THE ENEMY WITHIN:
The Effect of "Private Censorship" on Press Freedom and How to Confront It—An Israeli Perspective

by

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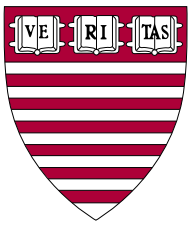

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INTRODUCTION

The Israeli press is one of the most vigorous, complex and diverse in the world. It has its origins in a rich cultural and historic mixture. Among the elements are an almost genetic urge to get at the truth, a democratic setting that is unique in an authoritarian neighborhood, and plain old stubbornness and disregard for authority.

The mythic story of Jewish scholars assembled to define what it means to be Jewish comes to mind. To be Jewish, the moderator observed thoughtfully, means to object. Quickly a hand shot up. "I object," the dissident declared.

It is no wonder, then, that Israeli journalists would rebel against censorship, by the government, commercial interests and even their own owners. Moshe Negbi, richly experienced in print and television journalism, writes of all forms of censorship with authority: The censorship of Arab war preparations before the Yom Kippur war of 1973 by a government fearful of demoralizing the public; a leading newspaper's retraction of a series of articles about irregularities in a large corporation.

Israeli journalists, for the most part, are dedicated to uncovering the truth and passing on the information to their viewers and readers. A landmark Supreme Court decision has limited what the government can censor to material whose publication probably would imperil national security or public order.

This may not seem all that progressive to an American First Amendment junkie, honed on the views of Justices William O. Douglas and Hugo L. Black. But Israel has no First Amendment, and most of its neighbors have only a nodding acquaintance with free speech.

David Ben-Gurion, the first prime minister, once contemptuously dismissed a newspaper's criticism: "What is a newspaper anyway? Somebody with money establishes a business, hires servants and they write whatever he directs them to write." Yitzhak Rabin, accusing editors of sensationalizing terrorist attacks, remarked: "They do what sells papers."

Well not really. The press practices that have developed over only 50 years are quite remarkable in their assertion of independence, not only from censorship but from a government or otherwise official line.

Unfortunately, this zeal, when combined with an acute sense of competition, sometimes produces erratic and inaccurate news accounts. There is too much gotcha journalism. But all that goes on in America, too, after more than 200 years of experimentation with freedom. One answer may be governments that provide more information and withhold the spin.

There probably is no way though, to slow the concentration of the media in fewer and fewer hands, in both countries. The rapid disappearance of distinctly separate radio networks in America poses a particular risk.

Israel has abandoned, probably forever, its socialist tradition and there are big bucks to be made in journalism properties. Newspapers controlled by political parties or by benevolent owners are also a thing of the past.

These trends are not conducive to press freedom, especially not to the kind of investigative journalism that seeks to pry information from uptight bureaucrats or plutocrats.

And Israeli courts have been sympathetic to the self-censorship of newspaper owners even while cutting down government censors. A rich owner in Israel can pretty much have his own way in the pages of his newspaper. Editors and writers can and will quit in protest, as in America, but it is not difficult to find replacements.

Happily, editorial pages seem to be bucking the trend toward concentration. Diversity of views is as rich as ever, again possibly a reflection of a tradition that predates Herzl and Ben-Gurion by centuries.

Of course, Israel has a special problem: it lives in a dangerous neighborhood among enemies who would seek to destroy it either by means of terrorism or traditional warfare. The question is whether security is better served by keeping information from the people or by keeping the public informed. Wouldn't Israel have been better off if self-censoring editors had not killed stories warning of massive Arab buildups at the nation's borders in the days before the 1973 war? Certainly, the Israeli government knew about the buildups. And so, of course, did the Arab governments who were about to strike. Only the Israeli people were kept in the dark.

As Moshe Negbi explains, sometimes censorship can take strange twists. He relates how the Israeli media in 1985 collectively decided to self-censor a Cabinet decision to release 1,150 terrorists in exchange for the return of 6 Israeli soldiers who had been abducted in Lebanon. The military censor did not object to informing the public, Negbi recalls. In fact, the Army wished the story would come out in the hope a

public outcry would compel the Cabinet to reverse itself.

A word or two should be said, also, in praise of Israel's press officers. My own experience largely has been limited to the diplomatic beat. But over a quarter-century of dealing with the Embassy as AP's State Department correspondent I have been extremely impressed with their honesty and particularly with their not trying to cast events in a favorable light. From Avi Pazner to Ruth Yaron to Gadi Baltiansky and all the others who held the difficult job, there has been a consistent practice of telling the truth even if the truth may be embarrassing. And without the spin many American publicists try to place on a story.

Barry Schweid
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Associated Press

THE ENEMY WITHIN: The Effect of "Private Censorship" on Press Freedom and How to Confront It—An Israeli Perspective

by Moshe Negbi

"What is a newspaper anyway? Somebody with money establishes a business, hires servants and they write whatever he tells them to write."

—Prime-Minister David Ben-Gurion in parliament, April 1951

"The commercialization of the media has become a major factor in depicting events, especially in Israel [..] They do what sells papers."

—Prime-Minister Yitzhak Rabin in an interview with Marvin Kalb, March 1995

"There are those who make a living out of information they publish, and there are those who make a living out of information they do not publish."

—Justice Mishael Cheshin, in a Supreme Court Judgment, August 1996

Introduction: The Nature and Hazards of "Private Censorship"

Traditionally the struggle for press freedom has been waged against the state. Publishers, editors, and journalists alike have fought to prevent, modify or abolish legislation which gave the government power to censor publications. However in well-established democracies where reasonable safeguards for protecting the press from official intervention were achieved, it has become evident that the state is not the only menace threatening the uninhibited flow of information and ideas to the public. Sometimes the state is not even the major menace. It seems that the all-powerful censors in such advanced democracies are no longer politicians or government officials but rather the "enemies within"—the people who own the media and consequently enjoy tremendous power to control its editorial contents and the access to it. These people may use their power to censor both information and opinion, which are not to their liking or which they perceive as detrimental to their interests.

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Their motivation for censoring may differ, but the impact may be as harmful as the impact of state censorship. As American legal scholar A. J. Barron has observed: "Increasingly private censorship serves to suppress ideas as thoroughly and as rigidly as the worst government censor" (Barron 1973:321). A similar sentiment was voiced on the other side of the ocean by the great British jurist Lord Radcliffe: "A man may glitter with new and valuable ideas or burn with wise thoughts [. . .] but if he is to communicate them [. . .] he has to render them acceptable to the real licensers of thoughts today [. . .] the publishers" (Radcliffe 1968: 162).

Some may object to the use of the term "censorship" in this context. For them this term means a complete brutal suppression of dissenting voices coupled with severe punishment entailing loss of liberty and even life for the dissenter. It is true that this brutal type of censorship is applied by governments only, since governments usually enjoy a monopoly over using and applying such forceful sanctions. It is also true that it is the more inhumane type of censorship. But let me submit that this is not the only type. Freud has observed there is profound moral difference between burning dissenters or "just" burning their books, but in both cases those dissenters are censored (Jansen 1991: 20). If you assume that Freedom of Speech means not only the ability to speak but the ability to communicate—not only to utter a dissenting voice but also to make it heard by others—then reducing it to an inaudible whisper can be fairly termed "censorship." And in our era when you deny a dissenting voice access to the mass media—you practically reduce it to an inaudible whisper. Indeed private persons or organizations cannot stop people from uttering information or ideas, but they can certainly reduce the audibility of their utterances to a degree that renders them insignificant.

As Lord Radcliffe said, "it probably does not much matter to the man whose nonconformity disqualifies him from breaking through the barrier whether the source of obstruction is an instrument of government or what we like to speak of as an independent agency. In either event it is the public that loses by the impoverishment of its culture" (Radcliffe 1968:163).

Moreover it is submitted that this "private censorship"—even if it is not inhumanely brutal—is often more effective and restrictive than government censorship. When a state organ censors, the press can protest and mobilize public opinion. It can also try to combat the censor in the court. And in extreme cases it can even decide to break the law by publishing the censored information ("publish and be damned"). However when censorship originates within the media itself—there is usually no one willing or able to protest, and no forum upon which to stage the protest. Thus the public at large has almost no chance to suspect that information or opinion had been censored.

It seems that most people are oblivious of "private censorship" and its threat. This unawareness makes it all the more difficult to combat. But this is not the only difficulty. There are also constitutional hurdles. Since "private censorship" takes place in privately-owned media, and is enforced by the owner, both the legislature and the judiciary—even if they are aware of it—are quite reluctant to interfere. Such interference may be deemed as trampling on the owner's freedom of speech and right of property. It may seem presumptuous, perhaps outrageous, to tell or force someone who has invested a lot of money in acquiring a medium of communication in order to publish his or her views and convictions (or to make money), to let it be used to rebut those views and convictions, or in a way that will cause him or her to lose money. Media critic A. J. Liebling has argued that freedom of the press means freedom of speech for the owner of that press (Baker 1994) and that censoring his or her own newspaper (or mouthpiece, if you like), is actually a legitimate exercise of that freedom. Thus the challenge of combating "private" censorship requires understanding that we must protect and guarantee not only "freedom of the press" in its classic meaning but also the freedom of the journalist.

The older and better known type of "private censorship" is the one which is motivated by ideology, i.e., the publisher's will to serve the public good. If a publisher believes that publishing a certain news story or opinion may harm the "public good" or the "national interest," he or she suppresses its publication. Certainly, there are people who see nothing wrong with this "highly motivated private censorship" (of course, only when they share the publisher's view of the "public good" or the "national interest"). On the contrary, they term this "private censorship" responsibility and applaud it. They claim that if the press is patriotic it should be responsible and not publish anything which might be detrimental to national interest. This argument apparently makes sense, but only if you forget that the very notion of a pre-determined "national interest" or "public good" runs contrary to basic democratic premises. Actually it is a Leninist notion, and Lenin advocated neither democracy nor freedom of the press. Indeed he complained he did not understand the idea of a free press: "Why should a government which is doing what is right and just allow criticism? It would not have allowed the use of lethal weapons against it and ideas are far more lethal than guns."[1]

The democratic answer to Lenin's query (and to the argument of the supporters of "private censorship" for the sake of "national interest") is that no one, including the people who govern (and certainly including publishers) can claim to know what is right and just. They may believe a certain policy to be right and just, but (because no human being is infallible) they may also be totally wrong. Democratic premises hold that since no mortal has knowledge about what is right and just, it is best to allow all persons to present their beliefs about what is right and just and let these beliefs compete in the free marketplace of ideas.

In the famous words of Justice Oliver Wendell Holmes: "When men have realized that time has upset many fighting faiths, they may come to believe [. . .] that the ultimate good desired is better reached by free trade in ideas [. . .] we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe fraught with death."[2] Certainly this vigilance is also needed when the expression of seemingly "death-fraught" opinions is checked not by the government, but by well-intentioned publishers.

