NUMBER 3

Jerusalem, August 2002

POSITION PAPER

Incitement, Not Sedition

Mordechai Kremnitzer
and
Khalid Ghanayim

המכון הישראלי לדמוקרטיה
THE ISRAEL DEMOCRACY INSTITUTE

The Israel Democracy Institute is an independent, non-partisan think tank dedicated to strengthening democracy in Israel. It serves the Knesset and its committees, government offices, public institutions, local government, and political parties by undertaking research and making recommendations for reform and change.

In addition, the Israel Democracy Institute undertakes comparative studies of legislative, structural and electoral systems of other democratic regimes. The IDI also aims to enrich public discourse and encourage innovative thinking by initiating discussion of topics on the country's political, social and economic agendas, with the participation of legislators, policymakers and academics.

The IDI makes its findings available through the publication of position papers and books in the Democracy Library and its other series.

Editor in Chief:	Uri Dromi
Production Manager:	Edna Granit
Translator:	Avinoam Sharon
English Books Editor:	Sari Sapir
Graphic Design:	Dina Sher-Rahat

Printed in Jerusalem by the Old City Press

ISBN 965-7091-32-2

Professor Mordechai Kremnitzer is a Senior Fellow at the Israel Democracy Institute and teaches at the Faculty of Law of the Hebrew University of Jerusalem.

Dr. Khalid Ghanayim is a lecturer at the Faculty of Law of Haifa University and a junior researcher at the Israel Democracy Institute.

A previous English version of this paper was published in Kretzmer, D. and F. Kershman Hazan, eds. *Freedom of Speech and Public Incitement against Democracy* (The Hague, London, Boston: Kluwer Law International, 2000).

TABLE OF CONTENTS

empty page

1 INTRODUCTION

This paper originated as a joint undertaking of the Israel Democracy Institute and the Ministry of Justice to examine offenses related to sedition in the Penal Code of the State of Israel with a view to conforming Israeli legislation to *Basic Law: Human Dignity and Liberty*. The task was nearly complete when Prime Minister Yitzhak Rabin was assassinated, and the first working paper was submitted by Professor Mordechai Kremnitzer to the Minister of Justice, Professor David Libai, two months later.

That working paper, which suggested replacing the offense of sedition with one of public incitement, served as the basis for a conference organized by the Center of for Human Rights of the Hebrew University and the Israel Democracy Institute in February 1996. The conference was attended by experts from Israel, Germany, and Switzerland, as well as by senior attorneys from the Ministry of Justice. The proposal included in Appendix II is similar to the initial proposal, which was also submitted at a subsequent international conference on Freedom of Speech and Public Incitement against Democracy, held in Jerusalem in December 1996 by the Center for Human Rights of the Hebrew University in conjunction with the Friedrich Ebert Stiftung and the Israel Democracy Institute.

The assassination of Prime Minister Yitzhak Rabin on 4 November 1995 put an end to the prevailing assumption that Israeli society was immune to political violence and shook public confidence in the resilience of Israeli democracy. It was also preceded by unprecedented acts of public incitement. Yet prior to that assassination, politicians had adopted a conciliatory approach towards such activity, and law enforcement agencies had failed to adjust their policies and institute criminal proceedings against politically motivated public incitement. This failure could be attributed largely to the overly broad, anti-democratic definition of the offense of sedition, as well as to the fear

that sedition-based prosecutions could result in trials turning into public forums for inciters.

Primarily, this restraint on the part of the State Prosecutor was due to the special status of freedom of expression and the desire not to stifle political dialogue. This approach was reversed after the assassination, bringing a torrent of criminal investigations, even where no legal action was warranted. This reflected a pervading sense of danger and exposed the inadequacy of the legal system, specifically the overly broad definition of the offense of sedition and the accompanying possibility of improper enforcement. Many regarded the assassination as a direct, or indirect, result of the public incitement that preceded it and felt that timely action against the inciters might have prevented the tragedy. While the truth of this view cannot be verified, its prevalence provides an added incentive for evaluating the current legal situation.

In this working position paper, we address the offense of sedition *de lege lata*, point out the faults and shortcomings of its definition, and propose a *lege ferenda* to the offense of public incitement with reference to comparative law.[1] In formulating the *lege ferenda*, freedom of speech and expression will be given the appropriate consideration, and we will focus upon the balance of competing interests of freedom of speech and the social interests protected by its curtailment. Our point of departure is that freedom of expression is a fundamental tenet of democracy and one of the most basic and important rights of the individual for the formulation of opinions and personal development. Furthermore, free speech is the primary tool of those not represented in the political arena who oppose government policies. Even so, freedom of speech is not an absolute right, and its limitation may be justified in order to secure important social aims.

We will emphasize that such legal limitation does not obviate the need for dealing with public incitement in the educational, social and cultural spheres—quite the opposite. The most valuable, effective methods of dealing with public incitement are on the social and educational levels, complemented by the legal system when these prove inadequate. As

a result, politicians and other public figures are obligated to condemn all kinds of violence, physical or verbal. They must refrain from behavior that may be interpreted as either encouraging or legitimizing violence. Furthermore, they must set an example by their own self-restraint. Not all forms of speech permitted by law are necessarily socially appropriate. A healthy political climate must be able to delegitimize personal attacks on public figures, e.g., the use of terms such as 'Nazi', 'traitor', 'collaborator' and the like. By the same token, a society that does not conduct an intensive, multi-disciplinary campaign against all forms of violence fails to carry out one of its primary functions. The Israel Democracy Institute, together with a group of Knesset (Israeli parliament) members consisting of representatives of various parties, attempted to formulate a social contract in this spirit, following the assassination. Unfortunately, the attempt proved unsuccessful.

empty page

2

THE NEED TO RE-EXAMINE THE EXISTING LAW

The offense of sedition in the Penal Code of 1977 is a relic from the British Mandate period in Israel, "with its roots in the Common Law dating back hundreds of years."[2] The definition of the offense is no more than a recitation of forms of behavior that were at the time considered damaging in a society under a non-democratic regime. Its aims were to repress criticism of the government and preserve the social order. The contemporary prohibition in Israel, anchored in the non-democratic Mandatory regime, was tailored to fit the complex exigencies of that time, which stemmed from the protracted struggle between different parts of the populace. With this as the constitutive base of the prohibition, the need arises for a reassessment of the offense in accordance with the guiding principles of a modern democracy. Freedom of speech is the soul of a democratic society. It is the basis for all of the individual rights and for the protection of the democratic regime and social order. Repression of free speech and of open criticism of government undermines the very foundations of this order.

In addition, a renewed assessment of the offense of sedition is called for in light of the nature of the offense and the amendments introduced into the Penal Code by the Israeli legislature. Sedition is considered an umbrella offense (an undefined offense, comprising all forms of behavior not included in the specific prohibitions). It includes for example, public incitement to racism and defamation of a particular group of people.[3] Given that the offense of public incitement to racism is separately defined[4] in the Penal Code, and that defamation of a segment of the population constitutes the criminal offense of defamation,[5] it is imperative that we re-examine the definition of sedition and clarify the overlapping relationships between these offenses in order to ensure consistency.

empty page

3 THE NEED TO ABOLISH THE EXISTING LAW

The offense of sedition, as defined in Section 136 of the Penal Code, should be abolished for the following reasons.

The Function of Criminal Law

The abolition of the offense of sedition in its current format has become necessary given that the function of criminal law is to protect social interests in a manner consistent with the nature of the regime. The function of criminal law in a democratic regime is to guarantee the peaceful coexistence of free individuals. The legislature may therefore proscribe a certain type of behavior only if such behavior seriously jeopardizes this guarantee. Under Section 136, publishing a statement liable to cause contempt, or to excite disaffection against the state or its administrative authorities, or to raise discontent or resentment amongst the inhabitants of Israel, constitutes an act of sedition.[6]

Criminal law does not, properly, deal with the prevention of behavior affecting emotions or sensitivities. In principle, emotions belong in the personal realm rather than in the public realm and thus cannot be regulated by criminal law. Irrespective of how repugnant they may be, an individual's thoughts and preferences are his personal prerogative, and a civilized state has no social interest in the invasion of his exclusive space by prescribing legal remedies. One may also be skeptical as to the effectiveness of any criminal law so structured.[7]

Furthermore, public disaffection and resentment are not necessarily negative phenomena to be prevented; often they are indicative of a healthy democratic state of affairs. Because public allegiance to the government is not a presumed value in a democratic regime, the public is permitted to hold the authorities in contempt. While compliance is

occasionally required, fealty is not. Respect for government authorities as institutions and allegiance to the state are positive values indicative of good citizenship. Even so, internal feelings of contempt for the government or disloyalty to the state cannot be defined as anti-social. Criminal law is not designed to create or sustain love among various segments of the society, or between the society and the administrative authorities. Since contempt for the authorities and non-allegiance to the state do not jeopardize either the social order or the infrastructure of the regime, criminalizing these attitudes would be inconsistent with the function of the criminal law.

Section 138 does include broad exceptions to what constitutes criminal action, thus allowing the exclusion of much of the above-described behavior. Yet it is doubtful whether this section is consistent with the definition of the offense of sedition and with the general function of exceptions negating the criminality of an act. The relationship between the exceptions and the definition of the offense (i.e., the objective and subjective elements of the offense) is rooted in the fact that the exceptions negate the anti-social nature of the harm to a protected value. When certain kinds of behavior do not actually harm a social value rightfully protected by the Penal Code, there is no reason for their proscription in the first place. It is not logical to define such behavior as *a priori* forbidden, but *a posteriori* permitted, because a legal exception renders the act non-criminal. The protected interest is both the core of the offense and its basic justification. There is *ipso facto* no need to negate the anti-social nature of the harm to that interest when there is no such harm to begin with. Instead of creating an unjustified prohibition and neutralizing it by means of a defense, a legal system should avoid creating such unjustified prohibitions in the first place.

Furthermore, in defining the exceptions to the criminality of an act, Section 138 restricts the incidence of these exceptions through requirements that do not square with the function of criminal law. For example, this section specifically determines that "an act, speech or

publication is not seditious by reason only that it intends ...." In other words, a different, or additional, purpose negates the applicability of this exception. Furthermore, the exception is contingent upon the act having been committed "with a view to remedying such errors or defects."[8] The exception would therefore not apply to criticism uttered for its own sake, but only to that which has "a view to the removal of any matters which are producing or have a tendency to produce feelings of ill will and hostility between different sections of population."[9] In other words, the exception will not apply when the publicizer of the criticism does not believe that the element causing discontent can be removed.

To reiterate, criminal law deals with the prevention of harm to essential values of society and not with the formation of negative attitudes. Thus, criminal law governs offenses and not thoughts. Where an act does not endanger values and interests deserving of protection in a democratic society, there is no place for criminalizing the act, even if it leads to negative attitudes. Essentially, the definition of sedition and its exceptions in the existing law are inconsistent with the function of criminal law—the assurance of peaceful coexistence of free individuals—that derives from *Basic Law: Human Dignity and Liberty*.[10] The current prohibition of sedition should therefore be abolished.

The Principles of Legality and Clarity

Now let us examine the principle of legality and its derivative principle, clarity. The clarity principle requires that the legislature clearly and explicitly define criminal behavior that harms a protected social interest and therefore falls within the ambit of prohibition by criminal law. This concept is inherent in the nature of the penal prohibition as an exception to basic freedom of action. According to the freedom-of-action principle, any behavior not specifically proscribed by the legislature is permitted, and any exception must be properly justified,

defined and demarcated. The joint principles of legality and clarity ensure the realization of the function of criminal law in protecting the social order and preserving the freedom of the individual. Attaining these goals means focusing on preventing crime, rather than on creating criminals.

An overly broad or vague definition of a criminal offense may deprive an individual of the ability to know whether a particular kind of behavior is prohibited. This may lead him to avoid doing things that are permitted, and perhaps even socially desirable, for fear that such behavior is forbidden. Thus a broad and vague definition of an offense violates both individual freedom and public order instead of guaranteeing them.[11] This potential violation is particularly grave since it may lead citizens to refrain from exercising one of the most essential democratic rights that lies at the very heart of free speech: harsh criticism of government. Of course, vagueness of definition may also lead to the unwitting perpetration of criminal acts under the mistaken notion that such acts do not fall within the boundaries of any prohibition. Consequently, the existence of a vague definition may actually create criminals instead of preventing offenses.[12]

Furthermore, such a broad and vague definition of an offense may cause arbitrary, inconsistent enforcement of the law due to changing tides of opinion, thus undermining the rule of law and the principle of equality.[13] The offense of sedition in Section 136 is broadly worded and includes, for example, the publication of a statement liable to cause discontent or resentment. However, the section contains no explicit definition of criminal behavior falling within the ambit of the prohibition, nor does it typify the protected social interest. It remains up to the judiciary to determine its precise scope. This, in turn, interferes with the enforcement of the existing law and maintenance of the instructive and premonitory nature of criminal law. Furthermore, where the judiciary itself is divided with respect to the definition of both the relevant protected social interests and the scope of the offense,[14] it is highly unlikely that the average citizen will understand the nature of the prohibition, its scope and its content. Clarity, as a

constitutional principle derived from *Basic Law: Human Dignity and Liberty*,[15] therefore mandates revocation of the prohibition of sedition in its current formulation.

Freedom of Speech and Democracy

The definition of the offense of sedition is not consistent with the nature of a democratic regime or with freedom of speech. As stated above, the offense of sedition was established by the Mandatory Authority in order to protect itself from expressions of contempt, hatred or discontent, even at the price of stifling criticism. A coercive regime does not sustain itself through its citizenry; rather, its exclusive or at least primary concern is with self-preservation at all costs, even if that entails repression of a political minority or suppressing criticism. A democratic regime, on the other hand, draws vitality from its citizens; it cannot survive without freedom of speech and criticism, which are the very soul of such a society. This freedom is vital both for maintaining the social order and for guaranteeing the exercise of the basic rights of every individual, especially those in the parliamentary Opposition, the public represented by the Opposition, or those opposed to government policies, as well as those not represented within the government framework at all.

According to Section 136, publicizing statements, or knowingly possessing materials, that may lead to contempt or hatred of government authorities or that may cause disaffection or discontent constitute criminal acts. This definition is remarkable. A democratic regime cannot demand unconditional love and respect for the government. Rather, it thrives on sharp, scathing criticism and the Opposition's check on government policy. This criticism is not always constructive; it may cause dissatisfaction or resentment among elements of the public, nor does it necessarily fulfill the requirements for applying exceptions to the criminality of an act under Section 138 (2): "with a

view to remedying such errors or defects." Even so, imposing restrictions upon public criticism of government institutions stands in sharp, irreconcilable contrast to the essence of democracy, and must therefore be considered out of the question.

Proper Enforcement of the Law

The abolition of the offense of sedition and its replacement with other offenses of a more narrow and precise scope is essential for proper law enforcement by the State Prosecution. Problems with respect to justifying certain prohibitions sometimes lead to under-enforcement, as does the fear that a trial may provide the ideal public forum for the seditionist. By defining the exceptions to criminality under its provisions, Section 138 actually encourages exploitation of the trial for that purpose. Consequently, there have been cases in which the State Prosecution has avoided prosecuting offenses of sedition for their anti-democratic nature even when there was material justification for doing so in order to protect the social order.[16]

This neglect of the law engendered a boomerang effect following the assassination of Prime Minister Rabin. Law enforcement authorities initiated unbridled, irresponsible enforcement of the sedition prohibitions and opened unjustified investigations. One can cite, for example, the threats made by Attorney General Michael Ben-Yair to prosecute members of the media for reporting acts of public incitement against members of the government, as well as for publishing statements made in praise of the assassination of the prime minister.[17]

Under-enforcement in ordinary times and over-enforcement during times of crisis is harmful to society and to the basic rights of the individual.[18] Under-enforcement undermines public trust in the social and legal order, both weakening the force of criminal law and diminishing in the mind of the public the weight of values protected by

the law. In addition, when public incitement is directed towards specific persons, non-enforcement deprives them of the legal protection to which they are entitled, directly violating their sense of personal security and their confidence in the legal order.

