

# Incitement and the Limits of Law

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## *Introduction*

Freedom of expression has been a central ideal of free and pluralistic societies since the classical period. Standard justifications for it precede the modern trend toward democracy,<sup>1</sup> but clearly a commitment to democracy as a system of government significantly strengthens these justifications.<sup>2</sup> Freedom of expression takes pride of place in all Bills of Rights and international human rights documents. It is supported by the value of freedom and liberty, as well as by the additional reasons special to the freedom to express opinions, disseminate information, and publish and perform artistic creations. The general liberal presumption in favor of freedom of action applies to speech; in addition, speech is distinguished from action and is deemed deserving of special protection.

According to the liberal tradition, the primary enemy of free speech is government's attempt to perpetuate its own power through the suppression of expression it deems subversive, dangerous, or immoral. The paradigmatic form of curbing free speech is censorship—prior restraint of unwanted expression by state officials—combined with a legal liability for speech deemed illegal.<sup>3</sup> The content of the speech that the state wants to curb is usually public; it relates to criticism of the government, to the dissemination of ideas deemed pernicious or blasphemous, or to the corruption of public morals.<sup>4</sup>

The story may be cast in a simple public-private framework: the public state, via public law and its enforcement, is the enemy of the freedom of speech of private individuals and civil society. In the absence of state action, freedom and the free flow of information and ideas prevail. The state, threatened by this freedom, reacts by activating mechanisms of censorship and repression. The classic implications for action are also simple and clear: the forces of light should struggle to keep the state out of the regulation of speech.

Recently, however, the picture has become more complex. People argue that there is no real freedom of expression in civil society, even when the state does not exert its power via prohibition, regulation, or punishment. A variety of other mechanisms exist that effectively silence. These include self-restraint by speakers themselves, effective censorship by peers and superiors, a variety of market devices, social implementation of norms of unacceptability, and the systematic marginalization of groups of people who are discouraged from

speaking their minds and feelings. These complex processes have nothing much to do with the law and legal constraints; nonetheless, their impact on freedom of expression may be more pervasive and deeper than the effects of legal curbs.<sup>5</sup>

From this descriptive claim—that threats to freedom of expression are private as much as public—comes an interesting conclusion. The remedy against public curbs of speech is a struggle for freedom of expression and the absence of legal constraints, but it may well be that an effective fight against private limitations on free speech may require public involvement in various forms, including enlisting the legal system to prevent, minimize, or mitigate the effects of private silencing. When the silencing is caused by the speech of others, this enlistment may itself permit or require public curbs on speech.

People also are returning, in new ways, to often-made arguments that freedom of expression is not necessarily all good. The marketplace of ideas does not always work, the truth does not always win, and occasionally the price of truth's victory is prohibitive and extremely wasteful. The prevalence and legitimation of unfettered speech may have caused some of the most terrible atrocities in human history, including those perpetuated by Nazi rule in Germany. Speech may, together with other social forces, reinforce and perpetuate long-term and persisting patterns of oppression and discrimination against weak and victimized groups.

If these arguments are valid, the classic liberal reluctance to limit freedom of expression may seem less justified in some cases. One conclusion is that some public limitations of speech may be permitted; a stronger conclusion might be that such public limitations of some sorts of speech are required. These revisionist claims are sometimes made as critiques of liberalism,<sup>6</sup> and sometimes they are presented as taking liberalism itself to its rightful conclusions.<sup>7</sup>

There are also arguments that more profoundly challenge the utility of invoking the public-private distinction to conceptualize legal curbs on speech. These challenges claim that the ascription of “publicness” and “privateness” to speech and its curbing mechanisms may be misguided: in both cases, the reality is a complex combination of elements that cannot be easily classified. The implication is that public-private talk in such contexts may be misleading and that we should design a new framework for discussion of such issues. In this new framework, we would have neither a presumption against the use of public legal force against speech nor for the immunity from state regulation of private activity and speech; rather, we would see all social processes—the ones we want to regulate and the ones invoked by regulation—in their full complexity.<sup>8</sup>

In this chapter I will argue that although it is important to see the forces that facilitate and inhibit speech as complex public and private mechanisms, and although regulation of speech (and action) should take into account this complexity and seek to use public and private means of many sorts to guide individual and social behavior, maintaining the distinction between public and private realms is important. The basic liberal attitude of suspicion toward

legal means of curbing speech, invoked and enforced by the state, is strengthened rather than weakened by this more sophisticated, richer approach.

In part, the state and the law should in principle not regulate speech because of reasons of political morality. These reasons have been rehearsed extensively in the literature and I shall not repeat them.<sup>9</sup> I will concentrate on reasons having to do with the characteristics of law as a public institution that invokes the state monopoly of the justified use of force. My argument will focus on the internal institutional limitations of law that in many cases render it unfit for regulating speech, often precisely in the circumstances where we may be most keenly interested in effective regulation. Even if there is a strong case of political morality for curbing some speech, these limitations of law should be considered before reaching a final decision.

Clearly, if an argument of political morality in favor of curbing speech exists, society may be permitted, or required, to use nonlegal means to discourage and delegitimize the offending speech. Consequently, the argument against legal sanctions is not necessarily an argument against all attempts to limit speech. It is, rather, an argument against putting the force of the state, with its legal mechanisms and institutions, behind the efforts to curb the complex processes that are often connected with illegitimate and dangerous abuses of freedom of speech.

My argument is presented against the background of a traumatic test case: the assassination of Israeli Prime Minister Itzhak Rabin and the debate conducted in Israel, before and after the murder, about the proper limits of legal prohibitions against incitement. The case study provides a dramatic illustration of the possible role of law, as well as its systemic limits, in fighting the dangers of incitement in situations of deep and divisive controversy.

### *The Test Case*

Prime Minister Rabin was assassinated on 4 November 1995. It is too early to know the long-term effects of this political murder; however, it clearly intensified a prolonged debate in Israel about the limits of free speech. Many saw the assassination as the culmination of a nasty process of hate, incitement, and delegitimation directed at the government, at the political process Rabin's government was leading, and at Rabin in particular. Some claimed that this atmosphere made the murder possible and that not preventing it was, among other things, a failure of the legal system. Now, more than a year later, we have some information about how attempts to enforce the law against incitement have fared and what changes have occurred in the social atmosphere.

The political background of the assassination was extremely charged, centering on the negotiations for an Israeli-Palestinian settlement, which began in 1993. In 1994 Rabin's government signed and started to implement the second stage of the Oslo agreements, under which the control of the major cities of the West Bank was to transfer to the Palestinian Authority and elections were to be held. The Oslo agreements had been approved in Israel's parliament by a very small majority. The Israeli population was intensely divided,

and the settlers living on the West Bank, many of them orthodox, increased their opposition to the agreements.

