DISCRIMINATING SPEECH: THE *HETEROPHILIA* OF THE FREEDOM OF SPEECH DOCTRINE

ZVI TRIGER*

In this Article, I seek to shed light on freedom of speech jurisprudence as it is reflected in the Snyder v. Phelps *and* Skokie *cases, as well as in two analogous Israeli cases, namely petitions of members of the extreme right against the pride parades in Jerusalem, as well as petitions by the same petitioners for police permits to hold anti-Arab processions in the Arab town of Umm al-Fahm.*

Comparing the cases, I identify the moral relativity built into the interpretation of freedom of expression doctrine in both countries. I introduce the concept of discriminating speech, which is speech that is designed to promote and enforce discrimination of vulnerable minorities, and therefore should be treated as an act and not as speech. I argue that both in the Snyder and the Jerusalem Pride cases the courts fail to notice this distinction between speech and act because of the courts' entrenched heterophilia.

Unlike homophobia, which is easier to notice and to combat, heterophilia is hidden from plain sight. It is benign in that it does not fight any person, group or community, but rather privileges and idealizes a certain ideology, namely heterosexual ideology. Although heterophilia is not violent, and may well be accepting of LGBTs, its consequences are still discriminatory, and it can account for what seem to be sympathetic courts that end up handing down anti-gay decisions. Heterophilia, the Article concludes, is not the only philia that informs freedom of speech jurisprudence. While rejecting racism, both the American and Israeli courts have protected racist discriminating speech. Like heterophilia in the case of anti-gay hate speech, race-based philia can explain how non-racist courts can rule in a way that de facto endorses racist deeds as speech valuable to democracy.

*Assistant Professor of Law, Haim Striks School of Law at the College of Management-Academic Studies. I am grateful to the Research Fund of the College of Management-Academic Studies as well as to the Research Fund of the Haim Striks School of Law for supporting this study through research grants I received in 2008-2009 and in 2011. Thanks to Liron Shilo and Oded Yosef for their research assistance. Thanks to Gilad Barnea, Raphael Cohen-Almagor, Aeyal Gross, Pnina Lahav, Menachem Mautner, Marc Spindelman, Dori Spivak, Dan Yakir, and Noam Zamir for their comments on an earlier version of this article. Thanks to Michal Tzuk-Shafir, who provided me with the responses of the State to the petitions discussed in this Article. Parts III-VI of this Article were translated from Hebrew by Batya Stein in collaboration with the Author.

INTRODUCTION

Literature on the freedom of expression in both American and Israeli constitutional law is extensive and deals, *inter alia*, with dilemmas related to the protection of offensive and anti-democratic expressions as well as with expressions offensive to feelings.[1] This Article will offer an examination of these and other interfacing questions from the narrow perspective of the connection between speech, act, and the minority-majority relationship. I will do so using two concepts which have not yet been explored in legal scholarship, namely heterophilia and discriminating speech.

The term "heterophilia" is used to mean the unconscious preference of the heterosexual sexual ideology. Heterophilia is to be distinguished from homophobia since it does not seek to discriminate against or persecute lesbians, gays, bisexuals, or transgendered individuals ("LGBT"). It is simply the idealization of heterosexuality. To be sure, heterophilia does have discriminatory consequences and the lack of bad intentions does not absolve it from them. This concept is explored in Part I of this Article.

In Part II, the Article introduces the concept of discriminating speech. Failing to correctly draw the line between speech and act, courts again and again protect various forms of hate speech that constitute sheer violence, and for purposes of this Article, it is hereinafter referred to as "discriminating speech."

Homophobic and racist demonstrations are not about the free market of ideas, nor are they about sustaining a democratic dialogue between opposing parties. These forms of speech both express and actively promote and exercise commitment to discrimination, and in some extreme cases, to violence. These forms of speech are discriminating inside and out, both in content and in execution, because in many cases they are violent and designed to offend and even terrorize their target minorities. This Article argues that courts commonly fail to distinguish discriminating speech from other forms of speech because of law's heterophilia.

After the introduction of the concepts of heterophilia and discriminating speech, this Article demonstrates the claim about law's inherent heterophilia both by using a comparative approach and looking at freedom of speech doctrine in two arenas: the American and the Israeli legal systems. Looking at cases that deal with anti-gay, anti-Muslim, and anti-Semitic demonstrations, this Article teases out the interesting connections between these prejudices and ties them to law's heterophilia.

[1] For a general historical review of the place of freedom of expression in Israeli constitutional law, *see generally* Pnina Lahav, *The First Amendment at Home and Abroad*, 9 COMM. LAW. 5 (1991); Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 23 (1981) [hereinafter Lahav, *American Influence*]; Pnina Lahav, *Freedom of Expression in the Decisions of the Supreme Court*, 7 MISHPATIM 375 (1977) (Hebrew); DAPHNE BARAK EREZ, MILESTONE JUDGMENTS OF THE ISRAELI SUPREME COURT 65-72 (2003) (Hebrew); RAPHAEL COHEN-ALMAGOR, THE DEMOCRATIC CATCH: FREEDOM OF EXPRESSION AND ITS LIMITS 176-242 (2007) (Hebrew).

Part III of this Article analyzes the petitions that were submitted against the Jerusalem gay pride parades in the years 2006 to 2008 as well as the surrounding events. It also explores the reasons for lack of such petitions in the preceding years. Part IV deals with the petition of the extreme right to rally in Umm al-Fahm, a predominantly Arab city in the north of Israel. Part V tries to make sense of the extreme right's inconsistent stance on freedom of speech: how can they petition against the freedom of speech of LGBT individuals in Jerusalem while at the same time file petitions against restrictions on their own anti-Muslim procession in an Arab town?

Part VI provides a comparative analysis of the Israeli cases discussed earlier and two analogous American cases: *Snyder v. Phelps*[2] and *Skokie*.[3] This Article offers a new perspective on three aspects of the petitions: the hurt feelings and intentional infliction of emotional distress claims, the cleanness of hands doctrine, and the utilization of the courts by racists and by homophobes to promote their anti-democratic political and ideological goals. This Article concludes by tying the above-mentioned comparative analysis to the concepts of heterophilia and discriminating speech introduced at the beginning of this paper.

I. LAW'S HETEROPHILIA

Much has been written about law's homophobia, past and present. Various forms of discrimination against LGBT individuals have been labeled "homophobic" and in most cases, justly so. But law sports an additional, more insidious trait—namely, heterophilia.

Homophobia is relatively easy to detect; it is an outright form of prejudice, which results in actual forms of discrimination against and persecution of LGBT individuals. Criminalization of certain sexual acts is among the most prevalent practice of legal homophobia.[4] Kendall Thomas argues that "homosexual sodomy statutes work to legitimize homophobic violence and thus violate the right to be free from state-legitimated violence at the hands of private and public actors."[5] Another form of legally sanctioned homophobia was the McCarran-Walter Act of 1952, which excluded LGBT individuals from immigrating to the United States.[6]

Homophobia, then, works "against" gays. But what are we to make of legal norms that do not work directly "against" gays, but "for" heterosexuals? This Article argues that such norms do not consciously discriminate against LGBT

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[2] Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[3] Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

[4] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (upholding the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adult men).

[5] Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992).

[6] *See, e.g.*, MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 20-21 (2009); WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003, 156-157 (2008).

individuals, but do privilege heterosexuals. The underlying result is discrimination. These norms are not homophobic in the sense that unlike sodomy laws, they were not designed with the specific aim of persecuting sexual minorities.

This Article borrows the term "heterophilia" from psychoanalyst David Schwartz, who argued that in addition to homophobia—a well-explored prejudice which is rooted in devaluation[7]—there can be another form of prejudice against LGBT individuals which is rooted in "philia," namely in the idealization of heterosexuality.[8] Heterophilia, argues Schwartz, is an "unarticulated belief in a particular sexual ideology," rather than an objection to an alternative sexual ideology.[9] By the absence of phobia, and in many cases by actual acceptance of LGBT individuals in several respects, heterophiles "immunize their ideological commitments against articulation and scrutiny."[10]

Heterophilia may manifest itself in many ways: from the psychoanalytical treatment of same-sex activity as "an attempt to repair [one's] fragmenting sense of self"[11] to the social demand—and resulting need—to assimilate.[12] One can see it as a new generation of homophobia, more politically correct perhaps, in which the goal of eradication has been substituted by the goal of assimilation. The need to cover, which almost every LGBT individual has experienced and which has been so shrewdly identified by Kenji Yoshino,[13] is a typical product of social and legal heterophilia that seeks to encourage such assimilation. Because of its benign nature, legal heterophilia, as opposed to legal homophobia, is much harder to detect, and therefore it is much harder to fight.

How can we distinguish law's homophobia from law's heterophilia? To be sure, it is not easy to draw the line between homophobia and heterophilia, and many heterophile actions can be interpreted as unconsciously homophobic. However, generally speaking, laws that privilege predominantly heterosexual institutions, such as marriage, are heterophile in nature, while laws that restrict LGBT individuals, discriminate against them, or punish them as such, would be labeled as homophobic. Thus, laws privileging married couples and awarding them forms of protection that unmarried couples cannot receive[14] are heterophilic as

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[7] *See, e.g.*, BYRNE FONE, HOMOPHOBIA: A HISTORY 5-7 (2000).

[8] David Schwartz, *Heterophilia – The Love That Dare Not Speak Its Aim: Commentary on Trop and Stolorow's "Defense Analysis in Self Psychology: A Developmental View,"* 3 PSYCHOANALYTIC DIALOGUES 643, 647 (1993).

[9] *Id*. at 643.

[10] *Id*.

[11] Jeffrey L. Trop & Robert D. Stolorow, *Defense Analysis in Self Psychology: A Developmental View*, 2 PSYCHOANALYTIC DIALOGUES 427, 433 (1992).

[12] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771-782 (2002).

[13] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 18-19 (2006).

[14] *See, e.g.*, Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES IN L. 127, 136-46 (2012) (discussing legal preference of married couples over cohabitants); CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010); Marc Spindelman, *State v. Carswell: The Whipsaws of Backlash*, 24 WASH. U. J.L. & POL'Y 165 (2007) (discussing the Ohio "Marriage Amendment," which abolished the protections

long as LGBT individuals cannot get married, and probably as long as they do not extend those privileges to all couples, married and unmarried. While not using the term "heterophilia" or its derivatives, Janet Halley has exposed some of the most heterophilic strands of the institution of marriage.[15] Marriage law, however, is not only heterophilic; it also has homophobic qualities, as many scholars have rightly observed.[16] Laws that exclude LGBT individuals from the institution of marriage altogether, such as the Defense of Marriage Act ("DOMA"), are homophobic.[17]

The First Amendment and its Israeli counterpart—the freedom of speech doctrine—do not exclude LGBT individuals from their protection. All are entitled to freedom of speech within the extremely narrow and limited restrictions set out by the law. However, as this Article seeks to demonstrate, court decisions that protect homophobic discriminating speech because of uncompromising commitment to freedom of speech do so out of heterophilia. Part II of this Article introduces the concept of "discriminating speech" and ties it to the long tradition of scholars who have sought to flesh out an important exception to the freedom of speech which excludes hate speech from its protection.

II. WHY "DISCRIMINATING SPEECH"?

A great deal has been written about the connection between speech and act in various disciplines, but most prominently in linguistics and law. Citing Wittgenstein, who argued that "words are deeds,"[18] Robert Post argued that "[a]ll speech, of course, is simultaneously communication and social action[.]"[19] Richard Delgado and Mari Matsuda have written that words wound.[20] Catharine MacKinnon has argued that certain forms of expression, such as pornography, sexual and racial harassment, and racial hate speech, are not "only words."[21]

awarded to unmarried victims of domestic violence).

15 Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 44-57 (2010).

16 Many critics of the same-sex marriage movement have pointed out some of the disciplinary and normalizing effects that marriage as an institution can have on LGBTs, thereby seeking to alter LGBTs identities. *See, e.g.*, Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97 (Robert Wintemute & Mads Andenaes eds., 2001); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE 96 (1999).

17 *See generally*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing that the definition of marriage for federal purposes as exclusively heterosexual is unconstitutional).

18 LUDWIG WITTGENSTEIN, CULTURE AND VALUE 46 (G. H. Von Wright ed., Peter Winch trans., University of Chicago Press 1984).

19 Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L. REV. 631, 640 (1990).

20 MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 23 (Mari J. Matsuda et al. eds., 1993).

21 CATHARINE A. MACKINNON, ONLY WORDS 40 (1994).

Instead, they are acts of abuse, discrimination, domination, and terror.[22] Indeed, the law has recognized that. Verbal sexual harassment is sexual harassment and not speech protected by the First Amendment.[23] Similarly, ads for racially segregated housing are prohibited as "acts of segregation."[24] One group's or one person's speech might have devastating effects on the actual lives of vulnerable minorities and in fact, sometimes this is the sole purpose of the speech in cases of hate speech. The speakers or demonstrators are less interested in the "free market of ideas" than they are in the intimidation of members of the minority they speak against.[25] These types of speech are in fact, as Raphael Cohen-Almagor argued, "morally on a par with physical harm."[26] Concerning such hate speech, Jeremy Waldron has argued that "the look of a society is one of its primary ways of conveying assurances to its members about how they are likely to be treated, for example, by the hundreds or thousands of strangers they encounter."[27]

J. L. Austin, British philosopher of language, argued that there are certain utterances that if made in appropriate circumstances are not mere statements, but rather performances of a certain kind of action.[28] For example, people may enter into binding contracts or alter existing contracts by spoken communication only. These oral communications, whether they are the offer, the acceptance, or both, are not just speech, but they are legally binding acts.[29] Perhaps one of the most famous and common speech acts are the words "I do" as well as the words that the officiator of a wedding ceremony utters. They are not mere expressions in that they create a legally binding bond of marriage.

Building on Austin's speech act theory, Judith Butler has written extensively on the murky line between speech and act.[30] Butler, however, saw hate speech not only as wounding, but also as having the potential to promote political change: "[t]he word that wounds becomes an instrument of resistance in the redeployment that destroys the prior territory of its operation."[31] Still, whether injurious or empowering, Butler's notion is consistent with those who argue that some forms of speech are not mere speech.

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22 *Id*. at 52.

23 *Id*. at 45-46.

24 *Id*. at 33.

25 *See infra* text accompanying note 209.

26 RAPHAEL COHEN-ALMAGOR, SPEECH, MEDIA, AND ETHICS: THE LIMITS OF FREE EXPRESSION 16-22 (2005).

27 JEREMY WALDRON, THE HARM IN HATE SPEECH 82 (2012).

28 J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-5 (2nd ed. 1975).

29 *See, e.g.*, Texaco v. Pennzoil, 626 F. Supp. 250 (S.D.N.Y. 1986), *rev'd in part on other grounds*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) (concluding that oral contracts can be valid and enforceable).

30 *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (1st ed. 1990).