For all of the foregoing reasons, the existing offense of sedition must be repealed and replaced by one or more offenses narrower in scope that are clearly and distinctly defined. Consequently, Professor Ze'ev Segal's approach opposing reform of the sedition offense must be rejected. This approach is anchored in the concept that

> the Penal Code, though broadly framed, contains exceptions that are intended to prevent the imposition of serious restrictions on the freedom of public speech. In addition, a criminal indictment will not be filed for a 'seditious publication', except within six months of the day of the perpetration of the offense, and no person shall be prosecuted without the written consent of the attorney general. These restraints *per se* ensure that even in the case of the filing of an indictment for 'seditious publication', the Court will be able to determine by way of interpretation whether the publication was, in effect, criticism or legal propaganda not constituting sedition, inasmuch as it includes the censure of mistakes and faults without calling for a violent response. The Court can also rule that the publication is not prohibited if it does not pose a 'clear and present danger' or at least 'near certainty' of serious and substantial harm to the public order.[19]

First of all, this position is inconsistent with the constitutional principles of legality and clarity. Furthermore, Professor Segal's position contradicts the basic approach he expressed elsewhere, that

> the imposition of broad and insufficiently defined criminal liability upon publishers may also have a 'chilling effect' which is liable to cause the media to refrain from publishing ... due to the fear of criminal indictment.[20]

He continues,

> the framing of criminal legislation in broad and comprehensive terms may lead to the criminalization of certain behavior never contemplated by the legislature. An inadequately defined criminal law causes the rule of law to become the rule of interpretation according to the spirit of the times and the demands of the hour, and as such destroys the image of the criminal law.[21]

Secondly, the exception by which no person shall be prosecuted "without the written consent of the attorney general" does not remedy the anti-democratic character of the sedition offenses with respect to freedom of speech. If free speech is to be protected, then the rule of law cannot be replaced by the rule of the attorney general.

Thirdly, this approach relies upon the judiciary to guarantee free speech, using its interpretative discretion to determine whether a publication constitutes a criminal offense. This, however, does not properly achieve the full realization of the freedom, nor does it negate its wrongful violation through a criminal investigation and prosecution for what is, in fact, a legitimate statement or expression of opinion. The act of acquittal, precluding continuation of the violation, does not neutralize the damage already sustained.[22] Furthermore, there is no guarantee that judicial interpretation will set clear and appropriate boundaries. The principle of the separation of powers, incorporated within the principle of legality, imposes a primary obligation upon the legislature to establish clearly the proper scope of protection of a vital social interest. Actions taken by other branches of government do not absolve the legislature of its responsibility; the obligation is not transferable and the rule of law is not the rule of the judge.[23] Thus, the most important and primary means of guaranteeing freedom of speech is the explicit and narrow definition of the criminal prohibition, which articulates the protection of a social value in a democratic regime by spelling out punishable crimes.

Opponents of reform have argued that legislating new restrictions upon freedom of speech may precipitate a domino effect and lead to additional and exaggerated curtailments of freedom. This fear can be allayed inasmuch as *Basic Law: Human Dignity and Liberty* protects free speech, and the courts entrusted with constitutional review regard this as a supreme right. The fear of a 'slippery slope' would, therefore, seem to be groundless. Furthermore, such a claim discounts other social values, focusing exclusively on free speech as if it stood alone. This perception is inconsistent with a constitutional regime that respects both freedom and life, and grants them equal protection.

empty page

4

THE LAW OF PUBLIC INCITEMENT, *DE LEGE FERENDA*

Public Incitement to Commit a Crime

The term 'public incitement' as used in the Penal Code means public solicitation to commit a criminal offense,[24] including solicitation directed towards an unspecified audience. The term 'public incitement' did appear in the former Section 34 of the Penal Code of 1977, which defined attempted instigation of a criminal act as though public incitement constitutes an alternative to attempted instigation and thus falls within the scope of this prohibition. However, both the literature and the case law interpret the term 'public incitement' in a novel way: public incitement here becomes no more than a technical term for attempted solicitation.[25]

In Amendment 39 to the Penal Code, the legislature adopted the position expressed in the case law and legal literature. Section 33 of the Amendment defines attempted instigation as "an attempt to instigate a person to commit an offense." In other words, the object of the instigation must be either a single individual or a distinct and defined group. The term 'public incitement' does not appear in the definition. By adopting this approach, the legislature removed the internal contradiction in the Penal Code regarding the meaning of the term 'public incitement' which appeared in the provisions relating to attempted instigation as well as in the definition of various specific offenses.

Since we are concerned here with formulating a desirable law regarding public incitement, we will examine the criminal phenomena of instigation, attempted instigation, and public incitement. We will consider whether public incitement is a form of instigation or attempted instigation or whether it in fact constitutes a unique offense, separate

and distinct from the various derivatives of instigation and attempted instigation.

The Meaning of the Term 'Public Incitement'

Public incitement is the public solicitation of a large group of persons, neither specific nor defined, to commit an offense. The proposed legislation defines the inciter as one who "publicizes a public appeal." The term 'publicize' as defined in Section 34 (24) of the Penal Code—the communication of an appeal, either orally or by other means, or its circulation or presentation to a group of persons—is compatible with our definition of public incitement. Section 34 (24) defines the term 'public' as follows:

(1) a public place, in which the person can see the act from any vantage point;

(2) a place which is not public, provided that a person located in a public place can see the act.

This definition is inconsistent with the requirements for public incitement, these being the communication or circulation of an appeal to an unspecified, indistinct audience. The determining criteria for public incitement are tied to the concrete circumstances of the behavior and the non-specificity of the solicitees, not the location of the occurrence. The location, as such, is irrelevant, and thus the definition of the term 'public' should not depend upon the location of the public incitement. Rather, the term ought to indicate the manner in which the event takes place, i.e., whether the public incitement is directed towards an unspecified audience. Consequently, public incitement occurs only if the appeal is likely to be heard by a large, undefined audience, e.g., in a communication through the electronic or written media, at a public gathering, or via a speaker at a demonstration. Other examples include posting a sign in a public place, affixing stickers on cars, or handing out leaflets to passers-by.[26] Thus, it follows that public incitement should not be deemed to have taken place in situations

in which an appeal is directed exclusively towards an individual or a specifically defined group (e.g., a school classroom), irrespective of whether the location is public or private.

Public Incitement as Distinguished from Instigation

The distinction between solicitation and public incitement rests upon the difference between the individual instigatee and unspecified incitees. The instigator as an abettor of an offense is defined in Section 30 of Amendment 39 of the Penal Code as one who "prompts another to commit an offense by persuasion, encouragement, demand, importunity." The accepted approach in both Israeli and continental law is that the instigatee must be either a specific individual or an identifiable, specific group. In other words, instigation as a form of criminality "expresses the relationship between individuals—the instigator and instigatee—and not that which exists between an individual and an audience—where an individual incites, solicits or stirs up an undefined audience without any distinction as to the individual identity of those comprising the audience to commit a criminal offense."[27]

On the other hand, there are those who maintain that for purposes of instigation, it is immaterial whether the object is an individual, a specific audience, or a large, undefined audience. The claim, in other words, is that public solicitation to commit a criminal offense directed towards a large, unspecified audience does fall within the ambit of instigation, as an indirect form of commission derived from the primary offense.[28] In our opinion, this approach is consistent neither with the nature of instigation as the indirect commission of the offense, nor with the social value protected by its prohibition. Rather, the requirement that the object of instigation be a specific individual is dictated by the very nature of the offense and the social value it is intended to protect.

Instigation is a form of criminality that broadens the scope of criminal liability beyond the perpetrator to include the instigator, who had no

hand in the physical execution of the criminal act. His contribution is indirect inasmuch as the decision to commit the crime and the control over its execution is left to the perpetrator. However, even though he does not participate directly in the criminal act, the instigator's contribution is primary and significant, because in its absence, the perpetrator would not have committed the offense. In view of the above, the instigator is considered the 'spiritual father' of the crime.

Instigation is thus defined as a form of indirect participation, deriving from the actual commission of the offense. The instigator is therefore an accessory, and the punishability of his conduct is contingent upon the actual commission of the instigated offense. Instigation is thus expressed in the instigator's contribution to the successfully committed crime. It can therefore be concluded that the social value protected by the prohibition of instigation is the selfsame value that would be violated by the potential instigated offense.[29] If the social value protected by prohibiting instigation were a specific one, instigation would not be an offense derived from commission as per the general principles of the Penal Code. Rather, it would constitute an independent offense, falling under the section on specific offenses in the Penal Code.[30]

The Danger Inherent in Instigation and Public Incitement

As stated above, the social value protected by the prohibition against instigation is that social value that would be violated by the potential instigated offense. The instigator is the spiritual father of that criminal offense. There are substantive differences between instigation and public incitement. Instigation is characterized by the influence of the instigator on the instigatee and the effectiveness of the act of instigation on the instigatee. It is generally based upon the instigator's familiarity with, or knowledge of, the instigatee (i.e., his weak points), in addition to personal contact and surveillance, which allows the instigator to adapt the solicitation to the instigatee in a protracted manner, adjusting

it according to the latter's responses and the ensuing interpersonal dynamic that develops between them. Furthermore, since the instigator is responsible for the formation of the instigatee's decision to violate a protected social value, he can bring about the timely prevention of the harm, as indicated in Section 34 of the Penal Code, whether by way of counter-persuasion or by notifying the authorities of the imminent offense. The decision to commit an offense is an essential condition to its execution. The critically significant contribution of the instigator to the formation of the decision makes him an actor, in addition to the main perpetrator, upon whom both the commission of the offense and the harm to the protected social value depend.

The situation is different, however, in the case of public solicitation, where the solicitation is directed towards an audience of unspecified individuals. The potential harm and anti-social damage of public solicitation to commit a specific potential offense are less than those posed by solicitation of an individual. The impact of a solicitor on a crowd is less than it would be on an individual. This is due to the absence of a personal relationship between the solicitor and the solicitee that characterizes instigation and to the opportunity for opposing responses from the audience that may neutralize the effect of the solicitation. Moreover, a public forum is not limited exclusively to those present; public figures and the media can respond in a manner that may counterbalance the potential harm of public solicitation.

Furthermore, in the case of public solicitation, government authorities and law enforcement agencies may be aware of the potential threat and could act to protect those endangered. This possibility does not exist in the case of solicitation carried out secretly between two individuals, far removed from the public eye. Additionally, in cases of public solicitation, the solicitor generally does not have protracted influence over his audience, nor can he easily monitor their responses and activities. His influence upon an unspecified audience is therefore limited, and it is thus more difficult to characterize him as the 'spiritual father' of an offense,[31] even if the offense is committed in the wake of

the solicitor`s remarks. Acknowledgment of this limitation is found in the absence of any retraction clause in criminal codes defining public solicitation, given that in such cases, practically speaking, there is generally no possibility of effective retraction.[32]

However, opposing considerations exist with respect to the special danger posed by public solicitation. The danger posed by inflammatory speech in a frenzied and excited crowd is obvious. Moreover, as stated, the public solicitor is powerless to monitor the potential impact of his words on impressionable individuals. Having thrown a stone in the water, he is powerless to stop the ripples.

Furthermore, the dangerous effect of public incitement cannot be assessed exclusively on the basis of a single act. Rather, the danger lies in the potential that a series of acts may create an overall environment conducive to crime and violence, and to an atmosphere that threatens the rule of law and the democratic order. The longer a solicitor's contact with his audience, the longer he has special influence over them, and the less they are exposed to other influences, the greater the effectiveness of the solicitation and the greater the potential for a criminal act to be committed in its wake.

The Unique Character of Public Solicitation

The twofold rationale for adopting the position that public solicitation is not a form of instigation is that the act of public solicitation is independent of the perpetration of any offense and that the conception of the social value protected thereby is quite different. The main harm caused by public solicitation is in challenging the social order and the rule of law and in undermining public confidence in their validity. On the one hand, the public fears realization of the crime encouraged by the solicitor, while on the other, its confidence in the values subverted by the solicitation is weakened.

In addition, public solicitation disrupts the lives of its potential victims and violates their right to security and peace. They are forced to live

in fear that the calls to harm them or their values may actually be acted upon and to adopt precautionary measures against potential assaults. When the objects of solicitation are less clearly defined, large elements of the public are exposed to panic, and the ability to protect them is limited. Further, public solicitation to perpetrate criminal acts, especially in the context of political-ideological matters, may encourage violence as the means of resolving political or other disputes. Consequently, the dominant social values protected by the prohibition against public solicitation are public confidence in the validity of the socio-legal order[33] as well as the internal public peace, i.e., the sense of public security.[34]

In a democratic regime, struggles are ideological and take the form of public debate devoid of brutality or violence. Therefore, when public incitement is of a political or ideological nature, it undermines the foundations of democracy and creates a menacing atmosphere that prevents society—and its political leadership—from freely and public expressing its opinions.

Internal public peace and security means the peace and security of all persons within the territory of the State of Israel. If the public incitement is directed towards persons living outside Israel and has no special connection to the state, it does not fall within the ambit of the offense. The legislature's obligation is to protect the peace and security of Israeli society. Other societies fall outside the jurisdiction of the Israeli legislature, and criminalizing this type of public incitement would constitute illegal interference in the internal affairs of a foreign state.[35]

In sum, the social value protected by the prohibition against instigation is the social value that would be violated by the potential instigated offense, and as instigation is derived from the perpetration of the offense, it requires a specific instigatee. On the other hand, the primary social values protected by the prohibition against public incitement are public trust in the validity of the socio-legal order as well as public peace and security. The social value violated by the potential offense is secondary. Public incitement, therefore, only occurs where the solicitees are undefined and non-specific. Public incitement is neither

a form of nor an alternative to instigation, but rather a special, independent offense belonging in the specific offenses section of the Penal Code.

Elements of the Offense of Public Incitement

The draft proposal in Appendix II defines the most serious threats to the socio-legal order and the interests shielded from the potential offense of solicitation but which do not constitute instigation or abetment. The proposal defines three alternatives for public incitement, since a single formula cannot adequately encompass the complexity of the material. Moreover, the use of three types of public incitement better serves the principles of legality and clarity.

I. A Public Call to Commit a Felony or Act of Violence

The first section of the draft proposal defines a public call to commit a felony or an act of violence as a criminal offense.[36] The term 'call' should be given the meaning accorded to it in every-day parlance, i.e., solicitation to commit the given act.[37] The call must give the impression of being serious, reflecting the solicitor's expectation that one of the solicitees will actually carry out the suggested action. The call will be deemed culpable only where its content clearly demands specific behavior. Consequently, the mere mention of an idea, giving advice or even encouraging commission of a particular act are not enjoined, given that they contain no unequivocal demand to execute an act, nor do they clearly reflect an expectation that the act will be committed. The minimum requirement for behavior to be deemed a 'call to action' is that the speaker place the full force of his personality behind the appeal.

This conclusion also emerges from a comparison with instigation, in that airing ideas or communicating an opinion falls not within the sphere of instigation, but within that of moral support. Nor is a statement deemed a call to action when it is understood as such only

under certain circumstances (where the circumstances themselves turn the statement into a call) that are not alluded to in the statement itself.[38] Thus, statements such as "the Government of Israel is the *Judenrat*," "an enemy" or "a wicked government" would not constitute calls for murder. Such statements express criticism of, or disappointment with, the policies of the government and relate to a particular situation. A statement may constitute a prohibited call for murder only if it clearly means "go and kill members of the government." Such is not the case here. Disappointed people—especially in the political context—will often resort to harsh, extreme invective to express their opinions, intending thereby to add weight to their comments and draw attention to their pain and anger.

A call to action may be either direct or implied. An innocent-sounding statement may constitute a call to violence according to an agreed upon code and will, therefore, be considered an implied call to action. Thus, the first prohibition is violated when a statement either explicitly or implicitly calls for the perpetration of a criminal or violent act. It is immaterial whether the crime is to be committed through action or omission.