Rabin was called a murderer and a traitor. He was described as cooperating with Nazis and was shown in posters wearing Arafat's headcover and an SS uniform. These posters were carried in Likud demonstrations, in which the head of the opposition, Binyamin Netanyahu, participated and spoke without clearly condemning these attacks on Rabin. Some rabbis in Israel and the United States declared that, according to Jewish law (*halakhab*), Rabin deserved to die because he was willing to give parts of the land of Israel (*Eretz Yisrael*) to gentiles (*din mosser*) and because he was creating a threat to the life of Jews in the territories (*din rodef*). An Israeli professor seriously looked into the possibility of indicting Rabin for treason. Each Friday a group of demonstrators stood near the Rabin residence and called out insults; they were quoted as saying that Rabin and his wife would be executed as traitors in the city square. Hooligans attacked Rabin's car. It became extremely hard for Rabin to speak in public gatherings because of the intense critical reaction he received.<sup>10</sup>

In addition to targeting Rabin personally, protests were also mounted against his policy and his government. Some took the form of speech. Rabbis declared that Jewish law prohibits any participation in the evacuation of settlements or even army bases. The government as a whole was called bloody and evil. Attempts to delegitimize the government were made through claims that the 1994 agreement had been approved by a majority that included non-Jewish Israeli citizens and that such policies should not be pursued without the backing of a "Jewish majority." A leading head of a yeshiva allegedly ruled that it was legitimate to throw hand grenades at Israel Defense Force (IDF) soldiers who tried to evacuate settlements. Other protests went beyond speech and took the form of illegal acts such as blocking roads and settling without permission in areas that the settlers claimed to be theirs. Small Jewish groups were accumulating arms and organizing to stop the implementation process.

Israel has a broad arsenal of legal measures that may be used against inciting speech of various sorts.<sup>11</sup> Prosecution under most of these provisions requires the approval of the attorney general, and his permission has always been given grudgingly, especially when Jews are implicated. In 1986, after a long internal debate played out against the background of Meir Kahane's initiatives against Arabs, Israel added a special proscription against incitement to racism. In 1994 this law was used to bring an indictment against Rabbi Iddo Elba.

Elba was indicted for racist incitement because he published a monograph declaring that, as a matter of Jewish law, Jews have a religious duty during a war to kill all members of the enemy group, including women and children. He stated that the duty applies not only to the organized Jewish community but also to individuals. Elba also stated that his monograph was for learning, not for action, but at the same time he was involved in collecting arms and



conspiring to act against Arabs. At the trial in a Jerusalem district court, Elba refused to testify as to his interpretation of the text or his purpose in publishing it. His lawyer conceded, however, that part of his intention was to present the acts of Baruch Goldstein, the perpetrator of the Hebron massacre, in a good light.<sup>12</sup> The judge convicted Elba, deducing the required intention from the surrounding circumstances. He appealed to the Supreme Court, arguing mainly that his conviction for incitement was not consistent with previous rulings on freedom of speech. In September 1996 the Supreme Court upheld the decision by a vote of seven to two.<sup>13</sup>

A few days after upholding Elba's conviction, the court sustained in part the conviction of Hassan Jabbarin, an Israeli Arabic writer, for incitement and praise of violence. Jabbarin had written a literary text in which he said he had been empowered by the *intifada*, since it meant Palestinians were willing to take active steps such as stone throwing to present the Palestinian plight to the world.<sup>14</sup> In the Jabbarin decision the court hardly looked at the facts of the case, or at the elements of the different offenses involved, and reached its conclusion by relying heavily and explicitly on the reasoning in *Elba*.

Throughout the public debate about the negotiated Israeli-Palestinian settlement, Attorney General Michael Ben-Yair was bombarded with requests from all sides to invoke the law against what was deemed incitement and seditious libel; Israeli society is as judicialized as American society. When a group of important rabbis, some of them state employees, published a "*halakbic* judgment" calling on soldiers not to participate in the evacuation of army camps, the attorney general decided not to invoke the criminal law, noting that most attorneys general before him had been extremely cautious about using their prosecutorial discretion in issues involving speech about matters of public importance. He added that suppression of speech might be counterproductive, particularly when the suppressed speech involved political debate that had polarized Israeli society. Some praised this decision; others expressed fears that the message was too permissive: by not even investigating the conduct, the legal system communicated that these expressions were exempt from law enforcement and might even be legal and permissible.

In addition, there were confused messages about how to treat illegal *conduct* in the context of the debate. Dispersing the demonstrators involved clashes with the police, resulting in accusations of violence and unjustified violation of human rights. When the leaders of these demonstrations were detained, public pressure led to their early release. Similarly, when police and the army tried to evacuate illegal settlers, they were accused of violating the human rights of peaceful protesters.

Reaction by the courts to attempts to prosecute participants in illegal demonstrations was also erratic. Demonstrators and their supporters declared that the protests were acts of civil disobedience, falling within their democratic right to protest, and that they would paralyze the legal system if the demonstrators were prosecuted in large numbers. When the police and the attorney general asked the courts to speed up the trials to circumvent this

threat, dissenters persuaded Chief Justice Aharon Barak to ask the attorney general not to interfere with the autonomy of the courts.

The Israeli media saw its task as giving full representation to all views. They hosted representatives of the groups expressing extremely critical views of Rabin and the political process. One television broadcast showed a masked youth pledging to use violence against Arabs and, if need be, against Jews as well.

In short, the assassination was preceded by intensified acts of protest, including blatant, delegitimizing verbal attacks against Rabin and his policies. The legal system's response was ambivalent. On the whole, it took a passive, ultracautious approach toward the prosecution of speech and an erratic and ineffective stance toward illegal action.

The shock of the assassination led many to reassess the developments that had preceded it, including the response of the legal system to expressions that might be seen as inciting or legitimating the murder. For a short while, this issue dominated public debates. The attorney general and the minister of justice planned to add new laws that would prohibit incitement to murder and violence and the praise of such conduct, explaining that present laws were too broad for effective enforcement. There was talk about a special prosecutorial unit to deal with incitement. The attorney general reminded the media that disseminating incitement was an offense on the part of the media as well as on the part of the speaker. Some Israelis who expressed joy at Rabin's murder were detained and interrogated under a law that makes expressions in support of terrorism a criminal offense.<sup>15</sup>

Opinion within right-wing political and religious groups was divided. A minority were willing to accept indirect responsibility for the atmosphere of incitement and delegitimation, but most counterattacked, claiming that the left was trying to glean political capital from the tragedy by inciting public opinion against the right as a whole, without acknowledging that the murder was the act of a radical individual. Right-wing groups pledged to change their political style, but they objected to proposals for new legislation imposing more specific curbs on speech. This position was shared, more or less, by human rights groups of all persuasions.