31 JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 163 (1997).

Both the American public and legal scholars have perceived the United States Supreme Court as consistently and broadly protecting freedom of speech[32] and thus rejecting the notion of speech acts in a series of what *New York Times* writer Adam Liptak has called "muscular First Amendment Rulings."[33] While not referring to the speech at question in these terms, the Court has refused to accept the contentions that some forms of speech are more than speech and therefore do not deserve First Amendment protection. Examples of such include the cases of state laws criminalizing the distribution of violent video games to minors under the age of 18 without parental consent[34] or depictions of cruelty to animals.[35] In a case concerning picketing at military funerals, the Court reaffirmed its approach to freedom of speech and its rejection of the Austinian notion of speech acts.[36]

These decisions have been widely celebrated by many commentators.[37] Others have criticized the Court's answers to the serious dilemmas raised in these and other First Amendment cases as "the usual facile and self-congratulating."[38] The only justice who was willing to accept the notion of speech as a form of action was Justice Alito in his dissents in the *Stevens* and *Snyder* cases, acknowledging the violent nature that speech may sometimes have. In the *Snyder* case, for example, Justice Alito described the slogans uttered during the funeral picketing as a "vicious verbal assault" and "fighting words."[39]

However, as Erwin Chemerinsky has recently shown, the Court's image as an unequivocal defender of freedom of speech is somewhat inaccurate.[40] Another study has also confirmed that the Roberts Court has taken less First Amendment cases than previous Courts and has ruled in favor of free speech in fewer cases.[41] The Supreme Court's complex approach to freedom of speech cases is not surprising. For purposes of this Article, this approach is considered "discriminating speech" for it is inconsistent in awarding protection to various

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[32] *See, e.g.*, Adam Liptak, *Hate Speech or Free Speech? What Much of West Bans is Protected in U.S.*, N.Y. TIMES (June 11, 2008), *available at* http://www.nytimes.com/2008/06/11/world/americas/11iht-hate.4.13645369.html.

[33] Adam Liptak, *Justices Rule for Protesters at Military Funerals*, N.Y. TIMES, Mar. 3, 2011, at A1.

[34] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (striking down a California law for infringement of First Amendment right to free speech).

[35] United States v. Stevens, 130 S. Ct. 1577 (2010) (ruling that 18 U.S.C. § 48 was an unconstitutional infringement of the First Amendment right to freedom of speech).

[36] Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[37] *See, e.g.*, Editorial, *Lamentable Speech*, N.Y. TIMES, Oct. 7, 2010, at A38; Editorial, *Even Hurtful Speech*, N.Y. TIMES, Mar. 3, 2011, at A26.

[38] Stanley Fish, *Hate Speech and Stolen Valor*, N.Y. TIMES (July 2, 2012), http://opinionator.blogs.nytimes.com/2012/07/02/hate-speech-and-stolen-valor/?smid=pl-share.

[39] *Snyder*, 131 S. Ct. at 1222, 1227.

[40] Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011).

[41] Monica Youn, *The Roberts Court's Free Speech Double Standard,* AM. CONST. SOC'Y BLOG (Nov. 29, 2011), http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard. *See also* Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25.

forms of speech and it oftentimes tends to protect speech acts that paradoxically negate freedom of speech or other constitutional rights of others. Thus, this approach discriminates between various forms of speech in its inconsistent protection, and it quite often chooses to protect those who seek to discriminate against certain groups.

This approach is not unique. Other nations' highest courts have taken the same approach as well. Hearing anti-gay and anti-Muslim cases for example, the Israeli Supreme Court, significantly inspired by American First Amendment jurisprudence,[42] has protected discriminating speech and treated it in much the same way as the American Court. The following Parts demonstrate this observation by providing examples and include a comparative analysis of how discriminating speech plays out in both the American and Israeli heterophile constitutional jurisprudence.

III. JERUSALEM: THE PARADE OF GAY PRIDE AND TOLERANCE

The tradition of gay pride parades, as they are known today, began after the New York police raided the Christopher Street Stonewall Inn on the night of June 26, 1969. The police arrested the gay patrons who were at the bar, resulting in a popular revolt in the neighborhood. A year later, in June 1970, the first gay pride parade was held to mark the anniversary of the Stonewall riots. Since that time, gay pride events have taken place every June in the United States and throughout the world. Their aim is to symbolize the cessation of hiding and denial and to call for full equality for gays, lesbians, bisexuals, and transgendered individuals.[43] With time and with the growing social and legal recognition of gay and lesbian communities throughout the world, gay pride parades have become a yearly festival where many straights participate to express their support. This is also true of gay pride in parades in Jerusalem.[44]

A. Brief History of Gay Pride Parades in Israel

The first Israeli gay pride parade took place in Tel Aviv in 1998. It was preceded by the "*Aliziyada*"—the first gay pride events in Israel that had been taking place since the late 1970s. On September 17, 1977, the first "*Aliziyada*" took place in Yarkon Park, Tel Aviv to mark the first anniversary of "The *Agudah*—The National Association of LGBTs in Israel."[45] During the 1990s, gay

[42] *See* Lahav, *American Influence*, *supra* note 1.

[43] For a fuller review of the history of gay pride parades, *see* MARTIN DUBERMAN, STONEWALL (1994); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE AND THE MAKING OF THE GAY MALE WORLD, 1890-1940, 2-3, 6, 11 (1994); DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2005).

[44] HCJ 5277/07 Marzel v. The Jerusalem District Police Commander, ¶ 7 in the response of the Jerusalem Open House for Pride and Tolerance (Isr.) (unpublished court briefs) (on file with author).

[45] "*Aliziyada*" is a Hebrew compound based on the word "*aliz*"—a Hebrew translation of gay once used to describe homosexuals—and "*Adloyada*"—the Hebrew name for a carnival parade on the Jewish

pride events took place in Tel Aviv's Shenkin Garden in 1993 and in 1996 when a convoy of cars bearing pride flags traveled across town.

The 1998 event ended in a confrontation, following the police claim that the participants and the organizers had breached the terms of the demonstration permit and had lengthened the event beyond the time stated. The organizers claimed they had not exceeded the terms stated in the police permit and clashes ensued. Some of the policemen who came to break up the gay pride event were photographed wearing rubber gloves. Since 1998, the gay pride parade in Tel Aviv has been a yearly regular event.[46]

In Jerusalem, Gay Pride Day was first marked in 1997 in an event organized by "*ha-Asiron ha-Aher*" (translated "The Other Tenth"), the LGBT student association at the Hebrew University.[47] The event included academic lectures and took place at the Faculty of Law.

The first gay pride parade in Jerusalem took place in 2002 and ever since, all the parades in the city have been accompanied by the strident opposition of religious leaders. In 2002, Jerusalem's Deputy Mayor, Shmuel Shkedi of the National Religious Party, condemned the event, declaring that "[t]his parade will not take place in Jerusalem. We will not allow the display of every sickness and perversion in the city."[48]

Ehud Olmert, who was the Mayor at the time and later became the Israeli Prime Minister from 2006 to 2009, held that the parade in Jerusalem should not be prevented: "Even if members of this association wanted to organize a parade to support Barghouti," a Palestinian leader convicted of multiple murders and terrorist attacks, "or give a humanitarian prize to Yasser Arafat, I would think that they are idiots, but I would allow them to hold such a parade as well."[49]

The fourth parade in 2005 made headlines for three reasons. First, it was planned as an international parade, part of the WorldPride events.[50] Second, the statements that ultra-Orthodox leaders—joined by the Mayor of Jerusalem and by Muslim and Christian leaders[51]—issued before the parade were unprecedentedly

festival of Purim. The announcement about the first "*Aliziyada*" appeared in the 13th issue of *Resh Galei*, the organ of "The Agudah-The National Association of GLBT in Israel," September 1977, at 9.

46 On gay pride parades in the Tel Aviv Municipality, *see Community*, TEL AVIV YAFO, http://www.tel-aviv.gov.il/eng/residents/community/Pages/communityLobby.aspx?tm=1&sm=22 (last visited Aug. 1, 2012). *See also* Yair Kadar, *Life in Pink*, HAARETZ (May 28, 2008), http://www.haaretz.co.il/hasite/spages/987968.html (Hebrew); Oded Avraham, *First Parades,* GOGAY (June 28, 2002), http://www.gogay.co.il/content/article.asp?id=894 (Hebrew).

47 Hagai Elad, *In Jerusalem, From the Route of the Gay Pride Parade One Sees Walls*, *in* WHERE, HERE: LANGUAGE, IDENTITY, PLACE 292, 294 (Israel Katz et al. eds., 2008) (Hebrew).

48 *Id*. at 298.

49 *Id*. at 298-299.

50 The disengagement plan (namely, Israel's retreat from Gaza) implemented that summer led to the postponement of the international parade to 2006. Due to the Second Lebanon War in the summer of 2006, the WorldPride event in Jerusalem was more limited, and the gay pride parade was postponed until November 2006. *Id*. at 305-306.

51 *Id*. at 305.

harsh.[52] Third, during the parade, Yishai Schlisel, an ultra-Orthodox young man who—in his own words—came "to murder in the name of God,"[53] stabbed three of the participants.[54] The 2005 parade became possible only after the Open House—the LGBT Community Center in Jerusalem and the organizer of the pride events in the city—submitted a petition to the Jerusalem District Court in that court's capacity as Court for Administrative Matters.[55]

1. Jerusalem 2006

Given the attitude of the ultra-Orthodox toward the gay pride parade and their violent response, the 2006 parade was to become a test case. Three petitions were submitted to Israel's High Court of Justice ("HCJ") against holding a gay pride parade in Jerusalem—one by Ephraim Holzberg and one by Yehuda Meshi-Zahav, both prominent ultra-Orthodox activists, and another by Baruch Marzel and Itamar Ben-Gvir, two extreme-right activists.[56] The petitioners' claims against the parade centered on the violent protests that had taken place in the city as the date of the parade approached, which, they argued, could worsen as the parade neared. The petitioners warned of the "grave danger to the public order and the serious risk of violent acts and personal injuries if the parade and the 'happening' were to take place."[57] Indeed, in the time leading up to the parade, hundreds of ultra-Orthodox

[52] Amiram Barkat, *Court Orders Jerusalem Municipality to Drop Ban on Gay Pride Parade*, HAARETZ (June 26, 2005), http://www.haaretz.co.il/misc/1.1021928 (Hebrew).

[53] Elad, *supra* note 47, at 294.

[54] Schlisel was tried, convicted, and sentenced to twelve years in prison and to a fine of 280,000 NIS (approximately $70,000). *See* CrimC (Jer) 843/05, State of Israel v. Schlisel (Feb. 8, 2006), Nevo Legal Database (by subscription) (Isr.). His appeal to the Supreme Court was mostly rejected, and his sentence was reduced to ten years in prison. CrimA 2625/06 Schlisel v. State of Israel (Dec. 17, 2007), Nevo Legal Database (by subscription) (Isr.).

[55] AdminC (Jer) 526/05 Jerusalem Open House for Pride and Tolerance v. the Municipality of Jerusalem (June 26, 2005), Nevo Legal Database (by subscription) (Isr.). Only four days before the date planned for the parade, June 30, 2005 the Israeli Police approved the parade in principle, and even held a coordination meeting with Open House members. Representatives of the Jerusalem Municipality did not attend the meeting. In its response to the petition, the Municipality claimed that it opposed the parade due to its sexual and provocative character and because it might offend the public's feelings. In a statement to the Court, the Mayor claimed that "gay pride parades have long become sexual and brazen processions devoid of any signs of civilization," and indicated that representatives of the three main religions in the city had warned of bloodshed were the parade to take place. Judge Musia Arad, Deputy Chief of the District Court, rejected the petition on the grounds that "the municipality is not allowed to discriminate against one or another section of the public because one or another of its employees disagrees with the views or sexual orientation of that section of the public. Indeed, it is not sufficient that the feelings of one or another circle are offended to prevent others from realizing their right to equality, dignity, and freedom of expression." Hence, the judge ordered the municipality to take all necessary measures to hold the march as planned, hang pride flags along its route, and prevent any disturbances to the parade and to the rally planned at its conclusion. In addition, the court imposed legal expenses of 60,000 NIS on the municipality and on Mayor Uri Lupoliansky. *Id*.

[56] HCJ 8898/06 Meshi Zahav v. the Jerusalem District Police Commander (Dec. 27, 2006), Nevo Legal Database (by subscription) (Isr.).

[57] Section 5 of Holzberg's petition. Holzberg also appeared before the Knesset Interior Committee about ten days prior to the HCJ session considering his petition, and threatened that the ultra-Orthodox rabbis had instructed their communities "to demonstrate and physically stop this parade at all costs." *Protocol No. 47 of the meeting of the Internal Affairs and Environment Committee* (Oct. 30, 2006),

demonstrators violently protested the permit, throwing stones at police forces, setting fire to trash cans, and hurling petrol bombs.[58]

The parade's opponents also argued that the parade would represent "deep offense to the religious and moral feelings and to the dignity of many many members of the public in Jerusalem and outside it."[59] The petition described the parade as a "blatant and offensive provocation against the religious faith of many many members of this public, both Jews and Muslims."[60] As Chief Justice Dorit Beinisch noted, these petitions were unusual. Previously, all petitions to the HCJ dealing with freedom to demonstrate had been brought by organizers who were denied permits. Now, for the first time, the HCJ had to consider petitions brought by members of the public directed against police decisions granting permission to demonstrate.[61]

Eventually, however, the parade was canceled due to military activity in Gaza and warnings against terrorist attacks throughout the country during the summer of 2006. Under these circumstances, the police claimed they could not protect a parade. Instead, a separate gay pride event—one without a parade—was organized in a stadium far from ultra-Orthodox neighborhoods and from crowded areas in Jerusalem.

In a ruling issued after the gay pride event, the HCJ rejected the petitions. Chief Justice Beinisch noted in her ruling that the violence the petition sought to protect against would, if it occurred, result at the hands of the parade's opponents, not its participants; the ruling also emphasized that the petitioners, as key spokespersons of "the public," represented the very group responsible for any potential violence.[62] Chief Justice Beinisch also noted that two of the petitioners, Baruch Marzel and Itamar Ben-Gvir, "act and express themselves in the media in ways that fan the fires of violence."[63] The State therefore requested that their petition be rejected due to the legal doctrine known as "uncleanness of hands."[64] Though the petition to the High Court was not rejected out of hand, the Chief Justice did not ignore the State's claim and wrote that the petitioners' claim concerning fear of violence "leaves a bad impression and should not be voiced by

http://www.knesset.gov.il/protocols/data/rtf/pnim/2006-10-30.rtf. According to press reports, Minister Eli Yishai, who was then Deputy Prime Minister and Minister of Industry, Trade, and Labor joined Holzberg's petition. *See* Aviram Zino & Ephrat Weiss, *Yishai Petitions the HCJ: "The Gay Pride Parade—An Explosive Charge,"* YNET (Nov. 7, 2006), http://www.ynet.co.il/articles/0,7340,L-3324921,00.html (Hebrew).

58 Ephrat Weiss & Aviram Zino, *Harsh Confrontations in Jerusalem as HCJ Decision Draws Near*, YNET (Nov. 6, 2006), http://www.ynet.co.il/articles/0,7340,L-3324175,00.html (Hebrew).

59 Para. 11 of Holzberg's petition, and HJC 8898/06, at para. 2.

60 Para. 20 of Holzberg's petition (emphasis in original). *See also* HCJ 8898/06 Meshi Zahav v. the Jerusalem District Police Commander § 4.

61 *See* HCJ 8898/06 Meshi Zahav v. the Jerusalem District Police Commander § 8.

62 *Id*. § 5.

63 *Id*.

