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“Dignitizing” Free Speech in Israel: The Impact of the Constitutional Revolution on Free Speech Protection

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Article abstract

This article examines the changes in the approach to the analysis of free speech rights in Israel. It demonstrates the growing shift from the American liberty-based influence in the 1980s to a more dignity-based, and principally Canadian- and German-inspired, model following the adoption of the partial bill of rights in the 1990s. This is demonstrated both by a statistical analysis of the Israeli Supreme Court free speech rulings in the past thirty years and by a substantive analysis of recent rulings in the areas of prior restraint, pornography, and libel.

The statistical findings demonstrate that while human dignity rarely played a role in free speech rulings in the past, it plays a significant role today. Another indication of the “dignitization process” lies in the reference to foreign rulings. Moreover, a substantive examination of the Israeli Supreme Court’s free speech rulings from the last decade reveals the dignitization process both in rhetoric and outcomes.

This article offers a means of strengthening the protection that free speech receives in Israel by divorcing the constitutional protection of free speech from the concept of human dignity, and by focusing on the value of liberty. This can be achieved by the incorporation of the unenumerated right to free speech via the liberty clause within *Basic Law: Human Dignity and Liberty.*

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"DIGNITIZING" FREE SPEECH IN ISRAEL: THE IMPACT OF THE CONSTITUTIONAL REVOLUTION ON FREE SPEECH PROTECTION

*Guy E. Carmi**

This article examines the changes in the approach to the analysis of free speech rights in Israel. It demonstrates the growing shift from the American liberty-based influence in the 1980s to a more dignity-based, and principally Canadian- and German-inspired, model following the adoption of the partial bill of rights in the 1990s. This is demonstrated both by a statistical analysis of the Israeli Supreme Court free speech rulings in the past thirty years and by a substantive analysis of recent rulings in the areas of prior restraint, pornography, and libel.

The statistical findings demonstrate that while human dignity rarely played a role in free speech rulings in the past, it plays a significant role today. Another indication of the "dignitization process" lies in the reference to foreign rulings. Moreover, a substantive examination of the Israeli Supreme Court's free speech rulings from the last decade reveals the dignitization process both in rhetoric and outcomes.

This article offers a means of strengthening the protection that free speech receives in Israel by divorcing the constitutional protection of free speech from the concept of human dignity, and by focusing on the value of liberty. This can be achieved by the incorporation of the unenumerated right to free speech via the liberty clause within *Basic Law: Human Dignity and Liberty*.

Cet article examine les changements dans l'analyse du droit à la liberté d'expression en Israël. Il démontre qu'un changement d'influence est en train de s'opérer, en passant d'une approche américaine basée sur la liberté vers une approche canadienne et allemande basée sur la dignité, suite à l'adoption partielle de la déclaration des droits dans les années 1990. Ceci est démontré par une analyse statistique des décisions des trente dernières années de la Cour suprême d'Israël, ainsi que par une analyse substantive des décisions récentes dans les domaines de la restriction préalable, de la pornographie et de la diffamation.

Les résultats statistiques démontrent que si la dignité ne jouait auparavant qu'un rôle très limité dans les décisions, le concept joue un rôle important aujourd'hui. Le fait de référer à des décisions étrangères est également un indice de ce « processus de dignification ». De plus, une analyse substantive des décisions de la Cour suprême d'Israël de la dernière décennie en matière de liberté d'expression permet d'illustrer ce processus de dignification, tant dans la rhétorique que dans les résultats.

Cet article offre un moyen de renforcer la protection de la liberté d'expression en Israël, en séparant la protection constitutionnelle de la liberté d'expression de celle de la dignité humaine, et en se concentrant sur la valeur de la liberté. Ceci peut être réalisé en incorporant le droit non-écrit à la liberté d'expression par le biais de la disposition sur la liberté de la *Loi fondamentale : Dignité et liberté humaines*.

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Introduction

This article presents the "dignitization process" of free speech in Israel in several ways. It demonstrates Israel's gradual shift from a liberty-based influence in the 1980s to a more dignity-based paradigm in the past two decades, as evidenced in Israeli free speech rulings. In addition, it describes the growing tendency to evaluate freedom of expression in human dignity terms.

First, the history of free speech development in the Israeli legal system is explored, and the background of Israeli constitutional law and the lack of a formal constitution are explained, in order to provide readers who are unfamiliar with Israel the necessary background to understand the processes Israel has been undergoing in recent years. This article demonstrates how the Israeli Supreme Court extended constitutional protection to the unenumerated right of free speech via the human dignity clause beginning in late 2006. The nexus between human dignity and free speech is tenuous, and the Court did not provide sufficient grounds to fully and satisfactorily incorporate free speech into the constitutional documents. In fact, the current method of incorporation, which uses human dignity as the incorporation channel, inherently weakens freedom of expression. This article makes two proposals to strengthen freedom of speech: by incorporating it into the constitution via the liberty clause, or by including it among the enumerated rights.

Second, this article demonstrates the growing shift from the American liberty-based influence in the 1980s to a more Western, non-US dignity-based influence following the adoption of the partial bill of rights in the 1990s. The slow shift of paradigms, which has caused a constant, yet almost unnoticeable, decline in the standing of free speech in Israel, is demonstrated both by a statistical analysis of the Israeli Supreme Court free speech rulings in the past thirty years, and by a substantive analysis of recent rulings in the areas of prior restraint, pornography, and libel.

The statistical findings clearly demonstrate that while human dignity rarely played a role in free speech rulings in the past, it plays a significant role today. This trend is labelled the dignitization process of free speech. Another indication of the dignitization process lies in the reference to foreign rulings. Although US rulings remain a popular source for citation in the Israeli Supreme Court's free speech rulings, the number of references to these rulings is on the decrease. Simultaneously, German and Canadian rulings are cited in growing numbers. These tendencies further indicate that Israeli free speech law is increasingly inclining toward the dignity-based approach to free speech through its slow disengagement from the American influence toward a more Western, non-US approach.

Moreover, a substantive examination of the Israeli Supreme Court's free speech rulings from the last decade reveals the dignitization process

both in rhetoric and outcomes. Three areas of free speech law are explored. Human dignity is acknowledged as a reason for invoking prior restraint under some conditions. It is recognized as a reason for limiting pornography. It has also become the principal rationale in libel cases, which have slowly begun to resemble European insult laws. These substantive examples, combined with the statistical tendencies, give a clear picture of the dignitization process Israeli free speech law is undergoing and unfold the paradigm shift that is not evident to the naked eye, since the transition is in process.

For free speech to be adequately protected, it needs to be explicitly enumerated within the constitutional documents in a manner that buttresses its standing and grants it the protection it deserves. In the interim, this article offers the use of an alternative channel to incorporate free speech into the existing Israeli constitutional documents. Instead of the current use of the human dignity clause within *Basic Law: Human Dignity and Liberty*,[1] the use of the liberty clause within the same basic law is suggested. Because liberty does not carry speech-restrictive features as does human dignity, some of the current speech-restrictive features that stem from the forced and artificial juxtaposition of free speech and human dignity may be alleviated.

Israel serves as a test case to explore the dignity-liberty model presented elsewhere,[2] and this article utilizes it for an in-depth analysis of rights in a specific legal system. Israel is uniquely positioned to reflect contemporary trends in Western constitutionalism, since it combines influences from both sides of the Atlantic, and it is in a transitional stage in forming its constitutional law in general, and its free speech law in particular. This article also illustrates the process that the Israeli legal system has undergone in the past two decades and which has not received much attention to date. The analysis conducted herein, backed by statistical data and the insights of comparing the dignity- and liberty-based models, unveils an almost unnoticed decline of free speech in Israel and explains its motives.

This article coins the term "dignitization process" to describe the growing tendency to evaluate freedom of expression in human dignity terms. This phenomenon is an important aspect of free speech in Western democracies. The articulation of free speech in terms of human dignity,

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1 5752-1992, 1391 LSI 150 (1991-92) (Isr), as amended by *Basic Law: Human Dignity and Liberty - Amendment*, 1994, SH 90, online: <www.knesset.gov.il/main/eng/home.asp>.

2 Guy E Carmi, "Dignity versus Liberty: The Two Western Cultures of Free Speech" (2008) 26:2 BU Int'l LJ 277 [Carmi, "Dignity versus Liberty"].

however, is inherently problematic, and this article warns of the undesirable consequences of this process.

The dignitization process is demonstrated in the Israeli setting by illustrating the growing use of human dignity-related terminology to analyze free speech. This illustration is made both through a statistical analysis of references to human dignity in free speech rulings in the Israeli context and through substantive analysis of Israeli Supreme Court rulings. Thus, this article establishes the intricate nexus between human dignity and freedom of expression in the Israeli setting. This phenomenon should receive the careful attention of other scholars worldwide and cause them to examine this nexus in greater depth as well as its implications for other legal systems.

The discussion of the possible uses of the liberty clause within *Basic Law: Human Dignity and Liberty* reveals undiscovered paths in Israeli constitutionalism. Israel's relatively young age and its lack of experience in constitutional developments mean that Israeli constitutional law is still in its formative stages. Currently, the existence of a single constitutional clause through which unenumerated rights are read into the constitution limits the ability to read such rights into the existing constitutional text. The proposal to read free speech into the liberty clause is innovative, since, to date, the human dignity clause has served as the exclusive channel for incorporating unenumerated rights. Thus, this article calls for new strategic ways to read and interpret the Israeli constitutional text.

I. Past—Background: Israeli Constitutional Law and Free Speech Protection

A. The Lack of a Formal Constitution

Attempts to enact a formal constitution in the early years following the establishment of the state of Israel were not successful. A constituent assembly that was established according to the Declaration of Independence reached a deadlock and was unable to produce an agreeable constitutional document. This resulted in a compromise, known as the Harari Decision.[3] Pursuant to this parliamentary decision, basic laws would be enacted in stages as chapters of the constitution-to-be. Basic laws were indeed enacted, and between 1958 and 1992 ten basic laws dealing primarily with structural issues (e.g., *Basic Law: The Knesset*,[4] *Basic Law: The*

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3 See "The Constitution", online: The Knesset <http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4>.

4 5718-1958, 12 LSI 85 (1957-58) (Isr).

Government,[5] *Basic Law: The Judiciary*,[6] etc.) were passed by the Knesset (the Israeli Parliament) but, at that time, were not considered to have special standing.[7] Fundamental rights were not mentioned in these basic laws; their protection was implemented by the courts, in particular by the Supreme Court presiding as the High Court of Justice.

While protection of free speech has been one of the main pillars of Israeli constitutional law since the early days of Israeli democracy,[8] there is no constitutional provision that deals with freedom of expression and prohibits its infringement. Supreme Court rulings have created common law protection of fundamental rights, placing freedom of expression at the top of the protected freedoms.[9] In addition, the Supreme Court has found creative ways to circumvent its lack of power to disqualify acts that infringe upon freedom of expression. This was done primarily through interpretation that implemented high democratic standards, and through doctrines that the Israeli Court imported, either in full or in part, principally from the American system.[10]

The landmark *Kol Ha'am* case in 1953 is perhaps the most important free speech ruling in the history of the Israeli Supreme Court.[11] But the 1950s-1970s were not characterized by a robust protection of free speech.[12]

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5 2001, SH 158, online: <www.knesset.gov.il/main/eng/home.asp>.

6 5744-1984, 38 LSI 101 (1983-84) (Isr).

7 The only exception was a limited recognition that article 4 of *Basic Law: The Knesset*, which deals with the principle of equal elections and requires a special majority vote for infringement of this principle, enabled courts to strike down statutes that did not withstand that demand. See HCJ 98/69 *Bergman v Minister of Finance and State Comptroller*, [1969] IsrSC 23(1), online: <http://elyon1.court.gov.il/eng/home/index.html>; Itzhak Zamir, "Judicial Review of Statutes" (1993) 1:2 Mishpat Umimshal 395 at 396.

8 See HCJ 73/53 *Kol Ha'am v Minister of Interior* (1953), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Kol Ha'am*].

9 See e.g. HCJ 606/93 *Kidum Entrepreneurship and Publishing Ltd v The Broadcasting Authority*, [1994] IsrSC 48(2) 1 at 9 [*Kidum*]: "Needless to say that '*freedom of expression stands at the top of the liberties* upon which our democratic regime is founded'" [translated by author, emphasis added].

10 See *Kol Ha'am*, *supra* note 8; HCJ 680/88 *Schnitzer v The Chief Military Censor* (1989), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Schnitzer*].

11 *Kol Ha'am* (*supra* note 8) is probably the most prominent landmark ruling of the Israeli Supreme Court and is the most cited Supreme Court decision of all time: see Yoram Shahar, Ron Harris & Myrron Gross, "Reliance Customs of the Supreme Court—Quantitative Analysis" (1996) 26 Mishpatim 763 (in Hebrew).

12 For more information on free speech protection in the 1950s–1970s see Daphne Barak-Erez, "The Law of Historical Films: In the Aftermath of *Jenin, Jenin*" (2007) 16:3 S Cal Interdis LJ 495.

In fact, free speech received only moderate and partial protection during this period in which the Court resorted primarily to British precedent.[13]

A shift in the development of freedom of expression rulings by the Israeli Supreme Court took place from the late 1970s to the early 1990s.[14] This period can be described as the golden age of freedom of expression. During this period, the Supreme Court, led by Chief Justice Shamgar, fortified and strengthened freedom of expression's position to the peak of its protection.[15] In a series of rulings, the Supreme Court buttressed freedom of speech vis-à-vis other fundamental rights, and the rhetoric behind the protection of this right was at its peak.[16] The *Kol Ha'am* precedent was rediscovered after several decades of dormancy, marking a change from the speech-restricting rulings of the early years of the establishment of Israel. Most of these rulings, written by Chief Justice Meir Shamgar and subsequently by Justice Ahron Barak, were based primarily upon US

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[13] Apparently the landmark decision *Kol Ha'am* (*supra* note 8) had an "intermediate stage", and its effects only started to fully take hold in the late 1970s and early 1980s. It seems that the seeds Chief Justice Agranat had planted in that decision did not bloom until several years later. For example, only several months prior to *Kol Ha'am*, the Supreme Court had rejected a very similar petition by the same newspaper, which had been closed for a few days by the decree of the executive (HCJ 25/53 *Kol Ha'am LTD v Minister of the Interior*, [1953] IsrSC 7 165—the "first" *Kol Ha'am* case). This less well-known case ended with an opposite result, upholding a temporary closing order of the same newspaper as a sanction for content that criticized the government. It seems that the "first" *Kol Ha'am* case served as the rule, during the transitional time of the 1950s–1970s, while the "second" *Kol Ha'am* case served as the exception.

[14] First traces of the fortification of free speech in the Supreme Court's rulings can be seen in CA 723/74 *Ha'aretz v Israel Electric Corporation* (1977), Shamgar J, online: <http://elyon1.court.gov.il/eng/home/index.html>. This decision was overturned by CFH 9/77 *The Israel Electric Corporation v Ha'aretz* (1978), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Ha'aretz*]; HCJ 1/81 *Shiarn v Broadcasting Authority*, [1981] IsrSC 35(3) 365, Shamgar J, concurring.

[15] For elaboration upon the free speech rulings of the Shamgar Court and of Chief Justice Meir Shamgar see Zeev Segal, "Freedom of Speech in the Light of Meir Shamgar", in Aharon Barak, Mishael Chesnin & Meir Shamgar, eds, *Sefer Shamgar*, vol 3 (Tel Aviv: Israeli Bar Association, 2003) 111 at 111 (in Hebrew).

[16] See e.g. CA 214/89 *Avneri v Shapira*, [1989] IsrSC 43(3) 840 (giving precedence to free speech when balancing it with the right to reputation in the context of injunctions) [*Avneri*]; HCJ 399/85 *Cahana v Broadcasting Authority*, [1987] IsrSC 41(3) 255 [*Cahana*] (protecting racist speech from prior restraint); HCJ 298/86 *Sitrin v Israel Bar Association*, [1987] IsrSC 41(2) 337 [*Sitrin*] (creating a common law journalist privilege); *Schnitzer*, *supra* note 10 (elevating the burden for prior restraint imposed by the military censorship). *Schnitzer* is considered by many to be the peak of the Supreme Court's free speech protection. See Ilana Dayan-Orbach, "The Democratic Model of Free Speech" (1996) 20:2 Tel Aviv University Law Review 377 at 389 (referring to the "*Schnitzer*-ian paradigm") (in Hebrew).

precedents.[17] This period can be characterized as structuring the right of freedom of expression as one of the most powerful rights, if not the most powerful one. It provided for the almost exclusive application of relatively strict scrutiny tests[18] in cases of infringement of the right of freedom of expression.[19]

The right of freedom of expression was constructed and shaped by the Supreme Court in a relatively robust manner, especially vis-à-vis other rights, taking into consideration that there was no textual constitutional anchor for this construction.[20] The Israeli Supreme Court found detours and created doctrines that enabled it to interpret the draconian British Mandate legislation narrowly since it did not have the elementary constitutional tool of judicial review.[21] This adaptability of the Supreme Court to the lack of both judicial review and a constitutional anchor for the right of freedom of expression is remarkable, yet imperfect. The scale and scope of the protection of freedom of expression was reduced, and the Court was

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[17] See rulings mentioned in previous footnote. See also Justice Shamgar's dissent in *Ha'aretz*, *supra* note 14.

[18] The most prominent strict scrutiny test is the "near certainty test" from *Kol Ha'am* (*supra* note 8 at section G), which was utilized in most cases that involved infringement of freedom of expression. One of the only examples of a different standard that was applied by the courts in the 1960s (and which was amended in 2002 by the Knesset to include the near certainty test) was the criminal offence of *sub judice* (see CrimA 126/62 *Dissenchick v Attorney-General* (1963), online: <http://elyon1.court.gov.il/eng/home/index.html>; *The Courts Act*, 1984, SH 198, art 71, online: <www.knesset.gov.il/main/eng/home.asp> [*Courts Act*]). See also Mordechai Kremnitzer & Liat Levanon, "Freedom of Expression in Aharon Barak's Rulings" in Eyal Zamir, Barak Medina & Siliya Pesberg, eds, *Barak Book* (Jerusalem: The Hebrew University of Jerusalem, 2009) 159 at 178-80 (criticizing the application of the near certainty test in the free speech rulings of former Chief Justice Barak).

[19] Compare HCJ 6126/94 *Szenes v The Broadcasting Authority* (1999) at para 18, Barak CJ, online: <http://elyon1.court.gov.il/eng/home/index.html> [*Szenes*]; EA 92/03 *Shaul Mofaz v Chairman of the Central Elections Committee*, [2003] IsrSC 57(3) 793, at para 17, online: <http://elyon1.court.gov.il/eng/home/index.html> [*Mofaz*]. These rulings have added the "limitations clause test" (article 8, of *Basic Law: Human Dignity and Liberty*) in cases of infringement of freedom of expression, at least to some extent. See e.g. Guy E Carmi, *Dignity and Liberty: Differing Approaches to Free Speech in Germany, the United States and Israel* (SJD Dissertation, University of Virginia School of Law, 2010) at 220-32 [unpublished][Carmi, *Dignity and Liberty*] (criticizing the introduction of proportionality and balancing to the free speech constitutional standards of review).

[20] See e.g. Dayan-Orbach, *supra* note 16 at 391 (referring to the common law protection of free speech by the Supreme Court as "impressing").

[21] See e.g. *Kol Ha'am*, *supra* note 8; *Schnitzer*, *supra* note 10 at paras 8-9.

ill-equipped to handle legislation that directly infringes freedom of expression.[22]

The positioning of freedom of expression at the top of the pyramid of rights as an integral part of the golden age rulings is exemplified by the following quote from a Supreme Court ruling: "*Freedom of expression stands at the top of the liberties* upon which our democratic regime is founded."[23] Although freedom of expression has never been considered an absolute right, the Court clearly positioned it at the top of the array of protected rights.

Thus, the golden age period implicitly gave hierarchal priority to freedom of expression vis-à-vis other rights, despite (or maybe because of) the lack of a formal constitution. This common law development of freedom of expression doctrines was not constitutionally anchored and was partially concealed due to the manner of its formation. While it has become an integral part of the Israeli legal ethos,[24] it was created solely by the Supreme Court's rulings.