The *mens rea* requirement of this prohibition is criminal intent of any kind, including both actual intent and recklessness. Specific intent or purpose is not required because the grievous threat to protected social interests presented by a call to commit an act of felony or violence—such as a verbal attack on the legal order—is particularly odious and lacks any redeeming social value. The definition of the offense should therefore not be encumbered with unwarranted requirements like specific intent. Such requirements could produce an unjustified acquittal, which in this sensitive area could well serve to legitimize, and even encourage, dangerous, anti-social expressions. Thus, the prohibition itself is characterized by the definition of the content of a prohibited expression. The advantages of such a characterization are its certainty and clarity (in comparison with the probability criterion), as well as the narrow ambit of the prohibition and its minimal restriction of freedom of expression.

II. Publishing a Statement in Circumstances That Constitute an Exercise of Power, Authority, or Special Influence to Encourage Commission of a Felony or an Act of Violence

The second definition in the proposal deals with statements made by people with special status, whether statutory or moral, who exploit that status to goad others into committing a criminal act. Included in this category are clergymen, cult leaders (gurus), military commanders, and even senior civil servants, to name a few. By virtue of their status they have special influence, and their statements carry significant weight with their audience. Our normal resistance is lowered with regard to such people because they exploit their position, authority or special influence. It is therefore only natural to impose special obligations on such persons. "Sages, watch your words lest ... the disciples who follow you drink [of evil water] and die."[39] This obligation derives from the uniqueness of their position and their special influence and the increased danger that these pose to society. Clearly, the words of a guru or a rabbi carry greater weight in the ears of his 'faithful' than those of a common person. A person who exploits such special status does not generally need to make an explicit or implicit appeal to commit a criminal act. Rather, he has the capacity to guide his listeners, observers or readers to the necessary conclusion implicit in his words.

Since a call to commit a felony or an act of violence falls within the ambit of the first type, this additional aspect is required only when there is no explicit or implicit call. For example, a statement can be a description of a given situation or an expression of an opinion that does not constitute a call to action, i.e., "the Israeli Government has forfeited Jewish blood" or "is leading to a holocaust" or "the prime minister (or a particular minister) is collaborating with the enemy" or is "a traitor."

The exercise of special influence can create an atmosphere conducive to criminal activity. There is particular danger that charged words may fall upon 'numbskulls' and lead to criminal acts on the authority of such statements.[40] Moreover, when supreme moral authorities incite

to criminal behavior, the statements are liable to undermine the validity of criminal prohibitions.

The *mens rea* requirement for this type is satisfied by criminal intent in any form, since the anti-social element it represents (in terms of protected societal interests) is equivalent to that of the call to carry out an act. Requiring *mens rea* means that the speaker must know that he is exploiting his position or authority to cause a person to commit an act of felony or violence.

III. Publishing Anything Likely, under the Circumstances, to Bring about the Perpetration of a Felony or Act of Violence

This type is applicable where there is neither an explicit nor implicit call to action, and where a statement does not fall within the purview of the second alternative, i.e., where there is no exercise of authority or special influence. In other words, this is a catch-all intended to comprise all dangerous publications not proscribed by the first two, more strictly defined prohibitions. The second type is by definition limited to particular persons, while the first may be circumvented easily by means of inciting statements that do not constitute an explicit 'call'. This third alternative is therefore crucial to an effective penal prohibition of public incitement.

Occasionally statements are made which are likely, under certain circumstances, to lead to the perpetration of a criminal or violent act, e.g., words of persuasion or encouragement analogous to some forms of instigation.[41] These expressions do not fall under the category of instigation because they are directed towards an undefined, unspecified audience. Additionally, we encounter provocative criticism or characterizations such as those mentioned above that lead to the natural, if not mandatory, conclusion that there is a practical need or moral justification for committing a criminal act.[42] Statements of this kind may serve to persuade an irresolute individual to commit a crime, or at least strengthen his resolve where he would otherwise hesitate to act.

The principal danger inherent in addressing an unspecific audience is that the speaker has no control over—or possibility of controlling—the behavior of his audience and that words may fall on unusually receptive 'numbskulls'.

The 'probability test' refers to the objective likelihood that a statement will result in the perpetration of the particular criminal act. It is a test of 'reasonable possibility' and not of 'near certainty' or 'clear and present danger'.[43] In order to assess probability, the following factors must be considered: the content of the statement, the identity of the speaker or author, the forum in which the statement is publicized (publication accessible to only a few people or publication in the mass media), the time and place of publication, nature of the target audience and the prevailing public mood (especially that of the audience itself).

The *mens rea* required for this alternative is expressed in terms of purpose, since the inherent anti-social nature of the violation of protected interests is less than that of the first or second types. Furthermore, statements in this category may have redeeming social value, especially in terms of harsh, incisive criticism of the government. The importance of freedom of political expression demands that we assume the risks inherent in statements that form part of the political discourse. We are willing to assume that risk even where the speaker is aware of the possible consequences of his speech. However, when the objective of the speaker is to give rise to the commission of a crime, he has crossed the line between punishable and non-punishable acts.

Under this alternative, criminality derives from both the danger to protected social values inherent in the statement (this is made clear in the language of the proposal, "anything that is likely, under the circumstances, to bring about the perpetration of a criminal or violent act") and the *mens rea* of 'purposefulness', which aggravates the anti-social nature of the statement as well as the culpability of the publisher, and removes the statement from the arena of legitimate political discourse.

If there is justification for criminalizing the attempted instigation of an offense (and this is undisputed), then certainly there is justification for the proposed prohibition as it is yet narrower in scope.

The Objective of the Public Incitement: Any Crime, or Only Felonies and Violent Crimes?

The question of whether the objective of public solicitation must be a felony (a crime punishable by more than three years' imprisonment) or whether any type of criminal offense will qualify, is one of legal policy. As stated above, the dominant social interest protected by public solicitation is that of public trust in the socio-legal order, as well as internal public peace. Any call to commit a criminal offense jeopardizes these interests, and it would therefore appear that any criminal offense should qualify as the objective of public solicitation.[44]

This approach is supported by the language of Subsection (B) of the draft proposal, which equates the perpetrator of successful public solicitation with the instigator of an individual, who can be punished for causing the commission of either a felony or a misdemeanor. However, the viability of the socio-legal order and the public trust therein cannot be viewed as having a constant weight. For example, the subversion of public trust in the efficacy of the legal norms protecting life cannot be equated with subversion of that trust in the efficacy of the legal norms protecting property. Undermining the public's sense of personal security is particularly damaging to public confidence in the socio-legal order, the foremost purpose of which is the protection of life and limb.

It has been argued that the anti-social nature of public solicitation is less severe than that of instigation in terms of the harm to the interests protected. Any criminal offense, misdemeanor or felony, can serve as the objective of instigation because the instigator is perceived as being morally responsible for the crime committed. Public solicitation, on the other hand, is regarded as an anti-social phenomenon positioned

at the margins of criminal law (*Vorfeld der Kriminalisierung*).[45] Consequently, and by virtue of the principle that penal law treats only the gravest of anti-social behavior, there is cause for restricting the offense of public solicitation to the solicitation of felony offenses. Given the special gravity attaching to offenses involving violence, both in and of themselves and because of the panic they induce, public solicitation to commit non-felonious violent offenses should be included as well.

The criminal act that is the objective of public solicitation must meet the *actus reus, mens rea,* and illegality criteria of the offense. The prohibition does not apply to public solicitation to commit an act that lacks either *actus reus or mens rea*, for such an act does not fall within the scope of the prohibition, nor to public solicitation to commit an act under circumstances where it is justified, e.g., self-defense. Such an act does not endanger the socio-legal order and, as such, lacks criminal character.

Neither can an absurd act, i.e., an act that cannot cause damage under any circumstances or jeopardize any protected social value (e.g., the "execution" of a person by sticking needles into a doll) constitute a public solicitation-induced offense. This is true even when the person being influenced is unaware of the act's absurd nature. Such an act is of no social consequence, and the actor is regarded as someone out of touch with reality. Therefore, his action does not endanger the socio-legal order. Thus, were the legislature to itemize all prohibited acts, absurd behavior would not be included.[46] Where the objective of solicitation is not a punishable act, even as a failed or an impossible attempt (an attempt which cannot succeed, though committed with tools not necessarily absurd, e.g., the attempt to kill with a defective weapon when the perpetrator is unaware of the defect), public incitement will not be deemed criminal, given that the criminality of public incitement derives from its intended offense.

Take, for example, an imprecation. Assuming that the curse is an entreaty that a certain person die at the hands of Heaven, such an

appeal neither harms nor endangers life on its own merits and therefore has no social consequence. Furthermore, neither the solicitor nor his audience has control over acts of God. Consequently, the non-criminalization of the act is the necessary result of the principle that "there is no offense where the actor has no control."[47] Hence the curse-invoking prayer is not itself prohibited. However, where the prayer constitutes a call for a human act of execution, i.e., where the solicitees are portrayed as the extended arm of God and are requested to assist Him in carrying out the act, the prayer will constitute an offense. Likewise, depending on the circumstances, this kind of prayer can fall within the scope of the other alternative definitions of public incitement. In such cases, the prayer does not constitute an absurd act without any social consequence, as both the solicitor and the solicitees control the act of execution.

Subsection (B): Consummated Public Incitement

Under Subsection (B) of the draft proposal, solicitor and instigator are punished alike, when the call leads to the execution of a crime or to an attempt. In this respect, solicitation that has resulted in the commission of a crime is analagous to instigation, in that it is the solicitor who triggers the solicitee's decision to harm the protected social value via the perpetration of the intended offense; thus, substantively speaking, the solicitor's behavior is comparable to that of the instigator. As stated, the anti-social nature of public solicitation is considered to be less than that of instigation in terms of the social value potentially violated by the designated offense. However, consummated solicitation is an exception to this rule. Consummated solicitation causes damage to public trust in the validity of the socio-legal order and to internal public peace, which is compounded by the damage done to the social interest violated by the offense. This justifies imposing the same penalty for consummated public solicitation as for consummated instigation. This is true even if it is contended that despite its 'fruitfulness', the

anti-social nature of public solicitation—in terms of the social value violated by the criminal act—is still less than that of instigation.

Clearly, there is no consummated public solicitation where the decision to carry out the criminal act is made prior to hearing the solicitation, i.e., where the solicitee was *omnimodo factorus*. Similarly, we cannot speak of consummated public solicitation when the solicitee commits the intended offense with lawful justification.[48]

The Retraction Exception

We will now examine the question of whether retraction can materially and legally constitute an exception to the criminal liability of a solicitor.

The primary social interests protected by the offense of public solicitation are public trust in the validity of the socio-legal order and internal public peace. These interests are violated by the very act of public solicitation. Thus, once a soliciting call has been issued, the offense of public solicitation has taken place, so that in terms of violating the dominant social interests retraction is irrelevant. Furthermore, dissuasion is not a practical possibility, since the solicitor does not know his audience. Even if we were to allow for the possibility of public counter-solicitation, one could not ensure its successful communication to all the solicitees. Once the appeal has been issued and has reached its target audience, the damage to the protected social interest is no longer contingent upon the solicitor. There is no justification for allowing the retraction exception. This approach is common to the criminal codes of several countries that do not recognize a retraction exception for the offense of public solicitation.[49] Even so, it bears mentioning that public counter-solicitation by the solicitor may constitute a mitigating factor in determining the judicial sentence.[50]

Public Incitement to Non-Criminal Disobedience or to Disobedience to Administrative Authorities[51]

Public incitement to disobey civil or administrative law does not constitute a criminal offense, given the role of criminal law in ensuring the peaceful communal life of free people. Civil and administrative law have their own specific tools of enforcement, and ensuring compliance with either is not a function of criminal law.[52] Thus, defining public solicitation to disobey civil or administrative law as a criminal act is not consistent with the residual function of criminal law, as derived from the limitation clause of *Basic Law: Human Dignity and Liberty*. According to this principle, the intervention of criminal law is justified only where there is a potentially severe threat to the social order. In other words, criminal law treats only the gravest of phenomena.

On the other hand, both civil and administrative law tend to deal with less serious offenses. Once the legislature has determined that certain forms of behavior may be defined as administrative offenses or as civil wrongs rather than as criminal acts, due to their weaker anti-social character, public solicitation to such behavior does not subvert the public trust in the validity of the socio-legal order to the same extent as does solicitation to commit a criminal offense. There is also an *a fortiori* consideration. If public incitement to commit a misdemeanor—which is of a more severely anti-social nature than an administrative offense or a civil wrong—is not punishable under criminal law, it logically follows that public incitement to disobey administrative or civil law cannot be deemed a criminal offense. If the legislature believed it necessary to prohibit public incitement to administrative disobedience, the prohibition would appear in administrative and not in criminal law. This is, in fact, the case in continental law.[53]

From the aforementioned, it emerges that non-compliance with an order issued by a duly constituted authority, other than non-compliance with orders of special importance such as military orders, is not regarded

per se as a criminal offense.[54] Failure to obey a military order is an exception because it undermines the army's fundamental discipline and in so doing, threatens national security. It is therefore justified, and even essential, to define disobeying military orders as a criminal offense.

Behavior that normally poses little danger to society may be so threatening in times of crisis that the intervention of criminal law becomes both necessary and justified. The legislature must expressly define these cases in the Penal Code, specifically establishing their temporary nature, e.g., public incitement to disobey a government order designed to ensure the supply of essential services to the public in times of emergency.

Publishing Statements Expressing Praise for, Identification with, or Support for a Crime That Has Been Committed[55]

Publishing words of praise for an act of violence is defined as a criminal offense in Section 4 of the Prevention of Terrorism Ordinance.[56] This provision is misplaced, however, since the Ordinance deals primarily with activities associated with terrorist organizations. Furthermore, the present location of the offense presents a problem with regard to the definition of the protected social interests as well as the scope of the offense. Expressing support for a criminal act that has been committed constitutes indirect public incitement to commit a similar crime. In terms of protected interests, this is substantively similar to public incitement. Consequently, the prohibition belongs in the Penal Code, together with the offense of public incitement.

The Anti-Social Aspect and the Social Interest Protected by the Prohibition

Expressing praise for a criminal act that has been committed may constitute indirect public incitement liable to lead to the perpetration of similar acts, as it typically encourages the commission of similar crimes.[57] Just as the actions of a hero are mimicked, so too praise for a criminal act encourages repetition of the crime, sometimes as an expression of solidarity, especially where the act has ideological or political underpinnings. Furthermore, such statements of support, especially if there is a multiplicity of them, may create a general atmosphere conducive to criminal acts.[58] It would therefore appear that the social interest protected by proscribing praise of a committed offense is the same interest that would be violated by commission of that offense. This is not the only—or even the primary—protected interest, however.

Publishing praise for a criminal act that has been perpetrated creates feelings of intimidation and panic among the public, who regard themselves as potential victims— especially in cases where the crime was committed out of political or ideological motives. The right of the public to live peacefully is thus violated, since as potential victims they will now need to seek some means of protecting themselves or their interests. It follows that the interest protected by the prohibition is that of internal public peace and the sense of personal security, the importance of which cannot be overstated. Praise voiced for a political or an ideological crime may suppress the formulation and expression of political opinions, thus undermining democratic society.

Furthermore, the prohibition in the Penal Code is designed to strengthen public trust in the socio-legal order and in the efficacy of such prohibitions, in addition to preventing perpetration of that specific criminal act. Imposing criminal liability on the perpetrator communicates public condemnation and denouncement of the crime, which has the effect of restoring public trust in the soundness of the

socio-legal order. Public expressions of acclaim for a criminal do the opposite. Thus, a society that tolerates such expressions effectively allows the penal prohibition and its punishment to be neutralized, thus undermining public trust in the socio-legal order and in the validity of the Penal Code prohibitions.[59]

Moreover, tolerating praise for a criminal act may result in turning the perpetrator's trial into a stage for trumpeting the anti-social views of the supporters of the crime. Such praise also constitutes an assault on the existence and justification of the relevant Penal Code prohibition, which in turn erodes the importance of the prohibition and the related social interest in the eyes of the public. The upshot is that public trust in the validity of the socio-legal order and respect for the fundamental values of society constitute an additional social interest protected by the prohibition against such expressions. Undermining the public's sense of protection from violence and from injury to life or limb constitutes a grave threat to the public's trust in the validity of the socio-legal order, the primary purpose of which is the protection of life and limb.

