
RESEARCH

Taking Profound Offence Seriously: Freedom of Speech v. Human Dignity

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This study discusses the issue of offence to sensibilities as possible grounds for limiting freedom of expression. This issue is constantly brought to the public agenda, as for example, in the limitation imposed in Israel on the playing of Richard Wagner's music by Israeli orchestras. The proposed thesis is as follows: The Offence to Sensibilities Argument will take precedence over free expression only in cases where profound and direct damage is inflicted upon the sensibilities of individuals or a target group, undermining their dignity, especially when the speaker's intentions are to offend the target individual/group under circumstances in which the individual or target group cannot avoid. In every case, it is incumbent upon those who wish to limit expression to examine the content of the expression and its manner, the duration and intensity of the expression, the frequency of the offence, the speaker's intentions, the circumstances and the likely consequences of the offensive speech. Psychologists should be consulted concerning the severity of each offence.

Keywords: freedom of expression; Feinberg; harm; offence; Skokie; Wagner

Preliminaries

I first came to think about the issue of offence when the Skokie episode came to my attention. Skokie is a Chicago suburb, inhabited mostly by Jews, some hundreds of whom were Holocaust survivors. In March 1977, the National Socialist Party of America announced its plans to hold an assembly in front of the Skokie Village Hall. Its leader, Frank Collin, decided to assert his free speech constitutional right in Skokie because of the large number of Holocaust survivors (Keneally, 2018). Psychological studies of Holocaust survivors showed that they were extremely vulnerable to profoundly painful reaction where they confronted situations that triggered memories of their horrific experiences at the hands of the Nazis (Goldberger, 1991, p. 1170).

Certainly, freedom of expression is most valuable. It is an enshrined value in every liberal democracy and, therefore, only very important considerations might outweigh it. I thought that a Nazi assembly in Skokie is not protected under the Free Speech Principle because the survivors were put in an impossible situation. If they were to challenge the Nazis, they would have to face the swastika, the uniform, the hatred, forcing them to relive the horrors they escaped. And if they were to decide to stay at home, draw the curtains and block their ears, they still would have difficulties reconciling to the idea that Nazism could pass in their own vicinity.

American courts approved the Nazi march in the name of freedom of expression.¹ They failed to take the issue of offence seriously.² The Illinois Supreme Court did not doubt that the swastika is abhorrent to the Jewish citizens of Skokie, and that "the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display". Yet the Court concluded that "it is entirely clear that this factor does not justify enjoining defendants' speech".³

¹ *Village of Skokie v. NSPA*. 366 N.E. 2d 347 (1977); *Skokie v. NSPA*. 373 N.E. 2d, 21 (1978); *Collin v. Smith* 578 F.2d. 1197 (7th Cir. 1978).

² Justice Blackmun, with whom Justice White joined, dissenting, argued that he would grant certiorari to the Skokie residents to present their case before the Supreme Court as he felt that "the present case affords the Court an opportunity to consider whether... there is no limit whatsoever to the exercise of free speech. There indeed may be no such limit, but when citizens assert, not casually but with deep conviction, that the proposed demonstration is scheduled at a place and in a manner that is taunting and overwhelmingly offensive to the citizens of that place, that assertion, uncomfortable though it may be for judges, deserves to be examined." *Albert Smith, President of the Village of Skokie, Illinois, et al. v. Frank Collin et al.* 439 U.S. 916, No. 77–1736. Supreme Court of the United States (October 16, 1978).

³ *Skokie v. Nat'l Socialist Party of America* 69 Ill. 2d 605 (Ill. 1978).

The mere thought of Auschwitz survivors facing the Nazis in Skokie agonized me. I could not fathom the courts' insensitivity to the survivors' anguish. At that point, I decided to investigate whether offence may serve as ground for limiting freedom of expression. This article is the culmination of many years of thinking about offence. My first thoughts were expressed in "Harm Principle, Offence Principle, and the Skokie Affair" (Cohen-Almagor, 1993) and developed in a string of articles and book chapters published in the past 25 years (Cohen-Almagor, 1994, 2002, 2002a, 2005, 2006, 2016). Every decade, some social and political episodes prompt me to rethink and reflect on this reoccurring problem. During this fascinating journey I benefited greatly from exchanges with my Oxford dons – Geoffrey Marshall, Isaiah Berlin, Ronald Dworkin and Jerry Cohen; with Joel Feinberg, and with two Israeli Supreme Court Presidents, Meir Shamgar and Aharon Barak. They helped me consolidate my thoughts and sharpen my argument on this intricate subject.

Liberal philosophers are hesitant when addressing the question of boundaries of liberty and tolerance. A perusal of the writings of influential thinkers, including John Milton (1973),⁴ John Stuart Mill (1948),⁵ John Dewey (1939), Thomas Emerson (1966, 1970), Alexander Meiklejohn (1965, 2000), John Rawls (1971, 1993) and Ronald Dworkin (1977, 1985, 2011) indicates that tolerance and freedom are regarded as values, as virtues, and as the right, lofty ideals for developed and humane societies. These and other philosophers chiefly wished to discuss principles, not the exceptions to them. This is not to say that they did not acknowledge the need to place limits on tolerance and freedom; but relatively little attention was paid by them to clarifying exceptions to the principles and to outlining boundaries. Several explanations can be suggested to explain this tendency; some are time and historical-cultural context bound, while others are more general in nature, touching upon the roots of liberal outlook.