B. The Constitutional Revolution

During the 1990s, the Israeli constitutional law arena changed dramatically as a result of a process known as the Constitutional Revolution.[25] This term generally refers to the process that started with the enactment of two basic laws in 1992. *Basic Law: Human Dignity and Liberty*[26] and *Basic Law: Freedom of Occupation*[27] were the first (and so far the only) basic laws that dealt with substantial rights.[28] This partial bill of

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[22] See e.g. HCJ 5432/03 *SHIN v Council for Cable TV and Satellite Broadcasting* (2004), online: <http://elyon1.court.gov.il/eng/home/index.html> [*SHIN*] (upholding a statute that forbids transmitting pornographic channels on licensed cable networks).

[23] *Kidum, supra* note 9 at 9 [translated by author, emphasis added].

[24] See CA 105/92 *Reem Engineers Ltd v The Municipality of Nazrath Ilit*, [1993] IsrSC 47(5) 189 at 201-202 [*Reem*].

[25] The term "Constitutional Revolution" was coined by the Minister of Justice Dan Meridor, and frequently adopted by Chief Justice Aharon Barak. See e.g. Aharon Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1:1 Mishpat Umimshal 9 at 12-13 (quoting Minister of Justice Meridor as referring to this process as a "constitutional revolution") [Barak, "Protected Human Rights"] (in Hebrew). It appears that the term is not related to the US constitutional revolution of 1937: see e.g. William E Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

[26] *Supra* note 1.

[27] 1994, SH 90, online: <www.knesset.gov.il/main/eng/home.asp>.

[28] Barak, "Protected Human Rights", *supra* note 25.

rights lists only a handful of fundamental rights,[29] and not necessarily the most important ones.[30] Attempts to include freedom of expression among the enumerated rights in the basic laws did not bear fruit, primarily as a result of political considerations.[31] The two basic laws did not introduce new rights and, at the time of their enactment, there was not the celebration that one might expect for a historical moment of such magnitude. The reason for this was that the legislature did not fully understand the future implications of the enactment of these two basic laws.[32] Three years after their enactment, the Supreme Court proclaimed these as the starting point of the Constitutional Revolution, acknowledging their constitutional nature and referring to them as a constitution, or at least a "cripple constitution."[33]

The Constitutional Revolution was not solely encompassed by the *Mizrahi* case, although it is clearly the landmark ruling and is considered to be the Israeli equivalent of *Marbury v. Madison*.[34] The Constitutional Revolution has been further entrenched by the Supreme Court, and its scope has been broadened.[35] For example, in *Mizrahi*, judicial review was limited to the two new basic laws that protected fundamental rights.[36] In

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[29] The two basic laws combine to produce the following list of rights: life, dignity, liberty, property, freedom of movement, privacy, and freedom of occupation.

[30] For example, basic rights such as freedom of expression or freedom of religious observance are not explicitly listed.

[31] See *Draft Bill Basic Law: Freedom of Expression and Association*, 1994, HH, 325; Judith Karp, "Basic Law: Human Dignity and Liberty—A Biography of Power Struggles" (1993) 1:2 Mishpat Umimshal 323 at 340 (in Hebrew).

[32] *Ibid* at 325.

[33] See CA 6821/93 *Bank Mizrahi v Migdal Cooperative Village* [1995] 2 Israel Law Reports 1, Shamgar J, online: <http://elyon1.court.gov.il/eng/home/index.html> [*Mizrahi*]. The term "cripple constitution" has been used many times by Chief Justice Barak when describing the status of the basic laws. See e.g. Aharon Barak, "The American Constitution and The Israeli Law", in Arnon Gutfield, ed, *American Democracy: The Real, The Imagined and the False* (Israel: Ganei-Aviv, 2002) 81 at 82 [Barak, "The American Constitution"] (in Hebrew).

[34] See Guy E Carmi, "A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review" (2005) 21:1 Conn J Int'l L 67 at 74-75 [Carmi, "Constitutional Court"].

[35] See e.g. HCJ 213/03 *Herut v Chairman of the Central Elections Committee* (2003), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Herut*]; *Mofaz*, *supra* note 19. For more on the entrenchment and scope-widening of the Constitutional Revolution see Ariel L Bendor, "Four Constitutional Revolutions?" (2003) 6:2 Mishpat Umimshal 305 (in Hebrew).

[36] In *Mizrahi* (*supra* note 33 at 351-52), the Court substantiated its ability to strike down laws of the Knesset on the limitations clause within the two new basic laws: *Basic Law: Human Dignity and Liberty supra* note 1, art 8; *Basic Law: Freedom of Occupation*, *supra* note 27, art 4.

the subsequent *Herut* ruling, the Court ruled that although there is no written constitution, judicial review can be deployed when an act of the legislature conflicts with a provision of any of the twelve basic laws.[37]

Basic Law: Human Dignity and Liberty was the centrepiece of the Constitutional Revolution. Even its name echoed the basic values behind it: *seemingly* human dignity and liberty stand at its base.[38] The Court's interpretive powers and wide discretion, however, could have resulted in fostering one of these values at the expense of the other. It seems that the Israeli Supreme Court has fostered human dignity as the leading value, since the value of liberty and the liberty clause in article 5 of the basic law were rarely litigated and poorly developed.[39] Human dignity is not necessarily superior to other values; rather, it is prominent due to the robust manner in which the human dignity clause is perceived.[40] It is not a controversial value, since it alludes to Jewish traditions and heritages, such that using human dignity rhetoric may disarm the conservative parties or the religious parties of some of their potential criticisms.[41] It is also perceived as encompassing almost anything, from the right to equality,[42] to

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37 In *Herut*, the Court broadened the rationale for judicial review from its *Mizrahi* ruling, by claiming that all the basic laws are higher norms than ordinary legislation, and therefore, in case of a conflict between a statute and a provision of a one of the basic laws, the higher norm (i.e., the basic law) should prevail (*supra* note 35 at para 4).

38 *C.f.* Leon Sheleff, "Two Models of Human Rights Guarantee: An American Model Versus a Possible Israeli Model" in Yedidia Z Stern & Yaffa Zilbershats, eds, *Law in Israel—A Prospective Approach* (Ramat-Gan: Bar-llan University Press, 2003) 199 at 222-23 (in Hebrew). Sheleff views *Basic Law: Human Dignity and Liberty* as "focusing on the two meta-values of Dignity and Liberty" (*ibid* at 222 [translated by author]). Sheleff also sees the basic laws, and in particular *Basic Law: Human Dignity and Liberty*, as setting a broad constitutional framework through which the Court can develop the constitutional law. He sees no need for elaboration of further rights and believes it is sufficient to mention the values.

39 See e.g. HCJ 6055/95 *Zemach v Minister of Defense*, [1999] IsrSC 53(5) 241 [*Zemach*]; HCJ 2605/05 *Academic Center of Law and Business v Minister of Finance* (2009) at paras 20-33, Beinisch CJ, online: <http://elyon1.court.gov.il/eng/home/index.html> [*Academic Center*]. See also the elaborated discussion in Part III, below (regarding the possible development of a robust liberty clause jurisprudence).

40 Compare note 54 and accompanying text, *infra* (stating the language of the Israeli human dignity clauses) *with* the robust language of article 1 of the German basic law, stating that the dignity of man is inviolable, and that to respect it and protect it is the duty of all state authority (*Basic Law for the Federal Public of Germany*, 1949). See Carmi, "Dignity versus Liberty", *supra* note 2 at 324.

41 See e.g. Orit Kamir, *Israeli Honor and Dignity: Social Norms, Gender Politics and the Law* (Jerusalem: Carmel Publishing House, 2004) at 131 (citing discussions in the Knesset prior to the enactment of the basic law in which Knesset members from religious parties viewed the basic law as containing "values from the Torah") (in Hebrew).

42 See HCJ 4541/94 *Miller v Minister of Defense* (1995), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Miller*].

social rights,[43] and, to a certain extent, freedom of expression.[44] This over-inclusiveness may be convenient for the Court, but it may have detrimental effects on some of the rights that may be read into this clause.[45] Reading freedom of expression into the human dignity clause would subject this right to the burden of preserving human dignity. Speech that conflicts with this obligation may as a consequence become less protected.

Constitutional terminologies are vague in nature. This trait enables courts to develop a living constitution. It is what gives the power to courts to attach different understandings to the constitution in different times, so these documents can endure different periods.[46] Each legal system has its own terminologies, which are a result of historically specific social arrangements.[47] In the Israeli context, human dignity and liberty capture the substance of the principal constitutional values.[48] The two-prong set of ideals that are parallel to human dignity and liberty may be traced back to the 1970s. As Mautner describes things, "it appears that from the seventies, two principal cultural values exist in the Israeli society which are fundamentally in opposition: a set of values that is founded on the principles of *collectivism* and a set of values that is founded on the principles *individualism*."[49] These sets of values are analogous to the dignity and liberty values that are apparent in current Israeli constitutional law.

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43 See e.g. HCJ 366/03 *Commitment to Peace and Social Justice v Minister of Finance* (2005), online: <http://elyon1.court.gov.il/eng/home/index.html>; Daphne Barak-Erez & Aeyal M Gross, "Social Citizenship: The Neglected Aspect of Israeli Constitutional Law" in Daphne Barak-Erez & Aeyal M Gross, eds, *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007) 243; HCJ 10662/04 *Hassan v Social Security Service*, [2012] Tak-Al 2012(1) 5203.

44 See HCJ 2557/05 *Majority Camp v Israel Police* (2006), online: <http://elyon1.court.gov.il/eng/home/index.html> [*Majority Camp*].

45 See e.g. Kamir, *supra* note 41 at 147 (citing Justices Zamir and Cheshin, who expressed in several rulings their fear that an exaggerated and overbroad use of human dignity may erode it and empty it of substantive content).

46 See generally William H Rehnquist, "The Notion of a Living Constitution" (1976) 54:4 Tex L Rev 693.

47 See Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass: Harvard University Press, 1995) at 13.

48 *C.f.* Sheleff, *supra* note 38 at 222-23.

49 Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel-Aviv: Ma'agalay Da'at Publishing House, 1993) at 125 [translated by author, emphasis in original] (in Hebrew). See also Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press, 2011).

C. The Current Constitutional Deadlock—A Transitional Period

It seems that the Constitutional Revolution has reached a certain deadlock that manifests itself through the halt of the enactment of additional basic laws. This is a result of a backlash of the Knesset, which has seen the Court's activism affiliated with the basic laws as a threat to its parliamentary supremacy.[50] The legislature fears that additional constitutional legislation would further shift power from it to the judiciary, and since the enactment of the two aforementioned basic laws, the Knesset has refrained from enacting new basic laws that deal with fundamental rights. It is unclear when and if the Knesset will decide to pass further basic law legislation consisting of newly enumerated rights or, alternatively, present them in a full-blown constitution.[51]

The Israeli legal system is in a transitional period, and the steps currently taken have long-term effects upon rights. The lack of a written constitution that anchors freedom of expression might lead to an erosion of the right. This erosion could take place even if freedom of expression eventually and explicitly receives its proper place in a constitutional document (whether in a formal constitution or in a basic law), and even if such protection is framed to resemble the First Amendment.[52] In this sense, Israeli constitutional law and doctrine are "up for grabs".[53]

The courts are limited, however, in their capacity to initiate heightened common law protection of freedom of expression under the current status quo since the partial bill of rights within *Basic Law: Human Dignity and Liberty* does not even enumerate this right. If in the past, when there was no formal anchoring of *any* right, the court had some leeway as to the structuring of rights, then it would be fair to say the Court's hands are tied, and its latitude confined, in the present.

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[50] See e.g. Carmi, "Constitutional Court", *supra* note 34 at 82-83.

[51] See Carmi, *Dignity and Liberty*, *supra* note 19 at 253-66 (regarding the possibilities for enumeration of free speech within the Israeli constitutional documents).

[52] This is a substantial risk due to managerial reasons and the application of *stare decisis*: see Post, *supra* note 47 at 17. The Court may continue sticking to doctrines that were formulated in the transitional period even if the constitutional basis of the right to freedom of expression changes in the interim.

[53] Accord Risa L Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass: Harvard University Press, 2007) at 5 (referring to the decade and a half prior to *Brown* as a period in which "the world of civil rights was conceptually, doctrinally, and constitutionally up for grabs"). See also Aharon Barak, "The Supreme Court as a Constitutional Court" (2003) 6:2 Mishpat Umimshal 315 at 326-27 [translated by author, emphasis added] (in Hebrew).

II. Present—The Israeli Shift to Dignity-Based Free Speech Doctrine

A. *The Development of Constitutional Protection of Free Speech in the Constitutional Revolution Era*

The human dignity clause is located in article 2 of the basic law and guarantees that: "There shall be no violation of the life, body or dignity of any person as such." Article 4 further stipulates that: "All persons are entitled to protection of their life, body and dignity."[54] One should note, however, that under the current basic law, the clause therein referring to human dignity and the right to life is not framed in a manner similar to its German counterpart, where human dignity and personhood are elevated vis-à-vis other fundamental rights.[55] All rights under the current basic laws, pursuant to the Canadian model,[56] are framed without a distinct hierarchy between the different rights and are subject to horizontal balancing.[57] The current constitutional framework offers a single-tier test for the infringement of all rights known as the general limitations clause, which is located in article 8 of *Basic Law: Human Dignity and Liberty*.[58]

Similar to the due process and equal protection clauses in the American Fourteenth Amendment[59] and to the *rechtsstaat* clause in the post-communist Polish constitution,[60] the human dignity clause is the main (and so far the only) incorporation clause for the Court to utilize in the development of unenumerated rights. The debate on the possible incorpo-

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[54] The distinction between articles 2 and 4 is usually construed in a way that views article 4 as rendering a positive commitment by the state to protect life. For the distinction between positive and negative rights, see Carmi, "Dignity versus Liberty", *supra* note 2 at 292-306 (discussing liberty and Berlin's "Two Concepts of Liberty").

[55] See Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d ed (Durham: Duke University Press, 1997) at 298. See also the discussion in Carmi, "Dignity versus Liberty", *supra* note 2 at 324-26 (regarding the primacy of human dignity in Germany).

[56] See Karp, *supra* note 31 at 331-32. Article 8 of the basic law, known as the "general limitation clause", offers a uniform test that is applied when rights are infringed upon. In comparison with the American system, one could say that this is a single tier of scrutiny. See further discussion in Carmi, *Dignity and Liberty supra* note 19 at 220-32 (discussing balancing in Israeli constitutional law and criticizing the single-tier system).

[57] See more on the "horizontal balancing" in *ibid* at 220-32, nn 285, 1004.

[58] For more on the limitations clause tests see *ibid* at 220-32, 258-62 (discussing balancing and proportionality and critiquing the single-tier system).

[59] See Carmi, "Dignity versus Liberty", *supra* note 2 at 355-61 (discussing the incorporation hypothetical).

[60] See Mark F Brzezinski & Leszek Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?" (1995) 31:1 Stan J Int'l L 13 at 35-42.

ration of free speech into the basic law has taken place solely through this clause.

1. Three Approaches to the Incorporation of Unenumerated Rights

The Knesset has deliberately decided to omit freedom of expression and equality from the list of enumerated rights.[61] The reasons for this omission vary, but in principle they relate to fears that the security status quo might be harmed.[62] The Court is in a difficult position: how can it protect these unenumerated rights without expressly defying the relatively recently stated will of the Knesset? There are three approaches to the incorporation of unenumerated rights dilemma.[63] The narrow approach gives deference to the Knesset's decision not to enumerate certain rights, and abstains from incorporation of such rights. Under this approach, free speech receives no constitutional protection within the framework of the basic laws.[64] In contrast to the narrow approach, the wide approach views the Knesset's omission of certain rights from the bill of rights within the basic laws as irrelevant for the question of whether these rights should be read into the basic laws, and gives great deference to the judiciary to read rights into the basic laws, even contrary to the Knesset's will.[65] Under this approach, free speech may be fully incorporated into the basic laws despite the Knesset's willful omission.[66] The third, intermediate approach takes into account the Knesset's decision not to enumerate certain rights, and avoids a blunt defiance of this will.[67] Yet, the intermediate approach also takes into account the need to protect fundamental human rights, at least to a certain extent. The compromise the intermediate approach of-

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[61] Shortly after the enactment of the basic laws, a draft bill, which did not pass, was proposed to include freedom of expression as part of the enumerated rights: see e.g. *Draft Bill Basic Law: Freedom of Expression and Association*, *supra* note 31.

[62] See Karp, *supra* note 31 at 326-32.

[63] See Aharon Barak, *Constitutional Interpretation* (Jerusalem: Nevo, 1992) at 412 [Barak, *Constitutional Interpretation*] (in Hebrew).

[64] See e.g. Eliyahu Winograd, *Injunctions*, General Part (Ramat Hasharon: Halachot, 1993) at 40 (in Hebrew). Compare with CA 6871/99 *Rinat v Rom*, [2002] IsrSC 56(4) 72 at 89-91 [*Rinat*]; CA 4534/02 *Shoken Network Ltd v Herzikowitz*, [2004] IsrSC 58(3) 558 at 571-73 [*Herzikowitz*]. See also Carmi, *Dignity and Liberty*, *supra* note 19 at 172-75 (discussing the narrow approach).

[65] See Barak, *Constitutional Interpretation, supra* note 63 at 414-16.

[66] Examples of this approach include PPA 4463/94 *Golan v Prisons Service* (1996) at para 14, Mazza J, online: <http://elyon1.court.gov.il> [*Golan*]; *Reem*, *supra* note 24 at 201. See also Carmi, *Dignity and Liberty*, *supra* note 19 at 172-75 (discussing the broad model of full incorporation).

[67] See *Golan*, *supra* note 66 at para 3, Dorner J; *Majority Camp*, *supra* note 44 at paras 12-13, Barak CJ.

fers affords constitutional protection to unenumerated rights only to the extent that there is a convergence between the unenumerated right and the enumerated right, for example, between human dignity and equality or between human dignity and freedom of speech.

The Supreme Court dealt with the possible connections between human dignity and equality shortly after the Constitutional Revolution commenced in a number of cases that involved equality.[68] One should bear in mind that in Western constitutionalism, human dignity and equality are strongly linked and often used as synonyms. When the Supreme Court ruled on whether equality receives protection under the new basic laws via the human dignity clause, it initially chose to interpret the overlap between the two rights as avoiding denigration. Subsequently, however, the Court expanded the constitutional protection of equality by using the intermediate model to partially incorporate the right to equality without limiting the protection of infringement of equality only to cases that entail degrading a person per se.[69]

The judiciary may find the intermediate model to be appealing for several reasons. By abstaining from a blunt defiance of the Knesset's will, the Court stays away from controversy and maintains its legitimacy.[70] Also, the Court is aware of the importance of safeguarding core fundamental rights, and manages to offer at least some protection to these rights. This compromise may seem politically savvy, but it lacks jurisprudential value in the absence of further theoretical support: it remains unclear how the unenumerated rights are incorporated.

The three approaches demonstrated above impact the different incorporation options available to the justices on the Supreme Court with respect to the enumeration of the right to free speech.

In the early 1990s, as *Basic Law: Human Dignity and Liberty* was enacted, the new constitutional array of rights was unclear. In particular, the rights that received enumeration within the Constitutional Revolution of 1992 were initially perceived as having been awarded more importance

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[68] See e.g. *Miller*, *supra* note 42; HCJ 453/94 *Israel Women's Network v Government of Israel* (1994), online: <http://elyon1.court.gov.il>.

[69] In HCJ 6427/02 *The Movement for Quality of Government v The Knesset*, [2006] Tak-Al 2006(2) 1559, online: <http://www.court.gov.il/heb/home.htm> [*Movement for Quality*] (in Hebrew), the Supreme Court clarified that the protection of equality through the intermediate model is the correct interpretation, but that there is no requirement for degradation. The court left vague the exact contours of the right to equality which is incorporated via the human dignity clause and put the emphasis on the elements of equality that express recognition in the autonomy of private will, freedom of choice, and the freedom of a person as a free being. See *ibid* at para 41, Barak CJ, concurring.

[70] See e.g. Carmi, "Constitutional Court", *supra* note 34 at 80.

than before.[71] Among these rights are the right to privacy[72] and, of special interest to our discussion, the right to reputation.[73] The right to reputation was considered as included within the right to dignity, and calls were made to change the balance in libel cases in order to afford greater weight to this right vis-à-vis the unenumerated right to free speech. These statements were primarily pronounced by lower courts in *dicta*,[74] but also in legal literature,[75] and by dissenting opinions within the Supreme Court.[76]

Another option for incorporation that many scholars[77] and some Supreme Court justices have toyed with in *dicta*[78] is the alternative of full incorporation. Perhaps the most visible proponent of full incorporation was Justice Mazza, who was one of the more liberal justices on the Supreme Court's bench during his tenure with regard to free speech.[79] In *Golan*, Justice Mazza held in *dicta* that freedom of expression is included

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71 This is a positivistic managerial concern: see discussion in Carmi, *Dignity and Liberty*, *supra* note 19 at 250-53.