The ambivalence toward law enforcement persisted. The high court clarified that the media were not controlled by the attorney general and that he could not direct their actions. There was a public outcry when a few rabbis were interrogated by the police to find out whether they had explicitly said that Rabin was "executable." Most of the demonstrators who had been detained either were released or received very light sentences. Three leaders of the settlers' protest movement who had been indicted for incitement argued in court that the indictment infringed their right to protest and complained that the government was using the law to persecute its political opponents.<sup>16</sup> Talk about changes in the law gradually subsided. People in the legal civil service explained that trials for political expression were extremely hard to conduct and win and that prosecution necessarily singled out some speech without

guaranteeing that it was speech that most deserved such treatment. Security arrangements for political leaders tightened significantly.

By the summer of 1996, important parts of the second stage of the Oslo accords had been implemented by Peres's government without serious public protest.<sup>17</sup> Public discussions of political issues and, especially, of political leaders were extremely subdued in most political circles.<sup>18</sup> The caution was so great that Rabin's murder was hardly mentioned in the election campaigns that led to the rise to power of Netanyahu in May 1996. Labor party strategists felt that appearing to capitalize on the assassination might alienate members of the right whom they hoped to attract.

When redeployment in Hebron started to seem more likely, right-wing rhetoric escalated again. Rabbis repeated their public statements against evacuation. On many occasions, criticism of the government took the form of support for the motives, goals, and courage of Rabin's murderer, Yigal Amir.<sup>19</sup> Nonetheless, redeployment took place in January 1997 without any serious protest.<sup>20</sup>

### *Legal Regulation of Incitement*

Decisions about using law to suppress incitement may be made at a number of different junctures: At each, decisions are made by different bodies and in different processes of decision making and accountability. The questions asked are different, but interrelated: Should there be laws prohibiting some types of inciting speech? What should the elements of such offenses be? Should this law grant discretion in its application? To whom? Should a speaker be prosecuted in a particular case? Should he be convicted? How serious should the punishment be?

By definition, inciting speech is speech that leads, at least potentially, to bad results, and laws that attempt to curb such speech seek to prevent or minimize these bad results.<sup>21</sup> In general, the case for having a law and using it is strongest when:

1. The speech in question has substantial undesirable results and weak or nonexistent desirable functions.
2. The causal relationship between the speech and the bad results is clear and strong.
3. The effectiveness of law enforcement is high.
4. The costs of law enforcement are low.
5. The costs of nonenforcement are high.
6. The availability of nonlegal measures that can effectively minimize the bad results is low.

These are complex considerations, raising factual and evaluative issues. Both law and the processes it seeks to regulate can be described in terms of a public-private continuum. Law is specifically public in many senses. It is the reflection of the fact that the state claims supreme authority and the right to be the only normative system having the power to use justified force. The results I discuss here are mostly public ones, affecting people other than

the speaker and often large numbers of them. Law seeks to regulate complex social and individual processes, which together determine the causal connections between speech, beliefs, attitudes, and conduct. Most of these processes are not controlled by the state through law. Some are elements of our public culture (for example, accepted patterns of speech and behavior in public life, which may affect individual expectations and conduct) and some are intensely individual and private (for example, the way particular individuals respond to a stimulus or are moved to act on their interpretation of a reality or norm). As we shall see, the complexity of social processes is relevant to the role of law. In part, the relevance has to do with the relationships between the public nature of law and the complex private-public nature of both the conduct the law seeks to regulate and of the processes that facilitate and hinder such conduct.

A test case such as Rabin's assassination frames questions about the role of law in attempts to curb incitement in a special and specific way. It makes a great deal of difference whether we consider the six factors listed above in the abstract or in the context of a specific case. The particular context of a specific case, in which harm has already materialized, may change our assessment of these factors. As we saw, before Rabin's assassination the attorney general declined to prosecute inciting speech; after the assassination his policy changed. I believe the court's decisions in the speech cases were also affected by the assassination. By analyzing these cases, we can better see how the murder affected the decisions and whether it should have affected them in the way they did.

### Identification and Evaluation of Results

The first set of elements to be considered in seeking to limit incitement is the identification of the consequences of speech, the evaluation of the worth and weight of these consequences, and the probability of their occurrence. The strongest case for legal prohibition is that of speech that creates a "clear and present" danger of a harmful result, with no mitigating features whatsoever. Shouting "Fire" in a crowded theater is a familiar hypothetical example. Encouraging an angry and hungry mob to storm a granary and kill the owner is another. In real-life situations the picture is often more complex, and the picture is further complicated when we design laws to deal with such situations. Let's look at some of these elements one by one.

Taking Rabin's assassination as the starting point focuses our attention on one event that may have resulted from the speech and activities described. Many people, including Rabin's political opponents, concede that Rabin's murder was an extremely unfortunate and undesirable event. Because the assassination was committed to undermine the political program of a democratically elected head of state, sanctity of life, the rule of law, and democracy were all put at grave risk. Assassination can threaten the stability of regimes, affect a country's international standing, and harm the well-being of those who rely on the effectiveness of law enforcement in that society.

When we look at the consequences of similar speech in similar circumstances from other junctures, or even at the situation in Israel prior to the assassination, the picture changes radically. The Rabin assassination was not the only consequence of the inciting speech. Clearly, this speech served functions other than the facilitation of the murder, and many of these functions are an essential part of democracy. We should recall that the Oslo process is far reaching and that opinion in Israel at the time of the assassination was truly and deeply divided. For many people in the opposition, free speech probably provided a way of participating in the process of national decision making. Most of the harsh words against Rabin were used to mobilize political opposition and clarify the depth of the feelings that inspired that opposition. Naturally, effective mobilization of the opposition can be extremely threatening to supporters of the government's policy, and they can easily be led to see accusations and caricatures as forms of incitement and delegitimation even as they pay lip service to democracy. It is not easy to draw the line between legitimate harsh criticism and dangerous delegitimation, and it is not clear that those connected with the government under attack should be the ones to make these judgments.

Despite the truth of these observations, one may be reluctant to conclude that the law must be helpless in the face of even the most blatant incitement. Surely there are types of speech whose bad results are obvious and imminent and whose beneficial value is small or nonexistent. Yet, when we seek to formulate a general law capturing this intuition, the quest is not an easy one. The distinction between legitimate and illegitimate speech must be independent, as much as possible, from substantive political views. Some try to draw a line between speech encouraging and legitimating legal activities and speech encouraging and legitimating illegal activities. Although this line has the advantage of being relatively clear, there is a serious debate about the limits of a citizen's obligation to obey the laws, even in a democracy. *Speaking* about disobedience, especially when it is not violent, and justifying it, per se, do not seem good targets for prosecution.<sup>22</sup> Thus, mere illegality does not provide the answer.

A stronger candidate for illegal speech might be speech that explicitly calls for the use of force or violence. It might show the deterrent capacity of law that such explicit speech is not present in public debates in Israel. Calling Rabin a murderer and a traitor and describing him as a *rodef* or *moser* were not such explicit calls: the conclusion that he should be murdered was not publicly stated. The *Elba* decision shows the willingness of the court to view a somewhat disguised message that legitimates violence—here against Arabs—as a case of incitement. To avoid overinclusiveness, the law must identify speech that is explicit and intended. Such a law is likely to be easy to manipulate, and the likely result will be that it is underinclusive in important ways.

