5, 2007).

<sup>16</sup> See COHEN-ALMAGOR, *supra* note 1, at 8.

<sup>17</sup> For further discussion, see John Horton, *Toleration as a Virtue*, in *TOLERATION: AN ELUSIVE VIRTUE*, 28-43 (David Heyd ed., 1996).

known for its excessively graphic and violent content.<sup>18</sup> Mr. Goshen did see the film and did not like it. Dana questions him regarding his opinion about rape and murder. Mr. Goshen replies that he conceives both as wrong and immoral crimes that deserve severe punishment.

Dana proceeds to have coffee with the prospective neighbor of the second potential apartment. Mr. Kushnir readily invites her into his apartment and soon they too embark in conversation. Dana again turns the discussion to *Natural Born Killers* and to Mr. Kushnir's view on murder and rape. He answers that he personally objects to both practices because they are illegal. Mr. Kushnir assures Dana he would not murder anyone. As for rape, he claims to fear punishment or retribution and thus would not commit this act.

Here too, the result is similar, but the reasoning is different. Still most of us, Dana included, would feel safer living next door to Mr. Goshen. This is not to say that Mr. Kushnir's neighbors are necessarily in danger, but rather most individuals would prefer living around Mr. Goshen's environment. Likewise, most of us would prefer to live in a society where tolerance stems from respecting others and not from the recognition that "persecution might be too expensive."

Nehushtan's last point in this section on tolerance, related to his previous critique, takes issue with the following statement:

When we *genuinely* [emphasis added, R.C.-A.] tolerate persons or conduct we do it *not* in order to maintain or ensure stability, tranquillity, or any other desired value, but rather because we respect others as human beings who should enjoy the ability to exercise choice and lead their lives as free, autonomous people, so long as they do not harm others. The consequences of tolerance may as well be peace and order in society, but the emphasis and reasoning are totally different.<sup>19</sup>

Nehushtan argues, yet again, that my narrow view of tolerance ignores two basic rationales for free expression: the democratic rationale and the free marketplace of

<sup>18</sup> Available at [http://en.wikipedia.org/wiki/Natural\\_Born\\_Killers](http://en.wikipedia.org/wiki/Natural_Born_Killers) (last visited February 5, 2007).

<sup>19</sup> See COHEN-ALMAGOR, *supra* note 1, at 33-4.

ideas rationale. Yet again Nehushtan overlooks that my focus here is on tolerance, in the genuine sense.

In my first book of the trilogy, *The Boundaries of Liberty and Tolerance*, I lay down the main arguments which explain the special status of freedom of expression and therefore insist on granting it broad protection:

(A) The Arguments from Autonomy.

(1) Freedom of expression is necessary to enable individuals to advance their faculties and to realize themselves by advocating ideas and beliefs. To use a familiar phraseology, words are “keys of thought and persuasion,” and we need free communication to enable individuals to learn about the different options open to them.

(2) Emphasis is put on the contribution of free speech to rationality, asserting that freedom of expression is needed to make up your mind, to decide what to believe, and to weigh reasons for action. It is maintained that while reliance on government acting as the arbiter of tastes and values provides no assurance that the decisions it makes for us will be the best ones, such reliance guarantees that whatever capability people have to make healthy choices for themselves will remain underdeveloped.

(3) The argument holds that a need exists to convey beliefs, to vigorously contest the opinions of others, for otherwise opinions will degenerate into prejudices, with little comprehension of their rational grounds. Thus, freedom of expression is needed to ensure the development of individuals as autonomous, rational, and independent beings. It is required to protect the moral sovereignty of people, the self-determination of our moral powers of rationality and reasonableness in conceptions of a life well and humanely lived. A further argument has been made that (4) expressions have a validating function in promoting people’s well being. They give the relevant ways of life the stamp of public acceptability. Free speech helps people identify with their way of life, their sense of its worth, and their sense that their way of life facilitates their integration into their society.