Freedom of expression is perceived by J.S. Mill (1949) and other liberal thinkers (Dewey, 1939; Lichtenberg, 1995; Hensley, 2001; Dworkin, 2011) in positively charged terms. When a concept is elevated to a value – a positive thing that is an ideal for humanitarian and advanced societies, it is very difficult to set limits to it. Liberals feel comfortable when setting limits to free action but they are far less at ease when facing the task of setting boundaries to free expression; this is because of the sincere desire to be as democratic and liberal as possible, to show that democracy tolerates everything or almost everything, and that in this sense it is different from other forms of governance. The category of offensive speech is considered to be protected speech, enjoying the full scope of tolerance.

This essay is comprised of four sections. Section I defines offence. Per Feinberg, I distinguish between offence and profound offence and explain that my discussion is limited only to profound offences and that due to space limitations it mainly relates to racist and anti-religion expressions. I acknowledge that sexually offensive and obscene expressions may inflict profound offence but they deserve a separate and somewhat different analysis.

Section II ponders when would it be justifiable to limit freedom of expression on grounds of offence. Following Kant, I accentuate the importance of protecting the dignity of the person as a crucial consideration. Then I expand the explanation as to what constitutes profound offence. The seven evaluative criteria to distinguish profound offence from offence include the content of the speech, the manner of speech, the duration and intensity of the offence, the frequency of the offence, the speaker's intentions, the avoidability standard, and the availability of mitigating circumstances. In addition, it is argued that responsible people need to think about the likely consequences of their actions. After explaining the relevant criteria, section III formulates the Offence to Sensibilities Argument while section IV argues that psychologists should be involved in the assessment of offences, helping judges to mete out justice when coming to consider whether a certain expression should be excluded from the protection of the Free Speech Principle.

Defining Offence

Offence is behavior that causes people upset and displeasure. People are offended when they suffer a disliked state of mind, attribute that state to the wrongful conduct of another, and resent the other for her role in causing them to be in that state (Feinberg, 1985, 2). The question is whether offence to sensibilities can serve as a valid ground for restricting free speech. Following Feinberg's reasoning (1985), I argue that only *profound* offences may provide ground for restriction. Speech that causes annoyance, nuisance, displeasure or discomfort is tolerable. This issue is complicated and troublesome for several reasons. First, offence does not involve physical harm. When a person punches another in the face, the victim is likely to bleed. The harm is visible. In offence, the harm is often not visible although it might be on a par with physical harm. Second, it is difficult to quantify the damage. If someone stabbed another, the victim might lose a limb, or a lung. In offence, the damage is not that easy to discern. Third, offence is subjective. Some people are more sensitive than others. People take offence differently and react to the offence in various ways. The defence mechanisms we have are varied, and our ability to employ these mechanisms is not universal. Fourth, offence has many variations, from causing annoyance and discomfort, through the causing of nervousness, feelings of disgust, insult or humiliation, violation of normative codes of

⁴ Milton Writes (1973, 35): "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"

⁵ For further reading, see Urbinati (2002); Turner (2014) and Cohen-Almagor (2017).

culture and good taste, to causing profound psychological offence (Ellis, 1984, 7; Cohen-Almagor, 2005, chap. 1). *Profound* offence amounts to attack on one's sensibilities. The elusiveness of the issue has caused jurists to throw away the proverbial baby with the bath water, thereby failing to give it adequate attention. It is not enough to argue for protecting even the most offensive speech without ample discussion and clarification of the relevant criteria that we should ponder. Sweeping generalizations are not the answer for complicated questions.⁶ This essay attempts to deal with the baby, focusing on the types of expression that hurt sensibilities. The discussion aims to determine when would it be justifiable to limit freedom of expression on grounds of offence, and how can we evaluate offence.

Due to limitations on scope, the discussion is limited to expressions that offend and undermine the value system of the targets, their self-worth and their dignity. At focus are racist expressions and expressions designed to offend religious sentiments.

When Would it be Justifiable to Limit Freedom of Expression on Grounds of Offence?

To answer this question, I will explain the concept of dignity, the notion of profound offence, the importance of the avoidability standard and of the speaker's intentions, and why it is important to evaluate the likely consequences of the offence.

In his defence of freedom of expression, C.E. Baker (1997) argues that people choose whether they are to be offended by speech. It is up to them to take notice of the speaker's words or to ignore those words. For instance, a speaker's racial epithet harms the hearer only through her understanding of the message. The extent of harm of offence depends on mental mediation. Any consequences involved in the listener's response must be attributed in the end to the listener.

Baker has in mind strong-willed individuals who are capable of choosing the right response: they have several options: to be offended, to suffer psychological harm, to ignore, to take something positive from the hateful slur, to learn from it etc. Baker (2008, 22; 2009, 143, 156) acknowledges that hate speech does offend. Yet his default is to protect the speakers and their freedom of expression rather than the target group by limiting speech.