Israel's short history has already exemplified the danger inherent in well-intentioned "private censorship." Actually such censorship made all the media guilty accomplices in the most traumatic military catastrophe that had befallen the country so far—the surprise attack by Egypt and Syria which initiated the October 1973 "Yom Kippur" war. A week before hostilities broke out the Israeli media decided collectively and voluntarily to censor reports by their own correspondents and to suppress wire reports about the heavy build-up of enemy forces on Israel's borders. The motivation for this self-censorship was the media's high regard

for the invincibility of the Israeli army and the infallibility of its intelligence service (which assessed the build-up was for maneuvers only), and especially its concern that the publication of the reports would cause panic which would generate escalation. Therefore when Yaakov Erez, the military correspondent of the highest-circulation newspaper at the time, *Maariv*, wanted to publish an exclusive interview with an army colonel saying the "whole Syrian army is on the border" the interview was suppressed and he was warned by his boss "not to scare our readers" (Negbi 1985:87). Of course, the boss censoring Erez felt that he was acting in a very responsible fashion, but the dire consequences show how grossly irresponsible such censorship may be.

But most "private censorship" does not even pretend to be responsible and patriotic. True, the distinction between ideologically and otherwise motivated censorship is sometimes blurred. Publishers may, for example, censor radical views because they think they are bad for society at large but also for their business (Hollingsworth 1986). When we shall focus here on commercially-motivated "private censorship" we shall speak of suppression or distortion of stories or opinions which the publisher feels would diminish profit or make him or her lose money. This "censorship" is especially effective and pervasive because while an intelligent reader may discern the ideological bias of a publisher, almost no one can be aware of his or her business interests at any given time and therefore of the possible bias which colors news and views in his or her paper. "Private censorship" can also be motivated by the financial interests of the publisher both inside and outside the communication medium he owns. If, for example, the publisher is interested in buying real-estate in a certain region he might censor stories which would cause prices in that region to go up. Then there are the financial interests of the communication medium itself. These are dependent mainly on advertising and circulation (or ratings). No doubt advertising is the dominant concern. As A. Roy Megary, publisher of the *Toronto Globe & Mail* rightly predicted in the eighties, "By 1990, publishers of mass circulation daily newspapers will finally stop kidding themselves that they are in the newspaper business and admit that they are primarily in the business of carrying advertising messages."[3] The same holds true in Israel. Advertising is the economic mainstay of newspapers. Amnon Abramovitz, one of Israel's prominent columnists, calculated that for every Israeli Shekel a newspaper gets from its readers, it earns 3–5 Shekels from advertising.[4] This may cause the owners to direct their editors and journalists not to publish or broadcast stories which would annoy advertisers. Sometimes such stories are very important for the public to know. The most striking American example is probably the alleged suppression of the significance of reports showing the health hazards in smoking cigarettes (Bagdikian 1983: 168–173), and even the prohibition to show "No Smoking" signs in early TV news reports (Brinkley 1995:66). But there are also more recent examples (Baker 1997). A survey in 1992 showed nine out of ten U.S. editors were aware of advertisers' pressures and more than a third reported those advertisers actually succeeded in blocking unfavorable stories (Hamilton and Krimsky 1996:32). As we shall see, Israeli experience allegedly shows that unscrupulous publishers may not only bow to advertisers' pressure, but also turn the tables and extort more advertisements in return for their enforcing "private censorship" and suppressing stories which are damaging or embarrassing for the advertiser.

Advertising is all important but a publisher or a station owner cannot totally ignore the audience. We should remember that the amount and rates of advertisement often depend on circulation or ratings. This can move the publisher to censor stories which would alienate readers and consequently advertisers. It is submitted that the fierce competition for circulation and ratings discourages publication of unconventional views or coverage of unpopular causes because such views and causes make the audience uncomfortable. Large scale production—and that's what the media has apparently become—must direct its catering towards the average taste. This may bar access to the media to the adventurous and the heterodox and thus again severely restrict the essential free marketplace of ideas (Radcliffe 1968:179). The catering for the mass audience and its limited attention span may also dictate censoring stories on complex but highly important issues, or shortening and simplifying them in a meaningless and distorting fashion. This of course happens a lot in commercial television.[5] However, the motivations to acquire advertisements and high circulation are not always necessarily interrelated. In some cases (high prestige or special-interest newspapers) the advertisers (and consequently the publishers) are not concerned with the circulation and ratings per se, but rather with maintaining

a certain class or category of audience. But again this can generate "private" censorship of information and opinions which might alienate a particular audience.

The effectiveness of "private" censorship is clearly multiplied as the number of media owners diminishes. The concentration of the media in fewer hands makes censoring much more tempting to the owner and much more harmful to the public. If owners know that material they intend to suppress in their newspaper or station is likely to surface and reach their readers through other media they would probably have second thoughts about suppressing it. After all, such suppression would serve no useful purpose and would just hurt their medium's credibility. But in a concentrated media market—especially where there is cross ownership of print and broadcast media—a great number of people may get almost all their information and ideas about public affairs and issues from media sources which are all controlled by the same owner. Such a situation makes it more tempting for advertisers and other interested parties to apply pressure on the owner to censor his or her journalists.

In the United States, where constitutional guarantees of press freedom from government interference are deeply entrenched, the hazards of "private" censorship were recognized long ago, and analyzed and confronted ever since (Bollinger 1976; Sunstein 1992). As much as fifty years ago, The Commission on Freedom of the Press noted that "protection against government is now not enough to guarantee that a man who has something to say shall have a chance to say it. The owners and managers of the press determine which persons, which facts, which versions of the facts, and which ideas shall reach the public."[6] In Israel, however, the issue was very slow to surface. This is probably because the Israeli media was too pre-occupied with fighting government censorship. Moreover, given the acute security situation, as long as "private censorship" was "patriotically"-motivated it did not raise much resentment. Only after the Yom-Kippur War catastrophe, some (but not enough) controversy arose about this kind of censorship (Goren 1976; Negbi 1985). But the issue of "private" censorship has really come forth with the advent of commercially motivated-censorship. This came about because of several simultaneous major changes in the Israeli media map over the last decade: The commercialization of most of the media and the demise of almost all ideological party-affiliated newspapers; the establishment of the first commercial TV channel (channel 2), and of cable TV, and the ensuing ratings war; and the concentration of 70 percent of the media in the hands of one publisher, and of more than 90 percent in the hands of three publishers only (two of whom cross-own newspapers and commercial and cable TV). The situation was aggravated when serious criminal charges of corruption were leveled against at least one of these powerful "press barons." Israeli journalists, media lawyers and academics—like their American counterparts—now find out how hard it is to resolve the issue of "private censorship" (Segal 1996). We will ponder their quandary and examine the possible solutions, but first a brief glance at the official censorship that the Israeli media (publishers and journalists alike) still have to contend with.

Press Freedom in Israel—An Overview[7]

There are no explicit constitutional or statutory guarantees for freedom of the press in Israel. Moreover, there are plenty of British colonial leftovers in the statute books which have no regard whatsoever for that freedom and restrict it harshly. Israel is probably the only democracy in the world in which a newspaper needs a government license to publish. According to the letter of the law, such a license can be refused or revoked without giving a reason (Lahav 1993:172–3, Negbi 1995:37–55). One of the more draconian leftovers from the time of the British Mandate is the military censorship. According to the Emergency Defense Regulations of 1945 which are still in force (and enforced), the censor—an army colonel—can demand to submit to his inspection any material prior to publication and he can close down a newspaper if it disobeys his orders.

The Israeli Supreme Court, however, dramatically curtailed the censor's vast powers and discretion (Segal 1990). Moreover, the Court decreed that freedom of speech and freedom of the press are enforceable legal rights in Israel. In a landmark decision in 1953, University of Chicago Law School Alumni Justice Simon Agranat ruled that the government could restrain the media only if there existed "probable" or "clear and present danger" to a vital interest.[8] Thus an American First Amendment doctrine was neatly and ingeniously imported and transplanted by an American-born and educated Supreme Court Justice, into the Israeli legal system (Lahav 1981, 1997:79–120).

Following this ground-breaking precedent, 35 years later Justice Aaron Barak ruled that the

military censor also could use his power only if and when there was "high probability" that the publication would imperil national security or public order.[9] He emphasized that "because of the implications security-related decisions have on the life of the nation, the door should be opened to a candid exchange of views [. . .] it is imperative that the press be free to serve as a podium for deliberation and criticism in matters vital to the individual and the community."[10] Thus it was held that the military censor had no authority to suppress an article criticizing the (then) head of the Mossad. In 1992 press freedom vis-à-vis the government was—as were other democratic rights—strengthened when parliament passed a nascent Constitutional Bill of Rights: The Basic Law on Human Dignity and Liberty (Segal 1995). Although this Basic Law does not, in general, mention specifically freedom of the press or freedom of speech, some Justices of the Supreme Court, and especially Chief Justice Barak, have clearly stated that they certainly view those rights as an integral part of Human Dignity. In the words of Justice Barak: "Human Dignity suffers if a person is not allowed to express his feelings or if he is denied the opportunity to develop by hearing the opinions of others."[11] Even given this generous interpretation of the Basic Law, freedom of the press in Israel has still no complete constitutional guarantees. The Basic Law does give Chief Justice Barak and his colleagues on the Supreme Court the power to strike down "new" (i.e. post-1992) legislation which would infringe upon Human Dignity, but not "old" (i.e. pre-1992) legislation. So the British Colonial leftovers of licensing and censorship are still there lurking in the statute books.

Ideological "Private Censorship"

Ideologically-motivated "private" censorship has prevailed in the Israeli media since its earliest days (Goren 1976). Until the seventies most Israeli papers were party-affiliated and often party-owned. In such a situation it is only realistic to expect that the publication would be tailored and censored along the party line. Moreover during the time of the British Mandate the Hebrew Zionist press, in the common struggle for independence, naturally allied itself with the Jewish political leadership. After the establishment of the state the press found it hard to train its professional guns on its past allies, and therefore was very amenable to those leaders' requests to suppress stories which would distress or agitate the public or give comfort to the country's enemies. Israel's acute security problems made it easy for both media owners and journalists to convince themselves that it is patriotic and laudable to self-censor for the sake of the "national interest." One should remember that this "private" censorship was utilized only if and when there was no military justification to enforce the official censorship. The October 1973 Yom-Kippur War incident—described in the introduction—is a case in point. The military censor had no legal grounds to suppress the reports about the alarming enemy build-up. It was certainly not a military secret: the enemy knew all about it. It was a secret only to the Israelis and it remained a secret only because the media decided it was in the public interest to keep it a secret. The terrible consequences of that well-intentioned hush-up should have taught the "private" censors that they are neither qualified nor authorized to determine when the "national interest" requires the suppression of information from the public.