(5) Expressions also serve to reassure those whose way-of-life are portrayed that they are not alone, that their problems are common, their experiences known to others. This argument proceeds by saying that (6) public validation is an essential element in the process of cultural transmission, preservation, and renewal. Free speech facilitates the assertion of traditions and is employed in challenging traditions and experimenting

with new forms of relationships, new attitudes, and life-styles. Moreover, (7) free speech is protected not because it is instrumental to any societal good, but because it inheres in people solely by virtue of their being people.

In addition, it has been proclaimed that (8) restrictions on free discussion and open exchange of opinions inhibit the intellectual and “spiritual progress” of individuals and that (9) free speech is a precondition for social progress. Progress is valued in the sense of improvement in the moral and intellectual qualities of the individual, which will contribute to the development of society. This argument is closely related to the Infallibility Argument and to the Arguments from Truth.

(B) The Infallibility Argument is based on the assumptions that:

(1) All human beings are fallible, and therefore they should have the right to express their thoughts and to compete in the free market of ideas and that (2) any intolerance of opinions involves, *ipso facto*, a claim to infallible knowledge.

In turn, (C) The Arguments from Truth holds that:

(1) The principle of freedom of expression allows almost any opinion the right to be heard because no one is in a position to claim complete hold on the truth. It is maintained that while an opinion may have been silenced because it was thought to be in error, it may have contained a portion of truth. The underlying assumption is that truth will prevail in a free and open encounter with falsehood.

(2) Freedom of expression is necessary for keeping the vitality of beliefs. The meaning of doctrines will be in danger of being lost, and deprived of its vital effect on the character and conduct, unless freedom exists to express any challenging opinion.

(3) Toleration of any opinion, even one conceived to be in gross error, is vital, since silencing such an error can lead to two negative consequences: it would open the gate for further constraints on free speech on the government’s account, and it would intimidate discoverers of truth, discouraging them from investing in further efforts, and leading to their silence.<sup>20</sup> This argument brings us to:

<sup>20</sup> David Edwards, *Toleration and Mill’s Liberty of Thought and Discussion*, in JOHN STUART MILL’S SOCIAL AND POLITICAL THOUGHT VOL. II: FREEDOM, 334-58 (G.W. Smith ed., 1998); Raphael Cohen-Almagor, *Why Tolerate? Reflections on the Millian Truth Principle*, 25(1-4) PHILOSOPHIA 131-52 (1997); Raphael Cohen-Almagor, *Ends and Means in J.S. Mill’s Utilitarian Theory*, 26(2) ANGLO-AM. L. REV. 141-74 (1997).

(D) The Arguments from Democracy assume (1) that an opinion does not necessarily entail action, and that, in most cases, opinions do not automatically translate into action. Thus enough time is available to stop ideas that aim to endanger democracy before they materialize. This argument is supported by the further assumption that (2) the public is rational enough to recognize evil expressions, and thus in a free discourse of opinions the “good” are bound to triumph over the “bad”: the open confrontation of ideas strengthens the self-correcting powers of society. Also argued is that (3) even if speech might cause injury, it still should enjoy protection because the damage incurred from its restriction outweighs the harm that could result from exercising that speech. Any restrictions on speech, once permitted, have a sinister and inevitable tendency to expand.

(4) Moreover, freedom of expression should be protected because of the lessons that society is likely to learn from such experiences, and because these experiences contribute to the shaping of a wider culture of tolerance. In addition (5) freedom of expression has been argued to be a necessary component for securing participation in the democratic life. It is the way in which relevant information is made available to the electorate who then can, on the basis of that information, decide their conduct. Furthermore, (6) acts of expression serve to familiarize the public at large with ways of life common to different segments of the public.

Moreover (7) given the fact that transitions are constantly in the making, freedom of speech is necessary for citizens to reflect upon their current situation, and to suggest accommodations. Freedom of expression is needed to maintain a balance between stability and change in society.

(8) Freedom of speech is a means for controlling the government and assuring its legitimacy; a means against the government’s attempts at exploitation; a means against possible corruption of public officials; and a necessary requirement for securing the consent of the citizens.