However, not all people are strong-willed individuals. Some are more vulnerable than others. We are the sum product of our cognitive abilities, physical abilities, mental structure, emotional basis, and life experiences. We react differently to the same stimuli. Indeed, the issue of offence is complicated and tricky precisely for this reason. Some of us will be deeply offended by a certain speech while others will choose to ignore the speech and move on. Our susceptibility to offence differs significantly. John Smith, a young British man from Newcastle might be intrigued by the denial of the Srebrenica massacre⁷ while his neighbour Fatima Sehic, who lost her mother in July 1995, might take deep and profound offence by the same speech. I can make an educated guess that American liberal men, who are white, Christian and belong to the middle class (or higher economic echelon) would tend to confer First Amendment protection on offensive speech. I would be hesitant to make a similar guess when American women and transgender people are concerned, or with regard to members of minority groups. In Europe, especially in countries where the concept of dignity is significant (e.g. Germany and Italy), offence is taken far more seriously than in the United States. For some people, the pain in offence is so strong, so immediate, so penetrating, so instant, that this luxury of choosing a response is absent. Such choice is in the mind of strong-willed liberals like Baker. For the Skokie Holocaust survivors, the challenge was not a mental process readily available to them as a targeted minority that wished to have equal standing in society and felt that they needed to fight for it, still.

It is reiterated that offences causing people mere discomfort are not of concern here. People are offended by almost everything. The intention is not to prohibit anything that might cause offence to anybody's sensibilities. For instance, a white woman holding hands with a black man might offend racists. Alternatively, a girl shouting commands might disturb the peace of mind of male misogynists, or some people who are homophobic might claim that they are deeply hurt by the mere suggestion of homosexuals as equal to others. Should we come to their assistance?

The definitive answer is "No." The discussion is about outrages or wounds to basic human dignity. People who adopt discriminatory ideologies and ideas, such as racism, are exploiting democratic mechanisms for the purpose of hurting others. The racist's and misogynist's so-called offences lack normative power because their origins are morally deficient. The Offence to Sensibilities Argument is designed to promote the values that underlie liberal democracy – respect for others and not harming others – rather than to assist those who wish to undermine them.

Dignity

The concept of dignity is germane to our discussion. The concept is derived from the Latin noun *dignitas*, which means: (a) worthiness, merit; (b) greatness, authority; and (c) value, excellence. The noun is cognate with the adjective *dignus* (worthy), from the Sanskrit root *dic* and the Greek root *deik*, which have the sense of 'bringing to light,' 'showing,' or 'pointing out' (Cohen-Almagor, 2017a). When a certain speech is deeply offensive, it undermines and shakes the dignity of the

⁶ See, for instance, the unsatisfactory discussion of Cleary (1995) and Simpson (2018).

⁷ The Srebrenica massacre, also known as the Srebrenica genocide, was the July 1995 massacre of 7,000–8,000 Bosnian Muslim boys and men by Bosnian Serb forces in and around the town of Srebrenica during the Bosnian War. In addition to the killings, more than 20,000 civilians were expelled from the area.

person. According to Immanuel Kant (1969), it is only through morality that a rational being can be a law-giving member in the realm of ends, and it is only through morality that a rational being can be an end in herself. Kant distinguished between relative value and intrinsic value, explaining that people have intrinsic value, i.e. dignity. He perceived autonomy as the basis for the dignity of human nature and of every rational nature. Kant (1969, 53) explained that if something is above all price “and therefore admits of no equivalent”, then it has a dignity. Human beings are ends in themselves and therefore they do have intrinsic worth.

Human beings are *objects of respect* (Abel, 1998). They are not subjective ends “whose existence as a result of our action has a worth for us, but are objective ends, i.e., beings whose existence in itself is an end” (Kant, 1969, 46). Such an end, reiterated Kant (1969, 46–47) “is one for which no other end can be substituted”. In this context, Stephen Darwall (1977) distinguishes between *recognition respect* and *appraisal respect*, explaining that the former includes the respect we must show to people qua people, just out of recognition of their status as people, while the latter is the respect we show to people in virtue of their character or achievements. Kant had in mind *recognition respect*. People wish to control their destiny, maintain their autonomy, not be humiliated, and perceive themselves with honour. Nazis accord Jews neither *recognition respect* nor *appraisal respect*. For Nazis, a good Jew is a dead Jew. Jews are vermin who deserve death. When the dignity of the person is attacked in such a way at one’s vicinity, at one’s home, mobilizing mental strength to decide not to be offended is quite difficult.

The concept of dignity refers to a worth or value that flows from an inner source. We are endowed with dignity and have the right to be treated with dignity. *Dignity as recognition* is about us recognizing the inner spark of the soul that we all possess, the inherent quality of the person. It is not given from the outside but rather is intrinsic to the bearer of dignity. An opera ticket has a certain value but it does not have dignity. The value is placed upon the ticket by the opera house in light of the importance of the popularity of the opera and the company performing it. People, on the other hand, possess dignity as an inner source of worth. It is impossible to put a price tag on humans because this would denigrate them into mere objects. Kant (1969, 46) unequivocally instructed: “Man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will”. In all their actions, humans must always be regarded as an end.