64 *Id*.

one seeking to fan the fires of violence instead of contributing to calm the situation, which is deplorable."[65]

Although Chief Justice Beinisch rejected the blatant homophobia of the petitioners, she failed to notice her own heterophilia: she repeatedly emphasized in her ruling the organizers' commitment to hold a parade that is "modest, not characterized by blatant sexuality and provocative behavior."[66] In writing this, Chief Justice Beinisch bought into the heterosexual notion of pride parades as wild parties devoid of any political statements concerning human rights and tolerance. She also discussed what she defined as the dilemma of striking a balance between the right to freedom of expression and the fear of hurting the public's feelings.[67] Ultimately, no balance was struck—according to the Court, the cancelation of the parade and the holding of the gathering in a closed venue far away from the city center minimized the risk of hurting feelings.[68]

2. Jerusalem 2007

In 2007, an even larger number of petitions were submitted against a gay pride parade in Jerusalem, with petitioners varying in their backgrounds and claims. In HCJ 546/07, petitioners Yaakov Sternberg and Itamar Ben-Gvir claimed that the parade should not be held due to the risk to the public that would result from a firefighters' slowdown.[69] Eli Yishai, Deputy Prime Minister and Minister of Industry, Trade, and Labor, also petitioned against the parade.[70] A couple petitioned against the parade because its planned route went past the hall where their daughter would be celebrating her *bat-mitzvah*.[71]

The main petition dealt with issues identical to those stated in the 2006 petitions: protecting public safety and the public's feelings. Some of the petitioners were also the same: Baruch Marzel and Itamar Ben-Gvir, joined this time by the

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65 *Id*. § 11.

66 *Id*. § 2. The words "modest and decorous" appear five times in the ruling, in different versions. According to the Open House representative, no such commitment was given (private correspondence, on file with author). The demand of modest and decorous behavior that recurs in HCJ decisions, as well as the petitioners' claim against the parades stating that they are sexually provocative draw on the familiar stereotype of the "homo as sensation." On this issue, *see, e.g*., AMIT KAMA, THE NEWSPAPER AND THE CLOSET: LINKAGES AMONG ISRAELI HOMOSEXUALS' PATTERNS OF COMMUNICATION 36-46 (2003) (Hebrew).

67 *See* HCJ 8898/06 Meshi Zahav v. the Jerusalem District Police Commander § 13.

68 *Id*. § 14.

69 HCJ 546/07 Sternberg v. The Jerusalem District Police Commander (June 21, 2007) Nevo Legal Database (by subscription) (Isr.). The petition was rejected, with Justice Rubinstein noting "that the purpose of the petition, without intending offence, is not the petitioners' concern for firefighting and safety but rather their attempt, however legitimate, to find a way to prevent the gay pride parade after the rejection of previous petitions." *Id*. at § 4.

70 HCJ 5425/07 Yishai v. The Jerusalem District Police Commander (June 21, 2007), Nevo Legal Database (by subscription) (Isr.). The petition was rejected without any deliberation, relying on the arguments stated in the main petition in HCJ 5277/07. *Id*.

71 HCJ 5346/07 Bernstein v. Israel Police (June 21, 2007), Nevo Legal Database (by subscription) (Isr.). The petition was rejected out of hand. *Id*.

"Kokhav Ehad" (translated "One Planet") Association, petitioned again.[72] The Marzel and Ben-Gvir petition charged that the gay pride parade would "disrupt the public order and would lead—with a high degree of certainty—to the eruption of extensive riots unlike any ever seen or heard in the city of Jerusalem."[73] The petitioners argued that the parade participants only wanted to create a provocation "and seemed to derive great pleasure from the attention and exposure they were receiving, without any concern for the rights of one or another community."[74] The petition also claimed discrimination: according to Marzel and Ben-Gvir, the police had not allowed them to have processions and protest pickets in Umm al-Fahm and in Sakhnin or "to criticize illegal building in other Arab cities" on the grounds of preserving public peace. Permitting the gay pride parade, therefore, allegedly discriminated against the petitioners.[75]

The panel of judges in the 2007 petition was the same as the panel in 2006: Chief Justice Beinisch, Deputy Chief Justice Eliezer Rivlin, and Justice Ayalah Procaccia. Like the previous one, this petition too was rejected and on similar grounds. This time there was a parade, not a gathering, but its route was short—less than a quarter of a mile overall—passing mainly through a commercial rather than a residential zone and far from ultra-Orthodox neighborhoods.[76] The Court repeated its statement that "violence should not be rewarded, and surrender to the violence of a hostile crowd should only be a measure of last resort."[77] The Chief Justice added that the petition would have had to be upheld "had the gay pride parade been planned to march through the city's ultra-Orthodox neighborhoods. Clearly, such an act would have been radically opposed to the mutual tolerance incumbent on all members of the society, and it would have inflicted a mortal blow to the feelings of the religious-ultra-Orthodox public."[78] Here, again, one can sense the heterophilia of the opinion: gay pride parades are devoid of any sociopolitical basis, based on the assessment that they are mere "parties" entitled to diminished protection from the courts.

Notably, in its ruling, the Court ignored that some of the petitioners seeking protection for their hurt feelings had been among the organizers of the 2006 "beasts parade," a protest march against the gay pride parade. The explicit aim of the "beasts parade" had been to humiliate and hurt the feelings of members of the LGBT community by comparing homosexual intercourse to bestiality, suggesting their own hypocrisy since these same organizers protested the offense based on

[72] HCJ 5277/07, 5380/07 Marzel v. The Jerusalem District Police Commander (June 20, 2007), Nevo Legal Database (by subscription) (Isr.)

[73] Preface to Marzel's petition in HCJ 5277/07.

[74] *Id.* § 9.

[75] *Id.* § 29.

[76] *Id.* ¶ 6.

[77] *Id.*

[78] *Id.* ¶ 7

their own hurt feelings.[79] By contrast, the Deputy Chief Justice held that insofar as hurt feelings are concerned, a group's freedom of expression should not be denied "when the very gathering of members of a specific group evokes opposition due to their being different."[80] In other words, Justice Rivlin exposed the basis of the opposition to the gay pride parade hiding behind the cover of "hurt"—opposition to the very existence of gays and lesbians. In 2007, again, Chief Justice Beinisch emphasized in her ruling the Open House's purported commitment to hold a parade that would be "modest and decorous," a phrase that appears three times in the ruling.[81]

About 2,500 people took part in the 2007 parade, which passed almost without disturbance. The police stopped a man carrying a homemade bomb that he had meant to plant in the parade's route.[82]

3. Jerusalem 2008

In Jerusalem in 2008, in response to the planned gay pride parade to be held under the motto of "Infinite Love," Baruch Marzel, Itamar Ben-Gvir, Ephraim Holzberg, and others again petitioned the HCJ, calling instead for a gathering in the remote stadium in the model of the 2006 event.[83] This time, the petitions focused on the hurt feelings of the religious public—*e.g.*, religious principles—as well as the secular public—*e.g.*, moral principles. According to the petitioners, "all the parades in recent years have been offensive, outrageous, and provocative";[84] "the parade's route this year will pass close to ultra-Orthodox and religious population centers in Jerusalem!";[85] and "no serious thought has been devoted to any other interests besides the 'rights' of the community to which [the respondents belong.]"[86] This time, the HCJ disregarded the arguments about public disturbance and the eruption of violence.[87]

In its response to the petition, the Open House noted that contrary to previous years, the ultra-Orthodox public had refrained in 2008 from violent protests against the parade and that arrangements had been harmoniously coordinated with the Jerusalem Municipality. In its view, therefore, that year's petitions against the

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[79] This was among the oral arguments in HCJ 5277/07, but it is not reflected in the final decision. From a personal exchange, *supra* note 66. HCJ 9178/06 "Let the Animals Live-Israel" v. The Jerusalem District Police Commander (Nov. 9, 2006), Nevo Legal Database (by subscription) (Isr.) (Rejected).

[80] *See* HCJ 5277/07 Marzel v. The Jerusalem District Police Commander (June 20, 2007), Nevo Legal Database (by subscription) (Isr.).

[81] As in 2006, the Open House gave no such commitment in 2007 either. *See supra* note 66.

[82] Steven Erlanger, *Israel: Gay Parade Draws 2,500*, N.Y. TIMES (June 22, 2007), http://query.nytimes.com/gst/fullpage.html?res=9806E4D6103FF931A15755C0A9619C8B63.

[83] HCJ 5317/08 Marzel v. The Jerusalem District Police Commander (July 21, 2008), Nevo Legal Database (by subscription).

[84] Open House's response to the petition in HCJ 5317/08 § 1.

[85] *Id.* ¶ 11.

[86] *Id.*

[87] HCJ 5317/08 Marzel v. The Jerusalem District Police Commander ¶ 9.

parade were especially puzzling. It also pointed to additional motives for the desire to prevent the parade,[88] particularly given the following: the petitioners were residents of Hebron, a city that would not be holding the gay pride parade; Jerusalem residents had not protested against the parade; and preparations toward it had so far "proceeded smoothly."[89] The Open House also noted that unlike the petitioners, its own members lived in Jerusalem and were interested in marching in their own city.[90] The petition against the parade was again rejected, with Justice Procaccia noting that "the respondents indicated that the homo/lesbian [sic] community would hold a sober and restrained event."[91]

4. The Post-Petition Era: Jerusalem 2009-2012

Opponents of the gay pride parades have not filed any petitions since the 2008 petition. In 2009, the parade—devoted to commemorating the fortieth anniversary of the Stonewall Riots[92]—passed through Jerusalem's streets without any notable disturbances.[93] About ten members of the extreme right organized a small demonstration in Paris Square, located close to parade's route, and one of the demonstrators threw an egg at the marchers. Sabbath Square closed for a demonstration of the city's ultra-Orthodox residents, but less than a hundred arrived.[94] Unlike in previous years, no massive ultra-Orthodox demonstration was organized. There were no displays of violence in the city in the days preceding the parade despite fears that the ultra-Orthodox would instigate disturbances following the opening of the Safra Parking on the Sabbath.[95] Sixteen-hundred policemen

88 *See supra* note 84, ¶¶ 7-8, 10.

89 *Id*. § 26.

90 *Id*.

91 HCJ 5317/08 Marzel v. The Jerusalem District Police Commander ¶¶ 4, 8.

92 *See supra* text accompanying note 43.

93 Actually, pride events outside Jerusalem at the time drew greater public attention: some of the marchers in Eilat encountered harsh physical and verbal violence, and a local grocer placed a sign at the entrance to his shop: "No entry to homos." *See* Ahuva Mamos, *The Gay Pride Parade in Eilat: Insults, Eggs, and 'No Entry,'* YNET (May 15, 2009), http://www.ynet.co.il/articles/0,7340,L-3716515,00.html (Hebrew). On June 10, 2009, two days before the gay pride parade in Tel Aviv, Ministry of Interior Eli Yishai, MK Uri Ariel and Israel's Chief Rabbis sent a letter to the Tel Aviv Mayor, to the Prime Minister, to the Attorney General, to the State Comptroller, to the Police Commissioner and to others demanding that the parade be canceled or, alternatively, that it be held in a closed and distant venue, that its contents be supervised, and that entry be forbidden to anyone under eighteen. The letter, which was sent by Adv. Doron Shmueli, raised a series of arguments against the holding of the parade: the exposure of minors to pornographic material, the offense to the feelings of the general and the religious public, "the offense to the dignity of every man, woman, and child," and so forth. Letter from Doron Shmueli to the Prime Minister of Israel, the Mayor of Tel Aviv, the Attorney General, the State Comptroller, et. al. (June 10, 2009) (on file with author). *See also* Amnon Miranda & Eli Senior, *Yishai and the Rabbis: Cancel the Gay Pride Parade in Tel Aviv*, YNET (June 10, 2009), http://www.ynet.co.il/articles/1,7340,L-3729362,00.html (Hebrew).

94 Jonathan Liss & Yair Ettinger, *The Gay Pride Parade Marched in Jerusalem Without Exceptional Confrontations*, HAARETZ (June 25, 2009), http://www.haaretz.com/hasite/spages/1095658.html (Hebrew).

95 Ronen Medzini & Ephrat Weiss, *Thousands March with Pride: 'Jerusalem is Not Dark as Teheran',* YNET (June 25, 2009), http://www.ynet.co.il/articles/0,7340,L-3737151,00.html (Hebrew).

guarded the parade, as opposed to the 7,000 deployed in 2008, and 12,000 during the stadium event in 2006.[96]

Why did the ultra-Orthodox and the extreme right wing activists stop filing petitions against the Jerusalem pride parade? According to the press, ultra-Orthodox activists confined themselves to fliers condemning the parade, claiming that violent demonstrations against the parade do more harm than good.[97] Press reports noted that some of the posters had been the initiative of right-wing extremists, among them Itamar Ben-Gvir and Baruch Marzel.[98] MK Michael Ben-Ari, a member of the "National Union," joined Ben-Gvir and Marzel when he declared that the extreme right intended to organize protest marches in Arab towns as a response to the gay pride parade in Jerusalem.[99]

In 2010 and 2011, the gay pride parades that marched in Jerusalem were greeted by anti-gay demonstrators, but they passed without any significant disturbance,[100] and as mentioned above, without any legal attempts to thwart them. One of the protests against the parade featured donkeys, again illustrating a comparison between homosexuality and bestiality.[101] The 2012 parade—the tenth Jerusalem pride parade—took place in early August. It attracted very little media attention, and it seems that for the most part, its opponents have decided to abandon any legal efforts to prevent the parades.[102] There have been, however, threats of violence against members of the Jerusalem LGBT community and against the participants in the 2012 parade.[103] During the 2012 parade, hundreds of members of the ultra-Orthodox community in Jerusalem demonstrated against it. Ephraim Holtzberg, one of the organizers of the protests against the parade, said that "Israel is the holy land, not the homo land,"[104] and he decried former Jerusalem Mayor Olmert's grant of permission for the first parade in 2002.[105]

Part IV discusses the efforts of those who fought both against the pride parades in Jerusalem and against the LGBT community's freedom of speech to use the parades as a means to assert their own right to organize anti-Muslim and anti-Arab marches in the streets of the Muslim town of Umm al-Fahm. In both fights,

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96 Liss & Ettinger, *supra* note 94.

97 Kobi Nahshoni, *An Ultra-Orthodox Dilemma: To Protest Against the Gay Pride Parade?,* YNET (June 18, 2009), http://www.ynet.co.il/articles/0,7340,L-3733628,00.html (Hebrew).

98 *Id*.

99 *See infra* text accompanying note 255.

100 The Associated Press, *Jerusalem Hosts Subdued Gay Pride March*, HAARETZ (July 29, 2010), http://www.haaretz.com/news/national/jerusalem-hosts-subdued-gay-pride-march-1.304865.

101 *20 Rightists Protest Jerusalem Pride Parade with Donkeys*, YNET (July 28, 2011), http://www.ynetnews.com/articles/0,7340,L-4101450,00.html.

102 Melanie Lidman, *4,000 March in 10th Annual Jerusalem Pride Parade*, THE JERUSALEM POST (Aug. 2, 2012), http://www.jpost.com/NationalNews/Article.aspx?id=279885.

103 Melanie Lidman, *Man Threatens J'lem Gay Gathering with Baseball Bat*, THE JERUSALEM POST ONLINE (July 24, 2012), http://www.jpost.com/Headlines/Article.aspx?id=278681.

104 *Quoted in* Lidman, *supra* note 102.

105 *Supra* text accompanying note 49.

the one against the free speech of the LGBT community and the one in support of their own free speech, petitions to the HCJ played a central role.