It is true that the prohibition may also apply to statements constituting mere encouragement, as opposed to an explicit or implicit call to commit a criminal act,[60] and the risk that such statements could lead to the perpetration of similar crimes is less than the risk posed by public incitement. Even so, the prohibition remains justified, given the other social interests protected thereby, in addition to the questionable inherent value of such statements and the limited restriction that the prohibition imposes upon their content. Regarding this last point, there is a substantial difference between the scope of a prohibition of this nature and that of the offense defined under Section 4 of the Prevention of Terrorism Ordinance. The latter is not limited to expressions of praise for a successfully perpetrated crime, but also includes words of encouragement and sympathy, thus significantly widening the ambit of the prohibition and making its precise delineation difficult.

From the above, it may be concluded that the social interests of concern in this context are internal public peace, especially the vital sense of personal security,[61] public trust in the validity of the socio-legal order, and respect for the fundamental values of society.[62] This is in addition to the social interest protected by the prohibition against the praised offense, which comprises a secondary social interest.

The Offense That is the Object of Praise for Public Incitement: Any Criminal Offense, or Only Particularly Serious Offenses?

Only the gravest of offenses should be considered as the unlawful object of praise, inasmuch as we are concerned with indirect public incitement and encouragement, behavior on the fringe of criminal law,[63] and also given that the social interest infringed by the prohibition is freedom of expression—a fundamental constitutional right. Consequently, the offenses constituting the objective of praise must be among the most heinous; for example, those offenses for which the statutory penalty is at least seven years' imprisonment.

An interesting question arises as to whether the praised offense must actually be indictable. This question is dependent upon the nature of the social interests violated by the offense. Public peace and security, public trust in the validity of the socio-legal order and the social interest violated by the offense are violated by praise for the offense even if the perpetrator is mentally incompetent. The question of insanity affects only the imposition of criminal liability; it has no bearing on the anti-social nature of a criminal act nor upon its legality. If we assume that publishing words of praise for a criminal act is liable to create a general atmosphere and possibly concrete conditions conducive to the perpetration of copycat acts, then there can be no doubt that praise for an attempted murder, even if perpetrated by an insane person, is liable to contribute to the creation of such a menacing atmosphere.

Moreover, the prohibition proscribes praise for a perpetrated criminal act, without reference to the perpetrator. Its purpose is to forbid praise of the act, not of the actor. This is the correct approach, since reference to the act, as opposed to the actor, increases the likelihood of imitation of the crime, whereas the personality of the actor may be otherwise praiseworthy. This approach also derives from the desire to limit the restriction of free expression to the absolute minimum by proscribing only the most dangerous behavior. Furthermore, the function of criminal law is realized through condemnation and abhorrence of the act itself, rather than of the actor. This idea is also entrenched in the humanitarian nature of the Penal Code, as dictated by *Basic Law: Human Dignity and Liberty*. Just as the condemnation relates to the act and not the actor, so too the prohibition of praise is directed towards the criminal act in its factual, mental and wrongful components. In sum, the prohibition forbids identification with the act rather than the actor, and the sanity of the actor is irrelevant in this context.[64]

Consequently, the elements of the offense are satisfied by the existence of the *mens rea,* the *actus reus,* and the criminal nature of the act being praised. Circumstantial requirements may also be met if there is an attempt to commit a felony or even simply preparation to commit one, if the preparatory element itself constitutes a serious felony. The perpetrator's retraction from the attempt does not affect the criminal liability of the person giving praise, since the retraction exception is a personal factor that, for policy reasons, removes imposition of the punishment. However, if the person giving praise also praises the perpetrator's retraction, then the offense will not incur criminal liability, since the perpetrator's words in this case will not contribute to a general environment conducive to criminality.[65]

Permissible Publication

It must be emphasized that the behavioral requirements of the offense are satisfied only where the perpetrator expresses praise, support or

identification with regard to a criminal act. In other words, publishing a fair and accurate report of a felony or reporting on an expression of praise for a criminal act or of identification with its perpetrator, will not satisfy the behavioral requirement if the report does not constitute identification—explicit or implicit—with either the act itself or the expression of praise. This conclusion is also supported by the meaning of the terms 'praise', 'support' or 'identification'.[66] Even so, for the sake of clarity, it is suggested that the law explicitly state that publishing a fair and accurate report of a felony, or words in praise thereof, will not fall within the ambit of the prohibition.

Practically speaking, the content and scope of the prohibition are determined not only by the language of the prohibition, but also by the social interest protected thereby. Consider an expression of support for a battered wife who killed her husband, or for euthanasia, where the speaker clearly believes that the legislature should justify such actions and define them as falling within the scope of the self-defense exception, necessity, or a special *sui generis* defense. In these cases, the speaker is criticizing the extant legal situation in an attempt to prompt the legislature to deal with the problem of domestic abuse or euthanasia in a satisfactory manner. Admittedly, this kind of criticism does not distinguish between the desired law and the one that exists, which, as long as it is valid, ought to be obeyed. However, it would be highly inappropriate to impose a criminal prohibition on criticism that expresses the critic's sense of injustice regarding a specific conviction and serves as the basis for changes he proposes to the legal status quo. Even if one takes exception to such criticism, the social interest of protecting free expression cannot tolerate the intervention of criminal law in such cases. The legal status quo is not immutable, and criticism thereof constitutes an important and essential tool for renewed examination of the existing law. Criticism is also crucial to democracy, which derives its vitality from a citizenry free to express its opinions on public matters. Thus, in examining whether behavior is unlawful, the goal as well as the language of the prohibition must be taken into account.[67]

For purposes of clarity and in order to avoid overly limiting free expression, it is suggested that statements constituting legitimate criticism of the legal status quo in a democratic state be expressly excluded from the criminal prohibition. The term 'legitimate criticism in a democratic state' is worded to preclude criticism unacceptable in a democratic context. Consequently, each issue must be examined on its merits to assess whether it falls within the scope of the language and purpose of the prohibition in a democratic political system.

5 CRIMINALIZATION VS. EDUCATION

Is the penal prohibition of public incitement justified, or can we rely upon the educational-cultural-social system as an effective method of dealing with public incitement?

Conceivably, the educational-cultural-social framework constitutes an effective method of dealing with this phenomenon. The claim that criminal law is not the appropriate tool here rests on the nature of the prohibition as a means of preventing public incitement at its initial stages and on the fact that although the issue is one of assault on the basic values of the society, that assault is a purely verbal expression of a negative attitude towards those values.[68] Refuting this claim is the argument that intervention through criminal law does not mean waiving the educational-cultural-social approach. On the contrary, the latter is invariably the most effective means of preventing criminality in all its forms, including homicide.

Assigning primary responsibility for dealing with criminality to the educational-cultural-social order does not *a priori* obviate the need for criminal law. The educational approach cannot prevent exceptional occurrences and, occasionally, there is no escaping the need for the intervention of criminal law. The two tools should function cooperatively in dealing with severe anti-social phenomena. Where the educational-cultural-social systems fails to deal successfully with extreme and unusual anti-social behavior, it is then both justified and essential for criminal law to confront its occurrence in order to protect the free functioning of society. The intervention of criminal law in such cases is also mandated by *Basic Law: Human Dignity and Liberty*, which charges the state (and its governing organs) with the protection of peaceful communal life for a free people and the protection of the life and freedom of the individual.[69] Israeli society is not immune to physical violence (e.g., violence within the family), or to contempt for the lives

of others (e.g., dangerous driving), and violence based upon the ethnic origin of its victims is not unheard of.

In the wake of the Middle East peace process, marginal extremist factions have adopted the path of violence—both verbal and physical violence—as part of their ideological, political struggle. Political criminality not only disrupts relations between individuals, it also erodes the fabric of the social order and undermines its foundations. Society must fight this phenomenon with legal tools designed to eliminate violence and prevent the creation of an atmosphere conducive to it. Even though the political assassination of Prime Minister Yitzhak Rabin was a flashing red light for many, appropriate conclusions have not been drawn with respect to dealing with what has become a violent atmosphere in Israeli society.[70]

As already stated, politicians and public figures have an obvious obligation to condemn all forms of violence as well as any expression liable to encourage it publicly and unreservedly. Their denunciation must be directed specifically towards incidents and expressions that are politically or ideologically motivated. Politicians and other public figures who enjoy a high media profile and have broad influence among the public must serve as examples in conducting informed, substantive political debate, in which they exhibit tolerance and responsible behavior. This kind of debate must be conducted on the understanding that nobody can accurately foresee the future, and that there is no single, absolute truth in political matters. Public figures must refrain from any behavior (including inaction) that can be construed as encouragement or legitimization of violence. Personal attacks and name-calling directed at public figures, such as 'murderer', 'traitor', 'quisling', etc., must be condemned and excised from the socio-political discourse through extra-legal means (primarily social consensus).

6

INFRINGEMENT OF BASIC INDIVIDUAL RIGHTS BASED ON APPREHENSION AND DANGER

A basic constitutional question is whether apprehension that an act will be repeated constitutes sufficient grounds for defining both explicit and implicit public incitement as a criminal offense, thereby justifying an infringement upon individual liberty. In other words, can the constitutionally protected freedom of expression be violated solely on the basis of the apprehension that an expression may engender a general atmosphere conducive to the perpetration of similar offenses?

As stated above, the protected social interests of concern here include internal public peace, public trust in the socio-legal order, and the upholding of fundamental societal values, in addition to the interest protected by the prohibition against the offense that is the objective of the public incitement. The first three values are violated by the very communication of the public incitement to the public; in this sense, the issue is not one of apprehension and danger. On the other hand, the issue of apprehension does arise in the context of the social value protected by the prohibition against praise for a committed offense. This, of course, assumes that there is no possibility of proving empirically the existence of a relationship between the public incitement and its effects. Below, we consider whether it is justified to prohibit certain forms of behavior and define them as criminal solely because of the possibility that a particular social interest may be infringed. This question is contingent upon the interpretation of the *in dubio pro libertate* principle and its application in constitutional and criminal law.

The Meaning of the *In Dubio Pro Libertate* Principle (Where There Is Doubt, Liberty Should Prevail)

According to this principle, an act may be declared anti-social and thus prohibited under criminal law only if it definitely violates a protected social interest and jeopardizes peaceful society and its freedom. The principle is rooted in the concept of man as a fundamentally free being. Accordingly, any limitation upon his freedom must be an exception, and any conduct is permitted unless criminally proscribed. Freedom of action is the rule, and its limitation or prohibition is an exception requiring strong justification. The onus is upon the legislature to justify the existence of a penal prohibition that sanctions an exception to the freedom of action rule. According to this principle, the obligation is not easily discharged, and an act cannot be defined as criminal in cases where there is only a fear, as opposed to a certainty, that it may breach a protected social value and endanger the public welfare.[71]

This principle must be rejected, for it is inconsistent with the constitutional principle that the state has of the right and obligation to protect its citizens. Constitutional protection is not limited to freedom of action, but extends to other interests of the individual, first and foremost his life. According to the limitation clause of *Basic Law: Human Dignity and Liberty*, individual liberty may be infringed, i.e., an act may be defined as a criminal offense, if the Penal Code prohibition is intended for a worthy purpose and does not exceed that which is necessary. The conditions of the limitation clause are satisfied if the prohibition achieves the desired goal, and the harm it prevents is greater than the harm occasioned by the prohibition.

The relevant factor for our purposes is proportionality. In this case, one must resort to the balance of values test to determine whether one can demand that society assume the risk of a possible violation of a given social value. According to this test, the importance of the social values themselves must be weighed against the possible danger

posed by the action taken to protect them. In cases where it is not possible either to prove or to negate the existence of a causal connection between a particular behavior and the harm or danger it poses, the legislature may define the behavior as criminal, since society cannot be required to assume the risk, especially if a supreme value such as life is at stake.

The imposition of a prohibition against certain forms of behavior is warranted when the threatened social value is particularly important, and when there exists a serious possibility (albeit not a certainty) of its violation. The prohibition is also justified when the social value infringed by the imposition of the prohibition is less important, or when the violation thereof is less grave. Let us assume that the state authorities are unable, practically, to prevent the importation of beef from England, while medical experts are unable either to prove or to rule out the possibility that the consumption of contaminated beef will cause the fatal disease known as CJD, or 'Mad Cow' disease. In such a case, the protection of human life competes with freedom of occupation, the violation of which is not as grave. In such a case, the legislature would be permitted, perhaps even obliged, to define the import and sale of contaminated or possibly contaminated meat as a criminal offense, since society cannot be asked to expose its citizens to the possible danger merely to guarantee freedom of occupation.

Thus, the principle of *in dubio pro libertate* in the present context is neither commensurate with constitutional law, nor with the role of criminal law. In applying the limitation clause, one must always balance the protected values, considering their relative importance and the degree or possibility of their violation. In the balancing process one cannot *a priori* negate the need for protecting a specific value from possible violation, provided that the possibility is scientifically or empirically based, or relies on common sense and is not merely a groundless speculation.[72]

It may therefore be justifiable, constitutionally and criminally speaking, to define an act as a criminal offense even where there is only a

reasonable possibility that the act may violate a protected social interest. In such a case, the offense would be that of posing danger to society. In the case of public incitement, a reasonable apprehension regarding its effects is reflective of an aspect of society without which it would be difficult to understand the power of moral influence (i.e., education, religion, politics, media, and interpersonal relations).

7

THE CONSTITUTIONALITY OF THE CRIMINAL OFFENSE IN RELATION TO FREE SPEECH

Freedom of expression is a supreme constitutional right. It is a fundamental freedom, providing for the self-realization of individuals and ensuring an interplay of opinions essential for clarifying public matters and preserving the democratic process. It is for this reason that freedom of expression has been described as the soul of democracy.[73] Even so, this freedom "is not an absolute, unrestricted right, but rather a relative one, subject to limitation and control with a view toward safeguarding important socio-political interests, which under certain circumstances are deemed preferable to those protected through realizing the principle of free expression."[74] In assessing the constitutional aspects of the infringement of freedom of expression, the social interests affected by violating this freedom must be identified and their relative importance determined. They must then be weighed against those interests pertaining to the status and importance of free expression. This approach is one of 'balancing of principles', or 'rational balancing'.[75]

There is no doubt that the prohibitions against public incitement encroach upon freedom of expression. The question is whether these prohibitions are constitutional, and whether they are commensurate with the limitation clause in Section 8 of *Basic Law: Human Dignity and Liberty*. Under this section, a violation is constitutional when it is intended for a worthy purpose and does not exceed that which is necessary. We have already identified the social values that the prohibitions are meant to protect, and the protection of these values is indeed a worthy end. There is, in fact, a rational relationship between the prohibitions and their intent, both in preventing social damage and in preventing the creation of a psychological climate conducive to criminality. However, the essential question here is whether the

infringement upon free speech meets the requirement of proportionality. In other words, is limiting free speech constitutionally legitimate only where an expression poses almost certain danger to the values of society, or is such a limitation legitimate even where only a real possibility of damage exists?

We will now examine four tests that have been developed in the United States to determine the conditions under which restricting freedom of expression is justified.

The Probability Test

The 'probability' test originated in the American *Dennis* case.[76] This test was not accepted by all of the Supreme Court justices, and we thus find other tests such as the 'clear and present danger' test, the 'imminent lawless action' test, and in the past, the 'bad tendency' test.[77] 'Probability' made its first appearance in Israeli Law in the *Kol Ha'Am* case,[78] but it is not the only test recognized within our legal system with respect to the constitutionality of limiting free speech. The accepted approach in Israel regarding criteria for permitting this infringement is that a balance must be struck between freedom of expression itself and the values in conflict with it, while examining when and to what extent free speech can be restricted in order to protect the conflicting values.