72 For a full list of the enumerated rights within the two new basic laws of 1992, see *supra* note 29.

73 Since in Hebrew, honour and dignity are synonyms, the right to human dignity in *Basic Law: Human Dignity Liberty* was perceived from the beginning as including the right to reputation, and the protection of the right to reputation. See e.g. *Rinat*, *supra* note 64 at 90, Rivlin J; CA 3641/97 *Dan Avi Itzhak, Esq v Israeli News Corp Ltd*, [1998] IsrSC 53(1) 26 at 50; Barak, *Constitutional Interpretation*, *supra* note 63 at 427. For the different meanings of the word "*kavod*" in Hebrew as including honour, dignity, glory, and respect, see Kamir , *supra* note 41 at 19-42.

74 See e.g. CC (TA) 942/93 *Termokir-Horashim v Hamagen Corp*, [1993] IsrDC 1994 177 at 185, Pilpel J [*Hamagen*] (expressing the opinion that following the enactment of *Basic Law: Human Dignity and Liberty*, free speech should receive lesser protection than the right to reputation, and calling for a reversal of the *Avneri* precedent).

75 See e.g. Winograd, *supra* note 64 at 40.

76 See *Szenes*, *supra* note 19 at paras 29-30, 37, Cheshin J, dissenting, (giving preference to the right of reputation over freedom of expression in reliance on *Basic Law: Human Dignity and Liberty*).

77 Aharon Barak, "Protected Human Rights: Scope and Limitations" (1993) 1:2 Mishpat Umimshal 253 at 261 [Barak, "Protected"] (supporting full incorporation) (in Hebrew); Barak, *Constitutional Interpretation*, *supra* note 63 at 427-28. Barak was a prolific writer and a former law professor and dean of the Hebrew University Law School. He expressed these views in non-binding scholarly articles. Barak is probably the most influential jurist in the Israeli system.

78 See e.g. *Reem*, *supra* note 24 at 201, Barak CJ, concurring; HCJ 4804/94 *Station Film v The Film Review Board* (1997), Barak CJ, online: <http://elyon1.court.gov.il/eng/home/index.html> [*Station Film*].

79 See e.g. HCJ 2888/97 *Novic v Second Broadcasting Autority*, [1997] IsrSC 51(5) 193; HCJ 8507/86 *Theodore Oreen, Esq v The State of Israel*, [1997] IsrSC 51(1) 269; HCJ 5118/95 *Maio Simon Advertising Ltd v Second Broadcasting Autority*, [1996] IsrSC 49(5) 751.

within human dignity in the human dignity clause, and that the basic law has anchored the recognition of past rulings into the legal standard of free speech.[80] Mazza's reasoning is consistent with content-neutral protection of free speech, since the constitutional protection of any speech will not depend on its type or content (i.e., hate speech, pornography, etc).

Full incorporation under the human dignity clause seems to raise difficulties, both politically and doctrinally. Politically, full incorporation may increase tensions between the Supreme Court and the Knesset, and the Court may be accused of rampant activism for incorporating a right that the Knesset deliberately omitted from the basic laws.[81] Doctrinally, too, there is difficulty because the manner in which human dignity is perceived in Israeli law has communitarian traits and does not focus solely on the speakers.[82]

Despite the fact that full incorporation would be the strategy that best serves the protection of free speech, it is not a silver bullet. The Constitutional Revolution jurisprudence still balances rights against one another; protected speech would therefore still be weighed against human dignity.[83] Thus, full incorporation would not yield results similar to the First Amendment protection of free speech. But it is the least of all evils for those who cherish free speech. It would provide (limited) constitutional protection to all speech, and fortify the image of free speech protection in Israel.

2. Partial Incorporation and Its Limits

Eventually, the Israeli Court opted for partial incorporation. The first to suggest this was Justice Dorner in *Golan*. Although her reference to the

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80 See *Golan*, *supra* note 66 at paras 14-15, 19, Mazza J.

81 See Carmi, "Constitutional Court", *supra* note 34 at 70-75.

82 See Guy E Carmi, "Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification" (2007) 9:4 U Pa J Const L 957 at 986-96 [Carmi, "Dignity—The Enemy from Within"] (discussing the affects of communitarian traits, audience focus, and positive rights' focus on the perception of free speech justifications in the West). For examples in the Israeli context, see HCJ 4466/95 *Klinberg v Parole Board*, [1996] Tak-Al 96(1) 192 at 197: "It is true that human dignity is a superior value among the values of the State of Israel. But *it is the dignity of man as a member of a community*, and the community itself is entitled to be upheld and existence secured. This is the only way that the human dignity of all her sons and daughters can be maintained. Therefore, human dignity can be infringed upon in order to maintain a social structure that safeguards human dignity" [translated by author, emphasis added]; David Kretzmer, "Human Dignity in Israeli Jurisprudence" in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 161 at 170-71.

83 See elaborated discussion in Part III, below.

issue of incorporation was made in dicta, and the later *Majority Camp* ruling developed the issue as an integral part of the Court's judgment, it is important to review her thinking.

In the intermediate model proposed by Justice Dorner in her *Golan dicta,*[84] freedom of expression is not a part of *Basic Law: Human Dignity and Liberty*. Nonetheless, when the infringement of freedom of expression impacts a person's human dignity, then the person's right should be protected through the basic law.[85] The possible situations where such infringement may occur, according to Dorner, are expressions in which the principal rationale behind them is the autonomy of the individual.[86] Dorner's approach is to examine the content of each expression under consideration. Only if the primary justification for the speech at hand involves self-fulfillment, and limiting it would hurt the speaker's autonomy, then Dorner would afford that speech constitutional protection.

In fact, Justice Dorner tried to apply to freedom of expression the same reasoning that she used when incorporating equality into *Basic Law: Human Dignity and Liberty* via the human dignity clause. In *Miller,* Justice Dorner offered the exact same logic that she offered in *Golan*.[87] But Dorner's attempt to transplant a model that may be fit for the incorporation of equality into the realm of free speech raises difficulties.

Not every limitation on freedom of expression causes harm to human dignity.[88] Thus, regulation of commercial speech, for example, "can hardly

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84 For elaboration on the intermediate model of protection of rights see Barak, *Constitutional Interpretation*, *supra* note 63 at 419.

85 See *Golan*, *supra* note 66, at paras 8-9, Dorner J.

86 See *ibid*. This construction ironically gives higher protection to artistic speech, since it is more essential for individual self-realization, than to political speech, which is central to democratic self-government. For elaboration on the "basic model" of free speech see e.g. Steven J Heyman, "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression" (1998) 78:5 BUL Rev 1275 at 1315; Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 969-74 (presenting the "classical model" for free speech).

87 See *Miller*, *supra* note 42 at 132-33; Dalia Dorner, "The Constitutional Protection of Human Dignity" in Alouph Hareven & Chen Bram, eds, *Human Dignity or Humiliation? The Tension of Human Dignity in Israel* (Jerusalem: Hakibbutz Hammeuchad Publishing House, 2000) 16 (offering the same construction for the incorporation of equality and free speech via the human dignity clause based on preventing denigration); D Schultziner & I Rabinovici, "Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach" (2012) 18:1 Psychology, Public Policy, and Law 105 at 132-34.

88 See Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 982 (in text accompanying notes 118-22).

be seen as violations of the human dignity of the commercial enterprise."[89] But when a free speech limitation "relates to the essence of the individual's rights to express ... herself, it involves degrading treatment that violates human dignity."[90] But in cases that involve degradation of group members, such as hate speech or pornography, this conception of human dignity serves as a reason to curtail free speech—not to defend it. In applying these conceptions to hate speech, it may seem more appropriate to apply human dignity's protection to the victims of the speech rather than the racist speakers.[91] This is especially true in the Israeli context, where the rights of the speaker and the listener are balanced one against the other.[92]

Under the liberty-based paradigm,[93] freedom of expression would have received *full incorporation* under the human dignity clause.[94] Under this approach, limiting any kind of speech infringes upon the liberty of the speaker, regardless of its potential effects on the audience. This under-

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[89] Kretzmer, *supra* note 85 at 174; *Golan*, *supra* note 66 at paras 8-9, Dorner J. Even under First Amendment doctrines, commercial speech is considered to be low-value speech that is subjected to heightened regulation. See e.g. William W Van Alstyne, *The American First Amendment in the Twenty-First Century: Cases and Materials*, 4th ed (New York: Foundation Press, 2011) at 845.

[90] Kretzmer, *supra* note 85 at 174 (citing Justice Dorner's holding in *Golan*, *supra* note 66 at paras 8-9: "When denying freedom of speech humiliates the individual and violates his dignity as a human being, there is no reasonable way of interpreting the right of dignity prescribed in the Basic Law so that this humiliation is not deemed to violate it").

[91] See Daniel Statman, "Two Concepts of Dignity" (2001) 24 Iunay Mishpat 541 at 577 (arguing that using dignity to protect the vilified seems more natural than applying it to the vilifier). *C.f.* Giovanni Bognetti, "The Concept of Human Dignity in European and US Constitutionalism" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 85 at 91 ("[i]n contrast, in private law the appeal to the dignity of the individual is frequently made in order to justify restrictions of the private rights of others").

[92] See *Rinat*, *supra* note 64 at 90, Rivlin J: "Only when safeguarding free speech can *the speaker and the listener* bring self-fulfillment. But infringing upon the reputation of a person can set obstacles in his path to self-fulfillment. *This is the source of the determination that 'reputation and free speech are derived from the same* '*mother*'*-right—human dignity*'" [translated by author, emphasis added]. See also Elad Peled, "A Critical View on the Constitutional Anchoring of Free Speech by the Court" (2010) 26 Mechkarei Mishpat 283 at 303-08 (criticizing the scope of protection free speech receives via the right to human dignity, especially the inaptness of human dignity to duly cover political speech) (in Hebrew).

[93] See Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 972-74 (discussing the argument from autonomy).

[94] See Carmi, *Dignity and Liberty*, *supra* note 19 at 172-75 (discussing the broad model of full incorporation).

standing leads to a content-neutral approach that would afford *all* speech the same protection.

But the Israeli approach is similar to the dignity-based paradigm. Free speech is not viewed as content-neutral and is primarily perceived as linked to certain kinds of speech that are closely affiliated with expressing the personality of the speaker. Thus, while artistic speech that purports to symbolize elements of the personality of the speaker, and thus is protected under human dignity rationales, commercial speech is probably not protected under human dignity.[95]

Justice Dorner's model for partial incorporation encompasses my fears of the negative ramifications of reading freedom of expression into the human dignity clause. It shows the inadequacy of the attempt to confine freedom of expression within human dignity. Her possible model for incorporation was made in dicta and was later replaced by Chief Justice Barak's ruling in *Majority Camp*. But the potential for Dorner's interpretation to determine the contours of free speech protection under the human dignity clause remains, since this protection is in many respects shapeless.

Chief Justice Barak adopted the partial incorporation approach in a decision rendered during his last days on the bench.[96] It seems he wanted to end speculation on the issue of whether or not freedom of expression is incorporated into the *Basic Law: Human Dignity and Liberty*. He took advantage of a petition regarding the licensing of demonstrations (an issue similar to the public forum doctrine) to briefly determine that free speech is protected as part of the basic law. His reference to the issue of incorporation occupied only one paragraph of his judgment, and it leaves some issues unresolved. Because of the importance of the analysis of his judgment, the following is a translation of paragraph 13 of his ruling:

> [N]ot all the aspects of the right of freedom of speech are included in the constitutional right to human dignity, but only those aspects that are derived from human dignity and are closely related to "those rights and values that lie at the heart of human dignity as expressing a recognition of the autonomy of the individual will, the freedom of choice and the freedom of action of the individual as a free agent", or those aspects that are "found in the heart of the right to human dignity". *Indeed, "one should not 'read' into the right to dignity more than it can support.* Not all rights can be derived from

[95] Kretzmer, *supra* note 85 at 174 (claiming that the regulation of commercial speech "can hardly be seen as violations of the human dignity of the commercial enterprise").

[96] Chief Justice Barak rendered his final ruling and withdrew from the bench three days later, after an almost twenty-nine year tenure on the Israeli Supreme Court, as he reached the mandatory retirement age of seventy.

> an interpretation of the Basic Law: Human Dignity and Liberty ... when deriving rights that are not mentioned expressly in the Basic Laws dealing with human rights but are included in the concept of human dignity, it is not always possible to incorporate the whole scope that the 'derived' rights would have had if they had been included separately as 'named rights'." *Determining the scope of the right to freedom of speech as a constitutional right derived from human dignity should be done in accordance with the meaning that should be given to the concept of human dignity.* We do not need, in this case, to discuss in detail the aspects of the right of freedom of speech that are included in the concept of human dignity. It seems to me that a demonstration that has a political or social background is an expression of the autonomy of the individual will, freedom of choice and freedom of action that are included within the scope of human dignity as a constitutional right.[97]

Chief Justice Barak's ruling in *Majority Camp* was cautious enough to avoid specifying the exact meaning, scale, and scope of the expression protected under this rationale. Yet his determination that political speech is undoubtedly within this sphere is inadequately explained and requires further analysis.

What Barak wanted to do is to ensure the protection of political speech, which is perceived as the core of speech to which democracies afford protection.[98] This is a worthy cause, but Barak failed to explain exactly how political speech is linked to human dignity, while at the same time assuming that not all speech receives such protection. Political speech normally falls under a different category—the argument from democracy.[99] Barak's ruling in *Majority Camp* presupposes that the argument from democracy is fully covered by human dignity. This might be true under the American content-neutral perception, since the limiting of *all* speech, including political speech, infringes upon the autonomy or dignity of the speaker. However, this perception was implicitly rejected by Barak, since he did not wish to grant protection to all speech within the framework of the human dignity clause.[100] From a theoretical standpoint, Barak's reasoning is too brief and requires further support.

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[97] *Majority Camp*, *supra* note 44 at para 13, Barak CJ [emphasis added, citations omitted]. Compare *Movement for Quality*, *supra* note 71 at para 41, Barak CJ, concurring (setting similarly vague contours of constitutional defense of the right to equality).

[98] See Van Alstyne, *supra* note 93 at 637 (claiming that political advocacy lies at the core of free speech protection).

[99] See elaboration in Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 971-72 (discussing the argument from democracy); Peled, *supra* note 96 at 289 (putting an emphasis on the significance of the argument from democracy in the Israeli Supreme Court free speech jurisprudence).

[100] See *Majority Camp*, *supra* note 44 at para 13, Barak J.

Barak, in *Majority Camp*, tried to square the old focus on the argument from democracy with the fear from governmental censorship on the newly emerging paradigm that focuses on human dignity. Barak's ruling in *Majority Camp* makes better sense after understanding the Court's approach to free speech justifications prior to the Constitutional Revolution. But the difficulty with Barak's reasoning is that he avoids explaining the nexus between the argument from democracy and his *quasi*-argument from dignity.[101] Perhaps he preferred avoiding such discussion because he did not have a sound theoretical basis for the logical leap in his reasoning in paragraph 13 of his judgment. The weak link Barak made between his *quasi*-argument from dignity and the argument from democracy represents a transitional period from the pre-Constitutional Revolution free speech rulings to the new dignity-based paradigm. But as the new paradigm becomes more established, and the link between the old and new paradigms remains unsubstantiated, political speech is expected to receive less protection than before.

Barak's approach in *Majority Camp* of partial incorporation also stands at odds with his previous approach to the scope of protection provided to free speech. In a number of cases involving hate speech, Barak made it clear that *all* speech receives protection.[102] While it is true that Barak viewed protected speech not as an absolute, but as subject to balancing, he nonetheless afforded constitutional protection to all speech.[103] Under the current constitutional framework, even speech that is covered by the human dignity clause is subject to balancing, due to existing proportionality requirements. If only some speech is covered by the human dignity clause, however, then the speech that is excluded from such protection would receive even less constitutional protection. It is the equivalent of categorizing hate speech as non-speech, similar to the perception of obscenity under First Amendment jurisprudence.[104]

Under Barak's new approach, hate speech and other kinds of speech that might infringe upon a person's dignity, such as pornography and libel, could be more easily curtailed. Formerly, all speech received constitutional protection. While it is true that this protection was not absolute, there was only one "sifter" through which speech could be limited. Now

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[101] See Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 974-82 (criticizing the use of human dignity as a free speech justification).

[102] See e.g. CrimA 2831/95 *Elba v State of Israel*, [1996] IsrSC 50(5) 221 at 296, Barak CJ, concurring; CA 10520/03 *Ben Gvir v Dankner* Tak-Al 2006(4) 1410 (2006) at para 11, Rivlin J, concurring [*Ben Gvir*].

[103] See *ibid*.

[104] See Carmi, "Dignity versus Liberty", *supra* note 2 at 348-52 (discussing obscenity in the US system).

there are two “sifters”.[105] Speech that infringes upon human dignity might not receive any constitutional protection due to the partial incorporation approach the Court adopted in *Majority Camp*. Nonetheless, the former balancing test that enabled limiting free speech remains intact. Thus, under current doctrine, speech needs to satisfy both restrictions in order to receive constitutional protection. Now, only speech that does not confront human dignity, and that was balanced vis-à-vis other constitutional rights, is sheltered under the basic law. Furthermore, the fact that human dignity is transformed into an internal limitation on free speech, due to the incorporation of free speech through the human dignity clause, results in a potentially more alarming limitation on free speech than under the former status quo that existed prior to the Constitutional Revolution.[106]

Although the proponents of partial incorporation have good intentions, and they mean to buttress freedom of expression’s standing by its incorporation into the basic law, the effect of such incorporation may have the opposite consequences. The intuition that a right that is protected by a constitutional document is in fact stronger may be somewhat misleading. Under current constitutional doctrines, freedom of expression already receives the same standard of review as enumerated rights under the general limitations clause test.[107] Therefore, reading freedom of expression into the basic law would not substantially change the scope of protection the right currently receives. Furthermore, if freedom of expression is confined to the human dignity clause’s boundaries, it may well be weakened, as the analysis above clearly shows.

The attempt to tailor human dignity as a constitutional source for the protection of free speech is still undergoing a refinement process. The Israeli Supreme Court has been experimenting with this idea for several years now but it has not yielded satisfactory results. The awkwardness of the formulated models is concealed by terse argumentation, and a speech-protective rhetoric that emanates from the pre-Constitutional Revolution era. That speech-protective rhetoric, however, is slowly disappearing as human dignity ascends. Whether it is Justice Dorner’s proposed model in *Golan* or Chief Justice Barak’s model in *Majority Camp*, the approaches

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[105] See Frederick Schauer, “The Exceptional First Amendment” in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 29 at 53-56 (discussing “methodological exceptionalism” and distinguishing between a one-step and two-step process in the adjudication of free speech).

[106] See *Kol Ha’am*’s near certainty test (*supra* note 8), and discussion in Carmi, *Dignity and Liberty* (*supra* note 19 at 220-32).

[107] See *Szenes*, *supra* note 19 at para 18, Barak CJ; *Mofaz, supra* note 19 at para 17; Hillel Sommer, “The Unenumerated Rights: On the Scope of the Constitutional Revolution” (1997) 28 Mishpatim 257 at 320 [Sommer, “Unenumerated Rights”].

the Supreme Court experiments with are prone to curtailing speech when it conflicts with human dignity.

The issue of the protection of political speech via the human dignity clause was raised in *HaMifkad HaLeumi*.[108] Justice Naor argued that since political speech is at the *core* of the right to free speech, it is covered by the constitutional protection of human dignity.[109] According to her reasoning, because political speech was recognized to be at the core of the right to freedom of expression, then, similarly to the protection of the right to equality via the human dignity clause,[110] political speech, which is at the *core* of the protected unenumerated right of freedom of expression, deserves protection.[111] Since human dignity protects the autonomy of free will, freedom of choice, and freedom of action of a person as a free being, the constitutional protection of political speech can be derived from the constitutional right to human dignity.[112]

Justice Naor further noted that "the freedom of political speech is an essential component of human dignity", and left the constitutional protection of commercial speech undecided.[113] The nexus Justice Naor has drawn between political speech and human dignity is tenuous and considers neither the possibility that certain political speech may impinge upon human dignity (e.g., hate speech), nor what would happen in such a case. It also omitted to consider other kinds of speech that may be important, but are not political per se. Furthermore, it left unsettled the kinds of speech that are covered by the constitutional protection of human dignity, and those which lack such protection.