Kant (1969) identifies dignity with moral capacity, arguing that human beings are infinitely above any price: “to compare it with, or weigh it against, things that have price would be to violate its holiness, as it were.” In other words, morality, and humanity insofar as it is capable of morality, is that which alone has dignity. Each person has dignity and moral worth. People should be respected qua being persons and should never be exploited. The concept of dignity is universal. All people qua people have dignity. Dignity cannot be qualified due to one’s gender, race, religion, culture, class or any other characteristics, and it requires us to take responsibility for our conduct. As Dworkin (2011) suggests, the concept of dignity needs to be associated with the responsibilities each person must take for her own life vis-à-vis herself and others. Dignity requires owning up to what one has done. “The buck stops here,” writes Dworkin (2011), is an important piece of ethical wisdom.

In *The Harm in Hate Speech*, Jeremy Waldron (2012) argues that hate speech legislation should aim to protect people’s dignity against assault. Hate speech laws aim to protect the public good of dignity-based assurance, and to block the construction of the rival public good that the racists and Islamophobes are seeking to construct among themselves. It is there to protect the targets’ equal status in the community, their entitlement to basic justice and to the fundamentals of their reputation. Waldron maintains that there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. Hate speech creates an environmental threat to social peace, a “sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good” (2012, 4). Waldron emphasizes the notion of dignity, arguing that hate speech undermines the dignity of the person. A person’s dignity is not just some Kantian aura. It relates to people’s social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Hate speech aims “to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing” (2012, 5). Hate messages undermine the targets’ equal status in the community, their entitlement to basic justice and to the fundamentals of their reputation.

Dignity involves not only *objective* but also *subjective* notions. It is the source from which human rights are derived, and it also refers to one’s own feelings about oneself. Haim Cohn (1983, 226) holds that human dignity is the source from which human rights are derived and it is, along with human rights, the foundation of freedom, justice and peace. To have dignity means to look at oneself with self-respect, with some sort of satisfaction. It means to feel human, not degraded. By subjective concept of the self it is meant how a person conceives of her life, her achievements, and her place in the world. The subjective evaluation is affected by the individual’s self-respect, relative to the abilities she believes she possesses, and relative to her peers and surroundings.

Let us also speak about *dignity as liability*. People deserve to be accorded a certain treatment from birth. We are endowed with dignity and have the right to be treated with dignity. While people cannot expect genuine *concern* from fellow humans,

we can expect *respect* from others. The value of freedom of expression should be weighed against the dignity of the person when freedom is abused to undermine others. Because offence is subjective, and people might be offended by many things, we should insist on striking a balance between free speech and personal dignity. As Feinberg (1985, 93) suggests, profound offences are distinctly different from mere nuisances due to their qualitative dimension, and also because of their independence of actual perception. Unlike offensive nuisances where the perception of offence is personal, profound offences are partly offensive in themselves: "one is outraged at the offending conduct on grounds quite independent of its effect on oneself" (Feinberg, 1995, 93).

Profound Offences

What is the difference between offence and profound offence? The obvious difference concerns the severity of the attack. Offences annoy, disturb, are of nuisance. Profound offence rattles the target person or group. It has long-lasting impression as the target tries to overcome the shocking experience. Offences can be forgotten. Profound offences leave scars that are difficult to heal. Furthermore, while offences tend to be personal, profound offences are partly impersonal. Many would be deeply offended by the very idea of certain statements, even without been subjected to those statements personally. One is likely to take offence when a person calls him "son of a b...". The offence would be far greater when a person is subjected to attack on his religion or race: "You Jew should be gassed"; "You monkey go climb trees in Africa." Profound offence is real and deep, so much so that it might shatter the emotional structure of the victims. In delineating the boundaries of free expression, mere offences are within the scope of tolerance. To consider its restriction, the offence should be so profound and severe, so tormenting, that it could be considered morally on a par with physical harm.

People may feel profound offence as a result of many problematic forms of expression. Pornography, sexism, racism, bigotry, hateful speech, satirical cynicism, discussions on abortion, euthanasia, slavery, capital punishment, human trafficking and prostitution are a few examples. These are important issues that need to be addressed, discussed, deliberated and probed. They should not be silenced. What are the criteria that would help up define profound offence?

In addressing this question *infra*, I mention several face-to-face incidents that happened to me personally. These incidents brought me to recall with sympathy the Skokie residents who were to face Nazis. I use these first-hand disturbing incidents as illustrations of the relevant factors that influence the significance and magnitude of offence.

Content of speech

Offence is not about pleasantries. It is not about the weather, "Oh, how nice you look today" or the fruits in the market. The content needs to be such that it shakes the target of the speech, undermining her dignity and is highly disturbing. It is about content that gets the target's attention and surpasses in her mind other issues. It puts the targeted person in a state of shock, disgust or humiliation. Minority groups are especially vulnerable. I argue that profound offences designed to undermine the equal standing of minorities in society, their self-respect and dignity are not entitled protection under the Free Speech Principle. Democracies have an obligation to protect weak and vulnerable third-parties.

