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Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine with Special Emphasis on Israel and the United States

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Article

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INTRODUCTION

The fairness doctrine [hereinafter “the doctrine”] which generally addressed broadcasters’ obligations to “afford reasonable opportunity for the discussion of conflicting views on issues of public importance,”¹ was repealed in the United States in 1987.² The decision to revoke the doctrine was upheld in court.³ Since then, some voices have called for its reinstatement to this day.⁴ Some restricted forms of the underlying principles of the doctrine have outlived it in American jurisprudence, namely the “Equal Time Rules” and until recently the “Personal Attack Rules”.⁵ Yet the overall broader principle of “enforcing fairness” on an ordinary basis has been forsaken.

In Israel, the fairness doctrine was imported from American jurisprudence in the early 1980s,⁶ and it still exists today. What are the major differences between the two systems that justify this discrepancy? Should Israel follow in the American footsteps and abandon the doctrine? Should the United States reinstate it? Or is the *status quo*, where Israel has it and America does not, the best alternative? In this paper, I will attempt to answer these questions.

The first part of the paper reviews the Israeli fairness doctrine: its main characteristics, its constitutional implications, the Israeli media market, and the distinction between print and broadcast media within the Israeli system. The second part of the paper reviews the main characteristics of the bygone American doctrine and tries to assess its constitutionality based on two models of First Amendment interpretation. It also reviews the political impediments to the doctrine’s reinstatement and briefly examines media patterns in the post 9-11 context. The third part of the paper endeavors to provide a broader comparative perspective, reviewing European concepts that are parallel to the fairness doctrine and offering an analysis that categorizes different systems’ approaches

1 See 47 C.F.R. § 73.1910 (repealed 1987).

2 In August 1987, the FCC unanimously moved to repeal the fairness doctrine. See *In re Complaint of Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd 5043 (1987) (decision to end enforcement of fairness doctrine); William W. Van Alstyne, *The American First Amendment in the Twenty-First Century: Cases and Materials*, 483 n. 100 (2001) [hereinafter Van Alstyne]; “How to Insure Fairness on the Air”, *The New York Times*, January 9, 1988, at 26.

3 See *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

4 See discussion *infra* Part II.C.

5 For elaboration on the “Equal Time Rules” and the “Personal Attack Rules” see *infra* p. 20 (notes 79-80).

6 H.C. 1/81, *Shiran v. Broad. Auth.*, 35(3) P.D. 365 (Isr.) [hereinafter *Shiran*].

and constitutional compatibility with the fairness doctrine. Finally, this paper concludes with a discussion focusing on the question of the doctrine's reinstatement, based on the discussion in the earlier parts of the paper.

The final conclusion of the article is that the fairness doctrine, despite all its merits and compatibility with most other legal systems' freedom of expression doctrines, is inconsistent with basic prevalent legal perceptions in the American system. Although the doctrine's reinstatement is legally feasible, it is not advisable, taking into account constitutional and media size considerations.

PART I: THE ISRAELI FAIRNESS DOCTRINE

A. The Israeli Fairness Doctrine – An Introduction

The term "fairness doctrine"⁷ first appeared in Israeli law in 1981, in the *Shiran* case,⁸ but an earlier case had already dealt with the right of reply aspects of the broader fairness principles,⁹ and even more importantly, the Broadcast Authority Act (1965) contained a requirement for "appropriate representation of viewpoints and opinions that are common among the public, and broadcasting of reliable information."¹⁰ Since Israel had only one quasi-governmental television channel at that time,¹¹ the adoption of the fairness doctrine principles seemed natural. Yet even under today's more complicated broadcasting map, every television channel, including both cable and satellite, is regulated under provisions which compel the fairness doctrine.¹²

While there are many similarities between the Israeli and American concepts

7 While in the United States there is distinct terminology that differentiates between the fairness doctrine and the personal attack rules, the Israeli use of fairness doctrine intertwines both terms. This paper focuses only on the political/impartiality aspects of the doctrine. One should also note that the Equal Time Rules, which are sometimes linked to the doctrine, are governed in Israel by the Election Act (Propaganda) (1959).

8 *Shiran*, supra note 6.

9 C.A. 7/79, "Book of Life" Publishing v. Broad. Auth., 35(2) P.D. 365.

10 Broad. Auth. Act, 1965, S.H. 106 (Article 4).

11 The Broadcasting Authority is a radio and television authority, established by the state as an independent authority, similar to the British BBC. It is also important to note that television broadcasting in Israel started relatively late, towards the end of the 1960s.

12 See Broad. Auth. Act, 1965, S.H. 106 (article 4); Second Authority for Television and Radio Act, 1990, S.H. 59 (articles 5(b)(6), 5(b)(7)); Second Auth. for Television and Radio (Ethics in Radio and Television Transmissions) Rules, 2002, K.T. 6188, 1190 (Rules 5-8); Second Auth. for Television and Radio (Television Programs Broadcasting by Concession Holder) Rules, 2002, K.T. 6202, 146. (Rule 6); Communications (Bezeq and Transmission) Act, 1982, S.H. 218 (Articles 6Kaf, 6Kaf2, 6Nun.(4)) and regulations thereunder (e.g. Communications (Bezeq and Transmission) (Broadcasting License Holders) Rules, 1987, K.T. 5064, 138 (Rules 6-7, 10-12)).

of the fairness doctrine, they are not identical. Amit Schejter, an Israeli scholar, claims that the Israeli doctrine has “taken on a life of its own,” and that “the doctrine has been redesigned in a manner that does not resemble its North American origins, although it still carries its name.”¹³ This is somewhat of an exaggeration, since the Israeli doctrine bears more similarities than differences to its American counterpart, yet one should keep in mind that the differences between the systems is bound to create differences in the manner in which the doctrine was perceived and developed in the two systems.

Interestingly enough, the importation of the fairness doctrine to Israeli jurisprudence, while American in its origin,¹⁴ is European in its essence. The Israeli media market evolved under market conditions comparable to European systems, and the constitutional constraints in these systems are not as absolute as the First Amendment. Therefore, upholding the doctrine in Israel does not raise difficulties analogous to those in the United States. Nonetheless, the Israeli Supreme Court referred only to the American system when discussing the doctrine, even after it was repealed in the United States, and did not seek external validation from other legal systems.¹⁵

The first rulings that shaped the Israeli doctrine occurred when Israel had only one quasi-governmental television channel.¹⁶ This fact had influenced the manner in which the doctrine was construed. The outline of the doctrine, as prescribed by the Supreme Court, was very similar to its American counterpart. An emphasis was placed upon minimal interference in the content of the broadcast, and censorship in the name of balance and fairness was deemed incompatible with the principles of the doctrine.¹⁷ The only remedy that the doctrine prescribes is adding speech, not omitting it.¹⁸ Also, the fairness doctrine allows the broadcaster discretion regarding the manner in which the response is conveyed, as long as the response is reasonable. In addition, the doctrine does

13 See Amit M. Schejter, *The Fairness Doctrine Is Dead and Living in Israel*, 51 Fed. Comm. L.J. 281, 282 (1999) [hereinafter Schejter]; see also Schejter at 290, wrongfully arguing that “[i]t is no longer doubtful, but in fact certain, that there is a fairness doctrine in the Israeli law, and that Israeli courts perceive it to be similar to or at least based on the American concept. However, it is doubtful whether it really is the same doctrine that existed in the American system.”

14 See *Shiran*, supra note 6.

15 See, e.g., H.C. 6218/93, *Dr. Shlomo Cohen v. Israel Bar Ass’n*, 49(2) P.D. 529 [hereinafter Shlomo Cohen].

16 See *Shiran*, supra note 6; H.C. 243/82, *Zichroni v. Broad. Auth.’s Executive Bd.*, 39(1) P.D. 757; H.C. 259/84, *M.L.L.A.N. v. Broad. Auth.*, 38(2) P.D. 673; H.C. 399/85, *Kahana v. Broad. Auth.*, 41(3) P.D. 255; H.C. 76/89, *Eldori v. Broad. Auth.*, 44(1) P.D. 798; H.C. 2868/90, *Israeli Ass’n for Smoking Prevention v. Broad. Auth.*, 46(1) P.D. 163.

17 See *Shiran*, supra note 6, at 386-87.

18 *Id.*

not dictate who the spokesperson conveying the response should be.¹⁹

A fascinating example was the *Kahana* case,²⁰ where the Broadcasting Authority decided to ban reporting on a racist parliament member, Meir Kahana from the “Kach” Party,²¹ except for broadcasting items with intrinsic news value. The Israeli Supreme Court ruled that the Broadcasting Authority’s duties of equal treatment and fairness do not dictate equal coverage of all viewpoints, but also do not enable it to discriminate between viewpoints to an extent that completely hides some of them from the public eye. The Supreme Court differentiated between the Broadcasting Authority’s freedom of expression as a “speaker”²² and its role as a “public stage” in which it should guarantee a platform for viewpoints and opinions.²³

Interestingly, Schejter observes that the formulation of the fairness doctrine by the Israeli Supreme Court was a problematic combination of basic American notions of the fairness doctrine and a broadcasting authority that was subject to a high-level of scrutiny as a public organization. As he notes:

The ideological basis for the ruling was unclear. It was not based on spectrum scarcity, as in the United States, but rather on broadcaster scarcity. Moreover, the fairness the broadcaster was required to practice was not a broadcaster’s fairness but a public authority’s fairness. In other words, Israeli Supreme Court justices sought an American solution to a system that looked more European – European solutions may have been more applicable.²⁴

I would similarly characterize the early Israeli Supreme Court’s rulings as influenced by these issues, yet not entirely. The Court was, and still is, very open-minded to a wide array of legal arguments when analyzing the fairness doctrine. For example, former Chief Justice Shamgar referred to the “constitutional market failure” which enables a handful of private entities to control, design and dictate the public marketplace of ideas, and considered the

19 See *Zichroni*, supra note 16.

20 *Kahana*, supra note 16.