The problem may be further exemplified by looking at the suggestions to prosecute those who publicly expressed joy at Rabin's murder. At first blush,

this appeared to be an easier case to justify than the prohibition of statements such as "Rabin is a murderer" or "Rabin is a traitor." Whereas the latter statements may be the legitimate expressions of political frustration and dissent, stopping short of recommending specific outcomes, the blessing of a political murder has no redeeming features. On the contrary, public toleration of such blessing may seem inconsistent with the official condemnation of the murder.

Nonetheless, serious difficulties exist both at the level of draftsmanship and prosecutorial discretion. How would such a prohibition be drafted? "Expressing support for murder" might be underinclusive: it would not cover expressions of joy for other illegal acts of violence. Expressing support for a general use of force or violence would, unfortunately, be applicable to quite a bit of talk in Israel, and, clearly, it would also be overbroad:<sup>23</sup> would the law apply to any murder, including the murder of an arch-criminal or a political assassination that took place decades ago?<sup>24</sup> A decision not to prosecute someone who publicly expresses admiration for those who attempted to assassinate Hitler may seem obvious. Is the decision so obvious when Rabin is compared to Hitler? What exactly is "blessing"? Is expression of joy, or a declaration of an absence of sorrow, enough? What about support of the murderer's motives and goals without explicit public support of the deed itself? On the one hand, the expression of this attitude cannot be prosecuted; on the other hand, it may well serve as an encouragement to a person contemplating murder.

### The Causal Relationship

Describing an action or an event as the "consequence" of speech presupposes that there is some causal connection between them. A central issue in any debate about the limits of free speech is the nature and the imminence of the causal connection between speech and its alleged consequences. When the connection is very close, some see speech itself as being a form of violent act.<sup>25</sup> The decision to punish speech that is closely and inevitably linked to undesirable consequences is rationalized by the fact that it would seem strange and counterintuitive to view the almost inevitable result of some conduct as highly undesirable, but to refrain from prohibiting that conduct. As we move away from the paradigmatic cases of direct and strong causation, we may be less willing to punish speech.

The juncture at which the decision is made is significant: judgments about causal relationships made when we contemplate a general law against incitement will be very different from those made when we consider prosecution for a specific act of incitement. In addition, judgments will tend to be different depending on whether they are made before or after a specific undesirable result occurs.<sup>26</sup>

After Rabin was assassinated, it was easy, and I think plausible, to say that his murder was facilitated and aided by the general atmosphere of incitement and delegitimation. Part of the trauma of Rabin's death, however, stemmed



from the fact that for most people the assassination came as a total surprise, despite the climate of unrest that preceded it. Even if the atmosphere facilitated the murder, it does not follow that we would be able to identify particular acts of speech or conduct that caused it.

In actual social situations it is impossible to isolate factors and determine their contribution to effects. Such control is extremely complicated even in a scientific laboratory. We cannot easily identify and disentangle the precise causal contributions of angry or even inciting speech, of harsh political criticism, of hooliganism, of a general tendency in Israeli society to solve problems by force rather than by debate; we cannot identify the effects of feelings of betrayal and desperation on the part of the settlers, of tension between religious and state law, of the existence of groups that support and legitimate murder, or of the special psychology of Rabin's murderer that made him respond in this way. The causal efficacy of inciting speech is not independent of these factors. Not only might the speech preceding the assassination have had less intensity had other factors been absent, but such speech may have had less impact on Amir than did other factors, such as his combination of military service and religious education.<sup>27</sup>

Rabin's assassination demonstrates that political murder is a possible outcome in such a complex situation. This is a meaningful statement, because before the assassination many believed that a Jew would not murder another Jew under such circumstances.<sup>28</sup> Nonetheless, the contribution that inciting speech made to Rabin's assassination is far from clear. Background conditions are relevant, without doubt, but the ultimate decision to act was made by one particular individual. The need for caution in deciding to connect specific speech to the murder, and deciding to prosecute for that speech, grows when we remember that, for psychological as well as political reasons, many were looking for someone, or something, other than the murderer to blame for the assassination.

In sum, a feeling of guilt and frustration at not preventing Rabin's assassination may well be consistent with the inability to use the law productively to suppress speech that may have contributed to the murder.

### **Enforcement of the Law**

Identification and evaluation of consequences and assessing the strength of the causal relationship between speech and outcome are relevant both in drafting laws and in deciding to invoke laws in particular circumstances. We should not have laws against incitement if these cannot be justified in terms of preventing undesirable results. The enforcement of such laws also generates social costs. If these costs are high, they might support a case against all legal regulation. This is a general truth about legal regulation,<sup>29</sup> and it applies with special force to the legal regulation of speech. This cluster of issues includes the effectiveness of enforcement, the costs of enforcement and nonenforcement, and the availability of nonlegal measures.

### Costs of Enforcement

We saw that laws prohibiting speech are likely to be both overinclusive and underinclusive. Since the content of speech alone cannot decide the issue, and since legal norms cannot enumerate the context of their own application, someone must have discretion in enforcement of the laws. This may raise concerns about equality before the law. If the law is enforced against some speakers but not others, charges of political inequity may result. Singling out individuals may cause injustice, and it may also make the silenced groups feel persecuted and martyred. In addition, such laws may have serious chilling effects. While some of the discouraged speech will be the kind of speech the law wishes to deter, the robustness and power of necessary public debate may be reduced as well.

The most serious problem in this context, however, stems from the nature of law itself, and the role of its enforcing agencies. Law is an arm of the state. Laws aim, at least in part, to maintain order. To do that, the state claims supreme authority and the right to be the only normative system having the power to use justified force. This claim of exclusive authority suggests serious constraints on the law. If the state claims authority, not naked power, the law must have a basis of legitimacy: there must be existing, known, and general norms that make the conduct illegal; suspects must be given an opportunity to present their case in an open court, where they are allowed to challenge the facts and the law; and the courts must be constructed in a way that will guarantee independence from the government. For the law to operate smoothly and legitimately, individuals accused of crimes must be seen as offenders, not persecuted heroes or martyrs, by most of society. If the law or its enforcement are perceived by too many, and for too long, as being simply the vehicle of persecution and oppression, the power of the law to regulate conduct declines. Law may ultimately be seen as a partisan tool used by the "enemy," against which society is justified to rise, instead of a system within which differing perspectives can work together for the advancement of a united, cohesive society that accepts its pluralism. Moreover, this ambivalence about law may be present within the law enforcement system itself, since police and courts usually reflect, to some degree, deep ideological and political divisions within the society in which they live and work.