In 1996, I made my first trip to Australia. It was especially long and tiring trip from my home in Ramat Gan, Israel, to Brisbane, Australia, during which I had very little sleep. When I landed at 4 am, I was utterly exhausted, fighting to keep my eyes open. The taxi driver who brought me to the hotel, however, was talkative, inquiring about my whereabouts and the reason that brought me to Brisbane. As we arrived at my hotel, I paid him, he helped me take my luggage out of the car boot, and then he uttered, out of the blue: "I hate Jews. I am German. I hate Jews". Then he entered into his car and drove away. I was shocked. I stood there on the pavement, staring at him and the car, unable to move, collecting myself. I did not expect such a welcome party to Australia. This incident took me by surprise. I was not prepared for it, certainly not in the physical shape that I was. At that point in time, I never lived outside of Israel. In Israel, I was never judged by my religion but by my personal traits. The taxi driver knew very little about me; still he felt the urge to say that he hated me. The reason he gave for his hatred, "I am German", was disturbing, recalling the most traumatic episode in Jewish history. Those sentences constituted profound offence. The words of the taxi driver caused me significant psychological distress, were intended to harm and they insulted my dignity. The driver did not aim to persuade but to shock. More than twenty years later, I still recall this incident vividly, as if it happened yesterday. It left a deep scar on me.

Manner of speech

Sometime, the manner of expression can be as offensive as verbal expression. Case at point is symbolic speech. In symbolic expressions, the content of the speech is included in the manner of expression. When a person enters a synagogue with a swastika armband, he need not say anything. His message is loud and clear. When a person burns the flag of his country or draft cards at a time of war, he need not say anything. When people wave the picture of Osama bin Laden after September 11, 2001, they said everything by this act. When people parade at the heart of a Jewish neighborhood wearing swastika armbands, they need not say anything. The message is loud and clear: no one can mistakenly interpret this message of hate as something positive. Symbolic speech is such that it encapsulates both content and manner of speech.

The duration and intensity of the offence

The scope and magnitude are certainly material. The longer the offence, the more it becomes unbearable to the targeted individual. Twice in my life, as a result of brute luck, I found myself in a situation where I stood next to men with extreme worldviews. In both incidents I was able to avoid the situations. The men had no specific intention to offend me personally. On both occasions, the men did not know who I was. While the situations were *not* deeply offensive, they were quite disturbing, made me concerned and caused me revulsion.

The first time, I stood next to a Nazi in a little corner of a shop in West Virginia for twenty minutes as both of us were waiting for merchandise we bought. I knew the man was a Nazi because on his neck there was a large tattoo of a spider web and a black swastika was hanging from it. Two meters separated us. I had a sense of intense repulsion and was greatly relieved to see him go. The second time I stood next to an extremist man for the entire evening. Again, his large, visible tattoos including HH and 88 signifying Heil Hitler revealed his political views. For a few hours, we were waiting in the same corner of the Hull City Hall for the local election results.

The frequency of the offence

If the extent of offence is frequent, this would disturb the target's life more substantially. To take the Skokie example, if the Nazis were to hold a march every weekend, this would disturb Jewish life more than a one-off visit. If racists were to burn a cross in front of an African-American family every weekend, this intimidating symbolic expression would make the life of the family intolerable.⁸

The speaker's intentions

The speaker's intentions and motives are important. It is one thing to offend another person unintentionally. This happens all the time. People offend others when they speak without proper reflection and thinking. It is quite another thing to inflict offence on others intentionally, wishing to rock their sensibilities and to undermine their dignity. We should be less tolerant toward offensive expressions when it can be proven that the speaker's intention is malicious and meant to hurt the target audience. This is the case when speakers announce beforehand that their aim is to hurt the sensibilities of their target group.

The intentions of the Nazis in Skokie were manifested by Collin himself, who said that he had decided to march in Skokie in order to spite and offend the Jews (Keneally, 2018; Cohen-Almagor, 2005). Collin did not mean to persuade the Jews that he was right, or that his ideas were justified. He chose Skokie not only because there was a big community which he could offend but also because he wanted to gain public attention. Indeed, it was the grotesqueness of the venue that gained attention. Often, the choosing of a venue is cardinal to the success of a demonstration. Protests are made where they can convey their message best. Thus, we would not seriously consider a demonstration against cutting housing benefits in front of an animal shelter. We would expect such a demonstration to take place outside the finance or housing ministries. By the same logic, we would expect a Nazi to propagate his ideas in a Jewish neighbourhood. Yet our understanding of Collin's motives in choosing Skokie to attract public attention and media coverage should not convince us to allow his offence.

One may ask: What if Frank Collin did not announce that his reason for coming to Skokie was to offend the Jews? More careful politicians than Collin do not openly declare their intentions, especially when their aims are controversial and aimed to undermine the equal standing of their target group in society. While those who wish to restrict freedom of expression must examine the speaker's intentions, there may be cases where profound offences would be restricted also when the speaker's intentions are implicit. Explicit offensive intentions strengthen rationale for prohibition but are not necessarily mandatory. The Skokie Jews would have been deeply offended by the Nazi march even if Collin were to keep his reasoning to himself. In this case, the seriousness of the offence, the circumstances and the historical experience are of great significance.