(9) Finally, freedom of expression is crucial to indicate causes of discontent, the presence of cleavages, and possible future conflicts.<sup>21</sup>

These arguments make a strong position for freedom of speech and for tolerance. In the same book I expanded on the Kantian Respect for Others Argument for

<sup>21</sup> See COHEN-ALMAGOR, *supra* note 2, at 89-92.

tolerance and freedom of expression, and on the Millian Truth Principle, asserting that our primary obligation should be given to the Kantian argument. Moreover in the event of a conflict between the Kantian argument and the Millian principle, the former should take precedence over the latter. I also showed the inconsistencies in the Millian principle.

Nehushtan concludes by saying that the essential criteria for viewing an attitude as tolerant 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. Thus for him, the example I presented in *The Scope of Tolerance* to reject partisan reasoning would be a case of tolerance. The example concerns Ronny who is notoriously late. Every appointment that he makes is qualified by the remark, "I'll be there on time, give or take half an hour; what's half an hour among friends?." Ronny has a new girlfriend, Sasha, who unlike his other friends strongly resents his behavior and qualifying statements. She wants to see him on time, period. She repeatedly warns him that she will break off their relationship if he comes late to their next meeting.

Ronny is on his way to meet Sasha. He leaves his home early, quite certain that this time Sasha will be happy. He plans on arriving at Sasha's earlier than expected hoping Sasha will realize that their relationship means a great deal to him. On his way he passes through the park and he sees two teenagers attacking a girl, stripping her clothes, and about to rape her. Ronny has grave reservations about rape; he detests such violent, gross behavior. Moreover, he is a big lad, in a perfect shape, and with powerful arms. He knows that he could overcome those two teenagers if he fights them. However, he also knows that it will take him some time to subdue them, and consequently he will be late, yet again, for his date. Sasha has clearly told him that she has no interest in hearing further apologies, explanations, and excuses, however perfectly logical and convincing these might be. She will not tolerate any late arrival. Ronny continues on his walk and allows the rape to occur.<sup>22</sup> While I think it would be absurd to regard Ronny as "tolerant," Nehushtan apparently would see this as a case in point.

<sup>22</sup> See COHEN-ALMAGOR, *supra* note 1, at 27.

### III. *Tolerance and the Intolerant*

Nehushtan proceeds to offer his interpretation of Karl Popper's theory and then argues that major parts of my book explore the question of when the state is allowed 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.

I admit: This was not my task in *The Scope of Tolerance*. I address this question comprehensively in my first book, *The Boundaries of Liberty and Tolerance*, and address concerns and criticisms that this first book attracted in Part I, "Freedom of Expression," of my second book *Speech, Media and Ethics*. There Nehushtan, and other interested readers, may find answers to the questions posed by Nehushtan in Section IV of his review.<sup>23</sup>

In a nutshell: I see significant difference between the right to free expression and the right to be elected to parliament. We cannot and we should not employ the same standards of tolerance for both. Simply put: words are different from ability to legislate. Therefore, a wider scope of tolerance is reserved for free expression than for free election. Liberal democracies should introduce stricter boundaries to the latter. It is neither morally obligatory, nor morally coherent to expect democracy to place the means for its own destruction in the hands of those who either violently wish to bring about the physical annihilation of the state or to undermine democracy. These two are the only cases in which democracy has to introduce self-defensive measures and to deny representation in parliament to lists which convey such ideas, and which act to realise them. Representation is a fundamental principle that underlies democracy but we need to set limits to it so as to overcome the "democratic catch" and to protect democracy. Therefore, when a violent list such as the quasi-fascist "Kach"