Was this lesson actually drawn? Right after the 1973 debacle it seemed that it was. The media went through a time of soul-searching, crying "mea culpa" and vowing "never again." But the vows were not perfectly kept.[12] In 1985, for example, all the Israeli media collectively agreed to self-censor reports about the cabinet's decision to release 1150 convicted terrorists in return for the release of only 6 soldiers abducted in Lebanon. The military censor did not object that the decision—which was already well known to the Palestinian group holding the soldiers—be also made known to the Israeli public. Actually the army hoped the story would come out so that public outcry and opposition would force the cabinet to reconsider the decision. The media, however, suppressed the story and most Israelis (including most members of parliament) learned about the deal, and got a chance to express their view of it only after it was carried out. In retrospect it seems this extraordinary deal had far-reaching repercussions on Israel's capabilities to confront terrorism, and to urge other countries to do so. It is unfortunate that such a momentous decision was allowed to become fait-accompli without any public discussion, and it is a shame that the media was responsible for this.

Ideologically-motivated "private" censorship persists in the (non-) coverage of Israel's nuclear capabilities and installations. Of course official military censorship is enforced on all stories touching on the strictly military aspects of those capabilities. However this alone cannot explain the almost total absence of media discussion of

the desirability of having such capabilities, or of the environmental hazards involved. The issue was not seriously discussed in the Israeli media even when Egypt thrust it into the limelight by vehemently protesting Israel's refusal to join the NPT. As an Israeli philosopher and historian put it, on this crucial issue "Israeli democracy—so vital, aggressive and vocal otherwise—has waived its fundamental responsibilities and looked the other way [. . .] the military censorship is only an institution that oversees and reinforces the sense of self-censorship [. . .] the absence of the nuclear issue from Israel's public life is more a matter of tacit public reluctance to confront the nuclear issue and less due to coercive and imposed methods effectively banning the issue" (Cohen 1993:197–223). So ideologically-motivated self-censorship did not disappear, but over the last decade it has been over-shadowed by the more sinister and malevolent variety of "private censorship"—which is commercially motivated.

The Commercialization of the Israeli Media

The advent of commercially-motivated "private censorship" was correlated to a fundamental change in the Israeli Hebrew-language media market. Until the eighties there was only one major daily newspaper in Israel which was published primarily for commercial reasons, i.e. for making money. That was *Yedioth Achronoth* owned by the Mozes family. The largest and highest-circulation newspaper at that time was *Maariv*, which was also privately owned but not commercially oriented. Actually it was controlled and managed by its senior journalists who had resigned from *Yedioth Achronoth* and established the rival newspaper, because they complained the Mozes family was compromising professional journalistic values for profit. Those journalists had only half the stock in *Maariv* but maintained control of its editorial policies and appointments, including the most important one of chief editor. In addition to *Maariv* and *Yedioth Achronoth* there was, until the eighties, the prestigious elitist *Haaretz*, which was deeply committed to the liberal ideas of its publisher-editor, Gershom Shocken, and several political party-owned or party-affiliated dailies. Of course their political and ideological inclinations colored and affected their news coverage and opinion pages, but this effect was overt and transparent. Their readers were usually well aware of the bias (Caspi and Limor 1992).

But today the situation is completely different. *Yedioth Achronoth*—still owned by the Mozes family—has become the dominant daily newspaper in Israel with an overwhelming circulation of 60–70 percent of the readership. *Maariv*—relegated to a far second place (circ. 25%)—is no longer owned and controlled by its senior professional journalists, but instead by the Nimrodi family which also owns other vast business interests and enterprises especially in the insurance and real estate markets. Almost all of the party newspapers have disappeared. In the early nineties, a similar trend prevailed in broadcasting. Until then practically all broadcasting—both on radio and TV—was non-profit in its orientation and done by the Israel Broadcasting Authority (IBA), a statutory body fashioned after the BBC. It was (and is) funded by a license fee paid by all TV set owners. But since 1993 there has been a commercial TV channel funded by advertisements and also local commercial radio stations. Surveys show that far more people are watching the commercial channel than IBA (Lahman-Messer 1997: 66–87).

The Manifestation of Commercially-Motivated "Censorship"

The potentially chilling, sometimes freezing effect of this process of commercialization of the Israeli media on its editorial content seems self-evident: when the primary motivation for publishing or broadcasting is not to enrich public knowledge and debate, but rather to enrich the publisher or broadcaster, it is quite unlikely that he would allow (into his communication outlet) news stories or views which would diminish his profits. A typical manifestation of this censorship is to avoid stories which might annoy or alienate advertisers. The famous Israeli novelist, playwright and long-time *Yedioth Achronoth* columnist, Amos Keinan, has revealed recently that one of the early and most useful lessons in journalism he had learned is that he can criticize almost any one, but not an advertiser (Raz 1995/6:156).

The price for not learning this lesson may indeed be extremely high, as an investigative reporter in the rival newspaper, *Maariv*, has found out. The reporter, Yoav Yitzhak, wrote a series of stories in late 1988 and early 1989 about financial irregularities at Klal Corporation, one of the largest corporations in Israel. *Maariv*, which was then still controlled by its senior journalists, ran the stories. Klal is the parent corporation of dozens of companies which advertise extensively in the Israeli media. In January 1989

all those companies stopped advertising in *Maariv*. For fifteen months the newspaper stood up to the pressure, but then in 1990 it capitulated, apologized for the stories (which were not refuted) and even published an announcement written by Klal which actually attacked its own reporter! Only after Yitzhak was forced to resign, did the Klal companies renew their advertisements in *Maariv* (Yitzhak 1995).

A similar incident involved Israel's National Lottery—Mifal Hapayis. For fifteen years it was chaired by Likkud politician, Gideon Gadot. It should be pointed out that this is a very powerful and sensitive public position. Mr. Gadot had much to say about which schools, community centers, hospitals, and neighborhoods would benefit from the huge revenues of the lottery. The lofty ethical standards and integrity of the man holding this position are certainly important to the public. Recently—only after it was made known that Gadot is finally retiring—*Yedioth Achronoth* disclosed that he abused his power in order to feather his nest and to pay large salaries to himself and to his girlfriend, for whom he created a lucrative job.[13] The question is, of course, why the newspaper revealed this information so belatedly? The answer was given in the story itself: "Mr. Gadot did not hesitate to use his power and cancel Lottery advertisements in the local and national press whenever they ran negative stories about him." Indeed one of those advertising "boycotts" by the National Lottery, which lasted for more than four years, hastened the early demise of the non-conformist hard-biting tabloid *Hadashot*—which, for a short while, tried to compete with *Yedioth Achronoth* and *Maariv* in the popular media market. In its fourth year (1988) *Hadashot* made the fatal "mistake" of criticizing Gadot and not retracting that criticism, and so was denied any lottery advertisements until it folded in 1993. A year later its publisher, Amos Shocken, complained that the Lottery was also "freezing out" his other media outlets including the daily *Haaretz*, and a chain of local weeklies.[14]

Usually it is the advertiser who, by exerting pressure on the publisher, generates censorship. However, it has been alleged that sometimes censorship is generated by the publisher in order to court (or extort) advertisers. The *Kol-Hair* weekly in Jerusalem claimed that *Maariv* publisher Ofer Nimrodi directed his journalists to compile embarrassing information on potential "heavy" advertisers and then offered to censor it in return for generous advertising accounts. According to the allegation a star investigative reporter for *Maariv* claimed in private conversation that the paper earns more money from what it conceals than from what it publishes! This was hotly denied and is now the subject of a big libel suit in Jerusalem. In the trial, a former reporter for *Maariv*, Avi Raz, testified that he was requested by Nimrodi to ask two big real estate developers questions that would imply he was preparing an embarrassing and incriminating story about them. "I want you to shake them up a little," the publisher allegedly told him. Raz refused the request on ethical grounds and the (then) editor of *Maariv*, Dan Margalit, later told him he was excused from this task. Was he the only reporter to receive such requests? Did all reporters refuse and then become excused? This remains to be decided by the court, but it should be pointed out that both Raz and Margalit left the newspaper soon thereafter. When Margalit resigned his editorship he accused Nimrodi of trying to interfere with his editorial decisions (Etzioni-Halevy 1993:129). But in his libel trial testimony he denied specific knowledge of any actual use of stories to extort advertisers and dismissed the Raz incident as insignificant.[15]

Usually star columnists are relatively immune from commercial censorship. Publishers are afraid such stars might protest the censorship publicly and also defect to a rival newspaper, and that this would off-set any profit gained from censoring. But the immunity, as a we have said, is relative, and when the economic stakes are high enough for the publisher, no one is absolutely immune from private censorship. Yaron London, a famous TV personality and a star columnist for *Yedioth Achronoth* revealed that he was censored three times in three years (1993–1995): The first time he was censored was when he wrote in his column that he hoped rival *Maariv*, which had just then been bought by a new publisher, would succeed because competition betters journalism and gives journalists more job alternatives. The second time came when he tried to criticize cross-ownership in the media. And the third time he was censored was when he tried to express support for taxing the stock-exchange market (Raz 1995/6:154). It should be noted that the government canceled the stock-exchange tax because of almost unanimous media criticism.

Now three censored columns in three years may not look like much—even when we speak of a star columnist. But it is not only those three columns. As London himself admitted, after a

few arguments with management about these and other columns, he has become sensitive about what topics are unacceptable to the publisher and he refrains from dealing with them because, as he says, he is "sick and tired" of arguing. So it seems that "private censorship" by the publisher may generate further self censorship by the journalist himself (Raz 1995/6:155). In his third censored (hence unpublished) column London raised the suspicion that almost all private media opposed and attacked the proposed stock-exchange tax because media-owners (unlike most of their readers) belong to that small segment in the population which invests heavily in the market and therefore would have suffered from this tax. Others have also argued that the Israeli private media tends to publish only opinions which support employers rather than employees, big business rather than social services because those opinions serve the interests and concerns of the publishers and their socioeconomic class. A well-known Israeli economist, Dr. Esther Alexander, lamented that "in Israel we have reached an absurd situation; in economic affairs there is one view only, at least on the pages of the private press. Has anyone ever read there an article supporting pay hikes?" (Alexander 1994:20). The same question may be raised also about articles supporting strikes.

Certainly, no one can claim seriously the Israeli media is monolithic. On the contrary—its opinion pages have become more and more pluralistic and cover the whole political spectrum, going to all extremes. But it is submitted that this pluralism is in political matters only. On socioeconomic debates radical left wing views and their proponents get little or no access at all. As Yaron London's experience seems to indicate this omission is occasionally the result of "private censorship." It is further submitted that commercialization has brought about in Israel—as in the U.S., the U.K. and other democracies—not only "private censorship" of particular news and views, but also a general overall tendency to censor or to avoid complex or troubling stories which are not attractive to mass audiences and might alienate advertisers. Israel's foremost communication expert and the man who had established television broadcasting in Israel some 30 years ago, Prof. Elihu Katz, complained that in the new commercial TV channel almost all prime time programming is escapist entertainment.[16] The evening news telecast was actually taken off prime time and is broadcast at a relatively early hour when most people are not free to watch it. Unfortunately the public channel, afraid to lose its audience, followed suit. As a result the evening news, which in the pre-commercial days had the highest ratings of all television programs (90%!), has now a rating of no more than 40 percent on both channels together (Lahman-Messer 1997:82).[17] Another communication expert, Prof. Dan Caspi, pointed out that the few public affairs programs which survived commercialization, also changed their format, tone and character into "infotainment."[18]

I personally experienced the censoring effect of this trend following the February 1994 massacre in Hebron, in which a fanatic Jewish settler shot in the back and murdered dozens of kneeling praying Palestinians. A well-respected and conscientious TV and radio broadcaster who hosted a prime time talk show on the then new commercial TV asked me to participate in a panel analyzing the Israeli Army's moral and legal responsibility for the massacre. He shocked me by telling me he could devote only ten minutes to this discussion. When I suggested the topic merits at least double that time and that I would think he should even devote the whole 50 minutes of the show to it, he told me: "You are absolutely right, but I cannot do it. My employers would kill me. They are already complaining the show is too 'heavy' and not popular enough. I had quite an argument with them about dealing with the moral implications of massacre at all." A few hours before the show was to go on the air I received an apologetic call telling me that the whole panel discussion was canceled. Instead the show led off with an interview with someone involved in a sensational domestic violence story which made big headlines that day.

