

INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

NOTE TO USERS

The original manuscript received by UMI contains pages with print exceeding margin guidelines, and slanted print. Pages were microfilmed as received.

This reproduction is the best copy available

UMI



Université d'Ottawa • University of Ottawa

INSTITUTIONAL RESPONSES TO HATE SPEECH ON CAMPUS

UNDER

PHILOSOPHICAL AND CONSTITUTIONAL ANALYSIS

© GRACIELA FUENTES

Thesis submitted to the Faculty of Law of
. . . the University of Ottawa in partial fulfilment to the requirement
for the Doctorate in Law

June 1997



National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-28340-2

ACKNOWLEDGMENTS

In submitting this thesis to the Faculty of Graduate Studies of the Faculty of Law of the Faculty of Law of the University of Ottawa, I wish to thank my thesis supervisor, Prof. Yves de Montigny who found time to make valuable and enriching comments on successive drafts. For the views expressed, however, the responsibility remains my own.

ABSTRACT

The aim of this work is to deduce from the condition of human nature, and taking into account basic principles in Western societies, new perspectives to deal with hate expression in academia. Based on the argument that freedom of expression is a positive individual power which meets both an anthropologic need and the social need of each individual to plead and promote all other rights, this work addresses the false dichotomy: equality-freedom of expression. A theoretical foundation for this study relies on Spinoza's philosophy, especially his assessment of freedom of expression as a positive freedom essential in the social contract, his idea "repression of expression as a harm to individual autonomy" and his distinction between expressions which convey ideas from those intended as action. Those elements are argued to be added to contemporary doctrines. Individuals, free, equal, rational and responsible for their actions, are influenced -- but not determined -- by their social, cultural and physical environment. They are neither completely independent from society, nor plain passive entities to be directed beyond their wills by irresistible forces. Political society is a complex system where individuals and groups interact. The social function of the law relates to the whole system, thus, the following discussion on freedom of expression considers both: the legal principles and the people, who hold those principles and observe or infringe the law. The purpose is not to present a completely unheard theory but highlight concepts which as agree best with practice could lead to a sound protection of expressions against any concentration of power. The issue of conflicting constitutional guarantees in the resolution of the expression of bigotry has an special angle in campus. In academia, a cooperative system of free, and responsible adults committed to the advance of knowledge, freedom of expression is a fundamental tool both to further knowledge, and to lay down and adjust parameters of intramuros government as well. Thus, any wrong curtailment on expressions on campus amounts a serious risk of impoverishing the intramuros intellectual goals, and of endangering its government. Based on a proposed general theory of expression, two different types of institutional responses to deal with

vilifying expressions on campus are discussed: hate-speech codes and "neutrality" policy. While reference to empirical studies is necessary to present the factual context in Western academia, the main concern of the analysis is normative: what ought to be. The complexity of the theme benefits from a comparison between the Canadian and the American experience, especially regarding to the important role which the Supreme Courts in both countries has played in the elucidation of the extent of protection of freedom of expression. Given the enormous weight that the rationales of protection bear, officials should ground limits on expressions on verifiable and effective harm. Given the values at stake and the fight for power developed on campus, they should also avoid absolute neutrality policies. Universities should implement structural measures to deal with the phenomenon of hate speech rather than resort to censorship or absolute *laissez faire* policies.

INSTITUTIONAL RESPONSES TO HATE SPEECH ON CAMPUS: A PHILOSOPHICAL AND CONSTITUTIONAL ANALYSIS.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	i
ABSTRACT	ii
TABLE OF CONTENTS	iii
INTRODUCTION	1
PART I. FREEDOM OF EXPRESSION IN A LIBERAL SYSTEM OF RIGHTS.	
A. Freedom as a positive power of each individual	13
1. A positive concept of freedom	16
2. Only one 'rational solution' to be coerced.	24
3. A departure from rational methods.	29
4. Spinoza's positive concept of freedom.	31
B. Evolution of the notion and the protection of freedom of expression.	44
1. A brief historical account	44
2. Traditional rationales of protection.	49
a. Goal-group based strategies.	50
i. Participation in decision-making	50
ii. Discovering the truth	51
iii. To get a more stable community.	53
b. Individual-right based strategies.	54
C. New grounds to justify the protection of freedom of expression.	57
1. Social and political context.	58
a. Reasonable pluralism.	59
b. Principles of justice	60
c. Non-majoritarian democracy.	62
2. Spinoza's theory of freedom of expression	64
a. Freedom of expression meets anthropologic need.	66
b. The social and political role of freedom of expression.	71
i. A means to defend rights	78
ii. A means to defend equality	83
D. Justifying limits on expression in a pluralistic society	94
1. Limits to expression conflicting with rights	98
2. Limits to expression conflicting with the state's right to regulate conduct	99
3. Expression conveyed by state-person.	100
Conclusion Part I	103

PART II.	FREEDOM OF EXPRESSION ON CAMPUS: A CONSTITUTIONAL PERSPECTIVE	108
A.	University: A unique market-place of ideas	108
1.	Population and system of government	109
2.	Educational objectives.....	110
B.	Hate Speech in campus	114
1.	The meaning of "hate expression"	115
2.	Factors distorting the hate speech debate	117
3.	Factors increasing hate on campus.....	121
C.	Institutional responses to hate expression on campus	133
1.	American and Canadian Hate-Speech Codes	134
a.	Factors prompting the enactment of codes.	134
i.	Key Law Professors	135
ii.	Change in the agenda of Civil Rights Movements	136
iii.	Minorities Students and Silent Majority	138
b.	Wording and results of hate-speech codes.	139
c.	Rationales and ideology underlying hate-speech codes.	151
i.	Freedom of expression v. equality: a false dichotomy?..	151
ii.	Freedom of expression v. freedom of expression: impairing speech to allow more speech	163
iii.	Hate speech as a harm to individual's or groups' rights	167
iv.	Hate speech v. the truth.....	178
v.	Hate speech and hostile environment.....	179
d.	Speech codes in light of the Supreme Courts' jurisprudence	
i.	American experience	191
ii.	Canadian experience.....	216
2.	No new rules policies. "Neutrality".....	251
PART III.	PROPOSALS	264
A.	Anti-hate codes and "neutrality": a normative perspective	264
CONCLUSIONS.....		280
BIBLIOGRAPHY		

INTRODUCTION

Throughout history, in varying degrees and with some exceptions, the political community -- individuals sharing political duties and rights within the same framework of justice -- has overlapped with the cultural community -- individuals sharing a cultural, linguistic, religious tradition. This social pattern -- monoculturalism -- endured until the late XIXth century, and even today, is the model in many non-western countries. Contemporary Western society has evolved towards multiculturalism. Each political community contains several interacting cultural and religious groups. Admittedly, multiculturalism is not *per se* a new phenomenon; the Roman Empire, in classical times, and the China or India of today are examples of multiculturalism. For the first time in history, since WWII there is the legal recognition of this social pattern. All members of different groups which coexist in the political community have the constitutional protection of their rights, regardless of their ethnicity, religion, age, or sex. This normative recognition allowed Western multicultural society to evolve into a moral pluralistic pattern. The normative recognition that all members of society may both maintain different sets of moral values, both comprehensive in scope and incompatible in their basic claims, to solve individual and societal problems and have the right to express different moral comprehensive doctrines has impacted on the debate of freedom of expression.

Presently, Western society is going through a period of great transition characterised by an ideological turmoil which is increased by the collapse of assumed values and the discovery of non-western cultures which must be incorporated to the Western thought for the sake of a new pattern of globalization. Deep social and political changes have led to a transformation of the constitutional order and of liberalism itself and consequently have reshaped the debate on freedom of expression. Many contemporary liberals no longer see the state as the enemy of freedom but argue that its role is to secure the plurality of values embraced by liberalism. In addition, at this point in time, other elements have touched the debate on free speech. Liberal society is defined both by the claims of individual liberties and the demands of equality. The issues of free speech unnerve the liberal consensus because the counter values offered to justify the limiting of expressions have an unusually

compelling quality. The counter values allude to fundamental rights rather than to state goals. Hate speech denigrates the worth of vilified groups; pornography attacks women's equality right rather than moral values. As long as there is no constitutional guidance as to how the choice between competing commitments should be made, participants in the debate are divided in favouring either expression or equality; compromise seems unreachable.

The university, as a micro-cosmos of society, faces a similar dilemma as that of the community in which it is immersed. It evidences both cultural diversity and an unusual increment of hate expressions and incidents of bigotry. Like in society at large, hate speech issues, because of their complexity, have prompted different institutional responses in academia committed to combat racism and sexism in *intramuros*. Solutions range from strong regulatory policies to very permissive policies ignoring the problem.

The ways universities solve the hate speech issue are worthy of minute study, not only because of the implications such solutions may have in the achievement of educational goals, but also because of the mutual and constant interaction between academia and society. Universities have always been philosophical grounds where ideas on political and social reforms are tested before applying them to society at large. Ideas which prevail in academia are spread in the rest of society, both through mass-media, which provides recognition for academics who elaborate those theories, and by alumni, who, placed in influential positions, put those ideas in practice. Thus, university policies set trends, which sooner or later are followed by the rest of the community. Furthermore, ideas prevailing in North-American campuses heavily impact on the Third World, given that, for better or worse, the former's policies acquire universal characteristics. If the university model to adjust the exercise of freedoms in a changing political and social environment fails to bring harmony, and nevertheless, is replicated in the broader community, an increase of lurid bigotry and balkanisation in society can be foreseen.

The methodology proposed is systemic: that means it is neither individualist (atomism) nor communitarian (holism). Individuals are neither completely independent from society as

individualism sees them, nor plain passive entities to be directed beyond their wills by social forces, as many theorists envisage them. Political society is an extremely complex system where individuals, interacting among themselves, form groups such as family, clubs, associations and so on. In turn, each group is interdependent with others. The interaction among groups and their members is regulated by a scheme of norms. Those norms, whether legal, moral, or religious, compel behaviours and keep individuals in cohesion. The analysis is restricted to legal rights and excludes moral ones. Because of the social function of law, the following discussion on freedom of expression takes into account both: the legal principles and the people, who hold those principles and observe or infringe the law. Because the analysis is systemic, the examples taken from the Canadian and American university experience were related to the largest system, society at large, taking into account essentially the constitutional and philosophical background of two liberal societies where university as subsystems are immersed.

The descriptive approach has been inevitable. However, while some empirical studies were given to present the factual context in American and Canadian universities, the main concern of the analysis was normative: what ought to be. Acknowledged the differences between Canadian and American university systems; because the approach is normative a comparison between both university systems or a detailed comparison of their codes enacted was beyond the scope of this work. For the same reason, examples from the institutions of Canada and the US were analysed together.

The discussion develops from three organising premises. First, in a democratic society individuals are free, equal, rational, and responsible for their actions and influenced - but not determined - by their social, cultural and physical environment. Second, democracy is both a system of inalienable rights which protect basic human needs and a majoritarian procedure of government. Because the protection of fundamental rights is the essence of democracy, a majoritarian law which enshrines sectarian values, even majoritarian, and departs from widely upheld principles of justice should be overthrown. Third, individuals

have inalienable rights understood as the legal power to meet basic needs common to every human being, regardless of social, biological, or any other particular circumstances. Every right implies a correlative duty and vice versa¹. Because rights form a system, the exercise of any right may conflict with another. This calls for deciding which right is the overriding one. Any restriction on the exercise of a freedom is justified if, and only if, that exercise deprives another from exercising his basic right, causing effective harm to a specific person.

The present analysis evolves in two parts. Part I addresses rationales to ground the protection and limits of free speech as exposed in a general theory of expression. Part II and Part III, from a constitutional and normative perspective, analyse what rationales of restriction, if any, should be applied in a university context. Despite outstanding differences between universities and society at large, the argument follows that solutions to the problem of expressions of hatred, institutional responses of academia may stem from a general theory of freedom of expression rather than from one to be applied especially in intramuros. It is so, because of the two rationales to protect freedom of expression -- it meets a basic anthropologic need, and it is a socio-political tool to renegotiate terms in the social contract -- do not lose validity in the university context.

At the present time, in trying to improve the functioning of a free and democratic society, where all individuals are able to develop their skills and attain their ends, both parties in the free speech debate follow conflicting routes. One group adopts an individual-rights based strategy, stressing the individuals' ends, while the another follows a strategy based on group-rights, emphasising the community ends and equality values. Throughout this work, it is argued that group-right strategies necessarily fall into arguing totalitarian solutions and that a tendency toward anti-democratic solutions is aggravated when censorship supporters base their claims on appeals to subjective perceptions, and distrust rational and

¹ Mario Bunge, *Sistemas Sociales y Filosofia* (Bs. As.: Editorial Sudamericana, 1989)

abstract solutions. Isaiah Berlin maintains that, currently, many liberals are following a path towards totalitarian postures; the same path followed by many previous followers of Enlightenment, who ended up defending ideas which were the ideological support of Communism and Fascism.² It will be argued that sincere liberals who support hate-speech codes, depart from democratic solutions because they use group-right based strategies to justify the protection of individual rights, and refuse to test rationally, their proposals against reality. An example of that path is the ideological evolution at Berkeley: from the Free Speech Movement in the '60s to the Platonic guardians enforced by its anti-hate code.

In an endeavour to find new elements in a general theory of expression, which would prevent the temptation to fall into totalitarian solutions, Part I starts analysing basic principles of the Enlightenment, with its findings and errors, and briefly presents a summary of their evolution in the subsequent centuries. What interest has the understanding of findings and errors of the Enlightenment principles in addressing the issue of expression in Western academies? Enlightenment principles shaped our Western culture and they prevail to this day in society and in academia as paramount values. Given that many followers of this ideology, which was aimed to prevent tyrannies, ended up strangely arguing and enacting totalitarian solutions³ it seems useful to point out some of the Enlightenment flaws and suggest strategies to prevent repeating them. It is worthy to investigate whether misunderstandings, which led to anti-democratic solutions in the past, are present in the current debate on expression in academia; and if it is so, how to correct them.

The intention of this work is to draw a circle, starting from the ideas of Spinoza and Kant, in order to show how some followers of the Enlightenment, in the last century, radically departed from its principles in proposing solutions to society matters. During this century, the argument follows, the envisaged totalitarian solutions were put in

² Isaiah Berlin, *Vico and Herder. Two Studies in the History of Ideas*, 1st ed., (London: Hogarth, 1976) I. Berlin, *Concepts and Categories. Philosophical Essays* rev'd ed. (New York: Viking Press, 1979)

³ Isaiah Berlin, *Four Essays on Liberty*, 1st ed., (N.Y.: Oxford University Press, 1969) at 152

practice when some philosophical landmarks gained consensus among influential politicians and thinkers. Similar in essence, Fascism and Marxism, for the sake of achieving absolute liberty in a perfect society, put in place the most unlimited despotism. Although ideological in debt with an ideology aimed to combat despotism, Communism and Fascism proposed illiberal solutions, in part because they departed from two great findings of the Century of the Lights and insisted on one of its flaws. In an era when human rights are proclaimed and declaimed, facts evidence that there is less freedom and less equality, more and more subordination of politics to economy. The proposal of this work is a return to the great findings of the Enlightenment and to avoid its errors -- to close the circle which was started with Kant and Spinoza -- in order to find democratic solutions to extreme expressions.

Part I follows, arguing that three philosophical landmarks connect the postulates of the Enlightenment with the rise and fall of the totalitarian systems during the XXth century. They are pointed out to prevent falling in the same regrettable solutions of the past. Firstly, one remarkable finding of the early Enlightenment thinkers, the positive concept of freedom, is revisited. Spinoza and Kant understood freedom as the inherent power to choose one's ultimate ends *in head of each human being*; individuals are moral self-directed and responsible agents. Some followers of Enlightenment in the next centuries, the argument follows, shifted from a positive concept of freedom *in head of individual* to the positive concept of freedom *at head of society*. They understood that the power of self-direction dwells in the society, which may coerce the ultimate values chosen by it with the goal to make the individual or society perfect. It is argued that the positive concept of freedom "at head of society" with perfectionist goals is dangerous for the notion of human rights rather than the positive concept of freedom in itself.

Dangerous for the notion of human rights is not the positive concept of freedom in itself, but the positive concept of freedom at head of society with perfectionist goals. Secondly, the belief that there is only one and final solution to be applied to the ends conflict is

analysed and presented a flaw in the Enlightenment thought. From this premise, some followers of this ideological movement theorised that the "rational" solution can be coerced beyond subjects' wills. This belief also proved a great danger for freedoms. In their endeavour to achieve a perfect society and in the understanding that the rational solution is the only possible option, rulers are entitled to coerce that solution disregarding the individuals' power to choose. Berlin argues that the seed of Rousseau's "New Man" blossomed in Mussolini and Lenin's deeds. Finally, another remarkable finding of the Enlightenment is addressed: the strict adherence to reason and scientific methods; a priori premises must be combined with the analysis of concrete facts in order to understand reality, in order to solve social conflicts.

Do current liberals, misunderstanding Enlightenment's findings or following some of its errors, run the risk of enacting a new totalitarianism? It is argued that, at the present time, many liberals, among them several law professors leading a radical change in the agenda of civil rights, propose solutions to deal with racist and sexist expressions which do not fit in a democratic scheme of fundamental rights. Theoreticians of welfare state, who see the state entitled to exercise the power of self-determination on behalf of its subjects, urge states to take responsibilities for their citizens. The help that welfare states give to their citizens has, as the obverse of the coin, that states invade all corners of the private life. Above all, states intend to eliminate, as much as possible, "strong disapproval of those propensities for free inquiry and creation which cannot, without losing their nature, remain as conformist and law-abiding as the XXth century demands."⁴ Hence, the welfare-state doctrine has a noxious impact on freedom of expression.

Moreover, the endangerment of freedoms is aggravated each time legal theorists, aimed with a perfectionist concept of freedom, propose solutions without applying rational methods to investigate the origin of the conflict and the means to solve it. Because supporters of those solutions are influential voices in universities, such solutions are carried out in

⁴ Berlin, *supra* note 2, "Political Ideas in The Twentieth Century" at 29

practice. In an endeavour to present new elements to be incorporated in the debate of freedom of expression which may prevent university officials from following the path to totalitarianism, Part I proceeds presenting some concepts of Spinoza's theory on expression as worthy of exploration. His whole theory, as very few, is a deterrent to totalitarian solutions. I prefer to rely on Spinoza rather than on Mill because: 1. Spinoza sees freedom as a positive power; 2. he envisages freedom of expression as power kept out of those delegated to the state; 3. he makes freedom of expression a constitutive part of the social contract; 4. he, like most parties in the current debate on expression, Spinoza posits the issue of limits on expressions within a framework where freedoms clash with other rights rather than with society's values or interests.

While Mill defines freedom as a lack of constraint from society, Spinoza sees it as an inherent intellectual ability endowed to each individual which empowers him to choose ends and a consequent course of action guided by their own reason. Spinoza believes that by the right of nature, each human being decides on his own advantage despite external forces or internal passions. For each person, his own welfare is indubitable and it cannot be measured by pleasure quantities. Whatever tends to develop and maintain man's own ends is lawful for him.⁵ This is a remarkable difference from Hobbes' theory and utilitarians' ones. In arguing for his views, Spinoza employs 'utility' in the general sense of human welfare. While Mill praises 'utility' in terms of the pleasure it affords to society, Spinoza does not admit it as a synonymous with pleasure-giving value. Utility is evaluated by each subject as a measure of what leads to achieve the own chosen welfare. Spinoza detaches his concept of freedom as a positive power from any perfectionist goal and applies it to a particular freedom, that of expression.⁶

This logical sequence leads to other finding in Spinoza's theory: the reasons to

⁵ See Robert A. Duff, *Spinoza. Political and Ethical Philosophy* (New York, Kelley, 1970)

⁶ See Benedict de Spinoza, *The Political Works, The Tractatus Theologico-Politicus in Part and the Tractatus Politicus in Full* ed. and trans. by A.G. Wernham (Oxford: Clarendon Press: 1958) chap XVI at 131

protect expressions. First, freedom of expression meets an anthropological individual need to convey own ideas and hear others' opinions. Second, it covers the anthropological social need to intervene in setting up the fundamental structure of society, reshaping it and keeping it united. While Mill tangentially addresses freedom of expression within his contractualist theory, Spinoza makes of it a fundamental part of his contractualist elaboration.

A legal theory would be inapplicable if, developed in abstract, it does not consider those upon whom the normative system is to be applied. Thus, Part I furthers a concept of "person" -- free, equal and responsible moral agents -- of "society" -- a co-operative highly competitive system -- and of "democracy" -- a procedural system (one person one vote) and a system which holds principles of justice. Having advanced the concepts of person, society and democracy, Part I goes on to analysing a third remarkable finding in Spinoza's theory: the rationales of limiting expressions. Spinoza maintains that any freedom, included freedom of expression, which harms others' rights must be restricted. Liberalism's defence of free expression has always stopped short of protecting expression which does real harm. If hate speech really harms, then eagerly fighting for the marketplace of ideas is irresponsible.

Spinoza sees expressions from an individualistic perspective but without neglecting their social dimension. Thus, he elaborates on both: harm which expression may cause to listeners and harm which irrational limits may cause to an individual who wants to express himself. The latter, a harm to individual's autonomy, is neglected by Mill and his followers. Furthermore, Spinoza sees a sharp distinction between expressions and actions, evaluating the intention of the speaker to draw the line. Utilitarians, who think that the ultimate goal of the state is to achieve social welfare, deny protection to any expression which could be believed to cause more harm than social welfare. The intentions of speakers or whether the harm is real or hypothetical are issues not considered in their analysis. On the contrary, Spinoza, premising on that the ultimate goal of the state is to preserve

freedoms, argues that the sovereign is only entitled to punish expressions which either cause effective harm or are intended to harm. The core of his argument is that the state does not have real power to prevent a person from expressing his thoughts, then it can only punish expressions which cause real harm to rights. Part I concludes that in a co-operative democratic system of equal and self-directed individuals, only a real and measurable harm to others' rights or to the right of the state to regulate conduct justify limits to expressions. In Spinoza's views a departure from these two rationales is antithetical to the state's goal and dangerous to its stability.⁷ In *Ethics*;⁸ in *Theological-Political Treatise*, and in *Political Treatise*⁹ Spinoza argues that persons and states must use reason to ground all decisions. From this idea, it may be argued that only after using rational methods of scientific experimentation to prove effective harms and their extent can states enact laws encroaching on free expression, grading the punishment both on the speaker's intentions and the extent of the harm really caused. Though beyond Spinoza's arguments, Part I elaborates on state-person's expressions as a special harm to the rights of individual and state.

Part II starts by analysing whether or not the arguments advanced to justify the protection and limits on expression can be applied without modification to academia. Campuses and society differ in several aspects, among others: system of government, quality of the population and specific goals pursued. Despite those differences, it is concluded that, first, the anthropological need to express does not vary according to the environment in which human beings are immersed. Second, rights and ends have to be defended and the terms of the fundamental contract renegotiated either in society or in academia. Third, a

⁷ Spinoza wonders, "how far such freedom can and ought to be conceded without danger of the peace of the state", *Works of Spinoza. Unabridged Elwes Translation. A Theologico- Political Treatise*, trad. R.H.M. Elwes, 1st. ed. (New York: Dover Publications, 1951) Chap XX, at 258, hereinafter *Tract. Theo-Pol.* Though chapters and paragraphs are referred, given differences between translation, pages references are to the Elwes' ones.

⁸ Benedict de Spinoza, *Ethics*, trad. W.H. White, rev. A. Stirling, rev'd ed. (Chicago: Benton, 1989)

⁹ *Works of Spinoza, Unabridged Elwes translation. A political Treatise*, ed. And trad. R.H.M. Elwes, 1st. Ed. (New York: Dover Publications, 1951)

broad freedom of expression is a condition sine qua non to advance scientific knowledge. Thus, the rationales for protecting and restricting expressions argued for society at large do not lose their validity in the academia milieu. Moreover, because academia is a co-operative system of adult people where any of its offended members can leave at any time,¹⁰ censorship on campuses would be less permissible than in society. Then, any restriction, if any, should be applied to very narrowly-defined circumstances: officials should only restrict expressions which harm specific rights of its members or the right of academic authorities to regulate conduct on campus. Part II follows contrasting the rationales argued in this work with the grounds furthered to restrict hate expression on campus, and analysing whether current limits placed by universities officials on speech, and the rationales justifying them, are proper in light of the most recent jurisprudence of the Canadian and American Supreme Courts.

Part III, from a normative point of view, elaborates reasons to justify a refusal either to enact hate-speech codes in academia or to take a position of absolute neutrality. The conclusion proposes to deal with hate speech in a comprehensive fashion, rather than set up partial solutions.

In the following analysis "speech" and "expression" are interchangeable terms a short forms of any communication, verbal or non-verbal. Similarly, "individual" and "citizen", are interchangeable throughout. I prefer to use "freedom" to stress a meaning of inherent feature, instead of "liberty", which suggests bestowed by the sovereign.

¹⁰ See John Rawls, *Justice as Fairness. A Briefer Statement* (Harvard University, Cambridge, 1990; unpublished). Moreover, he argues that "...In a democratic society non-public power, as seen, for example, in the authority of churches over their members, is freely accepted...By contrast with associations within society, the power of the government cannot be evaded except by leaving the state's territory." *Ibid.* at 76

PART I. FREEDOM OF EXPRESSION IN A LIBERAL SYSTEM OF RIGHTS

A. FREEDOM AS A POSITIVE POWER OF EACH INDIVIDUAL

The issue of defining parameters and content of freedoms in general and of freedom of expression, in particular, remains a controversial one in liberal debate. This task, far from being an idle philosophical digression, is a matter of practical politics and a legal need. Spinoza stated that no men are considered less fit to direct public affairs than theorists and philosophers. Today, a new trend in the philosophical arena maintains that different philosophical and political proposals are believed by their followers to be incontrovertible tenets of faith that must be promulgated in society and crystallised in laws. Philosophy is seen as a form of inquiry that seeks to provide an absolutely certain basis for beliefs which, however, are irrelevant to the world of real politics¹¹ It is held that philosophers, standing outside society, seek to impose their foundationalist theories which are developed in a strictly deductive way. Waltzer, for example, maintains that philosophers leave society in order to find the truth. When they return to society, they believe democratic politics must be reorganised according to the single truth each of them has found.¹²

However, conspicuous thinkers, without withdrawing from society, have developed their theories by distilling conceptions already held by community. Their invaluable contributions to the evolution of principles underlie our conception of human rights. Henry Sidgwick maintains that the best way to develop a moral methodology is to explore moral conceptions prevalent in community, and then through comparison discover the most sound conception.¹³ Among moral conceptions, those born during the Century of the Lights deserve a careful rethinking to adapt them, if possible, to new Western historical and social circumstances.

¹¹ Conf. Benjamin Baker, *The Conquest of Politics: Liberal Philosophy in Democratic Times* 1st ed., (Princeton, N.J.: Princeton Univ. Press, 1988)

¹² See Michael Waltzer, "Philosophy and Democracy" (1981) 9 *Pol. Theory* 379

¹³ Henry Sidgwick, *The Methods of Ethics* XXI-XXII, 7th ed., (Chicago, Univ. of Chicago Press, 1981)

Born in early XVith century in the shadow of the Reform, the Enlightenment transformed the way of thinking that had prevailed during previous centuries. Premising that all problems of individuals and society could be solved by appealing to reason and intelligence; while putting aside religious dogmatism, this ideological movement made a profound impact on both the industrial development of Western Europe and on the idea of human rights. Its great founders -- Condorcet and Helvetius, Grotious, Locke and Spinoza stretching back to Erasmus and Montaigne, intellectually in debt with to Italian Renaissance, and with Classic Roman and Greek thinkers -- changed the way of seeing the apparatus of society and gave an irreversible twist to the development of political ideas in Western society. Although the idea of human rights has deep historical roots in Western and non-western philosophies, the idea of human rights as expressed in the Declaration des Droits de l'Homme et du Citoyen and the American Bill of Rights -- which has become part of our legal and political tradition -- is the product of both the Enlightenment and the rise of industrial society. While in the feudal order, individuals' opportunities in life were limited by social position or birth, in the Modern Ages, individualism was considered the pivotal characteristic of the emerging social order in which every person can improve their position on individual qualifications or labour. Industrialisation increased individual, occupational and educational opportunities, social mobility and individualism; thus fading away traditional class differences. The connection between human rights and the rise of a new, liberal, democratic order produced consequences for the content of human rights.¹⁴ The conception of person was linked to an entrepreneurial and rational subject, able to manage properties, to express points of view and pursue happiness, to share in government and be involved in activities with the minimal interference from the state. The modern notion of fundamental rights was born bound to an individualistic, rational, cosmopolitan and responsible vision of man. The Enlightenment gave us as heritage the idea of equality, freedom, the search for truth

¹⁴ See: C.G.Weeramantry, *The Impact of Technology on Human Rights* (N.Y.: Global Case-studies, 1993) at 75

with scientific rigor, and above all the confidence in the ability of human beings to use reason. It gave intellectual and moral tools to develop the basic values constituent of contemporary civilisation.¹⁵ However, in the reconceptualization of its principles as applied to current expression issues, it must be recalled that this ideological movement, as any other, had important flaws such as exaggeration of individualism, lack of concern for general peace, acceptance of slavery, discrimination against women and aliens. The origin of these flaws can be recognised in several misleading concepts. First of all, early Enlightenment thinkers envisaged two outstanding values, liberty and equality with a narrower extent than we understand today.¹⁶ They understood "equality" as no inherent subordination of any individual to the will of others and "freedom" as individual autonomy. Their main concern was to set clear limits on state's authority. Nonetheless, both concepts were to be applied to already equal and free men. Absence of a clear meaning of freedom and equality, and a lack of attempt to apply them to all individuals, during early Enlightenment becomes easy to understand if we consider how modern the idea of human rights is. Freedom and equality were concepts foreign to ancient civilisations, Classic world, Chinese and Jewish traditions.¹⁷ Thinkers in next centuries had the task of addressing these concepts

¹⁵ Bunge, *supra*, note 1, at 151 and ss.

¹⁶ For example Grotius (1625), who in turn influenced Spinoza, wrote: "Liberty, whether of individuals or of states, that is 'autonomy', cannot give the right to war, just as if by nature and at all times liberty was adapted to all persons. For when liberty is said to be an attribute by nature of men and of peoples this must be understood of the law of nature, which precedes all human conditions, and of liberty 'by exemption', not of that which is 'by opposition', that is to say, that by nature no one is a slave, but not that man has right never to enter slavery, for in that sense no one is free. Here applies the saying of Albutius: 'No one is born free, no one a slave; it is after birth that fortune has imposed these distinctions upon individuals.' Also that of Aristotle: 'By law one man is a slave and another free.' Wherefore those who from a lawful cause have come inter personal or political slavery ought to be satisfied with their state, as Paul the Apostle teaches in the words: 'Hast thou been called to be a slave? Be not concerned thereat.'" Hugo Grotius, *De Jure Belli ac Pacis Libris Tres*. "The Law of War and Peace", trans. F. Kelsey, (N.Y.: Bobbs-Merrill, reprinted by permission of The Carnegie Endowment for International Peace. c.1925), Book II, Chap XXII, #XI at 551

¹⁷ Berlin, *supra*, note 4 at 129

universally.

Secondly, following Condorcet's ideas, Enlightenment thinkers overlooked the rights conflict. A government of enlightened men would lead to the satisfaction of all desires of all rational men.¹⁸ It was an immovable principle that all rational answers to the problems of individual and society form a harmonious system, in which the truth, which is only one and can only be got by reason, prevails. Ultimately, there is only one solution to every problem. Those thinkers did not realise that happiness, justice, equality, virtue, scientific and artistic progress, are ends at some point impossible for all members of society to achieve simultaneously. Moreover, they neglected the fact that equality is only one end among several others which must be attained. This important flaw has impregnated Western thought and has made it more difficult to solve the rights conflict.

A third flaw made by Enlightenment thinkers was to posit the origin of social conflicts in the antagonism between society and individual.¹⁹ As a logical reaction to the communitarian philosophy of the Middle Ages, Enlightenment thinkers, aimed to defend individuals from the omnipotent enemy, the state, adopted an extreme individualism, which impeded their realisation that individuals are immersed in a social context. In a pendular movement of history, in the following centuries, streams of Enlightenment reacted against that extreme position and ended up maintaining extreme communitarianism.

1. A POSITIVE CONCEPT OF FREEDOM

Deriving their postulates from findings and flaws of Enlightenment, two antagonistic streams of thought have shaped the debate on fundamental rights. Each of them envisages a different concept of freedom, which in turn has impacted on its understanding of freedom of expression. It is worthy of noting that both streams of thought, humanitarian individualism and romanticism,²⁰ start from the dichotomy society and individual to solve social problems.

¹⁸ Berlin, *supra*, note 2.

¹⁹ Bunge, *supra*, note 1 at

²⁰ I follow Berlin's division considering a detailed explanation on both schools of thought beyond the scope of this work.

One of them, the humanitarian individualism, disregarding the social features of human beings, stresses individualism without concessions and sees the goal of a human being as fulfilling his own wants and ends in life. The individual's autonomy from external forces is a paramount concept. The other stream, romanticism,²¹ reacting to the extreme defence of individualism, insists essentially on society's needs over the individuals' ones. This stream of thought, rooted in Plato's arguments and the Aristotelian assumption that the human being is "by nature a politikon zoon",²² evolving from Hegel, Schelling and Schopenhauer, to Marx, Comte and Weber, to the contemporanean group of British Hegelians in Oxford,²³ sees that the goal of individuals is to fulfil their role in society. Despite the fact that both streams of thought divided themselves in many schools -- which at times were antagonistic, and at times juxtaposed, but always influencing each other -- a conducting thread runs in each school which let us to cluster it in one or another main stream of thought: ultimately, each comprehensive doctrine emphasises either the "society" or the "individual" element of the dichotomy.

In other words, in their endeavour to further freedoms, all the ramifications flowing from the early Enlightenment adopted one of the two irreconcilable positions. One position sees individuals fighting against interference of society to achieve their self-development and regards education and the power of rational moral agents as the means to overcome human miseries. The other position, which includes socialism and utilitarians in their different versions, ignoring individuals' autonomy, sees subjects' self-realisation in the accomplishment of their duties in society and envisages institutions as almighty to compel individuals to fulfil some paramount ends. Hence, both positions differ about which are the deepest needs of human beings, about facts and their interpretation, about means, and on the concept and scope of freedoms, and obviously about the justification of coercion. Both

²¹ Bunge, *supra*, note 1

²² Aristotle, *Politics* I,2 , rev'd ed., (Chicago, Benton: 1989)

²³ See Bradley, Francis, *Ethical Studies*, 2nd ed., (Toronto: Lestr & Orpen Dennys, 1988)

streams²⁴ have such profound ideological differences that the divergence between their proposals to solve the rights conflict seems irreconcilable. Convinced that only one rational solution exists, both groups, unable to understand the other's position,²⁵ strive for its own solution be accepted without concessions.

One system of ideas, which gives priority to society's ends, develops a negative concept of freedom -- society must restrain from interfering with individual freedom because that leads to society's betterment. The other relies on a positive concept of freedom -- individual is his/her own master. I. Berlin in his lecture "Two concepts of Liberty" has contrasted these two main lines of thought.²⁶

A negative concept of freedom is argued by communitarians and utilitarians who envisage freedom as a lack of restraint or compulsion. The extension of the protection granted to each freedom depends on the needs of society to make itself or its members perfect. A positive concept of freedom is developed by thinkers, who from a non-utilitarian individualism, see freedom as the ability or power of individuals to attain their own ends --self-realisation -- without perfectionist aims²⁷. According to Berlin, freedom in a positive sense is valuable because it is the ability to exercise the power of judgement and to make a choice by oneself, to achieve self-realisation. Non-utilitarian liberals regard liberty as a power to act rather than a permission of the state to act.

The positive sense of liberty relates to who is able to determine that someone must act in one sense or another. The negative meaning of freedom relates to non-interference from society on that decision. The negative sense involves the answer to the question "What is the area within which a subject is to decide on his ends without interference?" Sir Berlin says: "The answer to the question "Who governs me?" is logically distinct from the question

²⁴ See Berlin, *supra*, note 3, "Two concepts of liberty"; Berlin, *supra*, note 2; Bunge, *supra*, note 1.