All these presuppositions of the work of law in society are usually present in well-ordered and stable societies. They may be weak in cleft and divided societies. Situations of great division thus create dangers to the fabric and legitimacy of law and call for special care in its enforcement. This is an important part of the lesson of the Rabin assassination and of the general background of Israeli society. Recall that the legal machinery to prosecute both speech and actual violence was available before the assassination. Despite this fact, enforcement of the law against Jews who committed violence against Arabs was extremely weak. No similar difficulties were experienced with Palestinian Arabs, however.<sup>30</sup> Arabs who expressed explicit or even indirect support of violence were detained or prosecuted and no leniency was shown

toward those convicted of terrorism. The factors creating this inability to enforce equitably the law reflect a deep ambivalence about the morality of acting against Arabs within Jewish Israeli society. Some of the ambivalence concerning acts of violence may have become more subdued after the murder, but the ambivalence concerning speech has not weakened, either among law enforcement personnel or among the broader public.<sup>31</sup>

The fact that enforcement requires discretion, and that this discretion is exercised by law enforcement personnel who may share the social ambivalence about enforcement, gains special importance when we remember that the control of enforcement is, constitutionally, the responsibility of the executive. While all legal systems contain mechanisms designed to separate legal enforcement from government, the ultimate responsibility for enforcement of the laws lies, as it should, with the branch that controls the daily use of governmental power in specific cases.

The responsibility of the executive creates two special risks: first, the government may, even in good faith, use laws against incitement to promote its own political goals; second, this fear, even if unjustified, may help delegitimize the legal system and the courts, making them appear to be servants of the current regime rather than protectors of human rights and the rule of law.<sup>32</sup> Both dangers are very real and should be counted as heavy costs of enforcement, especially in explosive social situations.

#### Effectiveness of Enforcement

The considerations against the use of law to curb inciting speech might have been overridden if the prosecution of speech had proved to be an effective way of decreasing the chances of political murder. It is far from clear that a fierce enforcement of the law against speech would have prevented Rabin's assassination, and it is not at all clear that it could restrain murder or violence triggered by a future political situation.

The relative ineffectiveness of law in this area is related to the fact that the causal chains leading to the murder are complex, and it seems that the role of identifiable speech acts within these chains is rather minimal. Furthermore, the attempt to prosecute for speech may decrease the occurrence of inciting speech, but it may increase the probability of the violence the law wishes to prevent. I noted above that Elba explicitly added that his analysis of Jewish law on "killing non-Jews" was for the purpose of study, not action. People may indeed more carefully control what they say if they realize that they may be prosecuted for what they say; nevertheless, prosecution for speech in volatile political situations seems likely to arouse as much resentment and suspicion as hoped-for internalization of the limits and dangers of free speech.<sup>33</sup> If a person feels that the power of the state is being used to persecute him and to prevent him and others who think like him from expressing their protest, he may feel victimized. If his desperation grows, he may be moved to believe that violence is the only route open to him. Under these circumstances, he may refrain from publicly expressing joy at political

murders but may be more willing to support and join groups that plan to repeat such deeds.

The effectiveness of the law in preventing violence may be further decreased by the fact that those prosecuted for inciting or blessing violence are usually tried and sentenced long after the initial speech occurs and long after the urgency that was dictated by a volatile political situation has passed. Under these circumstances it is not surprising that courts tend to acquit when they have to balance risks to life and security against free speech.

### **The Costs of Nonenforcement**

The arguments so far seem to indicate that great caution should be used before the law is mobilized to regulate political speech uttered in the context of an intense public debate about extremely consequential policies.

Nonetheless, the case of Rabin's assassination should give us pause, as it did to law enforcers in Israel after the murder. Is the law helpless in such a terrible national trauma? Is Israel doomed to be a society that tolerates incitement only to witness the murder of a national leader? These and similar questions suggest that the legal system may be in a real bind: if law is not effective and the costs of its enforcement are heavy, one should not prosecute. Conversely, a divided society might not be able to maintain its integrity as a democracy without clearly condemning inciting speech and the kinds of actions that the speech encourages. Law is the only mechanism that can impose official punishments through fines or imprisonment: conviction is the official mechanism of imposing social stigma. It seems strange that we cannot use this mechanism to deal with the kinds of activities that contributed, however remotely, to the assassination of Rabin.

Not using the law in such circumstances has social costs of two interrelated kinds. First, nonenforcement may suggest a willingness to give up the deterring effect of enforcement as a way of promoting the desirable state of affairs in which public debate is robust but avoids incitement. Secondly, it may be seen as approbation and legitimation of inciting and delegitimizing speech.

The feared loss of deterrence is a substantial cost, but it is dangerous to let the trauma of the assassination and the frustration over the public support it has received allow us to forget the long list of difficulties and costs concomitant to invoking the law. It is not at all clear that strict enforcement of laws against speech can promote robust debate while proscribing incitement, and that it could have prevented the murder. While the guilt felt by law enforcers is understandable, it is not clear that it is justified. Even if it had been, we should make sure that guilt does not dictate bad solutions just to prevent similar guilt in the future.

More troubling is the possibility that a decision not to prosecute will be seen as a declaration of permissibility and legitimacy. It is extremely important, in this context and in many others, to stress the fact that nonprosecution, or noncriminalization, is not tantamount to legitimation and approbation. In

fact, this is precisely one of the points in which law must be supplemented by social norms of various sorts. This declaration calls for some humility on the part of the law which is, I believe, quite beneficial. Admission of the law's limits may be hard for some lawyers, but it is an extremely important reminder for society at large.

I have explained why using the law to curb *speech* in such circumstances is a bad solution. The law need not feel completely helpless, however. It can make a contribution, and should do so, by strictly enforcing of the law against *violent subversive action*. Support for illegal acts, especially violent acts against innocent people, is likely to be much less focused and public than support for inciting speech. Violent acts are clearly dangerous to individuals and to the rule of law—they have no redeeming value whatsoever. Nonetheless, in conditions of great division and cleavage, when even the enforcement of laws against action is likely to be difficult, it is a mistake to attempt to use the law against speech. In this regard, feelings of guilt are justified: I have documented above the lenient treatment given in Israel to the Jewish perpetrators of ideological and political violence against Arabs. It remains to be seen whether this lesson has been learned by the legal system and by Israeli society as a whole.

#### Alternative Measures

If laws were the only agents of expressive condemnation available and the only way to discourage inciting speech, the dilemma of the law would be sharpened. Such condemnation would not make laws more effective, but it would make it harder to claim that nonenforcement is justified and that nonenforcement does not amount to legitimation. Similarly, if laws against incitement had been the only way to fight against political murder, justification for not using them would have been hard. Fortunately, however, other mechanisms often exist that do not have law's structural limitations, and they may be more effective than (or at least as effective as) legal curbs on speech. There is in addition a host of other ways, legal as well as nonlegal, to minimize the risk of political murders. The atmosphere before Rabin's assassination indicates that such mechanisms were not used effectively in Israel. Developments after the murder suggest that these forces can be relied on to do at least some of the work of curbing incitement.