The same trend has prevailed in the commercialized print media. The hard news stories have been drastically shortened, and so have opinion and analysis pieces. Complex issues are shunned and enhancing circulation has apparently become the primary concern. Thus, for example, Yaron London and others have indicated that *Yedioth Achronoth* censored critical stories about popular ethnic and religious leaders in order not to offend and alienate their followers which make up a large segment of the paper's readership (Raz 1995/6:159). Of course these leaders enjoy even greater immunity if and when the publisher has a personal vested interest in their popularity. It was alleged by a former reporter in *Yedioth Achronoth* that the publisher's sister (who also holds substantial shares) ordered to "kill" in December 1996 a

story he wrote about a much revered Kabbalist rabbi, Yitzhak Kaduri, who is believed by many to have supernatural fertilizing and healing powers. (This is the same rabbi Prime Minister Netanyahu courted and whispered in his ears that the "Left"—i.e. the Labor opposition—has neglected its Judaism.) The reporter revealed greedy and dubious practices by the people surrounding the nearly one-hundred-year-old rabbi. He claims the publisher's sister is also a fan and a regular customer of Kabbalist rabbis and told him herself that she is a great friend of Kaduri's grandson and that *Yedioth Achronoth* is trying to buy from the rabbi's family exclusive rights for a book about his life.[19] Perhaps the best description of the problems "private censorship" poses to the honest journalist, was voiced by Israel's foremost investigative reporter, *Yedioth Achronoth's* Mordechai Gilat. He was quoted as confiding in a novice reporter: "The effort in publishing a sensitive story in this newspaper is divided into two parts: 50 percent go into bringing the facts, 50 percent in getting it into the paper."[20]

Concentration And Its Impact

Since the eighties the Israeli media—both print and broadcast—was not only commercialized, but also concentrated in a few hands. It is not clear whether the two processes were interrelated, but their simultaneous occurrence certainly multiplied the adverse impact of actual and potential "private censorship." Today practically all of the print media market is controlled by three owners; more than 90 percent of it is controlled by two, and some 70 percent by one owner only! Moreover, the two major newspaper owners cross-own substantial chunks of broadcast media as well.

The dominant "Press Baron" of the Israeli media is Arnon (Noni) Mozes. His family owns *Yedioth Achronoth,* which has a circulation of more than 60 percent (at weekends more than 70 percent) of the daily newspaper market. It also owns a chain of local weeklies—one of the two most popular chains in Israel. It also has 24 percent of one of Israel's three commercial TV franchises (which makes Mr. Mozes one of the directors of the company which broadcasts the news on the commercial channel) and 30 percent of a cable TV franchise, which has a monopoly over cable broadcasting in many areas including Israel's capital, Jerusalem.

If we stretch the point a little, theoretically one might claim that Mr. Mozes has potential control over all the domestic information that many Israelis receive. If we take a person who reads *Yedioth Achronoth* (and 60–70 percent of the newspaper customers do) and who reads also the Mozes chain's local weekly (and about half the readers do), and who prefers to watch the commercial and not the public TV news (and most news viewers do)—Mr. Mozes can almost ensure that such a person would not be "exposed" to a certain piece of domestic information (of course, if it is not important enough to reach CNN, etc.). The only factor which makes this bleak picture of absolute censorship power exaggerated and theoretical is the Israelis' addiction to radio news. Fortunately radio news is (still) broadcast by public radio only. But this could also change. Israel's present government is very eager to privatize and commercialize all broadcasting.

The second "Press Baron" is Ofer Nimrodi, whose family owns the daily *Maariv* (25 percent of newspaper readers) and also cross-owns 18 percent of a commercial TV franchise and 20 percent of a cable TV franchise. The third is Amos Shocken, whose family owns the relatively low circulation (10%), but highly prestigious and influential *Haaretz*, and also a very popular chain of local weeklies which compete very successfully with the Mozes chain all over the country.[21] Admittedly the potential censoring power of Nimrodi and Shocken is far less overwhelming than that of Mozes. Still it should be clear that the concentration of practically all private news media in the hands of these three, makes the use of such censorship much more tempting and effective. It is apparently easier for an advertiser or a politician or any other interested party to convince three persons (or even four if we add the director of public radio and TV) to agree to conceal something from the public than it is to persuade a large diverse group of media operators to do it. At the same time, the high degree of concentration also makes it much harder for the individual journalist or the professional editorial staff to resist their owner's censorship or to protest it publicly. The owner is the journalist's (and the journalist's family's) bread-giver, and if he has no moral problem with the intentional concealment of information from his readers or viewers in order to enrich himself, then he has no problem with the firing of a journalist who frustrates his intentions and threatens his profit. When the media market is highly concentrated the journalist realizes that it is especially tough to find an alternative source of livelihood—his publisher's newspaper and all the other print and

broadcast outlets that the publisher owns would be closed to him. Then there are only two other potential employers, and they too may not be eager to employ a "troublemaker" journalist who has shown disregard for his or her employer's economic interests.

Public Radio and TV are also not very promising job options given their shaky position and constant manpower cuts. So the concentration in the media market may discourage even the most courageous journalist. Indeed the fear to protest and even to complain about censorship explains the rudimentary, largely circumstantial evidence that one can find for its enforcement.[16] This makes the task of raising public, political, and judicial awareness of this issue all the more complicated. As Lord Acton has said "power corrupts, absolute power corrupts absolutely." Indeed one may be concerned that the combined effect of simultaneous commercialization and concentration has made the censoring power of the owners almost absolute.

The Role of the Courts

We have briefly described the essential and momentous role that the courts in Israel, under the inspired leadership of American-born Supreme Court Justice Simon Agranat, have played in establishing (almost "inventing") freedom of the press as a quasi-constitutional right in Israel (Lahav 1997: 79–120). We have also mentioned how the contemporary Supreme Court Chief Justice, Aaron Barak, following Agranat's footsteps, curbed the powers of official military censorship, subjecting it to the "Clear and Present Danger" Rule (Segal 1990).[22] Unfortunately, the courts have not as yet played the same role in curbing "private censorship" in the press. On the contrary, in two recent landmark decisions they have unwittingly encouraged such censorship. In both cases there were judges who were quite sensitive to the hazards of "private" censorship and tried to curb it, but their opinions did not prevail. The first decision was given in 1994 in the *Jerusalem Post* case.[23] The plaintiff, Joanna Yehiel, a senior editor at the paper for nearly 20 years, resigned together with some thirty other journalists, protesting "private" censorship. She claimed that after the paper was bought by Canadian "Press Baron" Conrad Black, she and her colleagues were ordered not to criticize harshly the then Likkud government headed by Yitzhak Shamir and not to publish stories which would put it in a bad light. Under Israeli law, if there are circumstances which make it impossible for a worker to carry on the job, and he or she resigns—the resignation is seen as dismissal and the employer is liable for damages. Yehiel claimed that "private censorship" makes it impossible for journalists to carry on their jobs, and so if they resign—they should be fully compensated for their loss of employment.

The regional labor court in Jerusalem accepted this ground-breaking argument. Judge Elisheva Barak decided that a clear distinction must be made between journalists and other workers and that "private censorship" is indeed illegitimate because it infringes upon the journalist's freedom and the public's right to know. She emphasized that we must prevent a situation in which "he who rules the media financially, would also rule and determine public opinion." "Certainly," she added, "freedom of the press does not mean that the public would get only information and opinion which are acceptable to one who has the financial capability to run a newspaper." But her judgment was over-ruled when the case reached the National Labor Court. This Court utterly rejected the notion that the journalist enjoys distinct privileges vis-à-vis his or her employer. In a unanimous decision, it ruled that when a newspaper is privately owned, "the owner is allowed and entitled to push it in the direction that he likes, and to prevent publication of materials which point in the opposite direction. A newspaper owner is allowed to chart the political, economic, and cultural line of his newspaper and does not have to publish contradictory views. He may order a journalist to write about a certain topic and to give him guidelines for his writing. The journalist is not allowed to refuse [. . .] a newspaper, even if it has mass circulation, is not obliged to express all prevalent views [. . .] The readers who give it money will decide if they want to keep on buying a newspaper which is slanted in its news and views."[24]

The National Labor Court also rejected the argument that the owner's censorship infringes upon the journalist's freedom of speech. It noted that "a journalist whose work was censored can find another communication outlet or establish one himself." The Court did not address the question of whether in a concentrated media market this option really exists. The Court also emphasized the owner's right of property. Here it should be noted that the right of property—unlike freedom of the press—is explicitly enshrined in Israel's budding Constitutional Bill of Rights—The Basic Law on Human Dignity and Liberty. Therefore, the Court reasoned,

"much weight must be given to the right of property, and in this instance to the right of a private communication medium owner to decide what material to publish and which to reject."

The Court's view was harshly criticized. Constitutional Law Professor Zeev Segal noted that the Right of Property was not unlimited and that the Court's decision could be "the beginning of the end" for press freedom (Segal 1996:49–51). Six months after this decision, there came about another significant judicial victory for media proprietors—this time in the Supreme Court of Israel. This was the decision in the *Bar Association Journal* case.[25] The editorial committee of that *Journal* had decided to publish an article by a prominent lawyer attacking the Bar Association's president and his policies. The editorial committee had stipulated that the president would get the chance to reply in the same issue. But when the Association's president read the criticizing article, he convened the governing body of the Association and convinced it to pass a resolution prohibiting its publication. The author of the article petitioned the Supreme Court claiming the Bar Association—the *Journal's* owner—had no authority to censor articles once they were approved by the editors. His claim and petition were rejected by a majority 2–1 decision. It is noteworthy that the dissent supporting the petition was written by the then Chief Justice Meir Shamgar. In his opinion Justice Shamgar, a well-known champion of press freedom in Israel, and like Justice Agranat, a keen follower of American First Amendment jurisprudence (Lahav 1981), had indeed shown deep unique understanding and awareness of the hazards of "private censorship." He emphasized that "if the controllers of the media will refuse access to certain ideas [. . .] the 'market-place of ideas' may become the 'market for one idea only'" and that this contradicts basic democratic premises. He also recognized the adverse impact of media concentration, and noted that the media market in Israel is indeed over-concentrated, and that the owners had already shown that they know well how to use (and abuse) the enormous power this over-concentration gives them.[26] Therefore he opined that owners should not be allowed to interfere in editorial decisions when this would stifle public debate or criticism of public officials and harm the people's right to know. He pointed out that in such cases the Court—as the guardian of public interest—should enforce the right of access upon the owner. It would not do so only if and when the censored material can find an alternative and comparatively effective outlet. But Chief Justice Shamgar's opinion was not accepted by his colleagues. The majority Justices ruled that the courts had no business interfering with the decisions of the duly elected governing body of the Bar Association which owns and finances the *Journal*, and therefore also enjoys the authority to determine its character. So in the only two cases in which they were confronted with "private censorship," the Israeli Judiciary proceeded to enforce A. J. Liebling's famous adage: "Freedom of the press is guaranteed only to those who own one"(Baker 1994:1).