These attempts of the Supreme Court only prove the inherent weakness of human dignity to serve as a source for the protection of free speech. Human dignity is not an appropriate source of protection for speech because it tends to undermine the classical justifications for such protection. Israel provides a sobering example for why human dignity should not be a justification for free speech.

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[108] HCJ 10203/03 *HaMifkad HaLeumi Ltd v Attorney General et Al*, [2008] Tak-Al 2008(3) 3172 [*HaMifkad HaLeumi*]. The case involved a petition against the ban on political commercials on public television and radio.

[109] *Ibid* at para 22-26, Naor J, concurring. See also Peled, *supra* note 96 at 299 (criticizing Justice Naor's reasoning).

[110] *HaMifkad HaLeumi*, *supra* note 112 at paras 22-26, Naor J, concurring (referencing *Movement for Quality*, *supra* note 71 at paras 35-41, Barak CJ, concurring).

[111] *HaMifkad HaLeumi*, *supra* note 112 at para 26, Naor J, concurring.

[112] *Ibid*.

[113] *Ibid*. See also Peled, *supra* note 96 at 299 (criticizing Justice Naor's reasoning).

B. The "Dignitization" of Free Speech: An Overview

Elsewhere, I have presented a comparative model to assess freedom of expression.[114] It offers two contending views for the conceptualization of free speech. The liberty-based approach focuses on classic liberal concepts of liberty. Under this approach, freedom of expression is viewed as a negative right, one that is content neutral, individual, and speaker oriented. This approach is embodied in the First Amendment as interpreted by the US Supreme Court. The contending dignity-based approach views freedom of expression from a different perspective. Under this approach, freedom of speech is considered to be part of the general constitutional scheme of rights, often as derived from human dignity or similar concepts. This approach balances free speech vis-à-vis other rights and treats free speech through a communitarian and audience-oriented focus. Like other rights, the right to free speech is recognized as a positive right, and the legal system enables restricting free speech when it conflicts with other cherished rights and values—predominantly human dignity. The prominent example of a legal system that applies this approach is Germany. Yet many Western democracies share similar concepts and approaches to the dignity-based approach. All legal systems lie on the dignity-liberty continuum, but most Western democracies, with the exception of the United States, are closer to the dignity pole.

The purpose of the following presentation is to demonstrate how Israel's position on the dignity-liberty continuum is slowly drifting toward the dignity pole as a by-product of the 1992 Constitutional Revolution.

1. The Proliferation of Human Dignity in Numbers

The human dignity discourse that appears throughout Israeli constitutional law has even permeated the Supreme Court's free speech rulings with increasing frequency. The proliferation of human dignity in the constitutional jargon surrounding speech is clearly visible, while the increasing influence of non-American legal sources in this field is evident, but is not as evident as the rise of human dignity.[115]

Prior to the Constitutional Revolution, human dignity was seldom mentioned by the Supreme Court in its rulings, and when it was men-

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[114] See generally Carmi, "Dignity versus Liberty", *supra* note 2 (presenting the dignity-liberty model).

[115] Canadian rulings demonstrate statistical significance ($a < 0.05$), while German rulings are not statistically significant but are sufficiently close to be considered as significant. Also, the lack of significance for US rulings supports the claim that American rulings lose their priority in Israeli free speech rulings.

tioned, it was primarily in the context of prisoners' rights.[116] The idea behind the concept of human dignity during those years was that it protected vulnerable individuals against derogatory or inhumane treatment.[117]

In the years prior to the Constitutional Revolution, human dignity was not conceived as being related to free speech and was seldom mentioned in Supreme Court free speech rulings. Thus, in 1975–1980, human dignity was mentioned only once in free speech rulings, twice in 1980–1985, and four times in 1985–1990.[118]

When examining the contents of the pre- Constitutional Revolution free speech rulings that mention human dignity, it becomes evident that human dignity did not play a role in the manner in which the Court perceived the right to free speech. Usually, the rare mention of dignity was in the specific context of libel cases,[119] in which the relationship between free speech and dignity is relatively obvious.[120] In the mid-1980s, human dignity started gradually to emerge as a fundamental value that ought to be balanced vis-à-vis freedom of expression, but even then in a limited scope and in a handful of cases.[121] The constitutional discourse that preceded the Constitutional Revolution classified human dignity as just one weak

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[116] See Kamir, *supra* note 41 at 110-11 (noting that "human dignity" was mentioned only five times by the Israeli Supreme Court in its rulings in 1948–1978 while it has been mentioned nearly 300 times in the period 1992–1998). See also Kretzmer, *supra* note 85 at 163-65; HCJ 355/79 *Katalan v Detention Services*, [1980] IsrSC 34(3) 294 at 298.

[117] Kretzmer, *supra* note 85 at 165.

[118] See Carmi, *Dignity and Liberty*, *supra* note 19 at 304-30 (Appendix I).

[119] See *Ha'aretz* (*supra* note 14), where Justice Landau mentions human dignity, primarily in part of a draft bill of rights that eventually did not pass. It is part of his reasoning in rejecting the *New York Times v. Sullivan* balancing in libel cases (376 US 254, 84 S Ct 710 (1964)). See also CrimA 677/83 *Borochov v Yefet* [1985] IscSC 39(3) 205 [*Borochov*].

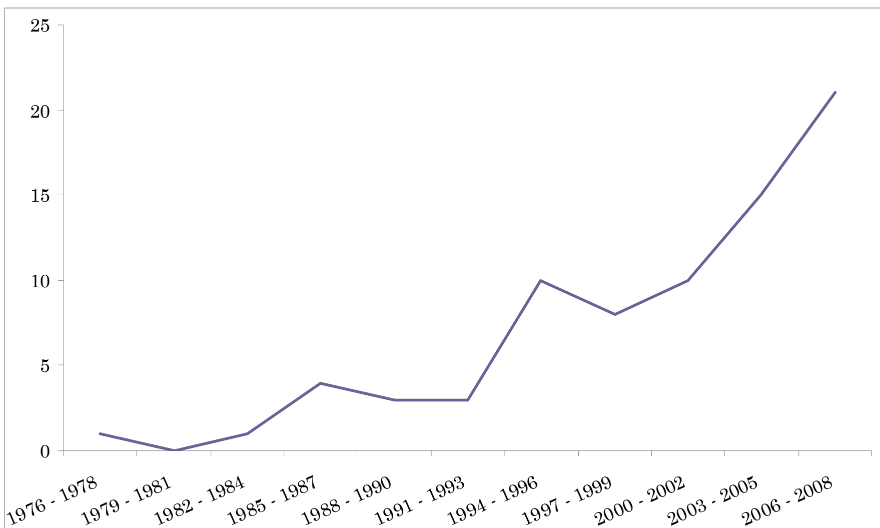
[120] See discussion in text accompanying note 69, *supra* (explaining that the right to reputation was derived from human dignity because in Hebrew the word "*kavod*" means both dignity and respect. Therefore, as part of the right to respect, human dignity is considered to encompass the right to reputation, and is therefore relevant in libel cases, where free speech struggles with the right to reputation).

[121] See HCJ 153/83 *Levi v Police Commissioner Southern District*, [1984] IsrSC 38(2) 393, Barak J, online: <http://elyon1.court.gov.il> [*Levi*] (human dignity as a factor for balancing the right of assembly). Justice Barak also mentions protection of life and bodily integrity in the same sentence, and only mentions human dignity once. In HCJ 14/86 *Laor v Review Board* ([1986] IsrSC 41(1) 421 at 433-34 [*Laor*]), a landmark ruling that led to the abolishment of the Theatrical Review Board, Justice Barak mentioned human dignity again, while referring to *Levi*, where he mentioned human dignity only once, as part of the rationale to keep the interest of "public peace". Human dignity was not mentioned as a right, and freedom of expression normally trumps it in the Court's reasoning. Chief Justice Shamgar also mentions human dignity once in his landmark *Sitrin* decision, which established journalist privilege (*Sitrin*, *supra* note 16 at 358-60), yet he also only mentions it once as an interest.

interest among others when weighed against the right to free speech.[122] In addition, the references to human dignity in these rulings were not treated as part of free speech theory per se or as an integral part of the manner in which the Court perceived the right to free speech. Therefore, all the judicial discourse surrounding human dignity and freedom of expression prior to the Constitutional Revolution may be fairly characterized as incidental and marginal at best.

Starting the early 1990s there was a dramatic increase in the appearance of human dignity in Supreme Court free speech rulings. The number of Supreme Court free speech rulings that mention human dignity has been constantly on the rise: in 1991-1995 dignity and human dignity were mentioned nine times, in 1996-2000 seventeen times, and in 2001-2005 twenty-four times.[123] In recent years this tendency has continued, as twenty-one free speech rulings in 2006-2008 mentioned dignity and human dignity.[124] This visible increase is further supported by statistical significance that reaffirms the claim that human dignity clearly plays a role in the Court's free speech rulings.[125]

Diagram I: Number of Supreme Court Rulings that Mention Human Dignity[126]



122 See e.g. *Cahana*, *supra* note 16.

123 *Ibid.*

124 See Carmi, *Dignity and Liberty*, *supra* note 19 at 304-30 (Appendix I).

125 *Ibid* at 331-32 (Appendix III).

126 The diagram is based upon the data gathered and presented in *ibid* at 304-30 (Appendix I).

The proliferation of the references to human dignity in the Supreme Court's rulings, a proliferation that coincides with the Constitutional Revolution, represents a shift in the manner in which the Court perceives the role of human dignity in its free speech jurisprudence. It demonstrates a new discourse that pervades Israeli constitutional law in general (and Israeli free speech discourse in particular), in which human dignity is a prominent constitutional concept. Furthermore, human dignity is mentioned in virtually all areas of free speech rulings. It is no longer limited to libel cases; it is also applied to issues such as the regulation of pornography,[127] the scope of the constitutional guarantees afforded to free speech,[128] and even prior restraint.[129]

I refer to this phenomenon as the "dignitizing" of speech, that is, conceptualizing free speech in terms of human dignity. Under this perception, free speech under Israeli law is increasingly becoming linked to human dignity and is derived from the right to dignity. This link is a result of the Constitutional Revolution of 1992 and is not reflected in the free speech jurisprudence that predates it. Undoubtedly, the concept of human dignity, which appears throughout the general constitutional discourse in Israel as a result of the Constitutional Revolution, has caused the dignitization of speech. This process has not been greeted by any skepticism regarding whether the validity or theoretical soundness of the link between free speech and human dignity is warranted or theoretically sound.

The dignitization of speech raises many difficulties. First and foremost, the right to free speech has an independent and well-developed theoretical basis that has little or no correlation to human dignity.[130] Second, the manner in which human dignity is perceived under Israeli constitutional jurisprudence stands at odds with the protection of many kinds of speech, including hate speech, pornography, and libel. Third, even areas of speech that were traditionally afforded robust protection, such as prior restraint, are more prone to limitation under the dignity-focused legal regime. Fourth, dignitizing free speech turns human dignity into an internal constraint on free speech and reduces the protected sphere of expression. Dignity-harming speech may well be categorized as "non-speech", similar to the American treatment of obscenity, and the newly formed constitutional standards are expected to yield more speech-restrictive results. Fifth, the dignitization of Israeli constitutional law has caused the

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[127] See e.g. *Station Film*, *supra* note 80; *SHIN*, *supra* note 22.

[128] See e.g. *Golan*, *supra* note 66; *Majority Camp*, *supra* note 44.

[129] See e.g. HCJ 2194/06 *Shinui Party v Chair of Electoral Board Committee*, [2006] Tak-Al 2006(2) 4500 [*Shinui*].

[130] See generally Carmi, "Dignity—The Enemy from Within", *supra* note 85.

right to human dignity to receive more weight than before.[131] Because the human dignity discourse has found its way into Israeli constitutional law in general and free speech doctrine in particular, there is an implicit new hierarchy that places human dignity on the top, at the expense of free speech.

The prevalent use of human dignity in the Supreme Court's free speech rulings is equivalent to introducing new vocabulary into free speech theory. Such introduction may even affect some of our most basic assumptions regarding free speech.[132] Mayo Moran's observation that the choice of certain terminology influences outcomes should not be taken lightly, since such influence may be far-reaching.[133] As she astutely notes, "once the issue is situated in a particular way, certain understandings appear far more plausible than others. Certain facts immediately become relevant and thus susceptible to being found, while others appear irrelevant, and thus are more easily lost."[134] As the Israeli example clearly shows, acknowledging the rhetoric of human dignity in freedom of expression contexts may prove to be harmful.

All these aspects raise serious concerns as to the appropriateness of affiliating free speech and human dignity and show why a skeptical approach is warranted. It is not too late to separate human dignity and free speech, both theoretically and doctrinally. But in order to do so, there is a need to demonstrate the negative impact that the current trends pose and to offer a viable alternative.

2. The Use of Comparative Law in Free Speech Cases

Another interesting aspect of the Constitutional Revolution is its effect on references to foreign rulings in the Supreme Court's free speech opinions. The use of comparative law by Israeli courts (and especially by the Supreme Court) is vast even when compared to other Western legal systems (including those of Europe, and especially that of the United

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[131] See e.g. *Szenes* (*supra* note 19 at paras 29-30, 149, Cheshin J, dissenting) and discussion in Carmi, *Dignity and Liberty*, *supra* note 19 at 250-53 (regarding the false managerial positivistic effect that affords human dignity greater importance than before).

[132] See e.g. Mayo Moran, "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" [1994] 6 Wis L Rev 1425 at 1426-27 ("So each of us must struggle to revivify our language, to adapt it to the changing nuances of our communal life. In so doing, we not only come to better understand our world, we also help to remake it").

[133] See *ibid*.

[134] *Ibid* at 1435.

States).[135] The Anglo-American system seems most popular among Israeli judges. The primary reason for this lies in language and accessibility to materials. Most judges and legal clerks are not fluent in materials written in other European languages, and it is therefore expected that they use English or American sources.[136] Although Israel is considered to be a mixed legal system,[137] it rests more closely with the common law influence, which has greater impact on Israeli law than does continental law. After all, the state of Israel was preceded by a British rule with a common law legacy, and this affected the formation of Israeli law.[138] The resemblance of Israeli law to the common law has been expressed through reliance on British precedent,[139] but in the 1970s and 1980s, the British influence diminished and Israeli law began embracing an American influence.[140]

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135 See Mordechai A Rabello & Pablo Lerner, "On the Place of Comparative Law in Israel" (2004) 21 Mechkarie Mishpat 89 at 114 (in Hebrew); George P Fletcher, "Comparative Law as a Subversive Discipline" (1998) 46:4 Am J Comp L 683 at 691 n 35 ("I should think that the most comparatively-minded countries are probably Israel and Japan"). See also Carmi, "Dignity versus Liberty", *supra* note 2 at 338-46 (discussing American exceptionalism and the American recoil from referring to comparative law).

136 Rabello & Lerner, *supra* note 144 at 113-14. See also *ibid* at 116: "Israel has a language proficiency problem. ... [S]ince most Israeli scholars are proficient only in English, it is hard to expect that they will possess understanding of French or Italian law" [translated by author].

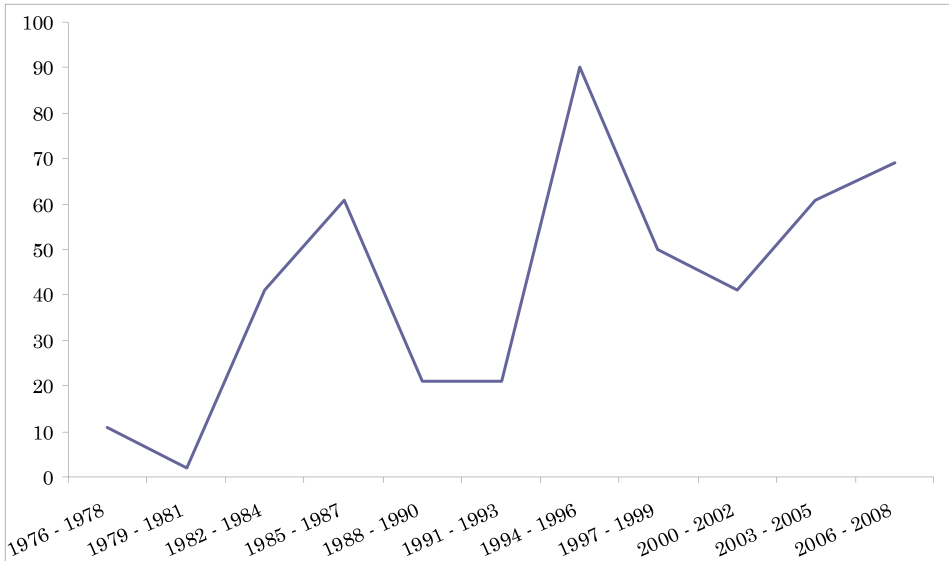
137 See Aharon Barak, "The Israeli Legal System—Tradition and Culture" (1992) 40:2 Hapraklit 197 at 206-207 [Barak, "Tradition and Culture"] (in Hebrew).

138 See e.g. Daniel Friedman, "Infusion of the Common Law into the Legal System of Israel" (1975) 10 Isr L Rev 324.

139 Up until 1980, Israeli law used the common law and British precedent in order to fill in lacunae as part of Israeli statutory law (see section 46 of the King's seal—the Palestine Order-in-Council, 1922-1947). This was changed in 1980 with the enactment of the *Foundations of Law Act*, 1980, SH 163: <www.knesset.gov.il/main/eng/home.asp>.

140 See Barak, "Tradition and Culture", *supra* note 146 at 206-07 (claiming that Israel is shifting from a British law centre of gravity to an American law centre of gravity, yet still characterizing the Israeli legal system as a mixed legal system). See also Table I, below (demonstrating a decrease (with minor exceptions) in the number of British rulings referenced in free speech cases, simultaneously with a constant increase in references to US rulings during the period 1975–1995).

Diagram II: References to US Rulings in Israeli Supreme Court's Free Speech Rulings[141]



Following the Constitutional Revolution, the references to US precedent has declined, but it still remains the most cited legal system in the Supreme Court's rulings. The increased tendency to resort to US rulings prior to the Constitutional Revolution changed as the Constitutional Revolution became more established.[142] The renewed rise in the number of references in recent years still lags behind the significant reliance on US rulings in the early and mid-1990s.[143] While it is too early to eulogize American influence on Israeli free speech law, it is clear that its golden age has passed.[144]

Analyzing the Americanization or de-Americanization processes of Israeli law is a challenging task, since evaluating the effects that American

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[141] The diagram is based upon the data gathered and presented in Carmi, *Dignity and Liberty*, *supra* note 19 at 304-30 (Appendix I).

[142] The statistical data on the use of US rulings by the Israeli Supreme Court is inconclusive. The lack of statistical significance (α = 0.083918) stems from the clear change in the tendency to refer to these rulings by the Court starting in the mid-1990s, following the Constitutional Revolution.

[143] The number of references to American rulings peaked in the years 1991–1995 with 113 Supreme Court free speech rulings that mentioned US cases. But the number of referenced American cases nonetheless remains high: 66 cases in 1996–2000, 98 cases in 2001–2005, and 44 cases in 2006-2008. See Diagram II.

[144] See discussion in Carmi, *Dignity and Liberty*, *supra* note 19 at 240-50 (examining whether Israel is undergoing a de-Americanization process).

law has had on the Israeli legal system varies from one context to another and because the common perceptions regarding the actual effects of American law on Israeli law are sometimes inaccurate. The centrality of American law in Israel may seem, to some, well entrenched. As Rabello and Lerner observe, "most Israeli scholars almost completely ignore the European Continental legal tradition. In fact, American Law is becoming an integral part of the legal thinking of a large number of Israeli scholars."[145] It is the American hegemony in many fields of law that impedes the utilization of comparative law.[146] The reason for this hegemony is that a large part of Israeli law is fed almost exclusively from American legal literature.[147]

In contrast to Rabello and Lerner, Yoram Shachar claims that there is a tendency to overestimate American influence on Israeli law, and that the actual reliance and references to American law by the Supreme Court is far less significant than commonly thought.[148] The following is an attempt to characterize the American influence on Israeli free speech laws in light of similar trends in other fields of law. There are strong indications that, in the past decade, the American influence on Israeli law has been on the decline on most legal fronts.[149]

For example, Lahav examines the American influence on the teaching of law in Israel.[150] In her study, she demonstrates how Israeli law schools came to resemble elite American law schools in a gradual process that peaked in the 1990s, but that this similarity is currently on the decline. She identifies Germany as the primary alternative source of influence.[151]

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145 See Rabello & Lerner, *supra* note 144 at 116 [translated by author].