After the assassination, political parties in Israel—especially the main opposition parties, secular as well as religious, who had been ambivalent about extreme right-wing rhetoric and activities—somewhat changed their ways, realizing that public support of incitement, whether active or passive, could alienate most of the public. These parties had an electoral incentive to support law enforcement against violent actions and to condemn publicly expressions made from within their camp that seemed close to incitement. Clearly, such moves from the political forces that participated in incitement and delegitimation, if they are thought to be sincere and if they persist, will be more effective deterrents of both incitement and violence than would be enforcement of the law against speech by those who are viewed as the long

arm of a hated government. Thus, a party's internal decision to exclude or marginalize members who carry unauthorized inciting posters or endorse *halakhic* legitimization of murder may be more feasible and more effective than legal prosecution of the same conduct.

Moreover, if a divided society is to avoid civil war and disintegration, all parts of the political system must cooperate in the effort to present the courts and law enforcement agencies as national mechanisms that are beyond partisan political controversies. They are more likely to do this if the activities of the courts and law enforcement agencies do not threaten them directly.<sup>34</sup>

The prohibition against inciting speech is not our main way of protecting political leaders. Obvious alternatives are laws against murder and assault. Stepping up security arrangements is another obvious measure. The failure of such arrangements in Rabin's case was the subject of a special commission of inquiry. Even before their report came out, however, it was quite clear that the failure consisted of much more than the fact that the prime minister was murdered despite having taken all reasonable protective measures.<sup>35</sup>

Additional measures that do not involve legal curbs on speech are suggested by a careful analysis of the events preceding and following the assassination. Education is clearly indicated, although results may be apparent only in the long term.<sup>36</sup> More interesting and controversial is the suggestion that an effort should be made to lessen the intensity of political polarization within Israeli society. Supporters of this idea suggest that this is the only effective way to discourage the demonization of political leaders. Critics argue that this would benefit the camp that used violence in that it would create a superficial and nonexistent unity that would inevitably give a veto power to those who object to the Oslo process and to similar policies that would require relinquishing Jewish control over parts of Greater Israel.

This debate may have far-reaching implications for my subject: if Israel cannot avoid or contain the deep divisions among its various camps, it may sadly have to go through a period of civil strife in which conflicting ideologies will seek victory through war. During that period, the law would be in a sense suspended, and it could re-establish itself and its authority only when a large part of the population agreed to work within the same framework of rules.

### *Some Conclusions*

The atmosphere that preceded Rabin's assassination, and probably made it possible, resulted from complex social and political processes; inciting speech was but one factor. The main opposition parties were ambiguous in their reaction to such extreme speech, fearing to lose the electoral support of radical objectors to Rabin's policies, whose numbers were not clear. The murder appeared to undermine the stability of democracy itself and suggested that Israel was splitting apart.

This is the kind of unruly situation in which some call for more public legal intervention in the hope that laws and their enforcement will change the atmosphere and prevent further violence. Law enforcement agencies in Israel



decided to step up law enforcement as a response to the trauma generated by the murder. They felt that there was a present danger of more political violence among Jews; the feeling more generally was that only strict enforcement of the laws could reintegrate Israeli society.

I have tried to show why these arguments, in this context, were not sufficient to justify the use of the law against speech. Moreover, I have tried to show that the very nature of the situation and the threats to democracy it reflected made the law the wrong tool to deal with the crisis. Prosecution and punishment are uniquely legal measures, and they are public in the strongest sense of state power. Their utility is extremely limited when the outcome the laws seeks to prevent is deeply controversial. Law enforcement, especially against speech, must therefore be wary of appearing to take sides in such controversies.

My analysis of why the law should not attempt to regulate inciting speech does not rely on classic justifications for freedom of speech or the resulting moral reasons against curbing it by laws. It instead focuses primarily on the structural and systemic features of law itself and on an analysis of the background social conditions against which the law must work.

Israel chose to combine its long-standing laws against incitement with a policy of nonenforcement. If I am right that law enforcement of political incitement laws is most problematic at times of great political division, when the tendency to use inciting language is great, should we not aim at abolishing such laws? Should law declare that it is out of this field altogether, thus “privatizing” speech, or should those who uphold the law be open to the possibility that there may be an occasion in which enforcement will be justified or even required?

I have no firm opinion on this matter, in part because generalizations are difficult. It is not necessarily the case that inciting language exists or is very dangerous only when there is a deep division within the population, nor are violence and murder the only undesirable outcomes of incitement that we may wish to prevent. Incitement against minorities may perpetuate serious structural social wrongs that we may well seek to regulate. Moreover, there may be cases in which causal relationships are stronger, costs of enforcement significantly lower, and redeeming features nonexistent. The balance of considerations may thus shift.

Considerations for new legislation or the abolition of existing legislation are obviously very different. One should be especially careful not to legislate against speech because of populist demands: more often than not, the purpose of such legislation is to suppress and silence political minorities who are seen as a threat. In such cases, arguments against the legislation are rooted in political morality, not in the public nature of law and its enforcement. When such legislation is passed nonetheless, enforcement agencies and the courts should regard themselves as institutional guarantees against abuse. When enforcement agencies fail and respond to populist or other pressures, it is the task of the courts to protect freedom of speech against unjustified intervention. When

the speech is clearly undesirable, but the law is not the proper tool because of a situation of deep controversy, the enforcement agencies must do the protecting, since the courts are in an institutional bind: conviction may reinforce the dangerous tendency of the inciters to accuse the system and delegitimize it, whereas acquittal may send an undesirable message of permissibility. What needs to be protected in such cases is not the rights of the speakers (if they are violated at all in these cases) but the integrity of the democratic system and the legal system within it. To preserve this integrity, special caution must be used in the decision to require a court of law to decide publicly on the illegality of inciting speech.

In the case of incitement law in Israel, I think the laws, although overbroad, should be left on the books for the present. I see no reason for a declaration that after the assassination it became clear that these laws are unnecessary. The question of the optimal legislation should be discussed when the political and the legal systems are not in the midst of turmoil. In the meantime, enforcement agencies should be careful not to invoke the law in inappropriate situations.<sup>37</sup>

I return to the issue of case versus rule. One may be tempted to say that if laws against incitement could not be enforced after Rabin's death, there will never be a case in which the law might justifiably be invoked. The conclusion of abolition seems to follow. I disagree. The Elba case may provide a case in point. I do not know of many written texts that came as close to encouraging murder as Rabbi Elba's text. It is a declaration of holy war against a whole people, far beyond shoutings of "Death to the Arabs" after a cruel terrorist activity. It is a reasoned argument, made by a religious authority, to justify and require murder of individuals simply because they are Arabs. Moreover, Elba made preparations to act in accord with his text.