This general balancing formula is based on the view that not all social values are of equal importance in the eyes of society.[79] Thus, the Court did not apply the probability test where certain lesser social values—such as the administration of justice and sustaining the standing of the judiciary,[80] the right to one's reputation, and the right of privacy—were likely to be endangered.[81] It should also be mentioned that while *Kol Ha'Am* emphasized that freedom of expression would retreat in the face of a threat to public peace only when the likelihood of a breach of the public peace was almost definite in the sense of being

'probable',[82] in the *Omer International* case[83] (hereinafter *Omer*), the Court was satisfied with the probability of endangering the public peace.[84]

Some judges[85] and scholars[86] do not adequately understand the probability test and tend to blur the distinction between this test and that of 'clear and present (immediate) danger'. They use the terms interchangeably, making no distinction between them, even though in effect they are separate and distinct. For instance, the clear and present danger test was actually rejected in *Kol Ha'Am*.[87] Furthermore, there has been increasing support for rejecting the probability test even in cases where the social value of public peace is in conflict with freedom of expression.[88] Conceivably, the probability test constitutes a derivative of the *in dubio pro libertate* principle and as such, as stated above, should be rejected.

There is a lack of clarity concerning the meaning of the term 'probability'. Is it sufficient that the possibility of such a breach is more likely than not, or must the probability of violation be of a higher degree, where only a miracle can prevent the violation from occurring? If we adopt the second approach (which is more consistent with the term 'near certainty'—which is the literal meaning of the Hebrew term used to denote the probability test—but less consistent with the concept of probability) and correctly apply it, then it would be almost impossible to restrict freedom of expression.

Basic Law: Human Dignity and Liberty requires that the infringement upon freedom of speech not exceed that which is necessary, i.e., that there is no less damaging means to prevent harm to the social interests protected by the prohibition. In the balance test, all of the competing factors are considered, especially the importance of the values themselves and the degree to which they are likely to be violated. As a result, when a less significant social value is at stake, only a high degree of danger can justify the restriction of the right. On the other hand, where life is in the balance, then it is possible and even mandatory to lower the risk requirements. There is no justification for demanding

'near certainty' for a threat to human life, the protection of which is the most supreme value. Here, the requirement of 'near certainty' as a precondition for restricting free speech in essence means abandoning this value altogether, and the symbolic message communicated is the cheapening of human life.[89]

Furthermore, requiring 'near certainty' of the violation of the public peace—including the violation of human life—as a condition for restricting free speech is not commensurate with the approach adopted by case-law with respect to balancing freedom of expression against the right to one's reputation and the right to privacy. As mentioned above, case-law does not apply the near certainty test to issues such as a breach of reputation or privacy. Could it therefore be inferred that reputation and privacy are more important than the right to life? If freedom of expression recedes in the face of the reasonable possibility of harm to a person's reputation or breach of his right to privacy, then should it not also recede, *a fortiori*, in the face of a reasonable possibility of harm to life, especially inasmuch as this is the goal of the person creating the danger?

The Bad Tendency Test

According to this test, freedom of speech can be restricted through the prohibition of an expression when the expression raises even a slight or remote likelihood of endangering public peace. For the restriction to be justified in this case, it is sufficient that there be only an indirect connection between the expression and the danger. This test was expressly rejected by the Supreme Court in *Kol Ha'Am*, where Justice Agranat ruled: "a 'bad tendency' test is perhaps appropriate to political systems based on authoritarian or totalitarian rule, but it frustrates, or at least renders inefficient, that process which forms the basic foundation of any democratic society."[90]

While the near certainty test elevates freedom of expression to the level of a supreme value with its importance eclipsing that of all other social values, the bad tendency test reduces its significance, making it a value that recedes in the face of other social values. Neither of these extreme approaches reflects a rational or appropriate balance between freedom of expression and other social values.

The Clear and Present Danger Test and the Imminent Lawless Action Test

According to the 'clear and present danger' test, freedom of expression recedes in the face of other competing social values only where the expression constitutes an exhortation that poses a clear—almost definite and immediate—danger that the prohibited offense will be committed. This test originated in the *Schenck* case in American law, in which Justice Holmes stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has a right to prevent. It is a question of proximity and degree."[91]

It is important to note that the Constitutional Court in Germany issued a similar ruling regarding artistic freedom (*Kunstfreiheit*),[92] but did not rely upon it subsequently. In other words, the clear and present danger test was ultimately rejected in German law as not constituting the appropriate test with regard to restriction of the artistic freedom.[93]

It should also be mentioned that in Justice Agranat's opinion in *Kol Ha'Am*, the clear and present danger test was distinguished from the probability test, but only with respect to the element of immediacy. In other words, both tests share the common requirement of near certainty that the exhortation will cause perpetration of the offense that is the objective of the exhortation. However, the two tests differ in that,

according to the clear and present danger test, the exhortation must lead to the immediate execution of the offense, whereas with the probability test there is no such requirement for immediate perpetration.[94]

Freedom of speech also recedes in the face of competing social values under the 'imminent lawless action' test. This test is rooted in the American *Brandenburg* case, according to which "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing **imminent lawless action** and is likely to incite or produce such action" (our emphasis).[95]

According to this test, as with the clear and present danger test, perpetration of the act must be immediate, but in contradistinction, there is no requirement that the probability of the act's being committed be a near certainty.

According to the ruling of Israel's Supreme Court, the clear and present danger test is not appropriate for limiting free speech. In *Kol Ha'Am* it was cited as one of competing tests concerning the restriction of freedom of speech, but the Court noted that the immediacy component was not necessary for the restriction. Justice Agranat then cited 'bad tendency' and 'near certainty' as the competing tests regarding the restriction of freedom of action,[96] apparently rejecting the other possible tests, including 'clear and present danger'.

It has also been suggested that "the presentation of these two tests only, from among all the other possible tests, relies upon the majority opinion in *Dennis*, as understood by Justice Agranat,"[97] which rejected the clear and present danger test. Justice Sussmann, in *Disentzik,*[98] also rejected the clear and present danger test, being of the mistaken opinion that the test had been adopted in *Kol Ha'Am*. In the *Zichroni* case, Justice Bach also mistakenly assumed that the clear and present danger test had been adopted in *Kol Ha'Am.*[99]

It bears mentioning that some scholars are in favor of the clear and present danger test,[100] whereas others do not make a sharp distinction between this test and that of 'probability'. Thus, Professor Ze'ev Segal writes "[t]he reality created gives words of public incitement the import of fighting words, which in a certain atmosphere can create that near certainty of the occurrence of violent acts. Such certainty can provide the basis for implementing criminal law against the inciters in cases where public speech, *prima facie*, creates a clear and present danger of physical violence which may be the result of verbal violence."[101]

As stated above, the near certainty test reduces the social weight of the values protected by the public incitement prohibitions and does not afford them appropriate protection. Instead, the test confers supreme value upon free speech to the extent that it almost always prevails over all the other social values. We indicated above that the tests of clear and present danger and of imminent lawless action are more demanding than the probability test. Consequently, they also go further in protecting freedom of expression at the expense of other values. These tests must therefore be rejected.

In *Kol Ha'Am*, *Schenck* and *Brandenburg*, the same result could have been reached (re the protection of freedom of speech) by utilizing a more modest, restricted test. Conceivably, it was the government's attempts to curtail freedom of speech without any clear justification that prompted the judges to adopt more rigid, stringent tests in circumstances where the tests themselves were in fact impractical. In addition to the arguments for rejecting the probability test, the clear and present danger and imminent lawless action tests must also be rejected for the following reasons.

First, these tests confer exaggerated weight to the possibility of preemptive prevention. When the potential victim of public incitement is a specific person, it is possible to protect him with greater efficiency, especially in cases where those charged with law enforcement and protecting public peace are aware of the danger. Even so, it is not clear that society ought to bear the expense of this protection, and

furthermore, it imposes a burden on the potential victim by subjecting him to a life of tension in the constant shadow of violence. Neither is police protection a guarantee against an armed assailant. When the potential victims are part of a larger group, a social minority, or an entire sector of society, then it is practically impossible to provide appropriate protection, and it is unrealistic to think of providing every person with a bodyguard.

Furthermore, the capacity for preemptive prevention decreases in cases of mass publication. As stated above, the draft proposal proposes proscribing public incitement, i.e., public incitement directed towards an unspecified group—mass public incitement. In such cases it is difficult, if not impossible, to identify those in the audience who are most likely to carry out a criminal act. Thus, given that prevention is almost impossible, public incitement itself must be defined as a criminal offense in order to prevent the violation at its preliminary stage (the public incitement stage).

Second, the clear and present danger and imminent lawless action tests do not relate to the accumulated potential for violence caused by a series of inciting acts. As stated above, according to these two tests, a published expression may be prohibited if it leads to the near certainty of immediate perpetration of the public incitement's desired but prohibited offense. It follows, therefore, that one cannot prohibit exhortation to commit felonious acts when the exhortation itself is not likely to create an immediate danger of the perpetration of a felony. This is true even if a whole series of such exhortations (especially those following the initial expression) seem likely to lead to the commission of a criminal act. However, by doing just that, these tests ignore the special nature of the psychological influence of the social climate. The psychological effect of statements communicated or published is unlike the effect of physical force. Generally speaking, this type of influence is gradual and cumulative, and it is particularly difficult, if not impossible, to make a prior assessment of when a person under such influence reaches the stage at which all that is required is the last straw. However,

in terms of socio-legal order, and for the potential victims, it makes no difference whether the damage results from an isolated act or a series of acts. Consequently, in terms of protecting the socio-legal order, as well as the basic rights of the individual, single acts of public incitement should be prohibited even when a particular act might not lead to the immediate perpetration of the offense, but where the cumulative effect of multiple acts of the same ilk would lead to the perpetration of a felony.

Third, these tests offer a one-dimensional treatment of complex, multi-dimensional material. Thus, they do not relate to the content of the public incitement (specifically, the call to commit a felony), the inciter's *mens rea* (mere awareness or intent), the nature of the intended felony, or particular influence of the inciter. Proper treatment of the subject requires differentiating between each type of danger and anti-social behavior. The probability tests are vague by definition, and when the issue is one of likelihood of psychological impact, the speculative nature of the probability-based assessment is particularly blatant.

Fourth, the tests are not commensurate with the nature of the social values protected by the public incitement prohibitions. As stated above, the social values protected by the prohibition of public incitement are public trust in the validity of the socio-legal order, public peace and, especially, the public's sense of security. According to the clear and present danger and imminent lawless action tests, public incitement will be prohibited if it would lead, with near certainty, to the immediate perpetration of the offense that is the objective of the public incitement. Neither test takes into account the other social values protected by the prohibition of public incitement, whereas these values are the most important and are violated the moment the public incitement reaches the ear of the incitees, for the audience's mere hearing the inciting speech harms the public confidence in the validity of the socio-legal order and the public's sense of security. These social values are equally worthy of protection, and any public incitement that violates them does not constitute a legitimate exercise of freedom of expression.

Fifth, neither test is consistent with the preventative function of criminal law. The protection of social values and the maintenance of peaceful communal life for free people necessitate the prevention of behavior that jeopardizes these social values. Society cannot afford the alternative, nor can it refrain from intervening until after a felony has occurred and the damage to society has already been done. Limiting the application of the prohibition to those expressions which will almost certainly lead to immediate criminal behavior would lead to a policy of non-intervention, or of waiting until the very last moment to intervene. The isolation of that moment is almost impossible; the practical consequence of this is the risk of missing the opportunity to prevent a criminal act. The optimal and most effective protection of the social values at stake means prevention of the commission of an offense at an early stage, as in the case of punishing an attempted offense, which is not contingent upon the completion of the offense. Similarly, individual instigation of an offense is not predicated upon the expectation of its immediate perpetration. Thus, the requirement of immediacy unjustifiably limits the prohibition, to the extent of rendering it irrelevant. Reliance upon these tests in their simple, literal sense increases the chances of acquittal, and such acquittals are likely to be interpreted as a legitimization of the otherwise prohibited speech. This constitutes yet another reason for the lack of enforcement of these prohibitions and serves as an example of the problems associated with their enforcement.

Sixth, it is unreasonable to expect that the offense targeted by the public incitement will have no influence on the other features of the test, and that the same degree of probability along with the same requirement of immediacy would be required for both a serious felony and a simple misdemeanor, or even for illegal behavior not regarded as a criminal offense.

In view of the above, the opinion of former Attorney General and Supreme Court Justice Professor Yitzhak Zamir should not be adopted. According to Zamir, "verbal violence, even when it poses the threat of

ultimately leading to physical violence, is not sufficient for activating the police and the courts … only in extreme cases in which the verbal violence creates a clear and immediate danger to the public peace will the balance of interests tilt in favor of filing criminal charges."[102] This approach is not commensurate with the sanctity of life, a supreme social value. When there is a real likelihood that an expression constituting verbal violence will lead to the endangerment of life, and when this consequence is the aim of the speaker, then the state must prohibit such speech and the relevant authorities must act to enforce the prohibition. In sum, free expression is not a sacred cow and is not more important than human life.

Times of Crisis

The risk of the development of an atmosphere conducive to violent crime is a sad reality in our time, judging by the assassination of Prime Minister Yitzhak Rabin and the threats on the lives of public personalities, resulting in the need to assign them personal bodyguards. Given that Israeli society is currently in a state of severe social crisis and contains extremist elements representing multiple points of view, it must, first and foremost, protect itself and its members, their lives, personal security, welfare and well-being. No society can "tolerate the law and the public order being breached by individuals, irrespective of their motives, without those criminals being punished. No state can continue to exist without the mutual tolerance of its citizens and universal respect for and compliance with the law. Fanatics of all persuasions, be they religious, political or otherwise, must learn and understand unequivocally that anyone who raises his hand against the public will definitely be punished."[103] In such a time, a society may curtail freedom of expression, despite its unique importance, in order to protect life itself, as well as life free from fear.

The prohibition also attempts to prevent an atmosphere that encourages violence in times of crisis. However, in order to acknowledge the background of crisis that underpins this legislation, and given the special status of freedom of expression and the possibility that in certain social situations the need may arise to reassess the balance between freedom of expression and other protected values, a time limit on the prohibition should be set. The proposal contains a provision that would allow consideration to be given to other balancing factors, while seeking to avoid any long-term determinations regarding such a sensitive topic.

SUMMARY

The offense of sedition under the broad wording of Section 133 of the Penal Code of 1977 should be revoked because it contravenes the principles of legality and clarity, and because of the role it accords to criminal law in protecting the social values of a democratic society. As worded, the prohibition mandates an exaggerated curtailment of free expression, thereby contradicting the essence of democracy. These features have resulted in the failure to enforce the prohibition in ordinary times and in unbridled enforcement in times of crisis, as witnessed in the wake of the assassination of Prime Minister Yitzhak Rabin.

Due to these considerations, the offense of sedition should be replaced by a number of prohibitions, each distinctly and clearly defined, e.g., the prohibition against public incitement; a call—explicit or implicit—to commit a criminal or violent act; the publication of anything that exerts pressure, authority, or special influence to encourage the perpetration of a felony or a violent act; and the purposeful publication of anything that is likely to bring about the perpetration of these acts under certain circumstances. The main danger of this kind of prohibited behavior lies in the creation of a psychological atmosphere conducive to criminal activity as well as to the delegitimization of the socio-legal order. Finally, the social values protected by the prohibition against public incitement are public trust in the efficacy of the socio-legal order and in penal prohibitions, public peace and the sense of security, in addition to the social values protected by the prohibition against the offense that is the objective of the public incitement.

Only felonies and crimes of violence are candidates for offenses inspired by public incitement, since undermining confidence in the efficacy of legal norms protecting property cannot be equated with undermining public confidence in those norms protecting life and limb. Undermining public security in the face of violence and apprehension of harm to life

or limb is particularly detrimental to public confidence in the socio-legal order.

Public incitement to non-compliance with civil or administrative law will not be considered a criminal offense, given that both civil and administrative laws are equipped with their own unique models of enforcement, and that it is not the function of criminal law to ensure the maintenance of either. For the same reasons, generally speaking, public incitement to disobey a competent authority will not be deemed a criminal offense. An exception to this rule is possible only if compliance with the order is of special importance, e.g., compliance with a military order.