²⁵ Crozier: We are prisoners of a system in which nobody listens to anyone. (*Le Monde*, Dec. 1989)

²⁶ Berlin, *supra*, note 2 at 121-131

²⁷ See Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (New York: Alfred Knopf, 1993)

"How far does government interfere with me?" It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists."²⁸

Although those queries are logically distinct they are not antithetic. Rather, the negative concept follows the positive one. If the answer to "who governs me?" is "myself", then the logic consequence is to discuss whether or not there should be any interference on my decisions from other individuals or from the government, and the extent of that interference. Quite the contrary, if the answer is "the government governs me", then, there is no need to address the question of interference, because the state cannot interfere with itself. In the last case, the state does not interfere with individuals because each individual does not govern himself/herself at all. If society has the ultimate power to decide on its subjects' ends, it may decide whether or not to allow individuals to decide on some remaining areas. Nevertheless, society ultimately decides. If society has the power to decide on its subjects' welfare, it may decide to forbid all activities that endanger the subject's life (e.g. high speed races), and allow individuals to decide whether to pursue activities less dangerous (e.g. climbing). However, because the power of decision dwells in society, it has the ultimate power to decide whether to delegate it and restrain itself and whether to reclaim its power and interfere with the individual's choices. Even if society grants subjects a wide protection to expression, it may properly reclaim its original power and society is not doing wrong when it reverses its decision and take the right to decide away from me. The negative concept of freedom entails that society has the positive power to ultimately evaluate and act in consequence, in deciding whether to interfere or not with individuals' decision as to what is the best for them. Hence, in strict logic it cannot interfere with itself.

The positive concept of freedom, like the negative concept of freedom, may entail the idea that society has the power to decide on behalf of subjects. The positive concept of freedom may be understood in two senses: either as the power to decide dwelling at head of

²⁸ Berlin, *supra*, note 3, at 129-30

each individual or at head of the whole social body, in Hegelians terms. The second meaning is maintained by those who give priority to society's ends, either from the right or the left. A positive concept of freedom in the latter sense, has been propounded by a large tradition of Western philosophers. For example, Engels believes in freedom as a positive power because "freedom involves control not just over natural forces but also over social forces."²⁹ In a capitalist society, his argument follows, social forces acquire their own momentum which cannot be governed by individuals because innumerable conflicting individual actions escape human control. Therefore, "only in a classless society, in which the means of production are communally owned and collectively managed, can these forces be brought under free conscious human control."³⁰ Meanwhile individuals bring under their control the social forces, the power to decide on ultimate ends is exercised by the social body. Hegelism considers the "self" beyond each individual being, it dwells in the social body -- being either a race, a church, or the state. This organic entity is entitled to impose the "true self" on its members in order that they achieve a higher degree of freedom. The free choice shifts from each individual to that collective entity empowered to coerce wishes on behalf of this "real self". This ideological position argues a positive conception of freedom which is exercised by a super-personal entity, either state, class or the march of history itself. It neglects the fact that society, an amorphous entity without neuronal web, cannot exercise the positive power of expression in behalf of the whole social body. Hence, the positive power at the head of society inevitably is entailed to the idea that some real person or elite is entitled to determine on behalf of the whole society what is best for its members. What led to totalitarian solutions in the past was not the positive concept of freedom but the conviction that the ends chosen by the "true-self" or collective entity -- indeed society's leaders -- may be imposed to make individuals perfect beyond their own conception of perfection. Indeed, Nazism and Communism showed how dangerous this

²⁹ Richard Norman, *Free and Equal. A Philosophical Examination of Political Values* (Oxford: Oxford Univ. Press, 1987) at 31 and ss.

³⁰ *Ibid.*

understanding of the positive concept of freedom is for human rights; in the latter self-direct became self-denial in order to attain independence, in the former the self-direct became the self-identification with a specific ideal. Then respectfully disagreeing with Berlin's assessment, it seems that this outcome could have been avoidable; the positive concept of liberty is not *per se* dangerous to individual rights. In brief, totalitarianism entailed to the positive concept of liberty is true if, and only if, "freedom" is equated to "self-direction at head of society" to impose the rational solution aimed with perfectionist goals. In this sense, the negative and positive concepts overlap; "the true self" restrains itself from interfering against the individual's will or act forcing the individual's will in order to achieve an ideal model to be imposed. The positive power dwells on the society rather than on each person. That is by necessity perilous for civil liberties. On the contrary, the positive concept understood exclusively at head of each individual -- each person chooses according his/her own conception of good -- is safe enough for freedoms.

Without distinguishing between who has the power to decide, either society through an elite or each individual, Berlin¹¹ seems to equate a positive concept of freedom to a perfectionist perspective; he sees in this a tremendous danger to civil liberties. He argues that the "positive" freedom interpreted as a social self-direction concept has aimed the two powerful totalitarian movements of our century. Both streams of thought, heirs of Enlightenment, one stressing individuals' values and the another stressing the society element, ended in exaggerated and distorted forms of totalitarianism, as Communism and Fascism. As Berlin maintains, from Kant's idea of humans as self-governed and rational beings we arrive at Mussolini, at Lenin, and at the dangerous postulates of utilitarians and consequentialist schools.

Only when freedom as a positive power is understood as belonging to each "individual", the question of interference makes sense. "Who governs me?" means "Who has the ultimate

¹¹ Berlin, *supra*, note 2, chap "Two Concepts of Liberty" at 166

power to choose my ends?" The query: "Where does the power of decision reside ultimately?" is a philosophical distinction, relevant to legal purposes. If the power to decide dwells in individuals, society must not interfere with individuals' rights even if those rights do not lead to improvement for mankind. Individual and social interests are not proportional and between interests and liberties there is not some rate of exchange "in terms of which it is rational to balance the protection of one against the protection of the other."³²

Keeping in mind the benefit of a positive concept of freedom at head of individual is crucial in the following argumentation. To avoid following in the same path towards anti-democratic solutions, the Kantian positive concept of freedom -- individual power to self-determination, that is, the power to choose one's ends to make oneself perfect -- must be sharply distinguished from the idea that this positive power belongs to "the sum of the individuals". In Kant's views, society never decides on ends in behalf of its members, though he, like Montesquieu, maintained that each individual is morally obliged to choose an ideal pattern of virtue. While relying on the kantian premise of individual self-direction, the positive concept of freedom which underlies this work is clearly opposed both to doctrines which conceive human beings as individuals in "wider" sense, or the "true self". Furthermore, departing from the kantian premise of self-perfectionism, the positive power argued here does not mean acting in certain self-improving ways established by either forces outside of the same individual or acting according to what we "ought to do" according to some ideal model to be imposed. Human beings are neither perfect nor capable of absolute goodness as Kant envisaged mankind.

The positive power guiding this work is the ability of each human being to choose rationally her or his own ends. Rationale does not necessarily mean that he or she must choose what improves himself or herself. "Rationally" means to be able to choose among several options, which may lead to fulfilling their welfare, by evaluating consequences of their actions *a priori*, rather than be guided by superior goals or without emotions. Freedom

³² Rawls, *supra*, note 10, at 26.

includes the ability to make all quantitative and qualitative choices meaningful for their own life, even those irrational, silly, wrong, rational, wise or social approved decisions. Many decisions may certainly lead him to worsen himself rather than to make him better. In a free society, for example, a genius cannot be forced to develop his/her skill to a maximum degree. Among decisions individuals are entitled to make are all those aesthetics, which are as valid as any other to be pursued, though considered irrational by the theoreticians of Objective Reason. Spinoza says: "That is, as wise man has sovereign right to do all that reason dictates, or to live according to the laws of reason, so also the ignorant and foolish man has sovereign right to do all that desire dictates, or to live according to the laws of desire."³³ What is worthy for someone may not necessarily coincide with the values of perfection held by other persons or society's leaders.

The core is that a positive concept of freedom, a self-direction power, may be argued either from an individualist perspective -- the individual has the right to decide ultimately -- or from a societarian perspective -- the ultimate decision on what is worthy to be expressed is *in head of society*. The real threat to civil liberties is the idea that because the power to decide on ultimate ends is at "head" of society, it is entitled to coerce those ends. Thus, the problem of limits on expressions is not whether or not society should interfere with the exercise of freedom of expression but who has the power to decide what is worthy to be said or heard.

In summary, the concept of freedom that guides this work is neither a positive power of society to decide on ends, nor the power of each individual which must exclusively be used to attain its own perfection according to an ideal model. It is the inherent ability of humans as rational beings, instruments of their own wills. Their decisions ultimately depend on them rather than on external causes. The positive concept of freedom, detached from the idea that human beings want to become "more human", is antithetical to the idea that subjects need some illuminated leaders to help them to decide what is best for them.

³³ Spinoza, *Tract. Theo-Pol.*, note 7, chap XVI at 201

In Green's words: "We do not mean a freedom that can be enjoyed by one man or one set of men at the cost of a loss of freedom to others. When we speak of freedom as something to be so highly prized, we mean a positive power or capacity of doing or enjoying something worth doing or enjoying, and that, too, something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellow-men, and which in turn helps to secure for them."³⁴

If the positive power to decide on one's own end always belongs to each individual, any encroachment on it implies government's wrongdoing. The negative aspect of freedom is a consequence of recognising this fact. Because the ability to make transcendental choices is inherent to human beings, society recognises it and restrains from depriving citizens of it. The non-interference, either from other individuals or from the whole social body, is a negative condition for the exercise rather than a constituent element of the concept of freedom. The lack of restraint is a logic consequence of the recognition of individuals' power to choose ends regardless of other individuals' assessment on their chosen values. Save, insofar as they may frustrate other's purposes, all individuals' ends have the same value. From a positive concept of freedom derives the counterpart of every right: duty. Whatever the decision is made by each individual, he or she bears responsibility for every identifiable harm or benefit that decision causes. As long as someone decides rationally, understanding the consequences of his/her action, this individual is accountable for his/her own choices. Each human being is -- instead of "human beings are"-- a self-directed being who can choose or reject a perfectionist goal for his/her life.

2. ONLY ONE RATIONAL SOLUTION TO BE COERCED

Not only the unfortunate misunderstanding of the concept of freedom argued by early Enlightenment, but also the insistence in one of its flaws is among the causes which led to this century's totalitarian governments. Despite their outstanding ideological

³⁴ T.H Green, *Lecture on the Principles of Political Obligation and Other Writings*, Paul Harris and John Morrow eds., (Cambridge, 1986) at 370 and ss.

differences, those who gave priority to individuals' needs and those who emphasised the needs of society shared a guiding principle of the Enlightenment: every social and political problem could be solved by the force of reason, *raison a toujours raison*.³⁵ The common root led them to believe that all clear-headed men would reach the same solution to a specific problem: there is one and only one rational solution to a given problem. Consequently, the origin of all conflicts could be found in the application of insufficiently rational solutions. "When all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all."³⁶ That is what Enlightenment means. If reason governed the world, there would be no need for coercion; a correctly planned life would coincide with absolute liberty and liberty with authority.³⁷ Imbedded in the mathematics way of reasoning, most theorists believed that, like the queries of Descartes' geometry, all social problems had only one rational solution, which could be found by every rational being, regardless of historical or geographic circumstances. Thus, they shared the conviction that reason will find the ultimate solution -the perfect one- to all individual and social problems. Rationalism argued that the only purpose of men was rational self-direction which fitted into a single universal harmonious pattern. Despite their deep differences, both Socialism and Liberalism further civil liberties. "In a sense Communism is a doctrinaire humanitarianism...No movement, at first, sight seems to differ more sharply from liberal reformism than does Marxism; yet, the central doctrines -human perfectibility, the possibility of creating a harmonious society by a natural means, the belief of compatibility (indeed the inseparability) of liberty and equality- are common to both."³⁸ Once the rational solution is found, it can be coerced,

³⁵ Berlin, *supra*, note 2, chap "Political Ideas in the Twentieth Century", at 11

³⁶ Berlin, *supra*, note 2 at 154

³⁷ See Kant, I. *What is the Enlightenment?* in *Perpetual Peace and Other Essays on Politics, History and Morals* 1st ed., trans. T. Humphrey (Cambridge: Hackett Publishing, 1983)

³⁸ Berlin, *supra*, note 2 at 122-31 and at 15.

because only irrational beings reject it.³⁹ That approach to social and political sciences has proved dangerous to freedoms by excess and defect. By defect, because it overlooks that, unlike mathematics problems, social issues have several rational though incompatible solutions. By excess, because "the" rational solution, chosen by "society", was seen worthy of coercion.

Once society as a whole, represented by its rulers, is seen as entitled to determine what is the "worth", any restriction on liberties can easily be defended. Stalinism and Fascism⁴⁰ carried out the perfectionist approach to a next step. Premising that rationality means that individuals must be coerced to accept the rational solution, Mussolini and Lenin felt themselves entitled to choose it on behalf of society. Fascism linked the idea of freedom to the state granting permission to individuals to develop their personalities in order to create the perfect state.⁴¹ The totalitarian thought is driven by the conviction that those who reject the perfect decision act under ignorance or under the influence of their passions. Stalin's and Mussolini's policies were defended by Caudwell and Rocco respectively on the basis that an elite has the right to determine what is worthy for individuals. Both totalitarian regimes used coercion, and suppression of individual differences in order to make men, who were not able to be changed by arguments, really free in the eyes of those rulers. In that sense, Norman recalls Christopher Caudwell's speech in the '30s: "A people is free whose members have liberty to do what they want... What do men want?...be happy, and not starved or despised or deprived of the decencies of life..to be secure,.. to marry and beget children, and help, not oppress each other... as Russia shows, even in the dictatorship of the proletariat, before the classless State has come into being, man is

³⁹ Arguing on the New Man, Rousseau held that men must be forced to be free. See Jean Jaques Rousseau, *The Social Contract*, trad. G.D.H. Cole, c.1952 (Chicago: W. Benton, Encyclopaedia Britannica, 1989) Book I, chap. 7

⁴⁰ It must be noted that this outcome was not inevitable. Marxism is just one of the possible derivation of Hegelism, and Communism in the Lenin version is just one of the possibilities of the Marxism; similarly, Nietzsche and Schopenhauer could have had another culmination rather than Nazism.

⁴¹ See Alfredo Rocco, *The Political Doctrine of Fascism* reprinted in *Reading on Fascism and National Socialism* (Chicago 1952) at 35-6

already freer. He can avoid unemployment, and competition with his fellows, and poverty."⁴² With this lecture Caudwell tried to justify purges, forced labour and forced collectivisation of agriculture as carried out by Stalin. Lenin acted with the belief that it was useless to talk and reason with persons who were unable to understand due to their extreme state of oppression. Thus, a rational pattern of liberation had to be coerced on them even against their wills.

Spinoza and Kant had taken great pains to refute this very totalitarian argument. They believed that the free individual should follow the "inner light". Man is a being who takes an orientation to his possible perfection by his own choice. In their aim of raising barriers to any tyranny either of majority or of elite, Kant and Spinoza taught that the power to choose always lies in the individual rather than in society.

Given that the idea that only one rational solution has impregnated Western thought to a lesser or greater degree, the two cruces -- whether to give priority to individual's or society's ends, and whether or not to foster liberties with a perfectionist goal -- have sharply divided the followers of liberalism from socialism. Those two gulfs have also separated two antagonistic streams of the liberal thought, namely utilitarians and non-utilitarians. At some point some scholars of liberalism, exasperated by the cruelty of social conditions and the lack of liberties for all, felt the impact of historicism and admitted the need for some adjustment to their theories on social control. The ideal of improving society and individuals led them to follow a moderate trend towards a more interventionist conception of state and the protection of freedoms. They come to the conclusion that non-state interference is not enough to secure the full exercise of freedom then an active participation of state is necessary.⁴³ Utilitarians premise that individuals cannot really decide on their own ends given that they are driven by irrational social,

⁴² C. Caudwell, *Studies in a Dying Culture* (London 1938). The essay is reprinted in C. Caudwell, *The Concept of Freedom* (London 1965) As quoted by Norman, *supra*, note 29, at 33

⁴³ Norman, *supra*, note 29

psychological and economic forces over which they have no control. Thus, they develop the concept of welfare state as a sound method to deal with injustices and to pursue the general well-being. A paternalist state, able to control such forces, is better positioned to choose what is worthy for its subjects, on behalf of them.

What is best for "the subjects" depends on the perspective utilitarian theorists adopt. Utilitarians always protect rights with perfectionist goals, though it must be highlighted that some utilitarians propose to improve individuals while others are aimed to better society. On the one hand, utilitarianism in its social version, like Socialism, protects a right as long as it leads to improve society, in the understanding that the individual's well-being is tied to their society. Freedoms are subordinated to society's rights. On the other hand, utilitarianism in its individual version protects a right only if it leads to the perfectionism of the individual. From any of the perfectionist ideologies -- socialism, social utilitarianism, and individual utilitarianism -- individuals may be coerced to act in a specific way in order to achieve either their own amelioration or the social betterment.

From a quite different position, another stream of liberal thought, that hereinafter called individual-right based theories, defends human rights regardless of any perfectionist goal. In the view of scholars such as John Rawls, R. Dworkin, Schauer, among many others, freedoms are valuable regardless of consequentialist reasons; they are to be protected regardless of whether they promote autonomy and self-fulfilment. They are protected because they are inherent to autonomous individuals.

Briefly, in the current philosophical landscape three positions shape the debate on freedom of expression. One position -- Communitarians, socialists and utilitarians in a social version -- maintain that the inescapable society individual antinomies must be solved giving priority to society's ends; they protect expression as long as they do not attack moral and public health.⁴⁴ Another position -- individualistic utilitarianism gives priority

⁴⁴ This is the approach of the International Convention on Human Rights

to individuals' rights as long this right leads to the improvement of individuals; it restricts freedom of expression such as pornography which may worsen individuals. A third position gives priority to the individual element and, detached from perfectionist goals, considers freedom as an inherent human power to attain ends. Protection of free expression is justified on the premise that it meets the needs of listeners as autonomous beings, rather than on the premise that freedom of expression "promotes" individual autonomy. The different rationales argued for protecting expression stemming from those different perspectives, are discussed further.

3. DEPARTURE FROM THE RATIONAL METHOD

Another ideological fact is argued, one connecting the postulates of Enlightenment to anti-democratic movements during the XXth century. During the XIXth century, most of schools of thought flowing from the Enlightenment departed from one of the greatest findings of the movement: strict adherence to reason and scientific method. They misunderstood the idea of reason by excess and by defect. First, as already discussed, they extended the idea of 'rational solution' as one to be coerced by the state. Second, in analysing the origin and possible solutions of the rights conflict they did not turn only to reason by using experience and verifiable facts to understand reality, but to emotions, which played an important role in their proposals.

According to Berlin, throughout recorded history, scholars aimed to propose the resolution of transcendent questions rather than the solution of pressing issues. Whether found through empirical methods or inferred from metaphysical or religious propositions, the answer to such queries provided a vital substratum for the legal, political and scientific inquiry. The XIXth century witnessed a change in this epistemology. Romantic movement thinkers denied either implicitly (the whole movement) or explicitly (Schopenhauer, Baudelaire, Nietzsche, Kierkegaard) the importance of political action based on premises elaborated according to scientific methods. The philosophical world in the current century received the 'impronta' of romantic scholars. Their followers of today, the

deconstructuralist movement⁴⁵, evidence a remarkable trend to distrust of scientific knowledge. In their endeavour to reach "the" solution to the social problems, many scholars put aside valid experiments, logical critics, counterexamples, and rational method to get it. In the rush to solve urgent problems, they apply a dogmatic ready-made solution. Hate-speech codes are a clear example of this trend to encroach on rights without recourse to empirical contrast on which to base policies. Jack Granatstein, professor at York University said: "We are moving in the Dark Ages again, where knowledge is not something that is going to be subjected to the tests of truth, but to the tests of race, ideology and gender. I find it terrifying."⁴⁶ The abandonment of the *idee fixe* to solve insoluble matters guarantees an accord on political matters. "The worried questioner of political institutions is thereby relieved of his burden and freed to pursue socially useful tasks, unhampered by disturbing and distracting reflections which have been eliminated by the eradication of their cause."⁴⁷ In the struggle for the rise of a perfect society, freedom of expression was rapidly put aside by Fascists and Communists. Similarly, today, supporters of welfare-state do not argue that the state must provide broad opportunity to discuss, in a rational or emotional way, all pressing issues. Instead, under fears that open discussion may lead to instability, they ask for censoring a debate which may lead to discrepancy and confusion. Taking away disturbing inquiries on the sources of social disintegration, they delude themselves that the conflict will despair.⁴⁸ Western society with its lack of love for reason and ideals intends to solve social problems by applying ready-made formulas to achieve the organisation of society as a "smoothly working machine."⁴⁹ New philosophical and political trends directly

⁴⁵ Bunge, *supra*, note 1.

⁴⁶ As quoted by Peter C. Emberley, *Zero Tolerance. Hot Button Politics in Canada's Universities*, (Toronto: Penguin Books, 1996) at

⁴⁷ Berlin, *supra*, note 3, at 23

⁴⁸ Debate of issues which may rise divisive controversies is put aside. *L'intelligentsia du 20^é siècle* owes a conscious critic on the disparity on tempo between technology and social changes. Social systems are not studied: the subjective philosophy and its daughter the phenomenologic sociology teach to study the *lebenswelt* or ordinary life instead. Globalization has been accepted without contest. See Bunge, *supra* note 1 at 163

⁴⁹ Berlin, *supra*, note 3, at 25

ignore overpowering and perplexing issues which cannot be answered by reengineering society.⁵⁰ What is worse, any challenge to this way of organising society is either considered a defensive psychological answer of the challenger, or a prejudice of class, or the query is rejected on relativism moral bases.⁵¹ This brilliant method of training people to avoid thinking and debating troublesome questions, of convincing them that seeking the last cause of all things is mental perturbation, together with the elaboration of myths, has favoured the rise of totalitarianism and quasi-totalitarian religions. From an ideological uniformism, nothing prevents a repressive regime from following in order to set up a new social order.

Indeed, the positive concept of freedom at head of society with perfectionist goals and the idea that society is entitled to choose and coerce ends are dangerous for the notion of human rights problem. The danger is aggravated when ends and policies to further them are established without checking a priori premises against facts. The next discussion proposes to add elements from an early Enlightenment thinker to traditional theories in expression in order to reverse a trend which is prompted to curb rights in its effort to solve current disagreements upon constitutional matters.

4. SPINOZA'S CONCEPT OF FREEDOM

Though there is a general assumption that Mill's theory is very effective in interpreting the principles of freedom of expression, Spinoza's contractualist theory may be another starting point. An appeal to a contractualist theory at a point time when those theories are brought into disrepute is considered appropriate because, beyond the discussion on whether the original agreement is hypothetical or not, the terms of the compact are renegotiated each time fundamental matters of the supreme law of a society are at stake.⁵²

⁵⁰ This discussion benefits from Sir Berlin's paper on *Political Ideas in the XXth Century*, printed in *supra*, note 2.

⁵¹ See K. Popper, in Guy Sorman, *Los verdaderos pensadores del Siglo XX*, trad. José F. Delos, 3rd ed., (Buenos Aires: Atlántida, 1989) at 269. Karl Popper, *El Conocimiento Objetivo* (Bs.As.: Complexe, 1985)

⁵² John Rawls, *Political Liberalism* (New York: Columbia Univ. Press, 1989)

Furthermore, academia, as very few social enclaves, recognises its origin in an agreement among its free and equal members.

In varying degrees, according to the exponents, contractualist theories are premised on a foundational agreement for the existence of the political society. Individuals consent to cede some power to the state if, and only if, the state, in turn, agrees to protect them from the uncertainties of natural life. Among them, Spinoza's theory seems outstanding to the human rights debate, specially regarding freedom of expression, because of three main reasons. First, starting from a specific idea of human beings, he envisages freedom as a positive concept which always belongs to each individual. Second, although explicitly retained by individuals from the powers ceded to the state, freedom of expression is a fundamental part of his theory linked to the idea of consensus. Third, despite his strong individualism he stresses the social features of human beings in elaborating his theory on limits to speech.

Spinoza's thought was affected by its philosophical milieu. His work is influenced by rigid formality of Descartes' method of geometric proof, by Cartesian Scholasticism mixed with Bacon's empirism (especially in the *Tractatus*), and Judeo Christian ideas; everything lucubrated in the tolerant atmosphere of Amsterdam. A whole application of Spinoza's theory seems inappropriate. Theorists of past centuries ignore large groups of population. The Declaration of the Rights of the Man and Citizen was given just thinking of "men" and "citizens". Denial to women and slaves of natural rights and their subjugation in order to create a new world order is part of Enlightenment heritage.⁵³ The legitimisation of the property relations called for the enslavement of women in Locke's theory.⁵⁴ Spinoza excluded

⁵³ Aristotle's influence on Enlightenment thinkers led them to accept his "type of relationships" as just ones. Grotius called rectorial law that which rules unequal relationships as master-slaver, father-children, God-men, etc. See Aristotle, *Nicomdem, Ethics*, 31st ed., (Chicago: Benton, 1989) at VIII, viii. Grotius, *supra*, note 14 Book I, Chap I, ii,2

⁵⁴ See Lahey, "The Charter and pornography: Towards a restricted Theory of constitutionally Protected Expression", in Joseph Weiler and Robin Elliot, eds., *Litigating Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986): 265 at 267

women from the *res publica*⁵⁵. Most, if not all, of those thinkers reinforced or grounded their theories on a conception of the Divinity which exceeds acceptable parameters for most Western comprehensive doctrines. However, the greatness of Spinoza's outcome impacted on the politic-philosophical thought of the following centuries and some of his ideas on freedom of expression are a new perspective for the discussion.

To ground his general theory on freedom, Spinoza analyses the nature of human beings. Spinoza envisages all men equal: "those who administer the laws are bound to show no respect of persons, but to account all men equal."⁵⁶ It is not clear what "equal" means. It can be inferred that men are equal because of their subjection to the law of nature and psychological laws, as well as their ability to use reason. Human beings are bound to the natural law and linked with the rest of the creatures as part of a complete order. Men, subject to the law of nature, act by the right of their nature to preserve themselves. An agent's conduct is always determined by what he personally thinks to be most advantageous for him. From this descriptive law, Spinoza derives his account that men always keep their natural right (power to decide on his self-preservation) intact. Man, as any other being alive, strives to keep his existence. Moreover, man does by natural right everything he does.⁵⁷ In the state of nature individuals have both the right to satisfy their desires by any means and the right to regard as foes those who wish to prevent them from acting in consequence.⁵⁸ Following Hobbes, Spinoza stresses the general law of nature of self-preservation as applied to humans as the very substratum of his idea of freedom. Freedom is the positive intellectual power to decide in order to meet the needs of self-preservation.

⁵⁵ Spinoza, *supra* note 9, chap XI, sec 4, at p 387

⁵⁶ Spinoza, *supra*, note 6, at 208

⁵⁷ Spinoza, *Tract. Theo-Pol.* xvi; *Tract. Politicus* 11, 4-5

⁵⁸ Spinoza states: "Anything, then, that an individual who is considered as subject only to nature judges to be useful to himself - either through the guidance of sound reason or through the impetus of passion - he has a perfect natural right to desire and indeed appropriate by any means in his power - by force, fraud, entreaty, or however he finds it easiest- and hence a perfect natural right to regard as an enemy anyone who wishes to prevent him from satisfying his desires." *supra*, note 8, Chap XVI

However, it should be noted that Spinoza does not limit natural right to self-preservation as Hobbes did. He extends this concept to the "self-interest", which includes ends which each individual chooses as most relevant in his life.

"The right of nature" is only limited by natural conditions. Like the rest of the creatures, man is bound to particular natural laws: he cannot fly like a tree cannot walk. The exercise of his power depends on his physical-mental abilities. By the same natural law, man cannot give up the right to choose his ends and to act for his self-preservation. Because of the law of nature, there is no possibility of depriving a human being of the ability to think, to decide, and express. The right of nature has the same essence and existence whether or not society recognizes it. It must be highlighted that Spinoza does not say "men have a right to do...", he says "men do by a natural right." The phrase suggests two prongs in his theory of freedom relevant for a contemporary perspective: (1) by a natural right men decide, inevitably guided by their natural reason and passions within a natural cosmos, (2) right cannot be separated from power.

(1) The first prong suggested by "the men do by the natural right" is that man acts not only according his own wants but at some point influenced by the general law of nature that regulates him, other individuals, and their environment. Men are not isolated, they interact with their whole universe. They are "instinctively" social and driven by the same psychological laws. Spinoza pays special attention to men's emotions and the role they have in their disposition to agree in a social life. External objects affect the human body.⁵⁹ Human beings correlate bodily affections (pain and pleasure) with ideas which, in turn, increase or decrease men's power. Men associate an increase of their power with joy and a decrease of it with sorrow. They love the former and hate the latter.⁶⁰ One of those psychological laws drives men to transfer the emotion involved in one idea to other ideas. It explains why hatred of Jews "who killed Jesus" is extended to the whole Jewish race.⁶¹

⁵⁹ Spinoza, *supra*, note 7, at ii, 16

⁶⁰ *Ibid.* at iii, 13

⁶¹ *Ibid.* at iii, 16 and 46

Another law drives each man to be affected by a certain emotion which they imagine a fellow-mate feels. The transference of hatred or love involved in one idea is affected by the human tendency to empathy with other fellows. Man is a creature torn by conflicting passions, which are transferred by and to other human fellows. Because men are bound by passions their entire existence is one of hate and warfare.⁶² Passions, good and bad, are natural and they follow necessarily from connections between human beings as sensitive beings. To act according to one's own passions means to merely react to an stimulus rather than evaluating *a priori* the consequences of one's conduct.

Spinoza suggests that men are not mere slaves of passions; they do not always react automatically to stimulus. According to Spinoza, the success to overcoming passions "consists in true knowledge of them,"⁶³ through a logical concatenation of ideas, and in rejecting mere association of previous painful or happy experiences.⁶⁴ Only if that process is followed, has the decision on ends been taken by a free man. This process is followed by a free man either in the state of nature or after the social agreement. Even in the state of nature men are able to use reason. By the law of nature man has passions and reason. He does not specifically explain what to use reason means, but it can be inferred from his distinction between *ordo intellectualis* and *ordo imaginationis*. Reason is the power to form adequate ideas and to grasp necessary connections.⁶⁵ Ideas connected in a logical chain have their origin in reason. Reason is the same in all men and enables their minds to perceive things through the first cause instead of the affections -- pain and happiness -- those things may cause on men. Reason "obliges" a person in the sense that it leads him to act in his own interest. "Interest" is not necessarily a selfish one. Someone may restrain himself in exercising one of his rights in order to foster others' well-being, on the understanding that such a decision is in his best interest. In this sense reason does not impose an

⁶² See A.G. Wernham, *supra*, note 6, General Introduction

⁶³ *Ethics*, *supra*, note 8, at v, 4

⁶⁴ *Ibid.* ii, at 18 and 29

⁶⁵ *Ibid.* at ii, 41, 44; *Tract.Theo-Pol.* *supra*, note 7 at iv

obligation stated in "it must be done" terms, rather to obey one's own reason means to follow the best course of action to get the chosen welfare in the long term. In Spinoza's views, "men lead by reason" does not mean that they are driven by any Kantian consideration to the ultimate good for everybody. He does not teach that rational men eliminate their desires and passions. He is opposed to the principle that "desire eliminated, or successfully resisted, is as good as a desire satisfied."⁶⁶ He would not agree with Rousseau's view that men "truly free" desire only what they can perform.⁶⁷ Spinoza despises asceticism. Rather, according to him, men are led by reason in the sense that they can a priori evaluate the consequences of their conduct in order to satisfy their own ends and emotions. Keeping this natural right intact a man does whatever he thinks to be most advantageous to himself. The agent can break any promise which he has made if to keep that promise becomes a disadvantage to him. Again, the decision on what is advantageous or disadvantageous is not necessarily taken by selfish desires, but according to the dictates of the reason. Man evaluates a priori what is most convenient for him, taking into account his own and other fellows' benefits in the short and long term.

It would be possible to deduce from Spinoza's statements that few free men, if indeed one, ever exist, or that he assumes that men are highly rational saints. On the contrary, he states that if men were saints "there would be no need of artifice to promote loyalty and concord."⁶⁸ He takes pains to stress that men should not be ascribed virtues as Reason and Will when experience shows that only a few of them really have them. Neither regarding men as exclusively rational nor conceiving them as an idealistic theorist "would like them to be" is helpful in a political theory. It would be useless to develop a theory beginning by setting up an abstract idea of human nature that is non-existent in the world of the

⁶⁶ See Berlin's explanation on sublimation of wants as the very antithesis of political freedom. *Supra*, note 3 chap Two concepts of liberty, at 139

⁶⁷ Jean Jacques Rousseau, *The Social Contract*, trad G.H.Cole c.52 (Chicago, Benton, 1989) #8. Jean Jaques Rousseau, *Dissertation on the Origin and Foundation of the Inequality of Mankind*, trad. G.H.Cole c.52 (Chicago, Benton, 1989) at 338

⁶⁸ *Supra*, note 7, chap v

experience. Indeed, men are neither perfectly rational nor perfectly irrational.

Differing from Hobbes, Spinoza explains that even in the state of nature men are not absolutely free if they act driven only by their passions. The exercise of his reason, which men possess even in the state of nature, is a requirement for an individual be free.⁶⁹ Spinoza differs from Kant too. Reason empowers men to be free, but freedom is not reduced to a mental power. The Kantian argument on the state of freedom of slave does not make any sense to Spinoza. Despite the fact that individuals are not always guided by reason, they are able to choose ends putting aside their desire to avoid immediate personal pain or get personal gratification. Reason leads to understand that passions or appetites, if fulfilled, would not lead to self-interest. It always leads a person to choose his/her own welfare, which may coincide or not with the fulfilment of her immediate desires and which may include others' as part of her own ends. Men, who decide by previously evaluating whether their actions will lead to their own self-interest are truly free.

The natural law of self-preservation and the guidance of reason have a special relevance in driving men to enter and remain into society. Spinoza envisages men in a constant interaction with society: "without mutual help men can hardly support life and cultivate the mind."⁷⁰ Everybody wishes to live without fears. Reason leads men to understand that a peaceful state of things would be quite impossible in a society where everybody does what he or she wants and has the right to achieve his or her own desires even by force. "Since fear of solitude exists in all men, because no one in solitude is strong enough to defend himself, and procure the necessities of life, it follows that men naturally aspire to the civil state."⁷¹ Here, he differs from Hobbes. The latter premises that man (Buffle-coate) is not "a political animal by nature,"⁷² hence, men need the state to keep them in

⁶⁹ Differing from Aristotle, Spinoza does not espouse a theory of different degrees of reason what led the Greek philosopher to envisage different degree of persons. See Duff, *supra*, note 5 at 121 and ss.

⁷⁰ See Wernham, *supra*, note 6 at 16

⁷¹ *Tract. Pol.*, *supra*, note 9, chap VI,1 at 316

⁷² Hobbes, *Leviathan*, 31st ed. (Chicago: Benton, 1989) at 18

order. For that goal be achieved, the sovereign must control religion and education, and decide what doctrines can be taught. Although Hobbes and Spinoza agree that security and peace prompt men to set up civil government⁷³ Spinoza differs with the former in arguing that peace is hardly worth the name if it is achieved in such a fashion that it prevents men from choosing rationally what they believe is their own self-preservation.⁷⁴ Following Grotious, he suggests that Man is a reasonable being and even the most primitive law is developed under the control of reason. Laws are originated in the social instinct of human beings, and they are enacted in the conviction that society must be preserved and subjects protected from others' harming actions. Only the law which accomplishes this purpose is just. Men obey government not because of a promise to obey (the social contract) but because they are rationally convinced that obedience is more advantageous to achieve their interests. Thus, they can reverse their decision whenever they consider that to remain in society is against their interest. This is a remarkable difference between Spinoza and other contractualists.

(2) The phrase "men do by a natural right.." suggests a second prong in Spinoza's theory of freedom. This phrase prevents any temptation to divorce right from power. In the same manner that a tree cannot walk "by law," "the power to choose," conferred to men by nature, cannot be suppressed by social convention. Not even for the fear of state of war, do individuals transfer their positive freedom to the state. *By the right of nature* individuals cannot give up the freedom to choose ends and to speak, even if they want to. The state does not have control on its subjects' thoughts or their expression. Even dictators need a minimum of consent of subjects; they must agree to be enslaved.