<sup>23</sup> In addition, see Raphael Cohen-Almagor, *Fighting Against Kahanism in Israel: Retrospect and Appraisal*, 22(4) *ANGLO-AM. L. REV.* 447-74 (1993); Raphael Cohen-Almagor, *Disqualification of Lists in Israel (1948-1984): Retrospect and Appraisal*, 13(1) *L. & PHIL.* 43-95 (1994); Raphael Cohen-Almagor, *Between Neutrality and Perfectionism*, 7(2) *CANADIAN J. L. & JURISPRUDENCE* 217-36 (1994); Raphael Cohen-Almagor, *Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism*, 9(2) *N. Y. INT'L L. REV.* 1-25 (1996); Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988-1996*, 11(1) *EMORY INT'L L. REV.* 67-109 (1997). See also Karl Popper, *Toleration and Intellectual Responsibility*, in *ON TOLERATION* 17-34 (Susan Mendus & David Edwards eds., 1987); Bhikhu Parekh, *The Logic of Intercultural Evaluation*, in *TOLERATION, IDENTITY AND DIFFERENCE* 163-97 (John Horton & Susan Mendus eds., 1999).

bases its political platform on discrimination and disrespect towards others, resorting to violence with the aim of harming some people, and undermining democracy, it should have been disqualified, as it indeed was in 1988 and in 1992, and as its splinter “Kahane Is Alive” was in 1992. I also justify the amendment to the Basic Law: The Knesset (1958) that specifically aims at banning “Kach,” and further vindicates outlawing quasi-fascist parties.<sup>24</sup>

Notice that I emphasize (1) the component of resorting (rather than preaching) to violence as crucial, for if political activists resort to such means they have very little respect to democratic order, and to human life. The Weimar experience leading to the victory of national-socialism is certainly in mind. Furthermore, (2) I speak of parties that wish to destroy the state as such, as the Hamas and Iran declare vis-à-vis Israel or to abolish democracy. Both components are necessarily, and each alone is insufficient. Thus, I disagree with Nehushtan’s assertion that surely the “democratic catch” applies in a similar manner to a violent anti-democratic party and to a non-violent theocratic, anti human rights party. While the latter accepts the rules of the game and works to advance its cause within the system, the former despises democratic mechanisms and resorts to violent actions, much beyond speech, to advance its cause. I am not convinced that there is scope to expand my narrow formulation for disqualification of political parties to the extent that Nehushtan wishes.

#### **IV. Offensive Speech**

Two chapters, 4 and 5, of *The Scope of Tolerance* address a neglected issue: offense to sensibilities. This is a most difficult question, so difficult that many scholars simply prefer to throw the baby out with the water, i.e., not to discuss it at all. Following Joel Feinberg,<sup>25</sup> I attempt to offer some guidelines for outlining the scope of tolerance in regard to this problematic speech. It is argued that the Offense to Sensibilities Argument will 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.

<sup>24</sup> See *supra* note 3, at 43.

<sup>25</sup> JOEL FEINBERG, OFFENCE TO OTHERS (1985).

Yet again, this formulation is too narrow for Nehushtan. He would like to expand it. His Offense to Sensibilities Argument would include speech that causes more than mere discomfort yet less than devastating and irreversible harm that could be considered morally on a par with physical harm. This is the slippery slope syndrome in practice. While I take pains to offer a very limited ground for prohibiting speech for reasons of offense, Nehushtan is quick to adopt it as a spring board for prohibiting speech that relies on “highly immoral values,” e.g., racist speech.

I personally do not advocate this standpoint. I am not convinced that attacks on your race are more offensive than attacks on certain beliefs, such as one’s beliefs on abortion, euthanasia, or pornography.<sup>26</sup> In the United States physicians performing abortions have been murdered by “pro-life” activists.<sup>27</sup> While acknowledging that one cannot be held responsible for one’s race in the way that one is responsible for one’s ethical convictions, I still do not see why dignity or equal respect and concern are more at stake in the one case than in the other.<sup>28</sup> I also do not think that racism is more of a moral or political issue than pornography or issues that concern life and death, like abortion. All are grave issues that affect the shape and character of society. Sometimes (but not at all times) racist expressions should be excluded from the protection of the Free Speech Principle, for instance when it is calculated to harm a designated group of people who cannot avoid being exposed to the serious offense which could be equated to physical harm (like the Jews at Skokie);<sup>29</sup> but we should not outlaw racist provocations merely because of their content without regard to the speakers’ intentions and the given circumstances.