The Role of the Legislature

Since the Israeli courts are apparently neither ready nor willing to curb "private" censorship in the same super-activist manner that they had curbed government censorship, one must rely on the legislature to do the job. This is not an encouraging prospect. In general the Israeli parliament has had a terribly poor record of protecting freedom of the media and of combating all kinds of censorship. As we mentioned, for fifty years it did not abolish a single piece of the British draconian colonial legislation which denies press freedom. In addition, it enacted an Official Secrets Act which forbids public officials—even after retirement—to reveal any piece of information relating to their public function even if there is no valid reason to conceal it. In the fall of 1997 this Act actually allowed the government to ban an embarrassing book about the Israeli Navy, and to arrest and threaten to indict its author, a decorated retired Navy commander, even though the book was cleared for publication by the military censor.[27]

If Israeli legislators have done practically nothing to combat government censorship, one may argue that there is not much chance they would fare better when dealing with "private censorship." Indeed they may even be more reluctant to tackle "private" censors than they are to tackle government. Legislators are politicians, and politicians are wary of incurring media owners' wrath or even displeasure. A catchy situation exists here. If politicians set out to break the censoring power of the media owners, they first have to confront it and such a confrontation may well cost them their political career. Today a politician has no real chance to succeed in politics if he is denied access to the media and especially to TV talk shows. And in the highly concentrated and commercialized Israeli media market the newspaper owners also

control the access to most of those shows. Thus the power of private censorship can be used very effectively to politically cripple those who try to neutralize it by legislation. This is exemplified in the case of Dan Meridor. As Minister of Justice in 1988–1992, Mr. Meridor fought for legislation that would prevent cross-ownership of print and broadcast media. A senior *Yedioth Achronoth* columnist at that time, Ishayahu Ben-Porath, revealed after his retirement that for this very reason he was forbidden to publish an interview with Mr. Meridor in early 1992, when he was struggling desperately to preserve his seat in parliament and in his party's leadership (Raz 1995: 152). Thus it takes a conscientious and courageous politician to initiate or even support legislation that can cut down media owners' power. One can only hope such politicians will be found and will survive.

The Role of Ethics

Unlike the U.S., there is one accepted ethical code for journalists in Israel. This code is enacted and enforced by the Press Council, a voluntary self-regulatory body which was established in 1963. On the Council sit representatives of newspaper publishers, the journalists' union and public figures (mostly elder statesmen and university professors). The Council's self-defined goals are "to guard freedom of the press and the people's right to know, to struggle against attempts to restrict the flow of information and access to sources, and to raise the professional standards of the media." Certainly realization of these noble goals entails the bold confrontation of not only the government, but also of the issue of "private" censorship. Indeed this was done in the latest version of the Code of Ethics adopted by the Council on May 5, 1996. A major and significant innovation in this Code is the stipulation that not only journalists, but also media owners and publishers are bound by its ethical rules. Rule 4 forbids refraining from publication due to political or economical pressures or threats by advertisers. Rule 15 obligates the owners and the publishers to avoid any conflict of interests, to publish their names in every issue, and to once a year publish (in their newspapers) a comprehensive report about their business interests. If an owner or a publisher has a vested interest in certain fields this interest must be disclosed in all stories relating to those fields. Rule 16 forbids abuse of the power to publish or to refrain from publishing. Rule 23 obligates the publisher and the owner to ensure working conditions which would enable all journalists to preserve ethical principles.

All this is very commendable and impressive, but one might wonder whether it is effective. As was mentioned, the Press Council is a voluntary body and so adherence to its Code is also voluntary. It has disciplinary courts which litigate complaints of Code infringements, but it is up to the alleged offenders to decide if they will show up for the hearing. Usually the disciplinary court stipulates that its damning decisions will be published by the relevant newspaper, but this stipulation is also not necessarily obeyed or if it is, the decision is buried where only few readers would see it. The futility of this voluntary mechanism can be demonstrated by the sad fact that not a single media owner fulfilled the clear obligation under Rule 15 to publish an annual report disclosing the publisher's other business interests. No complaints were lodged against the offenders and no disciplinary action was taken, presumably because of the fear that in retaliation the publishers would simply order all journalists in all their media outlets to ignore the Council, and thus, in fact, dismantle it. So again it seems that in the struggle against "private censorship" you cannot rely on a mechanism which depends upon the goodwill of the publishers, but instead you need the legal sanction of legislation. The big question is, of course, what kind of legislation?

Imposing Fairness On All Mass Media

The direct straightforward way to counter "private" censorship" is to impose a legal obligation upon the media to offer access to a wide spectrum of views and to give all interested parties a legal right to present their version of a story. This way has been followed in the case of the broadcast media only—both in the U.S. and Israel—under what came to be known as the Fairness Doctrine. Under this doctrine stations were required to present diverse and conflicting views and give a right of reply to people or organizations attacked or criticized in their broadcasts. The idea behind this doctrine—as elaborated by the U.S. Supreme Court—was that "It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas rather than to countenance monopolization of that market."[28] The Fairness Doctrine as a binding guideline for broadcast media only was affirmed by the U.S. Supreme Court in the late sixties[29] but abandoned in the late eighties.[30] In Israel it still persists. All the laws governing

broadcasting in Israel, public and commercial, include a section obligating the broadcaster to give appropriate access to all views and to disseminate accurate information.[31] The Israeli Supreme Court utilized this section in order to import the American Fairness Doctrine to Israel and to impose it on all broadcasters. It relied explicitly on this doctrine when it ordered Israeli Public Radio and TV to give access to both supporters of the PLO (even when it was defined an illegal terrorist organization)[32] and the Jewish extreme right-wing movement of Meir Kahane.[33] The Court made it clear in 1995 that it would adhere to the Doctrine in dealing with broadcast media even though it was discarded in the U.S.[34]

It is noteworthy that the Court never agreed to invoke the Fairness Doctrine as a tool for censoring alleged unfair reporting, but only as a tool of imposing fair reporting. Thus, for example, the Court rejected a petition to block a documentary series about the history of Zionism on the grounds that it allegedly belittled the contribution of oriental Jews to Jewish national revival—but stipulated that the petitioners would get a chance to present their criticism of the series in a panel discussion appended to the series.[35] In the summer of 1997, the Court, following this precedent, refused to bar a broadcast on commercial TV of a controversial documentary film charging the political right and Prime Minister Benjamin Netanyahu (personally) of involvement in the incitement leading up to the Yitzhak Rabin assassination. The Court did, however, insist that the attacked politicians would be given a fair chance to go on the air following the film and reply to the grave charges.

Can the Fairness Doctrine also be imposed on the print media? Can, for example, a publisher be required to give access to stories or articles which dispute the news and views he has published? In the U.S. the Court has declared that such imposition or requirement was unconstitutional,[36] saying that the First Amendment forbids interfering with the publisher's freedom to decide what (not) to publish.[37] The Court agreed with A. J. Barron, who argued for a constitutional right of access, that sometimes publishers abuse this power irresponsibly and that "a responsible press is an undoubtedly desirable goal." But they nevertheless held that "press responsibility is not mandated by the constitution and like many other virtues cannot be legislated."[38]

In Israel also, as we have seen, the courts have followed suit, and declined to interfere in the publisher's prerogative and discretion (not) to publish.[39] However a radically different approach was recently suggested by the Chief Justice of the Supreme Court, Aaron Barak. In a public address Chief Justice Barak raised as "an idea for discussion," the possibility that fairness and other virtues would indeed be legislated and required of private newspaper owners (Barak 1996: 8–10). He cited his predecessor, Chief Justice Shamgar's dissent in the *Bar Association Journal* case[40] which noted that there is a "constitutional failure" in the media market, which allows certain publishers effective control of the stage and platform of public debate. In such circumstances, Chief Justice Barak reasoned, "the private newspaper possesses control over the stage or platform through which democracy is preserved [. . .] this platform is not only a private asset to which property law applies, this platform is also a public asset which the newspaper holds as a trustee for the public [. . .] Accordingly it must act in relation to this platform or stage objectively. It must not discriminate; it must ensure true and trustworthy reporting; it must not enter into conflict of interest; it must act out of a duty of trust and it must give reasonable and appropriate access." He emphasized that "the proposed approach is not intended to impose external censorship on the private press. It is intended to prevent unwarranted internal censorship; it is intended to prevent the control of the minority over a public platform or stage; it is intended to impose limitations on power [. . .] indeed imposed in the hands of the private newspaper is the public interest in the free flow of information. This power requires [. . .] supervision and restraint in order to prevent its misuse [. . .] It imposes a duty on the newspaper to act fairly, objectively, without conflicts of interest, and with equality, as someone owing a duty of trust to the public is required to act."

The Chief Justice has said this was just an idea "put forward for examination and debate." It did raise vigorous debate in Israel. It does certainly merit further examination, perhaps not only in Israel. There are, of course, obvious arguments against it. Even those who justify imposing fairness on broadcasters tend to shy away from the idea of imposing it on the print media. They would point out that the imposition of the Fairness Doctrine on radio and TV station owners was based on the premise that they got from the state the monopolistic or exclusive right to make money out of the use of a limited public resource (the air waves, or, more specifically, a

spot on the broadcasting frequency spectrum). Therefore it may be legitimate for the state to require them to use this resource fairly and to let others have access to it. On the other hand, print media owners got nothing from the state and therefore owe it nothing. Also they do not enjoy—like radio and TV owners—monopolistic or exclusive rights to operate their media. You do not need an allocated spot on any spectrum in order to publish. So as the National Labor Court had said—if one is denied access in most or even all newspapers—he is free to start his or her own.[41]

But are these obvious arguments really valid? Does the option of starting your own paper and thus getting access to a meaningful substantial audience and making your voice heard in the free marketplace of ideas, really exist in the prevalent media market conditions? Isn't it theoretical only? Is the practical, de-facto exclusiveness of print media ownership—created by the said market conditions (or in the words of Justice Shamgar, by the "constitutional market failure"[42])—less restrictive and inhibiting for free debate and the flow of information then that of broadcast media ownership? True, this exclusiveness was not granted to the print media owners by the government, but should this distinction really matter that much? Shouldn't such exclusiveness—given the economic advantages it has for these owners—burden them with those "Public Trustee" obligations that Justice Barak suggested? And as he himself pointed out, he was not the first to suggest it. The Hutchins Commission has said that as far back as 50 years ago "the great agencies of mass communications should regard themselves as common carriers of public discussions."[43] But hasn't it become clear that it is naïve to expect them to do so voluntarily?