146 See *ibid* at 117 (criticizing the "American hegemony" in the Israeli use of comparative law).

147 See e.g. Amnon Reichman, "The Voice of America in Hebrew? The References of the Israeli Court to American Law in Free Speech Issues" in Michael D Birnhack, ed, *Be Quiet, Someone is Speaking!* (Tel Aviv: Tel Aviv University Press, 2006) 185; Barak, "The American Constitution", *supra* note 33 at 85-89.

148 See Yoram Shachar, "The Sources of The Israeli Supreme Court 1950-2004" (2008) 50 Hapraklit 29 at 30, 65.

149 See *ibid* at 65-66.

150 Pnina Lahav, "American Moment[s]: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?" (2009) 10:2 Theoretical Inquiries in Law 653 at 692: "A direct cause-and-effect relationship between these trends [globalization and Americanization] and American influence on Israeli legal education is hard to document, but there does seem to be a correlation."

151 See e.g. *ibid* at 695: "Europe, particularly Germany, has become more attractive to Israeli scholars and educators. The meaning of this shift, if indeed it is one, is not yet clear, as it appears to be in its initial stage. Some opined that German scholarship today, or European Community scholarship, is more interesting and relevant to Israel." Lahav further remarks that another trend worth noting is the growing Israeli interest in Asia (*ibid*).

Lahav correctly observes that "[t]he turn of de-Americanization, if a turn it is, is something to observe and follow before any solid conclusions may be drawn."[152]

Furthermore, Israel is gaining maturity and independence. This is expressed in greater self-reliance and less dependence on external sources as a growing body of Israeli law is at hand for judges and scholars who wish to develop Israeli free speech law. According to Shachar, the tendency to rely on domestic sources is on the rise, and reliance on foreign sources is on the decline, especially in the area of public law (which is particularly relevant to free speech).

Contrary to the views described above, Shachar has made interesting findings regarding the references by the Supreme Court to American sources. While in areas of criminal and civil law, the rate of American influence has been uneven, in the area of public law, the rate has been steady when compared to other common law sources. Shachar claims that when the Israeli justices sought sources for constitutional inspiration, it was only natural that they looked to the United States. But these findings are not consistent with the observation that American influence on free speech, which is a subcategory of public law, has waned in recent years. The most reasonable explanation for this disparity is that while the United States remained influential in the area of public law, in the area of free speech, the dissonance between First Amendment doctrine and the newly emerging dignity-based paradigm led to less reliance on US sources.[153]

In particular, Shachar claims that the Israeli Supreme Court relies primarily upon its own precedents and that comparative law plays a small part in the Court's reasoning.[154] He further claims that the Supreme Court's tendency to rely on domestic precedent has only increased in recent years. This tendency is greatest in the field of public law, which is highly related to freedom of speech. Therefore, Israel may feel a greater need to structure its public law independently, as compared to other fields of law, and this may also account for the decrease in references to American sources.[155]

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152 *Ibid* at 696 [emphasis added].

153 See discussion on the "constitutional cognitive dissonance" in text accompanying notes 165-66*, infra*.

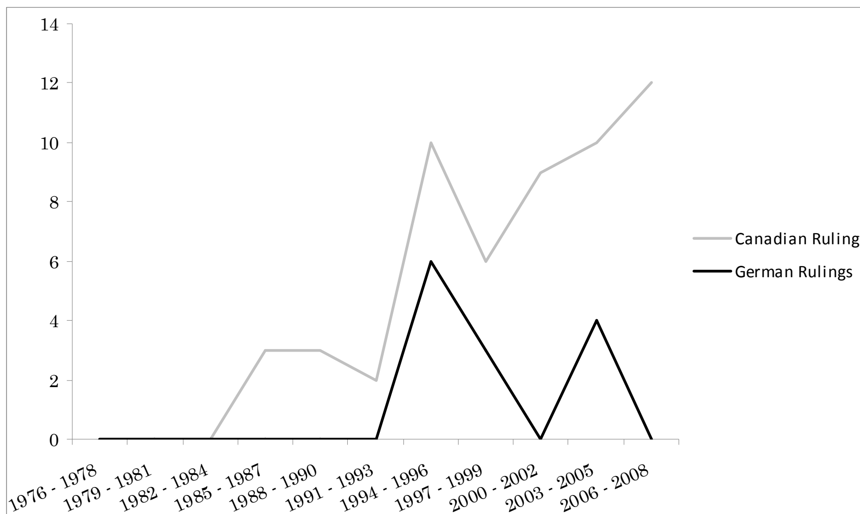
154 See Shachar, *supra* note 157 at 65.

155 *C.f. Atkins v Virginia*, 536 US 304, 122 S Ct 2242 (2002) (referring to the legitimacy of the use of international and comparative law for the interpretation of the constitution regarding the constitutionality of executions of the mentally retarded); *Roper v Simmons*, 543 US 551, 125 S Ct 1183 (2005) (referring to the legitimacy of the use of international and comparative law for the interpretation of the constitution regarding the constitutionality of juvenile executions); Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights" in Ignatieff, *supra* note 109, 1 at 8-9 (reviewing differ-

Lahav also recognizes the maturity and independence of the Israeli legal community as one of the sources of the de-Americanization process. Thus, despite Israel's affection for the United States and its general tendency to emulate American phenomena, free speech remains an area that receives restrained enthusiasm. It is a source for study and comparison but not for mindless duplication.[156]

The number of references to US rulings does not capture the full ambit of changes that the Israeli legal system has been undergoing since 1992. At the same time that the Supreme Court was reducing its reliance on authority from the United States, it was broadening its outlook and considering alternative sources for inspiration. References to other Western legal systems' rulings have been increasing in the past years.

Diagram III: References to German and Canadian Rulings in Israeli Supreme Court's Free Speech Rulings[157]



ent aspects of American exceptionalism); Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry" (2006) 115:7 Yale LJ 1564.

156 Barak, "The American Constitution", *supra* note 33 at 88-89: "Indeed, now, after more than forty years after *Kol Ha'Am* we can speak of an Israeli free speech tradition. It is fed by the American tradition. It is close to it yet different from it. It is the tradition of a people in its country. ... We have examples of controlled inspiration from overseas. The American ideas go through the Israeli sifter, and in the end of the process we remain with the good and beneficial, which reflects the common [between Israel and the United States]" [translated by author].

157 The diagram is based upon the data gathered and presented in Carmi, *Dignity and Liberty*, *supra* note 19 at 304-30 (Appendix I).

In particular, Canadian rulings have been increasingly cited by the Supreme Court in its post-Constitutional Revolution rulings. Also, German rulings, which were never cited prior to the Constitutional Revolution, are now utilized by the Supreme Court.[158]

Table I: References to Foreign Rulings in the Israeli Supreme Court Free Speech Rulings[159]

Years	US Rulings Cited	Australian Rulings Cited	Canadian Rulings Cited	British Rulings Cited	German Rulings Cited	Total Non-US Foreign Rulings Cited
1976-1978	22	0	20	0	1	12
1979-1981	2	0	0	0	2	3
1982-1984	18	0	15	0	0	41
1985-1987	22	0	14	3	5	62
1988-1990	31	0	24	3	2	22
1991-1993	10	0	8	2	0	22
1994-1996	29	6	9	10	1	90
1997-1999	14	3	4	6	0	49
2000-2002	24	0	13	9	2	42
2003-2005	35	4	16	10	4	61
2006-2008	44	0	12	12	1	69

The increasing references to Western, non-US sources,[160] coupled with the decrease in citations to US sources,[161] serve as further indication of the slow detachment Israeli free speech law is undergoing from US guidance and the liberty-based paradigm. Instead, the rulings of the Israeli Supreme Court are starting to reflect the dignity-based approach that is

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158 For more statistical analysis see Carmi, *Dignity and Liberty*, *supra* note 19 at 331-32 (Appendix III).

159 The table is based upon the data gathered and presented in *ibid* at 304-30 (Appendix I).

160 See Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1968) at 21-24 (referring to the addition of new sources that fit the perceptions as a means to reduce cognitive dissonance).

161 See *ibid* at 19-21 (referring to changes in behavioural cognitive elements and changes in environmental cognitive elements as a means to reduce cognitive dissonance).

common to the other Western, non-US rulings. The paradigm shift is not yet complete, but it is clearly in process. The pendulum is indeed swinging toward the German dignity-based approach and moving away from the American liberty-based approach.[162]

A recent and interesting example can be found in *Ilana Dayan v. Captain R*.[163] Justice Rivlin resorted primarily to US precedent in a very speech-protective ruling. However, Justice Vogelman, who wrote a concurring opinion, resorted primarily to case law from the United Kingdom and other Western jurisdictions (such as Australia, New Zealand, and Canada).[164] In Justice Vogelman's opinion, British rulings were more relevant to the interpretation of the *Israeli Defamation Act* than US rulings, because the act bears greater resemblance to British law than to US law.[165] Justice Vogelman further noted that although in recent decades there is a tendency to prefer free speech to reputation, "it is not the adoption of a monolithic approach like in the American system."[166]

There are several possible explanations for the rise in the use of non-American authorities in Israeli comparative law. One explanation is that, in the past three decades, there has been a general increase in the number of free speech rulings in the Western world.[167] As Western democracies started to develop free speech doctrines over the past thirty years, there has been a growing number of rulings and approaches. The monopoly that the United States had several decades ago, as virtually the only democracy with an evolved free speech system, is gone.[168] Furthermore, technological improvements in the flow of data, such as the Internet and legal databases, have made foreign materials more accessible than before.

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[162] See further discussion in Carmi, *Dignity and Liberty*, *supra* note 19 at 240-50 (examining whether Israel is undergoing a de-Americanization process).

[163] CA 751/10 *Dr Ilana Dayan-Orbach v Captain R* (2012) [*Ilana Dayan*].

[164] *Ibid* at paras 6-15, Vogelman J, concurring.

[165] *Ibid*.

[166] *Ibid* at para 19 [translated by author]. See also *ibid* at para 23: "As previously mentioned, British defamation laws resemble in their essence Israeli law and are considered 'plaintiff friendly' especially vis-à-vis the American law, which sanctifies freedom of speech and freedom of the press" [translated by author]. See also Tamar Gidron, "World Map of Libel Tourism and Defamation Law in Israel" (2011) 15 Hamishpat 385.

[167] See Frederick Schauer, "Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture" in Nolte, *supra* note 95 at 44-78 [Schauer, "Freedom of Expression Adjudication"] (relating to a growing number of Western free speech rulings in the past three decades).

[168] *Ibid*. There are also indications that the US Constitution has lost some of its influence worldwide. See e.g. David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYU L Rev 762.

Another explanation, which relates in particular to the increasing number of references to German rulings, may have to do with the Holocaust. Israeli courts in the past may have felt deterred from citing German rulings due to the ambivalent sentiment of Israeli society towards Germany.[169] Over the years, this reluctance is slowly fading away. The Supreme Court has employed several German law clerks as part of its foreign clerks program. The output of these clerks found its way into the Supreme Court rulings in a fashion similar to the work of American clerks.

Probably the most compelling explanation for the rise in willingness to rely upon Western, non-US legal systems is that, from the late 1990s to date, Israel has been slowly drifting away from the strong American influence that existed in the 1980s to a more European approach. I refer to this side effect as *constitutional cognitive dissonance*.[170] The greater the disparity between two legal systems, the less one will refer to the other.[171] The more the Israeli and US free speech doctrines are alike, the easier it is to import American First Amendment doctrines into Israeli law without much alteration or adaptation. But as the disparities between these two legal systems grow, so too does the dissonance between the American First Amendment doctrines and their Israeli counterparts.

The practical consequence of such a dissonance is that the future importation of American doctrines into Israeli law is questionable and would

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[169] See Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, translated by Haim Watzman (New York: Hill and Wang, 1993) at 187-252 (referring to the Israeli recoil from Germany). See also Eli Zalzberger & Fania Oz-Zalzberger, "The Tradition of Freedom of Speech in Israel" in Birnhack, *supra* note 156, 27 at 46 (claiming that the recoil from referring to German precedent slowly faded away during the 1970s, but that in free speech rulings there is no substantial reliance on German precedent).

[170] I borrow the term *cognitive dissonance* from psychology. In brief, the theory of cognitive dissonance holds that contradicting cognitions serve as a driving force that compels the human mind to acquire or invent new thoughts or beliefs, or to modify existing beliefs, so as to *minimize* the amount of dissonance (conflict) between cognitions. See Festinger, *supra* note 171 at 1-27.

[171] That is true from both directions: The Israeli Supreme Court would refer to the American system to a lesser extent the more the dissimilarities among the systems increase, and will refer to other, more similar, systems to a greater extent. At the same time, the relative lack of comparative constitutional law in the American system in general, and in the field of free expression in particular, may also be explained through this prism. American exceptionalism in the field of freedom of expression makes it perfectly sensible to avoid confronting foreign conceptions of free speech that are patently incompatible with the American formulation. In these cases, the comparison with other ideas will not lead to a change and would only decrease the dissonance regarding the orthodoxy. Therefore, from a practical viewpoint, the use of comparative constitutional law in the field of US free expression is inefficient and even sometimes superfluous, due to the constitutional cognitive dissonance.

require greater adaptation. Furthermore, it may lead to forsaking the American system as the main source of inspiration in freedom of expression issues and replacing it with other systems that are more compatible with Israeli doctrines, such as those from Canada and Germany. Among those legal systems, Canada would probably serve as a principal source due to the greater familiarity of Israeli jurists with the English language.[172]

The statistical data explored above gives us the big picture, but how does the dignitization of speech come into expression in free speech doctrine itself? The next section offers a substantive analysis of the effects of human dignity on Israeli free speech doctrines in three major areas of free speech laws.

C. The Dignitization of Free Speech—Substantive Analysis

1. Prior Restraint

Perhaps the most interesting area of free speech into which the concept of human dignity has penetrated is prior restraint. This field is at the heart of free speech protection and normally receives the most robust protection.[173] Early free speech rulings and doctrines developed within this field,[174] and the distrust of governmental censorship is among key explanations for the recoil from censorship.

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[172] See e.g. *SHIN*, *supra* note 22 at para 18, Dorner J (citing Canadian rulings); *Herzikovitz*, *supra* note 64 (citing German rulings); *Rinat*, *supra* note 64 (same). *C.f.* David Fontana, "Refined Comparativism in Constitutional Law" (2001) 49:2 UCLA L Rev 539 at 618-22 (relating to the importance of language for the accessibility to comparative materials, and the concern that it would result in an "[a]nglophile refined comparativism" in the American legal setting). This fear in the American context is also backed up by the history of use of comparative sources from looking to the "canons of decency and fairness which express the notions of justice of English-speaking peoples" (*ibid* at 587 n 240). See also Rabello & Lerner, *supra* note 144.

[173] See e.g. Lee C Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1986) at 76-103 (discussing the fortress model).

[174] See Schauer, "Freedom of Expression Adjudication", *supra* note 178 at 47, 58 n 21: "The modern era of free-speech adjudication in the Supreme Court is commonly taken to begin with a series of important 1919 cases, including *Schenck v United States*, ... *Frohwerk v United States*, ... *Debs v United States*, ... [and] *Abrams v United States*" [citations omitted]. In Israel, see *Kol Ha'am*, *supra* note 8.

Israel has several statutes that enable prior restraint through military censorship,[175] newspaper licensing,[176] a public film review board,[177] *sub judice*,[178] and an electoral board committee in cases of political advertisement in times of elections,[179] to name a few examples. In the 1980s, the Supreme Court's tendency was to give a narrow interpretation to these statutes so as to enable prior restraint only in extreme cases,[180] through the use of a judicially constructed rigid scrutiny test—"the near certainty test". Under this test, only speech that has great potential (almost with certainty) to cause substantial danger may be censored in advance.[181] This constitutional test was borrowed from the US "clear and present danger test" by Justice Agranat in *Kol Ha'am*.[182] It resembles the US test, although the Israeli approach is a somewhat weakened version, as it lacks the requirement of imminence as a prerequisite for prior restraint.

Another vague part in this constitutional test concerns the definition and scope of "near to certain danger". Some Israeli scholars, such as Mordehai Kremnitzer, claim that the required degree of certainty should diminish as risks become more substantial.[183] Others construe the probability required by the test as being substantially higher.[184] But if there is one thing certain about the near certainty test, it is that within the Israeli constitutional law framework, this standard of review is the most stringent, comparable to the strict scrutiny standard in the United States.

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[175] See Defense Regulations (Times of Crisis), IR 1442, 855, 2nd Addendum (1945); *Schnitzer*, *supra* note 10; CA 9185/03 *Esther Tennenbaum v Ha'aretz Publishing Ltd*, [2003] IsrSC 58(1) 359 [*Tennenbaum*].

[176] See *Press Ordinance*, 1933, 2 LSI 1191 (Isr); *Kol Ha'am*, *supra* note 8.

[177] See *Cinematography Ordinance*, 1927, 1 LSI 135 (Isr); Barak-Erez, *supra* note 12.

[178] See *Courts Act*, *supra* note 18, art 71.

[179] See *Election Act (Manners of Propaganda)* 5719-1959, SH 138, online: <www.knesset.gov.il/main/eng/home.asp>; *Shinui*, *supra* note 135.

[180] See e.g. *Cahana*, *supra* note 16; *Schnitzer*, *supra* note 10.

[181] See HCJ 644/81 *Omar Int'l Inc (New York) v Minister of Interior*, [1981] IsrSC 47(1) 829 [*Omar Int'l*] (requiring substantial danger). But see HCJ 316/03 *Bakri v Israel Film Council* (2003), online: <http://elyon1.court.gov.il> [*Bakri*] (requiring substantial harm to public sentiment).

[182] See Barak, "The American Constitution", *supra* note 33 at 87.

[183] See Mordechay Kremnitzer, "*The Elba Case: The Law of Incitement to Racism*" (1999) 30 Mishpatim 105 at 106-07; Kremnitzer & Levanon, *supra* note 18 at 178-80 (criticizing the application of the near certainty test in the free speech rulings of former Chief Justice Barak).

[184] See Ze'ev Segal, *Free Speech: Between Myth and Reality* (Tel Aviv: Papyrus, 1996) at 72 (suggesting adding the immanency requirement to the near certainty test so as to closely resemble the clear and present danger test) (in Hebrew); Avner Barak, "The Near Certainty Test in Constitutional Law" (1989) 14 Iunei Mishpat 371 (expressing a similar view for buttressing the near certainty test's requirements) (in Hebrew).

Yet, the tendency to buttress the rigid standard for prior restraint seems to have halted and even reversed in recent years.[185] Human dignity is the competing consideration that diminishes the pre-Constitutional Revolution tendency to place free speech above countervailing rights associated with human dignity. Instead, human dignity seems to have taken the lead. The following examples demonstrate the slow, almost imperceptible, shift toward a new, dignity-based approach to free speech.

In *Shinui*,[186] the Supreme Court upheld a decision by the then Justice Beinisch, who presided over the case as chair of the Electoral Board Committee, which disqualified an election infomercial that depicted Orthodox Jews as parasites. The infomercial was perceived as offensive to Orthodox Jews, portraying a figure of an Orthodox Jew who was latching onto a secular Jew's foot. Once the secular Jew put a vote for Shinui in the ballot, the Orthodox Jew vanished in black smoke. This political satire was meant to protest against the taxpayers' funding of Orthodox Jews and religious parties. Yet the depiction of the religious Jew as a parasite and the manner in which he vanished aroused, in some, connotations of the Holocaust and to Nazi propaganda. The decision of the Electoral Board Committee's chair was appealed to the Supreme Court presiding as the High Court of Justice, which upheld the decision to ban the infomercial.