Perhaps it would have been wiser to prosecute Elba only for his actions: collecting ammunition and conspiring to harm Arabs. Given the conditions in Israel, however, especially the background of Jewish violence against Arabs, and faced with a choice between declaring Elba's text illegal and protecting such speech, I believe acquittal was out of the question—it would have dealt a deadly blow to the law. Indeed, it may be that Israelis would have used more inciting language, with clearer and more immediate deadly results, had the law been different. We should not abolish laws simply because they do most of their work by guiding behavior without the need for prosecution.<sup>38</sup>

Rabin's murder dramatizes a case in which the argument for legal curbs may seem, in retrospect, extremely strong. Nonetheless, a detached and sober analysis at the time of the assassination could have shown what developments since then demonstrate: such legal curbs may often be ineffective and counterproductive. It is important to see why an argument that appears compelling in such dramatic and rare cases may nonetheless be misleading. It is even more important to see how crucial and central the often-disregarded institutional and systemic features of law and its enforcement are. The frustration of helplessness in the face of undesirable complex social processes may persist, but

deluding ourselves into thinking that the law can solve the problem is wrong. The mistake, moreover, is not costless: the attempt to regulate such situations through law will not only fail to fight dangerous social trends, it may endanger the very ability of law to perform its distinct function in society.

The public nature of law, as a tool of the state, is relevant and important to the question of whether the law should be used to curb speech. Law, however, is a way of regulating and dealing with social problems, and these problems often have foundations that go very deep. Law's effectiveness as a tool may depend on its being used as a part of an integrated program, where all are aware of the law's strengths and limitations and the risks involved in its invocation.

#### Notes

1. Mill's argument in *On Liberty* (London: J. W. Parker, 1854), chapter 2, as well as Milton's, is not confined to democracies.

2. See, for example, Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford Univ. Press, 1965); and Thomas Emerson, *Toward A General Theory of the First Amendment* (New York: Random House, 1966).

3. I am using here a narrow meaning of  *censorship*  as the legal prior prohibition of speech. I am not  *arguing*  for this narrow usage. Under broader meanings, all legal curbs, both prior and subsequent, are called "censorship." Under yet broader meanings, all inhibitive mechanisms of speech are called "censorship," as Richard Burt seems to do in "(Un)Censoring in Detail: The Fetish of Censorship in the Early Modern Past and the Postmodern Present," pages 17–41 in this volume. For a very interesting discussion of the "meaning" of censorship see Frederick Schauer, "The Ontology of Censorship," pages 147–68 in this volume.

4. When people in power wanted to prevent publication of intimate information about them, it was often related to their wish not to create an incentive for insurrection and not to contribute to a tendency to feel contempt for the government. Legal prohibition of invasions of privacy by publication appeared, if at all, only at the very end of the nineteenth century. For a historical account of the law of defamation, see Debora Shuger, "Civility and Censorship in Early Modern England," pages 89–110 in this volume.

5. I am stressing here the speech variety of these arguments, but the same strategy is made to challenge the general belief that individuals enjoy equal freedom of action in the prelegal state. Such critiques come both from the political left, concerning economic equality, and from radical feminists, concerning the sources of the inequality of women. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard Univ. Press, 1989).

6. Liberalism is criticized for allegedly seeing pornography as a "private" matter, in which society and the law should not interfere because of Mill-type arguments. For a discussion see Ruth Gavison, "Feminism and the Public-Private Distinction," *Stanford Law Review* 45 (1992): 1.

7. See Rae Langton, "Whose Right? Ronald Dworkin, Women and Pornographers," *Philosophy and Public Affairs* 19 (1990): 311.

8. I take it that this is the attitude, both theoretical and practical, exemplified by Richard Burt (see note 3).

9. For a recent comprehensive analysis see J. Cohen, *Philosophy and Public Affairs* 22 (1993): 207–63; reprinted in David Heyd, ed., *Toleration: An Elusive Virtue* (Princeton: Princeton Univ. Press, 1996), 173.

10. Some leaders of the opposition refused to participate in these mass demonstrations because they tended to get out of control and because the participants in the main were not Likud members but settlers and members of fringe radical right-wing groups. They were also careful to maintain the delicate line between criticizing the agreements and delegitimizing the government. However, many other leaders of the opposition expressed themselves less cautiously and used metaphors and analogies that were similar to those I describe here. For a long list of such pronouncements by leaders prior to the murder, see *Haaretz*, 24 Oct. 1996, p. B7 (in Hebrew).

11. For a comprehensive review see Pnina Lahav's description in Pnina Lahav, ed., *Press Law in Modern Democracies: A Comparative Study* (New York: Longman, 1985).

12. Elba's essay was included in a book titled *Baruch Hagever* ("Blessed the Man," from a Jewish prayer). The title is a pun on Goldstein's name.

13. *Elba v. State of Israel*, Cr. App. 2831/95. Ironically, the appeal was heard in court the day after Rabin's murder; the justices sat without making any comments to the attorneys' oral arguments. In a second hearing a few months later, some justices questioned the prosecutor about the compatibility of the charges with freedom of religion and religious study. The same justices, who are both identified with the religious right, voted to acquit Elba on the basis of freedom of speech and freedom of religion. The majority, including Barak, who is known as a staunch supporter of free speech, presented a tortured justification for the decision to convict.

14. *Jabbarin v. State of Israel*. Barak allowed a further hearing of this case.

15. A religious person who said on television that he was glad Rabin "the dictator" was dead, and that he hoped Arafat and Peres would have the same fate, was detained until the end of criminal proceedings against him and then indicted. After a public outcry, he was allowed to go home on bail. In July 1996 he was acquitted by the court. The judge said his words were despicable, but that the intention required for conviction had not been proven.

16. One of the accused was elected to Israel's parliament under a right-wing ticket calling for "transfer" of Israel's Arabs; his immunity must be lifted if the trial is to continue.

17. The Palestinian Authority (PA) was given control of all major cities of the West Bank with the exception of Hebron, where four hundred Jewish settlers have established an enclave. The delay in the evacuation of Hebron was agreed upon by Peres and Arafat in the wake of the terrorist attacks on Israel in February and March of 1996. Elections to the PA were duly held, and Arafat became the elected president of the new entity.

18. One member of the religious right was prosecuted for allegedly conducting

a religious ceremony tantamount to a symbolic execution of Peres. The ultrareligious press contained words depicting Peres as anti-Jewish and deserving hate and contempt.

19. Yigal Amir was convicted for Rabin's assassination and sentenced to life imprisonment. He also was convicted with his brother and another man for conspiring to kill Rabin and for acting against Arabs.

Three girls from a religious high school admitted on national television that they admired Amir and, moreover, were in love with him. After a public outcry, they apologized and explained that their words had been taken out of context. However, a study revealed that up to 15 percent of high school students in Israel agreed with Amir and that many believed that their teachers felt the same way. Since it is not "politically correct" to publicly support Amir, the actual numbers are probably higher.