21 It is interesting to note that the “Kach” Party was outlawed shortly after this ruling, because of its racist platform.

22 With due respect to Schejter’s argument, his assertion that the Broadcasting Authority is not allowed to editorialize is false, taking into account the explicit leeway that the Broadcasting Authority has to editorialize using its “speaker’s hat”. Supra note 13, at 300. It is true that the editorializing capability of the authority is bound by its “public stage” duties, but these limitations are quite similar to limitations experienced by private broadcasters who are under obligations of the fairness doctrine.

23 See *Kahana*, supra note 16, at 270.

24 *Schejter*, supra note 13, at 299.

fairness doctrine as one of the remedies to this reality.²⁵ Although some of the legal discourse regarding the fairness doctrine was mimicked by the Israeli Supreme Court (such as the spectrum scarcity rationale), the Court is more susceptible to additional arguments than its American counterpart, even when it comes to the written press.²⁶

The more recent rulings of the Israeli Supreme Court on the fairness doctrine²⁷ were made under different market conditions, as the Israeli television map started to extend in the early 1990s from a single quasi-governmental channel to a more diverse media market, which included a commercial channel as well as cable channels.²⁸

By and large, the same rationales that characterized the Broadcasting Authority as both a “speaker” and a “public stage” were carried over to the commercial concession holders,²⁹ and the fiduciary public duties were extended to the new players in the Israeli broadcasting arena.³⁰

B. Constitutional Aspects of the Fairness Doctrine

Israel does not have a formal Constitution, and therefore does not have a “First Amendment”. While protection of free speech has been one of the main pillars of Israeli constitutional law since the early days of Israeli democracy,³¹ there is no constitutional provision which deals with freedom of expression and

25 Shlomo Cohen, *supra* note 15, at 534-4. It is important to note that Chief Justice Shamgar related also to the written press in his analysis.

26 *Id.*; see also discussion Part I.D.

27 See H.C. 869/92, *Zvilli v. Chairman of the Central Elections Committee*, 46(1) P.D. 163; H.C. 6218/93, *Shlomo Cohen v. Israel Bar Ass’n*, 49(2) P.D. 529; H.C. 2888/97, *Novik v. The Second Broad.Auth. for Television and Radio*, 51(5) P.D. 193.

28 A similar process of a shift from a governmental monopoly to regulated limited competition characterizes many European countries. Rachael Craufurd Smith, in *Broadcasting Law and Fundamental Rights* 43-58 (Clarendon Press, 1997) [hereinafter Craufurd], speaks on a transition in Europe from a “state control and monopoly paradigm” to “regulatory options for an expanding market paradigm”. Although I am not sure that these processes are exactly parallel, the similarities between the market development in Israel and Europe are worth mentioning.

29 Please note that the terms “concession holders” and “license holders” are sometimes used interchangeably. The reason for this is that the terminology and reference to concession holders was shifted to license holders in recent years. There are no practical implications of this transition from a concession scheme to a licensing scheme on our discussion.

30 See *Novic*, *supra* note 27, at 203. Also compare with Germany, where impartiality obligations are more leniently applied on private broadcasting than on public channels. Further compare to Great Britain, where cable television’s impartiality duties are also less stringent than those of the BBC (Barendt’s Book, *infra* note 121, at 102-4, and discussion *infra* Part III.B. This rationale is probably applicable to the Israeli context as well.

31 See H.C. 73/53, *Kol Ha’am v. Minister of Interior*, 7 P.D. 871.

prohibits its infringement. Israeli Supreme Court rulings have created common-law protection of fundamental rights, putting freedom of expression at the top of the protected freedoms, and have found creative ways to circumvent the Court's lack of power to disqualify acts that infringe on freedom of expression. This was achieved primarily through interpretation that implements high democratic standards, and through doctrines which the Israeli court "imported", either in full or in part, principally from the American system.³²

In the last decade, a process widely known as the "Constitutional Revolution" has recognized a set of basic laws as a constitutional document which enables judicial review. These basic laws contain a very limited and partial array of fundamental rights (they are also often called a "cripple constitution"). Freedom of expression is not among this partial listing of rights, and attempts to enact a basic law that explicitly enumerates the right have failed.³³ Other attempts to interpret freedom of expression as part of the right to "human dignity",³⁴ similar to the manner in which the right of equality was "read into" this right,³⁵ and thus affording the right constitutional protection under the basic laws, have thus far ended in a plurality which has not finally determined the issue.³⁶ Therefore, Israeli courts do not have judicial review in their constitutional toolkit when adjudicating matters that involve infringement of freedom of expression.

The *Shin* case is a good example of judicial tactics the Supreme Court employs under the current constitutional regime.³⁷ The *Shin* court dealt with an amendment by the Israeli parliament to the Communications Act which forbids the transmission of channels by cable and satellite that "depict women as a handy object for sexual use."³⁸ The court, which was unable to strike down the law, interpreted it as allowing the broadcasting of the Playboy Channel, and upheld the interpretation which included a ban on hardcore sex channels on cable. One should note that the cable and satellite channels are fully regulated and work

32 See *id.*; see also *infra* note 49.

33 See draft bill Basic Law: Freedom of Expression and Association, 1994 H.H., 325.

34 Article 2 of Basic Law: Human Dignity and Liberty (1992).

35 See H.C. 4541/94, *Allis Miller v. Minister of Defense*, 49(4) P.D. 94.

36 See the H.C. 4463/94 *Golan v. The Penitentiary Service*, 50(5) P.D. 136. One should note, however, that even if the right is eventually proclaimed as protected under the current Basic Law: Human Dignity and Liberty (1992), the clause therein referring to Human Dignity is not framed similarly to the First Amendment of the American Constitution, and the expected scale and scope of the protection would be less powerful than under the American legal system. As a result, it would be more analogous to the scale and scope of the constitutional protection granted by European constitutions. See and compare with *infra* Part III.

37 H.C. 5432/03, *Shin v. The Cable and Satellite Council*, 58(3) P.D. 65.

38 See *id.*

under a licensing scheme. Therefore they are considered as part of the public sphere, and this classification influenced both the legislature and the court's decision.

Despite the lack of a constitutional anchor mooring the right of freedom of expression under Israeli law, democratic tradition and experience demonstrate that freedom of expression's protection under Israeli law is quite robust and does not differ from standards applied in other western democracies. The Israeli Supreme Court is renowned as a fierce protector of human rights, and Israel is not the only western democracy that lacks a formal constitution.³⁹

This divergent constitutional reality of Israeli and American systems may dictate different emphases in the legal discourse of both systems,⁴⁰ yet the similarities between the American and Israeli freedom of speech doctrines are many. While, as I will show, the differences between the Israeli and American media markets may justify a different approach to the doctrine's importance, the constitutional playing field may justify a different plan as well.

The right of freedom of expression under Israeli law does not conflict with the fairness doctrine. Unlike the American system, there is no potential conflict between Israeli constitutional law and the full implementation of the doctrine, not only with regard to the broadcast media, but to some extent, all types of media.

C. The Israeli Media Market Size Constraints (On Scarcity and Market Shares)

The Israeli media market developed according to the "European model",⁴¹ when, in the late 1960s, the first television station was established by the state as an independent broadcasting authority, similar to the British BBC. A second television channel was introduced by a state tender to concession holders in the early 1990s. The fairness doctrine, thus, was introduced to the Israeli legal system at a time when Israel had only one quasi-governmental television channel. Under such a reality, a mechanism like the fairness doctrine seemed imperative, probably even in the eyes of those who oppose reinstating the

³⁹ Great Britain is a good example of a western democracy in a constitutional condition similar to Israel.

⁴⁰ This is true, at least, to some extent. See my criticism on Sunstein, *infra* Part III.B.

⁴¹ The "European model" describes a phenomenon in most European countries. In those cases, the evolution of television stations started as states initiatives, rather than private commercial endeavors, like in the United States. See Schejter, *supra* note 13, at 285; see also Barendt, *infra* note 121, at 101; see also Craufurd, *supra* note 28, at 28-42 (describing the paradigm the European communications law developed as "state control and monopoly").

doctrine in America.⁴²

Currently Israel has a handful of television channels. This principally stems from financial reasons - Israel is a small country with a small population, which speaks a distinct language. Israel's six million citizens constitute the only population in the world which speaks Hebrew. Therefore, a market share of such small proportions serves to strengthen a kind of "natural monopoly", which restricts the economic feasibility of multiple players in the media market.

At present, the Israeli television market consists of three terrestrial channels: one quasi-governmental channel which is self-regulated and two licensed commercial channels under the authority of the Second Broadcasting Authority, which serves as their regulator.

The three cable companies that were established in the early 1990s did not compete because they were geographically divided. As individual companies, however, they were unable to compete with the satellite company that entered the market in 2000. As a result, the three cable companies merged in 2003, after both their regulator and the antitrust authority were convinced that competition between the satellite company and the three divided cable companies was unfeasible.⁴³ Unlike in the United States, the Israeli cable and satellite companies are fully regulated, and are both under the supervision of the same regulator - the Council of Cable and Satellite Transmissions.

Under the aforementioned market conditions, "scarcity" might receive a new meaning.⁴⁴ Because multiple players cannot freely compete in such a limited market, regulation is perceived, by and large, as a must, and a deregulation process that the American media system has experienced in recent years seems inappropriate in the Israeli setting.