Then there is the argument that imposing fairness on the owners violates two of their basic rights—freedom of speech and the right of property. Indeed it seems that telling publishers what to publish entails some re-thinking about defining Freedom of Speech, or to borrow a catchy phrase, drafting a "New Deal for Speech" (Sunstein 1992). One may be tempted to ask: Whose freedom is it anyway? The press owner's? The individual journalist's? The public's? It may be argued, and it has indeed been long argued, that "the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage" (Meikeljohn 1948). It certainly did not intend to guarantee men (and women) freedom to silence or to reduce to an inaudible whisper news or views which threaten their profit. The framers of the American Bill of Rights (and the Israeli Judiciary which followed in their footsteps[44]) bestowed freedom of the press and all the privileges that go along with it upon the private media, not in order to enrich its proprietors but instead to enrich public debate. When the owners use their freedom of speech in order to restrict others' freedom of speech, and in a way that intentionally stifles or inhibits public debate, shouldn't the law step in and defend those others' freedom? Isn't it evident that in such circumstances regulation of speech—by a legislated Fairness Requirement—will actually promote freedom of speech and not abridge it? (Sunstein 1992).

In the early nineties, it was probably an affirmative answer to these questions about the right of free speech and a free press that moved the Parliamentary Assembly of the Council of Europe to resolve that "the owner of the right is the citizen, who has also the related right to demand that the information supplied by journalists be conveyed truthfully in the case of news, and honestly in the case of opinions, without outside interference by either the public authorities *or the private sector.*"[45]

As for the right of property, we have already mentioned that unlike freedom of speech, it is explicitly enshrined as a Basic Right in Israel's Basic Law on Human Dignity and Liberty, and that this was apparently the major reason why the National Labor Court actually recognized and legitimized the owners' right to censor the contents of their newspapers.[46] Yet we should remember that under the Basic Law, the Knesset is allowed to restrict by legislation even Basic Rights if such a restriction is "enacted for a proper purpose, and is only to the extent required to achieve that purpose" (Segal 1995). Isn't preserving the free marketplace of ideas a "proper purpose" which justifies some restriction of property rights? And as was suggested by media economist, Richard Parker,[47] an analogy could be drawn with preventing using property rights to restrict access to essential resources, such as rivers.[48]

It is true that not only in Israel, but also in the U.S., the judiciary was reluctant to recognize free speech as a democratic value which justifies telling a private person what to do in his or her property. This was demonstrated not only in the case of publishers, when the court refused to force them to give a right of reply to those they attack, but also in the case of shopping centers.[49]

As current U.S. case law stands, dissenters have no constitutional right to demonstrate in such centers (and also apparently in the campus of a private university like Harvard[50]) without the owners' consent. However this judicial position was criticized as having no substantial regard for the value of dissent. In the words of one critic: "A serious commitment to the value of dissent would treat cases involving claims of access to property where large groups are gathering as a test of that commitment, rather than as an occasion for [. . .] homilies about the 'private character' of the streets and sidewalks of shopping centers. Unless one thinks that the gatekeepers of the print and broadcast media afford meaningful access to dissenters, a strong commitment to the value of dissent should tilt one toward upholding schemes of regulation designed to afford meaningful dissent" (Shiffrin 1990: 99–100).

Because they are wary and suspicious of any legislative meddling with the media's contents, many—in both Israel and the U.S.—view such schemes as dangerous. They warn that once the legislature—which is, of course, politically motivated, and in Israel is always dominated by the government—gets the chance to tell publishers what to put into their publications, it will soon wish to tell them what to leave out. They argue that "the risks of distortion caused by the intervention by non-ideal governments are necessarily and systematically greater than the risks of distortion caused [. . .] in a governmentally-unregulated communicative environment" (Schauer 1994:12–13).

These are certainly legitimate concerns and I share them fully. Still one should remember that once the legislation imposing fairness is enacted by the politicians, its actual enforcement and interpretation would be in the hands of the courts. As we have noted above, the Israeli Supreme Court, when it applied the Fairness Doctrine in the broadcast media, conscientiously resisted attempts to use the fairness requirement as a pretext to "leave things out," and insisted on using it only "to put things in."[51]

As First Amendment scholar Fred Schauer has noted, "there are undoubtedly good reasons to believe that even public-minded governmental action is frequently mistaken or misguided. But [. . .] then there appear equally good reasons to believe that the distortions of the putatively unregulated communicative environment will be equally mistaken or misguided, and the consequences equally problematic"(Schauer 1994:13). So it seems a case can possibly be made for legislation imposing Fairness Requirements, (or at least a right of access to people who want to reply to criticism which was leveled at them[52]), if not on all newspapers, perhaps only upon those which, because of their high circulation or other market conditions, are the only forum or stage upon which a dissenting voice can effectively reach a significant audience. This would also seem to conform with the position of the Council of Europe that "News organizations must consider themselves special socioeconomic agencies whose entrepreneurial objectives have to be limited by the conditions for providing access to a fundamental right."[53]

Preventing Concentration and Cross-Ownership

If one is shy or uncertain about tackling "private censorship" headlong there is also a roundabout way—preventing or reversing concentration of the media market. This will diminish the potential adverse effect of that "censorship." A single owner would not be in a position where he or she can effectively conceal certain news or views from a substantial audience. Moreover, in a diverse media market "private censorship" may often be not only ineffective, but also self-defeating for profit-seeking publishers. Most of their readers would be likely to get the censored material elsewhere and when they do so, lose confidence in their newspaper. This could eventually lead to a fall in circulation and revenues. So a diverse market may hopefully discourage even the unscrupulous publisher from using "private censorship" altogether. Finally, in a diverse, competitive media market the individual journalist and the editorial professional staff, are in a stronger stance vis-à-vis their publisher-employer, and consequently in a better position to protest or even defy his or her "censorship" orders. They know that if they are fired they will have more alternative jobs which are not controlled by that censoring publisher. And again, the existence of that option and the realization that they may lose some of their better professional journalists to the competition may, at least occasionally, deter publishers from censoring them.

It seems especially crucial to block cross-ownership of print and broadcast media. Most people—even if they have access to one newspaper only—also watch TV or listen to the radio, so it is extremely important that the contents of news broadcasts are not controlled (and potentially censored) by the same persons or business interests that control (and potentially

censor) their newspaper. This importance has been recognized by the U.S. Supreme Court. When, in 1975, the FCC decided to ban new acquisitions of broadcasting stations by newspaper owners in the same media market, and the publishers challenged this order, the Court unanimously upheld it. It also upheld the decision to order the dissolution of 23 existing cross-ownership combinations in communities in which the only newspaper and only radio and TV station were in the hands of a single owner (in other places existing cross-ownership was allowed to persist). Justice Thurgood Marshall, writing for the unanimous Court, held that the ban on cross-ownership was "a reasonable means of promoting the public interest in diversified mass communication."[54] In spite of this judicial encouragement, the ban gradually faded over the years.

So far, Israeli publishers have successfully resisted legislative attempts to impose such a ban in Israel. Although the original bill establishing commercial TV in Israel did propose to ban newspaper owners from having more than a 10 percent share in a TV franchise, the legislature gave in to their pressure and allowed the two highest-circulation papers to become major partners in two of the three franchises (Lahman-Messer 1997). In 1995 another bill proposing to ban cross ownership was tabled by Likkud member of parliament, Benjamin Begin,[55] but got nowhere. As we have noted, Israel's most powerful publisher allegedly did not hesitate to use his power to deny media access to a government minister who supported the ban on cross-ownership, and censored at least one columnist supporting it. Thus we see how the power of "private censorship" may, in fact, be used to perpetuate itself.

A ban on cross-ownership is the most significant anti-concentration measure, but not the only option. A more sweeping measure is to limit the number and scope of media possessions (either print or broadcast) a single owner can own. It can be stipulated, for example, that if someone owns a newspaper (or a chain of newspapers) that has a circulation of more than, say, 50 percent of the population, he would not be allowed to acquire another communication medium or would need the approval of a public official to do so. In France, for example, if their total circulation was more than 30 percent of the market[56] a newspaper owner was forbidden to acquire another one. Former Chief Justice Shamgar, in his dissent in the *Bar Association Journal* case[57] suggested specific legislation to prevent cartels in the media market. A similar suggestion was also raised by the Newspaper Law Reform Commission—a commission appointed in 1996 by the Israeli government, and headed by the president of the Israeli Press Council (and former Justice Minister) Haim Zadok.[58] An inspiration for such legislation was found by the Commission in Great Britain, where acquisition of a newspaper by someone who already owns one is subject to special and specific statutory rules and conditions, including ministerial approval.[59]

Freedom of the Journalist

"Private censorship" may be generated by the publisher and the business-side of the newspaper operation, but it cannot succeed and persist without the collaboration of at least some of the journalists. Of course a lot depends on the individual journalist's integrity and ethical commitment. Without these—no laws or reforms can help. One cannot dispute that "value ultimately resides in the individual journalist [. . .] whatever value journalism may have to society it derives from the individual authenticity of its practitioners" (Merrill & Odell 1983). But it should be clear that even the most honest, conscientious journalist needs some protection in order to have a fighting chance in confronting his or her employer, just as he or she needed constitutional guarantees to have a chance in fighting government censorship. After all, integrity means not only caring about democracy, ethics, the people's right to know etc., and your professional responsibilities, but also caring for your family and your responsibility for its well-being. No honest, conscientious journalist realistically can be expected to sacrifice his or her children's basic essential needs. Unfortunately under the prevalent labor law, as interpreted by the National Labor Court, a journalist who resists "private censorship" certainly risks such a sacrifice. The Court does not recognize his or her right to disobey censorship orders. On the contrary—it apparently recognizes the owner's right to order the journalists to censor both information and opinion so that the paper can totally conform with the owner's views or interests and promote them.[60]

This legal situation must be changed and reversed, and given the Court's judgment, this can be achieved, but only through legislation. The law can and should adopt the position that realization of freedom of the press and its goals depends—at least to a degree—on maintaining freedom of the journalist; as the Parliamentary

Assembly of the Council of Europe put it: "In addition to safeguarding the freedom of the media, freedom within the media must also be protected and internal pressures guarded against."[61] Therefore, just as the press was given special privileges vis-à-vis the government, the journalists should get special privileges vis-à-vis their employers. The law should stipulate that a journalist may not be ordered by his or her superior to act in an unethical way, and if he is fired or resigns because he disobeyed such an order, the publisher is liable to pay punitive damages. It will be, of course, up to the courts to decide if an order is consistent with ethical requirement, and it could rely of course on the voluntary but widely accepted Press Council Code which—as was shown—forbids suppression of material because of ulterior motives. Such legislation was indeed proposed by the Newspaper Law Reform Commission.[62]

Strengthening Public Media

We have seen that the advent of "private censorship" as a major menace on press freedom in Israel and the intensification of its adverse impact on the media, were closely related, as in other democracies, to the simultaneous concentration and commercialization of the media market. We have discussed measures to undo or reverse the concentration. It is much harder, perhaps impossible, to undo or reverse the commercialization. It is unfeasible, undemocratic, and probably unconstitutional to force media owners who are profit-driven to "mend their ways." But what we arguably can and must do is prevent the gradual demise of the non-commercial public media that still survive and especially public broadcasting. This is important because we cannot maintain an open and free marketplace of ideas if all main gates to that market are kept by commercially-oriented guards. We have noted above that only the presence of public radio and TV prevents a single, powerful media owner from controlling all of the news flow to a large portion of the populace. But even if the legislature would be bold and courageous enough to confront the power of this owner—by taking away some of his and the other two press barons' media possessions, and dividing the market among ten companies instead of three—we might not be assured of a real diversity when all are profit-oriented. Maybe there would be more political diversity of opinion, which is certainly important, but not socio-economic diversity. One may assume that those ten, just like the three now, would all tend to suppress or play down labor union and anti-big business causes etc. And what is much more worrisome, all would probably be eager to move from hard to soft news and from information to infotainment and certainly not risk the wrath of advertisers by publishing controversial, sensitive, disturbing material.