The avoidability standard

When it is possible to avoid exposure to the offence then we should allow greater scope to freedom of expression. If it is possible to avoid exposure to the offence at a minimal cost that brings about only a certain amount of discomfort, then the problematic expression should be protected. However, if we are dealing with an expression that the target group could not avoid, then there is room to consider whether the problematic expression should be excluded from the protection of the Free Speech Principle. In this sense, democracy would be obligated to restrict it. For example, it is necessary to ban anti-religious statements on public boards in very religious neighbourhoods, such as the Jewish ultra-orthodox neighborhoods of B'nei Brak and Mea Shearim in Israel, the Satmer and Chabad communities in New York, or the Muslim communities of Bradford. The lower the social status of the cultural or religious group, the stronger the claim about the offence to cultural identity is and the greater urgency on part of state agencies to protect vulnerable groups and their equal standing in society (Pinto, 2012).

⁸ See *Virginia v. Black*, 123 S.Ct. 1536 (2003), Gey (2004); Cohen-Almagor (2016a).

The avoidability standard is important to consider but there can be occasions in which the offence might be substantial notwithstanding whether the targeted group can avoid been exposed to the offence. As Feinberg (1985, 52) acknowledges, in Skokie, the feelings of the Jewish residents could not have been escaped merely by doing shopping away from home, by locking their doors, by pulling down the curtains or by using ear plugs.

Consider the following episodes. A neon advertisement at a busy city crossroad: “Cannibal Feast. Attractive Dishes. All You Can Eat”. Many people would take offence by the mere thought that such an advertisement that affronts the dignity of the person exists, notwithstanding whether or not they witnessed the neon ad themselves. Such a neon sign betrays human recognition of the inner spark of the soul that people possess, the inherent dignity of the person.

In Israel, a limitation is imposed on the playing of Richard Wagner’s music by Israeli orchestras as Wagner was a well-known anti-Semite and his music was played in Nazi functions and ceremonies (Barenboim, 1998; Ross, 2012). In 2001, one of the world leading musicians, Daniel Barenboim, announced his wish to play Wagner in a major music festival, called The Israel Festival. Holocaust survivors protested against Barenboim’s intention, saying that playing Wagner during the most important public music festival would greatly offend their sensibilities. Barenboim, director and chief conductor of the Berliner Staatsoper (State Opera of Berlin), explained that he had the greatest understanding and compassion for all Holocaust survivors and their terrible associations with Wagner’s music. He said that he also understood that some people cannot forget these strong associations and that they should never be forced to listen to Wagner’s music in a concert. Therefore, Wagner’s works should not be played during concerts for regular season ticket-holders, when faithful subscribers would be confronted with music that raises painful memories. However, the question must be asked whether any person has the right to deprive any other person who does not have these same associations of the possibility of hearing Wagner’s music. This, argues Barenboim, would indirectly serve the misuse of Wagner’s music by the Nazis. Moreover, Israel must act as a democratic state, which entails not preventing people who are free of these associations from listening to Wagner’s music (Barenboim, 2001).

Barenboim’s viewpoint was not accepted. After pondering the issue for some months, the management of the Israel Festival decided that the time was not yet ripe to play Wagner. Barenboim agreed to perform instead musical pieces of other composers. This decision was reached after receiving many appeals of Holocaust survivors and of other concerned citizens, among them then President of Israel Moshe Katzav (Shachar and Avidan, 2001). It seems that Wagner will not be played in Israel at least as long as there are Holocaust survivors alive. The mere knowledge that Wagner is played in the country, notwithstanding whether survivors are in the audience, would greatly offend them and possibly other Israelis.

A different issue is concerned with offending religion. In 1989, Salman Rushdie published his book, *The Satanic Verses*, which depicted Islam and the Prophet Muhammed in an unflattering light as deceitful, ignorant, and sexually deviant. The book, which was banned in the Muslim world, was considered blasphemous and insulting (Slaughter, 1993; Green, 2013). Violence had erupted in protest, resulting in hundreds of people killed. In 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoons of the Prophet Muhammed, including one depicting the Prophet wearing a turban in the shape of a bomb (Mohammed Image Archives, n/d). Another image had the Prophet informing a suicide bomber that Paradise has run out of virgins (Cram, 2009). The publication of the images in *Jyllands-Posten* had been condemned around the Islamic world. Many Muslims took profound offence without reading the Danish journal. The mere knowledge of the cartoons was sufficient to cause uproar and drive many of them to the streets and to open riots in protest. Nearly 250 people died and some 800 others were wounded (McGraw and Warner, 2012). People felt revulsion and moral indignation as the cartoons offended their precious symbols and core of belief. In Paris, the satirical magazine *Charlie Hebdo* printed cartoons that ridiculed the Prophet Mohammed in 2006 and 2011. Yet again, many Muslims felt that those cartoons had desecrated their deeply cherished religious values and beliefs. On 7 January 2015, two terrorists stormed the *Charlie Hebdo* office and murdered eleven cartoonists and satirists whose names were called out before they were shot dead. Among them were the then magazine editor Stéphane Charbonnier and the famous cartoonist Cabu. Eleven other people were injured. The terrorists screamed: “We have avenged the Prophet!” (Rayner *et al.*, 2015). Later they also killed a policeman. Again, the terrorist could have easily avoided the exposure to the cartoons but the knowledge of their very publication outraged them to the extent of going on this murderous attack. As explained above, the nature of profound offence is such that it is partly offensive in itself.