IV. UMM AL-FAHM 2009: THE ISRAELI FLAGS PROCESSION

As Israel's sixtieth independence anniversary approached in May 2008, Itamar Ben-Gvir and Baruch Marzel, the most persistent petitioners to the HCJ against the pride parades in Jerusalem, tried to set up a stall for the sale of Israeli flags in Umm al-Fahm, one of the largest Arab cities in Israel with a population exceeding 46,000. They approached the Umm al-Fahm Municipality, which ignored their request. The Israeli Police directed them back to the municipality.[106] The petitioners noted that since this was not a demonstration and no police permit was necessary to set up the stall, their approach to the police had gone "beyond the usual requirements."[107] Since the Umm al-Fahm Municipality had ignored them, the petitioners decided to hold a flags procession in the city and asked the police for a permit.[108] The purpose of the procession, as the petitioners noted, was "an expression of loyalty to the State—Israel's sixtieth anniversary."[109]

When requesting a permit for the procession, they noted it would pass through the center of Umm al-Fahm and would include about one hundred participants.[110] Israeli Police refused the request and offered an alternative route, outside the city.[111] According to the information available to the police, "holding a procession by these petitioners in the city of Umm al-Fahm would almost certainly lead to a flare up of violence involving a real risk to the public order and to public safety."[112] In response, a petition was submitted to the HCJ, stating: "The right to have a flags procession in Umm al-Fahm is a basic right that cannot be contested."[113] The petitioners mentioned the High Court's rulings on the gay pride parades in 2006 and 2007,[114] playing down the fact that they had been the ones who had petitioned the court against the gay pride parades in those years as well as in 2008. They further claimed that the police decision not to allow the route requested for the procession in Umm al-Fahm meant granting "veto power to the rabble and was a prize to violence."[115] Moreover, the petitioners noted that they were victims of discrimination because "parallel to the police's refusal to allow the

106 HCJ 6802/08 Ben-Gvir v. Israel Police-Northern District Commander (Jan. 21, 2009) Nevo Legal Database (by subscription) (Isr.) § 5 of State response (unpublished court briefs) (on file with author).

107 HCJ 6802/08 § 15 of the petition (unpublished court briefs) (on file with author).

108 *Id*. § 18.

109 *Id*. § 5.

110 *Ben-Gvir*, HCJ 6802/08 at § 7 of State's response.

111 *Id*. § 8.

112 *Id*. § 9.

113 *Ben-Gvir*, HCJ 6802/08 at § 45 of the petition.

114 *Id*. §§ 61-64.

115 *Id*. § 76.

petitioners to march in the city, the respondents had allowed residents of Umm al-Fahm and people who identify with them politically to roam the streets of the city, to hold mass demonstrations and processions."[116]

In its response, the State claimed that "the procession, with a high degree of certainty, will be injurious to public welfare and to the public order."[117] Relying on relevant precedents,[118] the State claimed that in the proper balance between public safety and the petitioners' freedom of expression, public safety should be the overriding consideration.[119] The State claimed that the petitioners and promoters of the procession were extreme right-wing activists. Furthermore, they had been involved in disturbances of the public order for nationalist causes in the past and were criminally convicted for these activities.[120] The State also claimed that the balance between freedom of expression and preservation of the public order should take context into account: "A demonstration does not take place in detachment from reality. It is related to a place and a time."[121] Nevertheless, the State did not argue that the procession should be forbidden altogether, but suggested an alternative route that, in its view, sustained both interests—public safety and the petitioners' freedom of expression.[122]

Contrary to the petitions against the gay pride parades of 2006 to 2008, the HCJ, with Justice Edmund Levy presiding, did not issue a ruling dealing with the substantive claims of either the petitioners or the State.[123] Instead, he sought to achieve agreement between the parties on the date and the route of the procession. The entire ruling—about a page and a half—dealt with coordination matters rather than with legal issues.[124]

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116 *Id*. § 75.

117 *Ben-Gvir*, HCJ 6802/08 at § 2 of State's response.

118 *See, e.g*., HCJ 1928/96 Yesha Council v. Major General Aryeh Amit-The Jerusalem District Police Commander 50(1) PD 541 [1996] (Isr.); HCJ 6658/93 Am Ke-Lavi v. Israel Police-Jerusalem Police Station Commander 94(2) Tak-El 2362 [1993] (Isr.); HCJ 153/ 3 Levi v. Israel Police-Southern District Commander 38(2) PD 393 [1984] (Isr.); HCJ 2979/05 Yesha Council v. Minister of Internal Security (Mar. 27, 2005) Nevo Legal Database (by subscription) (Isr.); HCJ 5647/90 Cohen v. Israel Police-Southern District Commander 45(1) PD 306 [1990] (Isr.); HCJ 7101/93 Novick v. The Jerusalem District Police Commander, 93(4) Tak-El 644 [1993] (Isr.); HCJ 411/89 Temple Mount Faithful Movement v. The Jerusalem District Police Commander 43(2) PD 17 [1989] (Isr.).

119 *Ben-Gvir*, HCJ 6802/08 at §§ 18-21 of State's response.

120 *Id*. §18.

121 *Id*. § 20.

122 *Id*. §§ 22-24.

123 *Ben-Gvir*, HCJ 6802/08.

124 Justice Levy's approach to the petition, which suggests that for him it did not raise any questions regarding the balancing for fundamental rights (unlike the Jerusalem Pride petitions), is consistent with his ongoing support of the Israeli extreme right wing. He wrote a strong minority opinion in the HCJ's ruling concerning Israel's unilateral disengagement plan, concluding that the plan was illegal and insinuating that the Israeli occupation is not at all a military occupation. The majority of the Justices on the panel upheld the constitutionality of the disengagement plan. *See* HCJ 1661/05 The Gaza Coast Regional Council v. The Knesset et al. 59(2) PD 481 [2005] (Isr.). Most recently he chaired a government appointed committee which explicitly rejected the notion that Israel occupies the West Bank. *See* Isabel Kershner, *Validate Settlements, Israeli Panel Suggests*, N.Y. TIMES, July 9, 2012, at A4.

The anti-Arab procession of the extreme right in Umm al-Fahm took place on March 24, 2009. It lasted less than thirty minutes and was accompanied by disturbances and protests by Umm al-Fahm's residents. The disturbances continued for over two hours, long after the procession had ended. The Police Vice-Commissioner, a Knesset Member, a reporter of Russian Television, fifteen policemen, and thirteen citizens were slightly injured by stones thrown by Arab demonstrators. The police arrested ten Arab demonstrators,[125] whom Ynet, a major Israeli news website, described as "rioters."[126] According to press reports, undercover units from the Border Police were in the crowd and "after tempers flared up, they put on police helmets and arrested some of the demonstrators who had been rioting and throwing stones."[127] The police also used "means for breaking up demonstrations," including tear gas, stun grenades, and water hoses.[128]

Itamar Ben-Gvir was cited as saying: "We do not come to provoke. We come to raise Israeli flags and to show that the State of Israel is the landlord in all of the Land of Israel."[129] Baruch Marzel said: "This is the first stage of our distinguished victory. It was proven that when Israel wants, it can. This time we entered the edge of the city, next time we will come to the center."[130] The Police Commissioner said to Haaretz correspondents: "Yesterday evening, I approved the last plan of action for today's procession. This morning, 2,500 policemen came to ensure the implementation of a democratic procedure in the State of Israel."[131]

V. WHAT DISTINGUISHES JERUSALEM FROM UMM AL-FAHM?

The two bodies of case law dealing with the Jerusalem gay pride parade and with the procession of the extreme right in Umm al-Fahm provide a fascinating opportunity to examine the High Court's attitude to minority-majority relations and to the interesting intersections between identity components—such as religion, sexual orientation, and ethnic origin—for a variety of reasons. First, both deal with war—cultural, social, legal, and perhaps even actual war—against a weakened

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125 Ahikam Moshe-David & Ro'i Sharon, *The Police Are Satisfied with the Force's Functioning in Umm al-Fahm*, NRG (Mar. 24, 2009), http://www.nrg.co.il/online/1/ART1/870/481.html (Hebrew).

126 *Police Commissioner: We Proved it Is Feasible to Demonstrate Everywhere*, YNET (Mar. 24, 2009), http://www.ynet.co.il/articles/0,7340,L-3691413,00.html (Hebrew).

127 *Id.*

128 *Id.* Unquestionably, the police had to react to the disturbances and the displays of violence. But press reports of ultra-Orthodox disturbances in Jerusalem prior to the gay pride parades do not show that the police resorted to similar means. If indeed undercover policemen, water cannons or other such means were used in the ultra-Orthodox demonstrations in Jerusalem, the police did not report on this proudly, as they did after the Umm al-Fahm procession.

129 *Id.*

130 Yoav Stern, Eli Ashkenazi, & Yuval Goren, *Police Are Satisfied: The Right-Wing Procession in Umm al-Fahm Has Ended. 28 Injured in Clashes Between Residents and Policeman,* HAARETZ (March 24, 2009), http://www.haaretz.co.il/misc/1.1252278 (Hebrew).

131 *Id.* A second march held by the same extreme right activists took place in Umm al-Fahm on October 27, 2010, and it, too, resulted in violent clashes between the city's Arab inhabitants and the police. *March in Israel Ends in Clashes in Arab Town*, N.Y. TIMES, Oct. 28, 2010, at A6.

social group: the LGBT community in the Jerusalem pride cases and Israel's Arab citizens in the anti-Arab procession case. Thus, the picture that emerges from a comparative analysis of the way the High Court decisions approached these two events can shed light on the Court's view of groups that are not part of the Jewish-heterosexual-male hegemony in Israel and its inconsistent approach to freedom of speech in events concerning these groups. In addition, a comparison of these two bodies of law shows us who is and who is not a minority, in the eyes of both the petitioners and the Court.

Second, these rulings are mirror images of one another regarding the petitioners' identities aims. Concerning the gay pride parade, the petitioners opposed the permit granted by the government. The marchers belong to the weakened group and two main groups petition against them: members of the extreme right and the extreme wing of the ultra-Orthodox community—*e.g.*, *ha-Edah ha-Haredit*. Indeed, both are considered minority groups in Israeli society, but their marginality is relative. The extreme right wing and ultra-Orthodox are significantly less marginal than the LGBT community in terms of political influence and as their petitions show, they view themselves as members of the Jewish heterosexual majority.[132]

By contrast, concerning the procession of the extreme right in Umm al-Fahm, the very people who had petitioned against holding the gay pride parade—members of the Jewish hegemonic group—petitioned without hesitation against the State's decision not to allow their procession in Umm al-Fahm. In other words, while in the gay pride cases they opposed others' freedom of speech, in the Umm al-Fahm case they fought for their own right to freedom of speech. This is not an unusual combination of legal stances from a comparative point of view; both the Nazis who sought to march in Skokie as well as the Phelps family and their supporters who picketed at soldiers' funerals believe in their own free speech rights and legally pursue them when they are infringed, while at the same time they would deny the rights of the groups they fight against without hesitation.[133]

Third, both marches epitomize struggles between relatively marginal groups in Israeli society and the silent majority, a majority comprised of secular Jews from the political center who look on from the sidelines.[134] The intriguing intersection

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[132] Note that the Vatican and the Islamic Movement also consistently opposed holding the gay pride parade in Jerusalem. *See, e.g.*, Jonathan Liss, Yuval Yoaz, & Yair Ettinger, *The Vatican Opposes Holding the Gay Pride Parade in Jerusalem*, HAARETZ (Nov. 8, 2006), http://www.haaretz.co.il/hasite/spages/785589.html (Hebrew); Itamar Inbari, *Muslims Will Come up to Jerusalem to Prevent the Parade*, NRG (Oct. 31, 2006), http://www.nrg.co.il/online/1/ART1/499/106.html (Hebrew).

[133] *See infra* Part VI.C. Curiously, there is a direct historical link between anti-Semitism and homophobia. Jews were depicted by anti-Semites as homosexuals and were accused of seeking to "spread" homosexuality. *See* Zvi Triger, *Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships*, 8 INT'L. J.L. IN CONTEXT 268, 270 (2012).

[134] At times, this "silent majority" actually supports the anti-democratic groups. Concerning the gay pride parade, many secular individuals were opposed to holding it "in Jerusalem of all places," and

of identities that enables one group to simultaneously represent society's mainstream—perhaps only in its own perception—and a group of weaker influence and legitimacy emerges clearly in the proceedings dealing with these petitions. Thus, members of the extreme right are a minority insofar as their political outlook is concerned, but apparently belong to the majority in many other regards—*i.e.*, Jews, heterosexuals, and so forth. Those who will always remain in the minority are the Arabs and LGBT individuals, as well as women, who compose a group discussed below.

Fourth, concerning the gay pride parade—an event meant to promote tolerance and acceptance of the other—the HCJ seriously considered the option of agreeing to the petitioners' requests to thwart it. Long and learned opinions were written weighing "pros" and "cons" with a clear bias favoring the "pros." By contrast, concerning the procession of the right, the Court refrained from any discussion of its aims—defiance, terrorization, and provocation for its own sake—and wrote a slim and succinct opinion dealing only with dates and arrangements, ignoring issues of principle: is the procession of the right a display of freedom of expression, or is it something else?

The slim ruling in the *Umm al-Fahm* case implies that the HCJ accepted as self-evident the right of the extreme right to march there. By contrast, the right of members of the Jerusalem LGBT community to march in their own city was the subject of a learned and profound discussion reflecting the Court's significant hesitations to allow the Jerusalem Pride Parade. In the *Umm al-Fahm* case, the Court did not discuss the need for balance between the right to freedom of expression and the risk of hurting the feelings of the town's Arabs. The warranted conclusion is that in its balancing procedure, the HCJ grants significant weight to the feelings of religious Jews in Jerusalem. However, it grants no weight whatsoever to the feelings of gays and lesbians or to the feelings of Umm al-Fahm's Arabs—or to Israel's Arabs in general.

VI. THE HCJ BETWEEN JERUSALEM AND UMM AL-FAHM

This Part addresses three issues explicitly emerging from the cases of the gay pride parades and the Umm al-Fahm procession: hurt feelings, the petitioners' use of the Court as part of their social and political activities, and the doctrine of cleanness of hands. These three issues are related and bear implications for one another.

A. Hurting Feelings: The Skokie *and* Snyder *Analogies*

Two American cases involving the tension between the First Amendment and alleged hurt feelings are especially relevant to this discussion. In the *Skokie*

agreed that this was a superfluous provocation that should be avoided. Elad, *supra* note 47, at 312-314.

case,[135] the Nazi Party wished to parade in a predominantly Jewish neighborhood, waive swastika flags, and shout "death to the Jews." Many of the residents of that neighborhood were Holocaust survivors, traumatized by their experiences during the War, and the American Nazis' express intent was to traumatize them again by marching in their neighborhood.[136] More recently, the Supreme Court ruled that the First Amendment protects the rights of those who wish to offend families of fallen soldiers at their funerals.[137] In its 8-to-1 decision, the Court ruled that the Reverend Fred Phelps, the church he has founded, and his parishioners are not liable in tort for picketing at the funerals of fallen soldiers where they display signs with slogans such as "Thank God for Dead Soldiers" and "Fags Doom Nations."[138] The Court pronounced that speech cannot be the basis for an intentional infliction of emotional distress claim even when it is hateful and hurtful.[139]

While the constitutional framework in which the HCJ works is somewhat different—*i.e.*, Israel does not have a Bill of Rights—the approach to freedom of speech as enjoying a superior status is not very remote from the American approach in many respects. The Israeli case law on the tension between freedom of expression and the risk of hurting public feelings is extensive[140] and is reviewed at length in the various gay pride parade rulings. The principle that became accepted in the case law is that the protection of public feelings will override freedom of expression only in those rare cases "that shock the very foundations of mutual toleration."[141] Protected public feelings include "religious and moral feelings, be they ethnic or other."[142]

Interestingly, most cases raising claims about hurt feelings refer to religious feelings.[143] Hence, in the rare cases where the HCJ ruled that the value of

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135 Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

136 *See id*.

