

THE LAW OF HISTORICAL FILMS: IN THE AFTERMATH OF *JENIN*, *JENIN*

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ABSTRACT

Filmmaking and the narration of history have been engaged in a complex relationship ever since the early days of filmmaking. Many films tell stories unfolding in previous times or about actual historical events, and their narration of history is often criticized as inaccurate, fictitious, or even intentionally misleading. When a highly publicized film suggests a controversial narrative of a certain chapter in history, a debate usually follows in the public arena, be it as part of the ongoing intellectual discourse or even in a political context. At times, however, the public debate is translated into legal terms. The article focuses on the difficulties confronting the attempt to apply legal regulation to historical films argued to be false—either by using private law causes of action, such as defamation and infringement of privacy, or by recourse to administrative censorship powers. The recent and highly controversial film *Jenin, Jenin* by the Israeli-Palestinian actor and filmmaker Muhammad Bakri, which professed to tell the story of residents of the Jenin refugee camp during an Israeli military operation, is used as a case study. In general, the courts insist on avoiding decisions on historical facts even when dealing with serious arguments about distortions in specific films. The article supports this judicial policy on the grounds that courts and governments should refrain from restraining freedom of speech based on arguments of truth and falsity. Yet, it also points to the inevitable disadvantages of this viewpoint given that the marketplace of ideas, particularly in the debate around realistic film making, is controlled by actors who have the power to shape collective memory.

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I. INTRODUCTION

Films such as *Gone with the Wind*, *Schindler's List*, and even *The Ten Commandments* rely on historical facts or historical narratives. Many films do indeed relate to historical events or are set in the past. Rosenstone observes that “historical films trouble and disturb professional historians—have troubled and disturbed historians for a long time.”¹ He also cites a letter by Louis Gottschalk from the University of Chicago to the president of Metro Goldwyn Mayer dated 1935, where Gottschalk warns him: “If the cinema art is going to draw its subjects so generously from history, it owes it to its patrons and its higher ideals to achieve greater accuracy. No picture of a historical nature ought to be offered to the public until a reputable historian has had a chance to criticize and revise it.”² Holding in mind the grievances against historical films, this article will assess the aspiration to apply legal rules to controversies surrounding films based on true historical events, pointing to the failure of this endeavor in legal systems wishing to remain loyal to basic principles of freedom of speech. The article follows failed attempts to contend with films alleged to be untruthful, both in systems resorting to private law doctrines of defamation and privacy (such as the American one) and in systems that still apply legislation of prior censorship (as illustrated by a case study from Israeli law). The article discusses in detail the recent and highly controversial case of the film *Jenin, Jenin* by the Israeli-Palestinian actor and filmmaker Muhammad Bakri, which professes to tell the story of residents in the Jenin refugee camp during an Israeli military operation. It then evaluates why attempts to apply legal doctrines to alleged cinematographic lies have failed, showing that the controversy hinges on the shaping of collective memory rather than merely on factual matters.

II. HISTORICAL FILMS IN PUBLIC DISCOURSE

During the twentieth century, film became a crucial medium in the shaping of collective memory; history is remembered as portrayed in films.³ The filmmakers’ historical interpretations have played an influential and formative public role, and continue to do so today. Although literature also influences our memory of history through, for instance, the genre of the historical novel, the impact of the cinema is more significant due to the

¹ ROBERT A. ROSENSTONE, *VISIONS OF THE PAST: THE CHALLENGE OF FILM TO OUR IDEA OF HISTORY* 45 (Harvard Univ. Press 1995).

² *Id.* at 45–46.

³ A wealth of literature has accordingly been devoted to various film versions of “momentous” historical events. See PIERRE SORLINE, *THE FILM IN HISTORY: RESTAGING THE PAST* (Barnes & Noble Books 1980) (regarding revolutions and civil wars). See also ALLISON GRAHAM, *FRAMING THE SOUTH: HOLLYWOOD, TELEVISION, AND RACE DURING THE CIVIL RIGHTS STRUGGLE* (Johns Hopkins Univ. Press 2001) (regarding racism in the American South). See also David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 *CONST. COMMENTARY* 511 (2000) (regarding capital punishment). See also CINEMA AND MEMORY: DANGEROUS RELATIONSHIP? (Haim Bresheeth, Shlomo Sand, & Moshe Zimmerman eds., 2004) [hereinafter *Cinema and Memory: Dangerous Relationship?*] (in Hebrew).

all-inclusive, panoptic character of the cinema experience⁴ and to its weight in contemporary patterns of culture consumption.⁵ The visual reconstruction of a historical period tends to enter consciousness as the collective memory of that period.⁶ Furthermore, technological developments often cause the representation of staged effects on the screen to appear more realistic than “authentic” photographs.⁷

The representation of history in filmmaking is even more controversial regarding films defined as documentaries, in view of the traditional pretension of such films to present “facts” and “truth.” But documentary films, like any narration of history, obviously involve interpretation, selection, narration, and politics. Films such as Michael Moore’s *Fahrenheit 9/11* have tended to blur the classic documentary/fictional distinction. Fictional films may incorporate documentary material or purportedly documentary passages, even if staged, while in films defined as documentaries the interpretive element, which may occasionally border on speculation, has become increasingly evident.⁸

III. HISTORICAL FILMS IN LEGAL DISCOURSE

Controversies about historical elements in films are usually confined to the public discourse. They may, however, involve legal aspects and are sometimes shaped by prevailing legal norms. When film screenings are subject to administrative censorship, censors may use their powers to consider a film’s “historical soundness” as well. Alternatively, controversial aspects can be the subject of civil actions brought by individuals on grounds of defamation, infringement of privacy, or similar private law causes of action. This article evaluates these two alternative courses for dealing with historical films. The use of censorship powers is discussed by recourse to a test case of film censorship in Israel, *Jenin Jenin*, directed by Muhammad Bakri, an Israeli-Palestinian actor and director. The film has claimed to tell the story of the Jenin refugee camp in the aftermath of a military operation that Israel conducted in the city. The Israeli case study is

⁴ The audience’s experience of film as reality is a focus of interest in film theory literature. As a researcher in this field notes, “the emotional faith of the audience in the genuineness of the material being shown on the screen involves cinematography with one of the most important problems in the history of culture.” Jurij Lotman, *The Illusion of Reality* in *FILM THEORY AND CRITICISM* 55, 55 (Gerald Mast & Marshall Cohen eds., 2d ed. 1979).

⁵ See SHLOMO SAND, *FILM AS HISTORY: IMAGINING AND SCREENING THE TWENTIETH CENTURY* 21–26 (Am Oved 2002) (in Hebrew). Indeed, literature has also had significant impact on the perception of reality and on moral judgment. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 3 (Beacon Press 1995). Yet, the total character of the film experience and the medium’s greater popularity ensure cinema a special status in the building of collective memory.

⁶ See Vivian Sobchack, *The Insistent Fringe: Moving Images and Historical Consciousness*, 36 *HIST. & THEORY* 4 (1997).

⁷ See JOEL BLACK, *THE REALITY EFFECT: FILM CULTURE AND THE GRAPHIC IMPERATIVE* (Routledge 2002) (Discussing the make-believe reality of the new cinema).

⁸ See BILL NICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE* 95 (Indiana Univ. Press 1994) (regarding the blurring of traditional distinctions between factual presentation and fiction). See also SAM B. GIRGUS, *AMERICA ON FILM: MODERNISM, DOCUMENTARY, AND A CHANGING AMERICA* 174–201 (Cambridge Univ. Press 2002) (discussing the film *Malcolm X* directed by Spike Lee).

interesting because it is a rare instance of a western oriented legal system that still retains a broad mechanism of film censorship. This case study is juxtaposed with the American case law on “docudramas,” which evolved within an entirely different legal context of civil actions against filmmakers rather than through the judicial review of administrative censorship decisions. The relevance of the United States case is self-evident in this context, given that the American film industry is the biggest and most influential worldwide, and increasingly relies on historical events as a basis for its productions.

The exercise of censorship powers is a major instance of transforming public debates about history into legal controversies. In general, prior restraint regarding film screenings has been declining for decades in the democratic world. Note, however, that several American states had laws empowering film censorship until the mid-1960s. The early case law of the United States Supreme Court held that films are less worthy of protection under the aegis of freedom of speech because they are essentially a product of entertainment for profit purposes,⁹ and this position was revised only after several decades. In the 1950s and 1960s new rulings were issued that, although not entirely barring the possibility of prior restraint of films, did prescribe particularly rigid criteria for legislation that would enable it.¹⁰ The combined effect of these judgments was that film censorship became impractical. Soon after, state laws invalidated as unconstitutional were not replaced by new ones, and censorship boards that were still operating according to the old laws were dissolved.¹¹ No prior administrative restraint on the screening of films exists today in the United States. Nevertheless, supervision of films is still in force through the voluntary initiative of the American film industry, in the shape of film classifications introduced by the Motion Picture Association of America.¹² In fact, independent supervision had been a voluntarily practice in the past as well, when the Motion Picture Association of America adopted a binding “code” regarding the contents of movies. This code provided for de facto censorship of films produced in the United States until the 1960s.¹³ In these circumstances, and not surprisingly, only European films became the subject of judicial scrutiny during this period. Similarly, England has no general legislation conferring powers to censor movies and yet the common practice since the beginning of the twentieth century has been prior censorship based on a

⁹ See *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

¹⁰ See *Burstyn v. Wilson*, 343 U.S. 495 (1952) (dealing with the ban on the film *Il Miracolo*, directed by Roberto Rossellini); *Freedman v. Maryland*, 380 U.S. 51 (1981) (dealing with the ban on the Danish film *A Stranger Knocks*, directed by Johan Jacobsen).

¹¹ See IRA H. CARMEN, *MOVIES CENSORSHIP AND THE LAW* (Univ. of Michigan Press 1966) (presenting a detailed discussion of this history). See also Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1 (2000).

¹² The classification purports to reflect the suitability of films for audiences of children and youth, and includes the following categories: G (suitable for all ages); PG (certain parts may not be suitable for children); PG-13 (certain parts may not be suitable for children below 13); R (children until age 17 must be accompanied by parent or adult); NC (children under age 17 not admitted). See also www.mpa.org/FilmRat_Ratings.asp.