All of this is certainly not meant to glorify or idealize public media. It too can be unfair and promote only the news and views of the people running or funding it while excluding others. In 1988 I actually gave up my job at Israel Public Radio because I felt my superiors censored criticism of the government. It is obvious that public broadcasting's dependence on public money makes it especially vulnerable to government pressure. This kind of political pressure as opposed to commercial pressure, is certainly not less restrictive both to the journalist and to the free marketplace of ideas. But the crucial point is that it is a different kind of pressure affecting a different kind of news and views. When you have both public and private media there is a fair chance that what is politically censored in the public media will reach the citizens through the private media, and what is commercially censored in the private media will reach them through the public media. And again the awareness that their "censorship" would probably not be effective may deter both private and public media operators from applying it altogether. Indeed there is no doubt in my mind that the advent of commercial TV in Israel in 1993 and the need to compete with it, contributed to more politically independent public broadcasting. On the other hand, the survival and (still strong) presence of public TV news and the need to compete with it is one of the reasons commercial TV news has not degenerated in Israel as fast as it has in some of the U.S. networks in recent years.

For Israeli democracy the importance of preserving and strengthening public media (even at a high cost) was recently recognized and even highlighted by an extraordinary decision of the Israeli Supreme Court, which actually saved public radio and TV from extinction. Public broadcasts in Israel are financed by an annual license fee which all television set owners pay to the Broadcasting Authority. The fee amount is determined by parliament. In the early nineties it was discovered that quite a few years back an error was made, and that the amount of the fee was raised by parliament not in a correct legal procedure, i.e. the Broadcasting Authority took a lot of money from many people without actually having a valid parliamentary authorization to do it.

Returning all that illegally seized money immediately would have paralyzed all public broadcasting. Parliament quickly passed legislation pertaining to the authorization and legalization of the fee-rise retroactively. A member of parliament petitioned the Court to strike down this legislation claiming it violated the Right of Property, a basic constitutional right according to the Basic Law on Human Dignity and Liberty. Usually cases are heard and decided by panels of three, five, or seven Justices, but this time an extraordinarily unprecedented 13 Justices panel was convened (there are 14 Justices on the Court). Unanimously it held that while retroactive taxation in principle was unacceptable legislative practice, the "laudable purpose" of sustaining public broadcasting, redeemed and justified it. Chief Justice Barak, writing for the Court, pointed out "the importance of the existence of a public non-commercial communication outlet, which is driven by wide public interests and not just economic considerations."[63]

Democracy would be even better served if we had not only public-interest-oriented broadcasting, but also public-interest-oriented newspapers. Here we are not talking of preservation, but of revival and this is, of course, a much tougher task—tougher, but not necessarily impossible. In Sweden, for example, there is a thriving non-commercial press which is subsidized by the state (Hedebro 1983:143). The subsidies are given only to relatively low-circulation papers which take a limited number of advertisements. This seems to be a far-fetched idea: can a state-subsidized press be really free? One should remember that in Israel, as in many other democracies, the state subsidizes theater, the arts, and even all political parties, and it does not prevent the people who get this money from criticizing the government and even struggle for its downfall. In the U.S., the government has subsidized public broadcasting for years.[64] One may also consider the idea that public-interest media—in all its forms—would be funded by the money paid by commercial broadcasters in lieu of their use of public property for profit (Grossman 1997). Thus it was suggested that a tax on commercial stations could be used to fund public stations, which would be awarded on the basis of demonstrated community support.[65]

The Proprietors' Propriety

The potential censoring power that newspaper proprietors have come to hold over the free marketplace of ideas has generated a debate among lawyers and journalists in Israel. The main question is whether or not in a democracy the law can or should take away this power from a person who flagrantly abuses it in a criminal or immoral way. Is it legitimate to deny such a person the right to control media outlets? Unfortunately the question is not only theoretical or academic. At least one publisher—Nimrodi of *Maariv*—was convicted of grave criminal charges of illegal wiretapping of journalists (both in rival newspapers and in his own paper) and public officials, and also of obstructing justice by trying to buy the silence of witnesses. We have already mentioned that according to allegations which are now the subject of a big libel trial in Jerusalem, Mr. Nimrodi tried to use his media position to extort advertisements. All this is, of course, hotly denied. But what if this proves to be true? Is it conceivable that he would continue to control Israel's second-largest newspaper and become a major power broker in commercial and cable TV? Is there a legitimate way to prevent this?

This issue is related to the issue of the freedom of the journalist discussed above. When Mr. Nimrodi was indicted he was also the editor in chief of his newspaper. Following the indictment the Israeli Union of Journalists and also senior journalists at his own paper demanded that he resign the editorship, and he acquiesced. But since the law as it now stands gives practically absolute power to the publisher to direct the editorial staff—it seems that this symbolic resignation did not diminish Nimrodi's control of the newspaper. One should also bear in mind that in a series of decisions in the early nineties, the Israeli Supreme Court held that a public official—either elected or appointed—must resign his or her public function if there is prima-facie evidence that he acted in an untrustworthy fashion. The Court reasoned that maintaining the public trust in the integrity of the persons who rule over its affairs is essential for the maintenance of democracy.[66] It is true that a publisher is not a "public official" in the strict legal sense. But if one accepts the notion—as raised by Chief Justice Barak—that a mass-circulation newspaper is not only a private asset, but also a public stage or forum, and therefore the person owning it must act as the public's trustee (Barak 1996)—it may be asked if the proven breach of that trust should not justify taking the newspaper out of his unscrupulous hands. Apparently the maintenance of public trust in the mass media is not less crucial for democracy then the maintenance of trust in public officials.

It is clear that criminal entanglements, or even allegations about such entanglements, may generate "private censorship." Thus a debate has been raging in Israel about legislating a general amnesty for all, or at least just the white-collar criminals, at Israel's fiftieth anniversary. Would convicted or indicted owners allow the opponents of such an amnesty, and the arguments and statistics they rely upon, access to their media? The courts—both in the U.S. and Israel—ruled that a convicted criminal should not be denied freedom of speech even if there is evidence that he or she has abused it.[67] But here we are not speaking about denying freedom of speech, but about denying the power to restrict the freedom of speech of others. No one is suggesting that the unscrupulous publisher would be denied access to his or her or any other paper. The suggestion is that he should be stripped of the power to deny this access to others. The Israeli Newspaper Law Reform Commission tackled this issue and came up with the following plausible recommendation: a criminal court convicting a publisher will be authorized by law to declare him or her unfit to control a newspaper. If such a declaration is given, the publisher will not have to surrender his or her shares in the newspaper, but will be required to put them in the control of a trustee appointed by the court and the trustee will run the newspaper.

This is certainly a novel idea, but it has its parallel in other private businesses deemed to require the maintaining of public trust. Thus, for example, a Judicial Commission of Inquiry when it found evidence that their illegal practices caused a devastating crash of the Tel Aviv stock market in 1983, recommended the disqualification of the owners of one of Israel's three leading banks from actively directing their or any other bank. The recommendation was carried out. And again one may wonder if public trust in the integrity of the media is less crucial to our society than public trust in the integrity of financial institutes.

Conclusion: A Matter of Life and Death

Israel's Founding Father and much revered first Prime Minister, David Ben-Gurion, had not much respect for the press. When a newspaper criticized him and the criticism was cited and hurled at him in parliament by his long-time adversary, Menahem Begin, Ben-Gurion retorted contemptuously: "What is a newspaper anyway? Somebody with money establishes a business, hires servants and they write whatever he directs them to write."[68] There was a time this was just an amusing anecdote for Israeli journalists and politicians. Not anymore. As we have shown, many Israeli journalists are finding out painfully that they are indeed servants beholden not only to their masters' opinions, but also to their business interests as well.

Ben-Gurion's successors at the pinnacle of Israel's politics are not amused either. In a May 1995 interview with Shorenstein Center director, Professor Marvin Kalb, about the "Promise and Problems of the Israeli Press," Prime Minister Yitzhak Rabin complained that "the commercialization of the media has become a major factor in depicting events, especially in Israel; the impact of television ratings on the coverage of events—their economic impact—has become so large a determining factor in the way that issues are brought to the people [. . .] economics has become a major factor and it influences the dissemination of news [. . .] it creates an unbalanced picture of the events in Israel." To demonstrate how commercialism sensationalized and at the same time distorted news reporting in Israel, Rabin cited the sensational reporting about the Palestinian terror attacks. He pointed out that the headlines describing those terror attacks, even when they were not fatal, were twice or three times bigger than the those that some 30 years ago had announced the outbreak of the Six-Day War. He also cited to Kalb the explanation he heard from editors for choosing these glaring headlines: "they do what sells papers" (Rabin 1996: 106–07).