Following Hobbes, Spinoza believes that free means not to be subjected to others' will. However, in this respect, Hobbes understands freedom as an absence of external impediments ⁷⁵ and "free man" is one who can do what he wants. In his theory, men are only free in the state of nature; when they enter into the social contract they transfer to

⁷³ *Supra*, note 9, at v,2; *supra*, note 8, at iii

⁷⁴ *Ibid.*, at v,4-5, vi,4; *supra* note 8 at xx

⁷⁵ Hobbes, *Leviathan*, *supra*, note 72 at 14

society the power to self-preservation. After the agreement, society can bestow part of its power on men. For Hobbes and his utilitarian followers, freedom means that society refrains itself from reverting the power it granted to subjects. On the same subject, Spinoza argues that the power of self-preservation as dictated by one's own reason is never transferred to society. Society is doing wrong when it forces upon individuals ends which they have not chosen. This a remarkable difference between Spinoza's and utilitarians' theories. Individuals always choose by natural right what they consider a worthwhile human life. In their choices, they are led by the "dictates of reason," which they cannot put aside or get rid off. Those dictates are not prescriptions. There are not "ought" or commands in Spinoza's theory. It is not a duty to follow those "dictates." Facing the conflict between the desires which have originated from the reason and the desires which spring from passion, a free man does not restrain himself from choosing the latter because it is his duty, but because reason says that the former are more advantageous for him. Spinoza's concept of reason does not equate to the Objective Reason. "Reason" is not the power to choose in accordance with a superior moral principle, but the capability of understanding a priori the consequences of one's own action and then act accordingly.

Spinoza states in his *Ethics*, 7 Definition: "That thing is said to be free, which exists by the mere necessity of its own nature, and is determined in its actions by itself alone. That thing is said to be ... compelled, when it is determined in its existence by something else in a certain fixed ratio."⁷⁶ A man is metaphysically free when he rationally decides on his self-interest according to his positive intellectual ability, and he is the origin of the impulse to act.⁷⁷ One is free who is compelled neither by external forces -- others-- nor by his own passions which prevent him from evaluating a priori the consequences

⁷⁶ Similarly in *Tract. Pol.* ii, 7 he adds: "He can be called free ... only in so far as he preserves the power to exist and act in accordance with the laws of human nature."

⁷⁷ Edward I. Pitts, "Spinoza on freedom of expression" (1986) 47 *Journal of the History of Ideas* 121 at 23

of his acts. Although, persons' thoughts, expressions and behaviours are influenced by their cosmos, the ultimate decision dwells in each individual.⁷⁸ Mill, stresses that "the human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice."⁷⁹ In this sense, Spinoza and Mill agree. But, while Mill tangentially addresses freedom as the exercise of an individual's own power, Spinoza makes of this idea the core of his argumentation. Spinoza argues that because man has decided rationally by himself, he is responsible for the harm his choice may cause. This volitive element is ignored by hobbes and subsequently by utilitarians and communitarians thinkers.⁸⁰

Spinoza connects his metaphysical concept of freedom with his political one. Robert J. McShea explains: "It is this concept of freedom as action originating wholly in the interest of the agent, and understood by him to be in his interests, which is contrasted with bondage, a state wherein the feeling of having acted is illusory, because of the apparent actor, is a mere transmitter of energies and interests foreign to him."⁸¹ To avoid a potential state of war where the desires of everyone conflict with others', men voluntarily enter into a social contract and limit some short-term gains in order to get some long-term gains of security and happiness.⁸² Led by reason, men create society "so each must have firmly resolved and contracted to direct everything by the dictate of reason alone..., to restrain his appetite when it suggested anything harmful to another, to do nothing that he would not wish done to himself, and finally, to defend his neighbour's right as if it were his own."⁸³ In order to enjoy the benefits an organized society gives, individuals enter into a partnership with government. Individuals by natural right, choose ultimate ends and

⁷⁸ Tract. Theo-Pol. *supra*, note 7 chap XVII, at 153

⁷⁹ J.S. Mill, *On Liberty and Considerations on Representative Government* (Oxford: R.B. McCallum, 1946), at 14. at 187

⁸⁰ See Wernham, *supra*, note 63, at 16

⁸¹ Robert J. McShea, *The political philosophy of Spinoza* (New York: Columbia Univ. Press, 1968) at 61

⁸² Tract. Theo-Pol., *supra*, note 7, at vi,1

⁸³ *Ibid.*, *supra*, note 7 chap XVI, 127

government fosters the conditions so that these ends may be accomplished. The state does not determine its subjects' welfare, but provides the means to its attainment.

Men do not enter into a social contract guided by perfectionist purposes. "It is not, I say, the purpose of the state to change men from rational beings into brutes or puppets; but rather to enable them to exercise their mental and physical powers in safety and to use their reason freely, and to prevent them from fighting and quarreling through hatred, anger, bad faith and mutual malice. Thus, the purpose of the state is really freedom."⁸⁴ The state's end is both to free from fear of the attack of other men and maintain the conditions which make possible human's fulfillment, and to respect men's independence of judgement on which fulfillment depends.⁸⁵

Spinoza's positive concept of freedom does not lead to any totalitarianism, as someone could fear. The choice of ends always belongs to each individual who is not obliged to choose either an individual or communitarian perfectionist goal. The state has to provide social conditions so that all men are free from their fears which in turn fosters their new choices. Spinoza clearly maintains that the state is not entitled to argue perfectionist goals to encroach rights. The choice made by the individual on what is worthy is a crucial point in Spinoza's theory.⁸⁶

Individuals cede to the government the ultimate power of decision "on coercing" behaviours so that the state may fulfil its ends. This power is not given once and for all. The interaction between man and his social system is intrinsic and permanent. In both *Tractatus*, Spinoza argues that neither moral duty nor political organization have any justification in the long run except as they serve to foster the subjects' free power to choose ends. Citizens may argue rejecting the property of the instrumentation of the chosen ends in the state policies. Thus, reason "obliges" the state also, leading it to act in order to preserve the citizens' interests. Spinoza does not mean that reason leads to the

⁸⁴ Ibid., chap XX at p. 259

⁸⁵ Ibid.

⁸⁶ Pittis, *supra*, note 77 at 25

perfect solution, but rather to an understanding of the consequences of one's own acts. The reasonable state convinces its citizens that obedience is in their own best interest.

As long as the state is governed by reason, political freedom is identical with the minimum infringement on metaphysical freedom. The main purpose of the wise state is to protect freedoms. The true aim of government is liberty"⁸⁷ and its virtue is its security."⁸⁸ Due to the fact that human beings have both a propensity to live in society and to insultate themselves, reason leads government to impose external legal solutions respecting the highest degree of freedom.⁸⁹ The state which gives priority to its interests over those of its subjects' is non-reasonable. This fundamental point makes Spinoza's account of human rights outstanding among contractualist theories.

Spinoza's theory does not necessarily exclude a state's actions in order to foster the exercise of freedoms. On the contrary, this is the whole justification of the state in Spinozian terms. The state must both: restrain itself from interfering with the individuals' ultimate choices, and provide positive conditions to facilitate the subjects' power to make choices. material conditions such as poverty and starvation are coercive means imposed by social arrangements which deprive individuals of freedom as any other coercive means may do. Finally, there are subjective conditions that affect our power to choose: cultural conditions. The more a person is prepared to question and analyse dominant attitudes and policies, the more she is able to make rational choices. material goods, culture and education do not make persons freer, but their availability enhances a subject's choices. Social arrangements either in the economic and educational fields or in the distribution of political power are positive conditions that could be used either to favour or make more difficult such exercise. Those political and material conditions are as necessary as the lack of coercion in the exercise of freedom.⁹⁰

⁸⁷ Ibid.

⁸⁸ Tract. Pol., supra, note 11 at p. 290

⁸⁹ See Kant, supra, note 39 at 33

⁹⁰ Norman, supra, note 29, at 40 and ss

It would be misleading to equate all or any of those conditions to freedom. They are not indispensable to the exercise of freedom. A lack of education or wealth does not absolutely prevent a person from deciding, at least in a minimum degree, what is best for his/her life. Extremely disadvantageous circumstances -- such as: when a life is at stake, or poverty, abused childhood, lack of political power -- do not prevent *per se* a person from choosing whether to commit a crime or not. As a counterpart, a materially and culturally advanced society does not guarantee *per se* that liberties are not encroached upon.

Indeed, the absence of coercion and availability of the positive conditions place individuals in a better position to make choices; while political, cultural, economic or legal coercion, either by state or by groups or some individuals, make it difficult to exercise the inherent power of making choices rationally. Both, the greater presence of these positive conditions and the greater absence of the negative condition of non-interference lead to a greater exercise of the freedom by each member of a society. Nevertheless, even if options have been objectively narrowed and the exercise of freedoms is made more difficult, it does not imply that freedom has lost its positive nature. Freedom is a concept that evolves around the individual's perception and assessment of alternatives. Even under coercion (e.g. "the money or the life", "change your ideas or imprisonment") there is a rational power to make choices evaluating *a priori* consequences. Although those circumstances limit the scope of his/her choices, nevertheless a person can choose to act in one sense or another, legally or as outlaw according to what is worthier for this person. In fostering an end rejected by subjects, the state may decide to apply more and more coercion. In Spinoza's view, this inevitably leads to the state's own ruin; at some point rebellion will explode.

In summary, the positive conditions and the positive nature of freedom can be clearly distinguished. Thus, policies intended to further the exercise of a freedom must hang on the very nature of freedom: the last decision on ends and how to satisfy them belongs to each individual. The crux of the human rights debate is who decides what is worthy for each

individual. In Spinoza's theory, the power of choice is - by nature - at head of individuals. Who determines the worth rather than the measure of others' interference in our decisions is the essence of the problem. Whether society or some group interfere with the execution of the decision made by individuals is a complementary problem rather than an antagonistic one. While a subject's perfectionist choice for his own life does not necessarily affect other individuals' rights, any perfectionist goal pursued by society or by a group with political, economic or cultural power necessarily will clash with individuals' decisions because what is perfect for one person may not be for another. The more a society or its leaders are driven by a perfectionist goal the more they interfere with its members' decisions, and the more danger of falling into an authoritarian government. The Spinozian idea that the power to choose ultimate ends is at head of each individual is a barrier to totalitarianism because it excludes the possibility that someone other than each person chooses ultimate ends and imposes them.

B. EVOLUTION OF THE NOTION AND THE PROTECTION OF FREEDOM OF EXPRESSION.

In their laudable effort to make society a better place to live, totalitarianism in an extreme degree, and liberalism proposing welfare state in a lesser degree, have encroached on rights. Those curtailments have been excused by the need to protect weaker members' liberties and equality. Moral, political and social catastrophes of the XXth century have led to a desperate wish to live in an universe which, though intellectually foreseeable and boring, gives some inner certainty that those disasters will not occur again.⁹¹ This solution demands conformism to certain patterns of behaviour, elimination of free inquiry and repression of other proposals. These factors have a devastating effect on freedom of expression; hence they must be recalled in revisiting current theories of expression, and when adding elements to them to offset censoring tendencies.

1. A BRIEF HISTORIC ACCOUNT

Neither ancient Greeks nor modern states protected expressions against the current

⁹¹ Berlin, *supra*, note 2, at 29

ideas on religion or against government's actions. Recorded history available to us shows that freedom of expression was a concept foreign to Chinese, Jewish and other ancient civilisations as well.⁹² Though beyond the scope of this work to delve into the historical evolution of freedom of expression, a brief historical analysis of its origin will be helpful to posit the debate on freedom of expression within a current liberal system of human rights.

Several authors have suggested that the idea of freedom of expression was developed from the concept of *Tolerance* in religious matters. After unmerciful persecutions of dissidents, either Catholics or Protestants, a certain level of religious tolerance arose in the late 1600's,⁹³ specially after the unlicensed publication of John Milton's *Aeropagitica*. Tolerance implies a "true doctrine" which prevails and "other truths" which are allowed to be conveyed. It seems logical to suppose that first someone claimed a right to express freely and then authority conceded her right to do so. "Tolerance" suggests authorisation to someone who has previously pleaded his need to convey unpopular opinions. Both the Reform and Enlightenment rejected the idea that there was an absolute truth. This was in Mirabeau's mind when he replaced "tolerance" for "freedom of religion".⁹⁴

The chronological connection between freedom of religion and of expression can be found in the beginning of the Reform debate. From the earliest times, governments used religion as a means of controlling their citizens. Moreover, religious conformity was regarded as vital to political loyalty. Socrates' trial is an example that heresy was taken as a proof of disaffection to the state. Until the Reform, political-religious control depended on two conditions: a) most of citizens were to recognise the same faith, b) the

⁹² However, works of literature e.g. Aristophanes' *Dionisio* in his *"The Frogs"*, just to mention one example, shows how important was considered to speak our minds in ancient times.

⁹³ Conf. Ethel Groffier, "Les Aspects Juridiques de la Tolérance: Essai de Terminologies" in Groffier & Paradis, eds. *"The Notion of Tolerance and Human Rights"*; and H. Kamen, *The Rise of Toleration* (London: Weidenfeld and Nicolson, 1967)

⁹⁴ A. Lalande, *Vocabulaire technique et critique de la philosophie*, 12th ed., (Paris: P.U.F., 1976)

secular government was to have the support of the religious authority. Religious fears prevented citizens from rebelling against the secular government. When a universal church was replaced by many churches, hostile among themselves, religion was no longer a means of social control.

The political role of the Reform came about in two domains. First, it gave ideological support to the abolition of the ecclesiastic jurisdiction. Once the secular authority became free from Roma, the Prince intended to become the authority in religious issues related to his territorial supremacy. Given that the religious authority could be chosen, citizens split themselves, recognising competing churches as their religious authority. The idea of freedom to choose the religious authority was perceived as a great danger to the stability of their governments: thus kings tried by every means at their hand to impose upon their subjects one single faith. They tripped with a great obstacle to their endeavours: Lutero and Melanchton's tenet of faith which said it was necessary to recognise the free will of all men because they were all God's creatures able to use their reason.⁹⁵ Sovereigns were not able to avoid the next political step: servants, either lords or burgesses, claiming freedom from the King previously regarded as positioned by God through Roma. Soon, the Divine Right of Kings was challenged on the basis of individuals' right to follow God's guidance. When peasants and common people heard that men were created equals, they wanted to conquer, together with the freedom of religion, other liberties. Secondly, the Reform gave ideological support to demand the right of men to argue for their ideas, though at the beginning "ideas" meant "religious ideas" only. Since the Bible could be interpreted freely by everyone according to their own understanding, this interpretation could and had to be exteriorized. If Lutero had received a message from God directly, then anyone could be used to carry a message from the Divinity. Peasants demanded the right to preach what they believed and to complain against the small lords that tyrannised them like big lords

⁹⁵ See "Confession of Augsburgo," June 25th, 1530, in Cesar Cantu, *Historia Universal*, (Bs. As.:Sopena, 1944) Vol VII, at 874

oppressed their vassals. (AD 1502)⁹⁶

Both ideas --the suppression of one single religion as a means of social control and the divine right of individuals to follow and convey personal convictions -- were regarded as a serious political problem. In Ireton's words: "When I heard men speak of lying aside all engagements to consider only that will or vast notion of what in every man's conception is just or unjust, I am afraid and do tremble at the boundless on endless consequences of it."⁹⁷ Hobbes shared those fears too: "covenant, without sword are but words." Contractualist theories were born to justify a strengthening of authority within a historical context perceived as social disintegration. Most of them craved for unity and gave strong reasons to justify coercive conducts.⁹⁸ Locke's and Spinoza's contractualist theories shine as exemptions to that general trend. They both, like Kant and Mill later on, argued that even if the development of men as self-directing beings was dangerous to state stability, at the end, it would be the best for human progress.

Acknowledging that the struggle for expressing ideas is as old as humanity, it may be pointed out that its legal recognition is a product of the intellectual movement originated in the Renaissance. Freedom of expression was regarded as *sine qua non* condition of human life and democratic process. It was highlighted among civil liberties by Milton, Mill and Tocqueville. The French Declaration des Droits de l'Homme et du Citoyen states: "La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf a repondre de l'abus de

⁹⁶ *Ibid.*, at 279 and ss.

⁹⁷ In *The Clarke Papers*, Camden Society, Vol I, at 273, as quoted by A.G. Wernham, *supra*, note 6, at 2

⁹⁸ Gottfried Leibnitz (1646-1716), the last "pre-modern" philosopher, devoted part of his life to reconcile Christianity. His purpose was not to prevent religious wars, as there was no such danger in his time. His main concern was that individuals without a common belief in an Almighty God would create secular religions. According to Leibnitz, a secular religion is by definition tyrannical and oppressive. A century latter, Rousseau, the first Romantic, seemed to confirm Leibnitz's fears. In "The Social Contract" it is argued that society can control and make individuals perfect. The creation of a "New Man" through society, became a tenet among Enlightenment thinkers.

cette liberté dans les CAS détermine par la loi." Soon after the French Revolution the idea of the great power free speech gave to citizens was so deeply rooted that Napoleon said to Metternich: "I would not undertake to govern for three months with freedom of press."⁹⁹ Nevertheless, the extension of that freedom was narrower than what we conceive today. For example, in England in 1765, freedom of expression was understood as "no previous restraints upon publications, and not in freedom from censure for criminal matter when published."¹⁰⁰ In 1791, the framers of the US Constitution went a step beyond: Congress "shall make no law abridging the freedom of speech or of the press." The U.S. Supreme Court Justice Joseph Story clarified: "[the First Amendment is] intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefore, is a supposition too wild to be indulged in by any rational man." In his view, the constitutional protection to speech "imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person ... disturb the public peace, or attempt to subvert the government."¹⁰¹

Most defenders of freedoms during and after French and American Revolutions relied on the misleading Enlightenment premise that there is a sphere private and public, the latter being that portion of human behaviour which remains independent of social control. From Hobbes to Jefferson, all thinkers believed in a preserved area beyond the dominion of the law. Without being able to fully agree on which liberties could be invaded, they coincided that if men wanted to keep their quality of humanity, liberty of thought, religion, speech and property should be inviolable. Though a clear demarcation between public and private

⁹⁹ Claude Colliard, *Les Libertés Publiques* (Paris: Dalloz, 1972), 4th ed., at 330 quoted by Humphrey John, "Political and Related Rights", in Theodore Meron, ed., *Human Rights in International Law*, (Oxford: Clarendon Press, 1984) 171, at 181-82

¹⁰⁰ Williams Blackstone, *Commentaries on the Laws of England*. (Boston: T.B. Wait, 1818) at 2:17

¹⁰¹ Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, 1833) rpt., Durham, ed., (NC: Carolina Academic Press, 1987) 2:597-98

spheres has proved impracticable given human interaction, the idea of drawing a line between them allures many scholars.

2. TRADITIONAL RATIONALES OF JUSTIFICATION

Despite the broad consensus of the importance of freedom of expression, it is perhaps one of the less clearly defined civil liberties. Its order of prevalence over other ends is even less clear. Moreover, after almost three centuries of the recognition of freedom of speech, the battle for its effective constitutional protection is far from being won. Liberal democracies have a short memory on freedom of expression issues. The bloody suppression of protesters in Tiannanmen Square is unanimously condemned in North America, but the McCarthy witch-hunt, police's actions against Black demonstrators or military personnel's repression against antiwar demonstrators less than 25 years ago in the US, and the crisis in 1970 and Jehovah's Witnesses persecution in Canada seem to be erased from the collective memory.

As said above, within the liberal thought two antagonistic trends -- one giving pre-eminence to society over its parts and another stressing the prevalence of the individual -- have shaped the jurisprudence of human rights. Freedom of expression is not excluded from this divisive debate. Emerson summarised four rationales proposed to justify a system of free expression. It is protected as a means to: a) participate in decision-making; b) discover the truth; c) achieve an adaptable and secure community; and d) assure individual self-fulfilment. The first three rationales are held by schools which see free expression as a structural support of a good life in society derive from "goal-group based" strategies. The fourth one, maintained by schools which assess this freedom as a good which leads to self-realisation flow from adopting an "individual-right based" strategy.

The following discussion is not meant to suggest that utilitarians maintain that individual rights only compete with utilitarian norms, or that liberals assert that individual rights conflict only with individual rights. The core of the discussion is that given the competition between two individual rights, or between an individual right and a

collective one, or between individual rights and social goals, the conflict could be solved: a) from a liberal utilitarian position – hereinafter called a goal-group based strategy – giving priority to group's rights, or b) from a non-utilitarian position – hereinafter called individual-right based strategy – giving priority to a scheme of individual rights as the supreme value of the legal order.¹⁰² Principles underlying the protection of freedom of expression have been elaborated on from one or the other position.

a. GOAL-GROUP BASED STRATEGIES

i. PARTICIPATION IN THE DECISION-MAKING

A system of free expression may be justified on its function to provide an open environment for discussion. Granted to every individual, it enables citizens to be informed about pressing political questions so that they are able to participate in the democratic process of decision-making. Alexander Meiklejohn defends freedom of expression as an aid to the political process and excludes from the constitutional protection all that speech which is not related to government.¹⁰³ Meiklejohn's thesis protects expressions as long they serve the audience's interest, the protection to press one's case forward to persuade others is not at stake in his argument. Freedom of expression is a tool to achieve the realisation of democratic self-government. The discussion of political issues is protected in an absolute

¹⁰² R. Dworkin, "Do We Have a Right to Pornography?", *Oxford Journal of Legal Studies* I (1981): 177; reprinted. in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) 335. Page references are to the reprint in *A Matter of Principle* 336, at 347. Dworkin speaks about two main groups of strategies to protect rights. I use "individual-rights based strategy" instead of "right-based strategy" to stress the individualist approach because "right-based" could include collective rights. "Goal-group based strategies" instead of "goal-based" stresses the collectivist approach. It must be recalled that some theories though individualistic see the protection of individual rights as a step leading to make human being perfect, this is a consequentialist approach in individualist theorists. "Right-based" could be interpreted as the "right" of society. "Goal-based" might include individualistic consequentialism: protection of individual rights with the goal to make individuals perfect.

¹⁰³ See A. Meiklejohn, "The First Amendment is an absolute speech", (1961) *Sup. Ct. Rev.* 245; M. Reddish, "The Value of Free Speech", (1982) 130 *Univ. of Pennsylvania Law Rev.* 591, at 597-599, 606.

way to enlighten voters.¹⁰⁴ Stressing the importance of society's goals, Meiklejohn denies that freedom of expression is inherent to human nature.

Meiklejohn distinguishes between civil and political aspects of expression, arguing for an absolute protection of the latter. Utterances falling short of politics can be censored. He overlooks that the primary type of speech to emerge is that related to religious, intellectual and aesthetic needs, which in turn leads to taking a stance on policy-making. In other words, civil speech gives the substance to political speech. Civil speech is the kind of speech which would be protected in the first place even if it does not lead to the solution of strictly political issues. The protection of speech because it is "an indispensable means of strengthening the democratic process," or "helps citizens to understand the political arena" or "is the means to inform to the government on the expectations of the citizenry" are reasons which lead to unprotective results. Expressions which do not promote political values, such as moral and scientific statements, would fall short of protection. Few decades ago in the US the teaching of the theory of the evolution was forbidden by an Arkansas law. The Supreme Court, in striking down the law, would not have been able to protect that teaching, which obviously does not lead to political decision, based on this rationale.¹⁰⁵

ii. DISCOVERING THE TRUTH

John Stuart Mill justifies the protection of freedom of expression as an instrument for achieving society's most important goal: the discovery of the truth. The truth may be found only by "collision of adverse opinions" and will prevail only if every available argument is heard.¹⁰⁶ It was argued before the US Supreme Court that: "The fundamental basis of free

¹⁰⁴ T. Emerson, "Towards a General Theory of the First Amendment", (1963) 72 Yale L. Rev. 883. Conf. M. Reddish & G. Lippman, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications" (1991-92) 79 Cal. L.R. 267, at 270.

¹⁰⁵ *Epperson v Arkansas* (1968) 393 US 97 The Arkansas law which forbidded teaching of evolution theory was challenged before the US Supreme Court. It ruled that the First Amendment forbids the state to require teaching and learning tailored according to specific religious dogmas.

¹⁰⁶ Mill, *supra*, note 79

opinion demands that convictions shall be freely spoken to the end that the truth shall be known. Upon this freedom all progress depends."¹⁰⁷ The US Supreme Court Justice Brandeis advocated freedom of speech in these words: "Those who won our independence believed... that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth... It is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."¹⁰⁸ Similarly Archibald Cox believes that the liberty of expression is crucial to the discovery and spread of truth, because error can only be exposed and truth emerge by the endless testing of debate.¹⁰⁹

This rationale cuts against rather than in favour of freedom of speech¹¹⁰. First, its supporters ignore that the superior persuasive skills often win the debate. Needless to say, many of the most widely acknowledged truths have turned out to be erroneous. Sometimes in the long run discussion delivers the truth, especially in scientific fields, but moral, religious or political statements cannot be proved as absolute truth.¹¹¹ In Socrates' words: "For the point is not who said the words, but whether they are true or not ... I doubt whether we shall ever be able to discover their truth or falsehood; for they are a kind of

¹⁰⁷ *Turner v. Williams*, Brief and Argument of Appellant, 49 quoted in David M. Rabban, "The First Amendment in Its Forgotten Years" (1991) 90 Yale L. Rev 53

¹⁰⁸ *Douglas v. Jeannette*, 319 US 157, 166, 168-9 (1949) as quoted by M. Blanchard, *Revolutionary Sparks, Freedom of Expression in Modern America* (New York: Oxford Univ. Press 1992) at 124

¹⁰⁹ Archibald Cox, *Freedom of Expression* (Cambridge: Harvard Univ. Press, 1981)

¹¹⁰ See as an example of "cut against" the arguments of K. Mahoney, "Pornography and Violence Towards Women - Comparisons Between Europe, the United States and Canada" in I. Cotler & P. Eliadis, eds., *International Human Rights Law: Theory and Practice* (Montreal: The Canadian Human Rights Foundation 1992) 333 at 343, quoting Lee Bollinger, *The Tolerant Society* (Oxford: Clarendon Press, 1986) at 57-58.

¹¹¹ *R v. Keegstra et al.*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1,1 C.R. (4th) 129, 61 C.C.C.(3d), at 79 [hereinafter Keegstra]. In the words of McLachlin J.: "Moreover to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proved neither true or false."

riddle."¹¹² Secondly, discovering the truth is hardly the most important reason for protecting heated speech during an electoral campaign of a candidate who attempts to subvert the truth-seeking process. Finally, expressions which do not lead to the "assumed truth" can be forbidden.

iii. TO GET A MORE STABLE COMMUNITY

The third rationale presented by goal-group based strategies stems from the utilitarian idea that the protection of freedom of thought and speech leads to achieve society's highest good: "the society's ultimate standard of order."¹¹³ Mill says: "If all mankind were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, that he, if he had the power, would be justified in silencing all mankind."¹¹⁴ Apparently Mill seems to value individual's right to express, but he is saying exactly the opposite. He is saying that *society has the right to hear every argument*. He is not arguing that individuals have the "right" to convey freely what they think; even less that speaker has the right to be heard, nor is he appealing to any abstract right. Any justification is given in terms of "utility."¹¹⁵ Freedom of expression is just a method for channelling the resistance of opposite social forces promoting or diminishing society's cohesion. As an instrument to achieve social order, it guarantees that social changes take place in a rational and peaceful fashion.¹¹⁶ The rationale "to get society cohesive" leads to the vulnerability of the system of freedom of expression. Utterances are protected as long as they do not alter ultimate standards of order. When some expressions are perceived so noxious as able to shake the basic principles of society, it is likely the state will prohibit them.

¹¹² Plato, "Charmides", *The Dialogues of Plato*, 31st ed., trans. B. Jowett, R. (Chicago: W. Benton, 1989) at 5

¹¹³ W. Kendall, in "The Open Society and Its Fallacies", in P. Radcliff, ed., *Limits of Liberty: Studies of Mill's On Liberty*, 1st ed., (Belmont, CA.: Wadsworth Publishing, 1966) 27 at 31.

¹¹⁴ J.S. Mill, *On Liberty and Considerations on Representative Government* (Oxford: R.B. McCallum, 1946), at 14.

¹¹⁵ Kendall, *supra*, note 113 at 33.

¹¹⁶ Emerson, *supra*, note 107 at 885.

These three rationales in a greater or lesser degree rely on Hobbes' or utilitarians' theories which understand freedom of expression as a lack of constraint. Society restrains itself from interfering with someone's right to express because of teleological reasons. Utilitarians do not argue a distribution on the basis that it has to be a right to express. Utilitarianism is an aggregative theory, mainly concerned with how much good is achieved overall from the protection of speech. It is protected as long as it will maximise the general welfare. Only in a second level are supporters of this theory concerned with the issue of distribution. From a utilitarian point of view, one distribution of burdens and awards is preferred to any other only if that distribution leads to the maximum welfare of society. Utilitarianism, treating the idea of justice as derivative rather than fundamental, ignores that the ethical significance of the question 'who gets what' hangs on an epistemology of personal relations among individuals; political and social relations must be set up within a framework of a just and appropriate distribution of goods.¹¹⁷ That necessarily leads to a unprotective result. William Levi maintains that: "[Mill]... in suggesting that the values of freedom are primarily social values, [he] opens the way for society itself to be the judge of freedom's social utility. But if the judgement of the social value of freedom is left to that type of democratic choice in which the authority resides in a majority of those whose interests are at stake ... then just this ... is to invite that very tyranny of the majority against which the essay *On Liberty* was specifically directed."¹¹⁸ Given a prevalence of consequentialist rationales in the philosophical defence of expression, the balance of good against bad consequences has been the approach of most, if not all, landmark cases regarding whether an expression has constitutional protection or not.

b. INDIVIDUAL-RIGHTS BASED STRATEGIES.

¹¹⁷ Norman, *supra*, note 33 at 65

¹¹⁸ W. Levi, "The Value of Freedom: Mill's *On Liberty* (1859-1959)", (1959-1960) XII *Ethics*. Reprinted in P. Radcliff, ed., *Limits of Liberty: Studies of Mill's On Liberty*, 1st ed., (Belmont, CA.: Wadsworth Publishing, 1966) 6 at 9.

While group-goal based strategies see the right to express as a mediate step leading towards the maximisation of the goal of society or its minorities, supporters of individual-right based strategies defend freedom of speech grounded on its connection with individual's self-fulfilment regardless consequences it may have on society. Before further discussion, it must be recalled that individual self-fulfilment may be interpreted either from a consequentialist or from a non-consequentialist viewpoint.

Those theories focusing in the "individual" element and aimed to improve the individual protect freedom of expression because it leads to individual self-fulfilment, to the development of his or her autonomy. Expressions are a tool to improve human beings according to a pre-established ideal model. Or in Emersonian terms, freedom of expression is a good leading to the achievement of the ideal aspirations of mankind.¹¹⁹ The individual consequentialist approach leads also to unprotective results: expressions which are considered to be able to worsen the human development, could be curtailed.

On the contrary, individual-right based strategies with a non-consequentialist perspective see freedom of expression just as a means of maximising opportunities for autonomous individuals to develop their potential of reasoning and understanding.¹²⁰ Those strategies, focusing exclusively on the speakers' needs, freedom of expression, as a complement to liberty of conscience, is seen as the means for conveying the outcome of our freedom of thought and religion. It protects any external manifestation of an inner feeling or conviction. Schauer¹²¹, argues that public debate and criticism engender the formation of beliefs. Therefore, individuals need freedom of expression to attain their spiritual and intellectual development. Freedom of expression is meant to protect the process of thinking rather than specific thoughts.¹²²

¹¹⁹ See F. Schauer's critics to Emerson in his *Free Speech: A Philosophical Enquiry* (New York, Cambridge Univ. Press, 1982) at 49

¹²⁰ See Thomas Scanlon "A Theory of Expression" in R. Dworkin, *The Philosophy of Law* (New York: Oxford Univ. Press, 1977)

¹²¹ Schauer, *supra*, note 119

¹²² According to him: "because it is thinking, reasoning, rationality, and complex interrelationships that distinguish humanity from other forms of animal life then

From a non-consequentialist perspective, which this work adopts, self-fulfilment is not a goal. Individual autonomy is inherent and intrinsically valuable because individual well-being is an end in itself. In this framework, the protection of communications is crucial not to develop individual autonomy but because human beings are autonomous and rational. If Kant is right in his assumption that humans are equal and autonomous with an inalienable capacity to choose in order to self-govern themselves, espousing and changing their own goods, then individuals need to exchange ideas. Every matter which affects subjects' lives, even "noxious" themes, deserves to be openly disputed. Debate enables individuals to rule their lives, wisely or not. Hence, expression are protected because they are part of an autonomous individual's self-fulfilment. Milton says that the liberty to know, to utter and to argue freely according to conscience, an essential element of human nature, is above all liberties.¹²³

Despite the fact that Mill was utilitarian to the marrow, he used an argument from an individual-right based strategy inconsistent with the rest of his theory when he spoke about: "the necessity to the mental well-being of mankind (on which all the other well-being depends) of freedom of opinion, and freedom of expression of opinion."¹²⁴ He was not thinking of people talking to themselves or merely transmitting information, but of individuals conveying ideas, even unpopular ones, in order to persuade others.¹²⁵ William Levi stresses that despite the fact that Mill implied a link between freedom of expression and mental well-being in the largest sense of "utility," he did not elaborate on it. If Mill had developed this idea: "he would have passed beyond both a Lockean theory of natural rights and a Benthamian theory of social utility. And it would have been a return to Aristotle".¹²⁶

it is the faculties of reason and thinking that are at the core of self-development." *Ibid.* at 49-61

¹²³ Milton J., *Complete Prose Works: Areopagitica*, 1643-1648, Vol. II, rev'd ed. (New Haven: Yale Univ. Press, 1959)

¹²⁴ Mill, *supra*, note 79, at 50.

¹²⁵ G. Hawkins & F. Zimring, 2nd ed., *Pornography in a Free Society* (New York: Cambridge Univ. Press, 1991) at 111.

¹²⁶ Levi, *supra*, note 118 at 10.

On the one hand, from a consequentialist perspective, the group-goal based strategies ground the protection of expressions on the benefits expressions give to society, to its minorities, or to individuals. Conversely, they ask for censoring expressions which harm society, to its groups or to individuals. The same teleological bases to protect expression may be used with the same force in the opposite sense to ban them. "Stable society," "political decision-making," "discovery of the truth," or "achieve self-fulfilment" rationales will guarantee protection only if expressions are consistent with the accepted truth¹²⁷, if they lead to making decisions in a democratic process, if they lead to the attainment of superordinate social goals, or improve individuals to an ideal. Ignoring the basic need of individuals to communicate, the goal-group strategies fail to ensure consistent protection of expression.

On the other hand, from a non consequentialist perspective, individual-rights based strategies, without perfectionist goals, protect broadly freedom of expression because it meets individuals' basic need of self-fulfilment. Focusing only on speakers' needs, those strategies fail to recognise that freedom of expression has an essential social aspect.

C. NEW GROUNDS TO JUSTIFY THE PROTECTION OF FREEDOM OF EXPRESSION

The flaws pointed out in the strategies described above are originated in their exclusively individualistic or holistic (communitarian) approach. They ignore that every human group, from family to the world community, is structured as a system of individuals sharing economics, biological, cultural and political bounds within an environment partly natural and partly artificial.¹²⁸ A mere individualist or an exclusively social approach does not solve the problem of whose freedoms should be sustained and whose should be sacrificed when the rights-conflict arises. Hence, current theories on freedom of expression could be reconceptualized by incorporating to them elements of Spinoza's theory.

¹²⁷ See I. Cotler, "The Right to Protection against Group- Vilifying Speech: Towards a Model Factum in Support of Anti-Hate Legislation", Principle 3 (Address to the Canada-Israel Law Conference, 20 December 1992)

¹²⁸ Bunge, *supra* note 1, at 29

Having started from a positive concept of freedom detached from any perfectionist goal --either social or individual-- to develop the meaning of freedom, it proceeds to apply the concept of "positive power" to a particular freedom, that of expression. A legal theory would be inapplicable if, developed in abstract, it does not consider those upon whom the normative system is to be applied. Thus, a concept of person and society are required to further the argument. The following analysis takes into account principles which have been developed over the last three hundred years, and which have become permanent parts of our democratic culture. It only applies to a society which holds autonomy and self-responsibility as basic qualities of human beings, regardless of its governmental regime.