The risks of unregulated competition are that it might eventually result in the collapse of some of the stations and deplete the number of television channels to an extent that might jeopardize pluralism in the Israeli media. "Forced" efforts to

42 This link between the national television channels and the public authority's characterization of the doctrine influenced the way the doctrine was construed, at least in the early Israeli Supreme Court rulings, since the Israeli Broadcasting Authority was subject to the duties of public entities. See Craufurd, *supra* note 28, at 28-42; see also Schejter, *supra* note 13, at 285.

43 The decision also involved considerations which are external to the media market, such as competition in the telephony field, where Israel currently has only one governmental owned company - "Bezeq". The united cable companies had committed to enter the telephony market. It is interesting to note that one of the main shareholders of the rival satellite company was "Bezeq", since it recognized the future rival in the telephony market. Telephony via cable has entered the experimental stages only towards the end of 2004.

44 This is probably what Schejter meant when saying that the doctrine "was not based on spectrum scarcity, as in the United States, but rather on broadcaster scarcity." See Schejter, *supra* note 13, at 299.

increase the number of players in the Israeli market might be disastrous: the newest of the three terrestrial channels, known as “Channel 10”, has struggled since its inception in the year 2002, and it is still unclear whether it will survive.⁴⁵

The Israeli “scarcity” therefore stems from the confinements of the small market, and the lack of potential for substantial market growth.⁴⁶

D. The Fairness Doctrine’s Principles and the Written Press

The distinct dichotomy between the printed press and broadcast media that exists in the United States does not exist under Israeli law.⁴⁷ The Israeli book of statutes contains restrictions reminiscent of the original British Mandate. These require newspaper licensing, enables censorship, closing of newspapers, and other draconian measures.⁴⁸ Although most of this legislation was not annulled by the Israeli parliament, the Supreme Court interprets it very narrowly, applying high standards as appropriate for a democracy, which effectively mitigates their seemingly threatening nature.⁴⁹ Consequently, the distinction between written press and broadcast media has little, if any, value in the Israeli system. Interestingly enough, a more relevant distinction in the Israeli system is the distinction between public and private spheres,⁵⁰ but, as will be shown below, even this distinction has lost its distinct dual nature in the Israeli jurisprudence.

In the *Shlomo Cohen* case,⁵¹ the Supreme Court discussed a petition submitted by the leader of the opposition in the Israel Bar Association⁵² who asked to compel the bar to publish an editorial in its periodical regarding the

45 See Craufurd, *supra* note 28, at 235-36 (exploring similar difficulties in other European markets, such as the French media market).

46 Similar difficulties might be relevant to other small media markets with limited expansion capabilities (in small European countries with distinct languages, such as Greece, The Netherlands, etc).

47 See and compare discussion on *Red Lion*, *infra* note 62, *Miami Herald*, *infra* note 67 (see also *infra* Parts II.A, II.B.iii), and *Van Alstyne*, *supra* note 2, at 480-7).

48 See, e.g., the Press Ordinance (1924) and the Defense Regulations (Emergency) (1945).

49 See, e.g., *Kol Ha’Am*, *supra* note 31, and H.C. 680/88, *Snitzer v. Head of Military Censorship*, 42(4) P.D. 617. The Supreme Court would have probably struck down these laws as unconstitutional if it were able, but under the current constitutional regime, judicial review is not an option in the case of a law that infringes on free speech.

50 See Schejter, *supra* note 13, at 299 (“The dichotomy created was not between broadcast and print media, but between public and private media.”). This is true to some extent, yet in somewhat of a generalization.

51 *Supra* note 15.

52 The Israel Bar Association is classified as a semi public body, and this was also a part of the court’s consideration. Still, the distinction of public versus private entities bears less significance under Israeli law (see discussion Part I.D., *infra*).

upcoming elections to the bar's institutions. The bar declined, stating that the periodical is professional in nature, and has no editorials from either side of the bar's political fence. Chief Justice Shamgar, in a two to one dissent, advocated granting the petition, allowing the petitioner to publish an editorial. The two other justices were unwilling to accept the petition, classifying it as too broad a right of access, and focusing on the fact that no editorializing was made on behalf of the bar itself (as opposed to a balanced debate which the fairness doctrine prescribes), although they seemed willing to require the publication of an opposing editorial to balance an existing one.

While the Israeli Supreme Court was reluctant to enforce a fairness doctrine in its affirmative sense, as a *de facto* right of access, on the print media, the current trends lead toward recognition of some kind of limited intervention, even in the sacred medium of the written press. This is especially true when it comes to personal attack rules, which are perceived in Europe in a broader sense than in the American system.⁵³

Chief Justice Barak expressed his views on the written press recently in a public lecture which was also printed as a law review article, as follows:

It is true that as a private corporation a newspaper enjoys all the individual rights and duties that every private entity has. But according to the proposed notion [to see newspapers as a two-dimensional entity – a hybrid of private and public bodies which should be regarded as a common carrier of public discussion], as a body that fulfils public functions, some basic public law principles apply to it as well. These are not all the rules that apply to every public authority. It [the written press] is not a statutory corporate, and it does not exercise governmental authority. But it is the public's trustee. All the principles of public law which are needed to safeguard the public *fora* and prevent unwanted takeover should be applied to it. Therefore, it should act objectively in regard to this platform. It should not discriminate. It should uphold standards of reliable and trustworthy reporting. It should update the reader – as Justice Goldberg recently ruled in a different context of freedom of expression regarding defamation – in developments that have occurred after the original publication was assimilated in the public conscience. It should not have conflicts of interests. It should act out of duty. It should give a right of access. It should act according to the fairness doctrine, and all in a reasonable manner and to an appropriate extent, as the fundamental nature of each individual case dictates. In this context, one should consider, naturally, the owner's property and freedom of occupation rights. Also, the nature of the

53 See Schejter, *supra* note 13, at 285-6; Article 25A to the Defamation Act, 1965 (as amended in Amendment # 7 – 2002, also known as the “Kraus Amendment”), and the Supreme Court's rehearing with a broader panel of the Kraus case: C.A. 7325/95, Yediot Aharonot v. Kraus, 52(3) P.D. 1.

newspaper has to be taken into account.” (translation by the author).⁵⁴

Although the quote above is from a public lecture (converted to a law review article), and is not the law of the land, it may provide a good indication of current trends regarding the Israeli Supreme Court’s stand on the issue, from its most influential and prominent figure.

General constitutional doctrines in the Israeli law that have emerged in recent years blur the once clear distinction between the private and the public realm, acknowledging that some entities fall into an intermediate category of “Dual Normative Bodies”. This results in some private entities with public characteristics being subject to some public law principles and duties.⁵⁵ Taking this into account, with former Chief Justice Shamgar’s two to one dissent in *Shlomo Cohen*, which supported extension of limited right of access to the print media, leads to a conclusion that application of fairness doctrine standards on the written press in Israel is feasible and even likely to be introduced in the near future. Furthermore, it does not contradict the basic principles of the Israeli legal system. In any case, even the majority opinion in the *Shlomo Cohen* case stated that the mere fact that the broadcast media is subjected to specific regulation, does not necessitate a positivistic interpretation which negates the application of similar principles in the lack of written regulation applicable to the written press.⁵⁶

The medium-specific approach that the American courts have taken is also

54 Ahron Barak, On the Private Press, 2 Ali Mishpat 293, 294-5 (2002). One should note that in this article, Chief Justice Barak specifically mentions *Miami Herald*, infra note 67, and the “Hutchins Committee” (Commission on Freedom of the Press, A Free and Responsible Press (1947)). For elaboration on the “Hutchins Committee” see Lee C. Bollinger, Images of a Free Press 24-34 (1991) [hereinafter Bollinger].

55 See, e.g., C.A. 3414/93, On v. The Diamond Stock Exchange Factories Ltd., 29(3) P.D. 196. This approach has not yet been implemented with regards to newspapers as such, but this doctrine has sprouted roots, and will probably be implemented with respect to the written press in the near future.

56 See *Shlomo Cohen*, supra note 15 (Bach, J., concurring). It seems premature to determine whether under certain circumstances the Israeli Supreme Court will eventually apply the fairness doctrine’s principles on the internet. It seems that the court would be inclined not to impose any duties on internet sites that are not mandated by statute (see H.C. 16/01, “Shas” Faction v. Elections Committee, 55(3) P.D. 159, 164-5, and Itzhak Zamir, Free Speech in the Internet, 6(2) Mishpat Umimshal 353, 354 (2003)). Another position was expressed by, Yuval Karniel, and Israeli scholar, who claims that as long as there is de facto free access to the internet there is no room for legislation to enable right of access to the internet. Nonetheless, Karniel mentions that if ISPs become “gatekeepers”, and restrict access to internet use, it may well justify a revision to this approach, and warrant the statutory regulation of a right of access (see Yuval Karniel, Freedom of Expression in the Internet, 1 Ali Mishpat 163, 178-9 (2000)).

less appealing in the eyes of European courts – some of which (such as the French and Italian courts) indicated a willingness to see newspapers and the audiovisual media as part of a wider communications sector governed by common principles.⁵⁷

Having reviewed the main features of the Israeli fairness doctrine, I will now turn to the American system and review its main characteristics as well. These overviews will enable the conduct of a comparative analysis of both systems.