The prohibition against publishing words of praise, identification, or support regarding a successfully committed felony is currently found in Section 4 of the Prevention of Terrorism Ordinance. This is not the proper venue for treating such conduct, given that the ordinance deals primarily with the actions and related activities of terrorist organizations. Praising a crime that has been committed constitutes indirect public incitement to commit a similar felony; it is therefore essentially similar to public incitement. Thus, the correct location for the prohibition is in the Penal Code, adjacent to the offense of public incitement, since the main danger in this behavior lies in the creation of an environment and psychological climate conducive to criminal activity. The protected social values of concern here are essentially identical to the values protected by the prohibition against public incitement. In this case, only praise for a particularly heinous offense will constitute an offense, since the context is one of indirect public incitement, which lies on the fringes of criminal law, and given the special importance of the social value breached by the restriction of free expression.

Finally, the probability test for evaluating the threat to public peace is not an appropriate one for justifying penal restrictions on freedom of speech. In the constitutional balancing test (between free speech and the other social values for which protection is sought), all factors liable to affect the balance of competing interests ought to be considered,

especially the relative importance of the value as set against the nature and scope of the danger to it. Thus, only a high degree of danger will justify the curtailment of free expression in order to protect a social interest of significantly lesser value. On the other hand, in defense of an important social value such as life, a lesser degree of certainty may suffice. The offense of public incitement relates exclusively to the more serious offenses, e.g., felonies and violent crimes, and the social values potentially violated by these offenses are life and limb, which are supreme in the hierarchy of values. It is therefore justified and perhaps even necessary to lower the danger threshold to a level lesser than that of 'near certainty'. The requirement of 'near certainty' does not afford appropriate protection for life or physical integrity, and it diminishes their value in the eyes of the public. For the same reasons, the clear and present (immediate) danger test should be rejected. Narrow, well-defined prohibitions are preferable to prohibitions contingent upon probability tests, which are by definition vague and largely dependent upon speculation.

empty page

Appendix I

COMPARATIVE MATERIAL

Prohibitions against Public Incitement

1. GERMANY

Article 111: Public Solicitation to Crime

(1) Whoever publicly, in a meeting or by distribution of writings (Article 11(3)) solicits committing a wrongful act shall be punished as a solicitor (Article 26).

(2) Should the solicitation remain without result, the offender shall be punished by up to five years imprisonment, or by a fine. The punishment may not exceed that which could have been imposed had the public incitement succeeded (subparagraph (1)). The provisions of Article 49(1), number 2 shall be applicable.

Article 130(a): Instructional Guidance to Commit Crime

(1) Whoever distributes, publicly displays, posts up, presents or otherwise makes accessible any writings (Article 11(3)) which are capable of serving as instructional guidance for the commission of one of the wrongful acts mentioned in Article 126(1), and which by their content are designed to encourage or to arouse in another the willingness to commit such an act, shall be punished by up to three years imprisonment, or by a fine.

(2) The same punishment shall be imposed on anyone who

(a) distributes, publicly, posts up, presents or otherwise makes accessible any writings (Article 11(3)) which are capable of serving as instructional guidance for the commission of one of the wrongful acts mentioned in Article 126(1), or

(b) publicly or in a meeting provides instructional guidance for the commission of one of the wrongful acts mentioned in Article 126(1), in order to encourage or to arouse the willingness of another to commit such an act.

(3) The provisions of Article 86(3) shall correspondingly apply.

Article 111 prohibits public incitement to criminal offenses. The behavior is characterized by a public call (*Aufforderung*), at an assembly or by way of the circulation of letters calling for performance of wrongful acts. Public incitement, defined as a 'call', must relate to a specific prohibition and must also leave a definite impression of seriousness in terms of the inciter's expectation that one of the incitees will perform the act. Under the prohibition, any criminal act can be the objective of the public incitement, whether a felony or a misdemeanor. A wrongful act is an act that in the broad sense consists of the *actus reus*, the *mens rea* and the wrongful nature of the offense. There is no requirement of culpability—in other words, the prohibition also includes the public incitement of minors below the age of criminal responsibility, or the mentally incompetent. The *mens rea* required is that of criminal intent, in any of its forms.[104] The social values protected by the prohibition against public incitement are internal public peace, especially the sense of security in the conduct of peaceful life in society, as well as the social value endangered by the offense in question. The law distinguishes between public incitement that leads to the perpetration of the wrongful act, for which the punishment is the same as that of instigation (Article 111(1)), and unconsummated public incitement, for which the punishment is up to five years imprisonment or a fine, provided that the punishment not be more severe than that imposed for the offense itself.

Article 130(a) prohibits the public circulation of written material containing instruction in the performance of wrongful actions that are enumerated in Article 126(1) and which are of particular gravity, and when the content of the material indicates the intention to promote or encourage another to commit such an act. The punishment is three years' imprisonment or a fine (Article 130(a)(1)). According to subparagraph (2), the same punishment is prescribed for the circulator of written material containing such guidance as stated in subparagraph (1), or one who gives such guidance in public or at a meeting. The offense here is a prohibition that had previously been revoked and was reinstalled. Conceptually speaking, the offense is an 'atmospheric offense', i.e., it risks creating a psychological environment and atmosphere conducive to the perpetration of serious felonies. The offense came under severe criticism and the prohibition has become a dead letter in German criminal law.

2. AUSTRIA

Article 281: Call for Disobedience to the Law

Whosoever calls for any sort of disobedience to a law in a printed publication, by broadcast, or by any other means such that it is accessible to the general public, shall be punishable by up to one year's imprisonment.

Article 282: Call for the Commission of a Criminal Act and Praise for a Criminal Act

(1) Whosoever calls for the commission of a criminal act in a printed publication, by broadcast, or by any other means such that it is accessible to the general public, shall, if he is not liable to more severe punishment as a principal party to the said act (Article 12), be punishable by up two years' imprisonment.

In Article 281, the law prohibits the call for general disobedience towards the law; in other words, a call not to comply with a specific law in a total and fundamental sense, the punishment for which is imprisonment for up to one year. Article 282(1) proscribes the call to commit a criminal act, the punishment for which is imprisonment for up to two years. Both prohibitions refer to the call, expedited by way of published material, in the electronic media or by any other form accessible to the public, directed to an unidentified, unspecified audience. It should be noted that the previous Austrian law (Article 65, concluding paragraph) did not distinguish between the call to disobey the law and the call to commit a criminal act. The call for disobedience was broader and also included the rulings, verdicts, decisions and orders of the courts and other public authorities. It also contained the call for avoiding tax payment and the discharging of other public obligations. The punishment was also more severe: imprisonment for up to five years and not less than one year.

3. SWITZERLAND

Article 259: Publicly Calling for the Commission of a Felony or Violence

(1) Whosoever publicly calls for the commission of a felony shall be punished by up to three years' imprisonment.

(2) Whosoever publicly calls for the commission of a violent misdemeanor against persons or property shall be punished by a jail term or fine.

Swiss criminal law prohibits public incitement, expressed in the public call for perpetration of a felony, the penalty for which is imprisonment for up to three years (Article 259(1)), and public incitement to commit a misdemeanor involving violence to a person or an asset, punishable by imprisonment or a fine (Article 259(2)). The elements of the call to

commit an offense, and commission of a felony, are the same as in German law.

4. HOLLAND

Title V: Serious Offenses against Public Order

Article 131

A person who in public, either orally or in writing or by image, incites another or others to commit an offense or act of violence against the authorities is liable to a term of imprisonment of not more than five years or a fine of the fourth category.

Article 132

(1) A person who disseminates, publicly displays or posts written matter or an image containing public incitement to commit any criminal offense or act of violence against the authorities, or who has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment of not more than three years or a fine of the fourth category, where he knows or has serious reason to suspect the written matter or the image to contain such public incitement.

(2) The punishment in paragraph 1 is also applicable to a person who, with like knowledge or like reason to suspect, publicly utters the contents of such written matter.

(3) Where the offender commits any of the offenses defined in this article in the practice of his profession and where, at the time the serious offense is committed, less than five years have passed since a previous conviction of the offender for any of these serious offenses became final, he may be disqualified from the practice of that profession.

Article 133

A person who publicly, either orally or in writing or by image, offers to provide the information, opportunity or means to commit any criminal offense is liable to a term of imprisonment of not more than six months or a fine of the third category.

In Article 131, the Dutch law prohibits public incitement, whether oral or written, of criminal offenses or of violent behavior against a public authority, the penalty for which is imprisonment for up to five years or a fine. Under Article 132, for the public display of an article or picture that could constitute such public incitement, the punishment is three years or a fine. Article 133 prohibits a public display, orally or in writing, of information about, an opportunity for, or other means of committing the criminal offense.

5. SWEDEN

Chapter 16: Of Crimes against Public Order

Article 5

A person who orally, before a crowd or congregation of people, or in a publication distributed or issued for distribution, or in other message to the public, urges or otherwise attempts to incite people to commit a criminal act, evade a civic duty or disobey public authority, shall be sentenced for inciting rebellion to pay a fine, or to imprisonment for at most six months.

If the crime is considered grave because the offender tried to induce the commission of a serious crime, or for other reasons, imprisonment for at most four years shall be imposed.

No responsibility shall be imposed where the crime is petty. In deciding whether the crime should be considered petty, special

consideration shall be given to whether there was only insignificant danger that the urging or the attempt might be followed.

Article 5 of Chapter 16 of the Swedish law prohibits the call for the perpetration of a criminal act, the avoidance of a civil duty, or disobedience to a public authority. The modes of public incitement are expressed in the oral communication to the public or to a crowd of people, written circulation by way of delivering a document intended for dissemination, or any other way of delivering it to the public. The punishment is imprisonment for up to six months or a fine.

The penalty for public incitement in aggravated circumstances, including inciting to the execution of a serious offense, is imprisonment for one to four years.

Criminal liability is not imposed for trivial matters. With respect to such, special consideration should be given to there being little danger of the public incitement's leading to the perpetration of an illegal act. In other words, the criminality of the public incitement is contingent upon the real danger that the public incitement will actually influence the incitees to act illegally.

6. GREECE

Plots against the Public Order

Article 183

Whoever publicly and by any means causes or incites to disobedience of statutes or ordinances or other lawful orders of authorities shall be punished by imprisonment for not more than three years.

Article 184

Whoever publicly and by any means causes or incites to the commission of a felony or a misdemeanor shall be punished by imprisonment for not more than three years.

Article 192

Whoever publicly and by any means causes or incites citizens to commit acts of violence upon each other or to disturb the peace through disharmony among them shall be punished by imprisonment for not more than two years unless a greater punishment is imposed by another provision.

Article 183 of the Greek law prohibits public incitement of non-compliance with laws, regulations or orders of the authorities, and Article 184 prohibits public incitement to perpetrate a felony or misdemeanor, the punishment for which is up to three years. In addition, Article 192 of the law prohibits public incitement of violence against a particular person or the arousal of discontent that violates the public peace. The punishment is two years' imprisonment, provided that the act is not within the scope of a more serious prohibition.

7. ITALY

Article 414: Solicitation of Delinquency

Whoever publicly solicits another to commit one or more offenses shall be punished, for the act of solicitation alone:

(1) by imprisonment for one to five years, in cases of solicitation to commit crimes;

(2) by imprisonment of up to one year, or by a fine of 80.000 lire, in cases of solicitation to commit misdemeanors.

In cases of solicitation to commit one or more crimes and one or more misdemeanors, the punishment prescribed in subparagraph (1) shall be applied.

Article 415: Solicitation of Disobedience to the Law

Whoever publicly solicits disobedience to the laws relating to public order, or to hatred between social classes, shall be punished by imprisonment for from six months to five years.

Article 414 prohibits public incitement of the perpetration of a felony or misdemeanor, the punishment for which is imprisonment for up to five years, and public incitement to perpetrate a transgression, the punishment for which is imprisonment for one year, or a fine. In addition, Article 415 prohibits public incitement of non-compliance with laws dealing with the maintenance of public order, or the prevention of hatred between various sectors of the population, the penalty for which is imprisonment for six months to five years.

8. NORWAY

Article 140 of the Norwegian law prohibits public incitement to the perpetration of a criminal act, the punishment for which is imprisonment for up to eight years, provided that it not exceed two-thirds of the punishment imposed for the perpetration of the offense that is the objective of the public incitement.

Prohibitions against Statements Expressing Praise, Support, or Identification with a Successfully Committed Criminal Act

1. GERMANY

Article 140: Rewarding and Approving of Criminal Activity

Whoever

(1) rewards, or

(2) publicly, in a meeting or by distribution of writings (11(3)), in a manner likely to disturb the public peace, approves of one of the wrongful acts mentioned in Article 138(1), numbers 1 to 5, and in Article 126(1), after they had been committed or after criminally punishable attempts to commit them had been made, shall be punished by up to three years imprisonment, or by a fine.

Article 140 of the German law prohibits providing any kind of material reward either for a wrongful act (as specified in this Article) that was successfully committed, or for an attempt to commit the same. The Article similarly prohibits expressions supporting such an action which are made in public—at a meeting or by the circulation of writings—in a manner that can disturb the public peace. The punishment is imprisonment for three years or a fine. In this context, a wrongful act, in the broad sense, is one that satisfies the *actus reus*, *mens rea* and illegality; there is no need for the element of culpability. In other words, the provision of material reward for, or the publication of words of praise in support of, a serious act committed by a minor or the legally incompetent are also prohibited.

The rationale behind the prohibition is the prevention of the possible effects of such expressions and is not limited to the direct influence of such rewards or praise, as influence can also be indirect and distanced

from the act itself, by contributing, for example, to the creation of a psychological environment conducive to the perpetration of serious criminal acts. The notion of protection here is based upon a general commitment towards maintaining the socio-legal order, as well as protecting the fundamental values of society, while the prohibition is directed towards maintaining public peace, and more importantly, the public's sense of security. The prohibition does not require the presence of definite danger that the crime will be committed; it is sufficient that the publication shake public confidence in its legal security, or create a psychological environment conducive to the perpetration of criminal acts.

2. AUSTRIA

Article 282: Condoning the Commission of a Criminal Act

> (2) Likewise, whosoever has in any form approved or condoned the deliberate commission of an offense as described in paragraph 1, which entails a punishment exceeding one year, such that the general sense of justice is outraged or offended, or whosoever incites or provokes the commission of any such act, shall be subject to punishment.

Article 282(2) of the Austrian law prohibits the publication of support for a criminal act committed with criminal intention which undermines the general feeling of lawfulness, the punishment for which may exceed a one-year imprisonment, or public incitement to such an action. A criminal act is an act that in the broad sense satisfies the *actus reus, mens rea* and wrongfulness requirements, but does not require culpability. Hence the publication of praise for a criminal act committed by a minor or legally incompetent person will fall within the ambit of the prohibition. The publication takes the form of circulated writings in the electronic media, or by any other means to which the public has access.

3. ITALY

Article 414: Solicitation of Delinquency

(2) Whoever publicly advocates or defends one or more crimes shall also be subject to the punishment described in subparagraph (1).

Article 414 of the Italian law prohibits publication of words of support for, or defense of, the perpetration of a criminal act, the punishment for which is imprisonment for up to five years.

4. GREECE

Article 185

Whoever publicly and by any means praises a committed felony and thereby exposes the public order to danger shall be punished by imprisonment for not more than three years.

Similar prohibitions are found in Norwegian (Article 140) and Turkish (Article 312) law.

Appendix II

DRAFT LEGISLATION PROPOSAL

Article 144(f): Public Incitement

A. Whoever does one of the following shall be liable to imprisonment for five years (up to five years and not less than one year):

(1) Publishes a call, explicit or implicit, to commit an act of felony or violence;

(2) Publishes anything that involves the exploitation of superiority or authority or special influence to commit an act of felony or violence;

(3) Publishes anything that is likely, under the circumstances, to bring about the perpetration of a felony or an act of violence [persuasion or encouragement to commit a felony or act of violence] with the aim that such an offense will be committed [leading a person to decide to commit such an offense].However, the penalty will not exceed the penalty set forth in the law for the felony or act of violence itself.

B. If an offense is committed following the call or publication, the publisher will receive the penalty set forth in the law for the offense.

Article 144(g): Indirect Public Incitement

Whoever publishes words of praise for, identification with, or support for a felony committed against a person, for which the statutory penalty is at least seven years' imprisonment, shall be liable to imprisonment for a term of two years.

Article 144(h): Permitted Publication

A. The publication of a correct and fair report of an act of public incitement as defined in articles 144(f) or 144(g) will not be regarded as an offense under these articles, provided that nothing in the publication identifies with the act.