1. A SOCIAL AND POLITICAL CONTEXT FOR A THEORY OF EXPRESSION.

Liberal society is a system where individuals form consensual and non-consensual subsystems¹²⁹ Hence, members of a subsystem belong simultaneously to various others and to the larger society. Those social systems have an objective existence, and like in most human communities membership to most of social subsystems (e.g. family) is unconscious and determined by external facts. Subjects work together in associations being co-operative, competitive or exploitative. Co-operative society refers to a willing human interaction conducive to production of a result that cannot be obtained individually. Similarly, an exploitative system is aimed at production of a common achievement; the difference is given in the fact that in a exploitative system a group promotes its own interest at the expense of others or other groups. The exploited groups do not participate in such a system willingly but are forced by circumstances beyond their control. In this sense exploitation differs little from coercion.

Liberal society has adopted a twofold co-operative-competitive pattern. A competitive form of a co-operative association is characterised by the fact that since the rewards are limited, only some individuals may gain them. Thereby, every participant deliberately tries to do better than the rest of the group, at the expense of others. In a co-operative-

¹²⁹ See Rawls, *supra*, note 52

competitive system the distribution of benefits and burdens on a competitive basis is institutionalised, and individuals voluntarily participate in it.

a. REASONABLE PLURALISM

Throughout history, in varying degrees and with some exceptions, the political community -- individuals sharing political duties and rights within the same framework of justice -- has overlapped with the cultural community -- individuals sharing a cultural, linguistic, religious tradition. When the cultural and political communities coincide, constitutional principles are interpreted, if not unanimously, with a view to general consensus. In monocultural societies, not every member of the community is a subject of rights. The legal system is based on recognition of few privileged individuals. "Different ones", women, "aliens" are not entitled to rights.

Contemporary Western society has departed from this social pattern and evolved towards one with two basic characteristics: multiculturalism and its legal recognition. Each Western political community contains several interacting cultural and religious communities. Admittedly, this situation is not *per se* a new phenomenon; the Roman Empire in Classic times and the China or India of today are clear examples of multiculturalism. What is distinctive in Western societies is the constitutional protection of the rights of all individuals in the political community, regardless of biological or social features.

As the outcome of human reason within a democratic environment, the pluralism of ethnic and religious groups, has produced a pluralism of comprehensive doctrines for addressing the meaning, value and purpose of human life, the goals of life in society and the justification of the state. Thus, most of the members of a morally pluralistic society may maintain a set of moral values both comprehensive in scope and incompatible in at least some of their basic claims. Each subject has a set of moral obligations to support public values, (e.g. democracy, tolerance and equality), and a set of moral or religious duties to rule her private conduct. Each citizen's sets of values may be incompatible with other fellows' values or even antithetical with democratic principles, such as values held by

religious fundamentalists.

The interaction of individuals working together in a co-operative-competitive system creates both inevitable clashes of interests, and a network of affective and economic ties which keep individuals together beyond their intentions. Those ties are bound and shaped by a constant dialogue. Though we can leave our communities, the price to be paid --the exile-- is too high to be a real option¹³⁰. Then, individuals are naturally driven to remain in their social systems and to try to solve social matters through dialogue.¹³¹ A democratic and pluralistic society maintains the tolerance of opposing ideas aimed to resolve societal issues. However, the extent of that toleration must be balanced against the danger of loss of stability of the system which is volatile in itself. Stability and respect for diversity are elements that are unlikely to be put aside in any theory of expression.

During the last fifty years Western societies have experienced deep social, technological and political transformations, such as new schemes of power in the relations between the sexes; family patterns different from the patriarchal one; new forms of economy; the rise and fall of the proletariat "as class"; recognition of minority rights; environmental problems; new forms of religious expression; scientific experimentation outside of traditional methodologies; the mass media intruding upon individuals' privacy; mass impact of technology on an ordinary citizen' life. These transformations have given rise to new and pressing problems. In past decades, society at large and campuses in particular have witnessed the rise in their midst of new political, religious, scientific and legal theories proposing solutions to those pressing problem which seem far beyond the traditional answers.

b. PRINCIPLES OF JUSTICE

A liberal society maintains certain principles of justice, which give guidelines when society protects basic rights, assigns a special priority to them, and affirms measures

¹³⁰ Norman, *supra*, note 29. Bunge, *supra* 1, chap 3

¹³¹ Rawls, *supra*, note 52 chap The Idea of Public Reason at 250 an ss

which assure all citizens adequate means to make effective use of their basic liberties and opportunities.¹³² In John Rawls' words: "the capacity for a sense of justice is the capacity to understand, to apply and normally to be moved by an effective desire to act from ... the principles of justice as the fair terms of social co-operation."¹³³ Or in Spinoza's terms, being able to include the other's welfare as part of our own welfare. In the struggle for life and pursuance of ends, each individual has the inherent capacity to act guided by a sense of justice and to define a personal conception of the good putting aside their own interests and affections. Like Grotius, Spinoza sees Man as a social being able to achieve virtue.¹³⁴

These fundamental values held by most members of a community shape the political and constitutional structure. Most, if not all, of the constitutional institutions which rule citizens' lives are based on an ideal of respect among equal individuals co-operating in a society within which they can develop their conception of the good, defend themselves from external attacks and face other challenges. Our current democratic tradition rejects the idea of the state as mere force applied to alienated individuals. It is very unlikely that serious arguments justifying political decisions in a liberal government would be grounded on a departure from the organising idea that individuals willingly associate to achieve common societal goals. At this stage of the political evolution, the idea that individuals

¹³² *Ibid.*, at 223

¹³³ J. Rawls, "The Basic Liberties and Their Priority" (Address to *The Tanner Lectures on Human Rights*, 10 April, 1981, University of Michigan) at 16; and, *supra* note 52 at 365, 368-69

¹³⁴ Grotius quoted in his *The jure belli ac pacis libri tres* Lutatich's *Life of Pompey* (xxviii, 663D): "By nature no man either is or has been a wild and unsociable animal; but man becomes brutelike when contrary to nature, he cultivates the habit of doing wrong. By adopting different habits, however, and making a change of place and of life, he returns again to a state of gentleness". According to Aristotle "Man is an animal gentle by nature" and Grotius quote Plutarch once more "In all animals, which are devoid of reason, we see that there is a nature which looks out for itself. For they do harm to others in order to secure advantage for themselves, since they do not know that to do harm is evil. But man, because he has a knowledge of good and evil, refrains from doing harm to another even with disadvantage to himself." Plutarch *Life of Cato the Elder* [v.A]. See Grotius, *supra*, note 16 at xxviii. See Spinoza, *supra* note 8, at 265

may be coerced unreasonably by the state does not reflect the values of liberal democracy. Rawls asserts that the three most innovative periods of American constitutional history -- founding, Reconstruction and the New Deal -- relied only on the political values of liberty, equality and co-operation which he embodies in his theory of public reason.¹³⁵ Society as a co-operating political body of free and equal individuals interacting in social systems and subsystems is not a "deductive argument."

c. NON-MAJORITARIAN DEMOCRACY

Given that liberal society regards individuals as free and equal within a co-operative system, it is proper to analyse whether a democratic system of government always allows individuals to choose their ultimate ends. If democracy is understood in a strict procedural sense, that is, one person one vote, the answer seems affirmative. However, to influence the outcome of political decisions cannot be equated to one person one vote. One-person-one-vote does not confer members of a permanent minority political power at all. If the majority wanted to coerce a religious dogma on a minority, one-person-one-vote system would not prevent the encroachment of minority members' right to religion. Merely procedural democracy and self-government are not equivalent concepts. A subject of the Queen of Netherlands is a great deal freer than a citizen in democratic Kenya. I. Berlin says: "Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom... Freedom in this sense is not, at any rate logically, connected with democracy or self-government."¹³⁶ Political power as a means of choice cannot equate democracy as a procedure of one-person-one-vote.

A logical connection between self-government and democracy is rather found in a non-

¹³⁵ Rawls, *supra*, note 52, at 234. An interesting analysis of the values of public reason as applied to the antiracist debate is made by David A. J. Richards, "Public Reason and Abolitionist Dissent" (1994) 69 *Chicago-Kent L. Rev.* 787

¹³⁶ Berlin, *supra* note 4, at 129-30

procedural conception of democracy. Rawls has emphasised that liberal societies enshrine principles of justice which cannot be overridden by majoritarian decisions as expressed in legislation.¹³⁷ A remarkable aspect of Rawls' theory is the idea that the political must also be juridical: in democracy, the basic political order cannot be disassociated from the constitution.¹³⁸ The *sine que non* condition of democratic governments is the foundation provided by constitutional procedures and guaranteed fundamental rights. A law which restricts a basic right, such as freedom of expression, is not legitimate simply because it is the outcome of a majoritarian vote. Benjamin Constant pointed out that it does not matter to the individual to be oppressed by a despotic monarch or by unlimited sovereignty of the people. "He saw that the main problem for those who desire negative freedom is not who wields this authority, but how much authority should be placed in any set of hands."¹³⁹ As Sartori teaches, in Western democracy human being is not only a "citizen" but a person whose freedom "cannot be entrusted... to the subjection of the individual to the power of the whole."¹⁴⁰ The fact that someone consents to be democratically oppressed does not take away the fact of oppression. According to Rousseau, "by giving myself to all I give myself to none". However, there is no logical reason to prove that 'all' --being 'all' society at large, a religious group or a social class -- are necessarily less tyrant than Louis XIV. The real cause of oppression lay in the fact of accumulation of power. When the majority is entitled to use the positive freedom, then, oppression is a fact.

Individuals, self-governing and responsible, agreed on basic values according to which their behaviour is to be regulated and a just law has to embody values all citizens endorse. A law which is enacted by a procedural majority, departs from those principles and resembles more a dictatorial rule than a democratic norm.¹⁴¹ One-person-one-vote, political democracy,

¹³⁷ Rawls, *supra* note 52, at 238

¹³⁸ *Ibid.* at 563. See Lawrence B. Solum, "Situating Political Liberalism" (1994)

69 *Chicago Kent L.R.* 549 at 580

¹³⁹ See Berlin, *supra*, note 3 at 163

¹⁴⁰ Reddish, *supra*, note 104, at 297 quoting G. Sartori, "The Theory of a Democracy Revisited".

¹⁴¹ Wernham, *supra*, note 6, at 26

is just a part of the total democracy to which we should attend. Public debate on distribution of burdens and awards is so indispensable as to cast a vote. In a co-operating-competitive society, politically structured both as a procedural and principled democracy, the issue of establishing the extent and content of freedom of expression is crucial for the survival of civil liberties and for the stability of government as well. The concern with the majority imposing an end is not that there is a fear that if society restricts some freedom, then it may restrict others. When society restricts the individual's power to decide on ultimate ends, there is no restriction left.

Thus, the question remains whether the government can enact a law restricting expressions in order to serve sectarian interests, based on the premise that the law reflects the will of the majority.¹⁴² If society is entitled by a procedural system to encroach on an individual's power to decide what to express, there is a conceptual shift from 'individual as self-governing person' to 'puppets' in Spinoza words. In a democratic system of government, individuals both have the power to choose their own self-realisation and have a voice to offer other solutions different to those implemented by the government in its endeavour to adjust chosen values to the political institutions. Spinoza prefers democracy as the best form of government because within it all problems society may have can be brought to light and cured through public debate. The excellence of democracy dwells not only in the popular consent to a law enacted according to specific procedure, but also in that each individual, rather the sum of individuals, decides on the principles embodied in the law.

2. SPINOZA'S THEORY ON FREEDOM OF EXPRESSION

Within this framework, how does freedom of expression interrelate with other fundamental freedoms within a general scheme of rights? The answer to these queries relates

¹⁴² It is argued that the concept of "just law" is very often replaced by the concept of "law". John Shestack, "The Jurisprudence of Human Rights" in T. Meron, ed., *Human Rights and International Law: Legal and Policy Issues* vol 1 (Oxford, England: Clarendon Press, 1984)

to the very rationales of protection of expressions. Politics must exist only within the constitutional context.¹⁴³ The constitution of each country is a testament of sorts produced by one generation for those that follow, fixing certain valued political ideals in a time and place. The articulation of these ideals is found in the constant interpretation of the highest law¹⁴⁴ by government, citizens and judges.

In elaborating on the rationales to protect and limit expressions, Mill's theory seems unavoidable; however, Spinoza may offer new elements to be incorporated into the current debate aimed to find solutions to "hard cases", such as hate speech or pornography. The following discussion departs from Mill's and Dewey's conception of liberalism without human rights, which envisages that the ultimate purpose of defending freedom of expression is to avoid society being closed to progress. The further arguments intend to stress the idea that human beings live according to principles even if in the short term those principles may or may not be beneficial to society.¹⁴⁵

Spinoza was probably the only philosopher of the Renaissance that argued so clearly the interweaving of thoughts and expressions. Although theoretically possible, for practical effects to distinguish between freedom of thought and freedom of expression is irrelevant and futile; interacting with others, human beings think in order to express their thoughts in some way. He linked freedom of expression to the well-being of individuals and state. In *Tract. Theo-Pol.*, Chap. 3 Spinoza states: "All things which we can desire can be reduced to

¹⁴³ Political theorists have often discussed about politics apparently without effective administration, constitutionalism and judges. According to them, politics must deal with participatory activity of citizens deliberating principles rather with abstract constructivist concepts. Value conflicts in a democracy must be solved through democratic deliberation and vote instead of appeal to truth or moral reasons. They distrust philosophers being able to address the complex relationship between citizens in a democratic society. See Baker, *supra* note 11; Walzer, *supra*, note 12; Bonnie Honning, *Political Theory and the Displacement of Politics* (Ithaca, Cornell Univ. Press, c. 1993)

¹⁴⁴ Ronald Dworkin makes an interesting differentiation between "constitutional originalism" or reductive view and "constitution of principles" or principled view. In *supra*, note 27, at 138 and at chap 5

¹⁴⁵ See Allan Bloom: *The Closing of the American Mind*, 2nd ed., (N.Y.:Simon & Schuster, c 1987, 1988) at 30

three at the most, 1) The understanding of things through their first causes; 2) the government of our passions or the attainment of a virtuous character; 3) a life of security." The attainment of all of those goals is unthinkable without a complete freedom of expression.

Though Spinoza protects speech in a broader fashion, he takes for granted principles which stands in much need of proof. Making this reservation, his theory on expression has three main good findings which could be used to strengthen the protection of freedom of expression. First, he argues that individuals have an inherent power to express, which cannot be ceded to others or taken away from them by others for anthropological reasons. Secondly, he envisages freedom of expression as a basic part of his contractualist theory; it is a tool to argue terms on rights and ends, and it is kept out from the social contract itself. Both ideas connect with Spinoza's rationales to justify the protection of freedom of expression. Thirdly, he has two findings regarding the rationales for limiting expression. Being the ultimate goal of state to preserve freedoms, rather than to achieve the social welfare, the state is only entitled to punish expression which harm other individuals' rights or the right of the state to regulate conducts. He distinguishes between expressions which express ideas (always protected) from expressions intended to harm (punishable) drawing the line according to speaker's intentions. This point relates to justification of limiting of expressions. Prof. Pitts considers that this is at the same time the weakest point in Spinoza's argumentation on harms because a speaker's intentions are not always adequate to make such a distinction.¹⁴⁶

a. FREEDOM OF EXPRESSION MEETS AN ANTHROPOLOGICAL NEED.

What role in a discussion on freedom of expression has the claim that it covers an anthropological need historically recognised? Is the assessment of empirical facts relevant, or even more definitive, for its protection? Or is freedom of expression a value, like any other in a democracy; a philosophical matter, a question of principle? The conviction that

¹⁴⁶ Pitts, *supra*, note 77 at 32

individuals have the anthropological need to express themselves is shared everywhere and for very long stretches of recorded history. Hence, most of the times this freedom was at issue, even before the Renaissance and the Reform, the main concern was how to restrict it rather than why to protect it. Spinoza largely rests his theory in the conceptualisation that freedom of expression does not protect an ideal, an entelechy, but a self-evident anthropological feature present from the very beginning of each human life. His mentor quotes Philo in *On The Ten Commandments*, ch chap.xxv "Man, who was to be the most gentle of animals, nature sociable and desirous of companionship, summoning him to live a harmonious life in society; and she gave to him speech also which would unite men by adapting their natures one to the other and leading then to a concord of feeling."¹⁴⁷ Spinoza believes in an almost absolute protection of freedom of expression grounded in the fact that *by the right of nature*, man is born endowed to think and express. Because thoughts and expressions are the result of a basic human feature, a state has not the right to control his mind and tongues. Moreover, he states: "it is impossible to deprive men of the liberty of saying what they think....the rights of rulers should merely have to do with actions, but that every man should think what he likes and say what he thinks."¹⁴⁸

Unlike the animals' languages, human's expressive symbols always presuppose, at least, a minimum of reflection intended in a greater or lesser degree to communicate ideas. On the one hand "expression" may mean "to think in loud voice", to put in words and gestures thoughts and feelings for the sake of externalising them without any communicative purpose; many works of art are produced only for the artist's satisfaction even if none can or wants to perceive them. On the other hand, "expression" comprehends written or spoken words, displays of symbols, observance of holy days, demonstrations, distribution of brochures, gestures, a scowl of the face, an eager look, a shrug of the shoulders, etc. produced with

¹⁴⁷ Grotious, *supra*, note 16, Book I, chap I,xii

¹⁴⁸ *Tract. Pol. supra*, note 9 at 264-65

the intention to "convey meaning,"¹⁴⁹ to one or more individuals.¹⁵⁰ Grotious said that words are the signs of thoughts and "words by their very nature and apart from the human will have no significance ..., were invented as a means of expression under a mutual obligation."¹⁵¹ Words were and are invented "by convention" with the purpose of conveying to others the ideas of the mind.¹⁵² Only expressions intended in a social context of communication are the subject of normative analysis and legal protection. Otherwise, a theory of freedom of expression risks collapse into a principle of general freedom. If every behaviour, whether or not intended with communicative purposes, could be understood as an expression of the freedom to choose ends, we would end up speaking about freedom in general.

Most basic ethical, aesthetic, emotional, and even physical and material human needs are met under the legal protection of inalienable rights. Most of those needs are individual and can be exercised almost without interacting with other human beings. Some rights can be argued in abstract detached from social interaction. The right to life, to occupy a space (as argued by Hegel), or to practice a religion can theoretically be exercised without interacting with other human beings. On the contrary, the freedom of expression is exercised by necessity interacting with others. Even in the most abstract level of theorisation, freedom of expression cannot be detached from the hypothesis of a relationship of listener-speaker which makes the very essence of communication. I think for myself, I express my thoughts to benefit or harm others. I develop my convictions for myself I express them in order to convince others about them. A theory of expression is concerned with acts of expression addressed to an audience. Freedom of expression distinguishes itself from other inalienable rights in two senses. First, though all rights presuppose a lesser or greater

¹⁴⁹ "Convey meaning" is the key phrase used in *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at 976, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy*].

¹⁵⁰ In America, since the '20s, the Supreme Court has extended the protection of the First Amendment to several forms of expressions, such as properly named speech, picket lines, insignias, gestures, printed words in clothes, etc. The Canadian Supreme Court has followed similar approach.

¹⁵¹ Grotius, *supra*, note 16, Book II Chap I, vi

¹⁵² Aristoteles, *On interpretation*, iv, *supra*, note 53

degree of social context, it meets an individual need and simultaneously its exercise always presupposes interaction with other human beings. Its volitive element always projects towards others. Secondly, all fundamental rights show the double characteristic of right-duty, freedom of expression not only shows this double aspect but also it unfolds itself to protect simultaneously two antagonistic holders of the same right. Freedom of expression meets simultaneously the same positive power "at head of two persons". It protects both and simultaneously the speaker's inalienable right to convey ideas and the listener's inalienable right to receive a message (e.g. information) or to refuse to receive it (e.g. slander). Thus, the basic human need of communication must be protected (1) as an inalienable individual right, (2) without neglecting the social implications of its exercise.

Since birth, human beings struggle to convey needs, affections, thoughts. Even though the mechanism through which human beings speak cannot be fully explained, all individuals, regardless of race, age, sex or abilities struggle to communicate their ideas. Man is the only symbol-using animal.¹⁵³ No society exists without language.¹⁵⁴ From the Altamira Cave's paintings to the latest micro-biology discoveries, mankind has always attempted to convey how "reality" is perceived. The ability to manifest convictions may only be inhibited through physical strength or social taboos. Often, despite physical pressures or interdictions, the wish to convey ideas prevails. Communications, either face to face or through a channel, is the main way to create and maintain human relationships, to make possible scientific development, and to foster a common culture. Without them we are not really human. Not in vain, one of the worst tortures is incommunication, as totalitarian regimes very well know. Levi-Strauss maintains that there are elements common to every human being which stand behind every culture. Regardless of historic or geographic circumstances,

¹⁵³ Regarding Man as symbol-using animal; see A. Montagu, *The Human Revolution*, rev'd ed. (N. Y.: Bantam Books, 1967)

¹⁵⁴ Claude Levi-Strauss, *Estructuralismo y dialéctica*, rev'd ed., (Buenos Aires: Paidós, 1987) at 40

every human being wishes to satisfy two basic needs: the preservation of life and the communication of thoughts. Humankind shares the former with animals. The second one – the struggle for expression – distinguishes the human race as superior.¹⁵⁵ Both needs – the protection of physical integrity and the expression of ideas – are so intrinsic to humanity that each human being has the inherent power to claim satisfaction of them when they are not met in the social organisation. Says Norman: "The notion of rights seems then, to be entirely arbitrary. Why? Perhaps because the very idea is meaningless. The notion of rights means nothing unless it means a power which is in some way guaranteed by some institution or convention. At best, then, talk of 'moral rights' is a shorthand way of talking about certain basic human needs or requirements which are so important that they ought to be recognised as positive rights in all societies."¹⁵⁶ The right to expression is inalienable because it gives legal recognition to the inherent power of each person, regardless of any social or biological circumstances, to satisfy the basic need of communication. It would be worthless to remain in a society which refuses to guarantee a right which is essential for the full exercise of its members' power as moral beings.

Spinoza's political theory is grounded on the transference to state of all powers individuals may have, except, the power of thought, free speech, love of one's neighbour, and love of God. The very nature of human beings rather than a philosophical device prevents the transference of those four powers. Spinoza saw with pristine clarity that freedom of expression is an anthropological feature beyond the control of sovereign. The state can take away from a person the good protected by a fundamental right, e.g. life, body safety, or mobility, regardless of whether that person wants to live, avoid torture, or associate with others. The state cannot take away from a live person his thoughts and the expression of them, even if that person consents. No one has the power to command the thoughts of another: obedience is a matter of each individual's inner activity.¹⁵⁷ Because thoughts cannot be taken

¹⁵⁵ *Ibid.*, at 103, 104.

¹⁵⁶ Norman, *supra*, note 29 at 139, 143

¹⁵⁷ *Tract. Pol.*, *supra* note 9 at chap XIX. See Duff, *supra* note 5 at 476-77

away from individuals, the expression of them follows, at some point, the same fate. The state can only receive what it is able to make use of; "by the right of nature" the state cannot make use of individuals' power to think or to express. Then individuals cede to rulers the power to enact policies to further the chosen ends and they keep their power to think and discuss whether or not implemented policies foster those values.¹⁵⁸

b. THE SOCIAL AND POLITICAL ROLE OF FREEDOM OF EXPRESSION.

Freedom of expression covers not only the ability to communicate one's thoughts and emotions among autonomous beings developing their potentialities, but also the ability to build and reshape a culture. In the last sense, it is both a tool to suitably solve the rights-conflict and to correct any deviation on agreed-upon principles. Expressions are the container -not the content- of social relationships. They are not in themselves social facts but convey social facts. They exteriorize mental states of individuals which are the engine of social facts. Levi-Strauss speaks about "Mental Fences", spiritual laws, which regulate the functions of the mind to satisfy the needs of self-preservation and social-political organisation. He adds that every human group has given similar answers to solve the most basic and identical problems of mankind. Those "Mental Fences" are the common characteristic of human beings above any other particular social or biological feature. They are like a psychological structure of humanity which manifests itself in the ability of human societies to establish rules. The unique and distinctively human desire to rule behaviour according to moral codes would be severely restricted --if not impossible-- if each individual were deprived of the possibility to explain her positions and to be reached by others'. In the human endeavour to develop common enterprises associated with others, rules become the essence itself of human beings living together.

The expression of rules set according to an agreed order of priority is a cultural element distinguishable from any other element that human communities share with animals. From a political and legal viewpoint, freedom of expression becomes the most effective means

¹⁵⁸ *Tract. Theo-Pol.*, *supra*, note 7 at chap XVII

to organise any society -either democratic or not- as a whole and in its subsystems. Increasingly in the human rights debate, freedom of expression is regarded as the tool to protect the exercise of all other basic rights covered by international conventions. Cardozo J. stated: "[freedom of expression] is the matrix, the indispensable condition of nearly every other form of freedom."¹⁵⁹ J. Humprey says "Freedom of information - the right to seek, receive and impart information and ideas - is indeed unique among all the freedoms. It is, as said at the first session of the General Assembly, the touch-stone of all the freedom to which the United Nations is consecrated"¹⁶⁰ It gives a "framework of deliberation,"¹⁶¹ on social problems, not only political ones. The interpretation of principles of justice that apply to specific institutions in a community calls for a constant dialogue to adjust the basic principles of society in the design of policies.

In a liberal democracy, the ruling of conducts takes place within the constitutional framework. In a majoritarian procedural democracy where most of citizens share the same conception of justice, that conception is embodied in the highest law of that society and solely applicable to "the basic structure of society, its economic, political and social institutions as a unified scheme of social co-operation."¹⁶² However, most if not all, citizens interpret and apply the conception of justice --containing the notion of fundamental rights-- from antagonistic moral comprehensive theories, disagreement may still be the final result. Liberal society seems destined to be in latent conflict. Thus, the state must ultimately decide how conflicting choices can be legitimately permitted or prohibited within a coherent scheme of liberties. As long as in a liberal democracy there is no presumption that one specific freedom has always priority over any other,¹⁶³ any

¹⁵⁹ *Palko v. Connecticut* (1937) 302 US 319, at 327

¹⁶⁰ See Emerson, *supra*, note 104 at 878; J. Humprey, *supra*, note 99, at 182. See: G.A. Res. 59, U.N. Doc. A64 Add. 1. at 95 (1946)

¹⁶¹ Rawls, *supra*, note 52, chap *Basic Liberties*, at 368

¹⁶² *Ibid.* at 223

¹⁶³ In today's liberal society, fundamental rights are considered a cluster. Rawls teaches that "basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself, even if, practically speaking, one or more of the basic liberties may be absolute under certain

guidelines chosen for application in a scheme of fundamental rights to specific institutions demand justification.

Spinoza envisages freedom of expression as the paramount tool for this task of adjusting fundamental principles in policies which rule interactions in the political community. He gives three main reasons both to regard freedom of expression as a fundamental part of his contractualist theory and as a freedom kept out from the powers ceded to state in the social contract. It is a tool to lay down the contractual terms and renew them, to give feedback to the state about its policies and to reach an agreement on renewal of the contractual terms which leads to social peace. Similarly, Rawls argues that freedom of expression operates on two levels: through it individuals set up both fair conditions under which fair terms of social co-operation are agreed upon and acceptable restrictions on the principles which parties may properly put forward and reject in designing policies. Like Spinoza, Rawls argues that freedom of expression protects both the set-up of the constituent contract and the revision and interpretation of its terms.¹⁶⁴

Different contractualists present the social contract as something that *ought* to take place if men want to have peace and security. The argument is constructed from the end -- peace -- to the first cause -- the agreement to create a common power. Locke's, Hobbes', and Rousseau's social covenants are hypothetical and non-temporal agreements, set up once and for all. As Wernham asserts, Spinoza's "contract is not like Hobbes', a recipe for constructing an ideal."¹⁶⁵ It seems that Spinoza's idea of the contract among men is something that has really taken place and, moreover, is constantly taking place. He states: "the state of nature is prior to religion both in nature and in time."¹⁶⁶ Side-stepping the discussion on whether there was a temporal first social contract, it is worth of noting the idea that, beyond when the contract was laid down, if indeed it was, it is temporally renewed. Its

conditions." Rawls, *supra*, note 52 at 357

¹⁶⁴ Rawls argues that the compound is non-historical. *Ibid.*, at 341

¹⁶⁵ Wernham, *supra*, note 6 at 25

¹⁶⁶ *Tract. Theo-Pol.*, *supra*, note 7 chap XVI at 207

terms are renewed each time fundamental constitutional principles are at stake, such as: in the discussion of the full membership of a group in society, limits on rights, changes in the structure of government. Those fundamental matters are also at stake in Academia. Even the most basic principles are presumably open to question, before subjects renew consensus. The idea of consensus as a constituent of the agreement is only implicit in the theories of Rousseau, Hobbes or Locke. They agree that consensus makes a society cohesive, but once it is given in the original contract there is no need to renew it. Thus, in their analysis, freedom of expression has no special status. From a position quite opposite, Spinoza makes explicit the necessity of a continual reneweal of the consensus, "in a democracy no one transfers his natural right so absolutely that he has no further voice in social affairs."¹⁶⁷

It is not enough that the state be able to impose its will. Individuals who willingly enter into and remain in a co-operative system are entitled to discuss the coercive policies in order to reach the agreement of minds. In this sense, Spinoza envisages freedom of expression as an instrument of social peace: "the liberty of philosophising and of saying what we think, cannot be destroyed unless the peace and piety of the state is therewith also destroyed." In the social contract subjects agree to cede the right of free action; but never do they cede the right to reason and express judgement. The social agreement would be impracticable if, after agreeing upon an end, all members of society were entitled to decide which method is the best to achieve it; society would become chaotic. Even if subjects agree on the need of property, it can only exist within a legal-politic system designed by the state. Thus, such a system has the power to establish the conditions under which things are owned and used. The state's power to regulate rights and duties is directly proportional to the possibility of achieving its goal.¹⁶⁸ Men agree to be ruled as by one mind because it is a necessity that the state acts "as it were one mind". In Spinozian terms, the state never is a mind. An unlimited monarchy is impossible. While the power to determine behaviours is

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, at Chapter XX

ceded, there is no means to prevent each subject from speaking against state policies even majoritarian decisions because of the very human nature. Insofar as a person can neither voluntarily transfer the rights to make judgements and express them nor be compelled to transfer them, any attempt to do so is an abuse of sovereignty deemed to fail. Spinoza specifies that only the state which is ruled by reason leads to promotion of the long-term interest of its subjects¹⁶⁹ as self-governing agents. On the other side of the coin, subjects do not infringe on the state's right to regulate conduct. Although laws must always be obeyed, (no civil disobedience is accepted) subjects obey the law because they believe their obedience is advantageous for them. Spinoza highly values keeping the social covenant voluntarily. Subjects obey the laws because they believe their obedience is advantageous for them."The natural right of every man does not ease in the civil state. For man, alike in the natural and in the civil state, acts according to the laws of his own nature and consults his own interest... The main difference between the two states is this, that in the civil state all fear the same things, and all have the same ground of security, and the manner of life; and this certainly does not do away with the individuals' faculty of judgement."¹⁷⁰ Duff rightly says that the whole *Tractatus Theologico-Politicus* is an attempt to prove that not only freedom of thought and inquiry are compatible with a stable political order, but also that the refusal to foster such freedoms leads to dissolution of the state itself. Through speech, individuals let the state know their opinions on social and political issues. With this feedback, the sovereign is better positioned to act in accordance with its subjects' opinions.¹⁷¹ Thus, Spinoza provides a rationale to empower individuals to express reasonable criticism against policies.

Spinoza acknowledges that the sovereign can rule in the most absolute way, even through the most violent manners, ignoring any need of consensus. However, in the same way as individuals, "sovereigns only possess this right of imposing their will, so long as they

¹⁶⁹ *Ibid.* chap XVI, at 137

¹⁷⁰ *Ibid.* at 302

¹⁷¹ *Tract. Pol.*, *supra*, note 9 chap X,8 at 382

have the full power to enforce it."¹⁷² Regardless of how unlimited their power may be, rulers "can never prevent men from forming judgement according to their intellect, or being influenced by any given emotion."¹⁷³ By the right of nature the state's power cannot be extended to the citizens' minds. Even the most oppressive government cannot enforce a law compelling citizens to think in a specific way. "If no man, then, can surrender his freedom to judge and think as he pleases, and everyone is master of his own thoughts by perfect natural right, the attempt to make men speak only as the sovereign prescribes, no matter how different and opposed their ideas might be, must always meet with very little success in a state."¹⁷⁴

A lack of reasonableness in state actions leads men to break the social agreement. The state of nature is latent and when authority is not more reasonable individuals can break the covenant and return to chaos.¹⁷⁵ Irrational actions of the state do not lead to civil disobedience; that is, to disobey a specific law but rather to social chaos. Citizens do not disobey a law which is against their interests, but all of them; the irrational state has lost its right to legislate. The social covenant is broken, the sovereignty has been reverted to the individuals. A new agreement is to be discussed.

According to Spinoza, the only reason that leads men to set up civil states is to protect the enjoyment of rights with which they are born; they enter into society to live no more conditioned by the force, but by the "power of the whole social body."¹⁷⁶ This last phrase would have led to a totalitarian state, even to a tyranny of the majority, if Spinoza had forgotten to add that the parties in the social contract, including the state, "will be guided in everything by reason...and restrain any desire which is injurious to a man's fellow." Individuals who enter into a social contract do not become a "dissolute multitude" as Hobbes argued. Rather they keep both their power to evaluate whether the state is

¹⁷² *Tract. Theo-Pol.*, *supra*, note 7 chap XVI at 205

¹⁷³ *Ibid.* Chap XX at 258

¹⁷⁴ *Ibid.*

¹⁷⁵ *Trac. Pol.*, *supra*, note 9 chap III, 15 at 308

¹⁷⁶ *Tract. Theo-Pol.*, *supra* note 7, at 202

fulfilling its purpose and their right to express their opinions. Individuals cede to the sovereign rules behaviours on their behalf as long as that is for their advantage. Were the sovereign ruling against their interests, they would revert that power upon them. No even for fear of the state of war, do individuals give up their power to decide on their own ends and to express them.

Members of society agree to submit to government's authority not because it is infallible but for a strictly utilitarian reason: the protection of freedoms within a framework of peace, which is their very welfare. They remain in the compound because of the same reason. The state is not an end in itself, but only a means to promote the conditions so that individuals are able to attain their highest ends and those of their fellows. Man's obedience to government depends not on a promise to obey, but on the certainty that to obey is more advantageous for attaining the personal chosen end. Whence, human nature is willing to cooperate only under certain conditions: laws must be set according to the dictates of reason, or, as argued before, according to a sense of justice. When men enter into the social contract they do not lose their human nature, that is, the guidance by the dictates of their own reason: "[C]ontracts or laws, whereby the multitude transfers its right to one council or a man, should without doubt be broken, when it is expedient for the welfare to do so."¹⁷⁷ Spinoza claims that a law, which is not willingly obeyed, has not "force of law." Then, the state has to give substantial reasons so that subjects yield obedience. It is worth noting that when a law is not obeyed, Spinoza does not argue that a more rigorous way of enforcement should follow. Rather he advises that the state should wonder whether the law is bad either in its goals or in the way it tries to achieve them. If threats are required for a law to be obeyed, it is inefficient and increases the likelihood of the state's own destruction. Sovereigns recognize that application of more and more force leads to its own ruin; even its measure of force has a limit; "no one can long retain a tyrant's sway."¹⁷⁸

¹⁷⁷ *Tract. Pol. supra*, note 9 at iv,4-6

¹⁷⁸ *Ibid.* at 206

Thus, the authority is bound to consult individuals about their ends and act in accordance with them. The state must convince citizens that its policies are effective in achieving those ends. Citizens, as rational beings, must be fully aware of the ultimate reason justifying what may be required of them in their political life.¹⁷⁹ Thus, freedom of expression is a *sine qua non* condition in order that they understand why social and political relations are as they are. It ensures that intentions of civil disobedience are reduced to a minimum.

i. A MEANS TO DEFEND RIGHTS

In arguing reasons for men entering into a social contract, Spinoza speaks of utility rather than of good. That utility consists of whatever enables man to maintain his existence, to develop his powers, and to attain the highest perfection of which his nature is capable of desiring. At first sight, Spinoza seems to argue from a utilitarian point of view, even for a perfectionist goal of freedom. This is not the case. He interprets "utility" in a quite different fashion to that of Mill or Spencer. "[Man] recognises no higher order, end from which an individual may act, than the apprehension of what is of advantage (*utilité*) for himself, for, in whatever, he does, or leaves undone, he is seeking his own welfare as it presents itself to him...Like Grotious, Spinoza employs "utility" in the general sense of human welfare, and he does not admit that this is synonymous with pleasure-giving value."¹⁸⁰ While Mill praises "utility" in terms of the pleasure it affords, Spinoza believes that *by the right of nature*, each human being seeks his own advantage and defines the terms of his own welfare which cannot be measured in pleasure quantities; whatever tends to develop and maintain man's ends is lawful for him.¹⁸¹

Each time the social contract is revised and its terms renegotiated, some right runs the inevitable risk of being encroached. No solution can be guaranteed against error; there

¹⁷⁹ B. Ackerman, *Social Justice in Liberal State* (New Haven: Yale Univ. Press 1980); Rawls *supra*, note 52; Bunge *supra* note 1

¹⁸⁰ Wernham, *supra*, note 6 at General Introduction, at 26. See Spinoza, *Tract. Theo-Pol.* chap XVI, *supra* note 7 at 131

¹⁸¹ See Duff, *supra*, note 5 at chap 6; Wernham *supra* note 6 at 36

is always a risk that a specific policy falls short of achieving the state's ultimate goal of protection of freedoms, then, no disposition is final. The realisation of one end implies the sacrifice of others. Choices cannot be avoided, not only because there are many ways of life worth living, but also because even the best solutions collide.¹⁸² Freedom of expression protects the discussion on many possible courses of action in utilitarian terms, and the debate which enhances the intrinsic capacity to choose rationally.