137 *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

138 *Id*.

139 *Id*. The Court relied on *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) (ruling that the First Amendment bars from recovery for intentional infliction of emotional distress).

140 *See, e.g*., HCJ Further Hearing 10480/03 Bousidan v. Bakri 59(1) PD 625 [2004]; HCJ 316/03 Bakri v. Israeli Film Censorship Board 58(1) PD 249 [2003]; HCJ Further Hearing 4128/00 Director General of the Prime Minister's Office v. Hoffman 57(3) PD 289 [2003]; HCJ 3358/95 Hoffman v. Director General of the Prime Minister's Office 54(2) PD 345 [2000]; HCJ 257/89, 2410/90 Hoffman v. Officer in Charge of the Western Wall 48(2) PD 265 [1994]; HCJ Further Hearing 882/94 Alter v. the Minister of Religious Affairs (June 12, 1994), Nevo Legal Database (by subscription); HCJ 4185/90 Association of Temple Mount Faithful v. the Attorney General, 47(5) PD 221 [1993] ; HCJ 6126/94 Szenesh v. Chairman of the Broadcasting Authority 53(3) PD 817 [1999]; HCJ 806/88 Universal City Studios Inc. v. The Israeli Board for Film and Theater Review, 43(2) PD 22 [1989]; HCJ 5016/96 Horev v. Minister of Transport, 51(4) PD 1[1997]. For the literature on the case law, *see, e.g*., COHEN-ALMAGOR, *supra* note 1, at 180-224.

141 *See* HCJ 5016/96 Horev v. Minister of Transport, 51(4) PD 1[1997], at 50.

142 HCJ 399/85 Kahana v. The Board of Directors of the Broadcasting Authority 41(3) PD 255, 287 [1987](Isr.).

143 Daniel Statman, *Hurting Religious Feelings*, *in* MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI MEMORIAL BOOK 133, 133-34 (Menachem Mautner et al. eds., 1998) (Hebrew).

protecting public feelings overrides freedom of expression, it unsurprisingly referred to religious feelings, whether of Jews or Muslims. As a rule, "the Court rejected almost entirely the power of arguments based on hurt feelings;"[144] however, this does not prevent petitioners from repeatedly raising this claim before the HCJ.

The question about the legitimacy of using hurt feelings—religious or otherwise—as grounds for legal proceedings and as cause for limiting freedom has been considered at length in liberal thought.[145] As Daniel Statman notes, mainstream liberalism is opposed to restricting freedom on the grounds of hurt feelings,[146] and Statman and Sapir also hold that "[r]eligious claims should not be accepted without critical examination."[147]

The discussion that follows will illustrate the fundamental problem with the use of hurt feelings as an argument for limiting freedom of expression. The reason is that "feelings" and "hurt" are not neutral terms, even though they are perceived as such. Accordingly, this Article proffers that those "religious feelings"—which might be legitimate to protect—can be redefined as "patriarchal feelings"—which are not legitimate to protect. When discussing the question of hurt feelings and recognizing a religious feeling as one whose protection should be considered, even though such protection is usually not granted, the HCJ endorses an ideological interpretation that prefers religious feelings to all others. At the same time, it also agrees with the very definition of the feeling as religious, a definition that—as explained below—is not necessary.

Moreover, in light of the narrow exception for hurt feelings, there is room for examining when the Court does take this issue into account and when it ignores it, especially when used to determine whether these differences are random or are guided by some underlying principle. The ruling on the Umm al-Fahm procession, as noted above, is devoid of any discussion of legal principles. Questions about hurting the feelings of the Arab public in Umm al-Fahm never arose, despite the recurrent ambivalence concerning the feelings of Jerusalem's religious Jews in the HCJ's rulings on the gay pride parades.

Below, this Article suggests two possible underlying principles guiding the Court's analyses of of hurt feelings: one is implied in the ruling of Chief Justice Beinisch in the 2007 gay pride parade case and concerns the location of the

144 *Id*. at 182-84.

145 *See e.g*., JOHN STUART MILL, ON LIBERTY 151-52 (1985). For a critique of the absolute and unqualified standing of freedom of expression in American constitutional law, *see* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND THE NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 149-62 (1997). The authors criticize what they call "the romantic appeal of First Amendment absolutism." In their view, a critical examination is in place as to whether protecting the neo-Nazis' freedom of expression does indeed promote freedom of expression. DELGADO & STEFANCIC, *supra* note 144, at 149.

146 Statman, *supra* note 143, at 141.

147 Daniel Statman & Gideon Sapir, *Freedom of Religion, Freedom from Religion, and Respect for Religious Feelings*, 21 BAR-ILAN L. STUD. 5, 54 (2004) (Hebrew).

demonstration, and the other deals with a redefinition of religious feelings as patriarchal feelings.

1. Hurt Feelings as a Question of Geography

Both the Jerusalem Pride cases and the *Snyder* case represent attempts to reinforce and reinstitute the patriarchal-homophobic view of homosexuals. As Marc Spindelman has observed, homophobia is deeply invested in the representation of homosexuality as the promoter of "decadence, waste, dissipation, disease, degeneration, and death, all of which are ruinous both for individuals and civilization[.]"[148] These homophobic representations are abundant both in the Israeli petitions against the pride parades in Jerusalem and in the protests at American fallen soldiers' funerals. The idea is to restore sexual segregation between heterosexuals and LGBT individuals and exile the latter—both morally and geographically—so that society can "protect itself" from homosexual sexuality, which in the homophobic mind is depicted as "insatiable, indiscriminate, violent, wild, untamable, and untamed."[149] Especially in the United States, homophobic violence has led to the actual segregation of LGBT individuals and to what Yishai Blank and Issi Rosen-Zvi have called the "territorialization of sexuality," namely the creation of predominantly LGBT neighborhoods within American cities, which can provide their residents with both a safe-haven and a sense of community.[150]

It is therefore no coincidence that certain expressions take place in carefully selected locations: a Jewish town;[151] an Arab city;[152] outside a cemetery;[153] or simply outdoors, as in the case of gay pride parades. These are not mere forms of expression; they are designed to impact the real world. In the case of pride parades, the purpose is to promote tolerance and equality through the increased visibility of minority groups such as the LGBT community; members of such groups claim their place within society and within the public sphere after having been in social exile for much of human history. In opposition to this tolerance and equality, others—such as racists or homophobes—seek to terrorize and traumatize the target audience and re-exile it from society.

In her ruling on the 2007 gay pride petition, the Chief Justice noted that the petition should have been accepted—that is, the gay pride parade would have been canceled—if "the parade had been planned to take place at the heart of the city's ultra-Orthodox neighborhoods. Such an act would have been radically opposed to

148 Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179, 192 (2011).

149 *Id*. *See also* Triger, *supra* note 133, at 270-71.

150 Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 996-1000 (2012).

151 *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

152 *See* HCJ 6802/08 Ben-Gvir v. Israel Police-Northern District Commander (Jan. 21, 2009) Nevo Legal Database (by subscription) (Isr.).

153 *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

the mutual toleration incumbent on all members of the society and would have been extremely hurtful to the feelings of the religious ultra-Orthodox public."[154] Is this not precisely what the activists of the extreme right sought to do in Umm al-Fahm? Why did the HCJ in that case disregard the Chief Justice's resolute statement concerning the gay pride parade ruling of 2007?[155]

The High Court has, in the past, had occasion to discuss protest marches in areas hostile to the marchers. In the *Meretz Faction* case, the Court considered a parade in Jerusalem on a Sabbath afternoon, meant to protest against the violence that the ultra-Orthodox public had displayed along Bar-Illan Street, a central traffic route, in an attempt to close it on the Sabbath.[156] In the *Temple Mount Faithful Movement* case, at issue was a procession that would pass through East Jerusalem and end at the Temple Mount on Jerusalem Day.[157]

The petition of the Meretz faction was accepted. The HCJ ruled that the procession would take place given the importance of freedom of expression and the desire to avoid granting veto power to a hostile and violent group.[158] By contrast, the petition of the Temple Faithful was rejected "due to a real fear, with a high degree of certainty, that public order and public safety would be disturbed."[159] The HCJ noted that, generally, the police should be deployed so as to prevent disturbances to public order and public safety. However, since the procession was planned to take place on Jerusalem Day and since the police had to assign forces to protect public order in all the day's events, its decision to refuse permission to a procession in the direction of the Temple Mount was defensible.[160]

In these cases and in others, and as reflected by Chief Justice Beinisch's remarks in the 2007 gay pride ruling, the HCJ was not oblivious to the timing and location of the processions—*i.e.*, Sabbath in Jerusalem/ultra-Orthodox neighborhood, Muslim area, feelings to be protected/feelings not to be protected. The Court also considered these elements when striking a balance between freedom of expression and the protection of public feelings.

Similarly, this question emerged more than once in the rulings of the United States Supreme Court, which also refused to restrict freedom of expression on grounds of hurt feelings.[161] One of the most famous cases is the march of the National Socialist Party of America in the Village of Skokie, a suburb of Chicago. In October 1976, the National Socialist Party of America requested permission

154 *See supra* text accompanying note 78.

155 This point is related to the cleanness of hands issue discussed in *infra* Part VI.C.

156 HCJ 4712/96 Meretz Faction v. Jerusalem District Police Commander 50(2) PD 822 [1996] (Isr.).

157 *See* HCJ 411/89 Temple Mount Faithful Movement v. The Jerusalem District Police Commander 43(2) PD 17 [1989] (Isr.).

158 *See Meretz Faction*, HCJ 4712/96 at 830.

159 *See Temple Mount Faithful Movement*, HCJ 411/89 at 21.

160 *Id*.

161 *See* Statman, *supra* note 143, at 182-83.

from the Commissioner of the United States Environmental Protection Agency to hold a procession in Skokie. Skokie was not a casual choice: most of its population was Jewish—40,000 out of its 70,000 residents—and many of its Jewish residents at the time were Holocaust survivors. Members of the Nazi party wanted to raise a swastika-bearing banner and distribute fliers calling for the murder of Jews and denial of the Holocaust. The declared aim of the march was to terrorize the residents of Skokie and hurt their feelings.[162]

After permission was granted, the village successfully petitioned for its cancelation in early 1977. At the same time, the village council enacted three by-laws seeking to prevent the American Nazi Party from obtaining permits to demonstrate in the future. A request by the Nazi Party for a permit to demonstrate on Independence Day, July 4, 1977, was refused on the grounds that such a permit would involve a breach of the new village by-laws. Subsequently, the American Civil Liberties Union challenged the denial on behalf of the Nazi Party, claiming that the by-laws unconstitutionally infringed upon the group's First Amendment right to freedom of expression.[163]

The Supreme Court of Illinois conveyed its sympathy to the residents of Skokie, but ruled that the march of the neo-Nazis and the waving of swastika-bearing flags could not be forbidden.[164] The United States Supreme Court refused to intervene, thereby upholding the verdict.[165] The march, which had been planned for Sunday, June 25, 1978, was canceled by the members of the neo-Nazi party. Frank Collin, the leader of the movement, claimed that the demand to hold the march had been "pure agitation on our part to restore our free speech."[166]

Would the Open House ever consider, for instance, a demand to hold the gay pride parade in an ultra-Orthodox neighborhood in Jerusalem or in Hebron? The right-wing activists chose precisely such a route: a nationalist procession designed to threaten and terrorize in the heart of an Arab city in Israel. Except for shifting the procession's route to the edge of the city, the same HCJ that stated it would

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[162] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 13 (1986). Incidentally, Bollinger notes that the father of Frank Collin, the leader of the neo-Nazi movement, was Jewish and a Dachau survivor. *Id*. at 26-27.

[163] *Id*. at 25. In this context, note that the Association of Civil Rights in Israel welcomed the HCJ ruling on the Umm al-Fahm procession. *Association for Civil Rights: The Right-Wing Activists' Procession Should not Be Prevented for Fear of Violence*, NRG (Oct. 29, 2008), http://www.nrg.co.il/online/1/ART1/804/305.html. (Hebrew).

[164] *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977). The facts detailed above rely on the description available in the ruling of the Supreme Court of Illinois. *See also* BOLLINGER, *supra* note 162, at 25-26. For the proceedings in the Illinois Appellate Court, *see* Vill. of Skokie v. Nat'l Socialist Party of Am., 51 Ill.App.3d 279 (1977). *See also* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985).

[165] Smith v. Collin, 439 U.S. 916 (1978).

[166] Douglas E. Kneeland, *Nazis Call off March in Skokie*, N.Y. TIMES, June 23, 1978, at A10; *A Peaceful Day in Skokie*, N.Y. TIMES, June 25, 1978, at E20.

have forbidden a gay pride parade in an ultra-Orthodox neighborhood supported extreme right-wing activists without adducing any legal arguments.[167]

Incidentally, one important difference is worth noting between the HCJ ruling on *Umm al-Fahm* and the American courts that ruled on *Skokie*. Contrary to the succinctness of the HCJ, each American judge who had occasion to discuss the *Skokie* case expressed personal revulsion at the ideology the neo-Nazi movement sought to promote, even while protecting the movement's First Amendment rights. As Bollinger notes, this recurs unequivocally and without exception in all the legal proceedings.[168] The American judges apparently felt that the Jews of Skokie deserved to know their unquestionable objection to the contents of the expression, despite ruling to protect it. This was not how the HCJ judges behaved toward Umm al-Fahm's Arabs and toward Arabs in Israel in general. The comparison between *Skokie* and *Umm al-Fahm* only strengthens the impression that the HCJ's extremely brief ruling is somehow disturbing in its lack of any reference to the goals of the Umm al-Fahm procession or to the racist and anti-democratic ideology of the procession's organizers.

Furthermore, references to gays' and lesbians' freedom of expression in the context of the gay pride parade are wrapped in quotes from the case law, à la "precisely those sayings evoking strong feelings of revulsion, anger and pain . . . require more than anything the protection [] of the basic right[.]"[169] The impression is that the HCJ tries its best to distance itself from the contents of the gay pride parades and to clarify that its ruling does not necessarily express agreement with these contents. The HCJ's *Umm al-Fahm* ruling lacks similar rhetoric, creating the opposite impression.[170]

The HCJ's obliviousness to the political context of the right-wing procession, as if the context of the demonstration were entirely irrelevant, proves that value symmetry is assumed between those struggling for freedom of expression and equal rights, and those opposed to these basic democratic rights. As Aeyal Gross wrote:

> The comparisons drawn in the course of the discussion on the gay pride parade and events that could lead to violence, such as a procession calling for the transfer of the Arab population, create a distorted symmetry between an event whose message is equal rights and one bearing a message of hatred and discrimination. This very message may incite violence and convey to the Arab population a message of inferiority and discrimination.