Less than eight months after this interview with Marvin Kalb, Prime Minister Rabin was assassinated in Tel Aviv. One may only speculate what was the contribution of the profit-driven sensationalism he had complained about in creating the atmosphere of panic and hysteria which bred the fatal hate propaganda against him. After all, wild charges that he was betraying Israelis' personal safety and basic security needs in order to appease Palestinian terrorists, played a major role in the incitement leading up to the assassination. And it was not just the huge red headlines (in Israel we have been talking in recent years about "Red" rather than "Yellow" Journalism). The headlines were always accompanied by huge gory bloody pictures of the terror victims. But one should pay attention not only to what went into the papers, but also to what was left out. When there are such huge headlines and such huge pictures there is no significant place left for thoughtful rational analysis and discourse about the deep causes of these outrages and the way to eradicate them. The hate propaganda

campaign against Rabin and the peace process also fed upon this lack of rational analysis and discourse. And so did the campaign against Rabin's successor, Shimon Peres. The "Red Journalism" coverage of the suicide terror attacks persisted. At the same time the election campaign was also covered in a sensational way, focusing on the drama of the horse-race, the public opinion polls (which were incidentally proven totally unreliable), and the slogans, and not the issues. I dare say that most Israelis went to vote without really knowing the terms of the Oslo Accords or what was the alternative strategy of Netanyahu to achieve his promise of "Secure Peace" (or if there was such a strategy). One suspects that their voting was determined not by facts and ideas, but instead by titillating headline images and empty slogans. I personally know several excellent political reporters who were frustrated by this kind of coverage. They wanted to analyze and criticize the issues and to raise the key questions, i.e. can we achieve peace without political engagement and compromise with despicable terrorists? Is there a way to prevent suicide bomb attacks other then eradicating the despair which makes a person blow himself to pieces? But they were told—like I was told after the 1994 Hebron Massacre—that these issues were too heavy and were sent instead to report the latest poll results or the latest lively products of the campaign slogan copywriters.

It is important to stress there was nothing political about this. I have no grounds to assume that the people running the media wanted to influence the election or to help Mr. Netanyahu. But as Mr. Rabin has said, commercialism has become the major factor, and *they do what sells papers.*

We have seen that this is not a unique Israeli phenomenon. This phenomenon has become even more obvious to me when researching and writing this paper at the Joan Shorenstein Center. During the fall of 1997 there were many manifestations in the American media of "private censorship." We have read about advertisers screening the contents of magazines;[69] about journalists in a big respected newspaper worried over the publisher's decision to involve business executives in their work;[70] and about an editor of a prestigious magazine losing his job because he criticized a public official who unfortunately happened to be the publisher's buddy.[71] Certainly we have heard many laments about how the quest for profit adversely affects political coverage and news in general[72] and even a description of the field of news management today as a battleground in which journalists must fight for the public interest "against corporate values."[73] Indeed I should hope the ideas discussed in this paper are as relevant for the U.S. and other democracies as they are for Israel.

But still there is a uniqueness about the Israeli situation, which is well exemplified by what happened to Yitzhak Rabin and the peace process. For Israel—given its limited sources and grave security predicament—the quality of political choices, and of political decisions, is simply a matter of life and death. On these choices and decisions depends not only the quality of life, but also life itself. A bad choice, a wrong decision may be fatal not only for individuals, but also for the whole country. We Israelis are not, as yet—like more fortunate peoples—in a post-war period, but are still locked in a mortal war for survival. If we accept the basic democratic premises that good choices and decisions are dependent upon a free flow of information and ideas to the public, then it is self-evident that preventing any restriction of this flow to those who ultimately make the critical choices and decisions—i.e. the citizens—is also a matter of life and death. To put it more bluntly—we simply cannot afford the election of a photogenic attractive leader on the basis of fabulously delivered copy-written "sound bites" just because the people owning and controlling the media have found it economically unprofitable to investigate and report and publish what is, or is not, beyond those good looks and slogans. This is why confronting "private censorship"—"*the enemy within*"—seems to me such a major compelling and crucial challenge for Israeli journalism today.

Endnotes

1. Cited in P. Lahav "On Freedom of Expression in the Supreme Court Judgments," Mishpatim 7, 375 (1975).

2. *Abrams v. U. S.* 250 U.S. 616 (1919).

3. *Editor & Publisher,* 10 April 1982, 48.

4. He spoke in a round-table discussion on "The Publishers' Wars and Its Danger to Freedom of Expression," *Ha'ir,* 30 Sep. 1994, 34.

5. *The First Annual Theodore H. White Lecture with Walter Cronkite* (moderator: Marvin Kalb), (Cambridge: Joan Shorenstein Center, 1990), pp. 23–26.

6. *A Free and Responsible Press* (Chicago, 1947), pp. 15–16.

7. See P. Lahav, "Israel's Press Law," in P. Lahav (ed.) *Press Law in Modern Democracies* (New York: Longman, 1985).

8. *Kol-Ha'am v. The Minister of the Interior,* 7 P.D. 871(1953).

9. *Shnitzer v. The Chief Military Censor,* 42(4) P.D. 617. For an analytic discussion of this case see Z. Segal, "The Military Censorship: Its Authority, Judicial Review Over Its Actions and a Proposal for an Alternative Arrangement," *Tel Aviv University Law Review* 15 (1990), 311.

10. *The Shnitzer case,* supra n. 9, at p. 634.

11. A. Barak, "Human Dignity as a Constitutional Right," *Hapraklit* 41 (1994) 271, at 280.

12. See especially G. Strassman (ed.) *The Journalists' Yearbook* (T-A Association of Journalists: 1974).

13. See report by S. Abramowitz, *Yedioth Achronoth*, Feb. 16, 1996.

14. Ibid.

15. S. Mittelman, "Dan Margalit Re-examined in Court" *Maariv* Aug. 26, 1997.

16. He was interviewed in I. Rozenblum, "4000 Commercials a Month," *Haaretz* Aug. 10, 1994.

17. *Haaretz*, Gallery Section, Nov 5 1997.

18. See O. Galili, "TV's new rules" *Haaretz Weekend Magazine* Sep. 30,1994, 12; Z. Blumenkrantz, "A Real Rating Needed," *Haaretz* 22 June 1994, 1c.

19. See S. Peretz "The People's Right To Know," *Maariv Weekend Magazine* Feb. 14, 1997, 32, at p. 38.

20. Ibid., at p. 36.

21. *Report on the Hebrew Daily Print Media Market* published by the Cartels Authority in the Ministry of Trade and Industry, 12 Apr. 1995; Y. Tikuchinski, "What Is Your Business?," *The Seventh Eye*, Sep.–Oct. 1996, p. 4.

22. Supra n. 9.

23. National Labor Court Case 3-223/93 Palestine Post Co. v. Yehiel (decided 17 Oct. 1994).

24. Ibid. Italics added.

25. High Court of Justice Case 6218/93 *Cohen v. The Bar Association* 49 P.D. 537.

26. Ibid. pp. 542–3.

27. See *The Jerusalem Post* Sep. 19, 1997.

28. See *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367 (1969).

29. Ibid.

30. See *Syracuse Peace Council v. FCC* 867 F2d 654 (1989).

31. See The Broadcasting Authority Act (1965), The Bezeq (Telecommunications) Act (1986), The Second Television and Radio Authority Act (1990).

32. High Court of Justice Case 243/82 *Zichroni v. The Broadcasting Authority* 37(1) P.D. 757.

33. High Court of Justice Case 399/85 *Kahane v. The Broadcasting Authority* 41 P.D. 255.

34. See for example the *Bar Association Journal* case, supra n. 23, at 545.

35. High Court of Justice Case 1/81 *Shiran v. The Broadcasting Authority* 35(3) P.D. 365.

36. *Miami Herald Publishing Co. v. Tornillo* 418 U.S. 241.

37. It is interesting to note that the Court did not refer to the *Red Lion* case, supra n. 26, decided five years earlier.

38. *Miami Herald* case, supra n. 32, at p. 256.

39. The *Jerusalem Post* and the *Bar Association Journal* cases, supra n. 21, 23.

40. Supra n. 23.

41. *The Jerusalem Post* case, supra n. 21.

42. *The Bar Association Journal* case, supra n. 23.

43. *A Free and Responsible Press,* supra n. 6.

44. See the *Kol-Haam* case, supra n. 8.

45. *Resolution 1003,* (adopted July 1, 1993), sec. 14, italics added.

46. *The Jerusalem Post* case, supra n. 21.

47. In a conversation at the Shorenstein Center, Nov. 11, 1997.

48. See M. J. Horwitz. *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press) 1992.

49. *The Miami Herald* case, supra n. 32; See also *Hudgens v. NLRB* 424 U.S. 507 (1967).

50. See J. Gewolb "Student Activists Prohibited From Distributing Leaflets at HBS" *The Harvard Crimson* Nov. 7, 1997, A–3.

51. See the *Kahane* and *Zichroni* and *Shiran* cases, supra n. 29, 30 and 33.

52. See D. Barak "Freedom of Access to the Media" 12 *Iyunei Mishpat* (Tel Aviv University Law Review) 183.

53. *Resolution 1003*, supra n.42,Sec.11.

54. Italics added. See for more details "Ownership and Control of the Media," in L. Sobel (ed.) *Media Controversies* (NY: Facts On File), 116–117.

55. The Second TV and Radio Authority (Diversification Amendment) Bill, tabled on June 26, 1995.

56. The Act on Reforming the Legal System Governing the Press, 1986.

57. Supra n. 23, pp. 542–43.

58. The Commission was appointed by the ministers of Justice and of the Interior on Feb. 6 1996. Its Report was submitted to the Israeli government, on Nov. 6, 1997. The author was a member of this Commission. See Z. Segal "The Law and Freedom of the Press" *Haaretz* Nov 9, 1997.

59. See Fair Trading Act, 1973, sections 57–62.

60. *The Jerusalem Post* case, supra n.21.

61. *Resolution 1003*, supra n. 42, sec.10.

62. See supra n. 53.

63. High Court of Justice Case 4562/92 *Zandberg v. The Broadcasting Authority* (Judgment given June 2 1996).

64. See The Public Broadcasting Act 1967 and *FCC v. League of Women Voters* 468 U.S. 364 (1984).

65. Such a suggestion was raised by the Ralph Nader-affiliated Consumer Project on Technology; see D. Kennedy "Sound and Fury" *Boston Phoenix* Nov. 14, 1997, 7–9.

66. See High Court of Justice Cases 6163/93 *Eizenberg v. The Minister of Housing* (Judgment given March 3, 1993); 4267/93 *Amitai v. Rabin* (Judgment given Sep. 8, 1993); *The Movement for Quality in Government v. the Israeli Government* (Judgment given Sep. 8, 1993).

67. *Procunier v. Martinez* 416 U.S. 396, at 422 (1974); High Court of Justice case 4463/94 *Golan v. The Prisons Service* (Judgment given Aug. 25, 1996).

68. He was cited in a column by the then *Maariv* editor: A. Karlibach "What is a newspaper?" *Maariv* Apr. 6, 1951.

69. R. Baker "The Squeeze" *Columbia Journalism Review* Sep.–Oct. 1997, 30.

70. J. Sterngold "A Growing clash of visions at the Los Angeles Times" *New York Times*, October 13, 1997.

71. D. Kennedy "An Unseemly Divorce" *Boston Phoenix* Sep. 12, 1997.

72. See veteran TV producer Don Hewitt's criticism in P. Johnson "Reporting Lost in Big-Money Era," *USA Today*, Oct. 9, 1997, D1–2.

73. See B. Bazenburg "Love the Profession, Fight the Industry" *Columbia Journalism Review* July–Aug. 1997, 6.

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