Condorcet maintained in *Esquisse*, that virtue, truth and happiness are part of an indestructible chain. Mill and his followers were convinced that there is such a thing as the attainable and objective truth of value judgements, and that the conditions for its discovery only exist in a society honouring a sufficient degree of individual liberty, particularly of inquiry and discussion. Facts have proved without doubt both that social justice, civil liberties and political equality are incompatible with an irrestrict *laissez-faire* of the exercise of fundamental rights, and that there is no such thing as an absolute answer on values. "[S]ince some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false *a priori* view of what the world is like."¹⁸³ It is a metaphysical chimera to believe that once a scale of values is established every values-conflict may be solved by applying it as a mathematics formula. At some point, some unforeseen problem will not fit in the formula. Given the plurality of values present in our multicultural society, we cannot guarantee the eternity of a determinate set of values. Nevertheless, this lack of eternity does not diminish the sacrosanctity of values in themselves and the importance of

¹⁸² In Berlin's views, the value of free choice does not derive from the premise that without free choice perfect life cannot be achieved; rather that human beings, able to make rational judgements, are bound to lose or sacrifice some ultimate values because the classic vision that all rational wishes are compatible proved utopian and incoherent. Those arguing for absolute truth in values maintain that once the perfect choice has been made, nor further choice is needed. The recrudescence of disagreement is regarded as a symptom of error whether in a Platonic, theocratic or communist society. Conf. Berlin and Popper, *Supra*, notes 2 and 51.

¹⁸³ Berlin, *supra*, note 2 at Introduction, LI.

determining them.¹⁸⁴

Those who believe that a harmonic system of values to solve all riddles can be set up through reason, neglect that human beings are free agents with ends that are in perpetual rivalry and that there is not only one path for them. Kant said that individuals, as autonomous and responsible beings, finally choose a path of action.¹⁸⁵ Any restriction on the debate about the priority of a right over other contracts the areas of human choice, which is a harm to individual self-development in a Kantian sense. Any moral judgement in a social context has as a *sine qua non* condition: a wide debate on promoting one right over other, one utility over other. Choice without knowledge of causes and consequences is not choice but coercion. Hence, the importance that the priority of one value over others be publicly debated. Given a particular institution, where two or more rights collide, the state must provide conditions to further arguments from different moral comprehensive doctrines, rather than to ignore the clash, or to attribute the conflict to a lack of political skills - or, what is worse, to eliminate one of the competing values altogether.

Because the Kantian world governed by the Holy Will has proved far from attainable; because values vary not only from culture to culture but from individual to individual and because the idea of universal and basic values is quite uncertain, the stability of the multicultural Western world depends largely on understanding the goals, motives and ways of living of the members of interacting groups. Such an understanding will hardly be achieved except through an invigorating exchange of ideas, even of noxious ones.

Outstanding examples of freedom of expression as protector of rights can be found in the American fight for political dissent and labour rights during the '20s and '30s, in the

¹⁸⁴ Berlin, *supra*, note 3, "Two concepts of Liberty" at 172

¹⁸⁵ Likewise Kant, Spinoza's approach differs diametrically to Hegel's. The former argues that even if external forces acts on individuals they do not determine exclusively individuals' conduct. Karl Popper teaches that with Hegel the bad philosophy was born. Since then scholars, statemen and ordinary people believe that History obeys to laws beyond individuals' control. We are not more responsible, we are just taken by the uncontrollable forces. The correct position is to run in the same sense that History does. Nothing more comfortable and convenient. *Supra*, note 51 at 271

struggle for religious freedom during the '40s and '50s and for equality in the '60s and for the Canadian fight for religious freedom of minority groups. During the first half of the XXth century ¹⁸⁶ the ideology underlying the American immigration program was "Americanisation," a movement of assimilation meant to ensure the preservation of Anglo-Saxon values. New arrivals from Latin America, Asian or Southern Europe countries were asked to assimilate into the cultural norms.¹⁸⁷ Education was seen as the best tool to achieve that process. The coercive process manifested itself in the banning of trade-unions' discourse, as well as communist and anarchist speech. The attack against free speech from the right-wing evolved around the idea that free speech was "un-American" because it benefited the left and union groups. In the '20s, free speech was deemed a dangerous idea according to the US Supreme Court. In its reply to those charges, the ACLU leaders made clear that their defence of workers' rights and political dissent was grounded on the "old-fashioned Americanism", that is, on the ideas famous patriots, such as Jefferson and Lincoln, had on free speech.

In the US, the success of the defence of ideas such as school integration in the Deep South in the '50s, or racial justice in northern cities in the '60s and '70s largely depended upon the wide protection of their speech. Moreover, the survival of civil rights movements was linked to it. "For the powerless and the excluded, speech was often the only resource available."¹⁸⁸ In the advancing of civil rights, Americans decided to invoke the First Amendment. As Walkers argues, the Court's opinion on free speech issues was shifting throughout the years because of the free speech advocates. During the '20s, victimised groups in the US (Jews and Catholics) started to fight back and ask for restrictions on the

¹⁸⁶ The following discussion greatly benefits from the views expressed by Prof. Walker answering Delgado's doctrine of two narratives. See Samuel Walker, *Hate Speech: the History of an American Controversy* (Lincoln: University of Nebraska Press, 1994)

¹⁸⁷ See Blanchard, *supra*, note 108 at 155

¹⁸⁸ *Ibid.* at 160

speech of those victimising them. Powerful arguments brought before the Supreme Court by ACLU leaders, while defending political and religious dissenters, such as Jehovah's Witnesses, Communists and unionists, prompted it to give a wide protection to speech. In the following decades, Americans become convinced that a tolerant and inclusive society may be better achieved through a broad guarantee of free speech to every individual regardless of his/her group. Though minority leaders' expressions were highly provocative, the Court afforded them protection under the First Amendment. Influenced by the Court's judgements, Civil Rights leaders, even Jews and Catholics, understood that by supporting free speech they could attain their groups' goals.

Not only political claims but also demands concerning every end to be pursued by persons need the infrastructure given by free expression. Supporters of alternative lifestyles, dissenting religious convictions, pro-life and pro-choice ideas, and progressive unions' demands are among those who need freedom of expression the most. Justice, the values of each freedom, social equality, social solidarity, the provision for all members of community with equal education which put them in better position to make free choices, the promotion of health, equal distribution of wealth and a rise of in living standards, all these are claims that must be advocated, and proved. Those claims, political or not, can only be sustained through strong debate. The American experience gives a clear example in the role of freedom of expression in protecting non-political values is found. Censorship of political material had eased in the '30 thanks to the arguments before the Supreme Court. At that time, sexual material became the target of the postal office. ACLU won a major victory in the government's attempt to censor a sex education pamphlet in 1929 and a nudist camp in 1934.¹⁸⁹ The guarantee of free speech and press made sexual education secure.

Not only there is a widespread belief that the rights conflict may be solved once and for all, but also there has been a very optimistic idea that the democratic principles do not decay. Once those principles are established they are held for ever; their collapse is

¹⁸⁹ *Ibid.*, at 84

unthinkable. Carl Bercker's Historicism teaches that democratic principles are part of the historic movement. Even democracy is not defended, its outcome is inevitable. Beyond the scope of this work to debate its ideas, Historicism is brought up because it believes that the being is historical and that history progresses toward a designated end, the final emancipation of the proletariat.¹⁹⁰ Despite that optimism, freedoms can be easily cut off from historical evolution. Popper teaches that Historicism is the common foundation of Marxism and Fascism.¹⁹¹ One of the lessons left by the totalitarianism of right and left in this century is the vulnerability of democracy and how easily its values can be eradicated when they cannot be defended through a wide freedom of expression. Democratic principles must be returned to and consulted even "though the consequences might be harsh for certain points of views, some merely tolerated and not respected, others forbidden outright, [in the founder's way of thinking] there should be no tolerance for the intolerant."¹⁹² Historical evidence shows that those principles whose advocates are silenced decline.

The priority given to a specific right depends on how members of a society determine good and evil, their position towards moral, economy, religions, and intellectual needs. Any defence of the prevalence of a right depends upon a particular vision, which guides each person either consciously or unconsciously, towards what he/she considers a life wholly human. The ideal democracy does not reject any argument *a priori*. Spinoza thinks democracy allows intense discussion on extent and distribution of rights, while theocracy, oligarchy and monarchy significantly reduce it. However, even those three regimes need some freedom of expression to get minimum cohesion.

ii. A MEANS TO DEFEND EQUALITY

Among the rights and values to be defended through freedom of expression, equality has become the most contested. Many legal and political disputes have arisen as a disagreement on the most effective means of achieving some paramount goal. Quite the opposite, the

¹⁹⁰ Carl Bercker, *supra*

¹⁹¹ Conf. *supra*, note 51 at 267

¹⁹² Bloom, *supra*, note 145 at 29

current liberal discord on the priority to be given either to freedom of expression or to equality has its origin in the very understanding of values, not about the meaning of words but on different viewpoints. While many scholars see equality and freedom of expression as complementary values with the same conviction others see them as incompatible.

While freedom of expression meets an anthropological and self-evident need recognised by every culture, equality has to be eagerly argued because of the significant anthropological and social differences among individuals. Far from being universally accepted, equality was not the efforts of Ancient Classic and subsequent thinkers. Plato, for example, envisioned a society governed by an elite with no personal wealth but concentrating all political power. His anti-egalitarian conception of justice of the political power is eased by his idea of similar wealth among "citizens".¹⁹³ Aristotle believed in a natural hierarchy of society with clear differences between its levels and without equality between the members of each level. Anti-egalitarian convictions went on impregnating the Middle Ages thought. In Modern Age, while Hume saw it unworkable, given the different skills subjects possess, and argued it as the very enemy of freedom, many Enlightenment thinkers, especially Condorcet, and XIXth century thinkers envisaged equality as a subtract of all other freedoms. During the XXth century this value has been put in doubt or frankly rejected by several schools of thought and patriarchal religions, in the understanding that more often than not equality is incompatible with the attainment of other conspicuous ends.

The *a priori* conceived principle of equality is largely debated in order to demonstrate its content and validity. Its content and order of prevalence over other values differ according to the philosophical perspective which claims it. Engels held: "the real content of the proletarian demand for equality is the demand for the abolition of classes. Any demand for equality which goes beyond that, of necessity passes into absurdity."¹⁹⁴ In

¹⁹³ Plato, *The Dialogues of Plato*, The Republic III, 416D-417B, IV, 421D-422, trad. Benjamin Jowett, 31st ed. (Chicago Encyclopaedia Britannica, 1989) at 340-343

¹⁹⁴ Engels *Anti-Durhring* at 128 as quoted by Norman *supra*, note 29 at 109

the other extreme of the ideological spectrum, F.A Hayek insist that one of the most distinctive facts about mankind is the differences among individuals because of their capacities and potentialities;¹⁹⁵ individuals are not born equal. The only equality he accepts is that before the law. In his views, freedoms and equality are almost irreconcilable. Between these two extreme positions a wide range of defences of equality have been elaborated flowing from logical principles or from empirical considerations, or from a philosophical system of inalienable rights, or from a political perspective which lacks a conception of fundamental rights and nevertheless holds "every man to account one" as a rule of order, or from a religion which holds that all men are created equal with an immortal soul. Often, different theories of justification on equality, have overlapped.

The next analysis is not intended to evaluate different theories on equality. Rather it is aimed at stressing that the concept of equality must be argued, never assumed, and to demonstrate the impossibility of arguing those theories in a system without a wide protection of freedom of speech. Freedom of expression is insisted upon as a protector and promoter of equality because it is empirically demonstrable that people's resentment over inequalities depends on whether they believe that those inequalities are reasonably justified or not. Egalitarian scholars ask for "equality" without clarifying the meaning of this term. From a principled argument, the satisfaction of the basic needs of each individual has been maintained as of equal in moral weight to that of every other. Beyond logical arguments or external facts, people are to be treated "with equality because such treatment is just."¹⁹⁶ Rawls maintains that equality must be understood as a part of the structure of a system of justice in a co-operating society.¹⁹⁷

¹⁹⁵ F.A. Hayek *The Constitution of Liberty* (Chicago, IL, Univ. of Chicago Press, 1978) at 86-87

¹⁹⁶ See Norman, *supra*, note 29 at 65

¹⁹⁷ Arguing for political equality, Rawls states: "all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions." *supra*, note 52, at 42.

Equal political power, equal educational opportunities, and economical equality are products of pure intellect. Montesquieu and Rousseau, for example, plead for equality for the sake of equality: rules enforcing inequality pursue the wrong scale of values. Slavery is wrong even if slaves were happy with their condition of submission. In their views, equality is an end in itself and overrides any other end in case of conflict. Their position may lead to an extreme and impracticable concept of equality. Those inequalities, such as distribution of authority, needed to develop a task (e.g. coach of a team) should be outlawed. Berlin argues that fanatical egalitarian will discourage even those differences of natural talent. When equality is a paramount goal, policies encourage a greater degree of total uniformity because the maximum of possible uniformism in physical and acquired features, mental achievement, possessions, power and emotional disposition leads to similar conduct among members of society. The egalitarian goal is not only that all members of society should benefit equally but also that they should benefit as much as possible. Equality, understood as the maximum similarities among all indiscernible members of society, means not merely an end in itself but the end. This sounds rather preposterous and unfeasible.¹⁹⁸ Although Norman rejects the charge of "uniformism" as a caricature of egalitarian theories, in a lesser or greater degree most egalitarian demands on equality derive from or are modifications of the proposal to achieve the most uniformity among individuals.

A society, in which human rights are a strange concept, may perfectly apply the notion of equality for utilitarian reasons or because it is the sovereign's will. Bentham's doctrine that "Every man to count for one and no one to count for more than one" has been the premise of the irreducible minimum of the idea of equality in the utilitarian literature. It is worth noting that although Bentham's doctrine about every man accounts for one was used by him to support his utilitarian doctrines, equality may well conflict with

¹⁹⁸ I. Berlin, "Equality" in *Proceedings of the Aristotelian Society*, (London, Harrison Ed, 1956) at ; repr'd in Berlin, I. *Concepts and Categories. Philosophical Essays*, chap. Equality, c.1950 (NY; Viking Press, 1979)

utilitarian norms. Conversely, inequality may well lead to a greater degree of happiness, such as in a theocratic medieval society hierarchically organised.¹⁹⁹

Some egalitarians in the last century came to the conclusion that natural features, such as skin colour, cannot be altered, and the only equality that should be pursued is that related to political and legal rights. Legal equality means that all persons are equal by abstraction of all contingent attributes in respect of which human beings may differ and that rules are to be applied by an authority blind to such differences.²⁰⁰ Uniform behaviour-uniform treatment in identical cases, is the type of equality that flows from the notion of law as such. Any departure from this treatment is an inequality that calls for justification. As Alan Brudner maintains, the abstraction that all beings who are unequal be equal before the law is a philosophical creation and a tautology because the equality of persons as persons is itself the idea of law.²⁰¹ He adds that the Canadian Charter protects two senses of juridical equality: impartial enforcement of the law and the right to impartial respect for persons in the context of the law.²⁰² Every man one vote assures same participation in democratic procedures, same treatment before the law, and same enjoyment of a set of civil rights. Ensured of the enjoyment of that threefold equality, any other inequality among subjects as a consequence of this treatment, is the price to be paid for the juridical equality. Norman justifies the values of equity on the fact that society is a co-operative political body. Says Norman: "In the abstract, there is no presumption; but in the context of a co-operative group or community, there is a presumption of equality in the distribution of benefits and burdens, because that is part of what it is for the institution to be a co-operative one."²⁰³ If persons with the same share of power work

¹⁹⁹ *Ibid.*

²⁰⁰ A. Brudner, "What are reasonable limits to equality rights?", (1986) 64 *Canadian Bar Review* 469, at 478. He states: "juridical equality is so far from entailing equality rights with respect to holdings or opportunities that it presupposes the inequality of individuals in respect of these goods".

²⁰¹ *Ibid.*, at 481-483.

²⁰² *Ibid.*

²⁰³ Norman, *supra*, supra 29 at 73 and ss.

together to achieve a common enterprise, it seems just that every of them will receive a similar share of the benefits and burdens. However, "equal power" and "equal benefit" are concepts deemed to conflict; only an ideal society is exclusively co-operative. Facts show that liberal society is more competitive than co-operative. Thus, any distributive equality must be argued rather than imposed.

A defence of the values of equality may be grounded on empirical considerations. Norman quotes: "Williams adds that, as well as the capacity to feel pain and the desire for affection, another important feature of human beings is the desire for self-respect, which he elaborates as a certain human desire to be identified with what one is doing, to be able to realise purposes of one's own, and not to be the instrument of another's will unless one has willingly accepted such a role...The relevance of all this to equality is that if we are neglecting features which they share with all other human beings, and in that sense we are treating people unequal."²⁰⁴

The struggle of American civil rights movements in fighting for equality, so clearly explained by Prof. Walter, presents a clear example on how the right of expression and equality values are complementary. Though the ideal of equality is embodied in the Declaration of Independence and the Fourteenth Amendment, slavery remained well after their enactment. Racial segregation was, and is, deeply rooted in North-American society. It was the strong advocacy by the National Association for the Advancement of the Coloured People (NAACP) throughout the first half of the century that led to make real progress in the racial equality issue. In 1963, the US Supreme Court reversed the conviction of 187 Black students who had been arrested when they refused to disperse during a demonstration before the Capitol of South Carolina. It ruled that they had exercised their rights to assembly and speech.²⁰⁵ Granted their right to express ideas which endangered paramount values of society,

²⁰⁴ Ibid. at 104 quoting Bernard Williams, "The Idea of Equality" in Peter Laslett and Runciman ed., *Philosophy, Politics and Society: Second Series* (Oxford 1962) Reprinted in Bedau ed., *Justice and Equality* (New Jersey 1971)

²⁰⁵ *Edwards v. South Carolina*, (1963) 372 U.S. 229

they were able to foster the cause of equality.

Two years later the Supreme Court denied to local authorities the "uncontrolled discretion... to determine which expression of view will be permitted and which not."²⁰⁶ During the '60s, students carried out, with disorder, massive demonstrations against institutionalised discrimination. They proposed an idea as offensive to the white majority as the Communist demonstrators had done some decades ago. Demonstrations and other expressions led to recognising the unfairness of segregation and enacting measures to correct it. That would have been impossible, had the Court refused to afford protection to their expression.

The protective role of freedom of expression was clearly understood by Martin L. King and other Black leaders in their struggle for racial equality in the '60s. Their fight -- perceived by the status quo as an extreme form of vilification able to arouse audiences-- needed a strong commitment to freedom of expression from the society at large to be carried on. "King's march, in the face of bitter community hostility and potential violence, would be cited ten years later as a justification for permitting the Nazis to march in Skokie. Allowing community sensibilities to veto political expression would block Nazis in one context but also stifle civil rights groups in others, both North and South."²⁰⁷ American major civil rights movements chose to use provocative and offensive speech as a weapon to fight racism and religious discrimination. Thus, the need to protect speech became a major concern of their leaders. NAACP was a direct threat to institutions (segregation) and societal values (White racial superiority) of the majority. Though its discourse was highly disgusting for the majority, it was the principal beneficiary of the 'breathing room' the US Supreme Court gave to offensive speech. The conviction that through advocacy the cause of equality could gain many adherents prevented Black leaders from asking for restrictions on their enemies' speech. They concluded both that speech was the best weapon to get their

²⁰⁶ *Cox v. Louisiana*, (1965) 379 US 536

²⁰⁷ Walker, *supra*, note 186 at 108

message across, and laws which ban expressions of their enemies' speech could be used against them. They realised that claims for prohibition on KKK's expressions jeopardised their survival as a group because the "prohibition of hateful ideas leads inevitably to the prohibition of organisations that expose those ideas."²⁰⁸ When the US Supreme Court gave support to the NAACP right to claim for equality their right to assembly was secure.²⁰⁹

Most important American achievements in the field of equality rights were gained through Supreme Court decisions expanding the scope of individual right to express against discrimination. Once they understood the protective role of freedom of expression, Blacks and dissenters distrusted any restriction on speech. This conviction left the idea of restriction on speech without advocates in America. As a paradox of history, followers of the main beneficiaries of a great freedom of expression are those who, at the present time, ask for strong restrictions on speech.

"Similar cases must be treated similarly" means that all members of society should be treated in a uniform and identical manner, unless there is sufficient reason not to do so. Berlin argues that "sufficient reason" can cover almost any policy, therefore the principle becomes a tautology. Any policy which instruments equality in detriment of other values calls for defence. The fact that there is a conflict between different principles does not mean that all principles have the same value and that all of them must be defended in the same way. Those conflicts, originated from empirical causes, arise in the moral experience of society and in each individual as well. Far from having a single solution very often they cannot be wholly resolved or resolved once and for all. Then, given the clash between equality and any other ends humans may pursue for "pleasure, or for justice or virtue, or colour or variety in a society for their own sake, or for liberty of choice as an end in itself, or for the fuller development of all human faculties. It is only the most fanatical

²⁰⁸ *Ibid.*, at 118

²⁰⁹ See *NAACP v. Alabama*, (1958) 357 US 449 case on disclosure of members' list and *Gibson v. Florida Legislative Investigation Committee*, (1963) 372, US 539, case on power of government to inquire in political beliefs of associations.

egalitarian that will demand that such conflicts invariably be decided in favour of equality alone, with relative disregard of the other values concerned."²¹⁰ As Popper argues, in an open society we struggle to resolve conflicts, given that to suppress them is against the very principles of a liberal society.²¹¹ The possibility of collision between ultimate goals leads necessarily to debate on the convenience of giving priority to one over others. There is an onus to supply reasons to justify inequalities. Within this framework, freedom of expression is a defender of equality values rather than its antagonist.

Within this conception of freedom of expression and equality as complementary ends, the issue is how to allot the former among members of society in order to achieve their ultimate goals. Spinoza's idea of equality seems to rest on the premises that by the right of nature all human beings, subjected to the same psychological laws, are endowed with equal reason and equal ability to communicate the outcome of the reasoning. Do these premises lead necessarily to a distribution of freedom of expression in the same share among all citizens? Since the powers to reason and express are both kept out of the social contract, all individuals have the same right to think and to convey their opinions. No individual cedes his reason or his right to express to anybody; all individuals are allotted by the right of nature with the same power. The clash between freedom of expression and equality can be reduced to a minimum degree. Spinoza does not address social, economic or distributive inequality. However, from his argumentation it is clear that he acknowledges them. Human beings, equal in their power to reason and express, have the inherent power - or right - to demand the exercise of all other form of equality. Electoral laws in Quebec are an example of the sorts of Spinozian ideas of equality and freedom of expression as complementary values. Each Québécois party cannot expend more than certain amount of money in the campaign. Some restriction on expression of the richer party is imposed so that the party with less resources will not be overwhelmed by the opponents' use of mass-media. The Quebec

²¹⁰ Berlin, *supra*, note 198 at 96

²¹¹ Karl Popper, *Conjeturas y Refutaciones: el crecimiento del saber científico* (Bs. As. Ed. Payot, 1985)

assumption is that the more a message is bombarded upon people, the more possibilities are that this message will be believed. To foster the result that each party has equal chance to be get its message across (even the party with less recourse) the state restricts all parties' expressions in the same way. Indeed, this is a regulation on mode or quantity rather than a limit to an idea. The right of each party to get its message across is not touched. Similar regulation is established when a university administrator gives one hour to each speaker in a public conference. The state is neither to foster the poor party's message nor to prevent the rich party's message from being heard.

In *The Second Treatise of Government*, Locke stated that "nothing more evident than that Creatures...should also be equal one amongst others."²¹² Although, Locke reviewed that concept later on, the idea of equality as a self-evident has remained in Western thought. Far from self-evident, equality stands for much proof and defence; there is no a such thing as a "presumption of equality". Equality is a value that must be striven for and argued from the "universalizability" argument,²¹³ or from "equal considerations of interests"²¹⁴, or from anthropological arguments, or from a utilitarian perspective²¹⁵, or other positions. Even if equality is accepted as an institutional truth, it calls for reasons to justify why it has become an exceptional value. Moreover, even if all human beings agree upon equality on morphological, metaphysically or religious bases, it does not follow that their needs and interests must be met in equal fashion. Reasons must be given to justify the pre-eminence of a kind of equality (e.g. economic or legal) over other type of equality (e.g. educational or of opportunity) and to justify exceptions too. Two systems promoting equality may well be incompatible in practice, e.g. a system proposing equality in self-government and another holding equality in the distributions of rewards. As Deleuze informs us, different

²¹² John Locke, *Two Treaties of Government*, rev'd student ed., (New York: Cambridge Univ. Press, 1988). Second Treatise, Chapter 2, sec 4

²¹³ See R.M Hare, *Freedom and Reason*, 2nd. ed., (Oxford: Clarendon Press, 1963)

²¹⁴ Stanley I. Benn, "Egalitarianism and the Equal Consideration Of Interests", in J.Roland Pennock and John Chapman, eds., *Equality* (New York: Atherton Press, 1967)

²¹⁵ See Hare's utilitarian arguments, *supra* note 213

principles of equality may be easily confused.²¹⁶ The concept, extent and the importance of equality in social life varies from a metaphysical viewpoint to others. Thus, to elucidate them requires free speech. Equality and expression are complementary rather than competing rights. Given that all subjects in a lesser or greater degree cooperate with the system with their work and ideas, and all them are able to elaborate ideas, and they did not cede part or all of this power, then they all have the right to convey the outcome of their reasoning. A wide enforcement of law protecting freedom of expression seems a proper tool to reassure the exercise of other liberties. Whence, if some positive action is needed from the welfare state, it is the provision of means able to enhance the debate rather than the suppression of noxious ideas. In this sense, equality and freedom of expression do not conceptually clash. Eventually, the clash is between the expressed ideas.

In summary, Spinoza sees that each and every individual has the same share of freedom of expression, because all of them retain it from the powers ceded to the state. Thus, they are able to discuss ends, burdens and benefits each time the terms of the social agreement are adjusted in policies. Within this conception of distributive justice in a co-operative community, equality and freedom of expression are not antithetical but entangled. Free expression is a precondition of a substantive equality.

According to Egalitarians, the more people share equality in power, wealth and educational opportunities, the more they will be able to express freely. On the contrary, the point developed up to here is: the more people equally share freedom of expression, the more they will be empowered to get equality in politics, education or wealth. Freedom of expression is not enough to lead to self-development of human beings, but without it would be impossible for both self-realisation and the protection of other freedoms and equality. Even if society departs from a co-operative system and adopts a coercive one, which rejects equality and democratic values, freedom of expression, not as an ideal of justice but as an

²¹⁶ Gilles Deleuze, *Expressionism in Philosophy: Spinoza*, 1st. ed., trad. M. Joughin, (New York: Zone Books, 1990) at 117

anthropological need, which a state cannot take away from subjects, is the last bastion to recuperate freedom. Though freedom of expression is not absolute, its rationales of justification bear such an enormous weight that any encroachment on it is very pervasive either to each individual or to society. Hence, while some reasonable limits may be conceded in the drafting of legislation, they must be carefully scrutinised and exact a heavy onus of justification. Those issues are addressed in the next section.

D. JUSTIFYING LIMITS ON EXPRESSION IN A PLURALISTIC SOCIETY

Said Spinoza: "If men's minds were as easily controlled as their tongues, every king would sit safely on his throne, and government by compulsion would cease."²¹⁷ The issue of placing proper limits to expressions has bitterly divided the liberal thought. In which cases, if any, should speech be forbidden? On which grounds should such a decision be made? The tension between those who support a right to convey ideas, even those out of the mainstream, and those who seek to protect the *status quo* through censorship has shaped the history of freedom of expression. Tolerance of opposing ideas is a paramount value in a democratic society. However, facing internal or external challenges, suppressive forces make consistent efforts to urge conformity to the established social model.

Limits on expressions were largely debated during this century. At first glance, the current debate seem very similar; the division and the proposed solutions are the same. Nevertheless, the current controversy is not a mere repetition of previous arguments but something much more significant. In the past, the debate was framed on the view that the state is the natural enemy of freedom. The American Supreme Court fixed in late 19th century that conception of freedom. It ruled: "the 14th Amendment did not protect individuals seeking to exercise their rights to associate from private individuals seeking to halt their activities. *Constitutional guarantees applied only to official action by the state against individuals.*"²¹⁸ Any claim to protect speech was a liberal demand for limiting the state that

²¹⁷ *Tract.Theo-Pol.* chap XX, *supra*, note 7 at 257

²¹⁸ *US v.Cruikshank*, (1876) 92 U.S. 542, emphasis added. Conf. Blanchard, *supra*, note 108 at 66

was trying to silence individuals. The state should not forbid expression because individuals' self-expressive interest prevails over any state interests, or structured in less individualistic terms, limits on a state's powers are placed as a way of preserving the democratic standards and the openness of public debate. Within this framework, some of the "countervalues" argued to impair the discourse of communists, unionists and Jehovah's Witnesses were "order", "national security", or "moral standards." The accommodation of conflicting interests was the crux of the debate. Ardent defenders of freedom of expression strongly believed that despite the great importance of any countervalue furthered by the state, at the end, judicial protection would be granted to speech.²¹⁹ Ronald Dworkin stressed the idea that rights are not taken seriously when they can be overridden by an appeal to the general welfare,²²⁰ even if these objectives are otherwise legitimate objects of government action. Rawls teaches that basic liberties can only be "limited or denied solely for the sake of one or more basic liberties".²²¹

The transformation of the constitutional order and of liberalism itself has reshaped the debate on expression. First, other citizens rather than the state are seen as the agencies which threaten speech. Secondly, the countervalues offered to justify censorship have an unusually compelling quality. Other constitutional rights and values are offered as countervalues to impair expressions. As long as there is no constitutional guidance as to how the choice should be made, compromise between pro and con censorship seems unreachable.

Flowing from group-goals based or individual-rights based strategies, the liberal spectrum proposes three main positions to solve "hard cases" of expressions. (a) Egalitarians always give priority to equality over discriminative expressions. (b) A second

²¹⁹ See Kalven, Harry Jr., *A Worthy Tradition: Freedom of Speech in America*, Kalven Jaime, ed., 1st. ed., (New York: Harper & Row, 1988); Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power*, 1st ed., (Boulder, Colo.: Westview Press, 1996)

²²⁰ See. R. Dworkin, *Taking Rights Seriously* rev'd. ed., (London: Duckworth, 1987), chapter 7.

²²¹ Rawls, *supra*, note 52 at 9. Emphasis supplied. See J. Rawls. *Justicia como Equidad. Materiales para una Teoria de la Justicia* (Madrid: Technos, 1986) at 107, 109.

group gives priority to speech over equality almost without exception. (c) A third group presents a troubling argument: the counter value to limit speech is speech itself; as discussed in extenso in Part II, they propose a balance between speech and speech values, rather than between equality and speech.

Fundamental rights, although imperfectly stated due to the limited experience of drafters, special historical conditions, and linguistic difficulties, materialise a more abstract pre-eminent scheme of values. From an individual-rights strategy with a social perspective, as proposed in this work, the following discussion asserts that freedom of expression is not absolute and its limits must stem from those prominent values. Nonetheless, given a conflict between expression and another freedom, there is no logical reason for the balance to be automatically struck in favour of other freedoms rather than in favour of speech. Thus, it is proper to wonder why, as Schauer does, balancing freedom of expression against the satisfaction of other human needs, governments tend to give pre-eminence to the latter at the expense of the former, despite the tremendous weight protective rationales carry. Rationales which underlie the protection of speech determine how to justify limits on it.²²² The same reason on which to ground protection may be used with the same force in the opposite sense to justify restriction.

In discussing limits on speech, several reasons make Spinoza's theory worthy to explore. He elaborates on harm to listeners and to speakers. He posits the issue of limits within a rights-conflict, like the current debate does, rather than state-interest v. rights. First, Spinoza's limits on expressions stem from his conception that men express by *the right of nature*. No individual right is absolute, not even the right to life. Consequently, though the sovereign has a very extensive right to regulate conduct, there is a clear limit to its power. Individuals retain three powers: to think, to express and to decide on religious matters. The government is not prevented from controlling or taking

²²² Peter Hogg, *Constitutional Law of Canada*, 3rd. ed., (Toronto: Carswell, 1992) at 855

advantage of these powers because of some legal contraption. On the contrary, *by the right of nature* the sovereign has real power neither to make use of thoughts, beliefs, or words of its subjects, nor to impose ideas upon them. Nature prevents someone's mind from being wholly controlled even by the most oppressive ruler. What persons believe true or false, pious or blasphemy is determined by their nature. Says Spinoza: "since every man is by indefeasible natural right the master of his own thoughts, it follows that men thinking in diverse and contradictory fashions, cannot, without disastrous results, be compelled to speak only according to the dictates of the supreme power... a government would be most harsh if, it deprived the individual of his freedom of saying and teaching what he thought."²²³ Irrational limits on expressions cause a harm to the individual who wants to communicate his/her views. This harm is overlooked by utilitarians.

Secondly, despite his severe individualism, he does not neglect the communitarian aspects of expressions. Mill's followers, assuming that the state's goal is to maximise the social welfare, maintain that expressions must be restricted in any case where it could be believed that more harm than social good could follow if they are allowed. They neglect to evaluate both whether the harm is real or hypothetical and the speaker's intentions. Spinoza maintains that the ultimate aim of the state is to protect freedoms. Hence, he does not accept restrictions on a "truth" basis or on general harms and benefits that might result from expressions. Spinoza posits two limits on speech which derive from his version of freedoms as positive powers. Limits must be justified by assessing whether the expression to be silenced effectively restricts the right of "a man's fellow" or the state's right to regulate conduct. Thirdly, Spinoza proposes that in the endeavour to discover whether or not expression has caused a harm, speaker's intentions must be evaluated to sharply distinguish between expressions which express an idea (always protected) and expressions intended to harm (punishable). Finally, Spinoza argues that the state must use "reason." Hence, it may be inferred that only after using rational methods of experimentation and insights of

²²³ *Tract. Theo-Pol.*, chap XX, *supra* note 7 at 258, 261

different disciplines to prove real harms and their extent, should a state limit freedom of expression. The punishment depends on the speaker's intentions and the extent of the real harm.

1. LIMITS TO EXPRESSIONS CONFLICTING WITH RIGHTS.

While group-goal strategies neglect to protect the individual autonomy, individual rights strategies fail to recognise that freedom of expression not only protects the inherent right to express oneself but also protects listeners' right, including within this concept individuals to whom speech is directed, bystanders and society at large. Then, they stop short of solving the effective harm caused by some expression. Freedom of expression is a two-way avenue. It covers someone's right to communicate rather than to think in loud voice. Simultaneously, it covers listeners' right to receive or not a conveyed message. This twofold feature is further analysed when addressing restrictions in academia.