¹³ See GREGORY D. BLACK, *HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES* (Cambridge Univ. Press 1994); Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer vs. Kramer*, 24 LEGAL STUD. F. 221 (2000).

voluntary initiative of the British film industry.¹⁴ The British board classifies movies according to their suitability to different audiences. In addition, film screening in England is subject to the powers of local municipalities in the area of business licensing. These powers grant official status to classification decisions because obtaining a license to screen films is contingent on abiding by the board's decision concerning classification.¹⁵

In contrast, other countries still retain censorship powers over films. The Israeli example has already been cited. Another example is India, which still has legislation, the Cinematograph Act 1952, enabling prior censorship of films, including their total ban.

At any rate, even when film censorship powers do exist, their usual focus is primarily on two concerns: scenes of harsh violence and scenes explicitly depicting sexual activities. The accepted view is that the public ought to be warned concerning exposure to such contents through the use of appropriate symbols. Restricting unsupervised exposure of children to these films by setting limitations on the viewing age for certain films is considered particularly important.¹⁶ As for adult viewers, the guiding considerations are preventing violence, and feminist opposition to the degradation of women and the use of violence against them (mainly with respect to films showing hard-core pornography).¹⁷ This article will not deal with these issues or with the conventional realm of protecting religious sensitivities.¹⁸ The following discussion is confined to a more unusual basis for film censorship: historical soundness.

In the United States, as noted, administrative censorship of films has long been relegated to the annals of history.¹⁹ When they did exist, these powers were implemented mainly in order to enforce morality and had no bearing on historical narratives. As a result, frustration with historical films can now be expressed only by bringing civil actions against the makers of the allegedly distorted film. Because of the context of private law litigation, the potential plaintiff must be directly affected by the distorted depiction of events and lawsuits are accordingly based on causes of actions concentrating on individual damages. Legal literature cites in this context

¹⁴ This voluntary action has been coordinated by the British Board of Censors, which was later renamed the British Board of Film Classification.

¹⁵ See Licensing Act 2003 § 20 (2003) (replacing the Cinemas Act 1985). The recommendations of the Williams Committee to replace this arrangement by legislation that would establish an administrative agency empowered to operate in this area were not accepted. See OBSCENITY AND FILM CENSORSHIP: AN ABRIDGEMENT OF THE WILLIAMS REPORT (Bernard Williams ed., Cambridge Univ. Press 1979).

¹⁶ See *supra* note 12.

¹⁷ See CATHERINE A. MACKINNON, ONLY WORDS (Harvard Univ. Press 1993) (presenting the radical feminist position against pornography).

¹⁸ For Israeli case law on the subject of films or television broadcasts with erotic and pornographic contents: see generally H CJ 4804/94 Station Film Ltd v. Film and Plays Review Board [1997] IsrSC 50(5) 661; H CJ 5432/03 Shin, Equal Representation for Women v. Council for Cable and Satellite Broadcasts [2004] IsrSC 58(3) 65 (regarding Israeli case law on the subject of films or television broadcasts with erotic and pornographic contents). See also H CJ 351/72 Keynan v. Films and Plays Censorship Board [1972] IsrSC 26(2) 811; H CJ 806/86 Universal Studios v. Films and Plays Censorship Board [1989] IsrSC 43(2) 22 (regarding Israeli case law on the subject of plays and films that offend religious feelings and specifically dealing with the decision to ban Martin Scorsese's *The Last Temptation of Christ*).

¹⁹ See text accompanying *supra* notes 9–13.

the law of defamation, the right of publicity, and the law of privacy (more specifically, false light invasion of privacy).

Throughout the years, many Hollywood docudramas have been the subject of potential lawsuits, settled lawsuits, and court decisions. This legal experience reveals that causes of action that had seemed applicable to cases of distortion in historical films tended to prove impractical for use by potential plaintiffs, given that the relevant legal doctrines were constantly being narrowed in an attempt to ensure optimal protection to freedom of expression. The law of defamation cannot be used effectively mainly due to the precedent of *New York Times Co. v. Sullivan*, according to which a plaintiff considered a public figure has to prove both falsity and malice in order to prevail.²⁰ In addition, defamation is a cause of action available only to living people and not to their heirs. This limitation becomes very burdensome concerning films dealing with remote historical events. Other legal options also emerged as narrow and as problematic in application. In many states, the right of publicity applies only to uses of an image associated with a commercial product. Additional obstacles are the limitation of the right of publicity to famous plaintiffs, and the “newsworthiness” defense. The action of false light invasion of privacy has been curtailed on the grounds that the interests it covers are already protected by actions in defamation. In addition, this cause of action seems to require “major representations” and proof of actual malice.²¹ Well-known dismissals of plaintiffs’ lawsuits include the defamation suit against NBC regarding the *Scottsboro Boys* docudrama (on a trial of African-Americans charged with rape),²² and the false light invasion of privacy suit regarding certain scenes in the docudrama *Panther* in the early days of the Black Panther party.²³ Sometimes, potential plaintiffs do not sue because they realize that the currently enforced legal doctrine will not enable them to prevail. This was the case with the film *Hoodlum* that portrayed former New York district attorney Thomas Dewey as corrupt, although historical evidence shows the opposite. Dewey was no longer alive by then and members of his family, who could not sue, could only present their case in the press.²⁴ Film producers have sometimes been willing to settle a suit brought by a living person depicted in a distorted manner. One instance is the suit brought by a former boxer who appeared in the opening scene of the film *Hurricane* as winning a boxing match with the hero through illegitimate means.²⁵

In general, American law is clearly reluctant to regulate the depiction of history in films. Applicable legal doctrines, as noted, have been saddled with many narrowing elements that make the prospect of legal suits very

²⁰ *Id.*

²¹ See Megan Moshayedi, *Defamation by Docudrama: Protecting from Derogatory Speculation*, 1993 U. CHI. LEGAL F. 331; Matthew Stohl, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must be Solved*, 35 AKRON L. REV. 251 (2002); Sean C. Symsek, *Based Upon a True Story: The Tension Between the First Amendment and a Person’s Reputation*, 10 UCLA ENT. L. REV. 171 (2003).

²² *Street v. National Broadcasting Co.*, 645 F. 2d 1227 (6th Cir. 1981).

²³ *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Penn. 1997).

²⁴ Symsek, *supra* note 21, at 196.

²⁵ Stohl, *supra* note 21, at 251-3.

dim. Besides the burdensome standard of malice, two central factors leave history outside the courtroom. First, limiting the ability to sue only to living plaintiffs turns more remote history into a non-issue for litigation. Second, since the applicable norms are private law causes of action, arguments about distorted depictions must focus on specific events or specific figures. A critique of the film's historical narrative cannot suffice. These limiting factors are not obstacles when the norms in force are censorship laws aimed at protecting the public interest rather than only individual rights. The Israeli experience with the regulation of historical films is accordingly the topic of the following discussion.

IV. THE NARRATION OF HISTORY BY CENSORSHIP POWERS: THE CASE OF ISRAEL

Controversies over the representation of history in films are not novel in Israel's public discourse, and have been particularly virulent concerning films dealing with the Israeli-Arab conflict and with the Holocaust.²⁶ Obviously, even when their historical inaccuracies are patently obvious to professional historians, historical films are not always controversial. The film *Exodus*, which presented the saga of Jewish immigrants who had survived the Holocaust and participated in the struggle to establish the State of Israel, was warmly received despite many factual inaccuracies that "tightened" its plot by intensifying its melodramatic dimension. These details never bothered the Israeli public, who sensed the film presented its own collective truth regardless of specific details.²⁷ In Israel, then, the debate about historical films became a legal issue only when the power to censor films or regulate their screening was used against films presenting historical narratives that Israeli public opinion found controversial.²⁸

The law regulating film censorship in Israel is the Cinematograph Films Ordinance²⁹ enacted at the time of the British Mandate in Palestine, which makes the screening of a film conditional on its authorization for display by the Censorship Board established under the ordinance, to be appointed by the minister of the interior.³⁰ Originally, and for several decades, the Board also operated as a censorship board for the performance

²⁶ See, e.g., FICTIVE LOOKS: ON ISRAELI CINEMA (Nurith Gertz, Orly Lubin, & Judd Ne'eman, eds., Open Univ. 1998) (in Hebrew); MOSHE ZIMMERMAN, LEAVE MY HOLOCAUST ALONE: THE IMPACT OF THE HOLOCAUST ON ISRAELI CINEMA AND SOCIETY (Haifa Univ. 2002) (in Hebrew).

²⁷ See Aviva Haramish, *Exodus: A Film that Changed History*, in CINEMA AND MEMORY: DANGEROUS RELATIONSHIP? 341 (Haim Bresheeth, Shlomo Sand & Moshe Zimmerman eds., Zalman Shazar Center 2004) (in Hebrew). See also Rachel Waisbord, *History as Melodrama: Exodus – The Book, the Film, and Israeli Culture*, in FICTIVE LOOKS, *supra* note 26, at 281.

²⁸ For a discussion of the Israeli historical narrative in court rulings: see Daphne Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CANADIAN J. L. & SOC'Y 93 (2001).

²⁹ Laws of Palestine, Vol. 1 (Eng.) 135 (1934) (Isr.) [hereinafter *Cinematograph Films Ordinance*].

³⁰ See *Cinematograph Films Ordinance*, *supra* note 29, at § 4(1). The ordinance does not specifically prescribe the Board's composition, but it does state it will include government officials as well as others. According to section 3(2) of the Cinematograph Films Ordinance "A quorum of the Board shall be formed by two members, of whom one at least shall be an officer of the Government," allowing us to infer that not all members of the board need to be government officials. See *Cinematograph Films Ordinance*, *supra* note 29, at § 3(2). According to section 3(1) of the Cinematograph Films Ordinance, at least one of the board members must be a woman.

of theater plays, in accordance with the Public Performances (Censorship) Ordinance,³¹ but powers for the preliminary censorship of plays were later repealed.³² Currently, therefore, the Board is only authorized to censor films intended for commercial screening.³³ The Board's powers, however, remain exceedingly wide even after the amendment, and include the possibility of a partial or total banning of films rather than merely their classification as suitable for screening to children and youth audiences. Despite broad awareness of this legislation's anachronistic nature, proposals for reform have not as yet led to a new law in this area.³⁴

Decisions of the Israeli Supreme Court dealing with the censorship of historical films have relied on various grounds, but most share a common theme: the need to react to allegations that the film distorts historical truth. Since the Court has adopted the view that state censorship in the name of the truth is problematic, the legal discourse has been channeled to more conventional and commonly accepted grounds, such as incitement and offense to feelings. Focusing on these grounds may have been legally sound, but has obscured the fact that the public debate surrounding these specific films has actually hinged on claims about distortion. The discussion that follows concentrates on the dissonance that has developed over the years between what public opinion believed should constitute justification for a censorship decision and the legal doctrines developed by the Israeli Supreme Court. Based on its traditionally strong support for

³¹ Laws of Palestine, Vol. 2 (Eng.) 1264 (1927) (Isr.).