Although the speech involved in this case was purely political and intended to advance the platform and agenda of a legal party, the Court preferred banning the speech because of its offensive nature. The main rationale for the Court's ruling was that the protection of public sentiment and of human dignity supersedes, in this case, the protection of freedom of expression. Chief Justice Barak said that "the protection of public sentiment may be also warranted in pursuit of the protection of the value of human dignity. This is especially true in cases in which the insult to public sentiment amounts to denigration, humiliation, and a harsh insult to

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[185] The near certainty test and the *Kol Ha'am* case seemed to have been so entrenched in the early 1980s that Justice Dov Levin commented that "the strong and enriching words [of Justice Agranat in Kol Ha'am] have become a cornerstone in our legal system, and the principles embodied in it are acceptable among all to an extent that they should not be questioned" (HCJ 243/82 *Zichroni v Broadcasting Authority*, [1983] IsrSC 37(1) 757 at 765 [translated by author]). It seems that the peak *Kol Ha'am* had enjoyed in the 1980s was reversed in recent years, as the analysis of *Shinui* (*supra* note 135) and *Tennenbaum* (*supra* note 186) below aptly demonstrates.

[186] *Shinui*, *supra* note 135. See also Guy Carmi, "Herut's Freedom of Expression" Editorial, *Haaretz* (9 March 2006) online: Haaretz <http://www.haaretz.com> (regarding a similar ruling by the Electoral Board Committee chair, Justice Beinisch, that occurred in the same week).

human dignity."[187] Barak seemingly qualified the limitation of free speech by saying that in a pluralistic society, the exchange of hurtful views is desirable. Yet, he said, "a democratic society is also founded upon the value of human dignity. Therefore, the protection of free speech does not grant an unlimited freedom to denigrate a person and to harshly hurt his dignity as a human being."[188] Chief Justice Barak therefore enforces civility by saying that all messages may be expressed, but not in a manner that is patently offensive and degrading.[189]

As previously mentioned, *Kol Ha'am* represents the peak of the common law protection of free speech formed in the pre-Constitutional Revolution era. Its highlight is the near certainty test—the Israeli equivalent to the clear and present danger test for prior restraint. Over the years, and especially in the 1980s, the Court further developed and buttressed this ruling.[190] Chief Justice Barak mentioned *Kol Ha'am*, and the near certainty test, yet failed to utilize it on the facts of the specific case. The ruling is perplexing since it is unclear whether *Shinui* implicitly overturned *Kol Ha'am* or simply narrowed the *Kol Ha'am* ruling due to human dignity concerns.[191] The latter possibility means that Barak broadened the exception of the near certainty test, which permits the restriction of speech where there is fear of a near to certain breach of public peace, so as to include human dignity. This broad understanding of breach of public peace stands at odds with the previous rulings that tended to narrow, not broaden, its meaning.[192] In retrospect, Justice Eliezer Rivlin, who concurred with Chief Justice Barak in *Shinui,* has publicly admitted that the ruling is too speech restrictive and that he would have decided the case differently today.[193]

Following *Shinui*, prior restraint is also possible in cases of infringement of human dignity and situations where certain groups would be of-

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[187] *Shinui*, *supra* note 135 at para 13, Barak CJ, concurring [translated by author].

[188] *Ibid* [translated by author].

[189] *Ibid* at para 14, Barak CJ, concurring.

[190] See e.g. *Laor*, *supra* note 127; *Omar Int'l*, *supra* note 192; *Schnitzer supra* note 10.

[191] Barak could have qualified his ruling by limiting it to elections' infomercials, by referring to the *Propaganda Act* (*supra* note 190), which authorizes the Electoral Board Committee Chair to regulate political broadcasting in the period preceding an election. Yet, Barak refrained from expressly qualifying his ruling.

[192] See e.g. *Schnitzer*, *supra* note 10 at para 15; *Omar Int'l*, *supra* note 192; *Bakri*, *supra* note 192.

[193] Justice Eliezer Rivlin "Hate Speech Sui Generis?" (Speech delivered at Ono College Conference on Free Speech, 27 May 2008) [unpublished].

fended.[194] Justice Barak did not limit his ruling to the specific context of political campaigns, although he could have.[195] *Shinui* represents a paradigm shift toward the further limitation of speech due to human dignity concerns in the area of free speech that traditionally receives the highest protection—the prior restraint of political speech.

Kol Ha'am's near certainty test suffered another blow in *Tennenbaum*. In this case, the family of Elhanan Tenenbaum, who was then held captive by Hezbollah, petitioned for a media ban on the details of the abduction. The family feared that the details might endanger the abductee's life. Although the Court rejected the petition and allowed publication,[196] it applied a mild proportionality test instead of the near certainty test.[197] The Court used a lower scrutiny standard for prior restraint in this case because it balanced the right to life against freedom of expression.[198] The right to life, which is enumerated in the same articles in *Basic Law: Human Dignity and Liberty* that enumerate human dignity, received greater importance and altered the level of scrutiny the Court used.

Following *Tennenbaum*, the near certainty test, which requires a high level of scrutiny for prior restraint, was replaced by a preponderance of evidence test of reasonable likelihood in cases that involve a fear for the life or bodily integrity of the petitioner.[199] This exception that was carved out of the formerly uniform stringent standard for prior restraint is also a

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194 *But compare with* CA 8345/08 *Ben Natan v Bakri*, [2011] Tak-Al 2011(3) 1779 (denying group libel as a cause under the *Defamation Act*, 1965, SH 240, online: <www.knesset.gov.il/main/eng/home.asp>).

195 The disqualification of the infomercial was done by Justice Beinisch presiding as chair of the Electoral Board Committee, which has the authority to preview elections infomercials and disqualify them as part of the *Elections Act* (*supra* note 190). The Court could have limited the ruling to that statute, but refrained from doing so.

196 The media committed not to disclose certain information, including information regarding the private life of the abductee or details regarding his military service (Tennenbaum served as a colonel in the Israeli Defense Forces in reserve duty). The media promised to focus its coverage on the abduction's details. Therefore, there was no factual basis for the claim that such publication might endanger Tennenbaum, since the details of the abduction were already known to his abductors. See *Tennenbaum*, *supra* note 186 at 364.

197 See *ibid* at 336, Or J, concurring: "We accept the lower court's position that there is no need to prove to a level of 'near certainty' the risk to Tennenbaum's life and bodily integrity, in order for the Petitioners to receive remedy [i.e., prior restraint]. We believe that due to the strength of the protected right [i.e., right to life and bodily integrity] it is sufficient that there is *reasonable likelihood* for infringement, in order for the Court to protect this right" [translated by author, emphasis added].

198 *Ibid*.

199 But see *Brandenburg v Ohio*, 395 US 444, 89 S Ct 1827 (1969) (the US system has no equivalent exception for the clear and present danger requirement).

direct result of the Constitutional Revolution and the dignitization process that free speech is undergoing in Israel.

A final example of the legal atmosphere in Israel that wishes to replace the near certainty test with a more speech-restrictive standard of review can be seen in the recommendations of the official inquiry committee for the Second Lebanon War, headed by former judge Eliyahu Vinograd. The committee, comprised of several leading jurists, recommended overturning the *Shnitzer* ruling that fixed the near certainty test for military censorship with a preponderance of evidence test of reasonable likelihood. This would enable military censorship on a whim.[200] The committee claimed that under the current strict standard, national security is compromised.

In sum, the post-Constitutional Revolution prior restraint rulings show a tendency to ease constitutional standards to achieve speech-curtailing results due to human dignity concerns. The current public and legal atmosphere in Israel seems to not value free speech to the same extent as in the 1980s, and other issues, such as national security, public sentiment, and preserving the human dignity of minorities receive greater importance than before.

2. Pornography

Another area of free speech that was affected by the Constitutional Revolution is the treatment of pornography. The rulings from the past two decades have classified pornography as speech with low social value, which impinges upon the dignity of women and therefore deserves weakened protection.[201] As Justice Rivlin recently noted: "Not all speech is born equal, and the level of protection freedom of speech is afforded is influenced by, *inter alia*, the type of speech and its characteristics."[202] The following rulings exemplify how pornography is a stepchild in the family of protected speech, and how it is easily curtailed by human dignity concerns that were introduced into pornographic speech restriction.

In *Station Film*,[203] the Court considered the decision of the Film Review Board to omit several sections from Nagisa Oshima's film *In the*

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[200] See *Final Report: The Governmental Investigations Committee for the 2006 Lebanon Military Campaign*, Eliyahu Winograd, Chairperson (Jerusalem: The Committee, 2008) at 439-40.

[201] See e.g. *Ilana Dayan*, *supra* note 174; CrimA 5493/06 *Emanuel Peled v Israeli Prison Service*, [2010] Tak-Al 2010(4) 331 [*Peled*].

[202] *Ilana Dayan*, *supra* note 174 at para 78, Rivlin J, concurring.

[203] *Supra* note 80.

Realm of the Senses, which were regarded as degrading to women. The Court reversed the Film Review Board's decision to censor the film, using the near certainty test standard. In its essence, this ruling is speech-protective. But this ruling also contains problematic rhetoric. Chief Justice Barak, referring also to Canadian precedents,[204] claimed that

> offensiveness may justify restricting freedom of expression if it exceeds the standard of social tolerance. ... Such harm can justify restricting pornographic expression to the extent that it is capable of degrading a woman, thereby causing both direct and indirect harm to the equal status of women in our society and encouraging violence, particularly towards women.[205]

Justice Cheshin also mentioned that the grounds for restricting pornography may also be linked to the degradation of human dignity, and especially "women's dignity".[206]

Another good example for community and human dignity as part of freedom of expression can be found in the *SHIN* case.[207] In that decision, the Court dealt with an amendment to the *Communications Act* by the Knesset that forbade the transmission of channels by cable and satellite providers that "depict women as a handy object for sexual use."[208] The Court supported an interpretation that allowed the broadcasting of the Playboy Channel, and upheld an interpretation that included a ban on hard-core sex channels on cable. The Court referred to arguments of protection of public feelings and "women's dignity" as integral parts of its reasoning.[209] The recognition of the feminist discourse for the regulation of pornography is a distinct element in dignity-related rationales, as explained above.

The decision was criticized by feminists as a non-feminist ruling that permits pornography at the expense of the human dignity of women.[210] But, in fact, no protest was heard that the government is denying access

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[204] Chief Justice Barak referred specifically to *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449.

[205] *Station Film*, *supra* note 80.

[206] *Ibid* at para 11, Cheshin J, dissenting.

[207] *Supra* note 22. In that case, the Supreme Court upheld legislation (*Amendment # 25 to the Communications Act*) that prohibits the transmission of hard-core pornographic channels via cable, while interpreting the act as enabling the transmission of the Playboy Channel. For the connection between the restriction of pornography and community norms see Post, *supra* note 47 at 9 and *passim*.

[208] *Communications Act*, *supra* note 218, art 6.25(2a).

[209] See also Barak CJ's *dicta* in *Station Film*, *supra* note 80.

[210] See Orit Kamir, "On Pornography and Human Dignity: The Ruling Not Taken" in Birnhack, *supra* note 156 (in Hebrew).

to sex channels that exist in the United States, such as Hustler or like channels, that are not classified as obscene, and that are protected under US law.[211]

In *Peled v. Israeli Prison Service,*[212] a prisoner petitioned against the prison service to allow him to bring pornographic materials into the jail, and claimed that the strict ban on pornographic materials impinged upon his right to free speech. The district court denied Peled's petition and found the regulations banning pornography to be reasonable and within the prisoner authority's jurisdiction. Peled appealed to the Supreme Court, and was represented by the Public Defender's Office.

Chief Justice Beinisch upheld the regulations and rejected the appeal. Although Peled argued that the relevant constitutional standard for infringement of his right to be subjected to pornography is the near certainty test, the Court rejected that position, claiming that the near certainty test is applicable only to the prior restraint of political speech.[213] Instead of using a different probability test (e.g., the reasonable likelihood test, which was applied in *Tennenbaum*), the Court implemented the limitations clause test. This choice is odd, since the application of probability tests in prior restraint is the norm,[214] and there was precedent that enabled lax application of such standards, especially in the setting of a prison.[215]

Chief Justice Beinisch mixed pornography and obscenity in her reasoning, treating them as synonyms.[216] Furthermore, the application of the limitations clause tests was done in a manner that was less rigorous than when applied in other settings, due to "the level of protection given to pornographic speech in our legal regime."[217] The due purpose requirement

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[211] See *American Booksellers Ass'n, Inc v Hudnut*, 771 F (2d) 323 (7th Cir 1985), aff'd 475 US 1001, 106 S Ct 1172 (1986).

[212] *Peled*, *supra* note 212.

[213] *Ibid* at para 10 Beinisch CJ, concurring. This conclusion stands at odds with *Station Film*, *supra* note 80. It is unclear whether the standard set in *Peled* is applicable to the regulation of pornography in general or to its regulation in prisons in particular.

[214] *Peled*, *supra* note 212 (applies the near certainty test to limiting pornography).

[215] *Ibid* at para 14, Beinisch CJ, concurring.

[216] *Station Film*, *supra* note 80 at para 10, Beinisch CJ, concurring. Thus, while citing Chief Justice Barak in *Station Film* regarding the fact that no constitutional arrangement grants protection to obscenity, she applies the standards of the limitations clause tests on both pornography and obscenity, without differentiating the two.

[217] *Peled*, *supra* note 212 at para 11, Beinisch CJ, concurring.

of the limitations clause tests was met by "the advancement of social values, such as the equality between the sexes and the dignity of women."[218]

As part of the proportionality requirements of the limitations clause tests, Peled argued that a strict ban on pornography is unconstitutional, since it is over-inclusive. Moreover, the prisoner authority would need to allocate resources to examine which pornographic materials are suitable for prisoners and which are not.[219] The Court rejected this claim, and found this position to be too burdensome on the prison authority. The Court left wide discretion to the prisoner authority, according it a high level of deference. The Court noted that had the prisoner authority decided to allow pornography in prisons, such a decision would probably be upheld.[220]

Justice Meltzer, in a short concurring opinion, emphasized the margin of appreciation doctrine as the rationale for rejecting the solutions other legal systems offer for the question of restricting pornography in prisons.[221] The fact that this issue has a vast array of solutions among Western democracies, many of which ban pornography, does not necessitate the adoption of solutions which allow pornography in prisons. Therefore, Justice Meltzer found the Israeli ban on pornography in prisons to be permissible, appropriate for the idiosyncratic needs and characteristics of the Israeli legal system.

Justice Rubinstein, who is a religious person, questioned whether there is a right to pornography, especially from a Jewish-moral standpoint. He remarked that, according to precedent, pornography is "an inferior kind of speech which is not at the core of freedom of expression,"[222] and joined the Court in rejecting the appeal.

These examples, briefly explored above, illustrate the emphasis placed on the human dignity of women in rulings that relate to pornography. Here human dignity serves as a reason to protect not the speaker, but the audience, relying mainly on Canadian precedent. The devaluation of the protection pornography receives under Israeli law is strongly linked to the dignitization process, as demonstrated above.

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218 *Ibid* at para 13, Beinisch CJ, concurring [translated by author].

219 *Ibid* at para 16, Beinisch CJ, concurring. *C.f. Miller*, *supra* note 42 (establishing a duty on the Israel Defense Forces to allocate resources for adapting the facilities in the air force pilot's course for women, and rejecting budgetary arguments).

220 *Ibid* at para 17, Beinisch CJ, concurring.

221 *Ibid* at para 2, Meltzer J, concurring.

222 *Ibid* at para 5, Rubinstein J, concurring [translated by author].

3. Defamation and Libel

Defamation and libel cases usually involve infringement of a person's honour. Since in Hebrew honour is one of the possible meanings of "human dignity,"[223] the same human dignity clause would have contradicting influences: protecting free speech on the one hand and protecting the reputation of the defamed person on the other.

Libel cases raise two noteworthy aspects regarding the influence of human dignity on free speech. The first is the broadening of categories of speech that are virtually automatically libellous, thus turning libel laws into a heavy-handed enforcement mechanism for maintaining a civil and respectable public discourse. The second is the slow shift in the equilibrium between free speech and human dignity, as exemplified in the context of temporary restraining orders.

In *Dankner v. Ben-Gvir*,[224] the Supreme Court held that the mere use of Holocaust-era epithets, namely, calling someone a Nazi, constitutes defamation.[225] During a heated television debate on a political talk show, the journalist Amnon Dankner used the epithet "filthy Nazi" when arguing with Itamar Ben-Gvir, a right-wing activist. Ben-Gvir sued for defamation. The three justices presiding over the case were divided. Justice Rivlin, in dissent, argued that using harsh epithets to refer to someone should not automatically constitute libel. He believed that in the circumstances of the case, which involved two Jews who were not using these epithets in a racially motivated manner, but as a profanity, the use of the term Nazi was not defamatory per se. The plaintiff himself used Nazi-era terminology on several occasions, and the defamation suit seemed somewhat opportunistic and politically motivated. The two other justices in the majority believed that any use of the term "Nazi" against another person is defamatory; yet, Justice Prokatia thought monetary compensation was appropriate, while Justice Arbel thought that symbolic compensation was in order. The Court finally awarded the plaintiff symbolic compensation of one Israeli shekel. Since then, lower courts have repeatedly held that the use of such epithets is libellous, and have awarded actual compensation for the use of Holocaust-era epithets.[226]

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[223] See *supra* notes 75 & 126 and accompanying text, for the different meanings of the word "*kavod*" in Hebrew.

[224] *Ben Gvir*, *supra* note 102.

[225] But see CA 2572/04 *Fridge v Kol Hazman*, [2008] Tak-Al 2008(2) 3675 (qualifying *Ben Gvir* by determining that Nazi-related epithets are not automatically considered libellous).

[226] See e.g. CA 1184/06 (Nazareth District Court) *Plaut v Gordon*, Tak-Mach 2008(1) 11886 (2008) (plaintiff awarded 80,000 Israeli shekels plus expenses by the Magistrate Court

The Court afforded a civil remedy for insults and turned the *Prevention of Defamation Act* into a de facto mechanism for enforcing civil and respectable public discourse.[227] Although the primary means of redress under the *Prevention of Defamation Act* is a civil law suit, the act also contains criminal libel provisions. Thus, *Dankner v. Ben Gvir* indirectly enables criminal prosecution for insults, though to a limited extent.[228]

The use of Holocaust related terminology has bothered the Knesset as well. Some Knesset members proposed draft bills to criminalize the use of Nazi and related terminology with a sentence of up to three years imprisonment.[229] This initiative was endorsed by the government, which decided to advance the private draft bill of MK Ariel who called for these actions. At the moment of writing, the proposed legislation has not yet passed, but if the Knesset does turns the bill into law, Israel will shift to the German model of criminal insult and enforcement of civility.[230] Such a move would require delicate deliberation since it would detract from the Anglo-American path on which Israeli free speech doctrine is established.[231]

Another area of libel law affected by the Constitutional Revolution is the standard for injunctions curtailing the publication of libellous materials. The leading precedent regarding injunctions (temporary restraining orders) in libel cases is the *Avneri* case.[232] This prominent precedent from 1989 predates the Constitutional Revolution by several years. Justice Barak recognized these injunctions as a conflict between the right to free speech and the right

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for being called a "Judenrat wannabe"—a nickname for Jews who collaborated with the Nazis. The Nazareth Appeals Chamber reduced the compensation to 10,000 Israeli shekels, but upheld the result relying on *Ben Gvir*); CC 32986/03 (Tel-Aviv Magistrate Court) *Boshmitz v Rephuaa Aharonovitz Anat*, (2008), Almagor J (the plaintiff was awarded 100,000 Israeli shekels for being called Auschwitz-Boshmitz—a play on words that analogized him the notorious Nazi death camp).

227 Compare *Cohen v California*, 403 US 15 at 25, 91 S Ct 1780 (1971), Harlan J ("one man's vulgarity is another's lyric") with §185 of the German Criminal Code (proscribing criminal insults).

228 Criminal libel cases are subjected to the discretion of the attorney general, and a private criminal complaint also requires the attorney general's permission. See *Prohibition of Defamation Act*, *supra* note 205, arts 6, 8 (setting a criminal libel offence and permitting for private criminal complaint. Such complaints require the authorization of the attorney general).

229 See private bill P/18/3642 Draft Bill Ban on Use of Nazi Insignia and Epithets (2011); private bill P/17/2656 Draft Bill Ban on Use of Nazi Insignia and Epithets (2007).

230 See Carmi, "Dignity versus Liberty", *supra* note 2 at 329-38 (discussing German enforcement of civility norms). See also Guy Carmi, "Don't Call me Nazi", Opinion, *Ynet News* (18 November 2007) online: Ynet News <http://www.ynetnews.com> (critiquing MK Avital's draft bill as harming free speech).