PART II: THE AMERICAN FAIRNESS DOCTRINE

A. The American Fairness Doctrine – Main Features and Erosion Process⁵⁸

As mentioned, the American fairness doctrine was repealed in the late 1980's, after more than five decades in which it was a part of the map of American telecommunications law. The doctrine originated from an acute need for regulation that served as "traffic police" during the early days of radio, and was a necessity in order to ensure the existence of a functioning radio market. Therefore, the spectrum scarcity rationale has been at the base of the doctrine since its inception in the early 1930s.⁵⁹ The fairness doctrine prescribed general obligations on broadcasters to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance,"⁶⁰ and these obligations were enforced by the FCC.⁶¹

57 See Craufurd, *supra* note 28, at 201-2.

58 The overview (and entire discussion) of the American fairness doctrine deliberately avoids details regarding former rulings which shaped it, or other legal issues which examine the "deceased" doctrine, since I believe that an elaborate "postmortem" will not serve the purpose of this paper. My goal is to provide a basic overview as to the main reasons for its dismissal, focusing on the policy level, the gradual process that caused it to be rescinded, while focusing upon developments subsequent to its demise. The broader policies and the main reasons which brought about the doctrine's dismissal enable conducting a comparative analysis as done in this paper. For a more elaborate discussion of the fairness doctrine see, *inter alia*, Ferris and Kirkland, *Fairness – The Broadcaster's Hippocratic Oath*, 34 *Cath. U. L. Rev.* 605 (1985); Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 *Duke L. J.* 151 (1982); see also Johnson, *infra* note 59.

59 See the Communication Act (1934); Logan, *infra* note 81, at 1693-5. Some attribute the first fairness doctrine's characteristics' even a decade earlier. See Nicholas Johnson, *With Due Regard to the Opinions of Others*, 8 *Cal. Law.* 52 (1988).

60 47 C.F.R. 73.1910 (repealed 1987).

61 One should note that over the entire history of the doctrine the number of significant cases in which the FCC even sent a letter to a station or network were so small as to be almost *de minimis*, and actual sanctions (fine or license suspension) were exceedingly rare. See Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 *Duke L.J.* 899, 925-30 (1998) [hereinafter Robinson].

The landmark ruling on the fairness doctrine is the *Red Lion* case, where the Supreme Court ruled eight to none in favor of the policy and its principle rationales, deeming it constitutional.⁶² The court relied on the “spectrum scarcity rationale” as justifying regulation, but also discussed fiduciary duties of the license holders to reflect opinions other than its own, negation of private censorship, and an emphasis on the rights of viewers and listeners, rather than broadcasters.

The *Red Lion* court left a gateway for a reexamination of the doctrine’s necessity and constitutionality, by stating that “if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”⁶³ As the District of Columbia Court of Appeals recently commented on the doctrine’s validity, “[A]lthough *Red Lion* has been ‘the subject of intense criticism’, it is still binding precedent.”⁶⁴ Yet over the years, the fairness doctrine was further developed and its boundaries defined by several rulings which decreased its scale and scope and disturbed the stability of some of its foundations.

Among these rulings was *CBS v. Democratic National Committee*,⁶⁵ where it was ruled that the doctrine does not compel the airing of political editorial advertisement, which, in that case, involved the war in Vietnam. Justice Potter Stewart said, in a concurring opinion, that he had joined the *Red Lion* majority “with considerable doubt”. Justice Douglas added that he had not participated in *Red Lion* “and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime.”⁶⁶ Although the court continued upholding the doctrine, and most justices continued endorsing it, the *Red Lion* consensus regarding its constitutionality as well as its need was gone.

Another nail in the doctrine’s coffin was the Supreme Court’s opinion in *Miami Herald Publishing Co. v. Tornillo*,⁶⁷ which, although suggesting striking parallels to *Red Lion*’s consideration of the personal attack doctrine,⁶⁸ never

62 395 U.S. 367 (1969) [hereinafter *Red Lion*]. It is important to note that the case involved the personal attack rules in radio. Nonetheless, it is the principle ruling in regard to the fairness doctrine, also in its political sense, demanding discussion of conflicting views on issues of public importance.

63 *Id.*, at 393.

64 See *RTNDA v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999); see also Robinson, *supra* note 61, at 965-6 (arguing that *Red Lion* is “at best a crippled precedent for the new age.”)

65 412 U.S. 94 (1973).

66 *Id.*, at 154.

67 418 U.S. 241 (1974) [hereinafter *Miami Herald* or *Tornillo*].

68 The case involved a Florida statute which gave political candidates a legally enforceable right of reply to newspaper attacks. State legislative candidate Patrick Tornillo sued the *Miami Herald*, which challenged the statute on First Amendment grounds, and won.

mentioned or differentiated *Red Lion* in its ruling. While this decision did not deal with the fairness doctrine *per se*, since it involved the written press, its negative effects on the fairness doctrine are evident, and some would argue that *Red Lion* and *Tornillo* cannot be reconciled.⁶⁹ This ruling sharpened the medium-specific approach, and is heavily based upon libertarian views of the First Amendment.⁷⁰

The Supreme Court sent further mixed signals regarding the fairness doctrine, while overturning a statute precluding public broadcasters from editorializing in *FCC v. League of Women Voters of California*.⁷¹ Some would say that the Court hinted to the FCC that it might be open to a policy shift regarding the doctrine, although it continued its recognition in the scarcity rationale.⁷² The Supreme Court was not the only judicial authority responsible for the erosion of the doctrine. The District of Columbia Court of Appeals had a considerable part in further eroding the doctrine, and eventually putting it to rest.⁷³

The FCC had planted the seeds for the doctrine's revocation in its fairness report in 1985.⁷⁴ In its decision to repeal the doctrine,⁷⁵ the Commission pointed to evidence that the fairness doctrine chilled broadcasters from presenting controversial subjects and to evidence of greater diversity in available means of communication. Thus, the FCC took advantage of the opening left by the Supreme Court in *Red Lion* and the subsequent erosion as described above.

The FCC's decision to repeal the doctrine was upheld by the D.C. Court of

69 See *infra*, discussion Part II.B.iii and Logan, *infra* note 81, at 1725-27 for a review of views according to which the two rulings cannot be reconciled and also for the opposing views.

70 See *infra* discussions Part II.B.i-iii.

71 468 U.S. 364 (1984).

72 See Johnson, *supra* note 59 (referring to two footnotes in which the justices gratuitously raised questions about that rationale: "We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcasting regulation may be required." The next footnote further encouraged critics, noting the FCC's suspicions that the doctrine "impeded, rather than furthered, First Amendment objectives," and adding that if "the Commission . . . decides to modify or abandon these rules . . . we express no view on the legality of either course.").

73 See, e.g., *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), and *Meredith Corporation v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), where the court suggested to the FCC that it might find "the doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue." *Id.*

74 102 F.C.C. 2d 145.

75 2 F.C.C. Rcd. 5043 (1987). The FCC further commentated regarding the questionable constitutionality of the doctrine, in addition to its claims against the chilling-effects on broadcasters. See Van Alstyne, *supra* note 2, at 483 n. 100.

Appeals in *Syracuse Peace Council v. FCC*.⁷⁶ In upholding the FCC's decision to repeal the doctrine, the Circuit Court did not negate its constitutionality nor limit the possibility that it could be reinstated. Rather, it simply declined to find the FCC's decision arbitrary or capricious.⁷⁷ Also, the court contributed to the erosion in the spectrum scarcity rationale by stating that "recent increases in broadcasting outlets undercut the need for the doctrine."⁷⁸

As we can see from these decisions, the abandonment of the fairness doctrine was a part of a gradual process that eroded its main justifications, such as the spectrum scarcity rationale. Some restricted forms of the underlying principles of the doctrine outlived it as part of the American jurisprudence, namely the "Equal Time Rules"⁷⁹ which still exist, and the "Personal Attack Rules", which were recently overturned.⁸⁰ Yet the overall broader principle of "enforcing fairness" on an ordinary basis was abandoned.

B. The Constitutionality Debate – Two Contending Approaches⁸¹

The debate regarding the constitutionality of the fairness doctrine is far from being resolved. In my view, it mainly stems from tension between two contending approaches to the interpretation of the First Amendment – the

⁷⁶ See *Syracuse Peace Council v. F.C.C.*, 867 F. 2d 6543 (D.C. Cir. 1989) [hereinafter *Syracuse Peace Council*].

⁷⁷ See Craufurd, *supra* note 28, at 239.

⁷⁸ *Syracuse Peace Council*, *supra* note 76, at 660.

⁷⁹ 47 U.S.C. § 315 (1994). The rule provides that whenever a licensee permits the "use" of broadcast station facilities by a "legally qualified candidate for any public office" it shall afford "equal opportunities" to all other candidates for that office; an exception is provided for appearance of a candidate in a "bona fide newscast." See Robinson, *supra* note 61, at 925-6.

⁸⁰ 47 C.F.R. 73.1920. This rule states that if an attack on the "honesty, character, integrity, or like personal qualities" of a specific person or group is made during the presentation of views on controversial issues of public importance, the station must notify the attacked person or group of the date and time of the attack and the program in which it took place. The station is required to provide a script, tape, or an accurate summary of the attack and it must offer the attacked person or group a reasonable opportunity to respond using the station's facilities (see also Van Alstyne, *supra* note 2). Another related rule was the "political editorial rule" (47 C.F.R. 73.1930), which required a station that broadcasts an editorial endorsing a candidate to notify the candidate's opponent of the date and time of the editorial. It also required providing a script or tape of the broadcast and the offer of a reasonable opportunity to respond using the station's facilities (see also Van Alstyne, *id.*, *id.*). Both rules were invalidated in 2000, per *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C.Cir. 2000).

⁸¹ The following representation of the two models is based upon the excellent article by Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcasting Regulation*, 85 *Calif. L. Rev.* 1687, 1716-1725 (1997) [hereinafter Logan]. For further elaboration on the distinction, please refer there.