B. The publication of criticism acceptable in a democratic regime regarding the current legal status quo, to which articles 144(f) or 144(g) formally apply, shall not be regarded as an offense under these articles.

Article 144(i): Submission of Indictment

An indictment under this Chapter shall not be submitted without the written consent of the Attorney General.

Article 144(j): Forfeiture

A prohibited publication under this Chapter and the implements or tools used in its preparation shall be forfeited.

Article 144(k): Transitional Provisions

Provisions under this Chapter shall remain in force until…

Article 144(l): Definition

For the purposes of this Article:

Public: in a manner by which the communication is likely to be received by any person, or an unspecified or undefined group, including through the electronic or written media.

An act of violence: violence committed against a person's body or property.

Appendix III

THE EXISTING SEDITION LAW

Article 133: Seditious Acts

Whoever does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention is liable to imprisonment for five years.

Article 134: Seditious Publications

(a) Whoever publishes any words or points or publishes or reproduces any publication of a seditious nature is liable to imprisonment for five years and the publication shall be forfeited.

(b) Whoever imports any publication of a seditious nature is liable to imprisonment for five years and the publication shall be forfeited, unless he has no reason to believe that it is of a seditious nature.

(c) Whoever with no legal justification has in his possession a publication of a seditious nature is liable to imprisonment for one year and the publication shall be forfeited.

Article 135: Conditions as to Prosecution and Conviction

(a) No prosecution for an offense under Article 133 or 134 shall be begun except within six months after the offense is committed, and no person shall be prosecuted for an offense as aforesaid without the written consent of the Attorney General.

(b) No person shall be convicted of an offense under Article 133 or 134 on the uncorroborated testimony of one witness.

Article 136: Sedition Defined

For the purposes of this article, 'sedition' means:

(1) to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities; or

(2) to incite or excite inhabitants of Israel to attempt to procure the alteration otherwise than by lawful means of any matter by law established; or

(3) to raise discontent or resentment amongst inhabitants of Israel; or

(4) to promote feelings of ill will and enmity between different parts of the population.

Article 137: Plea of Truth Not a Defense

It shall be no defense to a charge under Article 133 or 134 that the words alleged to be seditious are true.

Article 138: Lawful Criticism and Propaganda

An act, speech or publication is not seditious if it intends only:

(1) to prove that the Government has been misled or mistaken in any of its measures; or

(2) to point out errors and defects in the laws or organization of the State or in one of its duly constituted institutions or in its administrative or judicial system with a view to remedying such errors or defects; or

(3) to persuade the citizens or inhabitants of the State to attempt to procure by lawful means the alteration of any matter by law established; or

(4) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill will and hostility between different parts of the population.

ABBREVIATIONS

BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Supreme Court in Penal Law)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Constitutional Court)
Col. L. Rev.	Columbia Law Review
EuGRZ	Europaeische Zeitschrift fuer Grundrechte (European Journal for Basic Rights)
GA	Goltdammer Archiv fuer Strafrecht (Goltdammer's Archive of Criminal Law)
Harv. Int. L. J.	Harvard International Law Journal
JoeR	Jahrbuch des Oeffentlichen Rechts (Public Law Yearbook)
JZ	Juristenzeitung (The Jurists' Newspaper)
MDR	Monatsschrift fuer Deutsches Recht (German Law Monthly)
NJW	Neue Juristische Wochenschrift (New Legal Weekly)
StV	Strafverteidiger (Defense Attorney)
U.S.	United States Supreme Court Reports
ZRP	Zeitschrift fuer Rechtspolitik (Legal Policy Journal)
ZSt	Zeitschrift fuer die gesamte Strafrechtswissenschaft (Journal of Criminal Law)

NOTES

1. Given that specific prohibitions of public incitement are found primarily in continental European law, the research will focus on the continental countries. This approach is well substantiated in the footnotes.
2. *State of Israel v. Kahana*, P.D. of the Jerusalem District Court, issued on 24 September 1996 (not yet published), at 9.
3. See *Kahana v. Managing Committee of the Broadcasting Authority*, 41 P.D. (1987) 313; *Elba* v. *State of Israel*, 50 P.D. (1996) 221, 250; *Kahana*, *supra* note 2, at 13-14; "Explanatory Note to the Draft Proposal," *Hatzaot Khok* (Draft Proposals), no. 1728, of 17 April 1985, at 195-196.
4. See Sections 144(a)-(e) of the Penal Code.
5. See Section 4 of the Defamation Act.
6. See *Elba*, *supra* note 3, at10; *Kahana*, *supra* note 2, at 8.
7. See Feller, *Elements of Criminal Law*, vol. I, paras 54-59 [Hebrew] (Jerusalem 1984).
8. See Section 138 (2).
9. See Section 138 (4).
10. See Karp, "Criminal Law—Janus of Human Rights: Constitutionalization and Basic Law: Human Dignity and Liberty," [Hebrew] 42 *Hapraklit* 64, 67-79 (1995); Jescheck and Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil 2-3,* 5th ed., (Berlin, 1996); Roxin, "Sinn und Zweck der Strafe," *Strafrechtliche Grundlagenprobleme* 12-16 (Berlin, 1973).
11. Regarding the view that the criminal-law prohibition constitutes a violation of individual rights, see Kissel, *Aufrufe zum Ungehorsam und* §111 57-63 and *passim* (Berlin, 1996).

12. See Feller, *supra* note 7, paras. 6-19; Levy and Lederman, *Principles of Criminal Responsibility* 60, 62-87 [Hebrew] (Tel Aviv, 1981); Bein, "The Basic Law and the Specific Offenses," 13 *Bar-Ilan Law Studies* 251,256 [Hebrew] (Tel Aviv, 1996); Jescheck and Weigend, *supra* note 10, at 128-133; Roxin, *Strafrecht, Allgemeiner Teil, Band 1*, 2nd ed., 91-125 (Munich, 1994). In cases in which a mistake in understanding the essence of the prohibition was reasonably unavoidable, criminal liability will not be imposed. When these kinds of mistakes are almost inevitable due to the poor wording of the definition, it may well neutralize the prohibition.

13. See, for example, *Anbatoi* v. *State of Israel*, 91(3) *Takdin Elyon* 2396 (1991).

14. For differing opinions on the topic, see Kahana, *supra* note 2, at 7-19; Kedmi, *On Criminal Law,* vol. 3, 1119-1121 [Hebrew] (Tel Aviv 1995). See also the judgment of the Jerusalem Magistrates' Court in *State of Israel* v. *Blachsan*, p. 23, issued on 1 September 1996 (not yet published).

15. See Barak, "The Constitutionalization of Israeli Law. The Basic Law on Human Rights and Criminal Law," 13 *Bar-Ilan Law Studies* 5, 17-18 [Hebrew] (Tel Aviv, 1996); Bein, *supra* note 12, at 256; Karp, *supra* note 10, at 84-86, 98-100; Garibaldi, "General Limitations on Human Rights: The Principle of Legality," 17 *Harv. Int. L. J.* 503 (1976). See also Article 103(2) of the Basic Law of Germany; Pieroth and Schlink, *Grundrechte, Staatsrecht II*, 12th ed., para. 1171 (Heidelberg 1996). Regarding the principles of legality and clarity generally, and the constitutionality of the principles, see Troendle, *Strafgesetzbuch und Nebengesetze,* 48th ed., §1, (Munich 1997); Eser, in Schoenke and Schroeder, *Strafgesetzbuch–Kommentar,* 25th ed., §1 (Munich 1997); Krey, "Parallelitaeten und Divergenzen zwischen strafrechtlichem und oeffentlichrechtlichem Gesetzesvorbehalt," *Festschrift fuer Blau*

123 (Berlin, 1985); Sax, "Grundsaetze der Strafrechtspflege," in Bettermann, Nipperdey and Scheuner, *Die Grundrechte, 3. Band, 2. Halbband* 909, 998-999 (Berlin, 1959); Gruenwald, "Bedeutung und Begruendung des Satzes *nulla poena sine lege*," 76 *ZStW* 1 (1964); 25 *BVerfGE* 269; *BVerfG*, *NJW* 1671 (1986); *BVerfG*, *NJW* 44 (1987).

16. See *Shlenger* v. *Attorney General*, 48 P.D. 40 (1994); *Haetzni et al.* v. *State of Israel*, 42 P.D. 406 (1988). See also Zamir, "Freedom of Speech vs. Defamation and Verbal Violence," *Essays in Honor of Justice Sussman* 155-156 [Hebrew] (Jerusalem, 1984).

17. Regarding the guidelines for the Attorney General, see Segal, *Freedom of the Press—Between Myth and Reality* 37-38 [Hebrew] (Tel Aviv, 1996); for the possibility of indicting for reporting on an act of public incitement in which there is no identification, see *Zichroni* v. *Managing Committee of the Broadcasting Authority,* 37 P.D. 757 (1983); Kahana, *supra* note 3; Segal, *op. cit.*, at 37-38. See also *Jersild* v. *Denmark*, ECHR (1994), Series A, No. 298 (1995), p. 19; *EHRR* 1; Hanack, in Jaehnke, Laufhuette and Odersky, eds., *StGB, Leipziger Kommentar—Grosskommentar ,* 11th ed., §140, paras. 24, 35-37 (Berlin, 1995); Cramer, in Schoenke and Schroeder, *Strafgesetzbuch—Kommentar,* 25th ed., §140, para. 5 (Munich, 1997); Rudolphi, "Notwendigkeit und Grenzen einer Vorverlagerung des Strafrechtsschutzes im Kampf gegen den Terrorismus," *ZRP* 214, 220 (1979).

18. See Gruenwald, "Billigung von Straftaten (140 *StGB*) - Der Prozess um das Buch *Wie alles Anfing* von Michael 'Bummi' Baumann," in Luederssen and Sack, eds., *Vom Nutzen und Nachteil der Sozialwissenschaften fuer das Strafrecht, Bd 2* 502-503 (Frankfurt, 1980).

19. Segal, *supra* note 17, at 35.

20. *Id.*, at 59, 187-193.

21. *Id.*, at 189.

22. See Denckner, "Das Gesetz zur Bekaempfung des Terrorismus," *StV* 117, 120 (1987); Kissel, *supra* note 11, at 57-63.

23. See Eser, in Schoenke and Schroeder, *supra* note 15, §1, paras 17-18 and *passim*; Gruenwald, *supra* note 15, at 13-16.

24. See Sections 146, 166, 289. We use the term "solicitation" in the neutral sense; that is, instigation when it is individual, and public incitement when it is public.

25. See Feller, *Elements of Criminal Law,* vol. 2, paras. 14, 356-357 [Hebrew] (Jerusalem, 1987).

26. See von Bubnoff, in Jaehnke, Laufhute and Odersky, eds., *StGB, Leipziger Kommentar—Grosskommentar,* 11th ed., §111, paras. 13-13(c) (Berlin, 1993).

27. See Feller, *supra* note 25, paras. 295, 367; Jescheck and Weigend, *supra* note 10, at 688; Roxin, in *Leipziger Kommentar zum StGB,* 11th ed., §26, paras. 55-57 (Berlin, 1993); Rogall, "Die verschiedenen Formen des Veranlassens fremder Straftaten," *GA* 12-14 (1979); Stratenwerth, *Schweizerisches Strafrecht, Besonderer Teil II,* 4th ed., 156-157 (Bern, 1995); Fabrizy, in *Wiener Kommentar zum Strafgesetzbuch* §12, para. 46 (Vienna, 1992); Koegler, "Die Angriffe gegen die oeffentliche Gewalt," *Materialien zur Strafrechtsreform—Rechtsvergleichende Arbeiten, Band 2* 67 (Bonn, 1955).

28. See Dreher, "Der Paragraph mit dem Januskopf," in *Festschrift fuer Gallas* 307, 321-323 (Berlin, 1973); Troendle, *supra* note 15, §26, para. 3; Jakobs, *Strafrecht Allgemeiner Teil,* 2nd ed., §22, para. 28 (Berlin, 1993); Williams, *Textbook of Criminal Law,* 2nd ed., 335, (London, 1983), on the offense of public incitement.

29. See Feller, *supra* note 25, para. 299; see also Jescheck and Weigend, *supra* note 10, at 655-656, 684-686; Maurach, Goessel and Zipf, *Strafrecht Allgemeiner Teil, 2 Tb,* 7th ed., §50. para 57, (Heidelberg, 1989).

30. However, see also Feller, *supra* note 25, para. 299; Trechsel, *Schweizerisches Strafgesetzbuch, Kurzkommentar* Art. 24, para. 3 (Zurich, 1992). Both are of the opinion that in addition to this social value there is another social value, namely, the public interest that every individual should refrain from commission of the offense and be protected from influences that are liable to lead him to the world of crime. In other words, the reason for the prohibition of the act of instigation is also expressed in the prohibition of leading another person to the commission of offenses (*Schuldteilnahmetheorie*). This opinion is relevant to the question of whether the offense, which is the objective of the instigation, must also be indictable. The question is not of concern here, and for our purposes it is only important to establish that the sole or dominant social value protected by the criminalization of instigation is the same social value protected by prohibition of the potential instigated offense.

31. See Dreher, *supra* note 28, at 312 -313; Rogall, *supra* note 27, at 12-14, 16-17.

32. See below regarding the retraction exception.

33. See Schroeder, *Die Straftaten gegen das Strafrecht* 11, 13-14 (Berlin, 1985); Maurach, Schroeder and Maiwald, *Strafrecht Besonderer Teil, Teilband 2,* 7th ed., §93 para. 1 (Heidelberg, 1991); see also Plate, "Zur Strafbarkeit des Agent Provocateur," 84 *ZStW* 303 (1972).

34. See von Bubnoff, *supra* note 26, §111, para. 5; Samson, "Die oeffentliche Aufforderung zur Fahnenflucht an Natosoldaten," *JZ* 259 (1969); Rogal, *supra* note 27, at 18; Trechsel, *supra* note 30, Art. 259, para. 1; Steininger, in Foregger and

Nowakowski, eds., *Wiener Kommentar zum Strafgesetzbuch*, 33rd installment, preface to §274ff., paras. 1-8, §282, paras. 1-2 (Vienna, 1988); Leukauf and Steininger, *Kommentar zum Strafgesetzbuch*, preface to 2nd ed., §274ff., para. 1, (Eisenstadt, 1979); Stratenwerth, *supra* note 27, at 151; *Entwurf eines Strafgesetzbuches* 464 *(StGB)*, E-1962 (with commentary). Compare with Fincke, *Das Verhaeltnis des Allgemeinen zum Besonderen Teil des Strafrechts* 76-81 (Berlin, 1975); see also Horn, *Systematischer Kommentar zum Strafgesetzbuch, Bd II*, 4th ed., 25th installment, §111, para. 1, 9(b), (Frankfurt, 1989): the social value potentially infringed is the social value infringed by the potential solicited offense. This approach is both non-dogmatic and inconsistent, for it converts the offense of public solicitation into a form of instigation. See also Kissel, *supra* note 11, at 144-145, 259-260.

35. See also Hanack, *supra* note 17, §140, para 10.

36. See Section 111 of the German Penal Law; Section 282 (1) of the Austrian Penal Code; Section 259 of the Swiss Penal Code; Section 131 of the Dutch Penal Code; Section 5 of Chapter 16 of the Swedish Penal Code; Section 140 of the Norwegian Penal Code; Section 184 of the Greek Penal Code; Section 414 of the Italian Penal Code; and Section 8 (1) of Chapter 16 of the Finnish Penal Code.

37. For an everyday definition of the term 'public incitement', see Kedmi, *supra* note 14.

38. See Kissel, *supra* note 11, at 150-153; Hanack, *supra* note 17, §111 paras. 8-9.

39. *Ethics of the Fathers*, 1:11.

40. Quote from the *Report of the Commission of Inquiry into the Assassination of Prime Minister Yitzhak Rabin* 89 (Jerusalem, 1996).

41. See the forms of instigation that appear in Section 30 of the Penal Code.

42. See the statement of the assassin of Prime Minister Rabin, in the *Report*, *supra* note 40, at 89: "If I hadn't had support and not had many other people behind me, I wouldn't have acted."