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167 *See supra* Part IV.

168 BOLLINGER, *supra* note 162, at 28.

169 *See* HCJ 8898/06 Meshi Zahav v. The Jerusalem District Police Commander ¶ 9, (Dec. 27, 2006), Nevo Legal Database (by subscription) (Isr.) (quoting HCJ 2194/06 Shinui-Center Party v. Chairperson of the Central Elections Committee (June 26, 2006), Nevo Legal Database (by subscription) (Justice Rivlin's Statement)).

170 Another interesting difference between the gay pride parade rulings and the Umm al-Fahm one is a demand of "modest and decorous" behavior in the gay pride parades. *See, e.g.*, *Meshi Zahav*, HCJ 8898/06 ¶ 8, and the complete absence of any demands on decorous behavior in the Umm al-Fahm case.

> The discourse of rights, because of its abstract character, could invite this false symmetry, which should be unreservedly rejected.[171]

In the *Skokie* case, the Supreme Court adopted similar logic: whether the controversial expression is intended to topple the democratic regime is irrelevant and those who endorse it have a right to make use of their freedom of expression, even when their goal is to abolish freedom of expression.[172] The *Snyder* Court used a similar approach.[173] The pride that Israeli Police took in the fact that the Umm al-Fahm procession took place at all—and without serious disruption—confirms that this problematic symmetry is a trait common to enforcement agencies everywhere.[174]

In this context, Statman's proposition to draw a distinction between a deliberate offense to feelings that is intended to anger and humiliate the victim and an incidental offense that is not meant to humiliate deserves attention. Whereas the deliberate offense could, in certain circumstances, justify the limitation of the offender's freedom, the incidental offense cannot justify such a limitation.[175] The procession of the extreme right in Umm al-Fahm, according to its participants, constitutes a deliberate offense to feelings. This was the procession's main goal. By contrast, insofar as the gay pride parades hurt the public's feelings, their offense was incidental. The aim of these parades was to raise awareness about discrimination against lesbians, gays, transsexuals, bisexuals, and other sexual minorities, and it also aimed to call for the eradication of discrimination based on gender and sexual orientation. As this Article will claim in the next Section, these aims may hurt some people's feelings, but such feelings—just like racist feelings—are indefensible.

2. Hurting Feelings as a Question of Patriarchy

It is not a coincidence that the HCJ has limited the freedom of expression on grounds of hurt feelings in only a handful of cases. Hurt feelings is fundamentally a problematic concept: What feelings are defensible? Who determines what feelings are in danger of being hurt? How does one do that?

This Section illustrates the problems entailed in the recognition of hurt feelings through an interpretation that views the claims of petitioners against the

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171 Aeyal Gross, *Freedom of Expression and Public Order*, HA-MISHTEH (Nov. 22, 2006), http://aeyalgross.com/blog/?p=25548 (Hebrew).

172 BOLLINGER, *supra* note 162, at 15.

173 *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

174 Note that, like the demonstrators of the extreme right in Umm al-Fahm, who claimed that they wanted "to test whether there is equality before the law in Israel," members of the neo-Nazi movement who had planned to march in Skokie also wanted to protest against what they saw as a denial of their freedom of expression. *See* Bollinger, *supra* note 162, at 27. In both cases, groups seeking to eliminate what they consider undesirable minorities are the ones who feel persecuted and threatened.

175 Statman, *supra* note 143, at 147-57; *see also* Daniel Statman, *Two Concepts of Dignity* 24 TEL AVIV L. REV. 541, 585 (2001) (Hebrew).

gay pride parade as patriarchal feelings rather than as moral or religious ones.[176] In the past, as will be discussed further below, neither the courts nor legislatures had any hesitations about hurting patriarchal feelings, even though they did not refer to them by that term. Would the discussion on hurting feelings change were we to say that the gay pride parade is not hurtful to religious feelings, but rather to patriarchal ones? Why does hurting these feelings become illegitimate when they are dressed up as religious?

This Article will illustrate this claim through a brief discussion of the *Women of the Wall* case.[177] In that case, the HCJ upheld the State's claim that the right of the "Women of the Wall" to pray at the Western Wall according to their custom—to read the Torah and wrap themselves in prayer shawls—should yield because it hurts religious feelings and due to concern for the public order. In fact, the State of Israel, in its arguments, put forth the very same claims as the petitioners against the gay pride parades, which the HCJ had previously rejected as infringing upon the freedom of expression of Open House members. Justice Cheshin wrote for the majority in the *Women of the Wall* case:

> The Women of the Wall have a right to pray at the Wall according to their custom. This was the decision in the first ruling that also recurred in the second ruling, and I can find no justification for dismissing it. And yet, the right of the petitioners to pray at the Wall according to their custom, like any legal right, is not unlimited. This right—like any other legal right—must be measured and weighed against other rights that also deserve to be protected. Indeed, we must do the utmost to minimize the offense that the prayer mode common among the Women of the Wall causes to other observant Jews, and thereby also prevent serious clashes between the rival parties.[178]

The Court ruled therefore that the women would be permitted to pray at "Robinson's Arch," which is adjacent to the Western Wall. The HCJ thereby sanctioned the violence to which the Women of the Wall had been subject and confirmed the superiority of religious-Jewish-Orthodox feelings in their Israeli version.[179] I believe that if the if the High Court had considered the "offense to

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[176] On the patriarchal nature of religion, *see, e.g.*, NICHOLAS C. BAMFORTH & DAVID A. J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW 303 (2008).

[177] *See supra* text accompanying note 140.

[178] HCJ Further Hearing 882/94 Alter v. The Minister of Religious Affairs at 318 (June 12, 1994), Nevo Legal Database (by subscription) (Isr.). The developments after the decision in this further hearing are described in the short film of Yael Katzir, PRAYING IN HER OWN VOICE (Katzir Productions & New Love Films 2007).

[179] Note that some Jewish American Orthodox trends do not oppose calling women up to the Torah and to women wearing prayer shawls. Alternative views about calling women up to the Torah prevail also among Israeli Orthodox Jews, but they have not found expression in Supreme Court rulings or in the public discourse, where the conventional view of the Israeli rabbinic establishment enjoys an absolute monopoly. For alternative perceptions in Orthodox Halakhah, *see* DANIEL SPERBER, THE PATH OF HALAKHAH—WOMEN READING THE TORAH: A CASE OF PESIKAH POLICY 17-50 (2007) (Hebrew).

feelings" as an affront to patriarchal feelings, rather than religious feelings, a more just ruling would have resulted.[180]

Patriarchy is a hierarchy based on the rule of men over women of all ages and over younger men—*e.g.*, a hierarchy based on gender and age.[181] The patriarchal order subordinates women to men and forbids women to study, to work, and to be sexually independent. Moreover, it forbids men to have intimate relationships with men. Men who transgress the heterosexual command are punished both by the law and by society, typically with scorn and accusations of "unmanliness." Women who deviate from the "feminine" code—for instance, choosing to not have children, become "career women," put on phylacteries, wrap themselves in prayer shawls, or wear skullcaps—are similarly punished.[182] Many of the patriarchal prohibitions have a religious basis. In the past, Israeli courts were willing to recognize—indeed indirectly—that "patriarchal feelings" are not legitimate, even when anchored in religion. In fact, all the case law dealing with gender equality and with the struggle against the discrimination of women because they are women hurts patriarchal feelings, despite its characterization by the Court and the parties as religious feelings.[183] Accordingly, Israeli legislation abolished many patriarchal arrangements that might hurt these feelings—including, for example, the elimination of married women's economic dependence on men through the institution of inalienable assets in Section 2 of the Law on Equal Rights to Women, provisions ensuring women's right to their own bodies in Section 6a of that law, the Law on the Prevention of Sexual Harassment, and others.

Patriarchy, meaning the subordination of women to male rule, is a worldview and a political theory opposed to democracy.[184] According to this line of thought, hurting patriarchal feelings should pose no problem because anti-democratic feelings do not, as such, merit protection. Hence, no balance need be struck

(Rabbi Professor Daniel Sperber is an Israel Prize laureate and heads the Institute for Advanced Torah Studies at Bar-Ilan University). For a description of the legal struggle and for an analysis of the violence against the Women of the Wall, *see* Frances Raday, *The Fight against Being Silenced*, *in* WOMEN OF THE WALL: CLAIMING SACRED GROUND AT JUDAISM'S HOLY SITE 115 (Phyllis Chesler & Rivka Haut eds., 2003)

180 This is also the view of Raphael Cohen-Almagor, who argues that "[o]ffense to the feelings of the chauvinist racist lacks all normative power because its source is morally invalid." COHEN-ALMAGOR, *supra* note 1, at 178.

181 *See* CAROL GILLIGAN, THE BIRTH OF PLEASURE 7 (2003).

182 For further discussion of the connection between patriarchy, the superiority of what the cultural codes call "masculine" over what they call "feminine," and the heterosexual command, *see* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227, 232 (Henry Abelove et al. eds., 1993). *See also* DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN 189-220 (1997). On the connection between homophobia and misogyny in law and in culture, *see, e.g.*, DAVID A. J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 113-16 (2005).

183 For a review of many of the key rulings that abolished some forms of discrimination of women, including discrimination based upon religious commands, *see* Frances Raday, *On Equality – Judicial Profiles*, 35 ISR. L. REV. 381, 390-401 (2001).

184 *See* GILLIGAN, *supra* note 181, at 18-19.

between the scope of "offensive" freedom of expression—meaning one hurting patriarchal feelings because, for instance, it promotes gender equality—and the feelings of the chauvinist. The interest of the racist or the chauvinist in advancing their ideologies is not a protected interest.[185]

It is no coincidence, therefore, that the petitioners in the gay pride parade case chose to present themselves as religious.[186] As Statman and Sapir have observed, religion still enjoys "a special status in comparison with . . . other sectors."[187] When arguments are presented in the name of "religion,"[188] chances are that they will be weighed on their merits, even though these are patriarchal-homophobic arguments that deny LGBT individuals their actual right to exist.

Nor is it fortuitous that the leaders of the main religions in Jerusalem formed a common front in their opposition to the gay pride parade, since all these religions are distinctly patriarchal. Thus, toward the Worldpride events that were planned to be held in Jerusalem in 2005, the two Chief Rabbis of Israel, the Latin Patriarch, the General Secretary of the Greek Orthodox Church, the spokesman of the Armenian Church, the Deputy Mufti of Jerusalem, and other religious leaders held a press conference in which they called for the cancelation of the gay pride events.[189] The Chief Sephardic Rabbi Shlomo Amar declared: "The parade did one good thing in that it brought all of us together here—and I appreciate that."[190]

One can easily envisage what the Court would have said had the petitioners not presented themselves as religious men but as patriarchal men, fearful for the damage to the patriarchal social order in which women are subordinate to male authority and both genders are forbidden to cross the line and live without conforming to the accepted social codes of "masculinity" and "femininity." Furthermore, patriarchy draws the borders of permitted and forbidden not only along lines of gender and sexual orientation but also along lines of ethnic and racial membership.[191] As Carol Gilligan and David Richards noted, racism and patriarchy are mutually integrated.[192] The former promotes separation between

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185 *See* COHEN-ALMAGOR, *supra* note 1, at 178-79; *see also* STATMAN, *supra* note 143, at 151 ("The racist cannot ask the objects of his racism to take his despicable feelings into account and limit their behavior accordingly.").

186 *See*, *e.g.*, § 1(a) in Holzberg's petition in HCJ 8898/06.

187 Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does not Include Freedom from Religion*, 24 L. & PHIL. 467, 500 (2005)

188 An in-depth discussion of the question of "religion" and of how Orthodoxy in its Israeli version exercises a monopoly on "Judaism" exceeds the scope of this paper. I will only note here that the stance on "religious feelings" and their offense is also related to political forces within religion. There are Orthodox and non-Orthodox streams in Judaism whose attitude to homosexuality is very different from the one stated in the name of religious Jews in petitions to the HCJ. The essentialism straining the discussion on the attitude of "religion" to the gay pride parade is a fascinating issue beyond the limits of the current discussion.

189 *See* Elad, *supra* note 47, at 305.

190 *Id*.

191 *See* GILLIGAN, *supra* note 181, at 26-28.

192 CAROL GILLIGAN & DAVID A.J. RICHARDS, THE DEEPENING DARKNESS: PATRIARCHY, RESISTANCE & DEMOCRACY'S FUTURE 231-32 (2008).

races—and at times even the elimination of the race perceived as inferior—and the latter seeks to subordinate women to the rule of men. In women, according to the patriarchal fear, lurks the danger to "racial purity." Thus, controlling the sexuality of white women in the era of slavery in the United States—and also long after it—also included strict bans on sexual or marital relationships with black men.[193] Neither society nor the law responded even-handedly to this issue: white men who had intimate relationships with black women merited almost no public or judicial attention and were consequently not subjected to the sanctions imposed on white women who had deviated by having sexual relationships with black men.[194]

In the Israeli context, this Article has hinted at the connection between the control of Jewish women's sexuality and the prohibition of marriage between Jews and Arabs in Israeli law. The prior discussion noted that the separation between Jews and Arabs in the State of Israel, as well as the demographic considerations that the Israeli Legislature took into account, were brought together—not by chance—in the issue of gender equality. Moreover, the burden of continuing the Jewish people was imposed on women through the significant restriction of gender equality.[195]

Controlling the sexuality of "our" women and "protecting" them from "their" men are two important aspects of patriarchal ideology—not only in Israel, which ties together the subordination of women and racial or ethnic "purity."[196] Therefore, patriarchy not only subordinates women and young men to the men in control, but it also infringes upon the rights of racial, ethnic, and sexual minorities in order to ensure the continued control of women and the "purity of the race," which in politically correct terms is called "the continuity of the people." Hence, the protest march in Umm al-Fahm requested by the very same people who petitioned against the gay pride parades is an act entirely compatible with patriarchal values and meant to preserve them.

The petitioners who had presented themselves as religious men in the gay pride parades cases did the same in the Umm al-Fahm case. One petitioner is introduced as "a public activist, resident of Hebron, spokesman of the National Jewish Front movement . . . about to conclude his law studies . . . concerned about the policy adopted by members of [the Israeli Police], which discriminates between him and people from the left."[197] Another petitioner is described as "a public personality, a resident of Hebron for the last twenty-nine years, head of the National Jewish Front and partner to [] many charitable initiatives, to the

193 *Id*.

194 *Id*. Black men trespassing white men's limits also encountered harsh and cruel reactions: public executions, usually without trial or after sham kangaroo trials. *See* Zvi Triger, *The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law*, 30 WOMEN'S RTS. L. REP. 479, 485-89 (2009).

195 *See id*.

196 *Id*.