Several examples of clash between expression and other rights may help to clarify which kinds of harms, in Spinoza's views amount to curb expressions. Slander or intimidation should be banned because they attack the right to choice and self-preservation. Similarly, an act with a communicative dimension which attacks someone's physical integrity²²⁴ is beyond protection. Pornography should be banned if, for example during its production 'performers' are physically traumatised. In such a case, expressions (a movie) conflicts with another human's right (physical integrity). A person who suffered those harms should be entitled to juridical protection. Child pornography should not be banned because it attacks morality or listeners' sensitiveness, but because it harms the rights of those minors used in its production. Expressions should cede to children's rights to life, to a healthy social and psychological development, not to be exploited, etc. Similarly, the right to the press cedes to a criminal defendant's right to an impartial jury²²⁵ or to a minor's right to privacy. In those cases, the affected person is identifiable and the harm verifiable; punishment should

²²⁴ Michael Alexander, "Censorship and the Limits of Liberalism," (1988) *University of Toronto, Faculty of L. Rev.* 47 at 86

²²⁵ See *Nebraska Press Ass'n v. Stuart*, (1976) 427 US 539

follow. The hypothetical clash between expressions and equality values is further discussed in Part II.

2. EXPRESSIONS CONFLICTING WITH THE RIGHT OF THE STATE TO REGULATE CONDUCTS.

Authority can be injured by words or actions directed to rebellion or sedition. State intervention is justified on the grounds that they injure the right of the state to regulate actions. This rationale acquires relevance when academia must deal with demonstrations which interfere with the normal development of activities. Spinoza thinks that expressions aimed at interference with the state to coerce conducts are punishable. Before further argumentation, it must be highlighted that he is not arguing for forbidding political dissent speech. On the contrary, both his *Treatises* encourage citizens to rationally argue against a law which according to them is repugnant to sound reason; their arguments do not cause harm to authority.²²⁶ In the preface of his *Tractatus Theologico-Politicus*, Spinoza states: "wholly repugnant to the general freedom are such devices as enthralling men's minds with prejudices, forcing their judgements, or employing any of the weapons of quasi-religious sedition; indeed, such sedition only spring up when law enters the domain of speculative thought, and opinions are put on trial and condemned on the same footing as crimes, while those who defend and follow them are sacrificed, not to public safety, but to their opponents' hatred and cruelty. If deeds only could be made the grounds of criminal charges, and words were always allowed to pass free, such sedition would be divested of every semblance of justification and would be separated from mere controversy by a hard and fast line."²²⁷ Citizens in good conscience can argue against every law and policy they judge unjust and urge it be derogated. As counterpart of such broad free expression, subjects must not act contrary to valid and enforceable laws. Expressions, which encourage imminent action to force a legal change or acts with an expressive dimension - e.g. revolution, or bombing - aimed at overcoming valid legislation fall short of any protection. In R. Elwes words: "In

²²⁶ *Tract. Theo-Pol.* chap XX *supra* note 7 at 259

²²⁷ *Ibid.* at 5

all matters affecting conduct the State must be supreme."²²⁸

The use of force to convince is the antipode of a legal system. Laws can only be derogated by the entire power of legislation of the authority, be that a king, a parliament or an aristocratic group. Citizens must obey even the law regarded as unjust. Given that in the hypothetical agreement each man has transferred his power of controlling -- regulating -- actions to the government, citizens cannot revert upon themselves this power, except in a complete rupture of the covenant. If every citizen who is opposed to a law could abrogate the binding contract and behave according his own desires, and such practice became universal, then the ruin of the state would follow. Hence, the unjust law does not entitle the discontented citizen to nullify the foundational contract. Each subject is entitled to convince others and the sovereign that such a law must be derogated. Spinoza only protects lawful political dissent. Part of the task of a modern theory is extending his arguments so that even unlawful political dissent and civil speech, which is the background of the political expressions, will be protected too. If the state irrationally persists in coercive laws, against subjects' self-interest, they may break the contract. Spinoza rejects civil disobedience, either all laws are obeyed or none at all. Subjects' recognition of the state's power to regulate conduct is whole, never is it partial.

3. EXPRESSIONS CONVEYED BY STATE-PERSON.

In expanding Spinoza's theory, some expressions by a state-person may amount to a special harm on the right of the state and individuals. Says Reisman: "The identical words, in the mouth of different persons can carry a radically different weight."²²⁹ Non-state persons, protected by a wide freedom of expression, may express new standards of justification to apply to societal life. They may try to convince others of their viewpoints; they may ask for a democracy to be transformed into a theocratic one. They may question the principle of one person one vote. They may argue that some members of society

²²⁸ R. Elwes, *supra*, note 9, "Introduction" at xxxii

²²⁹ David Reisman, "Democracy and Defamation" (1942) 42 *Columbia L.R.*1318 at 1306

have no civil rights because of some inherent feature. They may claim rewards for dishonesty followed by achievement and not honesty entailed with failure.

Quite different is the case when a state-person uses those arguments to justify his/her denial of a right to a specific person. Admittedly, "state-person" or "person in power" are far from self-evident concepts. Two elements are proposed by scholars²³⁰ to determine the source of authority. The first one is the recognition of the public that the speaker has legitimate right to issue a verdict. In the case of hate speech, the point is not whether listeners are convinced by hate monger`s arguments, but whether or not subjects recognise the speaker's statements as verdict. The second element is the speaker's purpose to be recognised by the audience as in an authoritative position, able to enforce the utterances. As exemplifying enumeration, this category includes: judges, parliamentarians, academic authorities, and managers. The concept furthered here does not equate to "dominant class," not even to elite groups (e.g. all professors). Not all members of a dominant group are recognised as entitled to convey authoritative pronouncements, nor do they have the intention to be recognised as such.

"State persons," because of their position in the structure of power, are able to initiate and develop the public discourse, further influential decisions, and control the mode of their execution in societal policies.²³¹ They have preferential access to mass media. Their words are regarded by peers and social enclave as the authority's voice. If state-persons justify enforceable policies on principles which are not agreed upon by the whole society, their expressions may be restricted because of a twofold harm. First, their utterances are normative statements. Although expressions which reject equality values always convey a discriminatory message, they are not always a discriminatory act.

²³⁰ See Rawls, *supra*, note 52 chap. "The use of public reason",; conf. R. Kirk Whillock, Introduction in R. Kirk Whillock & D. Slayden eds., *Hate Speech*, 1st ed., (Thousand Oaks, Ca.: Sage Publications, 1995)

²³¹ Teun A. van Dijk, "Elite Discourse and the Reproduction of Racism" in R. Kirk Whillock & D. Slayden eds., *Hate Speech*, 1st ed., (Thousand Oaks, Ca.: Sage Publications, 1995)

Discriminative messages which emanate from persons with power to decide in the workplace or academia are normative statements only if the speaker uses his/her statements to justify a coercive policy within her area of authority. Such expressions infringe upon egalitarian ethics and cause measurable harm. Quite different is the case when the person in authority expresses hate speech outside the place where he/she exercises the ultimate decision. His/her freedom to express personal opinions is not limited because of his/her position. A professor may freely make discriminative remarks either to reinforce a theory or to tease the discussion, or just in order to express his/her inner convictions. But, in evaluating a student's performance, he/she must not use discriminative opinions. While a non-state person's utterances may harm sensibilities, a state-person speech to justify enforceable policies attacks fundamental rights. There is an important difference between someone saying from a platform that all women are brainless, sexual objects and a dean who refuses a position to a female professor on this basis. While someone has the right to think that women are inferior and to publicly convey his/her opinion, an administrator is not entitled to evaluate a specific woman as if she had a lesser degree of right than the rest of the members of the politic body. While the first case is covered by the freedom to convey thoughts, the latter is a discriminatory act. Rights imply responsibilities. The higher the position of power the more the responsibility to express and act according to principles agreed on by the persons involved.

Secondly, discriminative statements from high profile persons are understood as conveyed on behalf of the social body and as a policy to be followed. Indeed their statements are verdicts because they have the institutional authority to become enforceable. Messages from authority have an intense impact on society and vilified groups. Expressions which misguide subjects on the way the state rules behaviours interfere with the right of the sovereign. Subjects receive the message that nothing prevents authority from acting against a target group of discriminatory remarks.

Restriction on state-person's expressions justified on the harm they cause on

individuals' and the state's rights is a rationale most relevant in academia as discussed further. Despite the fact that subjects are entitled to argue against democratic principles, until new anti-democratic principles are endorsed by society, they should not be used to justify coercive decisions. Says Rawls²³², a liberal government requires that citizens or public officers, when voting or when rendering judgements on constitutional matters, ground their decisions on principles agreed upon by all those who will be affected by those policies. For example, because equality is an agreed value, a professor cannot justify his decision on Black students' work because of their race. The institution must curb his/her speech. Recently in *Walters v. Churchill* (1994) in denying free speech to high position government employees; the US Supreme Court stated: "[T]hough a private person is perfectly free to uninhibitedly and robustly criticise a state governor's legislative program, we never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing."²³³ An employee's words may be taken by the society at large as the voice of government, or understood as enforceable policy. Thus, when misguiding subjects on how the state regulates conduct, employees' utterances harm the state's right to regulate conduct.

CONCLUSIONS PART I.

As mentioned at the beginning of this work, earlier Enlightenment taught that freedom is a positive power to self-direction. This power at head of each individual was envisioned as the best deterrent of totalitarianism. Many contemporary thinkers envisage this power at head of society. From a historicism perspective, assessing that some groups acting in society are the very enemies of freedoms, they argue that the welfare state may rightly encroach upon their freedom to foster others' education, good health, self-esteem and good living conditions. Does the welfare state always promote its citizens' freedoms? Not necessarily. As Norman teaches, the positive meaning of freedom cannot be confused with the

²³² Rawls, *supra*, note 53 at 341 and ss.

²³³ *Walters v. Churchill* (1994) 114 S.Ct. 1878, 1878

positive conditions of freedoms, namely: security, justice, health care, and education, which are only that: conditions. While a lack of those conditions makes the exercise of freedoms almost impossible, a great abundance of those conditions does not necessarily grant their expansion. Any regime, which in order to provide abundant education, to reduce the level of poverty to a minimum, to encourage equal exercise of rights among citizens, disregards its subjects power to choose their own ends, and on their behalf determines what is worthy for their own self-realisation, in the Kantian sense, is not furthering the cause of freedom at all. Spinoza assesses that decisions on ends taken by rulers instead of by subjects and imposed by law lead to the state's ruin. The strength of all law is given by the fact that it is obeyed, and not merely enacted. Its validity does not derive from the wisdom of a monarch, or from the large majority as represented in a Parliament, but because it is seen as a means for advancing values subjects praise the most in a specific time and place. Laws must be a result of a legal procedure of enactment and have the support of public opinion. Freedom of expression is indispensable to reach that consensus. Laws which do not fulfil this requirement are weak, and easily overpowered.²³⁴

Freedom of expression understood as an anthropological feature which the state cannot take away from individuals, and as an instrumental good to lay down and adjust the social contract, is an excellent deterrent to illiberal solutions to the balance of competing rights. As long as this freedom is the reassurance of rights, it is illogical and epistemologically wrong to restrict it in order to protect other rights. Sooner or later equality or any other value that is meant to be protected through censorship may be diminished without the possibility to claim for it. Even if society reaches a level where all needs are supplied equally (like in a perfect Communist system) there is always the possibility of improvement or the rise of an unforeseen problem.²³⁵ Human beings intrinsically desire to argue against what they consider unfair acts, to explain motives to follow a

²³⁴ *Tract. Pol.*, *supra*, note 9, # x,9

²³⁵ Berlin, *supra*, note 2.

vision of life, or to foster scientific progress. Though it is impossible to guarantee an equal good life for everybody, society can be organised in such a way that everybody has the same chance to expose its viewpoints and propose policies that may lead to a good life for everybody. In that sense, freedom of expression becomes the hub around which all other freedoms evolve.

The conviction that an objective truth underlying all normative answers may be found in order to set up forever a harmonious model without conflicts is an utopia. Social and historical contingencies prevent fundamental institutions, which satisfied earlier needs, from being adequate forever. Therefore, new and fair arrangements must be accommodated to the new social conditions. As Rawls maintains, if the fundamental structure that regulates the functioning of a society is not corrected over time, the social processes are no longer just.²³⁶ The adjustment of constitutional principles cannot be articulated by applying a mechanical formula. Decisions on rights-conflict are preceded by contradictions which demand a public debate to elucidate them. While a dictator can enforce some over-all undebatable pattern of a desirable form of social life, in a democracy, all members in a democratic society have the right to participate freely and equally in the redesign of the fundamental structure, in the assigning of rights and duties, and in the distribution of burdens and rewards. An innate sense of justice, or in Spinoza's words, "the dictates of reason", impels human beings to argue what they believe is just. The goodness of reasons on the opportunity of the prevalence of a liberty over others depends not only on the motives adduced in the public debate but also on listeners' moral convictions. In turn, some listeners may reject the "good reason" either because of their own metaphysical beliefs or on the basis that tenets were interpreted wrongly.²³⁷ Basic disagreement among members of the same group are not foreign to any party or sect. Moreover, the negative condition for the exercise of a group's right, the government's lack of interference, may collide with the positive

²³⁶ Rawls, *supra*, note 52, chap The use of public reason.

²³⁷ See Rawls' elaboration on this issue in *supra*, note 10

conditions that the state must further in order to facilitate the exercise of other rights. Genuine freedoms can rightly be curtailed under certain circumstances for good reasons. Restrictions of discussion on those reasons makes the system unstable.

Although freedom of expression does not guarantee equality as its outcome, it guarantees the inclusion of antagonistic parties in multicultural society.²³⁸ It ensures all groups participate and foster their value, as the experiences of NAACP and Jehovah's Witnesses prove. Protected speech prevents both those in power from monopolising public discourse and those struggling to impose controversial ideas from being silenced.

The two argued protective rationales better position us to deal with the supposed conflict between equality and expression. While the anthropological need of expressing is self-evident, it is foreign to human nature to recognise as equal those who belong to different age, sex, economic or social class, or ethnic. Humans are born with the desire to communicate what they think, but the recognition of the "different" as equal requires a strong intellectual commitment. The attempt to restrict something innate in order to protect an enthelechy should be completed by education. Law per se is impotent to achieve equality.

Irrational restrictions on speech harm both society and individuals. Spinoza says: "It is far from possible to impose uniformity of speech, for the more rulers strive to curtail freedom of speech, the more obstinately are they resisted", not for those of weak will but for those of sound morality who strongly believe that the law is unfair. The latter will prefer jail or exile before abdicating their beliefs. Probably Spinoza was thinking in Socrates' trial and Aristotle's exile when he wondered: "What greater misfortune for a state can be conceived than that honourable men should be sent like criminals into exile, because they hold diverse opinions which they cannot disguise?"²³⁹ People who resent censorship may immigrate. In that case the loss is double: individual's cannot act by the law of their own nature, society loses citizens who cannot stand for oppression of mind. As Emerson says:

²³⁸ See Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell Univ Press, 1990)

²³⁹ *Tract. Theo-Pol.*, chap XX, *supra* note 7 at 263

"Furthermore, suppression promotes inflexibility and stultification, preventing the society from adjusting to changing circumstances or developing new ideas... diverts public attention from critical issues."²⁴⁰

²⁴⁰ *Supra*, note 104, at 884.

PART II. FREEDOM OF EXPRESSION ON CAMPUS: A CONSTITUTIONAL PERSPECTIVE

A. UNIVERSITY: A UNIQUE MARKETPLACE OF IDEAS

A logical analysis does not take us far if the outcome cannot be coherently applied to specific institutions where human psychology and social behaviour play a determinant role. Campuses present an interesting field of experimentation for the arguments that have been advanced thus far. The Western university is a microcosm of society, and their mutual influence is constant. The Race and Ethnic Relations Committee's Report of York University states: "the university also has an educational role in providing an example of commitment and leadership in the area of human rights to the larger community." (Section 1: Introduction) The intensity of the interaction between society and university varies from North America to other continents. While European and Latin-American universities are situated inside cities and their members are strongly involved in political and social actions (e.g. the revolution of '68 and De Gaulle's fall or university movements of liberation in South-America in the seventies), North-America campuses, especially in the US far away from larger urban centres, are meant to have little interaction with society. Students live with individuals from other countries but they are apart from their own society.²⁴¹ Despite this fact, North-American universities reflect society at large and in turn they become a leading indicator of the trend in social changes both in their own societies and in the Third World academia, which in turn, influences their own societies.

In applying the concepts for a theory of expression discussed above, it is proper to recall that universities differ remarkably from society at large in several respects, among them: government system, quality of the population and specific goals. Thus, it is worth studying whether a general theory of freedom of expression can be applied without modification to academia, or on the contrary if such a theory must be adapted given the

²⁴¹ René Girard, who left his cathedra in the Sorbona to teach at Stanford, explains that American universities resemble the cloisters of the Middle Ages, where scholars may devote themselves to their studies. See Sorman, *supra* note 51 at 17, 41 and 247

special features of higher educational institutions.

1. POPULATION AND SYSTEM OF GOVERNMENT.

Academia is a co-operative system of adult population where its members willingly enter and remain in order to achieve a common goal: to advance and impart knowledge through an analytical exchange of ideas. Emberly argues that in the last twenty years two demographic-social changes have taken place in the academic milieu. After WWII the university population changed from a strictly White middle-class and upper-class male community towards a social enclave where women and members of minorities and lower-class individuals got more and more space, either in the classroom or on committees.²⁴² Despite those changes, the university goes on being a corporate enterprise to develop talents and resources and to achieve a specific purpose. Since the creation of the university of Bologna, in 1087, academia members have recognised themselves as partners in this common endeavour. Throughout centuries, universities have been the place where scholars and students willingly undertake the interpretation of natural, social and spiritual orders to solve humanity's transcendental needs.²⁴³ University community often prides itself on being in the *avant garde* of society, immune to social prejudice, and willing to stand up for unpopular beliefs.

Its adult population makes the university an unique marketplace of ideas. While primary and High School teachers deal with minors whose abilities for making choices are diminished because of their age, university instructors' address an adult audience experienced enough to defy or accept ideas according to their own understanding. Richard Hierves argues that a university is entitled to prevent "that exploitation of students' vulnerability to racist ideologies."²⁴⁴ It is an inconsistency to speak about university students as immature, and easy prey of hatemongers, and simultaneously to regard them as

²⁴² Emberly, *supra*, note 46

²⁴³ C. Cantu, *supra*, note 95, Vol 6 at chap. 12

²⁴⁴ R. Hiever, "The Marketplace of Ideas" (1995) 22 *Journal of College and University Law* 2:282 at 333

mature enough to evaluate the consequences of their acts, so that they may be charged criminally, get married, defend their country in war, use self-destructive drugs, etc. Then, poisoning of students' minds is a concept to be applied to primary and high school population rather than to academia members.

As Rawls maintains, while universities are social enclaves where its members enter and remain by choice, society at large is a system where individuals belong unconsciously and which cannot be abandoned by subjects,²⁴⁵ except by exile, an experience so painful that it is not really an option. On the contrary, the abandonment of the campus is not only feasible but also desirable sometimes.

Another remarkable difference between society and academia is the system of government. While society has essentially a representative democratic system, universities display a form of government between hierarchy and democracy. While students have little, if any, representation in the government and authority is more diffuse than in *extramuros*. Beyond the administrative authority, university is about academic authority recognized because intellectual achievements.²⁴⁶

2. EDUCATIONAL OBJECTIVES

There is an inability of academics and outsiders to determine the purposes of university.²⁴⁷ Drucker claims that there are only two antagonistic theories in Western society regarding what can be known and how we know. This division originated in 400 BC with Socrates and Protagoras. While the former argued knowledge as intellectual and moral development of the student, the latter affirmed that the purpose of knowledge is to empower an individual to say properly what he knows.²⁴⁸ Similarly and since the same time, Ancient East was divided by the same crux. Confusionim, like Protagoras, was concerned with the

²⁴⁵ Rawls, *supra*, note at 10, Part III, §26, #4, 5 at 75, 76

²⁴⁶ Emberley, *supra*, note 46 at 42

²⁴⁷ *Ibid*, chap 2

²⁴⁸ P. Drucker, *La Sociedad Poscapitalista*, trad. Ma. I. Merino Sanchez, (Bs.As.: Editorial Sudamericana, 1993) at 28 and ss. See "Protagoras" and "Gorgias" in *Dialogues of Plato*, *supra*, note 112 at 40 and 253 for an enlightened discussion on "rhetoric" and "dialectic" in the Classic thought.

rhetoric, how to say what is known, Taoism, like Socrates, was concerned with the dialectic, the discovery of the truth. Like in the past, two ideologies addressing the goal of academia prevail. Many government and university officers embed by corporate ideas see universities as "learner-centred" institutions aimed to transmit the useful information so that students become skilful professionals. Professors are envisaged as mere reservoirs of data. Emberly cites two examples of these ideologies. According to Bill Spady, in the US a good education is that which qualifies students to build a life. In Canada, the Ontario Minister of Education regards valuable the education which gives "values, skills, and knowledge required for success in a rapidly changing world."²⁴⁹ Campuses seen as a business enterprise are expected to transmit data able to homogenise forces of technology and consumerism. As Bloom argues, pursuing this ideal of learning, higher education is producing a highly trained Ph.D., who does not necessarily know more about morals, history and politics than a illiterate countryman.²⁵⁰ This perspective regrets any disturbance in the flow of data and welcome hate speech codes.

From a quite different ideology, post-modernism and leftist, understanding that universities are to help students to deal with their personal and social contingencies, has transformed it in a "social welfare agency"²⁵¹ putting in place a network of counsellors, anti-harassment offices, awareness programs, therapy to the victims. An example of this is given by Michigan University Policy on Discrimination,²⁵² which offers a wide range of programs to assist students in solving "personal problems" in its *Confidential Personal Counselling and Assistance for those Affected by Discrimination and Other* section. The University offers a "setting where it is possible to explore personal feelings ..." for victims of discrimination. Both ideologies have an impoverished idea of what higher education means. It is neither reduced to transmitting professional information nor to

²⁴⁹ Emberley, *supra* note 46 at 137

²⁵⁰ A. Bloom, *supra*, note 145

²⁵¹ Emberley, *supra*, note 45 at 25

²⁵² Annexed

dealing with immanence.

Faculties and students are committed to the development of mind in a dynamic process through the use of reason as applied to scientific research. This commitment theoretically leads academia members to think critically, to research beyond the barriers of religion, ethnicity, and sexual proclivity.

Higher education has as its core ideas such as fairness and moral standards, a non-compromised search for truths, the promotion of questioning of prevailing patterns and values, the preparation for carrying out useful personal, political and professional lives; that is more than the mere transmission of techniques and vocational skills. Western universities are to train students to think independently, and to develop their skills in a specific field without forgetting that human problems must be solved within a moral cosmovision. Hence, campus is the place where students learn the power of free speech. Indeed, academic freedom is a concept derived from a general theory of freedom of expression to foster the advance of knowledge in *intramuros* in a framework of tolerance.²⁵³ "The common good of society depends upon the search for knowledge and its free expression. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship or research. Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights... Academic members of the community are entitled, regardless of prescribed doctrine, to freedom carrying out research and in publishing the results thereof,

²⁵³ "Academic freedom" is a concept developed to protect the highest universities' goals and to be applied in public universities as a barrier to actions against professors and faculties. It implies both: to be free from compelled academic speech and grading, and to be able to argue one's own theories, ideas, etc. without external pressures. Academic freedom protects: individual professor from their own colleges authorities and government; and colleges from government. The main concern in developing this concept was the protection of: professors' autonomy to teach how they see fit; student's rights to learn in an environment free of harassing behaviour; Deans' duty to ensure that appropriate instruction is taking place; accrediting agency's responsibility to maintain uniform standards across institutions.

freedom of teaching and of discussion, freedom to criticise the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual... Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge."²⁵⁴

Academia members's freedom to pursue teaching, research and publication in their own field of expertise without fears of endangering their position because of the ideas conveyed is a *sine qua non* condition to advance knowledge. Once Justice Frankfurter said that the educative system cannot achieve the purpose it has been designed for "if the conditions for the practice of a responsible and critical mind are denied to them [teachers]."²⁵⁵

Are the differences pointed out between both enclaves an obstacle to applying, in intramuros, the rationales used to justify the protection and restriction of expressions in society? First, the protective rationales, discussed thus far, do not stem from teleological reasons but from the principle that freedom of expression meets anthropological needs and is a tool to discuss ends and structure of a social system. Those grounds do not lose validity in the academic context. Members of academia retain their positive power to choose ends, and to argue them when adjusted to the fundamental structure of academia as a political subsystem.. Thus, differences between academia and society do not prevent the argued protective rationales from being applied to both social systems. In addition, the role of freedom of expression in the transmission of knowledge requires its strongest protection. Secondly, academia members, like citizens of society at large are aiming to increase their "chances of self-preservation", in Spinozian terms. Academia's special features do not entitle its members to harm others' rights or to harm authority's right to regulate conduct. Thus, advanced arguments on rationales to limit expressions apply also to academia. The next section contrasts them with the rationales underlying campus restrictive

²⁵⁴ R.W. Kerr, R. Leger & V.W. Sim, eds., *C.A.U.T. Handbook of Policy Statements and Model Clauses* 4th ed. (Ottawa, : C.A.U.T., 1986) at 4

²⁵⁵ *Weiman v. Updegraff*, (1952) 344 U.S. 183, 196; 73 S.Ct. 215, 221

policies.

B. HATE SPEECH ON CAMPUS

As discussed above, to understand how we arrive from the severe individualism of the Kantian conception of man as autonomous and rational, responsible, and self-perfectible being to the elite of Platonic guardians set up by XXth century totalitarianisms has not only a philosophical value but also a special interest to free speech as a legal issue. Nowadays, the ideal to achieve a "conflictless" society has led many sincere liberals to put forth a "final solution" to a very disturbing problem: communications of different moral comprehensive doctrines have adopted a special style: hate speech, which jeopardises the social peace.²⁵⁶ Neo-nazi movements, Christian, Muslim or Jewish fundamentalism, are phenomena spreading from active members towards the society. The increase of conveyed bigotry has proportionally raised the expectation of vilified groups to be protected at the cost of curbing others' right to express. The urgency of solving the upsurge of racism and sexism has prompted academia to enact censorship policies which seem the panacea to solve social tension. As in the past, campuses are not immune to the silencing forces. Stretching from Medieval cloisters forced to maintain orthodox views, to German universities cleansing themselves from anti-nazis scholars, and to American universities in the McCarthy era, to the 1968 Arkansas' law forbidding the teaching of theories which deny the doctrine of the creation²⁵⁷, innumerable cases remind us that campuses are the first targets of the same repressive forces which act in society. The university seems to face the dilemma either to encroach on expressions or to allow social disintegration. Unable to envisage other options, it proposes a middle ground solution: the minimum of speech. In an attempt to make the problem disappear, instructors are advised to "be careful not to introduce into their teaching controversial matter which has no relation to their subject."²⁵⁸

²⁵⁶ M. Reisman, "The New International Holy Alliance and the Struggle to Appropriate and Censor General Cultural Symbols" (1989) 83 *Proceeding American Society of International Law* 435 at 436, 437.

²⁵⁷ *Supra*, note 108

²⁵⁸ *Supra* note 3.

Academia, because of its peculiar features, is very sensitive to freedom of expression and alerts to its limits. Wrong solutions to the conflict between expressions and its assumed countervalues amount to serious risks both to the internal structure of academia and to society. Galileo's trials not only caused internal disturbances in the Italian university but also in society which was deprived of his discoveries. Given that, Western universities have always been philosophical grounds where ideas can be tested before being applied to the larger community; the way academia solves the issue of hate speech deserves special study. Part of this chapter argues that the notion that individuals must be held accountable for the indirect damage their expressions might cause is both alluring to the suppressive tendencies and dangerous to the survival of academia members' individual rights. Before presenting more arguments on the validity of limits to expression in academia, the nature of "what" is restricted is discussed. There is no sense being exact about something if one does not know what one is talking about.

1. THE MEANING OF "HATE EXPRESSION"

"Hate expression" and "hate speech" are elusive and ill-defined terms. Society, academics, domestic law and international conventions use it broadly without defining its meaning. During the '20 and '30s hate expressions referred to "race hate"; after that, the term referred to "group libel" including expressions offensive to race, religion and ethnicity. Though hate speech essentially refers to racial and religious expressions, increasingly, the mainstream of feminism claims that sexist remarks, pornography and terms used in anti-abortion campaigns such as "baby-killers" are a form of "hate speech".²⁵⁹

Similarly, members of self-isolated particular groups (homosexuals, handicapped, veterans of the Vietnam war) ask for inclusion within this category of offensive remarks which target them. Many authors and the wording of hate speech codes include within "hate expressions" from insensitive comments, slurs, offensive jokes, epithets or defamatory

²⁵⁹ Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Speech and Pornography" (1992) 55 *Law and Contemporary Problems* 77

comments to political opinions which convey a negative assessment of a group of individuals based on their religion, ethnicity, race, sex or chosen style of life, disability and in the US involvement in the Vietnam war. They may be conveyed in a written way, such as letters, billboards, flyers, T-shirts, tattoos, graffiti, and cartoons, or in a face-to face mode: by telephone hate lines, electronic messages, broadcasting, or through symbolic acts such as burning crosses, display of symbols, demonstrations, and rock concerts. All the expressions of this list, which is not exhaustive, fall short of a danger of physical assault or riot. This analysis is restricted to hate speech and excludes hate crimes. "The latter refers to common-law crimes against persons and property - assault, vandalism, and such - where the perpetrator is motivated by racial or religious hatred for the victim."²⁶⁰

Van Dijk²⁶¹ teaches that in every day conversation we use pejorative words to describe a group; that leads to stereotyping results. The human tendency to out-groups and self-isolation denies individuality among members of a group and highlights differences between it and the rest of society. This technique of communication is especially dangerous to social peace when groups compete for limited rewards within a co-operative systems with a strong component of competition like ours. Adverse social conditions make the struggle for survival more difficult. The multicultural element exacerbates the perception that competition is against a group rather than individuals. When a negative behaviour of a single individual is regarded as representative of her class, animosity perpetuates itself. Unless the process is stopped, feelings of enmity become deeply rooted.

Hate, a natural feeling, can be used as an unscrupulous rhetoric to annihilate opponents, as an stratagem for deceiving and achieving a goal. By presenting a group as responsible for a negative situation, hatemongers try to take away from the audience any empathy toward the vilified. In "dividing to reign," they are more concerned with moving audiences by creating a symbolic code for violence than with winning adherence through

²⁶⁰ Walker, *supra*, note 186 at 9

²⁶¹ *Supra*, note 231

argumentation. Fuelling emotions, humiliating the vilified out-class, they try to harm the opposition irreversibly.²⁶² Then, a conscientious analysis of hate speech, which includes discussion on factors which distort the debate and increase hate speech, must precede any pragmatic measure to deal with it.

2. FACTORS DISTORTING THE HATE SPEECH DEBATE

Many reasons amounts to the origin and evolution of the complex social phenomenon of hate speech. Their identification is an arduous task because several factors, ignored in the current debate, have contributed to distort it. First, hate has not received much attention from scholars, probably because of the negative connotations it poses. The absence of studies on its biological and social factors constitutes a serious obstacle. Lacking scientific research to prove their assumptions, many scholars rely on their own experiences as targets of racial hatred. Most, if not all, of those engaged in the debate assume that hate expressions are isolated instances of antisocial and abnormal behaviour in a society where new cultures are merging. Thus, those incidents are either ignored or repressed. However, hate speech issues need to be addressed in a more comprehensive fashion. Given that individuals are immersed in a social system which influences them and in turn is reshaped by its parts, the jurisprudence of human rights should explore the validity of another assumption: hate is not a pathological practice of "others" but it is an integral part of all members of society. When we understand that hate speech is just one form hate may adopt, we are better positioned, from a legal viewpoint, to analyse the hate phenomenon in its dialectic process, to explore its use in the academic discourse, and to design policies in consequence. In this task Spinoza's analysis of the two psychological laws which drive men, -- one that of the transference of emotions upon what is perceived as the cause of pain and pleasure, and the law of empathy (recall his example of hate towards Jews²⁶³) -- gives a new

²⁶² Rita Kirk Whillock, "The use of Hate as a Stratagem for achieving Political and Social Goals" in *Hate Speech*, R. Whillock & D. Slayden eds., 1st ed. (Thousand Oaks, Ca.: Sage Publications, 1995) at 33

²⁶³ Spinoza, *supra*, note 8, iii at 13

perspective.

Another reason which obnubilates the hate speech debate is the lack of recognition that a constant discourse -- through mass media, education, socializing talks, political campaigns -- expresses and reinforces discriminative ideas at a micro and macro societal level.²⁶⁴ Prof. Dijk gives several examples of a subtle discrimination that permeates media and academia. Minorities leaders are systematically less quoted, and when they are, a "balanced" perspective from majoritarian groups' speakers is offered. Few reporters are Asians or Latinos. Often, news regarding minorities affairs stress the idea that minorities are problematic "to us," either because of their religious values or because of economic reasons. Seldom are immigrants portrayed as making an important contribution to the economy or to the advancement of knowledge. In addition, politically correct words hide a certain message of bigotry: "gangs", "welfare mothers", "crack" are frequently attached to certain ethnicities within a discourse of denial of racism. In what seems a fair analysis, some individuals are simultaneously presented as members of minorities and successful citizens. Minority members who have not reached a comfortable situation are indirectly blamed. Similarly, the educational discourse reinforces ethnic sensibilities. The Third World is studied from a Developed World perspective. Through textbooks, in the three levels of education, the only "obligatory" discourse in society, ethnic children are prepared to accept a lower role in society. In academia the problem is more subtle; the political correctness emphasises "cultural differences" and confirms stereotypes. Bigotry in "racist socio-biology" is easy to identify. But, scholarly studies on "underachievement" or "culture of poverty" or "criminal tendencies" -- which stress racial and gender differences while ignoring the relation of power in society -- are presented as unbiased theories.

Another element, a historical event, has prevented the hate speech debate from being carried out in a more objective way. Hate expressions are often equated to anti-Semitism.

²⁶⁴ The following concepts benefit from the research carried out by Prof. van Dijk during 1984-1993 and presented at the International Conference on European Racism, Sept 25-30, 1990, *supra*, note 231

Nazism and the Holocaust had a profound influence on the Western thought about freedom of expression. The loss of millions of lives, the affective burden represented by the Nazi hate propaganda and the painful circumstances of the WWII raise the intuition that there is something really wrong with hate speech. Because these feelings prevail over a rational analysis, it is very often forgotten that it was government's hate propaganda rather than that of powerless individuals who spread anti-Semitic ideas before the WWII. Economic and social circumstances are also put aside in the elaboration of conclusions. It is rather simplistic to argue that Hitler's hate propaganda led inexorably to the extermination camps. For example Gordon Allport, as quoted by Mahoney, says: "It was Hitler's antilocution that led Germans to avoid their Jewish neighbours and erstwhile friends. This preparation made it easier to enact the Nuremberg laws of discrimination which, in turn, made the subsequent turning of synagogues and street attacks upon Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz."²⁶⁵ His conclusion is quite different from that of Ernst Nolte. This historian, in 1986, writing in "Frankfurter Allgemeine Zeitung" argued that the Holocaust was a reaction to acts of extermination carried out during the Russian Revolution. The socially motivated massacre in the Gulag, chronologically preceded the biologically motivated extermination. That is, Fascism tried to annihilate Marxism, by applying the same horrendous methods. Moreover, for Hitler to have succeeded, an underlying ideology supported by the whole society had to exist. His preaching was a visible sign of a hidden resentment, which later exploded.²⁶⁶

It is not the purpose of this work to discuss the origin of the Holocaust or endorse Nolte's theory. His ideas are brought up with the purpose of stressing both that the causes of the Holocaust were multiple, and that they have not been entirely rationally debated

²⁶⁵ K. Mahoney, "Regina v. Keegstra: A Rationale for Regulating Pornography?", (1992) 37 McGill L.J. 242., at 249 quoting G.W., Allport *The Nature of Prejudice* (Cambridge, Ma:

Addison-Wesley 1954), cited in D. Bottos, "Keegstra and Andrews: A Commentary on Hate Propaganda and the Freedom of Expression", (1989) Alta. L.R. 461 at 471.