In my discussion of offensive speech I reiterated that not every offense would count as sufficient to be excluded from the protection of the Free Speech Principle. I explained that the rationale is not intended to prohibit anything that might cause offense to anybody’s sensibilities. Thus, a white woman holding hands with a black man might offend racists. Alternatively, a girl shouting commands might disturb the peace of mind of male misogynists or someone who is homophobic

<sup>26</sup> For liberal discussion on pornography, see L. W. SUMNER, *THE HATEFUL AND THE OBSCENE* ch. 5 (2004); David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, in 4 JOHN STUART MILL’S SOCIAL AND POLITICAL THOUGHT 289-306 (G.W. Smith ed., 1998); Robert Skipper, *Mill and Pornography*, in 4 JOHN STUART MILL’S SOCIAL AND POLITICAL THOUGHT 307-11 (G.W. Smith ed., 1998)

<sup>27</sup> *Planned Parenthood of the Columbia/Willamette Inc. et al v. American Coalition of Life Activists*, U.S. Court of Appeals for the Ninth Circuit (May 21, 2002).

<sup>28</sup> See COHEN-ALMAGOR, *supra* note 2, at 130-131.

<sup>29</sup> See COHEN-ALMAGOR, *supra* note 3, at chap. 1.

might claim that they are deeply hurt by the mere suggestion of homosexuals as equal to others. We should not come to their assistance because people who adopt discriminatory ideologies and ideas, such as racism, are exploiting democratic mechanisms for the purpose of hurting others. The racist's and misogynist's so-called "offenses," even if they truly offended, lack normative power. 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.

In addition, in the context of offensive speech, but not under the Offense to Sensibilities Argument, I spoke of making accommodations out for respect for others; accommodations designed to mitigate tensions instead of compounding and exacerbating them; and accommodations to enable different segments of society, of different conceptions of the good, to live together. I spoke of employing common sense, of tolerant consideration of the other, of seeking compromise rather than galvanizing heated debates. To elucidate I mentioned the main cultural event that took place in 1998, when Israel celebrated 50 years of independence. Much time, energy, and money resources were invested in staging the "Jubilee Bells." A leading ballet group, "Bat Sheva," chose to perform a production called *One Who Knows*, involving indecent exposure of the bodies of the dancers. Because this was the main event of the 1998 Independence Day event and because it was broadcast live by the two main TV channels, religious people asked to censor the performance on the grounds that it offended their feelings.

I believe that it could have been possible to prevent the "cultural war" that ensued if thought had preceded action. "Bat Sheva" could have easily chosen a beautiful performance that would not have offended any public sector. After all, the performance was meant to be for the enjoyment of *all* sectors and not only for the secular. Hasty thinking caused an absolutely unnecessary heated atmosphere.

I argue that the religious outcry was justified because the choice of performance did offend their sensibilities. The special historical circumstances of the occasion and the magnitude of the event required sensitive consideration for all public sectors. The avoidability standard in this case was not reasonable because we cannot expect approximately 20 percent of the Israeli population to avoid the major event of this important holiday and to shut themselves off from the two major television channels that broadcast the special live performance. At the end, a compromise was reached: "Bat Sheva" performed the production it wanted but the dancers were fully clothed.

It was shown on both prominent TV channels, and people from all sectors, religious people included, watched it live.<sup>30</sup>

Nehushtan wonders whether we could deduce from this example that out of consideration for religious feelings we would also prohibit women from singing in major cultural events. (Religious people object to women singing.) My conclusive answer is “No.” Consideration for the other does not entail deserting our enshrined values and discriminating against fifty percent of the population. Surely there is a difference between asking performers to dress decently in major national events and excluding women from singing. The twist Nehushtan makes in this true story does not present us with a harder dilemma, but rather it is quite trivial.

#### **V. Incitement**

Characteristically, Nehushtan likes to limit the scope of tolerance by enlarging the concept of incitement to include 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. In other words, he takes the common liberal definition of preaching, that is protected under the Free Speech Principle, and transforms it into incitement, unprotected speech. While I am using a fine brush to outline limits to free expression, Nehushtan has no qualms against using a wide brush to exclude extensive categories of expression from the scope of tolerance. Again, his major concern is racist speech. Thus the call “death to the Arabs,” voiced in football matches, does not merit protection and should not be tolerated.