20. An orthodox Jewish soldier who shot at Arabs and wounded some in the Hebron marketplace in early January 1997 enjoyed very little public support. He was later pronounced insane by a special committee.

21. The requirement that speech be censored only if it leads to bad results may be a distinctive feature of all *legal* regulation. One may well seek to discourage or criticize speech when it involves falsehood, when it is vulgar, inelegant, too noisy, frivolous, irrelevant, boring or in bad taste, and one may shun people whose speech is often of this type. All these do not seem proper reasons for invoking the power of the law, however.

22. I therefore think that the decision to prosecute the leaders of Zu Artzenu, a right-wing organization, for incitement and not for their illegal activities was a mistake.

23. When the *intifada* started, Rabin, who was then the minister of defense, said during a television broadcast that Israel should "break their bones" to teach the Arabs a lesson. I never liked this statement, but I am not sure that asking the attorney general to prosecute Rabin was the right response.

24. Early in 1996, when it was reported that Yihye Ayash, the man responsible for many terrorist activities in Israel, was killed, all Israeli leaders expressed deep satisfaction. No call was made to prosecute anyone for expressing joy at the killing.

25. Linking an action to speech may consist of two parts. One is the concession that we do not want to protect a person calling "Fire" in a crowded theater, or using "fighting words"; the other is to redefine these activities in terms of the distinction between speech and action. The second move is best seen as a rhetorical device, aimed at fitting the practical conclusion into a principle prohibiting all punishment of speech. My concern is with the practical question itself.

26. B. Fischhoff and R. Beyth, "I Knew It Would Happen: Remembered Probabilities of Once Future Things," *Organizational Behavior and Human Performance* 13 (1975): 1-13. The authors argue for the existence of "the hindsight fallacy" and suggest that once a person knows that an event in fact occurred, the probability he assigns to its occurrence is much higher than the one he would have assigned had he not known the fact.

27. This may be supported by the fact that Amir had started to plan the killing very soon after the signing of the first agreement with the Palestinians. His profile is not at all that of the incited youth. He seems to be a calculating individual, and one

moved by a sense of a holy mission. Although he did participate in public protest against the political process, it is not clear whether he decided on the murder only after he became convinced that democratic protest had failed.

28. Some indeed argue that the legal system failed because it cooperated with some segments of the public to strengthen this distinction between the risks of Jews acting against Jews and those of Jews acting against Arabs by showing leniency to ward the latter.

29. Thus, if the only way to regulate an industry is by extremely vague standards that are not self-executing and cannot be made clearer through litigation, and if the result is capricious and erratic policy of prosecution and judicial decisions, it may be neither just nor effective to try such a regulation.

30. After the Hebron massacre, the Shamgar Commission of Inquiry documented the failure of the legal system to deal effectively with Jewish violence against Arabs and recommended that law enforcement against Jewish violence be stepped up. This determination came as no surprise to those who followed law enforcement in the occupied territories. The close ties, both personal and ideological, between Jewish terrorism and the religious right wing of Israeli politics prevented implementation of this recommendation.

These close ties were expressed by the fact that many rabbis and political leaders openly supported members of the "Jewish underground," a group whose members shot to death Palestinian students and maimed Palestinian mayors, and who, in April 1989, were detected just before they succeeded in blowing up two Arab buses. It was extremely difficult to prosecute these people, the sentences were very lenient, and the murderers (there is a mandatory life sentence for murder in Israel) were released by presidential pardon after less than seven years, despite the fact that some of them did not express remorse. More problematic than lenient sentences is the fact that many acts of killing, harassing, and looting of Palestinians do not result in any prosecution or conviction.

31. The reaction within the religious world to the conviction of Elba was very subdued. However, when Netanyahu decided to release all Palestinian women prisoners according to the Oslo and Hebron agreements, calls were made to pardon Jews who had been convicted of murdering Arabs as well.

32. This is a danger that attends all enforcement of the law in periods of political protest. A rabbi and his wife, both from Hebron, were prosecuted in early 1995 for attacking policemen on duty. Both refused to attend the court, and subpoenas against them were issued. The wife refused to obey the order. She was carried into the court hall, refused to stand up to hear the verdict, and kept shouting that the court and the police were traitors because they had betrayed the Jewish settlers of Hebron. She was sentenced to ten days in prison for contempt of court.

33. Indeed, much of the moral force of the demand that those using "inciting" speech accept some indirect responsibility for the murder is allegedly taken away by the fact that the demand is directed against the opposition on the whole, or against the university in which the murderer studied, rather than at the elements of public and political behavior in both camps who suggest a willingness to resolve differences by force.

34. It is interesting to see what happened in Israel in the wake of the attack on the



Supreme Court and the chief justice. All circles explicitly and immediately denied any intended connection between the harsh criticism and violence. While the government was slow to denounce the criticism (since some religious members of the government repeated it), many other parts of "civil society" came out very strongly against the delegitimizing speech. The speakers themselves persist, but the severance between speech and violent action has been internalized. The speech is justified as part of an attempt to change the role of the court in Israeli society, especially in the area of the separation of religion and the state, and not as a prelude to using force against it.

35. This alternative way of achieving the desired protection is not always available: such protection cannot be given to women in their families or to African Americans in bigoted neighborhoods. When the threat is more widely and diffusely spread, the case for fighting the conditions facilitating the violence may be stronger.

36. On this front, the record is not very clear, attesting to the complexities of the situation. Although some religious leaders have stressed the need to take religion out of politics, this is a minority view that is challenged by most religious political leaders. There has been no clear declaration by political and religious elites condemning Amir's analysis of Jewish law. Similarly, when asked about Elba's positions, one frequently hears that he is a radical and marginal, but there has been no serious public discussion, from a religious perspective, about his exposition of Jewish law.

37. Most observers believe that the attorney general overreacted in the period after the murder and that he has since regained composure. In late 1996, however, a right-wing person who expressed joy at the deeds of Amir and Goldstein, and made implicit threats against Netanyahu, was indicted for incitement. Many doubted the wisdom of this decision.

38. Laws that are generally unenforced (and that are very difficult to enforce effectively) create fascinating jurisprudential problems on various levels. One argument seeks correspondence between laws on the books and laws in action. This is one of the reasons that realists argue for a definition of law that will exclude unenforced laws from the realm of law. Furthermore, laws that are not regularly enforced create the danger of arbitrary and discriminating enforcement. These are reasons for abolishing them. It is not clear, however, that laws do not have expressive functions even where these functions are not reinforced by actual enforcement, and abolishing the law will prevent law enforcers from using the law against blatant violations of accepted norms. It is worth noting that the problem is not unique to the law or even to normative systems more generally. Some accept the need to deter others from serious violence as a justification for the development and possession of nuclear weapons, despite the fact that it is well understood that using such weapons is very hard, almost impossible, to justify, and that using them may well be counterproductive.