231 See *ibid*.

232 *Avneri*, *supra* note 16.

to reputation. In his attempt to balance the two, he argued that since none of these rights are enumerated, freedom of expression should hold the upper hand.[233] A problem with this reasoning arose when, a few years later, the legal foundation behind this reasoning changed. After the enactment of *Basic Law: Human Dignity and Liberty* in 1992 there was a consensus that one's reputation is included in the right to human dignity,[234] whereas the right to freedom of expression is unenumerated and, until recently, was also unincorporated.

Several leading jurists,[235] judges,[236] and Supreme Court justices (in dicta) called for a reversal of the *Avneri* precedent, so as to allow pre-publication restraining orders with greater ease.[237] The common explanation for the need to reverse the ruling was that following the enactment of *Basic Law: Human Dignity and Liberty*, the right to reputation received greater weight vis-à-vis freedom of expression. Although some believe that *Avneri* remains good law following the Constitutional Revolution,[238] and *Avneri* was not officially overturned,[239] the voices calling for preserving it are few and hardly heard. Many judicial references to *Avneri* remain reserved and, under current trends, *Avneri* might get overturned.[240]

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[233] *Ibid* at 860. See also Sommer, "Unenumerated Rights", *supra* note 111 at 335 (quoting *Avneri*).

[234] See Barak, *Constitutional Interpretation*, *supra* note 63 at 427; *Szenes*, *supra* note 19 at para 29, Cheshin J, dissenting.

[235] See e.g. Ariel L Bendor, "Freedom of Defamation" (1991) 20:2-3 Mishpatim 549 at 570-73 (in Hebrew); Winograd, *supra* note 64 at 40.

[236] See e.g. *Hamagen*, *supra* note 76 at 185, Pilpel, J (expressing the opinion that following the enactment of *Basic Law: Human Dignity and Liberty*, free speech should receive lesser protection than the right to reputation, and calling for a reversal of the *Avneri* precedent).

[237] See e.g. *Szenes*, *supra* note 19 at 35, Cheshin J, dissenting ("[The *Avneri* case] warrants renewed examination for since then the Basic Law: Human Dignity and Liberty has been enacted") [translated by author]; HCJ 2316/95 *Ganimat v State of Israel,* IsrSC 49(4) 589, Barak CJ, concurring ("The new standing of the right to reputation (as part of the right to human dignity) may justify reexamination of judicial discretion in awarding (temporary) restraining orders that are allegedly defamatory (*cf. Avneri*)") [translated by author].

[238] For a recent example see *Ilana Dayan*, *supra* note 174 at para 4, Amit J, concurring (remarking that he believes that *Avneri* remains good law after the Constitutional Revolution). Justice Amit expressed the same opinion even before his appointment to the Supreme Court (see CC 2481/96 (Acre Magistrate Court) *Suaed v Nimer Hasin*, Tak-Shal 98(3) 3408 at 3409, Amit J (same); Ori Shenhar, *Defamation Law* (Tel Aviv: Nevo, 1997) at 51-52 (in Hebrew) (same)).

[239] See CA 10771/04 *Reshet Communications and Productions v Etinger*, [2004] IsrSC 59(3) 308 at para 11, Benish J [*Etinger*].

[240] *Etinger* (*supra* note 250) is a good example for how managerial arguments prevented overturning *Avneri*. See Carmi, *Dignity and Liberty*, *supra* note 19 at 250-53 (discussing managerial arguments).

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As demonstrated above, human dignity serves as a channel to incorporate community norms into the constitutional arena. Whether by enforcing the majority's morals when it comes to the harming of public sentiments or the potential harm to women by pornography, human dignity serves as a legal argument that takes these issues into consideration.[241] At the more individualistic level, human dignity also serves as a counterbalance to liberal norms, and may lead to restrictions on speech that offends a person's honour, such as in libel cases.[242]

III. Future—A Possible Solution? Divorcing Free Speech and Human Dignity

A. Some Perspective on the Evolution of Constitutional Interpretation

Israel is a relatively young country. In the sixty years since its establishment, the Supreme Court has developed a rich body of constitutional law. The 1992 Constitutional Revolution has had a significant impact on Israeli constitutional law. In terms of constitutional history, Israeli law in general, and Israeli constitutional law in particular, are in the formative stages. It is appropriate to speak of the Constitutional Revolution in the present tense, and to understand that the development of Israeli constitutional law is currently undergoing substantial change.[243] It is too early to tell if existing doctrines will mature into reliable precedents in the future. When looking at American constitutional history, it took dozens of years for existing doctrines to evolve.[244] Israeli constitutional law is still in the

241 See Parts II.A-B, above; Statman, *supra* note 95 at 559-60, 593 (claiming that human dignity puts the emphasis on the rights of the victims and not on those of the perpetrators).

242 Part II.C, above.

243 See e.g. Hillel Sommer, "From Childhood to Maturity: Outstanding Issues in Implementation of the Constitutional Revolution" (2004) 1 Law and Business 60; Ahron Barak, "The Constitutional Revolution—12th Anniversary" (2004) 1 Law and Business 3 (both reviewing central aspects of the Constitutional Revolution for its twelfth anniversary and demonstrating how the constitutional doctrines are evolving); Ahron Barak, "The Constitutionalization of the Legal System Following the Basic Laws and its Impact on Criminal Law (Substantive and Procedural)" (1996) 13 Mechkarai Mishpat 5 (expecting a development of a "tier system" in Israeli constitutional doctrines following the Constitutional Revolution).

244 For example, substantive due process originally protected contractual freedom and property rights (see e.g. *Lochner v New York*, 198 US 45, 25 S Ct 539 (1905)) and later protected rights such as privacy under modern substantive due process (see e.g. *Roe v Wade*, 410 US 113, 93 S Ct 705 (1973)). Similarly, the privileges and immunities clause within the Fourteenth Amendment has remained virtually dormant since *Slaughter-*

developmental stage and is expected to yield substantial changes in the coming years.[245]

The freezing effect of the basic law legislation has led to a concern that the status quo will remain for many years or even permanently. Since the enactment of *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation* in the early 1990s, all suggestions to further enact basic laws that enumerate additional rights have been rejected by the Knesset. Even if free speech eventually is enumerated, the jurisprudence that would evolve prior to such mooring may have a detrimental long-term effect that weakens free speech's stand. Therefore, there is a need to offer an interim solution in order to avoid the weakening of free speech rights. This solution is offered in the form of separating free speech and human dignity, as the link between the two leads to speech restriction.

The current interim solution, in the form of partial incorporation of free speech via the human dignity clause, is inadequate.[246] Once the Constitutional Revolution flooded the constitutional discourse with human dignity, and once it collided with freedom of expression,[247] the Supreme Court justices made a tactical decision to align freedom of expression with human dignity so that it would not lose its powers in direct confrontation with enumerated rights.[248] Yet this tactical decision is wrong from a strategic viewpoint, and the short-run considerations that led to the use of this approach are harmful in the long run. The justices who supported incorporating freedom of expression through the human dignity clause in order to buttress it actually weakened it. Perhaps if the justices would have been aware of the negative implications of this tactic or would have been constitutionally creative, they would have chosen another path that

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House Cases, 83 US 36, 1872 US LEXIS 1139 (1872). Nonetheless, this clause occasionally reappeared in Supreme Court rulings (see e.g. *Saenz v Roe*, 526 US 489, 119 S Ct 1518 (1999)). Some scholars believe that it may be rediscovered by the Court as an additional incorporation clause. See e.g. John C Eastman, "*Re-evaluating the Privileges or Immunities Clause*" (2003) 6:1 Chapman L Rev 123.

[245] See also Goluboff, *supra* note 53 at 43-50 (referring to the "[u]ncertainties in the legal doctrine of civil rights" in the United States in the 1940s and their manner of crystallization). Much like American constitutional law in the 1940s, Israeli constitutional law is also undergoing a slow paradigm shift from doctrines that evolved via common law rulings to constitutional-documents-based doctrines that rely on the new basic laws of the 1992 Constitutional Revolution.

[246] See *Majority Camp*, *supra* note 44 and elaborated discussion in Part II.A.2, above (discussing the limits of partial incorporation).

[247] See e.g. HCJ 5688/92 *Vikselbaum v Minister of Defense*, [1993] IsrSC 47(2) 812; CA 294/91 *Kastenbaum v Havre Kadisha*, [1992] IsrSC 46(2) 463.

[248] See e.g. *Golan*, *supra* note 66; *Majority Camp*, *supra* note 44; Part II.A.1, above. See also Sommer, "Unenumerated Rights", *supra* note 111 at 377 (offering similar motives for the Court's strategy).

better served the purpose of buttressing freedom of expression. The proposal herein to incorporate freedom of expression through the liberty clause is an alternative strategic solution that is meant to replace that tactical anchoring of freedom of expression via the human dignity clause.

B. On the Undiscovered Liberty Clause

Basic Law: Human Dignity and Liberty is quite a short constitutional text.[249] A textual analysis of the basic law reveals an interesting picture. Human dignity and liberty appear in pairs within the text, with the exception of the specific clauses that enumerate human dignity and liberty.[250] The title of the basic law itself references human dignity and liberty.[251] Similarly, article 1 of the basic law, known as the purpose clause, declares, "[T]he purpose of this basic law is to protect *human dignity and liberty*, in order to establish in a basic law the values of the state of Israel as a Jewish and democratic state."[252]

The human dignity clause is located in article 2 of the basic law and guarantees that "[t]here shall be no violation of the life, body or dignity of any person as such." Article 4 further stipulates that "[a]ll persons are entitled to protection of their life, body and dignity."[253] Unlike the right to human dignity, which has both negative and positive aspects, the right to liberty has only negative aspects.[254] The right to liberty is intrinsically a negative right. Accordingly, while there is sense in protecting both the negative and positive aspects of the right to human dignity, this rationale does not apply to the right to liberty. Therefore, the only asymmetry with-

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249 The official English translation of the basic law contains 524 words, and the original Hebrew version contains 328 words.

250 See Sommer, "Unenumerated Rights", *supra* note 111 at 291 (relating to references to the term "human dignity and liberty" as not sufficiently distinguishable from the terms "human dignity" and "liberty").

251 See Sheleff, *supra* note 38 and accompanying text (referring to Leon Sheleff's view that human dignity and liberty are the two meta-values that stand at the foundation of the basic law).

252 *Basic Law: Human Dignity and* Liberty, *supra* note 1, art 1 [emphasis added]. In a similar fashion, the basic principles clause (article 1A) implicitly refers to values linked with human dignity (the value of the human being and the sanctity of human life) and liberty (the principle that all persons are free).

253 The distinction between articles 2 and 4 is usually construed in a way that views article 4 as rendering a positive commitment by the state to protect life. The title of article 2 is "*Preservation* of life, body and dignity" and the title of article 4 is "*Protection* of life, body and dignity."

254 For the distinction between positive and negative rights, see Carmi, "Dignity versus Liberty", *supra* note 2 at 292-306 (discussing liberty and Berlin's "Two Concepts of Liberty").

in the constitutional text of the basic law that enumerates human dignity twice and liberty only once should not be misconstrued as affording greater importance or protection to human dignity over liberty.[255]

Article 5 of the basic law, titled "Personal Liberty", stipulates that "[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition *or by any other means*."[256] While it is true that the article lists examples from the criminal justice setting (i.e., imprisonment, arrest, and extradition), the text does not limit the deprivation of liberty to the criminal setting.[257] The text of article 5 is much broader than the text of articles 2 and 4, especially when considering the ending of the article. The textual infrastructure of the liberty clause is much more accommodating as an incorporation channel than the human dignity clause.

Hillel Sommer claims that the interpretation of the ending of article 5 should be narrow, and include only criminal justice issues that deny the liberty of a person.[258] Sommer's narrow approach is inadequate for two primary reasons. First, Sommer is consistent with his call to give a narrow interpretation to human dignity as well as to liberty, since he believes that it is not the role of the Court to incorporate rights that were deliberately omitted by the Knesset only several years ago.[259] This claim is strong, but it disregards the Court's constitutional jurisprudence that rampantly widened the protection of unenumerated rights via the human dignity clause. [260] To be fair, most of this extension of the scope of the

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[255] See Sommer, "Unenumerated Rights", *supra* note 111 at 309 (relating to claims that the double reference to human dignity, in articles 2 and 4 of the basic law, affords greater protection to human dignity than other rights).

[256] *Basic Law: Human Dignity and Liberty*, *supra* note 1, art 5 [translated by author, emphasis added]. The official translation is: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition *or otherwise*." I have translated the ending differently to "by any other means" since I believe it is a more accurate translation.

[257] In fact, the first right to be incorporated via the due process clause in the United States was freedom of expression and not criminal due process rights: see Carmi, "Dignity versus Liberty", *supra* note 2 at 355-61 (discussing the incorporation hypothetical). This fact supports my claim that free speech is closely affiliated with due process, and that due process should not be confined to the criminal setting.

[258] Sommer, "Unenumerated Rights", *supra* note 111 at n 161.

[259] See *ibid* at 312-14.

[260] *C.f. ibid* at 294 (preferring a narrow reading of the liberty clause so that such a narrow reading could be inferred upon the human dignity clause, which he believes should be construed narrowly). My reply to Sommer would be that since the Israeli Court is reading the human dignity clause expansively, as is shown throughout this paper, a narrow reading approach to the liberty clause would not remedy the broad interpretation human dignity receives. On the contrary, a broad interpretation of the liberty clause can

Basic Law has been done after Sommer's article was published. At the time he wrote the article, his advocacy for a narrow interpretation of the enumerated rights made more sense. Currently, the scope of the human dignity clause is wide. Under these circumstances, Sommer might have perhaps agreed that the liberty clause and the human dignity clause should be treated symmetrically.[261]

Second, Sommer gives an interpretation argument that rests on the analysis of ordinary statutes rather than on constitutional interpretation.[262] Constitutional interpretation requires a different approach, one that allows for a living constitution to evolve through the years.[263] The great potential of the liberty clause as an incorporation clause would be lost under such an approach.

Another possible explanation for the centrality of human dignity vis-à-vis liberty is that most issues covered by the liberal due process provisions of the basic law (e.g., privacy, personal liberty) are also covered by specific statutes.[264] Thus, similarly to title VII, which covered much of the litigation of women's rights in the United States instead of the equal protection clause, these issues are litigated under specific statutes rather than the more general framework of the basic law.[265] These laws enable the court to neglect the constitutional interpretation and development of the liberty clause. Article 5 of *Basic Law: Human Dignity and Liberty*, which is the Israeli equivalent to the due process clause, was only applied in cases that

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serve as a remedy by counterbalancing the rampant use (and abuse) of the human dignity clause.

261 See *ibid* at 294 (calling for a symmetrical, yet narrow, interpretation to the human dignity clause and the liberty clause).

262 See e.g. HCJ 1255/94 *Bezeq v Minister of Communications*, [1994] IsrSC 49(3) 661 (holding that the interpretation of the basic laws are not subjected to the *Interpretation Act*, 1981, SH 302, online: <www.knesset.gov.il/main/eng/home.asp>); *McCulloch v Maryland*, 17 US 316 at 407, 1819 US LEXIS 320 (1819), Marshall CJ, concurring: "we must never forget that it is a *constitution* we are expounding" [emphasis in original].

263 See Rehnquist, *supra* note 46 and accompanying text.

264 See *Basic Law: Human Dignity and Liberty*, *supra* note 1, art 5-7. Also see e.g. *Privacy Protection Act*, 1981, SH 128, online: <www.knesset.gov.il/main/eng/home.asp>; *Criminal Procedure Act (Enforcement Authorities – Arrests)*, 1996, SH 338, online: <www.knesset.gov.il/main/eng/home.asp>; *Criminal Procedure Act (Enforcement Authorities—Search in the Body of a Suspect)*, 1996, SH 136, online: <www.knesset.gov.il/main/eng/home.asp>. The latter two acts were passed shortly after the enactment of *Basic Law: Human Dignity and Liberty* (*supra* note 1) and were tailored to conform with its provisions.

265 See Geoffrey R Stone et al, *Constitutional Law*, 4th ed (New York: Aspen, 2001) at 598-99; *Frontiero v Richardson*, 411 US 677 at 687, 93 S Ct 1764 (1973), Brennan J (discussing the impact of title VII of the 1964 *Civil Rights Act* on employment discrimination litigation based on gender).

revolved around criminal procedure issues, such as arrests, and for the aforementioned reasons, to a limited extent.[266] It is true that the clause's language suggests that it applies primarily to criminal due process issues, but its language does not block a possible wider understanding of the article's scope.[267] Surely, when comparing it to the language of the human dignity clause, this broader reading does not seem far-fetched and is especially true with regard to the very broad ending of this clause.[268]

Nothing in the constitutional text itself suggests that human dignity is a more suitable incorporation clause than the liberty clause. But so far, the Court has used the human dignity clause as the sole incorporation channel. The US experience teaches us that there is merit in having more than one incorporation channel within the constitution, and that the interpretation of these clauses changes along the years. Therefore, as a matter of sound constitutional policy, there is room to add the liberty clause as an alternative incorporation clause, thus enabling the incorporation of other rights into the Israeli constitutional documents. The liberty clause can serve as an adequate tool for the incorporation of other unenumerated rights, such as autonomy, into the basic laws.

When comparing the human dignity clause and the liberty clause to the US Constitution, the best analogies are the due process clause and the equal protection clause. Although there are some differences between the clauses, this analogy serves to demonstrate the plain logic of incorporating free speech via the equivalent of the due process clause.[269] The link between free speech and due process is self-evident and natural. Furthermore, the characteristics of equal protection that are applicable to free speech protection, such as content neutrality, are inapplicable to the human dignity clause, due to the different perceptions of equality in the United States and Europe.[270] Since Israel shares the European concepts of human dignity and equality, the human dignity clause has speech curtailing potential, which makes it a problematic incorporation vehicle.

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[266] See e.g. *Zemach*, *supra* note 39; *Academic Center*, *supra* note 39.

[267] For a different view see Sommer, "Unenumerated Rights", *supra* note 111 at 293, n 161 (calling for a narrow interpretation of article 5's ending).

[268] Article 5 of the *Basic Law: Human Dignity and Liberty*, titled "Personal Liberty" deems that "[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition *or by any other way*" (*supra* note 1 [translated by author, emphasis added]). Compare this with the human dignity clause phrasing, *supra* note 53 and accompanying text. When the two clauses are compared one against the other, the liberty clause seems to offer more fertile ground for the incorporation of unenumerated rights than the human dignity clause.

[269] See elaborate discussion in Carmi, "Dignity versus Liberty", *supra* note 2 at 355-61 (discussing the incorporation hypothetical).

[270] See *ibid*.

If the US experience can teach us something, it is that at least intuitively, free speech is affiliated with due process. In fact, free speech was the first right to be incorporated by the US Supreme Court via the Fourteenth Amendment, even before all the criminal due process rights.[271] The due process clause covers most fundamental rights, and free speech is at the core of the protected rights, alongside criminal due process rights. Therefore, the Israeli intuition to associate free speech with human dignity, rather than with due process, should be reassessed. For the Israeli reader, the link between free speech and due process may not be obvious. Similarly, American readers are likely to find difficulties in the link between free speech and human dignity. The benefits of this comparative perspective is to expose Israeli jurists and judges to the long-standing US approach to the incorporation dilemma, and to borrow from the US experience to the extent that it is relevant and appropriate.

Hopefully the discussion herein will promote the awareness of the importance of such a doctrinal development. As a matter of principle, it would be much more preferable to read the unenumerated right of freedom of expression through the liberty clause rather than its human dignity counterpart. There is no reason why the liberty clause should not be discovered.

C. On the Merits of Incorporating Free Speech via the Liberty Clause

Although the Supreme Court never seriously discussed the incorporation of free speech via the liberty clause, one of its closest approaches to discussing the link between the two occurred in *Bitton v. Sultan*,[272] which therefore deserves close attention. In that case, the Court convened in an enlarged panel of nine justices (instead of the regular panel of three) in order to re-examine the 1985 *Borochov* precedent.[273] According to *Borochov*, the *mens rea* requirement in criminal libel cases did not include a predictability requirement that entails a presumption of intent. Article 6 of the *Prevention of Defamation Act* requires an "intent to harm".[274]

Two primary reasons led the Court to grant certiorari in three petitions to appeal on private criminal libel complaints. First, the Israeli criminal code had undergone a substantial amendment process that affected the *mens rea* requirement of many criminal offences. Some of the justices believed that following this amendment, the *mens rea* requirement for

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[271] See *ibid* at 341, n 447 and accompanying text.