³² Originally, the legal validity of the preliminary censorship of theater plays was suspended for a trial period of two years, pursuant to the Public Performances (Censorship) Ordinance (Suspension of Validity) Law, 1989, and was later repealed altogether within the framework of the Criminal Law, (Amendment 35), 1991.

³³ Under section 4(2) of the *Cinematograph Films Ordinance*, the prohibition on screening a film applies to "public entertainment." In the Licensing of Businesses Law, 1968, this term is defined as screening for or without consideration, "with the exception of a lecture or debate the main purpose of which is educational, even if accompanied by the presentation of pictures or playing of notes, for purposes of demonstration" (as stated in section 3(b) of the Law). The result is that nothing prevents the screening of a film disqualified for public viewing when undertaken for educational purposes and accompanied by a discussion. With the development of technology connected to the dissemination of films (video, Internet, etc.), new questions arise regarding the application of the prohibition in the Mandatory Ordinance. See Yonathan Yovel, *Censorship Under Decentralized Technology: The Case of "Jenin Jenin"* 28 TEL-AVIV U. L. REV. 555 (2004) (in Hebrew) (providing more in-depth discussion of these questions).

³⁴ See *Report of the Committee for the Review of the Films Censorship and the Operation of the Films Censorship Board* (2003) (Providing a new report by a public committee on proposals for reform submitted to the Ministry of Science, Culture, and Sport in 2003) (on file with author).

Another aspect of the regulation of film screening in Israel touches on television broadcasting. First, the National Broadcasting Authority, which operates according to the Broadcasting Authority Law, 1965, determines its own broadcasting agenda. In this sense, its decisions effectively restrict public exposure to contents that the Authority's directors deem inappropriate. The decisions adopted by the Broadcasting Authority are not binding on other bodies but were particularly significant in Israel's early years, when only one television channel was available. More notably, commercial channels are also subject to regulation by the Second Council for Television and Radio, which operates according to the Second Television Authority Law, 1990. Initial decisions on the contents of the commercial channels are adopted by their managers, but are subject to the council's censorship. Here too, a decision not to broadcast a particular film on commercial television does not prevent its screening in Israel. At a practical level, however, it may effectively limit the film's availability to the broader public due to the commercial considerations of movie theaters' owners when deciding on the screening of a film. In this context, legal regulation merely complements the self-imposed restrictions of film producers and investors driven by commercial or public considerations, restrictions that carry particular weight in the self-regulation of the film industry in other countries as well, as the American movie industry shows. See BLACK, *supra* note 13.

freedom of speech,³⁵ the Supreme Court has invalidated censorship decisions in most cases. The Censorship Board, however, has apparently endorsed a different approach. The Board's decisions indicate its members feel they should express the "national spirit" as they perceive it, which is outraged by what they consider the vilification of the State of Israel and its authorities. A chronological reading of judicial rulings issued on decisions of the Board reveals a rather fascinating pattern of mutual imperviousness. The Board adopts decisions and the Court invalidates them. The Board then adopts a similar decision in the next case, although its subsequent invalidation is almost inevitable given the Supreme Court's entrenched case law on these questions. The Supreme Court's influence on administrative practice is thus limited, apart from the Board's sporadic attempts to couch its decisions, whenever possible, in a freedom of expression rhetoric in the hope of eluding the searchlight of judicial review.

Supreme Court case law has rejected from the outset the notion that claims about distortion could be grounds for film censorship, fearing governmental hegemony in the realm of expression. The question was discussed for the first time in the 1960s in the matter of *Israel Film Studios Ltd. v. Gerry* ("*Israel Film Studios*").³⁶ This case concerned a short film that was in essence a report, intended for screening as part of the newsreels that used to be shown in movie houses before the television age. It reported an eviction from a house in the Smail suburb of Tel Aviv, and included a clip showing "tenants resisting the police, who were protecting themselves and dragging a woman by her hands and feet. In the process, her dress rolled up and exposed her legs up to her hips."³⁷

The reason given for censoring this section of the film was that "it offends good taste and does not present the problem in its entirety, and is therefore liable to mislead and be injurious to public opinion."³⁸ In the responding affidavit submitted to the Court by the Board's chairman, he explains:

Someone who sees the aforementioned section gains the impression that the police invaded the neighborhood and acted as they did without any justification. The newsreel does not present an accurate picture of the events, namely, that the Smail residents forcibly prevented state authorities from executing a court order. The Board members held that these "appearances" could be educationally harmful to the public, and might even encourage lawbreaking and disturbances. Furthermore, the Board members also felt that the entire scene was in bad taste, and especially for youths viewing this newsreel.³⁹

The Court accepted the petition against the Board's decision to censor

³⁵ HCJ 73/53 Kol Ha'am v. Minister of the Interior [1953] IsrSC 7 871.

³⁶ HCJ 243/62 Israel Film Studios Ltd. v. Gerry [1962] IsrSC 15 2407.

³⁷ *Id.* at 2410.

³⁸ *Id.* at 2411.

³⁹ *Id.*

the film.⁴⁰ It ruled that the distortion ensuing from a partial perspective cannot constitute grounds for censorship, relying on two arguments. The first related to the particular context of the newsreel and its time constraints: “A newsreel cannot present problems in their entirety and explain them exhaustively It is sufficient for it to present the unembellished events, as captured by the camera; it can leave the task of explanation to others.”⁴¹ The second reason is of more general and fundamental significance, focusing on the fear of allowing the state to be the sole arbiter of the truth. Justice Landau explained: “A sovereign arrogating for itself the power to determine what the citizen should know will ultimately determine what the citizen should think; nothing constitutes a greater contradiction of true democracy, which is not ‘directed from above.’”⁴²

The *Ein Gal* decision of the late 1970s involved the more difficult case of a film that outraged the Censorship Board as representing lies.⁴³ This time, the claim of deviation from the truth did not devolve on an isolated dispute touching on the conduct of the state authorities. Rather, it was directed against an entire film dealing with the Israeli-Palestinian conflict, and was perceived as contesting the legitimacy of the State of Israel. More specifically, *Ein Gal* dealt with the screening of a documentary film entitled *The Struggle over the Land or Palestine in Israel*, produced by a German team. An Israeli citizen, known as a radical leftist, owned the rights to the film.⁴⁴ The Censorship Board banned the film for screening on the grounds that “it incites the minorities against the State of Israel and its citizens, and is liable to inflame emotions and acts of violence.”⁴⁵ In a letter sent by the Board chairman in response to reactions in the international press, he

⁴⁰ See generally *id.*

⁴¹ *Id.* at 2414.

⁴² *Id.* at 2416. Justice Witkon’s minority view espoused an alternative world view, ready to accept a presumption to educate the public by presenting it with the “correct” version of reality. According to Justice Witkon, “it is not true that the passage at stake indeed reflects reality as it was, untouched and unembellished; in fact, this was only a fragment of ‘reality.’ The reality is that in our country the values of the law are neither understood nor acknowledged and, in many areas, the public (and not only its ‘primitive’ layers) does not evince respect for judicial orders. In my humble opinion, this is one of the most painful and crucial problems troubling our young state. Hence, given these circumstances, portraying such an event and failing to inform the viewer of the wrong involved in contempt for the law and its agents do not depict the complete reality.” *Id.* at 2424.

⁴³ HCJ 807/78 *Ein Gal v. Films and Plays Censorship Board*, [1979] IsrSC 33(1) 274.

⁴⁴ The petitioner’s name, as it appears in the judgment, Ehud Ein Gal, is mistaken. His correct name is Ehud Ein Gil [not Ein Gal], a member of Matspen, a political party of the extreme left, who has recently published a book about his personal and political life. See EHUD EIN GIL, TAHANOT BE-DEREKH HATSARMAVET, (2004) (in Hebrew). In response to my enquiries when writing this article, he sent me the following e-mail message:

To Professor Daphne Barak-Erez
Greetings,
Indeed, it is I, and the missing “i” in my name is a minor mistake compared to the High Court’s major mistakes in this case.
Best wishes
Ehud Ein Gil

E-mail from Ehud Ein Gil to Daphne Barak-Erez, Professor, (Apr. 15, 2004) (on file with author).

⁴⁵ HCJ 807/78 *Ein Gal*, IsrSC 33(1) 274 at 275.

explains: “Not only does the film make no attempt to maintain even an appearance of fairness, but it maliciously perverts historical facts, patently intending to besmirch the image of the State of Israel and incite the Arab population.”⁴⁶

These comments focus on the two grounds for censorship that had guided the Board: the problem of distortion and the danger of incitement. In itself, the claim of distortion was insufficient for banning the film in view of the Court’s ruling in *Israel Film Studios*. Nonetheless, it was again discussed at length. Justice Landau issued the ruling, having also written the main opinion in the *Israel Film Studios* case. Given these circumstances, the judgment could have been expected to focus on the incitement claim that, after the ruling in *Israel Film Studios* eschewing intervention based on distortion, remained the only legitimate grounds for censorship. But this was not the case. In fact, the judgment centered almost entirely on the question of distortion. A large part of the judgment was devoted to the historical travesty presented in the film. For example, Justice Landau pointed out that, “in describing the events of 1948, the film producers avoided mentioning that they occurred at the height of a war of self-defense in which the Jewish community was fighting for its survival,”⁴⁷ and that the filmmakers had avoided mentioning that the lands of Petah Tikvah and Tel-Aviv had been purchased for full consideration.⁴⁸

Prima facie, the focus on the problem of distortion seems inconsistent with the ruling in *Israel Film Studios*. In differentiating between the cases, Justice Landau explained that a distinction must be drawn between the “shooting and screening of topical events in a documentary film, which does not require a comprehensive presentation of the facts, and an explanatory-informative film that purports to be documentary but, in fact, consists of a tendentious presentation of past events while distorting historical facts.”⁴⁹ Even so, Justice Landau was aware of the difficulty involved in censoring a film solely for not being true given the disputes over the question of truth and, accordingly, decided to apply the rule established in *Israel Film Studios*. In his own words: “Since when does the untruth of a movie or play disqualify it in a state that guarantees the citizen freedom of expression?”⁵⁰ Ultimately, guided by this fundamental consideration, Justice Landau decided to approve the banning of the film solely on the basis of his determination that it contained potential for incitement, primarily of the Arab public: “Were this film to be shown in Israel, there is an imminent danger that, given the high persuasiveness of visual images, it could become an effective tool of incitement among Arabs living here and encourage them to engage in criminal activities, while also winning the sympathy of Jewish youths who did not know Joseph.”⁵¹

⁴⁶ *Id.*

⁴⁷ HCJ 807/78 *Ein Gal*, IsrSC 33(1) 274 at 275–76.