197 HCJ 6802/08 Ben-Gvir v. Israel Police-Northern District Commander (Jan. 21, 2009) Nevo Legal Database (by subscription) (Isr.) at § 7 of the petition.

management of a religious school, to a large hospitality enterprise, and to activities for the sake of the people and the Land of Israel."[198] Not surprisingly, they do not present themselves as leading activists of a group that was declared a terrorist movement in 1994.[199]

Following Gilligan and Richards, who understand patriarchy as "a politico-religious paradigm,"[200] it could be said that through this introduction, the petitioners wish to identify themselves as part of a collective whose values they share with the judges—*e.g.*, religious Jews, public figures, and so forth—while pointing to Umm al-Fahm Arabs as outsiders. Unlike the patriarchal component, Jewish religiosity is a component of identity with which the judges can identify, which is why the petitioners' invocation of religion is not merely casual. The role of religion is central and important because the liberal principle of freedom of religion greatly restricts the ability to engage in a dispute with those claiming to act in the name of religion. Therefore, the cover of religion can be used to legitimize actions that would not be possible for a secular person.[201]

Further support for the notion that reliance on religion grants greater validity to the petitioners' claims lies in the fact that the petitions deal with an activity seeking to eliminate the groups they oppose. If one removes the cover of legalism from these petitions, they actually function as a further tool in the petitioners' struggle against the *very existence* of Israel's Arabs, gays, lesbians, bisexuals, and transgendered individuals. Had the aims of these petitions been formulated openly and directly, they would definitely have had no chance. Hence, the choice was to translate them into terms that are more acceptable, anchor them in religious arguments and in the feelings of religious individuals, concealing their aims under the cover of legalism. This appears to be a distinctly patriarchal struggle in which nationalism, homophobia, and sexism are inseparably linked. The aim of this struggle—where the HCJ serves, apparently unwittingly, as a further tool—is to humiliate those groups that lack the qualities the petitioners find acceptable and to terrorize them.

Except for members of the Open House, who were the respondents in the petitions against the gay pride parades, no one spoke of the hurt feelings of gays and lesbians as a result of the harsh verbal and physical violence encouraged by the petitioners and by others protesting against the parades. In the *Umm al-Fahm* case,

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198 *Id.* § 8.

199 This issue is also obviously relevant to the cleanness of hands issue discussed in Part VI.C, *infra*.

200 GILLIGAN & RICHARDS, *supra* note 192, at 225-46.

201 *See, e.g.*, Frances Raday, *Culture, Religion, and Gender*, 1 INT'L J. CONST. L. 663 (2003). Gila Stopler has also written on this question in the context of discrimination against women. *See* Gila Stopler, *A Rank Usurpation of Power: The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL'Y 365 (2008); Gila Stopler, *The Liberal Bind: The Conflict Between Women's Rights and Patriarchal Religion in the Liberal State*, 31 SOC. THEORY & PRAC. 191 (2005); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003).

this issue was never raised, as noted above. This disregard is particularly interesting given a discussion that is taking place within Orthodox Judaism on precisely this question. In the context of the offense to the public's feelings caused by calling women up to the Torah, which emerged in the *Women of the Wall* case, Daniel Sperber suggested that the feelings of the controversial group—*e.g.*, the feelings of the women who wish to read the Torah—should also be taken into account. Sperber held that when the public's dignity—*e.g.*, the public's feelings in the court's formulation—clashes with the dignity of individuals—*e.g.*, the sorrow caused to these women and the possible affront to their dignity—the principle is "great is human dignity," meaning that the women's feelings override.[202]

Sperber notes that the principle of "the public's dignity" is context-bound and its meaning is not fixed.[203] In the Talmudic period, the motivation of the rule prohibiting women from reading the Torah was the high percentage of illiterate men. Its purpose was to preclude a situation "where there [were] no men able to read, and the only one who [could] read the Torah [was] a woman. In these circumstances, her reading would not serve public dignity, since it would be offensive to the men if only a woman could read."[204] In modern times, this purpose is no longer legitimate or reflective of reality: "After all, in Israel a woman can officiate as State Comptroller, as Supreme Court Justice, as government minister, or even as prime minister."[205] Hence, as noted above, the offense to the feelings of women as a result of forbidding them to read the Torah is greater than the affront to the feelings of those who hold that women should not read.

This line of thought could have been applied in such cases as the gay pride parades and the Umm al-Fahm procession in an attempt to consider the hurt feelings of the minority group. The doctrine of balance between freedom of expression and the public's hurt feelings, however, does not seem capable of taking this type of offense into account because of the way it was fashioned by the High Court: "feelings" that can be hurt are, for the most part, religious feelings of Orthodox and ultra-Orthodox Jews.[206] Furthermore, what emerges from the reading of the HCJ rulings is that the Court grants greater weight to the feelings of religious Jews residing in Jerusalem than to the feelings of Umm al-Fahm's Arabs, if only because in the gay pride parade petitions the Court goes through the trouble of presenting a rationale and of balancing and explaining the reasons for its

202 SPERBER, *supra* note 179, at 34-43.

203 *Id*. at 25.

204 *Id*. at 26.

205 *Id*. at 39.

206 An additional problem raised by this line of thought is the emergence of a competition about "who is hurting more?" and who should decide that. On the problem of testing the intensity of the offense, *see* STATMAN, *supra* note 143, at 187-88. Be it as it may, Sperber's stance clarifies that, contrary to the petitioners' position against the gay pride parades and to the Court's position on hurt feelings, the feelings of the parties involved can be examined in an infinite number of ways. This approach may strengthen the stance that no weight should be assigned to hurt feelings when the concern is whether to allow a particular expression.

decision. By contrast, the ruling on the petition about the Umm al-Fahm procession includes no reference to the potential offense to the city's Arabs.[207] True, the quantitative and qualitative difference between the rulings could be due to reasons more prosaic. Perhaps the ruling on Umm al-Fahm is not substantive due to the Court's workload or lack of time; but the Court had been able to contend with the workload and with urgent petitions in the past. Thus, for instance, in the case of the 2008 gay pride parade, the decision was issued immediately and its detailed reasoning was published at a later date.[208] It is clear that while the pride parade Courts carefully weighed the competing arguments and interests, the *Umm al-Fahm* Court took for granted the superiority of the petitioner's stance, and it was merely concerned with the organizational and logistical aspects of the procession.

Whatever the reasons, what we have in the databases are these rulings, extremely different from one another in their attitude to the same subject. The message that remains is that the Court does not consider itself obliged to explain to Arabs why it allows the procession in Umm al-Fahm while it goes to great lengths to provide such explanations to the Jewish religious public in Jerusalem.

B. The Court as a Tool of Political Activity and Dissemination of Discriminating Speech

As mentioned above, the Nazis who wanted to march in the predominantly Jewish suburb of Skokie eventually called off the procession, stating that their legal struggle was "pure agitation . . . to restore [their] free speech."[209] This may indicate that they were not actually interested in free speech as a general concept of right and were not interested—paradoxically—in their own right to free speech. One may argue that their main purpose was to "agitate" the Jewish residents of Skokie, many of them Holocaust survivors who experienced the terror of the Nazi regime at first hand. If that was the case and the Nazis used their legal struggle to make an intimidating display of power, perhaps the Supreme Court was a mere means to another end, alien to freedom of speech.

The use of the courts for the advancement of political or other purposes is not a unique phenomenon.[210] In his book, *Law and the Culture of Israel*, Menachem Mautner describes how members of the Israeli left—the "former hegemons" in his terms—turned to the courts after they lost the 1977 elections to the Likud Party,

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[207] Thanks to Menachem Mautner for bringing this point to my attention.

[208] The ruling rejecting the petition was issued, without arguments, on June 23, 2008, three days before the planned date of the gay pride parade that year. The judges' arguments were published on July 21, 2008. *See* HCJ 5317/08 Marzel v. The Jerusalem District Police Commander (July 21, 2008), Nevo Legal Database (by subscription).

[209] *See* Kneeland, *supra* note 166, at accompanying text.

[210] For a survey of analogous European cases, *see, e.g.*, LISANNE GROEN & MARTIJN STRONKS, ENTANGLED RIGHTS OF FREEDOM: FREEDOM OF SPEECH, FREEDOM OF RELIGION, AND THE NON-DISCRIMINATION PRINCIPLE IN THE DUTCH WILDERS CASE 27 (2010).

and they began to use the courts to attain their political aims.[211] Mautner notes that the self-perception of the HCJ changed following the Labor Party's loss of hegemony in 1977 "from a professional institution, whose main task is to resolve disputes, to an institution playing a political role beside the Knesset."[212] The highest number of petitions to the HCJ between 1977 and 2005 came from members of the former hegemons' group.[213]

Another significant finding in Mautner's study is that the decisive majority of the petitions submitted by Knesset members belonging to the group of former hegemons dealt with issues that did not concern them personally. By contrast, when Knesset members belonging to the new hegemony, such as Shas members, petitioned the HCJ, their petitions dealt with decisions affecting them personally, such as the removal of personal immunity.[214] Accepting petitions such as those submitted by the former hegemons was made possible by the broadening of standing and of justiciability.[215] These processes were referred to as "judicial activism" in the legal literature, and the culmination of this activism was in the rulings that rescinded four Knesset laws.[216]

Following Mautner, this Article contends that the petitioners in the gay pride parades and in the Umm al-Fahm procession, just like the former hegemons, used the HCJ for extra-legal aims: as a continuation of their public and political activities. Thus, in the context of their political activity, Ben-Gvir and his gang publicly delivered documents to members of the Open House wearing rubber gloves, while Marzel asked to be chairman of the Umm al-Fahm election committee in the February 2009 general elections.[217] The petitions to the HCJ were but one part of these activities. Yoav Dotan and Menachem Hofnung found that politicians turn to the courts to promote their political goals, regardless of their chances of success.[218] According to this view, they do so more to enjoy extensive media coverage than to win the case and their purpose is to establish themselves in the public discourse.[219]

Besides the public exposure, the recourse of the extreme right to the HCJ may also be rooted in their deep understanding of the doctrine of the freedom of

211 MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 127 (2011).

212 *Id*. at 147.

213 *Id*. at 149.

214 *Id*. at 149.

215 *Id*. at 170. *See also* Daphne Barak-Erez, *The Revolution of Justiciability: An Evaluation*, 50 HA-PRAKLIT 3, 3-4 (2009) (Hebrew).

216 Contrary to the image of the Supreme Court as a serial abrogator of laws, only five legal provisions have been abolished since the *Bank Mizrachi* precedent of November 1995. *See* CA 6821/93 United Mizrachi Bank v. Migdal Cooperative Village 49(4) PD 221 [1995] (Isr.). *See also* MAUTNER, *supra* note 211, at 73-74.

217 Ephrat Weiss, *Who Will Be Chairman of the Election Committee in Umm al-Fahm? Baruch Marzel*, YNET (Feb. 2, 2009), http://www.ynet.co.il/articles/0,7340,L-3665247,00.html (Hebrew).

218 Yoav Dotan & Menachem Hofnung, *Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court?,* 38 COMP. POL. STUD. 75, 94-95 (2005).

219 *Id*. at 96-99.

expression in a liberal state and in their ability to harness it to their needs, even if they lose in the legal proceedings. Bollinger has pointed to the gap between the liberals' readiness to use social as opposed to legal sanctions against deviants. While liberals and believers in freedom of expression will not hesitate at times to boycott and exclude racists, chauvinists, or others, they will take strong exception to the imposition of legal sanctions on them, such as limiting their freedom of expression.[220]

Was it this understanding about the limitations of the liberal doctrine of freedom of expression that drew the extreme right to the Court? Concerning their goals—"to prove" that the State persecutes them and that it relinquishes its Jewish values—this would be a safe bet. Given the HCJ's consistent refusal to infringe upon the freedom of expression on grounds of hurt feelings, it was clear they would lose the legal battle against the gay pride parades and that they would successfully petition for their own procession in Umm al-Fahm. Both of these results serve their interests well: their target audience acquires "proof" of Israel's moral bankruptcy as it were—a gay pride parade in Jerusalem, sanctioned by the HCJ, and a continued ability to harass Arabs and incite the Jewish public against them, again with HCJ approval.

Be that as it may, one important difference is evident between Knesset members—former and current hegemons—who use the Court as an extension of their parliamentary activity and the petitioners in the gay pride parade and Umm al-Fahm cases. The difference is in the identity of the petitioners. In 1994, the State of Israel, by the power of its authority according to Section 8 of the Prevention of Terrorism Ordinance, 5708-1948, declared Kach, Kahana Hai, and all their factions and combinations terrorist organizations.[221]

According to this declaration, Baruch Marzel, Noam Federman, and Tiran Pollak were the leading activists of "Kach" as of the day of the declaration. Furthermore, the declaration states that it applies not only to the enumerated organizations but also to "every member-individual who will act to attain the same type of aims that the mentioned organizations acted to attain, through means similar to those that the mentioned organizations had used, even if called by other names or titles—whether permanently or occasionally."[222]

For many years now, terrorist organizations have been resorting to more than traditional violence. Like legal organizations and the State itself, terrorist organizations invest great efforts in the media. From this perspective, people who

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220 BOLLINGER, *supra* note 162, at 12-13.

221 Declaration according to the Prevention of Terrorism Ordinance, 5708-1948, 4202 OFFICIAL GAZETTE (SH) NO. 2786 (1994) (Isr.).

222 *Id*. In 2006, HCJ addressed the current validity of this declaration and ruled that it does remain valid, and that "no change has occurred in the political circumstances external to these movements, in a way that requires a reconsideration of the declaration, which was legally enacted in its time." HCJ 951/06 Stein v. The Police Comm'r, ¶ 23 (April 30, 2006), Nevo Legal Database (by subscription) (Isr.).

have been singled out as key activists of "Kach" enlist the Court and the press in the promotion of their goals. What is important to the petitioners is the petition itself and its use to gain media attention, regardless of whether the petition will succeed.[223]

Insofar as the 2009 gay pride parade in Jerusalem is concerned, recourse to the HCJ was published even before it actually took place. Surely, the extreme right's plan to request police permits for fifteen processions in Arab towns to protest the gay pride parade contemplated a future petition to the HCJ. According to the plan, the organizers would submit requests for processions one month after the parade in Jerusalem, based on the assumption that the police would have allowed the parade. The processions were meant to take place in numerous Arab towns across Israel. Parallel to the processions, the activists intended to hold protest pickets in front of the Open House in the city, to assemble hundreds of activists on the day of the parade to protest, and to campaign in the city's schools. The organizers clarified that were the police to refuse their request, they would petition the High Court. "One law for all, freedom of expression, and the right to march are not only for the members of the Open House and for the extreme left. And it is our right to march to examine the illegal building in the towns and the villages, and obviously to hold processions with Israeli flags," claimed Ben Ari.[224]

C. Cleanness of Hands

Cases like *Skokie* and *Snyder* illustrate a flagrant hypocrisy of the parties in the sense that both the Nazis and the Westboro Baptists, who are so concerned with their own First Amendment rights, do not hesitate to actively promote the infringement of the same rights of those who are the targets of their hateful speech. The same can be said about the Jerusalem pride petitions. This has a direct bearing on the issue of cleanness of hands. The principle of clean hands was developed in English laws of equity[225] as well as in Jewish law.[226] Its aim is to promote compliance with the law,[227] to improve the efficiency of administrative and legal proceedings by ensuring that the parties provide full information to the courts,[228]

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223 For instance, none of the petitioners against the gay pride parades resides in Jerusalem, as noted above. Furthermore, the request to hold a procession in Umm al-Fahm, as they describe in their petition, was a response to the municipality ignoring their request to set up a stall for the sale of Israeli flags in the city, and the processions planned in Arab towns in the summer of 2009 were a response to the gay pride parade in Jerusalem on June 27, 2009.

224 Medzini, *infra* note 255.

225 PAUL VIVIAN BAKER, PETER ST. JOHN LANGAN & EDMUND HENRY TURNER SNELL, SNELL'S EQUITY 31-32 (29th ed., 1990) ("He who comes to equity must come with clean hands.").