“absolute” approach and the “Madisonian” approach. Both approaches will be discussed and then used as an analytical tool in order to assess the question of the doctrine’s constitutionality.

i. The Absolutist View of the First Amendment

The most prominent theory of the First Amendment holds that its prohibition on Congress not “abridging the freedom of speech, or of the press” should be interpreted broadly in a libertarian manner. Proponents of an absolutist view, such as Justices Hugo Black and William O. Douglas, see the First Amendment as an immovable bulwark against governmental efforts to censor speech or impose an official orthodoxy.⁸² Government should not actively participate in the “marketplace of ideas” but, at most, be a neutral bystander. Neutrality calls for any regulation of speech to be content-neutral. Anything else receives the highest scrutiny, with a strong presumption of invalidity. Absolutists fear the most from governmental interference, whether rightfully or not, and see its intervention as worse than the alternative of its involvement in the status quo, no matter what the circumstances that might require intervention. These perceptions go hand in hand with libertarian views of a minimalist intervention by the state. Absolutists cite the language and history of the First Amendment to support their views, but its origins can be traced to classic liberal writers, such as John Stuart Mill and others.⁸³ Freedom of speech is an end in itself, a hallmark of individual liberty. The “marketplace of ideas”⁸⁴ is also the best means of finding truth, or at least of achieving popular consensus. The marketplace metaphor has been an integral part of the ethos of First Amendment protection throughout the twentieth century.⁸⁵

The absolutist marketplace conception has had a significant influence on the Court’s First Amendment jurisprudence.⁸⁶ It bars government attempts to censor

82 See, e.g., *CBS, Inc. v. Democratic Nat’l Comm.*, supra note 65, at 156 (Douglas, J., concurring) (“The First Amendment is written in terms that are absolute....The ban of ‘no’ law that abridges freedom of the press is in my view total and complete.”).

83 See John Stuart Mill, *On Liberty* (1861); Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* 145-7 (1994).

84 For elaboration on the sources of the “marketplace of ideas” metaphor, see Logan, supra note 81, at 1717-8.

85 See e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J. dissenting); *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

86 See Cass R. Sunstein, *Democracy and the Problem of Free Speech* 1-17 (1993). One should note that there is no necessary correlation between the “absolutist” position of Black and Douglas and the “marketplace” metaphor.

particular viewpoints or skew debate but it also severely limits benign regulatory efforts to provide for a more robust, open public dialogue. It provided the model for the Court's decision in *Tornillo* to strike down a right-of-reply statute as applied to newspapers. To conclude, the absolutist model advocates a laissez-faire approach, placing its faith in an unregulated marketplace as the best means of achieving the individual liberty and political discourse that the First Amendment promises.

ii. Public Debate Model of the First Amendment (The “Madisonian” Model)

A contending approach to the interpretation of the First Amendment views it as justifying government regulation of broadcasting as a means of fostering a more diverse and informative use of the media. This approach seeks to safeguard against government censorship and viewpoint discrimination, but envisions an active role for the government in promoting public debate and democratic goals. Unlike absolutists, the supporters of the public debate model are less fearful of governmental intervention in the mass media arena, and they recognize the severe ills that self-censorship and nongovernmental entities (such as media conglomerates) can impose on free speech. Countering these bad influences and repairing the market dysfunctions that these entities might create are sufficient justifications by themselves for governmental intervention. The approach tends to see the media's role as a platform to promote democratic discourse on a regular basis,⁸⁷ and, currently, its main proponents are Cass Sunstein and Owen Fiss.⁸⁸

One of the main criticisms on the absolute model by the public debate model proponents is the naïveté of its view of the media market as a “free marketplace of ideas”. As Professor Barron, who was one of the early and main advocates of this approach in the 1960s pointed out:

Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the ‘marketplace of ideas’ is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist...A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the

87 See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), and compare to the “Equal Time Rules”, supra note 79, which applies similar principles only at proximity to elections.

88 See, e.g., Cass R. Sunstein, *Why Societies Need Dissent* (2003); Cass R. Sunstein, *Republic.com* (2001); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); Owen Fiss, *Liberalism Divided* (1996).

managers of mass communications.⁸⁹

Sunstein's "Madisonian Model" emphasizes the importance of the lively discussion of political and social issues, and views the media's role as a supplier of information and a vigorous exchange for ideas and opinions. This perception looks at the media as if it had a duty to facilitate a well-informed public and to promote democratic values. It also recognizes the critical role media plays in our political and civic dialogue.⁹⁰

Sunstein also tries to extend the public forum doctrine to mass media by claiming that in today's society, mass media serves as the street corners and public parks of the past. He attempts to use this analogy to apply these rationales to mass media. Sunstein puts the emphasis on listeners rather than speakers, and endorses a "positive" perception of the First Amendment to enable some sort of additional speech rather than a negative right, which prevents governmental censorship.⁹¹ As he says, "a legal system that is committed to free speech forbids government from silencing dissenters."⁹²

Regulation of broadcasting that is intended to promote public interest does exist, but it is very scarce and marginal. Where such regulation exists, it is characterized by either providing educational content for children, or in furthering democratic debate in the context of elections.⁹³ These characteristics may even be justified through the absolutist prism, since libertarian approaches tend to see children's protection, and even advancement, as permissible, and elections are a limited time of a democratic climax. Even if we understand these requirements as a deviation from the absolute model, it is just a slight one.

iii. The Fairness Doctrine – In Light of the Two Conceptions

The notions of the imperfect telecommunications market, which stood at the base of *Red Lion* and Barron's quote, were eroded throughout the years for several reasons. First and foremost, the deeply rooted First Amendment jurisprudence of the printed press (the absolute approach) has generally prevailed over the exceptions that were tailored for the broadcast media. The highlight of the dissonance between the First Amendment doctrines and the "notions of fairness" in the spirit of *Red Lion* was probably in the *Miami Herald v. Tornillo*

89 Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967); see also Jerome A. Barron and C. Thomas Dienes, *First Amendment Law*, 387-395 (1993).

90 Cf. Barendt, *The First Amendment and the Media*, *infra* note 120, at 47.

91 See Cass R. Sunstein, *Why Societies Need Dissent*, 96-110 (2003).

92 *Id.* at 110.

93 See Logan, *supra* note 81, at 1719-21 (referring to the Children Television Act (1990), and the Communications Act "Equal Time" requirements); see also Notice of Inquiry, *Public Interest Obligations of TV Broadcast Licensees*, *infra* note 111.

case, where, only five years after *Red Lion*, the Supreme Court did not differentiate between the two cases or even mention *Red Lion* in its decision, despite the fact that this case seemingly called for analogies and distinctions.

When it came to the written press, which is at the core of the First Amendment's protection and legacy, there was no room for any approach other than the absolute approach. As the court said, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the constitution and like many other virtues cannot be legislated."⁹⁴

Along the years, the absolute approach to the First Amendment was extended to most mass media types, including the internet⁹⁵ and, to a large extent, cable television, by applying the *Miami Herald* rationales.⁹⁶

Rulings that broadened, rather than narrowed, the robust First Amendment protection to most media, make *Tornillo* seem like a more appropriate standard for these media than *Red Lion*. *Red Lion*, although seemingly still good law, was marginalized to an extent that it was portrayed as an abnormality, with insufficient justifications to differentiate it from First Amendment doctrines.⁹⁷

Both Logan and Fiss analyze the Supreme Court's First Amendment cases as "wax and wane between the absolutist marketplace model and the public debate model, never quite settling at either end."⁹⁸ The debate as to whether *Red Lion* and *Tornillo* can be reconciled or whether they are in a stark contradiction is a long and bitter one, and there is much academic writing in support of both views.⁹⁹

While it is true that the public debate model arguments were an integral part of the court's ruling in *Red Lion*, and are "admissible" arguments in the broadcasting arena, they cannot stand on their own without further justifications. Some, like Sunstein,¹⁰⁰ tend to attribute more power to the public debate model arguments in the broadcasting arena, which gives them some viability on their own. These commentators present a different paradigm for the broadcasting media than for the written press, merely because of the different nature of the

94 *Miami Herald*, supra note 67, at 256.

95 See *Reno v. ACLU*, 521 U.S. 844 (1997).

96 See, e.g., Justice Kennedy in *Turner Broadcasting System v. FCC*, 512 U.S. 622, 640 (1994) ("[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media; see, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 248-258.")

97 See note 64, supra, and accompanying text.

98 See Logan, supra note 81, at n.209 and accompanying text.

99 See *id.*; see also Bollinger, supra note 54, at 109; Van Alstyne, supra note 2, at 480-88.

100 See, e.g., Logan, supra note 81, at 1723.

mediums, and not just because of the scarcity rationale.¹⁰¹ They tend to see these traits as independent, so even in the lack of scarcity, the different treatment of the mediums can still be upheld.¹⁰² Although I find it tempting to agree with these notions, they are not well substantiated, and that the public model debate arguments, though admissible in the broadcasting realm, cannot stand on their own.

In conclusion, the current paradigm recognizes the “public debate/Madisonian” model in an extremely narrow context, namely, only when it coincides with another justification for regulation, such as spectrum scarcity. The model’s rationales, however appealing, are not satisfactory by themselves to regulate nonbroadcast speech.¹⁰³ Broadcasting, by its use of the airwaves with their “public characteristics” and limited resource qualifications, serves as an exception that enables the court to apply the Madisonian model. *Yet this is the exception – not the rule. The general rules are still dictated by the absolute paradigm.*

Unfortunately, the spectrum scarcity argument lost some of its stamina, and although it was not discarded by the courts, the seeds for its dismissal have already been sown.¹⁰⁴ Adding to this, the different treatment of cable and satellite even weakens the reasons to continue treating broadcasting differently. If cable and satellite are not bound by the same duties as broadcasting, the dissonance between broadcasting and other media only sharpens. It is hard to explain why the same television set is regulated differently when receiving broadcast channels as opposed to cable channels. They look the same, therefore our intuition tells us to treat them the same.

It seems that old concepts of broadcasting as a form of media which serves as a “tribal fire” and therefore necessitates a balanced coverage aimed at the unsuspecting “captive audience” became somewhat obsolete, primarily due to technology.¹⁰⁵ Although I would claim that we still have (and should have) an underlying expectation from broadcasting channels to offer a balanced and

101 Sunstein even believes that these rationales should be implemented on the internet. See Cass R. Sunstein, Republic.com (2001).