²⁶⁶ Ernst Nolte, "La guerra civil europea ha comenzado en 1917", in Sorman, G, *supra* note 51 at 150

because of the emotional burden they carry. For example, seldom is it highlighted that of the six millions Jews sent to concentrations camps only half million were German Jews. The rest were from "foreign lands" occupied by Germany.²⁶⁷ "The differences, the alienation of massacred groups that Hitler depicted were the result not only of ethnicity but also of nationality."²⁶⁸ As professor van Dijk maintains²⁶⁹, Nazis resorted to many strategies to achieve their inhuman purposes and counted on the silence of the West as a necessary accomplice. "A public opinion poll found that 58 percent of Americans believed European Jews were responsible for their own persecution."²⁷⁰ Special historical and social circumstances, strategies from the group in power and manipulation of feelings rooted in society ²⁷¹, are among the causes of holocausts; hate speech is just other stratagem used in conjunction with others to annihilate a group. Neo-Nazi speech is one form of hate speech but there are innumerable others. Consider the speeches of KKK; the Nation of Islam constantly preaching resentment against Jews and Whites; Christian, Jewish and Muslim fundamentalists; Zionists; new cults demanding mutual scatological extermination: all of them are scattered examples of the systematic expression of bigotry. Those examples which do not exhaust the list have the common feature that they all vilify. What is the ultimate purpose in using hate expressions? The belief that hate expressions are uttered "for no reason" or "just for teasing" is an illogical idea, which ignores historical facts. Citizens who form organisations and invest a large amount of money to convey their bigotry in as many places and ways as possible are motivated by something more than the *animus* to vilify. They want to convince others that some persons have to be alienated from society and deprived of all political power. Authorities which either ignore or censor them, hoping that they will

²⁶⁷ Porpora, D.V. *How holocausts happen* 1st ed., (Philadelphia: Temple Univ. Press, 1990) at 43

²⁶⁸ Kirk Whillock, *supra*, note 262 at 35

²⁶⁹ *Supra*, note 231

²⁷⁰ Hadley Cantril, ed. *Public Opinion, 1935-1946*, 1ed. 1951 (Wesport, Conn.: Greenwood Press, 1978) at 38

²⁷¹ See Plato, "Georgias"; "The Republic" Book IV in Plato, *supra* note 112 at 269, 342 and ss.

disappear, are not only naive but also adopt a dangerous position because power is at stake.

3. FACTORES INCREASING HATE SPEECH ON CAMPUS.

While the above described factors have distorted the debate both in society and academia, in the latter an additional factor has simultaneously distorted the debate and generated more hate; namely, the current intellectual climate in universities. As several authors have wisely argued,²⁷² relativism and deconstructionalism carry an important weight in the cycle of bigotry. Affirmative action programs carry similar share in the conflictive situations in university.²⁷³ No less important for this outcome are homogenising forces from the free market ideology.²⁷⁴

The North American intellectual atmosphere is impregnated by post-modernist theories. Post-modernism is a heterogeneous contingent whose main characteristic is its abandonment of the idea that "good and evil", "reasonable and unreasonable" and "just and unfair" are distinguished.²⁷⁵ Reality does not exist but it is constructed through words, hence reality may be re-constructed through another language; things are in permanent revolution and there is no truth to be found behind the evident unfairness of the present state of things.²⁷⁶ These ideas stem from the European linguistic theory which argues that language does not represent anything because reality is just a linguistic convention. Some French academics, among them Derrida and Paul de Man, applied linguistic theories to power relations "transforming them as tools of social emancipation."²⁷⁷ "Deconstructionism" looks to "demystify" the dominant meanings of everyday words in order to make evident the play of power hidden beneath them.

As D'Souza teaches, in the post-modernist analysis is crucial the assessment that objectivity does not exist and current neutral standards are White male ones. Its supporters

²⁷² D. D'Souza, *Illiberal Education, The politics of race and sex at campus*, 1st ed., (New York: Free Press, 1991); Allan Bloom *supra*, note 145; and Karl Popper *supra*, note 51

²⁷³ D'Souza, *supra*, note 272

²⁷⁴ Emberly, *supra*, note 46

²⁷⁵ Emberly, *supra*, note 46 at 103 and ss. Bunge, *supra*, note 1 at 167

²⁷⁶ Nitzche said that is better to believe in the nothingness than in nothing. Post-modernism believes in nothing.

²⁷⁷ Emberly, *supra*, note 46 at 104

regard institutions and values of liberal society as means to hinder social progress of those historically oppressed. Aleinikoff maintained that all standards, even those scientific, are White male ones; he discredits that they may be applied to Blacks and women,²⁷⁸ because the oppressed are unable to understand the White male perspective. In turn "oppressors" cannot understand the path vilified groups go through. There is on one hand a "White intelligentsia" and a different one for Blacks, another one for women, and others for members of the Third World countries²⁷⁹. Interestingly, those who seek the censoring of Neo-nazi movements use the same terminology used by Nazis. Hitler denied authorisation to go on developing the atomic principles because they were "Jewish science." From her "thinking Black" ideology, Bell Hooks says: "I write from the particular experience of living as a Black woman in the United States, a white supremacist, capitalist, patriarchal society, where small numbers of white men constitute ruling groups."²⁸⁰ It is unclear what "White-male perspective" means. Is not Marx as misogynist as Aquinas? Are African societies as capitalist, patriarchal and misogynist societies ruled by elite as Western society? If our gender or skin colour lets us speak on behalf of our sex or race, who speaks in behalf of White men, Aristotle or Plato? Pascal or Descartes? Nietzsche or Kant? There is a presumption without any empirical basis that all women and all members of a minority think "equal"; those women who are ultra-sexist and who eagerly refuse to be called feminists are not considered. Similarly, many minority members refuse to endorse their leaders opinions or even their own race customs. Unless we are ready to accept the idea of "natural" racial

²⁷⁸ A. Aleinikoff, "Constitutional Law in the Age of Balancing", (1994) 96 Yale L.R. 1004

²⁷⁹ A Black perspective is difficult to understand when activists try to emulate African cultures in external look while acting as perfect Whites if they were to be judged by African patterns of behaviour. In the '60s, Lewis Steel, White attorney of the NAACP wrote in the *New York Time* magazine that the Court's members were "nine men in black who think white" criticising their insensitivity to racial issues. Steel was fired and the organisation explained that his comments were an intolerable criticism of the NAACP, its many litigation victories and the Supreme Court." To think White or Black" was an unthinkable concept at that time. Conf, Walker, *supra*, note 186 at 118

²⁸⁰ Bell Hooks, *Talking Back: Thinking Feminist, Thinking Black*, (South End Press, 1989) at 20

differences, it is pointless to sanction the validity of "White" and "non-White" cosmos vision. As Spinoza masterly explains in his second law of psychology, humans are able to understand others' experiences. Mill was not only sympathetic to women's condition, but also he powerfully argued to ameliorate their situation. That is what learning is about: to comprehend others' experiences and goals.

What is the relation of multiculturalism, deconstructionalism and hate speech? The present globalization has led to the recognition of other cultures' cosmos visions; that has impacted tremendously on our Socratic and Christian cosmos vision.²⁸¹ The way to cope with the clash between Western and Non-Western values is different on both sides of the Atlantic. European university communities are homogenous. Oxford, Salamanca and Bologna, positioned among the best universities in the world, are highly interested in displaying mind diversity rather than racial diversity. A wide spectrum of ideologists encourage European students to challenge popular convictions and to explore innovative ideas. Quite the opposite, North America universities are concerned with achieving racial and gender representation in the hope that an ample range of intellectual responses will spring up from different racial and gender perspectives. D'Souza convincingly proves that the goal of keeping racial and gender quotas is so pressing that officials are ready to put aside academic merits to allow disadvantaged groups members to get in. Prof. Louis Gates explains that this endeavour is carried out from top-down because professors and officials are involved in it. "[Chancellor of Berkeley] Ira M. Heyman found the principle of merit admissions in sharp conflict with that of proportional representation or diversity. "Higher education at all levels simply cannot wait until social processes in our society allow all groups to start life with the same advantages and to achieve at the same rate."²⁸² Just the opposite of what was expected occurred: facts prove that "the philosophical composition of American faculties is

²⁸¹ See Emberley, *supra*, note 46 chap 2

²⁸² Ira Heyman, "UC Berkeley Admissions: The Best of the Balance," *Los Angeles Times*, February 7, 1989, as quoted by D. D'Souza, *supra*, note 272

remarkably homogenous,"²⁸³ despite the racially heterogeneous community.

The current North American approach to multiculturalism starts from a defined epistemology within a political agenda; the teaching of cultural-moral relativism is aimed at helping students discover a "different picture" than the Western culture.²⁸⁴ The Greeks were probably the first who studied different cultures to find valuable foreign elements in order to decide whether or not to incorporate them into their own culture. On the contrary, today other cultures are studied from the cultural and moral relativism. Given that throughout history in each culture there have been different definitions of good and evil to solve social issues, no hierarchy among moral comprehensive doctrines should be established.²⁸⁵ For the sake of respecting diversity and equality, Western values are placed on equal footing with other cultures and values. Popper says that Relativism is the greatest threat against our society.²⁸⁶ Post-modernism stresses ethnocentrism and rejects cosmopolitanism as ethics. They also distrust democracy as the best system of government, and reason as the truly human tool to understand and solve conflicts. Theories which foster fragmentation and homogenisation simultaneously²⁸⁷ have had a great responsibility in the increase of hate speech, and, paradoxically, in the conception that regulating codes are the best solution to deal with it. These theories impact on the curricula too.²⁸⁸ If everything has the same value, Classics may be replaced with popular literature and movies, and the study of sociological movements with the analysis of one's own experience as sociological fact.²⁸⁹ In both examples, academic endeavours seem unlikely to be present.

I fully agree with D'Souza's conclusions that one of the paradigms of this approach to multiculturalism is that not all cultures are equal. Feminists and new advocates of diversity find little support in other cultures for their egalitarian claims.

²⁸³ *Ibid.*, at 231

²⁸⁴ See an extensive discussion on this issue in A. Bloom, *supra*, note 145

²⁸⁵ Lévi-Strauss, *Antropologia estructural*, (BsAs. Agora, 1985)

²⁸⁶ *Supra*, note 51 at 269

²⁸⁷ Emberly, *supra*, note 46 at 151

²⁸⁸ D'Souza, *supra*, note 272 at 21

²⁸⁹ Bunge, *supra*, note 1 at 163.

Multiculturalism and equality are concepts alien to Non-Western cultures. Each of them is ethnocentric and believes that theirs is the best way to deal with immanent and transcendent problems. Foreigners and the "different ones" in their own society are regarded as inferior. Discriminative remarks about Blacks and women are common in the texts of ancient Islamic prophets.²⁹⁰ Homosexuality and "alternative sexual lifestyles" are unthinkable in non-liberal cultures. (Homosexuals are sent to jail by Castro, put under electro-shock in China, treated as under spell of witchcraft and harshly punished by Papuas and Massais).

Thus, Non-Western cultures supporters face "the law of iron"²⁹¹: they have either (1) to recognise that Non-Western cultures perspectives, because of their ethnocentrism, are useless to deal with multiculturalism; that means the recognition of the superiority of the Western knowledge; or, (2) to accept Non-Western ethnocentrism and reject Western culture altogether with the multicultural project. They cannot follow either path. The Third World is viewed by North American minority activists as suffering the same kind of oppression that Blacks, Native American, women, and homosexuals suffer in North America. Intellectual facts conflict with political sympathies. In order to dissolve this conflict they follow several strategies. First, they present an idealised picture of Non-Western cultures while emphasising messages of hate against the European race, that is a trigger to their own hate. When Black students hear a sweeping statement such as: "the prison system [is] largely designed to replace the earlier form of black chattel slavery,"²⁹² it is easy to understand the increase of hate on campus. A young African-American quoted by Denish D'Souza says: "People are always calling blacks angry. They say, look at what blacks have, nice cars, nice clothes, so why are they angry? Our culture does not come from racist Greeks. Our ancestors were African. Yet we were brought here in chains, against our will. If someone takes you

²⁹⁰ See Taymiyya and Koran stipulations that "men have authority over women because Allah has made the one superior to the other." "When a husband beats his wife for misbehaviour, he should not exceed ten lashes."

²⁹¹ Either option is disastrous and unthinkable

²⁹² D'Souza, *supra*, note 272 at 179 quoting Marxist critics Rutgers Bruce Franklin in "Prison Literature in America."

away from paradise, you can never get back."²⁹³ She is not told that "paradise", which few African American visit, includes -- at the time of the slavery trade and today as well-- a patriarchal system, female circumcision, dowry custom, absolute absence of equality and freedom, infanticide, tribal slavery and genocide. Prof. Jeffries, whose discourse fuels hate against White and Jews, does not say that the providers for the slave trade organised by the Jews in Amsterdam (target of his discourse) were willing Black Muslims from Western Africa. Few --if any-- North American scholars who claim for "the victim revolution" admit that, as insiders of the American society, they benefit from the exploitation to which developed countries have subjected the Third World. Yet, they present themselves bitterly alienated from it. If bitterness is vicarious, are they self-appointed representatives of their minority or of the Third World?

Secondly, the best of Non-Western cultures is hidden too; those cultures are essentially studied through "representative" figures (e.g. Evita) who are congenial to the Western agenda. Neither the best of the Far and Middle East thought (Rabindranath Tagore, Lao-Tze, the Vedas, Ibn-Sinha) nor even the best contemporary Non-Western authors (Luis Borges, Lyn Yu-Tang, Octavio Paz, Zhao-Fusan, Ashis Nandy, Kenji Nakagami or Isabel Allende) are quoted by multiculturalism advocates. Most North American professors do not present the intellectual zenith of the Third World either because of difficulties in understanding them or because it does not meet their ideological agenda. The appeal of this pedagogy is easy to see. On one hand, students may easily explain their failures and label as discriminative higher education requirements: Classics reflect White male ethics and aesthetics foreign to them. On the other hand, professors may more easily deal with *I, Rigoberta Menchu* than with Octavio Paz's work.

Most of the North American intellectual elite presents not only a very idealised idea of minorities but also of women. Gilligan argues that women are the essentially caring

²⁹³ D'Souza, *supra*, note 272 at 115

element of society.²⁹⁴ Lesli Bender in an interview said: "the feminine voice can design a tort system that encourages behaviour that is caring... and responsive to others' needs and hurts [which is] far preferable to the masculine voice of rights, autonomy and abstraction."²⁹⁵ The non-"encouraging caring behaviour" policies of B. Buttho's or M. Thatcher's are not part of these authors' efforts.

Campus authorities do not counter-attack these distortions on the understanding that it is dangerous to oppose those powerful forces. In turn, distortions of academic standards increase the power of activists for two reasons. First, arrivals of new students and young faculties, seduced by these myths, enlarge their departments which become poles of power. Secondly, within a Machiavellian logic, fragmentation of academia allows them to get a share of the general decisions. The price of this strategy is paid by the minority members and by the whole academic community. Minority members cannot get real liberation: for enjoying the "benefits" of preferential treatment they have to be victims, not because of disadvantages such as immigration, lack of mastery of the language, or poverty, but because of their race, sex, chosen lifestyle.²⁹⁶ Gender and racial harmony is prevented as well.

Several consequences flow from this philosophical perspective. By denying the importance of rational analysis in elaborating on incommensurable and reducing all truth to the level of opinion, moral relativism spurns the legitimacy of any distinction between truth and error, beauty and vulgarity, right and wrong. To obviate these differences students are deprived of a deep knowledge of their own culture before facing others; so they can neither understand other cultures nor rationally defend or attack their cosmovision. They are not exposed to the idea that beyond our gender, colour or religion, we belong to Western culture; not because our ancestors came from Europe but because our juridical and philosophical values, our language and moral principles are overwhelmingly European. Like

²⁹⁴ Gilligan, Carroll, *In a Different Voice: A Psychological theory on women's development*, 1st ed (Cambridge, Ma: Harvard Univ. Press, 1982)

²⁹⁵ Quoted by D'Souza, *supra*, note 272 at 207

²⁹⁶ *Ibid.* at 234

it or not, since Thermopylae, civilisation was divided into two differentiated systems. Freedom and equality are not valuable in Non-Western cultures.²⁹⁷ Youth who is deprived of the recognition of the values of their own culture lack of grounds on which to anchor their transcendental choices and their self-consciousness. The young's normal rebelliousness becomes anarchism and hate. If there is not such a distinction between vulgarity and politeness, self-restraint in language and behaviour are regarded as old standards while slurs and insults are condoned.²⁹⁸

Secondly, deconstruction has an important share in throwing the campuses system of government off-balance because it dissolves notions of "authority", "personal accountability and responsibility," and indeed it "renders theoretically unintelligible basic moral terms such as good and evil".²⁹⁹ Post-modernism denies the rationality of the idea of hierarchy among relationships; the power belongs to European males and any appeal to reason is just a way to convalidate this power. Authority has no legitimacy because it only responds to WASP values. The rejection of Eurocentric values leads to the discarding of democratic principles. Says Harvard professor Sacvan Bercovith: "Individualism, self-reliance and liberal democracy are no more or less absolute,... than the once eternal truths of providence, hierarchy and the divine rights of the kings."³⁰⁰ Democracy is argued as a system of government not inherently superior to totalitarianism. The negation of ultimate truths, and a total emancipation of all sorts of authority and individual accountability connect Post-modernism to nihilism and chaos. If there is no "good" and "evil", "truth" and "err"; if Nazism was the result of an epoch, how can war trials be justified and a resurgence of Neo-nazism and hate crimes be condemned?

²⁹⁷ Farrakhan is entitled to speak because he lives in a liberal democracy. Radish has a pending death sentence because he spoke against the non-western system that Farrakhan sees as paradise. Feminists can advocate liberation because they are in a liberal democracy. Their peers in Kenya are in jail.

²⁹⁸ A. Bloom, *supra*, note 145 at 61

²⁹⁹ See debate between Griswold and Donoghue, "Deconstruction, the Nazis and Paul de Man," *N.Y. Review of Books*, Oct.12, 1989, at 69) as quoted by D'Souza, *supra*, note 272 at 192

³⁰⁰ Quoted by D'Souza, *supra*, note 272 at 159

Thirdly, the current philosophical approach, stressing ethnocentrism, deepens fragmentation in academia ever more. First, it teaches that 'White male democratic principles' are a facade to bigotry towards women and minorities, and an obstacle for them to achieve equality and dignity. Secondly, Communitarians maintain that there are no universal experiences able to move us beyond the bounds of our parochialism. Only insiders can understand experiences lived by each member of the group. The *leit motiv* in Studies' Programs and Aware Weeks is to remind the majority's repulsion towards minorities. Interestingly, minority members' past or present scholarly achievements are overlooked. The constant reminder that a person is an outsider, coming from a group without merits, and that he/she deserves pity though she will never get any empathy from 'others', increases this person's resentment. Even worse, both premises do not empower her to overcome disadvantageous circumstances. Troy Duster, a sociologist at Berkeley, conducted a research experiment into students' relations on campus. Students from different backgrounds come to the campus thinking as themselves as "Americans," but once in there they begin to think about themselves as "African American," "Asian American" or whatever. Those who argue that a "victim's perspective cannot be reached by others," that gender and racial "intelligences" are watertight compartments deny that reason is the common feature of human beings. Religious, racial and gender groups are condemned to be alienated in their own moral universe without meaningful communication among themselves and to struggle for a share of power that let them survive. That necessarily leads to racial and gender tension.³⁰¹

By no means does the previous discussion mean that multiculturalism cannot be addressed. The interaction of groups differentiated by their gender, ethnicity, or chosen lifestyles must be a prime concern of legal theorists. However, a departure from

³⁰¹ For a more extensive discussion on this point see D. D'Souza, A. Bloom, S. Walker, P. Emberly and K. Popper, in their works cited above. For the need to stress ethnocentrism see the profuse works of R. Kennedy and Delgado; A. Fisher "A Communitarian Compromise on speech Codes: restraining the hostile environment concept" (1994) 44 *Catholic Univ. L. Rev.* 97; Stanley Fish, *There's No Such Thing a Free Speech and It's a Good Thing, Too* (N.Y.: Oxford Univ. Press, 1994)

cosmopolitanism as ethics leads to an irreversible balkanisation of campuses. Understanding can be promoted only if Western and Non-Western cosmovisions are explored in a conscientious and balanced manner. Secondly, this endeavour a broad protection of freedom of expression is crucial. Each time officials enact "*ipso facto* tolerance" without considering whether campus members undertake it seriously transcendental and divisive differences remain.

Affirmative action programs stem from this atomised approach to multiculturalism. Far from what was expected when implemented, they contribute to increase of hate on campus.³⁰² With an inclusive purpose, those programs are aimed at making academia more accessible to minorities and women. Their implementation is based on the idea that academic standards are not universal and objective. According to Fish, academic standards are arbitrary values, which do not deserve special reverence but must surrender to political exigencies "such as the agenda of minority activists in campus."³⁰³ Berkeley University is a clear example of willingness to lower standards to get a fair representation of historically oppressed minorities in its milieu. Former dean Wildavsky's comments and other data collected by professor D'Souza suggest that Berkeley may have set up different ethnic tracks for admission, in which students only compete against their peers of the same skin colour. This three-track system seemed confirmed in early 1989 when an applicant to the Berkeley Law School received a printed letter denying admission, and explaining that he was in the bottom half of the Asian waiting list. The word "Asian" was typed on the printed form. Given that according to studies carried out by Berkeley's Office of Budget and Planning, less than 4% of Black, Hispanic, and American Indian students combined could be accepted on merit bases, a former official said "There is no way to admit more Blacks and Hispanics without slackening academic requirements".³⁰⁴ If knowledge is ideology and truth is bias, students and faculties may show as credentials their special "perspective" rather than success to

³⁰² S. Fish *Ibid.*

³⁰³ *Ibid.* at 176;

³⁰⁴ *Ibid.*, at 36

pass traditional academic standards.

Harvard Law School professor Randall Kennedy teaches that preferential treatment reduces racism because "it teaches Whites that Blacks, too, are capable of handling responsibility, dispensing knowledge and applying valued skills... Those who are affected adversely should learn to live with the "injustice" of affirmative action."³⁰⁵ His views deserve some reflections. First, contrary to Kennedy's hopes, when disadvantaged students are placed in a highly competitive environment they are condemned to fail, regardless of skin colour. In Berkeley while Asians' and Whites' drop-out rate before graduation is at 25%, Hispanic drop-out rate is at 50% and Blacks' at 60%.³⁰⁶ Blacks and Hispanics normally lack the economic advantages of most White students or the strong familial support that benefits Asian students. They have already received lower grades in High School and SAT scores.³⁰⁷ Despite their efforts, the lack of basic college preparation prevent them from keeping pace with their fellow mates.³⁰⁸ Many students, under the pressure of being unable to succeed despite the preferential treatment, develop feelings of frustration, and resentment and find a scapegoat for their pains in the privileged majority.

Secondly, Kennedy does not explain how racial harmony can be achieved when affirmative action programs are perceived as unjust and inegalitarian by majority and minority students. First, those programs always imply winners and losers. Jews, Asians and Whites know that their fates are determined by their belonging to a favoured or disfavoured racial or gender group.³⁰⁹ Many of them, because of their background and commitment to equality, do not accept

³⁰⁵ Randall Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate" (1986) *Harvard L. Rev.* 1327 at 1330-36

³⁰⁶ Office of Student Research, UC- Berkeley, as quoted by D'Souza, *supra*, note 272 at 39

³⁰⁷ Acknowledged that SAT has been criticised by its biased content, I am not in a position to agree or disagree. However, if the problem is the content, the logical solution would be to modify the content instead of using it for some students and not for others, given the fact that both groups of students are going to be in the same classroom in the future.

³⁰⁸ This assumption in the US is reaffirmed by the Education Department Reports as quoted by D'Souza, *supra*, note 272 at 41

³⁰⁹ D'Souza quotes two cases. A Black student from a accommodate family argues "I am oppressed, and I will always be oppressed" even if she gets the best job and

being charged as oppressors. When they are denied access to university because of "racial or gender quotas", their resentment is inevitable. In our competitive society, someone's decision to immolate himself in the shrine of equality flows from an intellectual commitment rather than from a legal imposition. As Spinoza teaches, the choice of ultimate ends may well include other's welfare but this decision always rests at the head of each individual. Secondly, beneficiaries of affirmative actions programs resent that they cannot brush off the stigma that they got into university and earned their degrees because of a preferential treatment rather than because of their skills. Thus, it does not come as a surprise that while, Berkeley, strongly committed to quotas and affirmative action, is one of the American universities with more racial outbursts. Southern universities, with populations which compete on bases of merit regardless of sex or ethnicity benefits, evidence few racial outbreaks.³¹⁰ Kennedy starts from a valid wish to eradicate racism, but he skips a conscientious study of human nature.

Affirmative action programs were designed as compensation for students who had suffered disadvantages because of the discrimination against their race. Today, according to leading scholars³¹¹ they mostly benefit students without disadvantages other than their race or sex. Those programs reinforce the idea that those features make them inferiors ergo they deserve special treatment. This inegalitarian result stems from the false concept that "groups" are disadvantaged, instead of evaluating each minority member's particular case. Affirmative action should start when the children are born, to give them an environment where their skills are developed in order to prepare them to get into university if they choose so. Affirmative action in university arrives too late, is expensive and fruitless.

Finally, as professor Emberley points out, the intellectual spectrum in academia

becomes millionaire. An Asian student, arrived a few years ago as a refugee, without family or resources, was rejected access to university despite her high marks in High School and SAT. *Ibid.* at 34

³¹⁰ See D'Souza, *ibid.*; and cases cited by Michael A. Olivas, "Reflections on Professional Academic Freedom: Second Thoughts on the Third "Essential Freedom" (1993) 45 *Stanford L. Rev.* 1835 at 1842

³¹¹ D'Souza, *ibid.*

displays another stream of thought, which shares in the trend to censorship. Working together with the fragmentation forces represented by post modernism, there is an homogenising force which fosters an ideal university according to the model of the free-market and corporation efficiency³¹². Paradoxically, convinced that it is possible to "re-engineer" human interaction, both forces, far from being enemies, are allied in supporting hate speech codes. For one school of thought, words have constructed reality in the past, and reality may be modified at will through another discourse. Hence, some words, "some realities", should be silenced so that their own discourse prevails in academia. The other ideology believes that by excluding disturbing expressions the university increases efficiency.

The interaction of those discussed factors (a specific philosophical climate on campus, the incidence of the Holocaust, the lack of studies on hate, affirmative action programs, the strong conviction that university should be a smooth machine producing skilled workers, and probably many others I am not able to visualise) carries an important weight in the increase of hate speech on campus. Were those factors taken into account, it would be possible that hate speech be considered as something different to a White male backlash. Within Spinoza's theory, it may be assessed as a feedback received by academic authorities: equality is a value contested. This assessment could lead campus officials to rethink, in a systemic way, the reasons on which equality is challenged so that they may be better positioned to modify policies or to give overpowering reasons to back those already in force. Even if the ideological factors pointed out above increase hate or conflict, an academia committed to tolerance of ideas may rightly provide the means to exchange conflicting ideas without suppressing any of them.

C. INSTITUTIONAL RESPONSES TO HATE EXPRESSIONS ON CAMPUS

Facing the increase of hate speech, but without analysing its causes in depth nor assessing its prevalence, university managers have adopted two kinds of policies to deal

³¹² Supra, note 46

with the less desirable expressions in academia: 1) Anti-hate codes, and 2) the policy of "neutrality". Acknowledging the differences between Canadian and American university systems, given the normative approach of this work, a comparison between both university systems or a detailed comparison between the institutional responses given in both sides of the frontier is beyond the scope of this work; codes and neutrality policies in both countries are analysed together.

1. AMERICAN AND CANADIAN HATE-SPEECH CODES

Racial, homophobic and sexist incidents confirm university officials' suspicions on how extensive and urgent the problem is, and prompt them to eradicate them through hate-speech codes and programmatic remedies. According to the Carnegie Fund for Advancement of Teaching, 60% of American universities have some form of written policy to deal with bigotry and other 11% are considering enacting one.¹¹³ The next discussion analyses the legitimacy of restrictive dispositions on speech in American and Canadian universities. It addresses: a) some factors that prompted universities to enact speech codes,¹¹⁴ b) their wording and effects when enforced; c) their rationales and ideology, and d) their validity under the current American and Canadian Supreme Courts' jurisprudence.

It would be inaccurate to consider all speech codes enacted in the last 15 years as homogeneous; they are not even similar. Some are carelessly drafted, others are meticulous; many cover conduct and speech while others target only speech. The present analysis is narrowed to codes which include some restrictions on expression and are enacted by public institutions. The debate of the applicability of the Constitution to private institutions and state actions doctrine is beyond the scope of this work.

a. FACTORS PROMPTING THE ENACTMENT OF SPEECH CODES

The North-American society is strongly committed to free speech; however most of its

¹¹³ Conf. *supra*, note 272 at 14 and ss.

¹¹⁴ The chosen codes are relevant for two reasons: 1) they have been copied by several institutions; 2) scholars involved in their drafts are praised in the academic context.

intellectual elite was prompted to restrict speech in a harsher way than post WWII after.³¹⁵ Several interacting factors led to this out-tempo of society-academia: key law professors, changes in the civil rights agenda, minority activism and a silent majority.

i. KEY LAW PROFESSORS

In the avant garde of social and political changes, a significant group of scholars mostly from vilified constituencies, intent to carry out an academic revolution, organised on behalf of victims of discrimination. It is worthwhile noting that in society at large women and minority members have little weight in political or entrepreneurial decisions; but quite the opposite in university they have a share of power and occupy influential positions. Led by four minorities scholars: Mari Matsuda, Ricardo Delgado, Charles Lawrence III, and Derrick Bell, they constitute a well-organised rather than numerous coalition of Blacks, Hispanics, women, supporters of alternative sexual styles, physical disabilities and left-wing White male faculties. Many of them are key law professors in different North-American universities. Publishing their sophisticated scholarly arguments in very prestigious law journals, they have introduced their personal experiences in legal reasoning. Though civil libertarians have always objected to the emphasis on the weight personal experience and sensibilities carried into legal writing; avant garde scholars prefer to appeal to feelings rather than to rational discussions, to personal voice rather than to abstract terms of the law. Influenced by, or endorsing, moral relativism, they distrust constitutional values and see the current protection of rights as a White male pattern. The Founding Fathers were racists and sexists, who enshrined those discriminative principles in the American Constitution. Delgado maintains that the hate speech controversy may be framed in terms of two "constitutional narratives in collision": a clash between the First and the 14th Amendment narratives. One narrative protects the system's winners, those

³¹⁵ The following digression greatly benefits from the conclusions of D. D'Souza, S. Walkers, A. Bloom in their quoted works and J. Craddock "Constitutional Law, words that injure, laws that silence: campus hate speech codes and the threat to American education" (1995) 22 *F.S.U.L.R.* 1047

who "have a stake in the liberal marketplace interpretations of law and politics"³¹⁶ and includes the content-neutral doctrine and free speech for WASPS. The other covers victims of inequality who cannot achieve equality through civil litigation. From his situational ethics, Stanley Fish adds that any protection or restriction on speech does not depend on a principled doctrine, but on "the ability of some persons to interpret principles and doctrines in ways that lead to the protection of speech they want hear and ... regulation of speech they want silenced."³¹⁷

As S. Walkers has convincingly argued, Delgado and his colleges ignore a narrative which shows freedom of expression as a protector of rights, including equality. "Winners" of the system of free speech were those empowered by it to fight against an oppressive system: Communists in the '20s, minority religious groups in the '30s, Blacks, pro-choice supporters and Vietnam War protesters in the '40s - '60s.³¹⁸ The protection of speech for everybody, including the victims', was crucial to achieve racial and gender legal equality in the past. Because equality was enshrined in the Constitution and was part of the Founding Fathers thought, Lincoln and Martin L. King had juridical and moral bases on which to base the civil rights struggle.³¹⁹

ii. CHANGE IN THE AGENDA OF CIVIL RIGHTS MOVEMENTS

A second factor prompted universities to enact codes: a clear change in the agenda of civil rights movements. Leaders of older civil rights movements such as Martin L. King, an American, asked for the elimination of any form of discrimination based on principles of the American Constitution principles. The message was "blind-colour" Constitution. Malcolm X,

³¹⁶ Richard Delgado & Jean Stefancic *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, (1994) 82 *Calif.L.Rev.* 851 at 853

³¹⁷ S. Fish, *supra* note 301 at 110

³¹⁸ Walkers, *supra*, note 186

³¹⁹ Says D'Souza "during the infamous *Dred Scott* case, Justice Tany argued that the American founding was pro slavery, that pro slavery principles were inherent in the document. Against these arguments the abolitionist movement put up stern resistance. Ironically, a century later, young Black students were defending a view of history, put forward by Taney, to justify a constitutional right to own slaves." *Supra*, note 272 at 223

a native of the Caribbean looking for African identity, rejected the Western tradition altogether. His discourse swept Black leaders' agenda. The New Black Power Movement believes that the Constitution was enacted to defend slavery; then its values will unlikely lead to a blind-colour society. Bell and Lawrence share a remarkable pessimism.³²⁰ Harvard Law School professor, Derrick Bell, writes that Blacks will never achieve full equality. To reverse this situation, minority leaders want deep changes in academia: quotas, new curriculum, minority "only" fraternities, and hate-speech codes. Aimed at getting power for their groups, they call for race and gender conscious measures.³²¹ Professor Henry L. Gates explains that the melting pot was an option to European emigrants, not for people of colour. Identifying himself as a part of a "rainbow coalition of blacks, leftists, feminists, deconstructionists and Marxists ready to take control," he says that his generation "took over buildings in the late 1960's and demanded the creation of Black and Women's Studies programs and now, like the return of the oppressed, we have come back to challenge the traditional curriculum."³²²

Leaders of this movement ask for silencing any criticism which could jeopardises the share of power already achieved. A challenge to their ideas is immediately taken as a sexist or racist reaction. Their goal to take control is not democratically wrong. However, attempts in that direction by suppressing antagonistic ideas are antithetical to the democratic system. Because those scholars justify anti-democratic methods to impose their values, a crucial point in their epistemology is to put in doubt constitutional democracy as a fair system of government. Reducing the conflict to a struggle among races and genders, they claim that Blacks, gays, women, etc. should be respected because their "group" has the

³²⁰ Derrick Bell, *And We are not Saved: The Elusive Quest for Racial Justice* 1st ed., (New York: Basic Books, 1987) Lawrence III, (1989) *Duke L. Rev.*

³²¹ The departure from strict constitutional principles of equality in order to get more equality raised the question whether affirmative action violates the 14th Amendment. Numberless cases before the US courts challenging affirmative action show the concern on how to resolve this issue.

³²² Henry Louis Gates, "Whose canon is it anyway?" *New York Times Book Review*, February 26, 1989, at 44

right not to be discriminated against rather than because they are simply human beings. They ignore that the Western system of fundamental rights does not promise women's rights, or natives' rights. It guarantees the protection of rights for each and every person.

iii. MINORITY STUDENTS AND A SILENT MAJORITY

A third factor has its share in the sudden enactment of university codes. Though fewer Black students enrolled in universities in the 90's than in the '80s, they are now better organised³²³ and strongly promote codes, joining forces with other minority centres. While the beneficiaries of freedom of expression in the last fifty years -- religious and ethnic minorities, women, and equality-defenders -- intend to promote equality through censorship, the majority remains silent to their claims or when someone suffers attacks because of their unpopular expressions.³²⁴ This unorganised silent majority of faculties, administrators and students, regardless of colour or gender, takes little interest in hate codes. Furthermore, they consider it unsafe to take an unpopular stand. Few positions in a highly competitive workplace and a difficult economic situation -- limit research funds controlled by dominant lobbies, are stringent about expression of arguable opinions. Not only are faculties reluctant to challenge new policies but students also; in an amazing reversal of their traditional role of challengers of the status-quo; they ask for or consent to censorship.