I cannot agree to expand the definition of incitement thus far. At the same time I agree that such a call does not merit protection. It should be prosecuted under hate offense provisions. Section 144F(a) of the Penal Law holds:

If a person commits an offense out of a racist motive... or out of enmity toward a public because of their religion, religious group, community of origin, sexual inclination or because they are foreign

<sup>30</sup> See COHEN-ALMAGOR, *supra* note 1, at 122.

workers, then he shall be liable to double the penalty set for that offense or to ten years imprisonment, whichever is the lesser penalty.<sup>31</sup>

Nehushtan takes issues with my thesis regarding the connection between the incitement that preceded Prime Minister Rabin's assassination and the act of assassination. This contention reminds me of the Legal Advisor to the Government, Menachem Mazuz's statement, that there was "no indication" that the Rabin assassination had been sparked by incitement.

Two theories may be pondered in this context: the "isolated island" theory and the "social being" theory. The first holds that a person is an island unto himself, and once he decides to commit a certain act, including murder, then he will do it notwithstanding what others are saying. The second theory, on the other hand, assumes that a person lives among people; he is a social being influenced by the environment and his significant others. Of the two theories, I am inclined to believe in the second.

True, during Yigal Amir's trial no evidence was brought to show that he assassinated Prime Minister Rabin under the influence of the incitement campaign against the government and its leader. Such proof was not necessary as the assassin did not claim that he was not responsible for the planning and conduct of the murder. At the same time, it is important to recall what Amir had said during his interrogation: "Without *psak halacha* (ruling of the collective corpus of Jewish religious law) or *din rodef* (provision allowing extrajudicial killings) rulings on Rabin by a few rabbis whom I knew, I would have found it difficult to murder. Such murder needs to be authorized. If I did not have backing, if behind me were not many people, I would not have acted."<sup>32</sup> This statement is cited in the Shamgar Investigation Committee Report but the committee refrained from concluding what were the causes for the murder. They conceived this issue as lying outside the scope of its mandate.

Furthermore, in addition to law we also need to pay notice to considerations of ethics and legitimacy. Here the media have considerable weight in delineating the bounds of what is acceptable. Following the flurry of emotions that Mazuz's controversial statement stirred up, he published an article in the newspapers aiming to clarify his

<sup>31</sup> Chapter Eight, Article One, Section 144F(a) of the Penal Law, in *Penal Law, 5737-1977* (Aryeh Greenfield-A.G. Publications, March 2005).

<sup>32</sup> INQUIRY COMMITTEE FOR PRIME MINISTER RABIN'S MURDER: REPORT 203 (1996) [in Hebrew].

words. Mazuz explained he did not mean to belittle the severity of the incitement prior to Rabin's assassination or the severity of incitement against Sharon.<sup>33</sup>

Mazuz acknowledged that inciteful and violent speech could have a catalyzing effect on violent acts, and that the duty of the legal system is to assure that the public struggle against governmental controversial decisions will not cross any red line, and will not turn into violence. Legal intervention is warranted but only in significant rare circumstances. However, while Mazuz thinks that the *Pulsa Denurah* (curse, death sentence, or excommunication edict), for instance, is protected under the Free Speech Principle, I think this is an inciteful expression that should not be protected.<sup>34</sup> Incitement lies outside the boundaries of the Free Speech Principle. It should not be sheltered nor legitimized in any form, certainly not by the Legal Advisor to the Government.<sup>35</sup>

<sup>33</sup> Manny Mazuz, *The Democratic Test*, MAARIV, August 17, 2005.

<sup>34</sup> Yuval Yoaz, *Shlomo Cohen Uses Censorship—in the Name of Free Speech*, THE MARKER ON LINE, August 18, 2005.

<sup>35</sup> Raphael Cohen-Almagor, *Political Extremism and Incitement in Israel 1993-1995, 2003-2005: A Study of Dangerous Expressions*, 3(1) DEMOCRACY & SECURITY 21-43 (2007).