⁴⁸ *Id.* at 276.

⁴⁹ *Id.* at 277.

⁵⁰ *Id.*

⁵¹ *Id.* at 278. The phrase “who did not know Joseph” cites from the biblical story about the new Egyptian king “who did not know Joseph” meaning he was not acquainted with the past. See *Exodus* 1:8 (King James).

At least formally, then, the decision to ban the film was not based on its falsity. The question of incitement, however, was not actually discussed in depth. The decision was largely based on a general assessment of the possibility of incitement, without specifically examining the concrete situation in light of the stringent probability criteria established in the well-known *Kol ha-Am* precedent. The two other members of the panel, Justices Bekhor and Elon, concurred with Justice Landau's judgment and made no further comments.⁵²

It bears emphasis that the subjects discussed in *The Struggle over the Land* were anathema to Israeli society when the screening of this film was originally discussed. The historiography of Israeli cinema shows that the Palestinian problem first surfaces during the 1980s.⁵³ Up to then, Israeli cinema ignored the subject almost entirely, confining discussion of the Arab-Israeli conflict mainly to the context of Israel's wars with the neighboring Arab countries.⁵⁴

Developments surrounding *The Struggle over the Land* are worth comparing with those involving another film, *Hirbet Hiz'eh*, which was broadcasted on television in the same year (1978) after a protracted public controversy. The film was based on a book by S. Yizhar published in 1949, *The Story of Hirbet Hiz'eh*, which portrays the expulsion of residents from an Arab village by an Israeli Defense Force ("IDF") unit at the end of the War of Independence, in compliance with an operative order. The name, *Hirbet Hiz'eh*, does not point to an actual place and the story is usually understood as a metaphor for similar stories in numerous Arab villages during the War of Independence. In 1977, the Broadcasting Authority decided to finance the production of a film based on the story, which was only completed after the elections that resulted in the establishment of the first Likud government. The controversy surfaced during 1978, after the Broadcasting Authority's decision to show the film became public knowledge. At the last minute, the new minister of education from the National Religious Party, Zevulun Hammer, decided to cancel the showing. The discussion had by then expanded into issues touching on the independence of the Broadcasting Authority, and opinions divided along party lines. Right-wingers were opposed to the showing and opposition parties, including the Labor party that had just lost the elections, were in favor. Finally, about a week after the minister's decision, the Broadcasting Authority's plenum decided in favor and the film was shown despite the heated polemic.⁵⁵

A comparison with the film censored in the *Ein Gal* case is particularly instructive. Both films triggered indignation and argument, for similar reasons. In portraying the problem of the Palestinian refugees, both films

⁵² HCJ 807/78 Ein Gal, IsrSC 33(1) 274 at 278.

⁵³ Ella Shochat, *Meta-Narrative/Critical Readings: The Politics of Israeli Cinema*, in FICTIVE LOOKS: ON ISRAELI CINEMA 44, 62 (Nurith Gertz, Orly Lubin, & Judd Ne'eman, eds., Open Univ. 1998) (in Hebrew).

⁵⁴ *Id.* at 56.

⁵⁵ See also Anita Shapira, *Hirbet Hiz'eh: Memory and Oblivion*, 21 ALPAYIM – A MULTIDISCIPLINARY PUBLICATION FOR CONTEMPORARY THOUGHT AND LITERATURE 9 (2000) (in Hebrew).

begin with the victims and the injustice that they suffered, and both point to the State of Israel as the agent responsible for it. Yet, whereas *The Struggle over the Land* was totally banned for screening in Israel, *Hirbet Hiz'eh* not only reached the Israeli public but did so through the only channel of national television!⁵⁶

Why this discrepancy? Several distinctions could help to clarify this question, at least partially. At the formal level, the screenings were not discussed by the same body. As for contents, *The Struggle over the Land* covered a broader historical epoch. It presented Zionism as a colonialist movement and was not limited to specific wrongs during the War of Independence. Moreover, it was also regarded as more problematic in view of its documentary pretensions. By contrast, *Hirbet Hiz'eh* could enjoy the benefit of the doubt because it need not be considered necessarily representative. The personalities associated with the films also played a role in establishing the films' public image. *Hirbet Hiz'eh* was based on a novel by author S. Yizhar, a pillar of the Israeli literary and political establishments. In contrast, *The Struggle over the Land* was produced by a German team, and was being promoted by a member of the far left Matspen party. As such, it was judged a greater threat. Another and perhaps decisive difference is the documentary character of *The Struggle over the Land*, which directly threatened the "established" version of the national history, as distinct from *Hirbet Hiz'eh*, which was based on a purportedly fictional story. While it was common knowledge that the story was based on the writer's personal experiences, it remained just that—a story or a parable. Admittedly, the comparison between the two cases is limited because only *The Struggle over the Land* was the subject of legal proceedings.

Over the years, Israeli case law has repeatedly ruled out censorship of films by reason of their being allegedly tainted by the distortion of history.⁵⁷ This was also true regarding the censorship of plays, to which the

⁵⁶ Compare *id.*, with H CJ 807/78 *Ein Gal*, IsrSC 33(1) 274.

⁵⁷ This was the case both in the traditional context of censorship exercised by the Censorship Board and in the context of petitions requesting the Court to censor television broadcasts, in accordance with the laws governing the operation of the Broadcasting Authority or the Second Authority for Television and Radio. A well-known controversy over allegedly distorted documentary materials emerged in the context of a petition brought by activists of Mizrahi (non-European Jewish) origin in the early 1980s. Their petition was directed against the broadcasting of Yigal Lussin's *Pillar of Fire*, a series dealing with the history of Zionism. The petitioners argued that the series was inaccurate insofar as it ignored the role played by Mizrahi Jewry in the Zionist enterprise. See H CJ 1/81 Shiran v. Broadcasting Authority [1981] IsrSC 35(3) 365. The petition was dismissed in view of the Court's fundamental approach that an unfair and even biased presentation of content does not justify the infringement of the right to freedom of expression.

A petition similar to the one filed against the screening of the *Pillar of Fire* series was submitted concerning another important television project surveying the history of Israel on its fiftieth anniversary, the *Revival* series. See H CJ 2137/98 Elias v. Chairman of Managerial Committee of Broadcasting Authority (unpublished). The series, argued the public petitioner in this case, "although supposedly documentary, does not record the facts as they occurred." He explained that "the series is unfaithful to historical truth and, even worse, it is unfaithful to the State of Israel." In a brief judgment dismissing the petition, the Court reiterated its position stating: "As we know, historical truth has many facets and many interpretations... whatever the historical truth, the Court is not the censor of the Broadcasting Authority to disqualify programs that, according to one or another petitioner, or according to the Court, do not reflect actual truth." *Id.*

In the same spirit, the court also dismissed a petition against the screening of the film *The*

same legislation applied.⁵⁸ The controversy surrounding Yitzhak Laor's mid-1980s play *Ephraim Returns to the Army*, describing events in the occupied territories under Israeli military rule,⁵⁹ can exemplify this. Rather than depict specific episodes, the play presented imaginary scenarios purportedly reflecting the conduct of the Israeli military. The Censorship Board banned the play, claiming that it "presents a false, distorted, dreadful, and malicious image of the military administration, even intimating a comparison with Nazi rule."⁶⁰ The censorship decision also considered fears of "a harsh emotional outburst of negative feelings towards the State, of loathing and revulsion towards the IDF generally and the military administration in particular."⁶¹ It further referred to fears due to the incitement of the Arab public, and to the "severe offense to the feelings of the Jewish public by the implied and explicit comparison between the Israeli regime and the Nazi occupation."⁶² In this case too, the petition against the censorship decision was accepted. The distortion claim was summarily rejected as irrelevant. According to Justice Barak, "It is none of the Board's business whether the play reflects reality, or distorts it."⁶³ As a precedent for this statement, he cited the ruling of Justice Landau in *Ein Gal*⁶⁴ that, while affirming the decision to censor the film in question, refrained from predicating this conclusion on the distortion claim per se. Regarding the incitement argument, Justice Barak further determined that its probability had not reached the level of "near certainty." He did not relate to Justice Landau's willingness to assume a danger of incitement

Israeli Government Announces in Astonishment, which linked protests against the Oslo Accords to the assassination of Prime Minister Yitzhak Rabin. The petition contended that the film, presented as a documentary, "distorted" the events of the time. See HCJ 2888/97 Novick v. Second Television and Broadcasting Authority [1997] IsrSC 51(5)193.