Pope Francis rightly denounced the murder, saying (Schapiro, 2015): “No one can kill in the name of God... This is an aberration.” The Pop added: “One cannot provoke, one cannot insult other people’s faith, one cannot make fun of faith... There is a limit. Every religion has its dignity ... in freedom of expression, there are limits.”

Mitigating circumstance

I mentioned that I spent an evening with an extremist right-wing man in the City Hall. Unlike the shop episode where the Nazi and I were the only two people waiting for merchandise in a small corner, in the City Hall there were hundreds of people. I was there with a politician friend. When I shared my revulsion with him and wondered aloud what would that man do were he to know I was Jewish, my friend responded half-jokingly: “Don’t worry. This Nazi wouldn’t hurt you. There are policemen around”. I was not amused or reassured. I did not come to the City Hall to take part in a fight. I came to support

my friend who ran for re-election. My friend's presence and the hundreds of people around us reassured me and served as mitigating factors in this disturbing episode. I felt very uncomfortable standing next to that extremist. I was disturbed by his presence but I did not focus on him. The situation in that respect was different from Nazis strutting in a Jewish neighbourhood and my shop episode, where I was totally focused on the Nazi who was two meters away.

Feinberg (1985, p. 26) also adds the *volenti* standard: People should not complain if they voluntarily subjected themselves to the offence. *Volenti non fit injuria*. Feinberg (1985, p. 7) further elucidates that we have lesser qualms to suppress offensive speech when the social value of the speech is low, and when the interests of the community in hearing the speech are minimal or non-existent.

Consequences of speech

Responsible people need to think about the likely consequences of their actions. Speakers such as Frank Collin wish to inflict offence on their target group but they do not wish to harm themselves. Satirists like to mock and offend but they do not wish to be harmed nor do they wish to cause bloodshed. They operate in the realm of words and see a clear distinction between words and deeds. After the violent episodes of *The Satanic Verses*, *The Danish Cartoons* and the *Hebdo Cartoons* we know full well that freedom of speech has a price. Responsible people should weigh the consequences of their conduct – action and speech. We should learn from these affairs, take offence seriously, acknowledge the reality of globalization where speech in a liberal part of the world may provoke negative and violent reaction worldwide. We should fight for our principles while being cognizant of the price tag which might be high and bloody.⁹ And the price would not necessarily be paid only by the speaker. The speaker also endangers others. Prior to publication, prospective speakers should ask themselves whether the likely consequences are less important than their freedom to ridicule. The decision is theirs. They should bear in mind that the outcomes might also affect innocent bystanders and policemen rushed to restore order. Responsible speakers should ask themselves whether their struggle to express outrageous ideas freely justifies putting other people's lives at risk. It is one thing to be willing to pay a price for your own conduct. It is quite another to expect others to chip in for a cause that they do not endorse as strongly as the speaker. They might simply be in the wrong place and time to earn the title "victims who fought for the right to free speech". Our freedoms should always be tempered by responsibility (Cohen-Almagor, 2015, 2016).

The Offence to Sensibilities Argument

Now I can formulate the Argument that would instruct us when we should take offence seriously. *Most cases* in which the expression "offence to sensibilities" is used do not involve the type of behavior that causes emotional incapacity, a sort of assault on the person's sensibilities (Cohen-Almagor, 2006, Chaps. 4–5; Pinto, 2010; Smits, 2016, chap. 8). As aforesaid, the reference here is to profound offence, formulating the offence to sensibilities argument as possible grounds for restricting free expression when the expression might cause severe damage to the target person/s. The task of definition is truly problematic because of the difficulty in assessing emotional and psychological offence. At the same time, we acknowledge that certain expressions under certain circumstances might hurt no less than physical harm. An irreversible offence to the sensibilities of a person, which brings that person to a state of shock or constant dejection, is arguably more harmful than injury to one's arm or leg, or irreversible damage to one's kidneys. While a person can live without a limb or a kidney, one might lose the taste for life if the offence to sensibilities is devastating and irreversible. In extreme cases, it can cause the victims to lose their human dignity. Thus, we must not avoid discussion of the Offence to Sensibilities Argument, but rather invest more efforts to set defensible criteria for restriction. Instead of being discouraged from the outset, we must make greater, more rigorous attempts to find sensible solutions.