226 *See* 24 *Psalms* 3:4: "Who shall ascend into the mountain of the Lord? Or who shall stand in his holy place? He that has clean hands, and a pure heart; who has not taken my name in vain, nor sworn deceitfully."

227 HCJ 3483/05 DBS Satellite Services Inc. v. Ministry of Communications Tak-El 2007(3) 3822, ¶ 13 [2007] (Isr.).

228 HCJ 579/89 Nibbit Sys. Inc. v. State of Israel 89(4) Tak-El 58 [1989] (Isr.).

and to further investigation of the truth.[229] The principle of clean hands includes several sub-principles: disclosing all facts and documents;[230] disclosing previous proceedings relevant to the matter;[231] avoiding misleading presentation of facts;[232] avoiding contradictory versions of events;[233] and refraining from "taking the law into one's own hands."[234]

At times, the HCJ rejects petitions on the grounds that the petitioner has approached the Court with unclean hands.[235] In such cases, it relies on Section 15(c) of Basic Law: The Judiciary, which authorizes the High Court to grant relief for the sake of justice: "a leading and important principle is that whoever comes to this Court seeking relief for the sake of justice, will do so with clean hands."[236] Since the HCJ grants relief for the sake of justice, "granting relief to one who has trampled the law within or outside this Court in direct or indirect connection with ongoing proceedings, is incompatible with a basic sense of justice."[237]

There are several degrees of gravity to the claim of unclean hands. Deliberate and malicious uncleanness bearing, for instance, on substantive concealment from the HCJ could lead to a dismissal of the petition out of hand.[238] Given the restrictive approach of the HCJ to out-of-hand rejection, this is a relatively rare event. Less serious uncleanness of hands, such as concealing a marginal detail from the Court, does not justify dismissing the petition solely for

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229 HCJ 594/85 Uzzieli v. Israel Land Admin. 40(2) PD 262, 263-264 [1986] (Isr.).

230 HCJ 421/86 Ashkenazi v. Ministry of Transp. 41(1) PD 409, 410 [1987] (Isr.); HCJ 430/87 Aharoni v. Vice-Comm'r.Yehuda Wilk 87(3) Tak-El 21 [1987] (Isr.).

231 HCJ 1778/05 Yassin v. Prime Minister, Tak-El 2005(1) 2842, 2843 [2005] (Isr.).

232 *Uzzieli*, HCJ 594/85 at 229; *Ashkenazi*, HCJ 421/86.

233 HCJ 3975/05 Cohen v. Ministry of Interior, Tak-El 2005(2) 1252 [2005] (Isr.).

234 ELIAD SHRAGA & ROI SHAHAR, ADMINISTRATIVE LAW 132-133, 147-152 (2008) (Hebrew); *see also* HCJ 609/75 Israeli v. Mayor of Tel Aviv-Jaffa 30(2) PD 304, 306 [1976] (Isr.).

235 *See e.g.*, HCJ 2631/09 Yamin v. Civil Serv. Comm'r. in Jerusalem, (Apr. 21, 2009), Nevo Legal Database (by subscription) (Isr.) (rejected out of hand, *inter alia,* due to non-disclosure of all the relevant details); HCJ 384/09 Hekeri (Yitah) v. Israel Police, Neighborhoods Station (Feb. 2, 2009), Nevo Legal Database (by subscription) (Isr.) (non-disclosure of all facts suffices for the rejection of the petition out of hand); HCJ 1439/08 Survivor of Cartel Inc. v. Income Tax Assessor for Large Enterprises, Israel Tax Auth. (Nov. 20, 2008), Nevo Legal Database (by subscription) (Isr.) (petition rejected out of hand due to non-disclosure of facts and the existence of similar legal proceedings on the same issue in the past); HCJ 5548/00 Rachel Abraham (Cohen) v. High Rabbinic Court in Jerusalem (May 29, 2001), Nevo Legal Database (by subscription) (Isr.) (rejection of her petition to cancel the divorce agreement on grounds of coercion and exploitation due to a purportedly fraudulent declaration about her agreement to sign a divorce agreement in the rabbinic court); HCJ 669/85 Kahana v. Chairman of the Knesset 40(4) PD 393, 402 [1986] (Isr.). *See also* Ariel Bendor, *The Discretion of the High Court of Justice – What are the Rules?*, 21 MISHPATIM 161 (1991) (Hebrew); SHRAGA & SHAHAR, *supra* note 234, at 129-157. Uncleanness of hands has been recognized as grounds for rejecting requests for leave for appeal as well as civil appeals. *See, e.g.*, LCA 199/09 Bank Hapoalim Inc. v. Seri (unpublished) (Isr.). In Israeli civil law, cleanness of hands is related both to the good faith and fairness doctrines. *See*, *e.g.*, HCJ 5548/00; LCA 7724/04 Golko v. Israel Discount Bank Inc. (Nov. 4, 2004), Nevo Legal Database (by subscription) (Isr.).

236 HCJ 11407/04 Jane Doe v. Ministry of Interior, Tak-El 2205(2) 3587 [2005] (Isr.) (Justice Joubran).

237 SHRAGA & SHAHAR, *supra* note 234, at 132.

238 *Id*. at 133. *See also* HCJ 561/85 Coco v. Israel Police 86(2) Tak-El 72, 73[1986] (Isr.).

this reason.[239] Nevertheless, even if the petition is not rejected out of hand, uncleanness of hands will be a consideration when awarding damages against the party that behaved in this manner.

How "clean" petitioners' hands must be when approaching the HCJ has been disputed over the years. Thus, for instance, former Chief Justice Moshe Landau held that some people do not deserve relief from the HCJ because of their political activity.[240] Conversely, Justice Haim Cohen claimed that cleanness of hands is required only in matters directly connected to the petition.[241] Justice Yitzhak Kahan stood for an intermediate position, which was the one adopted in the later case law: cleanness of hands concerns only those matters related to the petition, but the range of matters related to the petition should be interpreted widely.[242]

In the 2006 gay pride parade ruling, the HCJ mentioned petitioners' cleanness of hands in passing and rebuked them for their warnings about potential flare-ups of violence.[243] The HCJ, however, disregarded the respondents' claims that the petitioners' uncleanness of hands justified rejecting their petitions. Given the case law's reluctance to broadly apply the doctrine, the HCJ likely reached the proper result. Nevertheless, there was still room for a more detailed examination of the petitioners' uncleanness of hands as an additional reason to reject the petitions against the gay pride parades.[244]

In its 2006 ruling, the HCJ rebuked the petitioners for threatening violence in response to the gay pride parade. In its 2008 ruling, however, the HCJ was entirely oblivious to the double standard of the petitioners concerning the scope and implementation of freedom of expression. The same petitioners that approached the Court seeking to gag the marchers in the gay pride parade petitioned against their own gagging in Umm al-Fahm. In its response to the petition seeking to prevent the 2008 gay pride parade, the Open House noted:

> Despite the petitioners' attempt to rely on a claim of hurt feelings, hurting feelings as a value does not particularly bother the petitioners and they apply it only regarding the gay pride parade, which they oppose on ideological grounds. Thus, for instance, the petitioners note in passage 42 of their petition that they have recently requested a permit from the Israeli Police to hold a procession in Umm al-Fahm. The petitioners, who are among the leaders of the radical right and support extreme views toward the Arab public in Israel, are not at all bothered by the warranted affront to the feelings of Umm al-Fahm's residents. In other words, hurting feelings

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239 HCJ 134/79 Shikun Ovdim Inc. v. Local Council Neve Monossohn 33(3) PD 169, 170-171 [1979] (Isr.); HCJ 5445/93 Ramla Municipality v. Ministry of Interior 50(1) PD 397, 404 [1994] (Isr.).

240 HCJ 320/80 Kawassme v. Minister of Def. 35(3) PD 113,122 [1980] (Isr.).

241 *Id*. at 130.

242 *Id*. at 136. This was the approach adopted, for instance, by Justice D. Levin in *Kahana*, HCJ 669/85, at 405.

243 *See supra* text accompanying notes 61-65.

244 *See supra* text accompanying note 239.

> is not a genuine value for the petitioners, who use it cynically in the context of the present petition.[245]

As noted above, the Court ignored the contradiction between the petitioners' stance concerning hurt feelings, both in the 2008 gay pride parade petition and in the procession of the extreme right in Umm al-Fahm. How should we understand this? Is this obliviousness related to the general disfavor of the cleanness of hands principle in Israeli law? Is the reason for the absence of any discussion concerning the feelings of Umm al-Fahm's residents that the discussion in this case does not focus on religious feelings, which usually enjoy broader protection than others?[246] The comparison between the gay pride parades and the Umm al-Fahm case seems to suggest that, although the petitioners—Jewish religious settlers—feel alienated from the State of Israel in general and from the Supreme Court in particular,[247] the Court ultimately invests greater efforts in explaining its rulings to them than to Arabs in Israel or to gays and lesbians.[248]

Concerning violence, the petitioners' unclean hands could have been dealt with through the rule that forbids taking the law into one's own hands. As long as the petitioners, who are among the leaders and spokespersons of this riotous group, fail to prevent the violence they threatened in an attempt to prevent the gay pride parades, they may be viewed as people who take the law into their own hands. In taking the law into their own hands, they seek to preclude these parades through illegal and violent means should the petitions against them be rejected and should they not be canceled legally.[249] The clean hands principle was particularly relevant to the petitions of Ephraim Holzberg against the gay pride parade, considering his statements at the Knesset Interior Committee.[250]

Concerning the double standard as it applies to the freedom of expression principle, this could be a situation presenting contradictory appeals in proceedings before the Court and before the police.[251] In this case, the contradictory versions touch on the perception of the petitioners' interests, which are affected by the police's decisions regarding the gay pride parades and the Umm al-Fahm procession. In the former case, they claim that freedom of expression will hurt their own feelings and those of the public they represent; in the latter, when their

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245 HCJ 5317/08 Marzel v. The Jerusalem District Police Commander (July 21, 2008), Nevo Legal Database (by subscription), at § 38 of the Open House Response.

246 *See supra* text accompanying note 143.

247 MAUTNER, *supra* note 211, at 116-121.

248 Marc Spindelman suggested, after reading an earlier draft of this Article, that, according to an alternative reading of the Court's elaboration in the gay pride cases, the Court presumes a general audience who has not yet appreciated and accepted gay rights.

249 *See* HCJ 609/75 Israeli v. Mayor of Tel Aviv-Jaffa 30(2) PD 304, 306 [1976] (Isr.); *see also* HCJ Further Hearing 19/68 Petah Tikva Municipality v. Minister of Agric. 23(1) PD 253, 255 [1969] (Isr.).

250 *See* Holzberg, *supra* note 57.

251 *See* HCJ 3975/05 Cohen v. Ministry of Interior, Tak-El 2005(2) 1252 [2005] (Isr.); *see also supra* text accompanying note 234.

freedom of expression could be offensive to the feelings of another public, they protest its infringement.

In any event, the interpretation of the cleanness of hands principle, as it developed in the case law following the ruling of Justice Yitzhak Kahan in the *Kawasme* Case,[252] required at least a broader examination of the context regarding the petitioners' clean hands in both the gay pride parades and the Umm al-Fahm procession, particularly given that the same petitioners were involved in all these cases. Therefore, the intention underlying the petitions of Marzel and Ben-Gvir was clearly discernible: opposition to the very existence of gays and lesbians[253] and the desire to expel Arabs from the State of Israel. According to the Supreme Court ruling, the mental circumstances of the petitioner who approaches the Court with unclean hands are relevant to the weight given to this element.[254] On this matter, the use of the regime's institutions by its opponents with the aim of changing it emerges here in full force: should those who deny that the State of Israel is a Jewish and democratic state be allowed to use its courts to promote their own agenda—turning it into an undemocratic state? This is a familiar dilemma, and perhaps these petitions should have been considered in this light.

In June 2009, the contextual perception of the parades was confirmed *ex post facto* with the publication of a plan by activists from the extreme right to organize fifteen marches in Arab towns to protest the police permit to hold the gay pride parade in Jerusalem on June 25, 2009.[255] Organizers of the extreme right protest marches usually include Baruch Marzel and Itamar Ben-Gvir, the petitioners against previous gay pride parades and the organizers of the Umm al-Fahm procession in 2009.[256]

CONCLUSION

It is not a coincidence that Phelps and his supporters chose to picket at soldiers' funerals[257] and not to demonstrate near a marching pride parade. By directing his offensive slogans at mostly non-gay audiences, he probably expects—consciously or subconsciously—to provoke homophobia in the hearts of his targets. "Why do LGBT individuals have to provoke religious sensibilities?" wondered many straight secular Israelis when they were asked whether they supported the

252 *See supra* text accompanying note 242.

253 As Justice Rivlin noted in his ruling in HCJ 5277/07 Marzel v. The Jerusalem District Police Commander (June 20, 2007), Nevo Legal Database (by subscription) (Isr.).

254 HCJ 5/48 Levin v. the Acting Dir. for the Tel Aviv Urban Area 1(58) PD 62-63 [1948] (Isr.); HCJ 37/49 Goldstein v. the Custodian of Absentee Prop., Jaffa 2 PD 716 [1949] (Isr.).

255 Nadav Shragai, *In Response to the Gay Pride Parade, Right-Wing Activists Plan to March in Arab Towns*, HAARETZ (June 22, 2009), http://www.haaretz.com/hasite/spages/1094764.html (Hebrew); Ronen Medzini, *The Jerusalem Gay Pride Parade: Marzel Will March in Arab Towns*, YNET (June 22, 2009), http://www.ynet.co.il/articles/0,7340,L-3734968,00.html (Hebrew).

256 Medzini, *supra* note 255.

257 *Supra* text accompanying note 35.

right of LGBT individuals to have a pride parade in Jerusalem.[258] If this is indeed the case, then it is an extremely sophisticated tactic and a strong example of discriminating speech: singling out a historically and legally vulnerable minority and pitting one vulnerable sector of the public—like mourning families of fallen soldiers—against another in order to incite hatred in the hearts of the former and eventually to promote discrimination against the latter. That the Court could not see this is proof of its heterophilia. Raphael Cohen-Almagor claims that democracy must "decry the person who discriminates and make him see that his problem is not really with the place of homosexuals (or Jews, or Arabs, or other minorities, or women, or the blue-eyed) in the society, but with the democratic approach in general. Democracy need not help the racist to substantiate his racism."[259]

This Article is purposed to shed light on the unwitting mobilization of the American and Israeli Supreme Courts in the service of the petitioners' aims to promote discriminating speech, relying on the inherent heterophilia of these legal systems. The *Umm al-Fahm* and *Skokie* cases prove that there are other forms of *philia* that these Courts need to acknowledge. These forms of *philia* pertain to race rather than to sexuality and they prove that getting rid of racism, while mostly welcomed, is not enough, just as getting rid of homophobia is important but not enough. It is time to account for unconscious privilege and not be satisfied with the eradication of devaluation.

This Article proffers that the widespread scholarly and instinctive hostility by judges towards any interference with the substance of the expression and the legal protection for all expression regardless of its content stems from various forms of *philia*. In its relentless pursuit of value neutrality, this refusal to distinguish the speech from the discriminating speech serves to subvert the freedom of expression.

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[258] *Supra* text accompanying note 134.

[259] COHEN-ALMAGOR, *supra* note 1, at 178-179. *See also* COHEN-ALMAGOR, *supra* note 26, at 23.