Another judgment "celebrating" the (legal) freedom to distort historical truth was delivered in 1999, on the matter of Motti Lerner's docudrama *The Kastner Trial*. See HCJ 6126/94 Senesh v. Broadcasting Authority [1999] IsrSC 53(3) 817. The script included an exchange suggesting that Hannah Senesh, a legendary heroine who parachuted in Hungary during WWII, broke down under Nazi torture and gave away her comrades. This accusation had no basis in any historical record, and even the series' producers made no claims to its authenticity. On the other hand, they did claim they could do this in a non-documentary film, which specifically noted at the beginning of every chapter that it was a fictional drama that did not pretend to be a documentary reconstruction of events. The petitioners, members of the Senesh family joined by concerned members of the public, demanded the omission of the offensive statements from the series. Their demand was explained as intended to protect Hannah Senesh's personal dignity as well as the feelings of the public at large. Among the various questions raised by the *Senesh* case, the one deserving attention here is the censoring of speech based on its alleged falsity. The *Senesh* case also dealt with the protection of the particular person maligned by the expression and, as such, raised additional considerations pertaining to the appropriate balance of freedom of speech vs. human dignity and the good name of others. In this case too, however, the Court was steadfast in its refusal to allow any curtailment of expression on the basis of its falsity. According to Justice Barak, "a democratic, freedom loving society does not make the protection of expression and creativity contingent on their reflecting the truth." *Id.* at 840. The reason is that the "the victory of truth will come by virtue of its intrinsic power and its ability to overcome deceit in the battlefield of ideas." *Id.* Justice Cheshin issued a minority opinion that favored accepting the petition. Nevertheless, although he believed that the majority had failed to give adequate weight to the claim of personal affront to the dignity of Hannah Senesh, he did not question the majority opinion insofar as it concerned the protection of the public interest in general.

⁵⁸ See *supra* note 32.

⁵⁹ HCJ 14/86 Laor v. Films and Plays Censorship Board [1987] IsrSC 41(1) 421.

⁶⁰ *Id.* at 426.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 439.

⁶⁴ *Id.* at 439–40.

without reviewing it thoroughly. According to Justice Barak, “The finding that a play (naturally intended for a limited and often selected public coming to the theatre on their own initiative) might lead to a nearly certain probability of disruption in the public order might be substantiated only exceptionally.”⁶⁵

The conclusion emerging from the legal precedents is that the Israeli Supreme Court definitely holds that distortions of truth are not adequate grounds for censorship, as opposed to expressions with significant potential for incitement, which do serve as sufficient cause for limiting freedom of expression. When adequately implemented, however, incitement law cannot lead to a decision to disqualify films even when they evoke rage and resistance. From this perspective, *Ein Gal* illustrates, by reversal, that incitement law is an inadequate tool for dealing with this matter. As noted, this is an isolated case of banning a film considered false on grounds of incitement, although the judgment did not examine this cause in detail.

The entrenchment of the doctrine barring state intervention in films thought to include false facts led to a search for other grounds for censorship. One alternative noted above was incitement, but this is not a widely applicable option. Many enraging expressions are not inciting. As a result, case law began to focus on another cause of censorship, more precisely, on grave offense to public feelings. The claim in this context is different: truth may indeed be victorious in the battle of ideas, but the emotional damage attendant on the dissemination of lies cannot be ignored.⁶⁶

The claim of offense to feelings was originally considered in the context of non-documentary works, where the distortion claim is irrelevant in any event, but later it also surfaced regarding documentaries. A qualified readiness to legitimize restrictions on freedom of speech by invoking protection of feelings emerged in two rulings issued during the 1970s. These decisions centered on films that touched on sensitivities associated with historical events but had not professed to be historical, including *The Night Porter*, a film directed by Liliana Cavani describing a fictional relationship between a Holocaust survivor and a Nazi,⁶⁷ and *The Vulture*, an Israeli film that criticizes the hypocrisy and commercialization it attributed

⁶⁵ *Id.* at 440.

⁶⁶ The claim that legal intervention is necessary due to the harm caused by the expression itself is accepted in the theoretical discourse dealing with justifications for restricting racist expressions.

⁶⁷ HCJ 549/75 Noah Films Ltd v. Films and Plays Censorship Board [1975] IsrSC 30(1) 757, 762. The Censorship Board banned this film in 1975, following protests against the screening by the National Union of Israeli Students, the Israel Organization of Former Nazi Prisoners, and the Association of Religious Teachers. Following the decision, the distributors filed a petition to the High Court of Justice. The justices shared the assumption that the film was a fictional account and not a documentary, that it was not pornographic, and that its general spirit was anti-Nazi. A distortion claim was fundamentally irrelevant for a film of this kind, and censorship could only be based, if at all, on an alleged offense to the public's feelings, as the Censorship Board indeed attempted to argue. Ultimately, these were not the questions at the focus of the ruling, which was primarily based on the violation of the distributors' right to a hearing, since the decision was made in the absence of their representative. Under the circumstances, the Court held that the damage to the distributor could not be rectified by way of a renewed deliberation at the Censorship Board, given the Court's estimate that the public atmosphere would preclude the exercise of calm and considered discretion, unaffected by the surrounding events. As a result, the film was permitted for screening without elaboration on its merits.

to many of the official projects commemorating fallen soldiers.⁶⁸ The decisions dealing with these two films are important in the present context. Although they did not confront the issue of distortion, they did contribute to the development of the claim of offense to feelings, later used to disqualify films that were also claimed to be distorted.

Offense to feelings is, *prima facie*, a different and separate basis for restricting freedom of expression, and is adjudicated independently from the question of truth. The claim of offense to feelings, however, did serve as an alternative to censorship based on falsehood. In other words: even though the government is not the custodian of truth and cannot disqualify expressions it perceives to be false, it may still bar them because of their effect on the public's feelings. Seemingly, then, the claim of offense to feelings has gradually emerged as a camouflage for falsehood claims rejected by the Court.⁶⁹ After all, if the truth content of the film is beyond dispute then, even if this content is painful, requesting that the film be disqualified would be extremely difficult. For instance, a serious attempt to ban a documentary film presenting the IDF massacre in Kefar Kassem in October 1956 merely because it shames the army is hardly conceivable. The claim of offense to feelings, then, is often based on a presumption of untruth, even though this may not be the claim up front. While the Court has not explicitly addressed the internal nexus between these two grounds of censorship, in practice it has refused to uphold censorship decisions based on offense to feelings claims that, *de facto*, were aimed at expressions considered untruthful. More precisely, the Court has set such a high threshold for the offense to feelings claim that, since the 1970s, it has not found any emotional offense serious enough to justify restrictions to freedom of expression.

The first ruling addressing the offense to feelings claim as an alternative to the falsehood claim was *Laor*.⁷⁰ While affirming the validity of the claim in principle, Justice Barak rendered it irrelevant in practice by establishing a particularly high threshold for its application. In a touching paragraph of his judgment he writes:

⁶⁸ HCJ 243/81 *Yaki Yosha Ltd. v. Films and Plays Censorship Board* [1981] IsrSC 35(3) 421. Originally, the Censorship Board approved the screening of the film for audiences eighteen and over by a bare majority of one (eight against seven). Following a renewed application by the deputy minister of defense, who requested that the film be banned altogether, the Board reconvened and decided to allow screenings only subject to certain cuts and omissions. In this case, the ruling unquestionably supports the principle of disqualifying the film due to consideration for the feelings of the bereaved, drawing an analogy to the possibility of banning a film by invoking religious sensitivities. According to Justice Landau, "the bereavement of the families of soldiers who fell in Israel's wars is a supremely sensitive matter, and if many of them are deeply offended by the manner in which memorial projects are presented in this film—and the petitioner does not deny that they indeed are—they deserve special tolerance and consideration, no less than those who believe that a special prohibition was enacted in the criminal code for their protection." *Id.* at 425. He further added: "The caution required from us toward their feelings counterbalances our aversion to any form of censorship." *Id.*

⁶⁹ Note that case law also addressed the question of affront to feelings in contexts that do not involve disputes about factual truth. For other cases in which the Censorship Board accepted banning decisions due to affronted feelings, see *supra* notes 67–68 and accompanying text. See also HCJ 15614/01 *Gur Aryeh v. The Second Authority for Television and Radio* [2001] IsrSC 55(4) 267 (regarding a petition by religious individuals to prevent the screening on the Sabbath of a film about their lives).

⁷⁰ See HCJ 14/86 *Laor* [1987] IsrSC 41(1) 421.

Indeed, the passage in the play may offend the feelings of the Jewish public, and is certainly liable to offend the feelings of those with personal experience of the Holocaust. I myself was a child during the Holocaust, and I crossed fences and borders guarded by the German Army smuggling objects on my body. The parallel between the German soldier arresting a child and the Israeli soldier arresting an Arab youngster breaks my heart. Nonetheless, we live in a democratic state, in which this heartbreak is the very heart of democracy.⁷¹

He then concluded that, “under the circumstances, one should never say that the offense to feelings is so deep as to justify infringing freedom of expression.”⁷² The two other members of the panel, Justices Netanyahu and Malts, concurred with Justice Barak’s opinion, albeit with considerable discomfort, and accepted the Board members’ description of the play as a “vulgar concoction of eroticism, politics, and all manner of perversion.”⁷³ At a later stage, the High Court decision on *Laor* served as a catalyst for abolishing the censorship of plays once it became clear that, in most cases, it could not be justified.⁷⁴

V. THE *JENIN*, *JENIN* AFFAIR

All the problems attendant on the censorship of historical films emerged in the relatively recent controversy surrounding the documentary film *Jenin, Jenin* in the *Bakri v. Film Censorship Board* (“*Bakri*”) case.⁷⁵ According to the people involved in the making of this film, it was meant to present the Palestinian narrative of the battle in the Jenin refugee camp in April 2002, during “Operation Defensive Wall.” Justice Dorner noted: “From the outset, the petitioner declared he had made no attempt in the film to present the Israeli position or to offer a balanced portrayal of the events, but to give a voice to the Palestinian story.”⁷⁶ The Censorship Board decided not to authorize the screening of the film. A majority—eight out of

⁷¹ *See id.*

⁷² *See id.* at 441.

⁷³ *See id.* at 442 (Justice Netanyahu); *id.* at 444 (Justice Malts).

⁷⁴ *See supra* note 32. The high threshold set in the *Laor* decision sealed the fate of the offense to feelings claim in all other cases. For instance, in *Novick v. Second Television and Broadcasting Authority*, the petitioners had claimed that ascribing responsibility for Rabin’s assassination to the protests against the Oslo agreements was not only untrue but also offended their feelings. The Court rejected the claim but qualified its rejection by stating that “as opposed to an anticipated affront to a person’s good name, an anticipated affront to the feelings of the public at large or of a large sector of the population may occasionally justify granting an injunctive measure that infringes freedom of expression. This could be the case when the offense is so grave, extreme, crude, and profound that its very occurrence creates a highly probable and unavoidable certainty of disruption in the public order.” HCJ 2888/97 *Novick* [1997] IsrSC 51(5)193, 202.