102 See e.g. Logan, *supra* note 81.

103 See Justice Kennedy’s quote at note 96, *supra*.

104 See discussion Part II.A., *supra*.

105 See, e.g., Herbert Marshall McLuhan, *Understanding Media: The Extensions of Man* 7 (1964), where he coined the phrase “the medium is the message.” See also Robinson, *supra* note 61, at 902. The fairness doctrine was blooming in an era when technology actually was a relatively good predictor for the nature of the channel. Broadcasting, as its name implies, contains an underlying assertion that its target audience is the public-at-large, and that the medium is expected to offer a broad and balanced coverage.

comprehensive report on issues of public interest, this expectation varies according to the nature of the channel at hand. Channels that are affiliated with a certain political agenda, such as “Fox”, are not really expected to offer a balanced coverage, since they do not have the pretence of objectivity. One could say that the expectation for balanced coverage is derived from a premise of neutrality.

Technology blurred the differences between broadcasting and narrowcasting. Convergence of different media types and the proliferation of the Internet further reshuffled the cards. The medium is increasingly an invalid criterion for the differential treatments of different media, unlike some have understood the hidden rationale behind *Tornillo*.¹⁰⁶ The medium-specific approach simply does not make much sense.

Finally, the rulings in recent years that extended the absolute paradigm to more media types, such as the internet, only strengthen the current absolute paradigm, at the expense of its Madisonian rival.

In order for the Madisonian model to prevail in the lack of special circumstances (such as spectrum scarcity), or to apply it on *all* audiovisual media, there is a need for a *paradigm shift*. Under the current status quo, while the reinstatement of the fairness doctrine is feasible, it will not stem from the general First Amendment doctrines, but rather, from their exceptions. Furthermore, if the court will finally dismiss the spectrum scarcity rationale as obsolete, it might prevent the reinstatement of the doctrine altogether.

C. Political Aspects on the Reinstatement Prospects of the Fairness Doctrine

Although some futile attempts were made in the past to reinstate the doctrine, it seems that the last word has not yet been spoken. Voices calling for its reinstatement are still heard.¹⁰⁷ The FCC’s policy-making approach to the

¹⁰⁶ See *Bollinger*, supra note 54, at 109 (“Although it is uncertain whether the Court in *Miami Herald* saw it as such, the critical difference between what the Court was asked to do in *Red Lion* and what it was asked to do in *Miami Herald* involved choosing between a partial regulatory system and a universal one. Viewed from that perspective, the Court reached the correct result in both cases.”). *Bollinger* also notes that “[t]he Court need not, however, isolate the electronic media to achieve this result.” *Id.*

¹⁰⁷ For a quite recent example of calls for the doctrine’s reinstatement, see speech of Michael J. Copps, Commissioner Federal Communications Commission, Future of Music Coalition Policy Summit (May 3, 2004), 2004 FCC LEXIS 2430; FCC news release, Statement of Commissioner Jonathan S. Adelstein, Dissenting (June 2, 2003), 2003 FCC LEXIS 3122. Both Copps’ speech and Adelstein’s dissent use the same language in criticizing the Commission and backing a reinstatement of the fairness doctrine. Copps said in a speech condemning the Commission majority’s decision on June 2, 2003 to loosen media ownership rules:

fairness doctrine can be linked to political motivations, and it is attributed to Republican policies, primarily as part of a broader deregulation process of the mass media.¹⁰⁸

In 1987 a bill to place the Fairness Doctrine into federal law passed the House by a three to one vote, and the Senate by nearly two to one, but it was vetoed by President Ronald Reagan.¹⁰⁹ In 1989, the Fairness Doctrine easily passed the House once again, but did not proceed further as then President George Bush threatened a veto. In 1991, hearings were again held on the doctrine, but President Bush's ongoing veto threat stymied passage.¹¹⁰

From a political perspective, it seems that the proponents of the reinstatement of the fairness doctrine are affiliated with the Democratic Party, whereas the opponents are aligned with the Republican Party. This trend can be explained by general policies towards deregulation of the media which have prevailed since the Reagan administration. Reviewing viewpoints within the FCC reveals that commissioners' views on the issue are politically oriented, and that they usually draw a partisan line.

During the Clinton administration, attempts were made to promote public interest obligations within the FCC,¹¹¹ and even a declaratory commitment

Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and flashed the green light to the forces of consolidation, until now a handful of giant conglomerates are on the inside track. Fundamental protections of the public interest have been allowed to wither and die. Vertical safeguards, such as the financial syndication rules, are long since gone. Horizontal protections were whittled significantly down long before June 2. License renewal is a joke. Requirements like ascertaining the needs of the local audience, the fairness doctrine, teeing up controversial issues, providing demonstrated diversity in programming – all these and more have long since been abandoned. Rigorous public interest scrutiny is more a quaint relic of the past than an effective safeguard to protect against excessive concentration.

Copps, Future of Music Coalition Policy Summit. See also Democrat Congressman Maurice Hinchey's recent initiative to reenact the doctrine: Hinchey Pushes Fairness Doctrine Bill to CWA, *Communications Daily*, March 31, 2004. For the sake of fairness, it should be noted that the proponents of the doctrine's reinstatement are not many. See Robinson, *supra* note 61, at 929-30.

108 To learn more about the political settings behind the attempts to revoke the fairness doctrine, which led to the FCC's decision in 1987, see Logan, *supra* note 81, at 1693-6.

109 See S. Rep. No. 742-100 (1987), reprinted in 133 Cong. Rec. H4160 (daily ed. June 3, 1987) (enacted); Veto of the Fairness in Broadcasting Act of 1987, 23 Weekly Comp. Pres. Doc. 715 (June 19, 1987) (vetoing S. 742-100 (1987), reprinted in 133 Cong. Rec. H4160 (daily ed. June 3, 1987), at 715-16; and How to Ensure Fairness on the Air, *The New York Times*, January 9, 1988, at 26.

110 See <http://www.twf.org/News/Y1997/Fairness.html> (last visited May 12, 2005).

111 See, e.g., Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, 14 FCC Rcd 21633 (1999). A possible understanding of the Notice of Inquiry is that it was issued for political convenience subsequent to the Gore Commission report, and that it was primarily a lip service that was not implemented, except in the case of children's television. I thank Glen Robinson for this comment.

public interest in broadcasting was reaffirmed by Congress.¹¹² Nevertheless, the “window of opportunity” to reinstate the doctrine during a democratic administration was missed.

Commentators believe that the current administration is unlikely to shift its public interest policies, including reinstatement of the fairness doctrine.¹¹³ Relying on the premise that the current administration will not change the status quo and will not reinstate the doctrine, the next opportunity for the reinstatement of the doctrine might be at least four years from now. By then, the doctrine will have been absent from the American legal scene for more than two decades. This long period of time tremendously decreases the probability of reintroduction of the doctrine to the American system.

The importance of separately reviewing the political aspects of the doctrine’s reinstatement prospects from a legal analysis is that the doctrine’s reinstatement is primarily a public policy issue, and the prospects that the judiciary will get a chance to reinstate it are slim. By and large, the judiciary is poorly equipped to handle such issues as the doctrine’s reinstatement vis-à-vis regulators and the legislator.¹¹⁴

D. Many Channels, Fewer Opinions – The American Mass Media in the Aftermath of 9-11

As mentioned, the spectrum scarcity rationale has lost much of its weight due to technological developments. The current American media market is comprised of dozens of television channels, numerous radio stations, as well as other media outlets – only some of which are regulated.

The American media market is not entangled with size confinement as is the Israeli, and some European, markets. The American market has around 280 million potential domestic consumers and has great ability to expand its audience by exporting media products to English speaking countries, and beyond. The effects of globalization and Americanization create demand for American media

112 See 47 U.S.C. §336d (2000) (stating that “[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity”). This may also be construed as political rhetoric, and an empty gesture, which had no real meaning in promoting a public interest agenda.

113 See Bill McConnell, *Head to Head: How Bush and Kerry stack up on key media issues*, *Broadcasting and Cable*, October 25, 2004, at <http://www.broadcastingcable.com/index.asp?layout=article&articleid=CA474626&display=Top%20of%20the%20Week> (last visited Mar. 16, 2005).

114 See Craufurd, *supra* note 28, at 239-40.

products. Seemingly, such optimal conditions and a virtual lack of a significant size confinement might make a free market model look appealing and even appropriate.¹¹⁵ However, one should not confuse the large variety of media outlets with pluralism. Multiple channels do not ensure diversity of opinions.

Much criticism was directed at the American media post 9-11 and the war in Iraq.¹¹⁶ Many American channels spoke in one voice. This criticism came not only from sources outside the media, but from the media itself. For example, when referring to the war coverage by the American media, Dan Rather said: "There is an inherent bias in the coverage of the American press in general".¹¹⁷ Another good example of the bias in the media coverage is the military, which barred photographers from taking pictures of the coffins of military casualties, where such activity did not pose a direct security risk.¹¹⁸

While it is true that other *fora*, such as internet sites, were available to dissenters, one should bear in mind that they are not a good substitute for television, and the nature of these media is different. Television, if we borrow Marshall McLuhan's metaphor, is a tribal fire, and the different nature of this medium is expressed in the different ways they influence public opinion. To take a few examples, the internet requires active browsing while television is passive; television reaches many more people, the internet is decentralized and scattered, etc. Therefore, the mere existence of other media does not remedy a biased

115 See criticism supra Part II.A. through Part II.B.ii. This is, of course, an oversimplification that also disregards problems such as cross ownership and the concentration of the media market in the hands of a small number of private players.