43. Regarding the constitutionality of the offense of public incitement and its compliance with freedom of expression and the probability test, see Chapter Seven.

44. See Section 111 of the German Penal Law, under which any criminal offense can be the objective of the public incitement.

45. See Jakobs, "Kriminalisierung im Vorfeld der Rechtsgutsverletzung," 97 *ZStW* 751 (1985).

46. See Kremnitzer "Criminal Attempt from a Comparative Perspective," 12 *Tel Aviv Uni. L. Rev.* 393, 400-401 [Hebrew] (1987); Eser, in Schoenke & Schroeder, *Strafgesetzbuch Kommentar,* 25th ed., §22, paras. 78-79, (Munich, 1997); Jescheck & Weigend, *supra* note 10, at 532-533.

47. See Section 34(g), which defines the exception of lack of control.

48. See Maurach, Schroeder and Maiwald, *supra* note 33, §93, para. 9.

49. See Dreher, *supra* note 28, at 313.

50. See von Bubnoff, *supra* note 26, §111, para 31.

51. See Section 281 of the Austrian Penal Code; Section 5 of Chapter 16 of the Swedish Penal Code; Section 183 of the Greek Penal Code; and Section 8 (2) of Chapter 16 of the Finnish Penal Code.

52. See Baumann & Frosch, "Der Enwurf des 3 Strafrechtsreformgesetzes," *JZ* 116 (1970); Karp, *supra* note 10, at 109.

53. See Section 116 of the German Administrative Offenses Law (*Ordnungswidrigkeitsgesetz*).

54. It is worth mentioning that cases of public incitement to non-compliance with laws, ordinances, or orders, also occur in circumstances of civil rebellion. Take, for example, the case of Arab public figures who called on the Arab minority not to pay taxes to the state in order to put pressure on the government and the minister of finance and to force them to allocate budgets to the Arab municipal authorities on the same basis as funds allocated to the Jewish municipal authorities. In these cases, the call for civil rebellion does not challenge the legitimacy of the authority against which they are rebelling. It represents an attempt by members of a minority to realize their rights as equal citizens with equal rights. See Marmur, "The Limits of Democracy: National Policy in the Aftermath of the Rabin Assassination," *Israeli Law Yearbook* 18 [Hebrew] (Tel Aviv, 1997).

55. See Section 140 of the German Penal Code, Section 282 (2) of the Austrian Penal Code and Section 414 of the Italian Penal Code.

56. Section 4 of the Prevention of Terrorism Ordinance:

    A person who:

    (a) publishes either in writing or orally, praise of, sympathy for, or encouragement of violent actions that may cause the death of a person or his bodily injury, or may cause threats of the commission of such violent acts against him, will be prosecuted and if found guilty will be liable to imprisonment of up to three years, or a fine of 1000 Israeli Lira, or both.

57. See also Section 414 of the Italian Penal Law, where the publication of support for, or defense of, a criminal offense that has been committed is deemed to constitute public incitement to commit a similar offense.

58. See *BGH*, *MDR* 509 (1979); *BGH*, *NJW* 58 (1978); 28 *BGHSt* 314; Cramer, *supra* note 17, §140, para. 1; Lackner, *Strafgesetzbuch,* 21st ed., §140, para. 1, (Munich, 1995); Rudolphi, in *Systematischer Kommentar zum Strafgesetzbuch, Bd II*, 5th ed., 32nd installment, §140, para. 2, (Frankfurt, 1994); Ebert, "Zum Bedeutungswandel der Billigung begangener Straftaten," *Festschrift fuer Spendel* 118 (Berlin, 1992). See also Elba, *supra* note 3, at 64.

59. Compare Jakobs, *supra* note 45, at 779.

60. See Hanack, *supra* note 17, §140, para. 1(a).

61. Compare 22 *BGHSt* 285; Hanack, *supra* note 17, §140, paras. 1-1(a); Rudolphi, "Notwendigkeit und Grenzen einer Vorverlagerung des Strafschutzes im Kampf gegen den Terrorismus," *ZRP* 219 (1979).

62. See Schroeder, *supra* note 33, at 7-8, 10-15.

63. See Jakobs, *supra* note 45.

64. See Hanack, *supra* note 17, §140, para. 4.

65. *Id.*, paras. 5, 7-8; Maurach, Schroeder and Maiwald, *supra* note 33, §93, para. 22.

66. See *supra* note 17.

67. See Hanack, *supra* note 17, §140, para. 14(a); Jescheck and Weigend, *supra* note 10, at 251-253. See also Feller, *supra* note 7, paras. 92-93; Feller, *supra* note 25, paras. 739-742. Feller notes that these cases fall within the *de minimis* exception.

68. See also Zamir, *supra* note 16, at 156.

69. See Section 1(a) of Basic Law: Human Dignity and Liberty: "This Basic Law is intended to protect human dignity and liberty…."

70. Regarding the phenomena of public incitement and violence that both preceded and followed the Rabin assassination, see

Ben-Simon, *A New Israel* 38-104 [Hebrew] (Tel Aviv, 1997); Kapeliuk, *Rabin: Ein Politischer Mord—Nationalismus und Rechte Gewalt in Israel* (Heidelberg 1997). The book also appeared in French under the title: *Rabin—un assassinat politique* (Paris: Le Monde Editions 1996).

71. See Denninger, in *Kommentar zum Grundgesetz fuer die Bundesrepublik Deutschland, Reihe Alternativkommentar,* preface to Art. 1, paras 12-13 (Neuwied 1984); see also Jaeger, "Strafgesetzgebung als Prozess," *Festschrift fuer Klug I* 83, 91-96 (Cologne, 1983).

72. Compare Amelung, *Rechtsgueterschutz und Schutz der Gesellschaft* 326-329 (Frankfurt, 1972); Hesse, *Grundzuege des Verfassungsrechts der Bundesrepublik Deutschland,* 8th ed., 29, (Stuttgart, 1975); von Muench, *Grundgesetz Kommentar, Band 1*, 2nd ed., preface to Arts. 1-9, para. 51, (Munich, 1981).

73. See *Kol Ha'Am* v. *Minister of the Interior*, 7 P. D. 876-879 (1953); Kahana, *supra* note 3, at 255; *State of Israel* v. *Ben-Moshe*, 22 P. D. 427 (1968); Lahav, "On the Freedom of Expression in the Rulings of the Supreme Court," 31 *Hapraklit* 378 [Hebrew] (1976-1977); Rubenstein and Medina, *The Constitutional Law of the State of Israel,* 5th ed., 999-1002. [Hebrew] Tel Aviv, 1996); Segal, *supra* note 17, at 15-19; *Ligens* v. *Austria*, *ECHR,* (1986), Serie A Nr. 103, *EuGRZ* 428 (1986); 8 *EHRR*, p. 406; Maunz, Duerig and Herzog, *Grundgesetzkommentar* Art. 5, paras. 3-5, 55(e) (Munich, 1993); Schmitt-Jorzig, *Handbuch des Staatsrechts,* Vol. VI §141 (Heidelberg, 1989); 7 *BVerfGE* 198; 42 *BVerfGE* 133; 50 *BVerfGE* 234.

74. See *Kol Ha'Am*, *supra* note 73, at 879; Rubenstein and Medina, *supra* note 73, at 1003; *Whitney* v. *California*, 47 *S. Ct. Rep.* 647 (1927); 7 *BVerfGE* 198.

75. See *Kol Ha'Am*, *supra* note 73, at 881; *Laor* v. *The Council for Film Censorship*, 41 P.D. 434 (1987).

76. *Dennis* v. *U.S.*, 341 U.S. 494 (1951).

77. See *Schenck* v. *U.S.*, 39 S.Ct. Rep. 247 (1919); *Abrams et al.* v. *U.S.*, 40 S.Ct. Rep. 17 (1919); *Whitney* v. *California*, *supra* note 74; *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); Mendelson, "Clear and Present Danger—from *Schenck* to *Dennis,*" 52 *Col. L. Rev.*330 (1952) 330, 391; Lahav, *supra* note 73, at 391-403.

78. The question of the desirability of the adoption of this test with respect to administrative decisions does not concern us here. For a discussion of this issue, see *Kol Ha'Am*, *supra* note 73, at 885-886; Kahana, *supra* note 2, at 23-30.

79. See Barak, "The Role of a Supreme Court in a Democracy," 41 *Ha'Praklit* 5, 14-15 [Hebrew] (1993); Rubinstein and Medina, *supra* note 73, at 1003-1010; Avner Barak, "The Probability Test in Israeli Constitutional Law," *Tel Aviv Uni. L. Rev*. 371 and *passim* [Hebrew] (1989).

80. See *Disentzik* v. *State of Israel*, 17 P.D. 169 (1963); *Azulai* v. *State of Israel*, 37 P.D. 565 (1983).

81. See *Chevra Kadisha GachShah 'Kehillat Yerushalaim'* v. *Kastenbaum*, 46 P.D. 464 (1992).

82. See *Kol Ha'Am*, *supra* note 73, at 882.

83. See *Omer International, Inc., New York* v. *Minister of the Interior*, 36 P.D. 227 (1982).

84. See Rubinstein and Medina, *supra* note 73, at 1021.

85. See *Disentzik*, *supra* note 80, at 177.

86. See Zamir, *supra* note 16, at 158.

87. See *Kol Ha'Am*, *supra* note 73, at 884. See also Avner Barak, *supra* note 79, who criticizes the imprecision and judicial blurring

of the distinction between the tests. Regarding the distinction between the 'probability test' and the 'clear and present danger' test, see *Dennis* and *Schenck*, as well as *Lahav*, *supra* note 73, at 420, according to whom "The difference between the 'clear and present danger' test and the 'near certainty' test is not great, and in fact it is preferable to regard them as different formulations of the same test."

88. See Elba, *supra* note 3.

89. Regarding the balancing of competing interests and the content of the limitations clause, see also Pieroth and Schlink, *supra* note 15, paras. 300-323, 341-365.

90. See *Kol Ha'Am*, *supra* note 73, at 884.

91. See *Schenck*, *supra* note 77, at 249; see also *Abrams*, *supra* note 77; *Whitney*, *supra* note 74.

92. The Court ruled in 33 *BVerfGE* 71 [German]: "On the other hand, the guarantee of artistic freedom is not without limitations. Its boundaries, however, may only be drawn from the Constitution itself, i.e., from the highest values entrenched in the Constitution. The very existence of the Federal Republic of Germany and of her free and democratic basic laws are threatened in the case of a film which is hostile to the Constitution and oversteps the boundaries of artistic freedom. The guarantee of artistic freedom may be revoked if the effect of such a film on the average viewer presents an unavoidable and actual danger to the existence of the Federal Republic of Germany and its basic democratic laws."

93. See Hailbronner, "Der 'clear and present danger test' und verfassungsfeindliche Betaetigung in der neueren Rechtsprechung des Supreme Court der Vereinigten Staaten," 22 *JOeR* 579, 581. With respect to the restriction of artistic freedom in German Law, see Pieroth and Schlink, *supra* note 15, paras. 690-693.

94. See *Kol Ha'Am*, *supra* note 73, at 890-891: The test of 'near certainty' does not require that the danger to the public is liable to occur a short time after the publishing of the words in the particular paper. The determination of 'near certainty' in the sense of 'probability' does not necessarily mean the determination of immediacy in terms of time, or 'proximity'.

95. See *Brandenburg*, *supra* note 77, at 447.

96. See *Kol Ha'Am*, *supra* note 73.

97. Lahav, *supra* note 73, at 394.

98. See *Disentzik*, *supra* note 80, at 181.

99. See *Zichroni*, *supra* note 17, at 780-782.

100. See Zamir, *supra* note 16, at 158.

101. See Segal, *supra* note 17, at 36-37.

102. See Zamir, *supra* note 16, at 158.

103. *Attorney General* v. *Rider et al*., judgment of the Jerusalem District Court, 5 *Psakim* 411 (1952).

104. Criminal *mens rea* in German law is narrower than its parallel in Israeli law. See Kremnitzer, "On Various Characteristics of German Criminal Law," in *Essays in Honor of Shimon Agranat* 341-347 [Hebrew] (Jerusalem, 1987).

Position Papers
of the
Israel Democracy Institute

In English

1E. ***Religious and Secular Jews in Israel: A Kulturkampf?***
by Aviezer Ravitzky. 33pp

2E. ***State, Law, and Halakha: Part One—Civil Leadership as Halakhic Authority***
by Yedidia Z. Stern. 79pp

3E. ***Incitement, Not Sedition***
by Mordechai Kremnitzer and Khalid Ghanayim. 93pp

In Hebrew

1. ***Reform in Public Broadcasting***
by Yaron Ezrahi, Omri Ben-Shachar and Rachel Lael. 35pp

2. ***Output-Driven Management and Budgeting Principles in the Public Sector***
by David Nachmias and Alona Nuri. 53pp

3. ***The General Security Services Bill: A Comparative Study***
by Ariel Zimmerman, supervised by Mordechai Kremnitzer. 45pp

4. ***Religious and Secular Jews in Israel: A Kulturkampf?***
by Aviezer Ravitzky. 28pp

5. ***Structural Reform in Israel's Public Sector***
by David Nachmias, Merle Danon-Kremzin and Alon Yironi. 57pp

6. ***Accountability: The Attorney General***
by David Nachmias and Gad Barzilai. 56pp

7. ***Incitement, Not Sedition***
by Mordechai Kremnitzer and Khalid Ghanayim. 93pp

8. ***Accountability: The Bank of Israel***
by David Nachmias and Gad Barzilai. 46pp

9. ***The Integration of Peripheral Groups into Society and Politics in the Peace Era: The Ultra-Orthodox in Israel***
by Gad Barzilai and Michael Keren. 45pp

10. ***Accountability: The Comptroller General***
by David Nachmias and Gad Barzilai. 68pp

11. ***Freedom of Occupation: When Should the Government Regulate Entry into Professions?***
by Mordechai Kremnitzer, Omri Ben-Shachar and Shachar Goldman. 61pp

12. ***The 1996 Primaries: Political Conclusions***
by Gideon Rahat and Neta Sher-Hadar. 33pp

13. ***The Jewish-Arab Rift in Israel: Characteristics and Challenges***
by Issam Abu-Ria and Ruth Gavison. 74pp

14. ***The First Hundred Days: Suggestions for Reform***
by an IDI team headed by David Nachmias. 68pp

15. ***The Proposed Reform of the Court System***
by Shachar Goldman, supervised by Ruth Gavison and Mordechai Kremnitzer. 106pp

16. ***The (Emergency) Defense Regulations, 1945***
by Michal Tzur, supervised by Mordechai Kremnitzer. 108pp

17. ***The Economic Arrangements Bill: Between Economics and Politics***
by David Nachmias and Eran Klein. 102pp

18. ***Rabbincal Rulings on Policy Questions***
by Yedidia Z. Stern. 44pp

19. ***The State Rabbinate: Appointment, Tasks and Freedom of Expression***
by Yossi David and Eyal Yinon. 91pp

20. ***Referendum: Myth and Reality***
by Dana Blander and Gideon Rahat. 92pp

21. ***The Socioeconomic Rift in Israel***
by Iris Gerby and Gal Levi, supervised by Ruth Gavison. 116pp

22. State, Law, and Halakha: Part One—Civil Leadership as Halakhic Authority
by Yedidia Z. Stern. 70pp

23. Government Transitions
by Asher Arian, David Nachmias and Doron Navot. 110pp

24. Affirmative Action in Israel
by Hilly Moodrik Even-Khen, supervised by Mordechai Kremnizter and David Nachmias. 94pp

25. Multi-Channel Television in Israel: The Public Aspect
by Yaron Ezrahi, Zohar Goshen and Hanny Comaneshter. 50pp

26. Patterns of Civic Involvement
by Dana Blander and Efrat Waxman. 128pp

These position papers may be purchased from the Israel Democracy Institute

P.O. Box 4482, Jerusalem 91040, Tel: (972) 2-539-2888
or 1-800-20-2222; Fax: (972) 2-563-1122

They may also be ordered online at our web site: www.idi.org.il