In *Senesh v. Broadcasting Authority*, Justice Barak reiterated and clarified that what is required is an “offense to feelings that shakes the foundations of mutual tolerance,” HCJ 6126/94 *Senesh* [1999] IsrSC 53(3) 817. Accordingly, cases falling in this category will be “exceptional and unusual.” *Id.* The language of the ruling in fact questions whether such cases could ever materialize. The Court’s precedents suggest that an offense to feelings can never or, more precisely, almost never justify censorship.

⁷⁵ HCJ 316/03 *Bakri v. Film Censorship Board* [2003] IsrSC 58(1) 249.

⁷⁶ *Id.* at 257. More precisely, note that the petitioner did not present the Palestinian narrative from the perspective of an external observer, but the public position that, from his perspective, was true.

eleven Board members present at the meeting—adopted this decision, against a minority view supporting the position that the screening should be allowed accompanied by a slide from the IDF spokesperson or as limited for screening to audiences eighteen and over. This decision was litigated in the High Court of Justice following a petition filed by the film's director. Details in Justice Procaccia's opinion can help to discern the elements that had so incensed Board members: "According to the film, the IDF carried out a massacre in Jenin and attempted to cover it up by hiding the bodies. IDF soldiers deliberately injured children, women, elderly, and handicapped people. The camp was shelled by aircraft and artillery, causing extensive injury to life and property."⁷⁷ Interestingly, a previous documentary film directed by Bakri, *1948*, did not lead to any uproar or public demands for censorship, although it described the misery of Palestinian refugees who lost everything during the war that followed the establishment of Israel in 1948. The difference apparently lies in the public perception of the truthfulness of the two films. The suffering of Palestinian refugees following Israel's creation was perceived as historical truth, although interpretations differ regarding the responsibility for this outcome on the two sides of the conflict. In contrast, the accusations made by *Jenin*, *Jenin* were perceived as sheer lies and anti-Israeli propaganda.

The reasons given for banning *Jenin*, *Jenin* related to its being "distorted," "offensive to the public's feelings," and "inciting." The Board's reasons for the censorship decision expose the gap that has emerged over the years between general culture and legal culture. Some of these reasons have no room from the outset within the context of the legal precedents on freedom of expression. According to settled case law, a government body seeking to restrain personal expression cannot, *prima facie*, adduce claims of distortion and falsification, even if persuasive and substantiated. The incitement claim, recognized in case law,⁷⁸ was not factually substantiated in the specific circumstances of this case and was raised only in a general sense. On the face of it, then, only the argument of offense to feelings had any validity and yet, for over twenty years, it did not serve as a basis for censorship (unless the issue at stake was religious sensitivities).⁷⁹

Reading the protocols of the deliberations in the Censorship Board sharpens the sense of a gap between the views of the Board members and settled case law. Generally, Board members' statements include arguments relevant to film criticism in the public discourse, where a film can be denounced as propaganda or simply as deceit. These claims, however, are widely opposed to the Supreme Court's accepted criteria for banning a film.

Most supporters of the censorship decision related primarily to their reservations about the film's contents. They paid little regard to the weight they should assign to the value of freedom of expression or to the balancing

⁷⁷ *Id.* at 273.

⁷⁸ *See supra* note 51.

⁷⁹ *See* HCJ 243/81 Yaki Yosha Ltd. v. Films and Plays Censorship Board [1981] IsrSC 35(3) 421 (for the last case in which an offense to feelings argument prevailed).

tests guiding the Supreme Court, which might perhaps be expected given that most board appointees have political affiliations and public commitments.

The Board plenum devoted two meetings to the decision on *Jenin*, *Jenin*—one that adopted the original decision to ban the film,⁸⁰ followed by another that considered an appeal on this decision argued by Muhammad Bakri's attorney.⁸¹ At the opening of the first meeting and before the screening, Chairman Nissim Abuloff warned the participants: "We must suppress our feelings and, however much we abhor the film, we must repeatedly emphasize that our role is not to restrain anyone and certainly not to prevent freedom of expression, obviously subject to certain limitations."⁸² After the screening, however, this warning was seemingly forgotten. Some of the participants indicated that this was a propaganda film, a fact they considered was enough to justify its banning. The entire hearing was influenced by the film's identification with the enemy and its perception as a non-Israeli film, or worse still, the film of an Israeli who had joined the enemy. One of the Board members argued: "This is a Palestinian propaganda film made by an Israeli citizen. Just imagine that in England during the war they would have shown a Nazi propaganda film."⁸³ Another member concurred saying, "this is expressly an enemy propaganda film, and for that reason I cannot allow it."⁸⁴ One of the other speakers was particularly incensed by the mention of the Palestinian Public Relations Minister, Yasser Abd Rabbo, in the credits. In his view, "given that the name of the Palestinian public relations minister appears in the credits, they were obviously aware of this. This is an enemy propaganda film."⁸⁵ The dissenting view in the Board discussions was spearheaded by Adv. Orna Lin. While condemning the film as a loathsome and even inflammatory piece of propaganda, she remained loyal to the values of freedom of expression. But, as mentioned, this view remained a minority opinion.

Special interest attaches to the comments of Yechiel Guttman, a lawyer and journalist who supports the Labor Party (and hence is not identified with the right wing). Guttman argued for a distinction between "freedom of expression" and "freedom of anarchy."⁸⁶ He also related to the lack of balance in the film: "Not even one good word was said to the effect that maybe, by chance, one soldier was an angel in *Jenin*."⁸⁷ The claim against the film's bias was also echoed by others. Another member stated: "For a film purporting to be a documentary, it does not present the background, meaning the events preceding the actions of IDF soldiers defending their

⁸⁰ MINISTRY OF SCIENCE, FILM CENSORSHIP BOARD: PROTOCOL OF FIRST PLENUM MEETING OF *JENIN*, *JENIN* (Nov. 18, 2002) [hereinafter *FIRST PROTOCOL OF JENIN, JENIN*].

⁸¹ MINISTRY OF SCIENCE, FILM CENSORSHIP BOARD: PROTOCOL OF SECOND PLENUM MEETING OF *JENIN*, *JENIN* (Dec. 23, 2002) [hereinafter *SECOND PROTOCOL OF JENIN, JENIN*].

⁸² *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 1.

⁸³ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 4.

⁸⁴ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 5.

⁸⁵ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 6.

⁸⁶ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 1.

⁸⁷ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 2. This expectation of balance resembles the "fairness doctrine," formerly recognized in the context of American telecommunication law. See *Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367 (1969).

lives in hostile surroundings. The presentation of the issue is biased and tendentious. It is a film devoid of moral integrity, which maligns the IDF.”⁸⁸

Even when legal arguments such as the claim of incitement were raised, they were addressed intuitively and through generalizations. One member argued: “The film will be seen by Arab residents of Israel, who might be affected by it.”⁸⁹ Another stated: “As the representative of the police in this Board, my role is to prevent incitement. This film will have grave effects, causing damage, incitement, hatred, and so forth.”⁹⁰ Another member, relying on her experience as an educator, declared: “The film engenders real hatred, and I believe that all seeing it leave with feelings of hatred.”⁹¹ At the second hearing, some of the speakers reiterated their concerns about the danger of incitement within the Arab population, but without addressing the question of whether the degree of incitement in the film reaches a threshold justifying legal intervention. One of the members indicated that the film “is liable to encourage cooperation with terrorist organizations within extremist factions in the Arab population.”⁹² Another member noted “it is inflammatory and, if I were an Arab, the film would be a call to revenge. It would encourage me to take revenge.”⁹³ There is no little irony in the extensive attention of the Censorship Board to the film’s influence on Arab viewers, given that the Board includes no Arab members.

The participants’ comments at the Board’s hearings suggest they took into account the possibility that the High Court of Justice might invalidate their decision, and were not deterred by this. Perhaps even the opposite. They expressed their belief that it was incumbent upon them to speak their minds against the film, even at the risk of the decision being overturned.⁹⁴ As Yechiel Guttman observed: “Our decision may be annulled, but I’m not really bothered by this . . . I still think it is my right, and not just my right, but my duty, and the Court will do as it pleases.”⁹⁵ Other members joined him in this line of argument, emphasizing the moral responsibility that would rest upon the Court. One of them explained: “I think that the film should be banned and if the High Court wants to permit it, then let the blood of those who will suffer as a result of the decision be on the Court’s head.”⁹⁶ In a slightly more moderate formulation, another one added: “This is a case in which, if the High Court permits, it assumes full responsibility [for the consequences of its decision].”⁹⁷

⁸⁸ *SECOND PROTOCOL OF JENIN, JENIN*, *supra* note 81 at 12.

⁸⁹ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 4.

⁹⁰ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 5.

⁹¹ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 5.

⁹² *SECOND PROTOCOL OF JENIN, JENIN*, *supra* note 81 at 12.

⁹³ *SECOND PROTOCOL OF JENIN, JENIN*, *supra* note 81 at 12.

⁹⁴ In this context, note Heather Gerken’s “dissenting by deciding” notion, describing a decision-making process that aims to challenge the hegemonic view, even if it might be overturned. See Heather Gerken, *Dissenting by Deciding*, 57 *STAN. L. REV.* 1745 (2005). Gerken, however, concentrated on the views of minorities that cannot prevail in the general political process, whereas concerning *Jenin-Jenin* the position of the censorship board was not necessarily a minority view but rather a view that contradicted the judicial view on the matter.

⁹⁵ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 2.

⁹⁶ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 5.

⁹⁷ *FIRST PROTOCOL OF JENIN, JENIN*, *supra* note 80 at 5.