116 See, e.g., Karen Engel, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. Colo. L. Rev. 59, 105 (2004); Fahrenheit 9/11, Scene 20: "An Independent Media" (Columbia Tristar Home 2004).

117 See Fahrenheit 9/11, id.

118 See id. (quoting Michael Moore narrating "[b]ut one story the media wasn't covering was the personal story of each and every soldier who was killed in the war. The government would not allow any cameras to show the coffins coming home. That kind of a story is a downer."); Associated Press, *Coffin Photos Remain Taboo as Senate Backs Pentagon Policy*, June 22, 2004, at http://www.firstamendmentcenter.org/news.aspx?id=13549&SearchString=coffin_photos_remain_taboo. (last visited May 6, 2005). For more criticism on the media's biased coverage, see Norman Solomon, *The Toll of Self-Censorship as Bombs Fall*, Media Beat, at <http://www.fair.org/media-beat/980219.html> (last visited Mar. 16, 2005); Gene Policinski, *Why the Rash of Restraints Against the News?*, Aug. 20, 2004, at <http://www.firstamendmentcenter.org/analysis.aspx?id=13897&SearchString=iraq> (last visited Mar. 16, 2005); Ronald K. L. Collins, *Wartime Riskiest for Free Speech, Scholar Says*, Nov. 5, 2004, at <http://www.firstamendmentcenter.org/analysis.aspx?id=14124&SearchString=iraq> (last visited Mar. 16, 2005); Associated Press, *Debate Persists Over Criticizing Iraq War*, Oct. 19, 2004, at <http://www.firstamendmentcenter.org/news.aspx?id=14207&SearchString=iraq> (last visited Mar. 16, 2005).

coverage by television channels.

Much of the media's behavior during the aftermath of 9-11 and the war on Iraq is not surprising. Conformity, especially during times of crisis, is a well-known syndrome of mass media in democracies, and its roots are understandable. Nevertheless, it is in the best interest of democracies that even (or some may say especially) in times of crisis, the media enables the public to form an unprejudiced opinion, with the goal that it might prevent support for actions that stem from exposure to partial information and opinions.¹¹⁹ The fairness doctrine may serve as a mechanism to ensure that dissenters are heard.

PART III: A BROADER COMPARATIVE OVERLOOK

A. Approaches to the Fairness Doctrine - A Comparative Scale

Having reviewed the main characteristics of the Israeli and American fairness doctrines, we move now towards a broader comparative examination of the notions of the fairness doctrine, as perceived by most other western democracies and by trying to map the different approaches on a comparative scale.

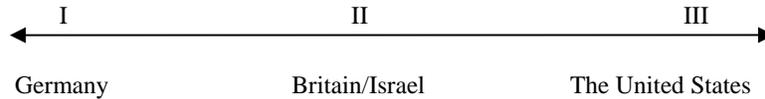
The primary advantage in the Israeli fairness doctrine is that it is, to some extent, a "hybrid" between the American and the prevalent European conceptions of fairness and impartiality. This is attributable to the fact that the market and constitutional conditions in Israeli resemble their European counterparts, yet the main influences upon the structuring and basic legal perceptions of the doctrine were derived from American jurisprudence. Therefore, the Israeli model, as presented above, is perhaps the ideal model as a starting point for a broader comparative analysis.

The overall approaches to the compatibility of the fairness doctrine with national constitutional freedom of expression doctrines can be divided to three major groups:

- I. Fairness as a "constitutional must" (the "German Model");
- II. "Constitutional indifference" to the fairness doctrine; and
- III. "Constitutional impediments" to the fairness doctrine.

¹¹⁹ See Sunstein, *Why Societies Need Dissent*, supra note 88, at 109-110.

Diagram I: Scale of the “constitutionality” of the fairness doctrine according to various national systems



B. European Principles of Impartiality and Fairness

Most of the democracies in the world belong to the second category, in which the fairness doctrine is feasible with regard to the constitutional conventions. Great Britain, for example, has “due impartiality” provisions in its UK Broadcasting Act 1990 which are also incorporated in the BBC Broadcasting Agreement.¹²⁰ Similar provisions may be found in the French and Italian systems.¹²¹

The British Broadcasting Act forbids editorializing, and a broadcasting channel is not allowed to promote a certain political agenda.¹²² This stands in stark contrast to the American content-neutral doctrines which allow editorializing even in publicly funded television.¹²³ The impartiality rules are intended to control the exercises of the editorial discretion. Some European systems require impartiality and balancing on every occasion, and a specific television program cannot be intrinsically biased.¹²⁴ Others require impartiality but are more lenient as to its application, by requiring that a series of programs on a specific topic be balanced,¹²⁵ or that a channel’s broadcasting, assessed as a whole, is balanced.¹²⁶

If we try to extract the basic rationales which are common to the European impartiality principles, we can find several shared characteristics. Firstly, public

120 (1996) Cm. 3152, Cl. 5. See also Eric Barendt, *The First Amendment and the Media*, in *Importing the First Amendment* 29, 34 (Ian Loveland ed., 1998); Eric Barendt, *Judging the Media: Impartiality and Broadcasting*, 69B *Political Quarterly* 108, 110 (1998), at <http://www.blackwell-synergy.com/links/doi/10.1111/1467-923X.00195/abs/> (last visited Mar. 16, 2005).

121 See Craufurd, *supra* note 28, at 148-168, 235; Eric Barendt, *Broadcasting Law – A Comparative Study* 101-2 (2nd ed., Oxford, 1995).

122 See Barendt, *supra* note 121, at 100-1.

123 Compare *FCC v. League of Women Voters of Calif.*, *supra* note 71, and Barendt, *supra* note 121.

124 See, e.g. Barendt, *supra* note 121, at 102 (describing the French impartiality requirements, and those of German public television).

125 In Great Britain, for example, the general impartiality requirement may be applied over a series of programs. Thus, a specific program can advocate a certain position, as long as it is countered by another program in that series. See Barendt, *supra* note 121, at 103.

126 For example, privately owned channels in Germany. Barendt, *supra* note 121, at 102.

broadcasting is subjected to greater and more stringent impartiality and balancing requirements than private channels, although the latter are still subjected to impartiality principles. Secondly, impartiality refers to opinions, while the coverage of news is always expected to be done impartially.¹²⁷ This is, in fact, a distinction between facts and opinions. Thirdly, the American medium-specific approach is not applicable in the European context, where impartiality requirements are applied to all audiovisual media, without distinguishing the method of broadcast.¹²⁸

While the fairness doctrine does not contradict the constitutional law of these nations on one hand, it is not compelled by it on the other hand. This is what I refer to as the “constitutional indifference” model, although, in most cases, this “indifference” will be translated into a generally positive attitude towards mechanisms such as the fairness doctrine. Most other legal systems treat governmental interference in media less suspiciously than the American system,¹²⁹ and since the fairness doctrine has its merits, absent compelling reasons to the contrary, some sort of regulations aimed at promoting fairness, impartiality, or diversity will exist.

A good description of a foreigner’s perspective of the American approach is given by Eric Barendt, who notes, after describing the American approach to freedom of expression regulation, that:

[M]uch of this analysis will seem very strange to European readers, accustomed to quite extensive public regulation of the broadcasting media and on the continent, at least, some regulation of the press as well. In the United Kingdom, France, Germany, and other countries, government is usually trusted to regulate the media with sensitivity, subject to judicial review. In many continental jurisdictions, regulation to promote pluralism or to provide rights to reply, or even access to the media, is considered perfectly compatible with freedom of expression.¹³⁰

The German Model is quite unique in a sense that the lack of governmental intervention is perceived as prohibited.¹³¹ This approach principally stems from a

127 For example, the British Broadcasting Act deems that news, whether given in news bulletins or other forms, must be “presented with due accuracy and impartiality” (see Barendt, *supra* note 121, at 103).

128 It seems that in the European context the impartiality requirements may be applied even on non-audiovisual media. See *supra* note 57 and accompanying text.

129 See Barendt, *The First Amendment and the Media*, *supra* note 120, at 30 (describing the dominant US thinking about the First Amendment as an “Orwellian perspective”).

130 *Id.* at 42-43.

131 See Sunstein, *The Problem of Free Speech*, *infra* note 86, at 77-80; Dieter Grimm, *Human Rights and Judicial Review in Germany*, in *Human Rights and Judicial Review: A Comparative Perspective* 267, 283 (David Beatty ed., 1994). One should note, however, that the German approach still views

perception of *positive rights* that is prevalent in the German system,¹³² and is acceptable to some extent in other European systems as well as in Israel. The notion of positive rights is inconsistent with libertarian approaches to constitutional law in the United States, which perceives constitutional rights, such as the right to free speech, as “relatively modest”, negating positive enforcement of rights by the state.¹³³

Cass R. Sunstein, in his book *Democracy and the Problem of Free Speech*, gives a comparative overview of broadcasting regulation, with special emphasis on Germany.¹³⁴ As I will show, the manner in which Sunstein portrays some of the comparative perspective is biased. The German model, which views governmental intervention and regulation in broadcasting as a duty, is not as widespread as Sunstein tries to depict. Sunstein attempts to marginalize the comparative importance of legal systems that recognize regulatory intervention, including mechanisms such as the fairness doctrine, for irrelevant reasons. For example, Sunstein is wrong in his observation that:

[I]t is important to note that England has no constitutional protection on free speech, and the constitutional protection in France is quite limited. Because of the absence of constitutional safeguards, both countries are inadequate models for the United States.¹³⁵

First, Sunstein did not show that the lack of a formal constitutional protection of free speech is relevant for making a comparative analysis. In fact, the British freedom of expression doctrines are more similar to the American ones than those of their German counterpart, and the British tradition of protection of free expression does not deviate from the German tradition.¹³⁶ Second, Article 5 of the German Basic Law, which deals with freedom of expression, is not framed similarly to the American First Amendment.¹³⁷

editorial independence and prohibition of governmental interference in content as an integral part of its free speech jurisprudence. See Barendt, *supra* note 121, at 35.