[272] CrimA 9818/01 *Bitton v Sultan*, [2005] IsrSC 59(6) 554 [*Bitton*].

[273] *Borochov*, *supra* note 125.

[274] 1965, SH 240, online: <www.knesset.gov.il/main/eng/home.asp>.

criminal libel should be changed to include a presumption of intent. Second, the *Borochov* precedent was decided before the Constitutional Revolution. In *Borochov*, the Court recognized four competing interests and values that are at stake in criminal libel cases: free speech and personal liberty on the one hand, and human dignity and public peace on the other hand. The *Borochov* Court preferred the former to the latter. But some justices believed that following the Constitutional Revolution the balance was tilted in favour of human dignity and therefore justifies imposing the presumption of intent.

Chief Justice Barak, who wrote a concurring opinion in *Borochov*, wrote the leading majority opinion in *Bitton*. Barak explained that although more than twenty years had passed, and some legal changes had occurred that may affect *Borochov* and justify overturning it, he believed *Borochov* was still good law. Chief Justice Barak claimed that two relevant changes had occurred in the four values and interests that were at stake in criminal libel cases since *Borochov* was decided. First, human dignity received greater importance following its enumeration in *Basic Law: Human Dignity and Liberty*. Second, the same basic law had also enumerated the right to personal liberty in article 5. Because the case involved *criminal* libel, and a conviction in such an offence may deprive personal freedom, this consideration also received greater weight. Therefore, these two changes balance one another, and *Borochov* still represents a valid balancing of the competing interests and values.

Justice Cheshin in dissent believed that the balancing of interests in *Borochov* was obsolete and remained loyal to his position that libel standards should be more speech restrictive following the Constitutional Revolution.[275] Justice Cheshin further claimed that the resort to personal freedom, via the interest of public peace, is begging the obvious.[276] To a certain extent, Justice Cheshin was right in his remark that the link between the personal freedom guarantee in article 5 of the basic law and protecting free speech in criminal libel cases was relatively weak and unsubstantiated. In the way it was argued by Chief Justice Barak, it could have been applied to any criminal offence, but this constitutional discourse did not characterize criminal adjudication.

Justice Rivlin dedicated a large portion of his concurring opinion to replying to Justice Cheshin and explaining the link between personal liberty and criminal libel. Justice Rivlin's opinion deserves attention. He focused on the criminal sanction that may cause deprivation of freedom as

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[275] *Bitton*, *supra* note 284 at para 11, Cheshin J, dissenting.

[276] *Ibid* at para 13.

the link between free speech and the liberty clause.[277] He criticized the use of criminal (rather than civil) sanctions for libel and demonstrated how current trends among Western democracies aim at limiting, or even eliminating, criminal libel.[278]

Justice Rivlin confronted Justice Cheshin's dissenting opinion and criticized Cheshin's claim that the link between public peace and criminal libel is begging the obvious. Justice Rivlin emphasized that the criminal proceedings and sanctions are state actions, which require prudence and are prone to abuse.[279] Rivlin further noted that

> [p]ersonal liberty is within the array of balancing that stands at the base of the criminal libel offence, which enjoys a constitutional stand. In practice, freedom of expression is closer to personal freedom, as far as the criminal sanction within Article 6 [of the defamation Act] goes, and opposing them is the right to reputation. Therefore, the balancing point [between free speech and defamation] is drawn to the accumulating mass of freedom.[280]

The limits of Justice Rivlin's reasoning in *Bitton* are obvious, since the protection of free speech via personal liberty is confined to a criminal setting. Under this rationale, personal liberty is irrelevant to free speech in the absence of a criminal prohibition. It seems that Justice Rivlin went in the right direction but stopped short of the desirable goal. Just one step further in his reasoning is the linking of free speech directly to the liberty clause, without resorting to criminal prohibitions. As the discussion above shows, such a link is not only feasible but sensible and warranted. The US experience and the incorporation hypothetical demonstrate the soundness of this connection. Justice Rivlin's opinion in *Bitton* may serve as a fertile ground to fully incorporate free speech via the liberty clause, whether the speech concerns criminal or civil libel.

Very recently, Justice Rivlin went one step further toward the incorporation of free speech via the liberty clause. In *Ilana Dayan v. Captain R.,* the Supreme Court focused on the link between free speech and liberty in a civil libel case.[281] The case involved a libel claim of Captain R., a company commander in the Israel Defense Forces, who was charged with the killing of a twelve-year-old girl as part of a military operation, when the task force he headed thought they were being ambushed by terrorists. According to some newspaper accounts, Captain R. emptied a rifle magazine

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277 See *ibid* at para 2, Rivlin J, concurring.

278 *Ibid* at paras 2-4.

279 *Ibid* at para 3.

280 *Ibid* at para 4 [translated by author, citations omitted].

281 *Ilana Dayan*, *supra* note 174.

on the girl to verify her killing. A reporter aired a story attributing responsibility to Captain R., while also showing him to be indifferent to the girl's death. The district court of Jerusalem found the reporter and the television company guilty of libel, and imposed on them a heavy fine of 300,000 shekels.[282]

The Supreme Court overturned the district court's ruling, and found that the reporter had not committed libel (however, the television station remained guilty of libel for the promos it aired, but its fine was reduced to 100,000 shekels). Justice Rivlin's opinion is of special importance, since it relates to the nexus between freedom of speech and liberty.

Justice Rivlin referred to the theoretical nexus between freedom of speech and the general concepts of liberty.[283] He then returned to the conventional wisdom concerning the foundations of constitutional protection of free speech via the human dignity clause, and, in particular, the balancing of free speech and reputation, both of which derive from human dignity.[284] But this time, Justice Rivlin recognized free speech as a part of liberty and did not confine the rationale of liberty to the criminal aspects of libel (as in *Bitton*). This time, liberty appeared as a source for free speech protection, and not just theoretical concept of "liberty", but specifically the liberty values within *Basic Law: Human Dignity and Liberty*.[285]

This path should be further developed, and a free speech jurisprudence that relies on liberty in general, and on the liberty clause within *Basic Law: Human Dignity and Liberty* in particular, should be further explored. The seeds to do sow have been sown. But now that Justice Rivlin, the most speech-friendly member of the Supreme Court, who received his higher legal education in the United States,[286] is retiring from the bench, who will continue his legacy? Hopefully, the baton of free speech protection will be passed and carried forward.

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[282] See CC (Jer) 8206/06 *Captain R v Dr Ilana Dayan-Orbach* (2009), Solberg, J.

[283] *Ibid* at para 65, Rivlin J, concurring (quoting *Whitney v California*, 274 US 357 at 375-76 (1927), Brandeis J, concurring).

[284] *Ilana Dayn*, *supra* note 174 at para 76, Rivlin J, concurring.

[285] In Justice Rivlin's words: "[I]ndeed, free expression is a part of a person's dignity, but it is also a part of liberty, the liberty to express what is in one's heart (for a thorough and comprehensive essay on the source of the right to free speech in the value of *liberty* in Basic Law: Human Dignity and Liberty, see Guy E Carmi, *Dignity versus Liberty: The Two Western Cultures of Free Speech* 26 BU Int'l LJ 277 (2008))" (*ibid* at para 76) [translated by author, emphasis in original].

[286] Justice Rivlin, who is presiding as Vice-Chief Justice on the Supreme Court received his LLM from Temple University Law School in 1986. Justice Rivlin's CV is available at the Supreme Court's website: http://elyon1.court.gov.il/heb/cv/fe_html_out/judges/k_hayim/17393234.htm.

Very few voices have called for the incorporation of free speech via the liberty clause. Those voices that have advocated for this change have done so with very limited argumentation or development. None of these voices have explained why this incorporation strategy is preferable to the prevalent option of the human dignity clause. Thus, Chief Justice Barak's early writings that mentioned the liberty clause as an incorporation channel for free speech and autonomy were left undeveloped.[287] Eventually, the Supreme Court implicitly rejected these ideas, when it decided to incorporate autonomy and free speech via the human dignity clause.[288] Chief Justice Barak himself abandoned these ideas when he chose partial incorporation of free speech via the human dignity clause in *Majority Camp*.

A few voices have called to consider free speech as a manifestation of personal liberty.[289] These voices are not loud enough and are underdeveloped. They lack a compelling explanation for the disadvantages of the current incorporation strategy, and they are not calling for the separation of free speech from human dignity.[290] Nonetheless, these are important voices that may signal the problems of the current approach and the need for a viable alternative. The analysis conducted herein explains the difficulties in the current incorporation strategy, stresses the link between free speech and due process by examining the US experience, and offers a coherent explanation for the need to replace the current incorporation strategy with a more suitable one.

The separation of free speech and human dignity through the use of the liberty clause as an alternative incorporation channel has several distinct advantages. First, all speech would to receive protection under this incorporation strategy. As shown above, not all speech conforms with human dignity, but all speech receives protection as part of the protection of liberty. *Majority Camp*'s partial incorporation via the human dignity clause would be replaced by full incorporation through the liberty clause. Although this shift would still not afford free speech as robust of a protection as the First Amendment affords due to the balancing mechanisms Is-

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[287] See Barak, "Protected", *supra* note 73 ("[l]inguistically 'human dignity and liberty' spreads upon a vast array of activities. Every action that infringes upon life, body or reputation of a person infringes 'human dignity' and every action that deprives free will infringes 'liberty'" at 259) [translated by the author]; Sommer, "Unenumerated Rights", *supra* note 111 at 292 (referring to Barak).

[288] *See* CA 2781/93 *Ali Daka v Carmel Hospital*, [1999] IsrSC 53(4) 526 (incorporating autonomy via the human dignity clause); *Majority Camp*, *supra* note 44 (partially incorporating free speech via the human dignity clause).

[289] See e.g. Khalid Ghanayim, Mordechai Kremnitzer & Boaz Shnoor, *Libel Law* (Jerusalem: The Israel Democracy Institute, 2005) at 64-68.

[290] See *ibid* at 66 (claiming that free speech is included within human dignity and therefore protected by it).

raeli constitutional law employs, it would give free speech stronger protection than it currently receives.[291] Second, the artificial link between human dignity and free speech, which was produced largely due to the current incorporation strategy, is expected to fade away. The interrelationships between free speech and human dignity are inherently problematic, and the two should be viewed as contending, rather than harmonious, concepts.[292] Third, Israeli constitutional law will gain from the existence of two distinct incorporation channels in its constitutional documents. The Israeli constitutional evolution requires such a doctrinal development, and the current status quo where the human dignity clause is the only incorporation clause, when only a handful of rights are enumerated, is inadequate. Lastly, freedom of expression deserves a place of honour in the Israeli constitution. But until this shift happens, the closest thing would be reshaping free speech in terms of due process and incorporating it via the liberty clause. Only this strategy would restore freedom of expression's heightened standing before the Constitutional Revolution.

Conclusion

This article pointed out the intricate relationship between human dignity and freedom of expression. It demonstrated how human dignity expands at the expense of freedom of expression. It warned that juxtaposing the two results in the limitation of free speech and called for the analytical separation of the two.

Israel is perhaps the best laboratory for examining the dynamic interrelationships between human dignity and free speech. The Israeli constitutional arena is undergoing a transition period following the 1992 Constitutional Revolution. As explained above, the emphasis on human dignity that stems from the constitutional text of *Basic Law: Human Dignity and Liberty* led to the evaluation of free speech in human dignity terms. This dignitization of speech is detrimental, and has long-term effects on the array of rights in Israeli constitutional law that have not been fully understood or discussed.

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[291] Under the Israeli balancing doctrine, a horizontal balancing between free speech and other protected rights is possible when the two contending rights are in conflict. The proposal to anchor the near certainty test into the future free speech clause would enable free speech to trump other rights in most conflicts. See also Carmi, "Dignity versus Liberty", *supra* note 2 at 264-66 (referring to the proper framing of the free speech clause), 366-71 (discussing "Balancing" in Western constitutional adjudication).

[292] See Carmi, "Dignity—The Enemy from Within", *supra* note 85 at 959-60 (claiming that human dignity and freedom of speech should be viewed as contending rather than harmonious values).

This article outlined the necessary background regarding the history of free speech protection in Israel and the constitutional development of the young Israeli democracy. In particular, the 1992 Constitutional Revolution, which introduced a partial bill of rights, was presented, as well as the fact that freedom of expression, which enjoyed heightened status in the common law rights' protection that preceded the Constitutional Revolution, did not receive enumeration. Among the rights that were enumerated was human dignity. Israeli constitutional law has been increasingly relying on human dignity in its rulings, and this concept has also found its way into free speech jurisprudence. This background facilitates a better understanding of the changes that Israeli constitutional law in general, and free speech doctrines in particular, have undergone in recent years, even to a reader who is not closely familiar with Israeli law.

This article demonstrated Israel's shift from the liberty-based paradigm toward the dignity-based paradigm following the 1992 Constitutional Revolution, and the growing emphasis human dignity has received in Israeli constitutional jurisprudence ever since. The "dignitization" process that Israeli free speech laws are undergoing was demonstrated in several ways.

First, this article explored the different approaches to the incorporation of freedom of expression into *Basic Law: Human Dignity and Liberty*, as well as the manner in which the Supreme Court grappled with the issue of incorporation up until the 2006 *Majority Camp* decision, which seemingly resolved the matter. The limits of partial incorporation were explored as well as the weaknesses and unresolved issues of the laconic ruling of Chief Justice Barak in *Majority Camp*, opting for partial incorporation. The Israeli approach to the incorporation dilemma and the use of the human dignity clause as the incorporation channel for free speech have led to the weakening of free speech due to the juxtaposition of free speech and human dignity.

Second, the statistical analysis of the Supreme Court's free speech rulings in the past three decades showed that as years have gone by, human dignity has increasingly been referenced more and more in free speech rulings. This shift toward human dignity has occurred even in areas of free speech where it was not previously mentioned, such as prior restraint. The empirical data gathered for the purpose of this article demonstrated that human dignity is increasingly used in free speech rulings. If two decades ago human dignity seldom appeared in free speech rulings, today it appears in nearly all these rulings. Prior to the Constitutional Revolution, free speech was not generally perceived as a human dignity issue. Currently, free speech is assessed through the human dignity lens, with this area of constitutional law becoming increasingly dignitized.

Furthermore, the statistical analysis showed that while the Supreme Court increasingly relied on US rulings in the 1980s and early 1990s, it has decreased the number of references to those rulings in recent years. Concurrently, it increasingly referred to other Western sources, such as Canadian and German rulings. Although the United States remains the primary cited source, the attitude toward American rulings has changed, and Israel is getting closer in results and substance to the European model for free speech. The references to foreign rulings thus revealed the growing gap between Israel and the United States in free speech doctrines, and the growing resemblance between Israeli and European approaches to free speech. This is yet another indicator that Israel is slowly shifting from the liberty-based approach to free speech to the dignity-based approach.

Third, the statistical trends were also backed by substantive decisions of the Supreme Court in several areas of free speech. Thus, the dignitization process is exemplified in the areas of prior restraint, pornography, and libel. The analysis of prominent rulings from recent years shows how the near certainty test for prior restraint that was buttressed during the 1980s has been weakened by the court due to human dignity concerns, or even replaced in certain contexts by a more speech-restrictive standard. In the area of pornography, the court has recognized the "dignity of women" as a reason for curtailing free speech, and the court upheld these rationales when it allowed a ban on hard-core sex channels on cable. The restriction of pornography by administrative acts is upheld using lax constitutional standards. In the area of defamation and libel, the court has turned the *Prevention of Defamation Act* into a de facto mechanism for enforcing civility. The use of Nazi-related epithets is almost automatically libellous, and legislative initiatives even seek to criminally prohibit such use. Other areas of libel laws, such as temporary restraining orders, are also undergoing changes, as explored above. These substantive examples show how the dignitization of free speech is slowly weakening freedom of expression's standing in Israel.

The last part of the article offered strategic ways to fortify the status of freedom of expression. Unfortunately, the inclusion of free speech in a constitutional document may take many years, and perhaps it may never even occur. Therefore, in the interim, an alternative incorporation strategy was suggested that does not carry the same side effects as the current incorporation strategy. Instead of incorporating free speech via the human dignity clause within *Basic Law: Human Dignity and Liberty,* the liberty clause within the same basic law was offered as a more suitable incorporation channel. Some of the speech restrictive features that lead to partial incorporation of free speech through the current strategy would be amended by this proposal, and free speech would receive full incorporation, so that all speech would be constitutionally protected.

The liberty clause within article 5 of *Basic Law: Human Dignity and Liberty* serves as an appropriate vessel for the incorporation of freedom of expression into the Israeli constitutional documents. This approach would require a broader appreciation of the liberty clause's scope, as it has, so far, been primarily construed as protecting criminal due process. Nonetheless, such an interpretation makes sense, especially when looking at the US experience with the incorporation of free speech on the states via the Fourteenth Amendment, as well as the developmental history of incorporation channels within the US Constitution through the years. The nascent Israeli constitutional experience and its transition period features suggest that incorporation channels may be discovered and their content may change. Therefore, reading freedom of expression into the Israeli constitutional documents via the liberty clause should be given serious consideration.

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In recent years there has been a growing tendency among the Israeli Supreme Court justices to prefer human dignity at the expense of freedom of expression. The widespread appearance of the human dignity discourse in freedom of expression cases characterizes all fields of free speech doctrine, such as prior restraint, pornography, and libel.

The Court's free speech limitation trend stems from the Constitutional Revolution and from the legal discourse that emanates from it. The Court is seeking an "identity of interests" between free speech and human dignity. According to the Court, both stem from one source—human dignity.

This reduced significance that the Court has attached to free speech is inherently problematic. Human dignity cannot stand for everything. Giving a systematic preference to human dignity over free speech when the two are in conflict will eventually lead to a situation where very few expressions receive protection.

The Court offers an inadequate legal discourse, with a limited vocabulary. The attempt to force freedom of expression into the human dignity mould is inappropriate, and will eventually lead to severe limitations on free speech in Israel. Many kinds of expressions may stand at odds with human dignity. However, numerous expressions are important for the public discourse in Israel and deserve protection. Protecting only speech that does not conflict with human dignity will dilute the public discourse and have a chilling effect. Speakers will think twice before expressing their views, and some may decide not to speak at all.

Thus, paradoxically, the Constitutional Revolution has weakened freedom of expression, and in recent years, there has been a slow devaluation in the prominence of free speech in Israel. The Supreme Court would have been wise to not artificially find the similarities between free speech

and human dignity, but to recognize the inherent tension between the two and confront it. The current discourse leads to the subordination of free speech to human dignity, and to the reduction of a fundamental right that has received protection in Israel from the late 1970s through the early 1990s. This situation is neither a necessary nor desirable outcome of the Constitutional Revolution. The Supreme Court should recognize the intricacy of the interrelationship between freedom of speech and human dignity, and avoid the oversimplification that characterizes its recent rulings. This article offered tools to do so.

For a liberty-based jurisprudence to take root it should be structured from within the Israeli jurisprudence, and it cannot simply emulate the United States. Israel has passed the stage of imitation. It needs to process, in domestic terms, the important wisdom that the United States has to offer. As part of this process, it is important to distinguish free speech from other rights, as a right that deserves heightened protection. This change is possible thanks to the existing infrastructure in which the United States has a great share, but the liberty-based paradigm needs to become naturalized and integrated into Israeli law. Therefore, Israel needs to establish its own "First Amendment". It should resemble that of the United States, but it should also reflect the necessary adaptations to the Israeli setting.

Human dignity can only carry the right to free speech so far. One cannot seriously commit to both, and a legal system must decide which of the two it favours. In the United States and Germany, this decision seems to be clear. Israel should decide which model it chooses to embrace. Following the 1992 Constitutional Revolution, it seems that the dignity-based model has gained strength, but no clear preference between the two models has been made. The introduction of human dignity into the realm of free speech may render this battle lost before it has even begun.

Israel stands at a crossroads. It is slowly abandoning American influence in the field of free speech, and trading it for a human dignity emphasis. Thus, as a by-product of the 1992 Constitutional Revolution, Israel risks losing the relatively high protection it afforded to free speech without serious debate and deliberation. This direction may well prove to be a mistake. My scholarship aims to expose these tendencies and cautions against their possible consequences. As shown, Israel is experiencing a paradigm shift. It may not be too late to halt and ponder the outcome of the current trends. If Israel wishes to abandon its former free speech jurisprudence, at least it should do so consciously.