In contrast to these deliberations, and focusing exclusively on legal parameters, the Israeli Supreme Court accepted the petition against the decision to deny permission for the screening of *Jenin, Jenin*. Regarding claims pertaining to the film being false, the justices rejected them unanimously, relying on existing precedents.⁹⁸ In the words of Justice Dorner: “The falseness of an expression is also, per se, insufficient cause for removing protection.”⁹⁹ Similarly, Justice Procaccia categorically stated: “The question of true and false in human creativity, including artistic creativity, cannot usually constitute cause for restricting freedom of expression.”¹⁰⁰

The claim of incitement, raised only in generalized terms, was also bound to be rejected according to existing precedents. In her decision, Justice Dorner disregarded this claim altogether, and Justice Procaccia explicitly ruled out the possibility of incitement with regard to an Israeli audience. In her view, “the film is meant to be shown to the general public in Israeli cinemas. The fear that the film’s images might incite the public, or part of it, to negate Israel’s right to exist, is a far-fetched claim without basis in proven fact.”¹⁰¹ Interestingly, Justice Procaccia spoke from the viewpoint which assumed that the screening of the film would be before the Israeli public in general, whereas the Board members had focused the incitement claim on screenings to Israeli Arab audiences.¹⁰²

In these circumstances, the ruling on *Jenin Jenin* focused on the question of offense to feelings. Justice Dorner’s judgment broadened the reservations that previous case law had shown regarding the claim of offense to feelings, effectively barring any possibility of using it as grounds for an absolute disqualification of a film. In her view,

the pain and anguish of the bereaved families and the heavy feelings of the soldiers are understandable, and allowing the screening of the film does not imply disregard for this pain or reduced appreciation for their contribution to the security and well-being of the country. Nor does it suggest endorsement of its contents. It would be fitting for the respondents to focus their energies—as they have indeed done, and with significant success—in confronting the alleged offense in the realm of freedom of expression.¹⁰³

In this context, she mentions the *Ein Gal* ruling and states it no longer reflects the law. In her view, “since this ruling was issued in 1979, times have changed and so has the law. Given the case law since then, the precedent set there can no longer stand. In any event, I hold that Israeli society is currently able to deal with such expressions.”¹⁰⁴ Justice Dorner’s

⁹⁸ See generally H CJ 316/03 Bakri [2003] IsrSC 58(1) 249.

⁹⁹ *Id.* at 261.

¹⁰⁰ *Id.* at 271.

¹⁰¹ *Id.* at 272.

¹⁰² *Id.* at 272.

¹⁰³ *Id.* at 270.

¹⁰⁴ *Id.*

statement of the law is imprecise here. As noted, the claim of offense to feelings was not discussed in *Ein Gal*, and the formal basis for that decision was the fear of incitement. Even so, the drift of the ruling is clear: there is no basis for banning provocative films, no matter how infuriating.

Justice Procaccia's judgment is more complex, but still conveys the gulf separating public sentiment from legal culture. In her view, "the Board's third reason for banning the film, dealing with severe offense to the public's feelings, requires special consideration and on it hinges the main dilemma of this affair."¹⁰⁵ As she admits, "the messages of the film *Jenin, Jenin*, as described above, are indeed offensive to wide sections of the public in Israel."¹⁰⁶ Even so, she too ultimately supports rejecting the petition because,

although the injury is deep and real, it does not reach the high threshold required to rescind freedom of speech . . . the offense is not radically shocking to the point of posing a concrete threat to the public order, in a way that might justify restricting freedom of expression and creativity. Although the offense to feelings is tied to Israel's armed struggle against the enemy, we are not currently going through an emergency or a national crisis of the type that might justify giving decisive weight to protection against such an offense.¹⁰⁷

But *is* there any pain that might "radically shock" the Court? The anguish of the public that protested against the screening of *Jenin Jenin* was acute,¹⁰⁸ as evident from the intensity of the ensuing public controversy.¹⁰⁹ What else has to happen? This question does not imply a call to ban the film. Banning a film the government judges to be false because it is annoying sets a highly suspicious precedent. Still this question points out that the Court's reasoning is not convincing, and the gap between the extent of the offense to public feelings and the extent of the offense as experienced by the Court is too great. A more candid account is imperative: the offense to feelings is indeed enormous, but precisely because the dispute hinges on claims pertaining to the falsity of the film, all government interference in determining the truth must be met with strong resistance.

¹⁰⁵ *Id.* at 272.

¹⁰⁶ *Id.* at 274.

¹⁰⁷ *Id.* at 284.

¹⁰⁸ Parenthetically, one could further question whether the intensity of the offense can be a function of the protests' intensity. Theoretically, public feelings may be offended even when the public lacks the skills to bring its grievances to the media. Another question is whether an offense to the feelings of those whose protest was stifled as a result of a decision by the Censorship Board deserves any consideration. Thus, for instance, the Arab public in Israel presumably feels offended by the suppression of one of its prominent spokesmen with the banning of *Jenin, Jenin*.

¹⁰⁹ The Israel Cancer Association has recently cancelled a campaign with the participation of Muhammad Bakri, directed at the Arab public. The Association adopted this decision following protests against Bakri because of his identification with *Jenin, Jenin*. See Rivka Freilich & Amos Oren, *Shelving of Campaign with the Participation of Muhammad Bakri*, YEDIOTH AHARONOT (Isr.), Aug 27, 2004 (in Hebrew). See also Moti Gal & Ofer Meir, *Mk Eldad Protested, and the Campaign with Bakri was Suspended*, <http://www.ynet.co.il/articles/1,7340,L-2968965,00.html> (in Hebrew).

The *Jenin, Jenin* litigation exposes once again the gap between legal doctrine and public sentiments. A culture granting broad protection of freedom of expression has taken root in the Israeli Supreme Court over the years.¹¹⁰ Concerning criticism of films purporting to portray or document history, this approach sets a particularly high threshold for censorship, making it unclear when and under what circumstances (if any) its requirements would be satisfied. Whereas public sentiment leans toward sensitivity concerning feelings, the Court ascribes the public a high and even inhuman threshold of tolerance.

To date, however, the Israeli Supreme Court has not abandoned the rhetoric of protecting feelings. It thereby exposes itself to criticism as detached from and impervious to public sensitivities. The political culture that the Court wishes to impart to the public, and rightfully so, holds that everything can be said, subject to certain restricted and delineated qualifications, such as the prohibition on incitement and the prohibitions restricting racist expressions. The public, however, is not a full partner to this endeavor. As a result of the tension between these two cultures, the Court finds itself repeatedly at the eye of the storm.

The cultural gap between the Court and the general public can also be illustrated by applications for further hearings¹¹¹ filed in cases dealing with controversial productions. Thus, for instance, in *Laor*, the application for a further hearing filed on behalf of the Censorship Board called upon the Court to permit additional limitations on freedom of expression for the sake of morality and good taste. Chief Justice Shamgar rejected the application, emphasizing that it reflected views alien to the Court's concept of freedom of expression. According to Justice Shamgar, "The thesis whereby the Court accepts that the petitioning Board will formulate moral criteria and educational guidelines and will ban plays it considers unedifying is far-fetched and incompatible with our legal conceptions."¹¹²

In the case of *Jenin, Jenin* as well, three applications were filed for further hearings: one by the State, another by the families of the fallen soldiers, and the third by soldiers who participated in the battles. These petitions were filed although, from a purely legal perspective, the ruling had entailed no legal innovations that could serve as grounds for additional consideration. In dismissing the applications,¹¹³ Justice Matsa stated that, "the vast majority of the petitioners' claims were directed against the conclusion reached in the judgment, without pointing to any new legal rule determined thereby."¹¹⁴ In fact, the State's application for a further hearing implicitly admitted this fact when it relied on "a number of cumulative reasons, some of them purely legal, and others public-legal."¹¹⁵

¹¹⁰ Even so, the level of protection that case law has afforded to freedom of expression has not always been uniform.

¹¹¹ The Israeli Supreme Court can be asked to reconsider a ruling issued on a new and complicated legal question in an enlarged panel. Ordinarily, judgments are issued by panels of three Justices.

¹¹² See FH 3/87 Films and Plays Censorship Board v. Laor [1987] IsrSC 41(2) 162, 163.

¹¹³ FHHC 10480/03 Bosidan v. Bakri [2005] IsrSC 59(1) 625.

¹¹⁴ *Id.* at 639.

¹¹⁵ *Id.* at 634.

In his decision to reject the petitions for a further hearing in the matter of *Jenin Jenin*, Justice Matsa attempted to bridge the gap between the judicial permission to screen the film and the public sentiments in this regard. From a formal legal perspective, the original ruling allowing the screening was not altered. His decision, however, is crammed with terms expressing criticism, disgust, and condemnation of the film and its creators. Justice Matsa positively states that parts of the film are “patently false.”¹¹⁶ He also blames the creators for the failure to reach agreement in the negotiations then being conducted under the aegis of the Court concerning the screening of the film after deleting certain passages and adding cautionary subtitles regarding others. He further states:

The respondents also lose from the failed attempt to reach a consensual agreement. The screening of the entire film after it has already been proven that it incorporates perfidious slanders although pretending to be a documentary, would certainly do them no credit. Indeed, had they consented to the arrangement I have generally described, they would have removed the stigma now attached to it as slanderous propaganda and endowed it with the stature of a film presenting the events from the Palestinian perspective that, although controversial, merits discussion.¹¹⁷

Justice Matsa also mentions that granting permission for the film’s screening does not guarantee it will find a venue in cinemas or on television, where decisions are made by the managers of the various channels “and their considerations for granting such approval are not necessarily identical with the commendable considerations of the Board.”¹¹⁸ This decision goes a long way toward the prevalent public view (within the Jewish audience) without altering the ruling’s formal legal conclusion. Its message is that the Censorship Board is indeed not allowed to ban films due to their alleged falsity, but the Court can most certainly condemn them.

Justice Matsa’s condemnation of *Jenin, Jenin* was primarily intended to mollify the public anger that accompanied the permission to screen it, due to the “approval effect” or the “legitimation effect” created whenever the State of Israel allows the screening of a film that maligns it. This effect would have been avoided altogether had the screening of films in Israel not required authorization. From this perspective, it is precisely the approval effect created by the authorization to screen *Jenin, Jenin* that compels reconsideration of the current format of prior review of films. In the past, the deliberation on *Laor* resulted in the abolition of prior review of plays.¹¹⁹ The desirable outcome of the storm generated by the permission to screen *Jenin, Jenin* would be a parallel reform in the area of film censorship.

¹¹⁶ *Id.* at 630.

¹¹⁷ *Id.* at 638.

¹¹⁸ *Id.* at 639.

¹¹⁹ See *supra* notes 32, 74.