132 Some refer to this perception in the German jurisprudence as “protective duties” (Schutzpflicht). See Grimm, *supra* note 131, at 283.

133 See discussion on the absolute viewpoint on the interpretation of the First Amendment *supra* Part II.B.i.; lecture: John C. Harrison, Are There Constitutional Rights?, (University of Virginia School of Law, Nov. 16, 2004), at <http://www.law.virginia.edu/home2002/html/news/video.htm> (last visited Mar. 16, 2005).

134 Cass R. Sunstein, *Democracy and the Problem of Free Speech* 77-81 (1993).

135 *Id.*, at 80-81.

136 In that respect, similar arguments concerning the British constitutional protection of freedom of expression can be made regarding the Israeli system. See discussion on Israeli constitutional law *supra* Part I.

137 See Donald P. Commerce, *The Constitutional Jurisprudence of the Federal Republic of Germany* 361 (2d ed. 1997): “[t]he German speech clauses, read together and in light of other constitutional

Therefore, drawing comparisons between the less protective/absolute provisions of Article 5 of the German Basic Law and the robust American First Amendment is problematic in itself. I fear that, perhaps, in order to support his thesis, using the “German Model” as a role model for the American system, Sunstein attempted to overshadow other milder models as inadequate, even though some of those other models are more appropriate analogues to the American system.

At the European supernational level, the European Convention on Human Rights does not conflict with intervention of this sort.¹³⁸ The European Court of Human Rights tends to see program regulations designed to further pluralism “merely as legitimate restrictions on freedom of expression.”¹³⁹ Also, the nature of the judicial review of the Strasbourg Court, combined with its “margin of

provisions readily yield to a balancing analysis [...] Indeed, the text itself appears to provide a set of scales on which various interests and values are to be weighted and assessed”. Also, compare with the wording of Article 5 (Freedom of Expression) of the Basic Law for the Federal Republic of Germany which states:

1. Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship.
2. These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor.
3. Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the constitution.

Grundgesetz [GG] art. 5 (F.R.G.), at <http://www.psr.keele.ac.uk/docs/german.htm> (last visited Mar. 17, 2005).

138 Article 10 – Freedom of Expression of the European Convention on Human Rights states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 10, Eur. Conv. on H.R., at

<http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Mar. 17, 2005).

139 See Craufurd, *supra* note 28, at 241; Cf. Informationsverein Lentia v. Austria, 17 Eur. Ct. H.R. 93, 94 (1994) (holding that a public monopoly on television and radio stations established by national legislation was an “unnecessary interference with the freedom of expression in a democratic society” and that “broadcasting must be grounded in the principle of pluralism”).

appreciation doctrine,”¹⁴⁰ allows the existence of the different approaches to restrictions on freedom of expression by various member states of the convention, such as Great Britain and Germany, without a need to intervene in the alleged inconsistencies between the approaches.

In conclusion, most European democracies, with the exception of Germany, see promotion of diversity and pluralism as consistent and compatible with their legal systems and implement such measures to some extent. The German system goes even further, considering provisions which are intended to ensure pluralism and fairness to be a constitutional duty. All western democracies share a relatively favorable approach to provisions that are meant to promote fairness and impartiality and endorse such measures. Although the absolute paradigm is not absent from other legal systems, especially when it comes to issues such as censorship, the public debate model is more prevalent when issues of pluralism and fairness are involved.

CONCLUSION

American jurisprudence has veered away from the fairness doctrine. American courts could have easily chosen to strengthen and broaden the exceptions within the absolute model or even accepted a more subtle interpretation to the First Amendment, such as the Madisonian model. The accumulation of rulings that strengthen the absolute paradigm leads to the conclusion that reinstatement of the fairness doctrine in the United States is unlikely, unless a major shift in basic legal viewpoints occurs. The fairness doctrine is simply inconsistent with core First Amendment perceptions.

“The road not taken,” which supports a paradigm shift, from the absolute model to the Madisonian model, and enables reinstating the fairness doctrine *as an integral and coherent part of American freedom of expression doctrines*, seems to be a missed opportunity. The basic legal principles upon which I was raised do not negate all content regulation per se, and the Israeli legal system is not unique in this regard. The absolutism of the American model is far more unique. First Amendment doctrines are by far the most *libertarian* freedom of expression doctrines among western democracies – most of which recognize the concept of positive rights, or at least enable some restrictions on the media in order to promote pluralism and fairness.

140 The “margin of appreciation doctrine” enables the European Court on Human Rights to implement and interpret the duties according to the European Convention on Human Rights, while taking into consideration the special traits of the legal system at hand. See Francis G. Jacobs & Robin C. A. White, *The European Convention on Human Rights* 38, 307-8, 323 (2nd ed. 1996). See also Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* 110-136 (1996).

As I have shown, the American media market is far from being balanced or “fair”. The rationales of the Madisonian model would have aspired to ameliorate the shortcomings of the media market, using mechanisms such as the fairness doctrine. For Europeans, this kind of interference is natural, but this is also a cultural matter. Americans tend to be less troubled by the imperfections of the media market, and their innate fear of governmental interference, embedded in their Constitution, overshadows their willingness to actively mend these imperfections. Some of the impediments to the fairness doctrine’s reinstatement are so embedded in American jurisprudence that one should wonder how it survived for so long. It was a “stepson” to First Amendment doctrines from the day of its conception.

At least some of the reasoning the Supreme Court utilized in *Red Lion* is, in part, less relevant for today’s discussion.¹⁴¹ Yet it is naïve to expect the debate’s main focus to shift from “spectrum scarcity”, in its older physical sense, to the more “sophisticated” arguments presented by either foreign scholars and legal systems (i.e. fiduciary duties of the media as a whole, public law influence on the private sphere, etc.)¹⁴² or by American scholars who adapt their arguments to the American system (i.e. trying to extend the public forum doctrine to the broadcast media).¹⁴³ It does not seem likely that the debate will effectively shift to the new arguments, abandoning the old rationales, and any debate which continues to revolve around the old arguments is doomed to fail.

Almost all other western democracies recognize the importance of balancing mechanisms, like the fairness doctrine, and implement some restrictions to ensure pluralism to various extents. Lacking a robust obstacle such as the First Amendment, these mechanisms do not contradict constitutional regimes in countries such as in Israel and Great Britain, and implementing these mechanisms is even a constitutional duty according to other regimes, such as in Germany.

For these reasons, what is good for Israel and Germany is not necessarily good for America and vice versa. Each system is coherent within itself, and none of them should adopt or relinquish the doctrine just because the other system has it or has abandoned it.

In this context, a good word of advice to the Israeli Supreme Court would be to look further away from the American system and refer to European systems the next time a fairness doctrine issue is discussed. Although the origins of the

141 Some of the relevant arguments were already expressed at that time, but they did not hold the attention of the court to a sufficient extent. See, e.g., *supra* note 89 and accompanying text.

142 See *supra* Parts I.C-D, III.B.

143 See *supra* Part II.B.iii.

Israeli doctrine are American, its spirit is European, and the abandonment of the doctrine in America should not lead to similar results in Israel.¹⁴⁴ The Israeli Supreme Court, which usually relies on American doctrines, especially in the freedom of expression arena, should avoid this old habit when discussing the doctrine, and broaden its comparative perspectives, looking elsewhere for guidance.¹⁴⁵

Finally, the fact that the American legal system managed to get along without the fairness doctrine for more than seventeen years is probably a good sign that it can do well without it. Politically, the odds are against the doctrine's reinstatement in the near future. The American system will probably become accustomed to living without the doctrine for a total of more than two decades before there are any reasonable chances for its comeback. Since the key for the doctrine's reinstatement lies in the hands of politicians and the regulators,¹⁴⁶ there are no real chances that any change will occur during the current administration that would facilitate the doctrine's return.

Although the fairness doctrine *can* be reinstated, the more important question is *should* it be reinstated? The doctrine is inconsistent with the prevailing First Amendment principles that rely on the absolute model and is even more inconsistent with these doctrines today than it was at the time of its repeal. This "stepson" to the American freedom of expression jurisprudence is part of the "core family" of most other legal systems. The United States is unique in that sense, but this might be true about most freedom of expression doctrines.

I have demonstrated the continuing need for the doctrine in the Israeli and European markets and its consistency with their legal systems and constitutional perceptions. Nonetheless, it would be inadvisable to reinstate the fairness

144 In this respect I disagree with Schejter, who claims that the "McDonaldization" of the Israeli public life makes it somewhat uncertain to predict whether the Israeli system will follow the American one in relinquishing the fairness doctrine. Schejter, *supra* note 13, at 300. I believe that the Israeli fairness doctrine, which has foundations in statutes and Supreme Court rulings and is consistent with the basic notions of Israeli constitutional law, is at no real risk of being overturned. See also Karniel, *supra* note 56, at 173.

145 A "bad example" can be seen in Chief Justice Shamgar's opinion in Shlomo Cohen where he referred several times to the repeal of the doctrine in America, and its irrelevance to the Israeli law, but refrained from any referral to other foreign systems. Shlomo Cohen, *supra* note 15. See also Schejter, *supra* note 13, at 282 (claiming that "[the fairness doctrine's] popularity stems much from its American origin, even though other types of imports from systems of less glamour may better fit the local culture").

146 See Craufurd, *supra* note 28, at 238-40 (claiming that the judiciary is under-equipped to lead communications policies and that change in this field can be led only by the regulators or the political branch).

doctrine in the United States. Differences in legal culture, basic constitutional perceptions and market conditions make it perfectly consistent to continue the doctrine in Israel and in Europe, while avoiding its reinstatement here.