My line of reasoning places the individual at the center in examining whether the individual needs protection from certain expressions because they might offend one's emotional and spiritual system. **The Offence to Sensibilities Argument in and of itself can serve as grounds for restricting freedom of expression in extreme cases when the offence is severe; even more so when the target group (individual or individuals) cannot avoid being exposed to the offence, and the consequences of the offence might be destructive.** The factors that must be taken into account are:

- The content of the expression.
- The manner of expression.
- The duration and intensity of the offence.
- The frequency of the offence.
- The intentions of the speaker.
- The circumstances which include the avoidability standard and the presence of mitigating factors.
- Consequences of speech.

⁹ For a different view, see Dworkin (2006).

It is incumbent on those who restrict speech on grounds of profound offence to examine *all* the above factors. As explained, not all of these factors are essential, and we may decide to prohibit certain expressions also when the intentions of the speaker are not explicitly pronounced, and when the target group can avoid exposure to the offence, though members of the target group are still aware of its existence. I also argued that speakers should not be callous about expressing profound offence when they have reasons to believe that their speech might result in loss of life.

Who Determines the Severity of the Offence?

Some years ago, the Israel Supreme Court considered a petition regarding a documentary titled *Shoah Tova*, which means in Hebrew Good Holocaust. The documentary was not controversial in its content but its title was disturbing. Holocaust survivors' organisations petitioned the Court to bar the offensive title. They were horrified by the thought that public billboards around the country would be filled with posters saying *Shoah Tova*. This combination of words, good and Holocaust, was most disturbing. For them, there was nothing good in the Holocaust. Quite the opposite The Holocaust was horrific and evil. For them, the Holocaust was the most tragic experience in human history. However, the film's public relations office refused to change the title. The controversy triggered public interest.

Holocaust survivors are not forced to watch the film. But they will have difficulties to avoid been exposed to the film PR campaign as the intention was to have wide publicity, exploiting the controversial title. It was unclear how long the film will be playing but it could have been assumed that it will be screened for some weeks, maybe months, and as it is a good documentary, it might be screened later time and again, each time subjecting survivors to see and hear these two words, "Shoah tova" together. Thus, potentially the offence was significant. But I am not equipped with knowledge and expertise to assess the extent of offence. My advice was to consult psychologists on the likely impact on Holocaust survivors when they encounter such publicity. If the offence might cause some survivors substantial distress, morally on a par with physical harm, then the title should be replaced with a non-controversial title.

This case evoked questions regarding the authority that should estimate the extent of the offence. Clearly we are dealing with a controversial and difficult issue to assess. Should we leave such a tangled problem of assessing the extent of offence to courts alone? Are justices the appropriate authority for assessing offence to the sensibilities, which has more to do with the framework of mind and human psyche? Here, justices are encouraged to ask the advice of psychologists who, despite the deficiencies of their profession, still seem to be better equipped than other professionals to assess offences to the sensibilities. Surely, court decisions are and should remain in the hands of justices, but they should not hesitate to turn to the advice of experts in order to gain a more comprehensive picture of the issue. Psychologists can shed a different light and provide justices with additional tools for assessment, analysis and critique.

Conclusion

The aim of this article was to show that liberals are wrong in dismissing offence. While damage to one's psyche is not visible as physical harm, it might still be weighty and significance. Words can have serious implications. Profound offence needs to be taken seriously. Profound offence might diminish the self-worth and dignity of the target group, and it might lead to a loss of life when those offended might take the law into their hands to settle account with the offenders. The lessons of the Salman Rushdie affair and the Charlie Hebdo terror attack should be carefully learned.

The Offence to Sensibilities Argument provides valid grounds to limit expression when the content and/or manner of expression causes severe and profound psychological offence to a certain target group, especially when the speaker resolves to cause distress, maliciously aiming to insult the dignity of those intended to suffer the distress, and when the objective circumstances are such that the target group cannot escape the offence. But even if the speaker's intentions are not made explicit (e.g. when polished politicians prefer to use implicit language to make partisan political gains), and the profound offence is avoidable (as the Skokie affair demonstrates), we should bear in mind the specific circumstances and the likely consequences of the offence. We are living in an age of political extremism and terrorism. We expect speakers to be reasonable and responsible. As Feinberg (1985, p. 44) argues, offensive conduct is unreasonable to the extent that its driving purpose is spiteful. Wholly malicious conduct, done with the explicit intention to offend others, is wholly unreasonable and unsound.

At the outset, I stated that my discussion is limited to expressions that offend and undermine the value system of the targets, their self-worth and their dignity. At the centre of attention were racist expressions and expressions designed to offend one's value system and/or religious sentiments. These are sensitive issues that matter greatly to those who hold them. Psychologists should be consulted in evaluating the seriousness of the offence.

For space limitations, I did not closely examine sexually offensive and obscene expressions. While these certainly deserve separate analysis as they may cause profound offence, especially to women and to traditionally suppressed groups whose sexual preferences are deemed "deviant" and "unconventional", the above guidelines may serve as a reasonable starting point.

Competing Interests

The author has no competing interests to declare.

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How to cite this article: Cohen-Almagor, R. (2020). Taking profound offence seriously: Freedom of speech v. Human dignity. *Journal of Hate Studies*, 16(1), 1–11. DOI: <https://doi.org/10.33972/jhs.152>

Published: 29 December 2020

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