The current scheme of film censorship has been criticized due to the tension between the broad powers of the Censorship Board and the broad judicial review of its decisions, which are usually overturned. Another perspective could argue that this institutional tension enriches public dialogue in Israel. This claim basically states that the Board's decisions contribute to a passionate public discourse on sensitive and repressed issues. Thus, for instance, concerning *Jenin, Jenin*, the controversy surrounding the screening of the film contributed to a public debate on issues related to "Operation Defensive Wall." The decisions of the Board, which expressed "another voice," represented a fruitful addition to this debate. From a broader perspective, however, the advantages of the current legal situation are negligible in comparison with its drawbacks. First, the public discussion elicited by censorship decisions is invariably conducted in the shadow of litigation and its contents are affected by it. In the case of *Jenin, Jenin*, instead of engaging in direct discussion of questions bearing on warfare in the occupied territories, attention was diverted, at least partially, to the secondary question of censorship. Second, the contribution to the public discourse ensuing from the disqualification of a film is greater than its damage only when the results of the process are not deleterious to freedom of expression. In other words, a censorship decision furthers public discourse only if rescinded by the High Court of Justice. Third, the public controversy triggered by the decision to ban a film such as *Jenin, Jenin* is also flawed because of the hierarchical nature of the system. Ultimately, the controversy is always decided by the High Court of Justice, and its rulings are binding.¹²⁰

In the context of the current legal scheme, the fundamental position of the Israeli Supreme Court should be supported. Screenings should not be prevented purely because they are considered false and provocative. At the same time, it would be preferable for the Court to acknowledge the grave affront to feelings in cases such as *Jenin, Jenin* while explaining that it refuses to uphold the censorship decision not because the film is not offensive to the public's feelings but because of the enormous danger of turning the state into the custodian of the truth. In view of this danger, government interference in contents should be opposed, even if it may occasionally prove exceedingly difficult for the truth to prevail in the marketplace of opinions and ideas.

VI. THE LEGAL REGULATION OF COLLECTIVE MEMORY: A FUTILE ATTEMPT

The Israeli case law on historical films has so far led to results resembling those of American case law in this regard. Despite the different context—private law litigation in the United States and judicial review of administrative decisions in Israel—both show a similar pattern: the courts insist on avoiding decisions on historical facts even when confronting

¹²⁰ Similarly, the Court's support of freedom of expression has led to a de-facto nullification of the Board's impact regarding films considered daringly erotic and even pornographic. Censorship decisions regarding such films were also abolished outright. *See supra* note 18.

serious allegations about distortions in specific films. Both private law litigation in the United States and the process of judicial review in Israel reach similar decisions of non-intervention.¹²¹

A comparison between these two case studies offers some important lessons to both sides. To Americans, the Israeli case study demonstrates that winning lawsuits dealing with distortions in historical films is hard not only because of doctrinal developments in American law, but also because courts are probably not the ideal place for deciding controversies not really hinging on historical facts but rather on collective memory. A similar trend, despite wide differences in the legal background, is also evident in the Israeli Supreme Court. To Israelis, the American case study may demonstrate that public feelings demanding censorship of controversial historical films are without legal backing abroad as well. Theoretically, the regulation of film screening through public law, as in the Israeli model, imposes greater limitations on freedom of expression and enables a different focus, centering more on community narratives and not only on falsehoods attached to individuals. In practice, however, the interpretation given to the censorship powers in Israel has gradually erased this difference.

At present, American case law is particularly relevant to Israel because it sheds light on the options for future reforms in this area. As noted, the clear policy of the Israeli Supreme Court is not to enable banning of historical films. One option is to abolish prior censorship of films altogether, subject to appropriate enforcement of criminal prohibitions relating to racist or inciting expressions. Another option for reform is to curtail the prior censorship procedure and apply it to a restricted list of grounds, such as violence, pornography, incitement, and racism (in addition to the classification of films as appropriate for viewing by specific audiences). Yet another possibility is to narrow the powers of the Censorship Board, allowing it only to add warning subtitles that would precede the screening of films offending feelings. Finally, reform could take the form of transferring licensing powers to the level of local government, making one film subject to various decisions in different places. If the power to censor films is abolished, current pressures to censor distorted films might be channeled to civil litigation, mainly in the shape of defamation suits against filmmakers. Plaintiffs may then confront hurdles similar to those already experienced by their counterparts in the United States. Although the protection granted to freedom of speech in the Israeli defamation law is not as broad as that afforded by *New York Times Co. v. Sullivan*, Israeli courts do take freedom of speech very seriously and acknowledge that, institutionally, they cannot decide historical controversies.¹²²

¹²¹ The details are obviously different, as indicated by the discussion thus far. In principle, when censorship powers such as those existing in Israel are still operative, the film might not be screened in public. By contrast, private lawsuits such as defamation are brought ex-post and, therefore, do not prevent the screening.

¹²² Indeed, the Court is sometimes required to decide on the question of what is historical truth such as, for instance, when a defamation action is filed concerning a description of events in the past and the

Defamation suits are, in any event, limited to specific allegations made by living people and general arguments regarding the narration of national history will not be the subject of litigation. In addition, only relatively recent events will serve as a basis for lawsuits because of the limitation on the right of family relations to sue on behalf of the dead. The family of Hannah Senesh cannot sue for the distortion of her image in the docudrama *The Kastner Trial* because she is dead, just like the Dewey family could not sue the producers of *Hoodlum*. It is also questionable whether anonymous soldiers who actually participated in the battle can sue the producers of the film *Jenin, Jenin*, because they would need to prove that they were personally defamed, and because this course is obviously open only to living soldiers and not to the families of those killed in battle.¹²³

In a more general manner, courtrooms do not seem to be the proper venue for deciding controversies about collective memory.¹²⁴ First, courts do not have the necessary expertise to decide historical disputes, unlike controversies on relatively recent events. Second, contrary to decisions bearing on professional disciplines such as engineering or medicine, court rulings on historical events could suppress future public debate on the same matters. This argument is even more relevant when the debate does not focus on specific historical events but on the interpretation of broader historical processes and developments. Courts do occasionally participate in the process of shaping memory, but their contribution in this regard is not binding, and their deliberations serve only as a source of inspiration in the public debate.¹²⁵

Should this view prevail, historical controversies will be left solely to public debate and academic research, relying on the marketplace of ideas. This conclusion, however, involves some disturbing shortcomings. The marketplace of ideas, like markets in general, is often a setting for bitter

defense plea is "I spoke the truth." Yet, it is precisely these cases that expose the difficulties attendant on decisions of this nature, even after a long and rigorous, meticulous legal procedure. For instance, when the Court adjudicated on the action filed by Ariel Sharon against the journalist who accused him of misleading Prime Minister Menachem Begin during the Lebanon War, the Supreme Court based its rejection of the action on the defendant's claim of good faith and preferred to leave the question of truth pending. See CA 323/98 Sharon v. Benziman [2002] IsrSC 56(3) 245. According to Justice Matsa, "In my view, the determination of 'historical truth'—insofar as such a concept exists—is a matter for historians and not for the court, and the more the court succeeds in refraining from dealing with this the better." *Id.* at 257. See also Daphne Barak-Erez, *supra* note 28. In addition, Israeli precedents clearly oppose the granting of temporary injunctions against expressions alleged to be defamatory. See CA 214/89 Avneri v. Shapira [1989] IsrSC 43(3) 640; LCA 10771/04 *Reshet Communication and Productions (1992) Ltd. v. Etinger* [2004] IsrSC 59(3) 308 (regarding Judicial suspicion against regulation of speech in historical matters).

¹²³ In fact, after *Jenin, Jenin* was authorized for screening a group of IDF combatants did file a defamation action against Muhammad Bakri and the theatres screening his film. See CC (TA) 1255/03 Ben Nathan v. Bakri (pending). According to Israeli defamation legislation, one cannot file an action for the "defamation of a body of persons or any group" Defamation Law, 5725-1965, 19 LSI 254 (1964-65) (Isr.). The plaintiffs contended, however, that the contents of the film maligned them personally as well, and the application to summarily strike out the action was rejected. See CC (TA) 1255/03 CA 16581/03 Ben Nathan v. Bakri (not published, 2.8.04).

¹²⁴ See Amos Funkenstein, *Collective Memory and Historical Consciousness*, 1 HISTORY AND MEMORY 5 (1989) (explaining the concept of collective memory).

¹²⁵ See generally Daphne Barak-Erez, *supra* note 28; Jean-Francois Gaudrault-DesBiens, *The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity*, 23 VERMONT L. REV. 793 (1999).

failures.¹²⁶ Balancing historical narratives presented in films that focus public attention and are marketed professionally is an especially difficult task for people who lack financial resources. And yet, remedies intended to correct this failure—such as state censorship—might prove even worse.¹²⁷ The judicial policy toward defamation suits should probably be less hostile to plaintiffs than the one which prevails in American courts; but, even then, the main arena for debating historical films will continue to be one or another form of public discourse, with all its flaws.¹²⁸

¹²⁶ A painful historical example, from another context, is the enduring power of anti-Semitic writings such as *The Protocols of the Elders of Zion*. See HADASSA BEN-ITTO, *THE LIE THAT WOULDN'T DIE: THE PROTOCOLS OF THE ELDERS OF ZION* (2005). The problem with the classic view expecting truth to prevail in the marketplace of ideas grows when the sources of information available to the public on the contents of the film are limited. In this sense, the problems posed by documentary films dealing with contemporary issues are greater than those posed by films dealing with more remote events, which have already been studied and researched. Regarding *Jenin Jenin*, however, the Israeli public had the opportunity to see a rival film on the same issue, *The Road to Jenin* by French director Pierre Rehov, which describes the same events from the perspective of IDF soldiers. This film was shown on Israeli television.

¹²⁷ An exception to this rule may be the case of Holocaust denial, but even this exception may prove controversial. For discussion of this example in the context of the traditional offence of "spreading false news" in Canada, see: *R. v. Zundel* [1992] 2 S.C.R. 731 (Can.).

¹²⁸ For an argument that advocates coping with problems of distortions through a code of ethics to be adopted by all relevant agents (authors, filmmakers and others) See, Geoffrey Cowan, *The Future of Fact: The Legal and Ethical Limitations of Factual Misrepresentation*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 155 (1998).