In the current ideological confusion another paradox is worth noting. While leftist has shifted from arguing protection of speech to censorship, inversely, conservatives who always were tenaciously pro-censorship, are among the few who oppose hate-speech codes. In the understanding that codes are the means used by leftists to take over campus, conservative Hyde's Collegiate Speech Protection Act allows students at private educational institutions receiving federal funds to challenge campus conduct codes on First Amendment grounds.³²⁵

³²³ The US Department of Education, cited in *Chronicle of Higher Education*, August 26, 1992, at 11

³²⁴ S. Walkers, *supra*, note 186

³²⁵ See Henry J. Hyde and George M. Fishman, "The Collegiate Speech Protection Act of 1991: A response to the New Intolerance in the Academy," (1991) 37 *Wayne*

b. WORDING AND RESULTS OF HATE SPEECH CODES.³²⁶

Initially designated to punish racial and sexual blackmail and explicit discrimination, university codes and anti-harassment policies cover a wider range of speech and behaviour than that covered by extramuros dispositions. The challenged Michigan code covered any behaviour, verbal or physical, that stigmatises or victimises an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." The University of California-Berkeley, as well as Wisconsin University, enacted a campus wide *Diversity Awareness Program* penalising fighting words; that is, abusive words "likely to provoke violent reaction whether or not they actually do,"³²⁷ spoken on university common places and at official events. The University of Texas code regulates campus hate speech based on common law tort of intentional infliction of emotional distress. University of Stanford

L.Rev.1469 at 1524

326 Annexed: University of California-Berkeley: "University Guide Student Conduct: Harassment Policy", (1989); University of Michigan: "Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment," no longer in force, (1989); University of Stanford: "Sexual Harassment", "Policy on Campus Disruption," "Fundamental Standards," "Honour Code." (1996) Revised: University of Alberta: Office of Human Rights, Report (ANNEXED); University of British Columbia: Policy #3, Discrimination and Harassment and Draft Policy on Human Rights (Annexed); Brock University, Draft Harassment and Discriminatory Policy; "Laurentian University: Policy on Race Relations;" University of Manitoba: Policy on Human Rights, and Policy on Sexual Harassment; McMaster University Senate, Procedures on Alleged Violations of Human Rights; Ontario Institute For Studies in Education, Harassment Prevention Policy & Procedures; Queen's University, revised version (1995) (ANNEXED); Ryerson Polytechnic Institute, Harassment: Policy and Procedures; Harassment Discrimination Policy and Procedure; St. Francis Xavier University Policy on Human Rights and Affirmative Action; University of Saskatchewan: Excerpt 7. Non-Discrimination; Simon Fraser University: Harassment Policy; University of Toronto: Code of Student Conduct, Statement on Prohibited Discrimination and Discriminatory Harassment and Statement on Freedom of Speech ANNEXED); Trent University Policy Concerning Persons with Special Needs; University of Waterloo Policy: Ethical Behaviour; Wilfrid Laurier University; University of Windsor, Non-Discrimination Policy; University of Winnipeg Policy on Racism; The University of Western Ontario Policies and Procedures: Race Relations Policy; York University: Race and Ethnic Relations Committee Report: condensation (ANNEXED)

³²⁷ See Nat Hentoff, *Free Speech for Me, But Not For Thee: How the American left and right relentlessly censor each other* 1st ed., (New York: HarperPerennial, 1992) at 161-2

enacted one of the most carefully drafted codes, officially named "The Fundamental Standard of Interpretation: Free Expression and Discriminatory Harassment."³²⁸ It is modelled upon the fighting words doctrine, prohibiting words intended to harass: "gutter epithets."

Objectives pursued by enacting restrictive policies differ from one university to another. In the US, Stanford officials admit that the ban of certain class-based expression is aimed as³²⁹ symbolic opposition to discriminative ideas. Other institutions, such as Wisconsin, aim to preventing violence or psychological harm to its members.

Stanford's restrictions apply to all students, faculty and staff. Robert Rabin, chair of the Stanford Student Conduct Legislative Council, argued that free speech rights extend only to victimised minorities, since the white majority does not need such protection."³³⁰

Despite the fact that numerous public and private American universities have enacted speech codes, only those implemented by the University of Michigan and the University of Wisconsin have been challenged in court. At Michigan University, after many racist incidents, students formed a United Coalition against racism and threatened to file a class-action suit against the university. The institutional response was to enact a quick and carelessly drafted "The policy on discrimination and discriminatory harassment of students in the University environment" effective May 31, 1988. It applies only to students and punishes "any expression or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curriculum activities...sexual advances, requests for sexual favours." The Interpretative Guide explains that "you are a harasser when... a male student makes remarks in class such as: "Women just aren't as good in this field as men," creating a hostile learning atmosphere for female classmates, ... tells jokes about gay men and lesbians." The code did not require that the offensive expression be

³²⁸ See its defence by Cass Sustein, "Ideas, Yes, Assault, No" (1991) *American Prospect*, at 35-9

³²⁹ See Grey, "Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment" (1991) 8 *Soc. Phil. & Pol'y* at 81,93

³³⁰ See Nat Hentoff, "Stanford and the Speech Police," *Washington Post*, July 30, 1990

directed to a specific individual. Classroom situations were not exempt.

A graduate student in social work argued that the current view that homosexuality is not pathological was wrong, but the previous one was the correct. (In 1968, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders 44 (2nd ed. (DSM-II) had catalogued homosexuality as a sexual deviation. In 1980, homosexuality was taken off its list of mental illnesses). The student was charged with making harassing comments on the basis of sexual preference, forbidden by the University code. The code was challenged with the support of ACLU Michigan affiliate, and struck down by the Court of Appeal; there was no appeal before to Supreme Court. It was deemed unconstitutional because of its overbroad and vagueness. Given that several students were disciplined because of their general remarks in class, the Court of Appeal ruled that "the University had no idea what the limits of the Policy were and ... was essentially making up the rules as it went along."³³¹ Since then Michigan University has adopted a total neutrality policy.

The Wisconsin University code was more clearly and carefully drafted. It was directed to students and not to faculties; it only applies to direct attacks on an individual and classroom incidents were excluded. Like Michigan's code, the Appeal Court found it unconstitutional because of its vagueness. It fell short on both prongs of the fighting words doctrine as defined in *Chaplinski* because it limited its dispositions only to one type of words that may incite an imminent breach of the peace. With respect to "the breach of peace", the University had maintained that the code only regulated harmful speech with minimum social value. The Court ruled that because it only banned racist speech, it was a content-based restriction and therefore, any balancing test between low social value and freedom of speech was impermissible.³³² The Court rejected the 14th Amendment argument because the University was "providing education on equal terms". It rejected the Title VII argument on the basis that "students are not the responsible agents of the University in the same

³³¹ *Doe v University of Michigan*, (1989) 721 F.Supp.852 E.D. Michigan at 868

³³² *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis.1991) at 1173-74

sense that employees are, and consequently the University was not liable for their conduct as the employer was in *Meritor*. The Court added that "Title VII of the 1964 Civil Rights Act was a statute and could not supersede the First Amendment."³³³ Neither Wisconsin University nor Michigan University appealed before the Supreme Court.

Like in the US, Canadian codes differ from university to university; however, they are more homogenous than the American ones in goal, wording and conduct target. British Columbia University enacted one of the most carefully drafted Canadian codes: the "*Policy #3. Discrimination and Harassment*," approved in January 1995 with the stated purpose of: "(11) To provide and maintain a study and work environment free from discrimination and harassment, including sexual harassment." Its drafters believe that it is a policy of human rights because "it applies to various forms of discrimination and harassment, including racism...The University regards discrimination and harassment as serious offences that are subject to a wide range of disciplinary measures, including dismissal or expulsion from the University." Its code provides procedures to address complaints and impose discipline when acts of discrimination and harassment occur. Relying on the British Columbia Human Rights Acts (1984, amended 1992), the university extends the concept of discrimination to "age, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, and unrelated criminal convictions." Affirmative action programs and mandatory retirement are excluded from the policy.

Similarly, the University of Toronto code targets "offensive comments or behaviour which create a 'poisoned environment' in the workplace or in the provisions of services or accommodation, whether or not amounting to harassment, may violate the right to equal treatment without discrimination." Authorities considered it necessary to "define standards of student behaviour and make provisions for student discipline with respect to conduct that jeopardises the good order and proper functioning of the academic and non-academic programs

³³³ See further comments on Wisconsin code in Walker, *supra*, note 186 at 154

and activities of the University or its divisions, which endangers the health, safety, rights or property of its members or visitors, or that adversely affects the property of the University or bodies related to it, where such conduct is not, for the University's defined purposes, adequately regulated by civil and criminal law."

In enforcing its *Race Relations Policy*, the University of Western Ontario aims to "develop and maintain an environment free of racial discrimination and harassment" in campus. It intends to promote "dignity and respect among all members of the University community and the provision of "educational opportunities" within a framework of no "tolerance of any act of harassment or discrimination on the basis of race". It states: "Racial discrimination is defined as: differential treatment of an individual or group that is not based on individual or group performance, but arises only from racial-group membership."

Similarly, university officials at Manitoba and York rely on equality rationale and on victim's jurisprudence -lower self-esteem of vilified- to justify their codes. York University is also concerned with the psychological harm to the minority group. Given that most of faculty members are White, York officers assumed that this fact results in "the lack of role models authority positions but, perhaps more importantly in the University context, with the implications for curriculum and course content."³⁴ Similarly, Queen's policy states that: "The Eurocentric character of the Queen's curriculum is not keeping with the multicultural character of the Canadian population or with our international obligation." Therefore, its objective is: "(5.a) To establish a more balanced curriculum by addressing and correcting the lack of interdisciplinary studies, lack of curriculum dealing with non-European cultures and the inadequate use of indigenous material." Laurentian University Policy on Race Relations declares that "... (III.a) ...racism in any form is not tolerated."

It appears that only York University relied on previous surveys concerning the subject of racism before drafting its code. Indeed, that institution carried out the first survey

³⁴ Annexed Policy at 33

concerning the effect of racism on students' life. "The survey found that in general students have not thought a great deal about race and ethnic relations." Only "about 3% (or 3%) of the students indicated that they had been object of a racial incident at York." It showed that most racial and sexist incidents consist of verbal assaults either to or against students and professors; economic status and race issues were related. "Few students are really aware of racism, being unable to cite examples." "Sixty per cent of the individuals interviewed gave "no opinion" to the statement that the University has not done enough to eradicate racism on campus." This data is relevant because York University population displays a great multiculturalism.

Some universities, such as York, British Columbia or Toronto are seriously concerned with the proper balance between their commitment to non-discrimination and freedom of speech. The *U. of T. Statement of Freedom of Speech* protects only lawful speech but even it may be superseded by the values of mutual respect and civility. "Similarly, although no member of the University should use language or indulge in behaviour intended to demean another on the basis of their race, ancestry, place of origin, colour, ethnic origin, family status, the receipt of public assistance or record of offence, the values of mutual respect and civility may, on occasion, be superseded by the need to protect lawful freedom of speech." The Statement explicitly affirms: "However, members should not weigh lightly the shock, hurt anger or even the silencing effect that may be caused by the use of such speech."

Another issue in Canadian codes relates to jurisdiction. The University of Toronto code extends its jurisdiction to all activities sponsored by the University, even events off campus. Similarly, the B.C. policy, #7, targets discriminatory and harassing conduct or verbal behaviour, punishable even if there were only one incident, even off campus. From that, it can be deducted that there is no private areas in the British Columbia University where someone may hold non-orthodox views. The jurisdiction is extended *in personae*; some policies target out-siders such contractors and agents, working in campus.

The Equity Issued Advisory Group is among those responsible for implementation of the codes. Insisting on the concept of Platonic guards, the Report of York suggests the establishment of a "Center for Race and Ethnic Relations," one of which functions "should have a research and monitoring function on matters relating to race and ethnicity." Similarly, the Queen's Report states: "(8. Recommendations.2.a.)...in order to achieve the confidence necessary to carry out their work, the majority of the members in the Council [Race and Ethnic Relations Council] should be racial minorities." Likewise, an essential part of this policy is the establishment of a Race Relations Office, part of the W.O. University's Department of Equity Services. The Office has no duty to inform the person under investigation about of the procedure.

In terms of what kind of conduct is targeted, most codes, such as those of B.C., Simon Fraser, and U.W.O., declare that one incident is enough to constitute discrimination or harassment. The BC code defines: "Harassment refers to physical, visual or verbal behaviour directed against a person for which there is no bona fide and reasonable justification." A remarkable legal feature relates to the *mens rea* of a person whose conduct or comments are targeted. The B.C. and U.W.O. codes state that a person who: "knows or ought reasonably to know that the conduct or comment is unwanted or unwelcomed" is responsible. The distinction between intentional and non-intentional harassment is ignored by Canadian codes. In WWO Racial Harassment is defined as: engaging in a course of comment or conduct of a racially oriented nature that is vexatious and is known or ought reasonably to be known to be unwelcome." According to B.C. policy, "discrimination refers to intentional or unintentional treatment for which there is *no bona fides* and reasonable justification." Putting aside any logical and scientific method to assess the allegedly discriminative or harassing incident, the code states: "(8) The impact of behaviour on the complainant defines the comment or conduct as discrimination and harassment, subject to the test of a reasonable person." There is no distinction whether a person who discriminates is in an asymmetrical or symmetrical relationship of power towards the victim. After stating so vague a description of what is

banned so that any discussion of any idea may fall in the definition, the code emphasises that "faculty, staff and students may "engage in the frank discussion of potentially controversial matters." The last statement could be easily interpreted as a fine use of irony if someone were to distrust the good intentions of the university administrators.

The University of Toronto targets both conduct and expressions. The dispositions include sexual assaults, assault causing bodily harm, creation of conditions which endanger health or safety of persons and propriety, threatens, and "1. (a) ...vexatious conduct that is directed at one or more specific individuals, and that is based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap, receipt of public assistance or record of offences of that individual or those individuals, and that is known to be unwelcomed, and that exceeds the bounds of freedom of expression or academic freedom as these are understood in University policies and accepted practices, including but non restricted to, those explicitly adopted." These broad and vague dispositions target conduct and expression, whether intended to offend or not. It is stated explicitly at #11 that offences are punishable whether the offender know or "ought reasonably have to know" that the targeted persons will be offended by them.

According to the dispositions enacted by the University of Western Ontario, "the University asserts the racial discrimination or harassment on the basis of: (a) doctrines or practices which declare inherent superiority due to race, or (b) claims that human abilities are determined by race, (c) or on any other ground, is hereby condemned and will not be tolerated."³³⁵ Similar to the dispositions of the *"Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities"*, the University of British Columbia forbids "offensive materials" to be used by students so that they do not enter into dangerous territories. The intolerance of written or verbal discriminatory remarks is against professors, students and books. Moreover, not only slurs and offensive remarks are

³³⁵ Race Relations Policy, University of Western Ontario, Sept 24, 1994, #4,5 emphasis added

forbidden but literature also; the non tolerance of offensive theories is at issue.

The following cases are presented as scattered examples of the conflictive situations created by the application of codes. In late 1993, University of New Brunswick Professor, Martin Yaqzan, wrote an article arguing that women should understand that visiting a man's room at night implies their consent to sexual intercourse. He maintained that date-rape of "promiscuous women" is an "inconvenience" to be monetarily compensated rather than a "moral outrage." He addressed the matter seriously from an Islamic vision. In no way were his comments denigrating or gratuitous jokes. Though his analysis is inegalitarian according to Western parameters, and may be foolish or troubling for someone, they were not malicious. Yaqzan had no administrative position, no predictable harms to the college or one of its academic bodies could flow from his published views. Through his expressed views, he did not evidence any pernicious desire to stigmatise women, or to regard them less intelligent or less capable of pursuing higher education. He did not advert his convictions in class in any way. His opinions, though arguable from an academic viewpoint, prompted the University authorities to suspend him. The case caused a countrywide debate between those campaigning against date-rape and those defending academic freedom. Later on, he was reinstated to his position. Finally, he accepted the benefits of early retirement. His case is an example of the paradox tearing to pieces Western academia; the commitment to multiculturalism -- in this case respect for Islamic values -- necessary clashes with democratic values.

Similar to Yaqzan, Michael Levin, a professor of philosophy at City College of New York (CCNY), expressed in *Quadrant*, 1988, and in a letter to *The New York Times* editor, that after a scholarly analysis of IQ tests he thought that Blacks are less intelligent than Whites. He added that White store owners run a higher risk of crime with Black than White customers. Similarly, his ideology did not affect his teaching work; during 20 years no one complained of his racism. His classes were disrupted by Black activists. Officials did not take disciplinary measures against them and set up another course for students offended by

Levin's views. Later the Board threatened Levin's tenure. He won his case before court.³³⁶

After professor Philippe Rushton published his article arguing that women are less intelligent than men, Ontario premier David Peterson asked for his immediate removal based on the fact that his research was "morally offensive to the way Ontario thinks."³³⁷ Beyond the fact that his studies *prima facie* may be offensive, the suggested way of dealing with it reveals a totalitarian thought. "Ontario thinks" as a final solution to the equality issues is far beyond a democratic approach to the problem, intolerance to dissenters is the message. The Ontario NDP government in 1993 showed the same approach in distributing to universities a "Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities." The document, which was not the answer to any specific anti-discriminative act, endorsed "zero tolerance for harassment and discrimination in Ontario Universities" and encouraged ending "poisonous atmospheres" and "negative environments." The foreseeable reaction was a campaign pro academic freedom, a return to the principle of presumption of innocence and rules of evidence. In turn, minority groups and women demonstrated against White-male backlash. Those events prompted universities to enact more equity measures.

Dr. Marjorie Ratcliffe, who at the time of the incident, 1991, was teaching Spanish 302 - Theory of Translation - was under process established by the WOU's Race Relations Policy. Her case, though well-know, deserves some comments because her ordeal may happen to any professor in any Canadian university. In one of her classes, she said to an Iranian student (who many times complained in class about the Iranian government) that he had some problems translating the word "condemn" because "in Iran they condemn everybody." The student filed a complaint of racial harassment. The person in charge of the Race Relations Office, at that time, said to the press that "everyday and systemic racism" permeates Canadian society, and "deep-rooted racism within the university community" adding that "at

³³⁶ *Levin v. Harleston*, 770 F. Supp. 895, (S.D.N.Y. 1991), *aff'd*, 966 F.2d 85 (2d Cir. 1992) See R. Hiever, *supra*, note 244 at 296. See Olivas, *supra*, note 310 at 1843

³³⁷ Quoted by Emberley, *supra*, note 46 at 5 and ss. emphasis added

times we are all insensitive and perhaps racist."³³⁸ When Ratcliffe was informed about the complaint, she had a meeting with the student; the head of the Racial Relations Office was the mediator. The student withdrew the charges except his statement that "I feel that there has been a degree of insensitivity to my situation." When asked to "apologise for any unintentional hurt she may have caused and acknowledge she that may have been insensitive" Prof. Ratcliffe refused. Then the RRO initiated a formal complaint against her on the bases of her "insensitivity". The RRO hired an adjudicator, who was assisted by a lawyer paid by the University and the professor paid her own legal counsel. The adjudicator judged that there had not been racial harassment and the University dismissed the complaint. Ratcliffe asked for an apology and the reimbursement of the \$7,000 of her lawyer's fees. Another adjudicator was hired to review the request; after evaluating the antecedents, he ruled that the University had not committed any wrongdoing; however he made serious criticisms of the Race Relations Policy. After almost four years of discussions and committees *ad hoc*, Ratcliffe reached an agreement with the University; she was reimbursed for her legal fees and expenses and one year paid academic study leave. In September 29th, 1994, the University of Western Ontario modified the code; though the Race Relations Officer remained, it would not have executive authority. Not only are those procedures expensive in time, energy and funds both for the University and person investigated, but also they attack the principle of presumption of innocence. The charge of insensitivity is unanswerable.

In Toronto, in late 1980's, a professor gave a hypothetical anti-pornography law to students to analyse. Some of his female students presented a complaint to the sexual harassment office, because they were "suffering identity crises from this assignment,"³³⁹ None of the cases above show malice on the speaker's behalf, and the opinions, unmistakably troubling, were conveyed according to academic standards. Moreover, they are as offensive as "human descending from primates" in the last century. Emberly describes an incident at

³³⁸ The description of facts benefits from the research pursued by Prof. Robert Martin, "Speech Codes in Action" in (1995) 44 *UNB L.J.* 135 at 136 ss.

³³⁹ See Alan Borovoy "When Rights Collide" (1995) 44 *UNB L.J.* 56

the University of Calgary illustrating the philosophy underlying hate codes.³⁴⁰ When two female students complained about a poster showing a bare-breasted woman, authorities ordered stickers placed over the woman's breasts. The picture deserved responses from a moral comprehensive theory either to leave it or take it away. However, the conflict was solved through technical regulations, more concerned with a middle ground solution than with an intellectual answer.

Codes are unable to solve problems, if indeed there are any, and create or increase discord. "When students at Eastern Michigan University complained, in 1988, of racial intolerance in campus, citing no specific incidents but merely an atmosphere of "subtle racism", the administration set up a 24-hour "minority concerns hotline" for prompt reporting of racial abuse. Several months passed however, and the hotline received few calls."³⁴¹ In light of that and the York University survey, why are hate codes needed?

In summary, most Canadian codes target simultaneously verbal or physical interaction of all members of a university, without distinguishing between utterances and acts, or between intentional and non-intentional harassment. All students, staff and faculty members are subject to sanctions. Some codes gave examples of what is meant by expression of negative attitudes: slurs, threats, discriminatory evaluations, verbal abuse, jokes, name-calling, ethnic insults, and graffiti. None of them distinguish between the discriminatory expression from persons with authority and those not in a position of authority. All of them refer to or transcript dispositions of the Human Rights Code of their Provinces.

Codes raise two serious concerns; one related to the principles of the law, another related to the philosophy underlying them. First, from a legal perspective, they attack the juridical security. Though aimed at being remedial regulations, they are punitive dispositions. Their wording does not make provisions for due process, they reverse the *onus probandi*; offences are not precisely stated; no *in dubio pro reo*. The name of the accuser

³⁴⁰ See Emberley, *supra*, note 46 at 237

³⁴¹ Denise Magner, "Hotline Targets Racism" *Chronicle of High Education*, June 7, 1989, at A-33 quoted by D'Souza, *supra* note 272 136-7

may be hidden, the instructors and the adjudicator may be the same person, and the rulings do not have to be based on findings beyond a reasonable doubt. Above all, damages and losses do not have to be proved. Secondly, the wording "that is vexatious and is known or ought reasonably to be known to be unwelcome" makes one think that the drafters were guided by non-intentional torts (negligence) principles. However, "negligence" presupposes that the accused acted without the standard of care that a reasonable person would have met in similar circumstances. University codes, overbroad and vague, do not refer to standards at all. "Poisoned environment" or "sexual terrorism" or "systematic discrimination" are concepts so diffuse that it is impossible to get a general understanding of them. With respect to "ought to know", often campus members ignore private details of others' life. How, then is a student or professor to know whether someone involved in the discussion is receiving public assistance or has problems concerning their marital status and may be offended by a remark uttered to reinforce the speaker's position in the debate?

c. RATIONALES AND IDEOLOGY UNDERLYING HATE-SPEECH CODES

Powerful arguments were put forward to justify hate speech codes. The strength and novelty of some of them dwells in the fact that restrictions are claimed not to pursue utilitarian norms. Prohibitions are permissible or perhaps required under the Fourteenth Amendment and Section 32 of the Canadian Charter. They are probably even required under Section 2 and the First Amendment itself. Code supporters rely on two main reasons: either a particular speech represents an exception to protection because it harms listeners, or it is aimed at attacking equality values. Restrictions on speech are aimed at preventing: psychic injuries, or attacks to listeners' sensitivity, or attacks to equality; or violence against vilified groups; or an interference with the truth.

i. FREEDOM OF EXPRESSION V. EQUALITY: A FALSE DICHOTOMY?

The rationale most frequently used to justify hate speech codes is the promotion of equality. While Alexander maintains that hate speech "carries an overt denial of the Fourteenth Amendment's promise and social agenda," Lawrence argues that the *Brown v Board*

of Education was a "speech" case; the segregated schools gave a message of unworthiness to Black children.³⁴² By introducing the values embodied in the 14th Amendment and Section 32 into the hate speech debate, they contest the great weight given to individual rights. They recognise an ideological debt to Communitarianism. This school, led by sociologist Amitai Etzioni, joined by the American Alliance for Rights and Responsibilities and by the theologian Richard John Neuhaus' Institute on Religion and Public Life, emphasises responsibility rather than unlimited individual rights.³⁴³ Thus, hate speech advocates, premising that some intrusion on individual rights benefits the general welfare, appeal to the "balancing test."

Those scholars, thereafter called egalitarians, base their argument on hypothetical effects that hate speech may have on listeners.³⁴⁴ Its attacks on equality of the target groups is twofold. First, assessing that hate expression degrades and promotes domination, egalitarians conclude that hate speech inevitably leads the university population to act violently against vilified groups. Secondly, hate speech humiliates, and undermines the self-esteem of the target group; thus, it encourages victims to withdraw from society and to reject unconsciously their identification with the group to which they belong. Hence, it deprives victims of fulfilment and happiness as human beings.³⁴⁵ The consequence of vilification on listeners is the internalisation of racism and stereotypes.

Hate expressions are seen as assaultive words, which injure in the same way that physical violence does. In Irwin Cotler's words: "[this is] an affirmative responsibility of government to protect the inherent human dignity ... [because] assaultive words may be treated as comparable to assaultive acts... and the very utterance of some words - i.e., the

³⁴² Alexander, William S., "Regulating Speech on Campus: A Plea for Tolerance" (1991) 26 *Wake Forest L. Rev.* 1349 at 1370; Lawrence, *supra*, note 320 at 438-9. See Sustein *supra*, note 328

³⁴³ See Walker, *supra*, note 190 at 142; NOTE, "A communitarian defence of group libels laws," (1988) 101 *Harvard L.R.* 682-701

³⁴⁴ They follow Reisman's approach restrictions on speech may and must be contextualized. See Kent Greenawalt *Fighting Words Individuals, Communities and Liberties of Speech* (N.J.: Princeton Univ. Press, 1995)

³⁴⁵ Cotler, *supra*, note 127 at 250

wilful promotion of hatred – may be deemed dangerous enough to justify criminalization."³⁴⁶ Similarly, Delgado sees hatred expressions as a "dignity affront", a direct violation of the victim's right to be treated respectfully. Catherine MacKinnon takes a further step and equates speech to acts. It is an expressive conduct attacking human dignity, which must be limited: "public promotion of group hatred is an act, an injury and a consequence in itself. It is not a mere intention to act in the future...to promote group hatred is to practice discrimination."³⁴⁷ Drawing an analogy between hate speech and pornography, this author argues that they are "expressive forms of equality." A sign saying "Whites only"³⁴⁸ is not just a viewpoint but a segregative act. Hence, censorship will prevent vilified persons from being victimised. This scholar overlooks the fact that the segregative act was in fact the authority's previous decision to exclude those non-White. Such a sign conveys a discriminatory act which exists behind the words. Even if the sign is taken away, no non-White person will enter.

Despite the sweeping statements that egalitarians ask for banning conducts rather than speech, given that hate expressions are conduct distinguishable from speech, to draw the line is extremely difficult. Several authors give some guidelines in this sense. Kent Greenawalt explains that communications which "are "situation-altering" are much more "action" than "expression".³⁴⁹ Fighting words, commands and offer of agreements fall within this categorisation. They are able to modify "the listener's normative environment," creating rights and duties. With due respect for Professor Greenawalt, there are reasons which support, as discussed furthermore, that hate speech does not alter victims' normative environment but the speaker's power and intentions to do so.

Egalitarians agree that censorship of hate speech, either as words or as conduct, is justified because it attacks equality. In Kathleen Mahoney's words: "Hate speech undermines

³⁴⁶ *Ibid.*, at 292, 279.

³⁴⁷ Catherine MacKinnon, *Only words*, 1st ed., (Cambridge, Ma.: Harvard Univ. Press, 1988) chap "Equality and Speech"

³⁴⁸ *Ibid.*, at 116, 117.

³⁴⁹ Greenawalt, *supra*, note 344 at 6

the values of protecting and fostering a vibrant democracy because it denies citizens' equality and meaningful participation in the political process and its contribution to self-fulfilment and flourishing is negligible."³⁵⁰ Cotler adds that inasmuch as "hatemongering seeks not to inform, but to incite; not to discuss but to degrade,...not enlighten...but to diminish..."³⁵¹ it can be restricted by law. Hogg asserts: "The purpose of the ban is to promote the value of equality, because the effect of hate propaganda is to reinforce the maligning attitude towards minorities."³⁵² Matsuda argues that hate speech reinforces the subordination of minorities.³⁵³

Rigorous workings of the egalitarian jurisprudence on hate speech present several flaws. Probably the most important one relates to the very concept of equality; others relate to the concept of "equality of groups". At the present time, as Jack Greenberg holds, international rules on racial discrimination are more or less clear, but those dealing with gender discrimination and to a greater extent with religious discrimination, are still in an ambiguous form.³⁵⁴ Having given priority to the notion of equality, the international community has not made evident whether "equality" refers to legal or political rights, or to distributions of punishments and rewards, or to responsibilities for one's own conduct, or to economic choices and opportunities. As Berlin explains different types of equality may clash among themselves, or within the system of values of each expositor: "[A] reformer bent on abolishing discriminatory legislation may find himself faced with a choice between incommensurables (e.g. of emancipating either one large class of 'inferiors' say the poor, or several classes, say religious or racial minorities, which between them contain fewer members than the single large class). The first policy will give equality to more human

³⁵⁰ K. Mahoney, *supra*, note 110 at 12

³⁵¹ Cotler, *supra*, note 127 at 279

³⁵² Hogg, *supra*, note 222 at #40.9

³⁵³ Mari Matsuda, "Public response to Racist Speech: Considering the Victim's Story", (1989) 87 *Michigan L. Rev.* 2320.

³⁵⁴ J. Greenberg, "Race, Sex, Religious Discrimination" in T. Meron, ed., *Human Rights in International Law: Legal and Political Issues*, Vol. II (Oxford, Oxfordshire: Clarendon Press, 1984) 307.

beings; the second will abolish a greater number of class distinctions. Since either course can correctly be said to increase equality, and both cannot (for some practical reason) be adopted, the choice of a conscientious egalitarian will depend on the type of equality preferred. As it stands, the question before him cannot be answered."³⁵⁵ Hence, elucidation of what kind of equality egalitarians ask for is crucial in the debate.

Pro-censorship egalitarians defend another type of equality; equal opportunity in education by fostering a learning environment free of offensive remarks.³⁵⁶ That includes, equal opportunity to influence academic community life. Equal opportunity is an instrumental good aimed at the attainment of ultimate goals. Emerson maintains that: "every individual is entitled to equal opportunity to share in common decisions which affect him."³⁵⁷ This instrumental good presupposes that, ideally, chances of access to some good depend on factors under one's control, such as skills or will. Government should equalise external conditions as much as possible, so that any person has the same chances despite inherent features, such as skin colour upon which she does not have control. Historically, liberalism focused on speakers' needs of self-expression, and for an equal chance of influencing the government's policies.³⁵⁸ Today, Egalitarians essentially focus on equal opportunity for listeners.

The argument that hate speech deprives vilified groups of legal equality deserves a quite different answer. Legal equality provides the infrastructure for the exercise of freedoms. Egalitarian ethics are attacked only if an en-force disposition denies the exercise of a human right, to which individuals are entitled in respect of personality. Hatemongers, who do not have the power to coerce their discriminative remarks, cannot abridge others' rights. Their discriminatory remarks are not enforceable. Rights and legal equality are diminished only if an enacted law impedes their exercise. A coercive

³⁵⁵ I. Berlin, *supra*, note 198, chap. Equality.

³⁵⁶ Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" (1982) 17 *Harv. C. R. - C.L.L.Rev.*133

³⁵⁷ Emerson, *supra*, note 104 at 880.

³⁵⁸ Rawls, *supra* note 52 at 358

disposition attacks equality when it suppresses someone's right to express (e.g. pro-life's ideas) and fosters other subjects' same right (e.g. to express pro-choice ideas). Such a discriminatory act cannot be justified by "public-spirited motives, because the invidious impact of such a law precisely fragments the *res publica*."³⁵⁹

Different from legal equality is the concept of other kinds of subordination through words. Firstly, there is no such a thing as "the feelings of discrimination." The Michigan University code, for example, ignores that equality is not a feeling but a legal concept, a person may be discriminated against even if he or she has no perception of it; and vice versa. Hatemongers, arguing target groups as moral subordinates, cannot alter in any way the victim's legal status. Victims enjoy legal protection despite of hate speech. Enjoyment is a legal concept not a psychological one. Secondly, economical and social subordination (which is not constitutionally forbidden) must not be confused with legal inequality (inimical to constitutional dispositions). Then, the premise that hate expression of private individuals conflict with constitutional rights is a fallacy. The clash is between inegalitarian ideas expressed by hatemongers and egalitarian ideas expressed by their opponents. Thus, Greenawalt's argument that "situation-altering words" are action cannot be applied to hate speech because it cannot alter the normative environment more than any other idea does. Hate speech is not a command. Another distinction, elaborated by J.L. Austin, cannot be applied to hate speech either. He distinguishes between "perlocutionary utterances," words which impact on the conviction of listeners, and "illocutionary utterances," actions that are performed by saying something; only the latter has legal consequences.³⁶⁰ Doubtless hate speech has effects upon an audience as any other ideas uttered, but unless it is uttered by authority, it has no illocutionary entity.

While hate expressions do not take away the opponents' right to express, speech codes statutorily prevent individuals from expressing discriminatory ideas. Historic

³⁵⁹ Brudner, *supra*, note 200 at 473.

³⁶⁰ J.L. Austin, *Philosophical Papers* (Oxford Univ. Press, 1970, 2nd ed.) at 239 and ss

discrimination - a factor which is not under individuals' control - is not a valid reason to justify a new discrimination: to bestow a right on some persons while others receive a lesser degree of the same right, like Matsuda proposes.³⁶¹

Another "equality" used to justify hate speech codes is that associated with dignity and respect of all persons;³⁶² hate speech attacks the paramount value of being treated with dignity. Admittedly, freedom of expression is not an absolute right. But equality is not an absolute value either. It is a value infusing Western democracies, so are the values of free market, federalism, democracy, and protection of human life. However important those values are, all of them are subject to discussion, especially in *intramuros*. If hate speech is banned because it attacks the democratic idea of equality, then almost any restriction on speech can be justified on the same bases. Communist speech, speech against federalism, pro-life and pro-choice speech, and debate on the death penalty and euthanasia may be banned. Censorship, by making reference to constitutional values, amounts to recognising that any speech can be banned because, by its very definition, every public discourse implies discussion on the basic structure of society as crystallised in the supreme law.³⁶³ It is true that hate speech amounts to treating human beings without dignity, but so do many constitutionally protected expressions and conducts (e.g. offensive campaign speech). Supporters of that argument are really arguing for claims which have no link with the desire for equality at all, but with other values. They ask for a perfect social system where all persons' needs are satisfied similarly, the ideal of Enlightenment.

Despite how appealing are the claims on equality -- with the exception of the legal one -- may be, they are unworkable within a meaningful framework of constitutional

³⁶¹ Says Rawls: "The requirement that the basic liberties are to be the same for everyone implies that we can obtain a greater liberty for ourselves only if the same greater liberty is granted to others. *Supra*, note 52, at 56 and ss

³⁶² Irwin Cotler, *Hate Speech, Equality, and Harm Under the Charter: Towards a Jurisprudence of Human Dignity for a "Free and Democratic Society"*, in *The Canadian Charter of Human Rights and Freedoms*, in Beaudoin & Mendes, 3rd ed., (Toronto: Cadswell, 1996) at 20-5

³⁶³ Rawls, *supra*, note 52, Chap. "The Use of Public Reason"

protection of rights for two reasons. First, the only equality protected by the 14th Amendment and Charter s.32 is legal equality. In its pertinent part the former says: "No state shall make or enforce any law.. nor deny to any person within its jurisdiction the equal protection of the laws."³⁶⁴ Its provisions do not apply to private individuals' activities. The US Supreme Court said that the 14th Amendment does not shield "against merely private conduct, however discriminatory or wrongful."³⁶⁵ This doctrine was confirmed years later when the US Supreme Court³⁶⁶ declared that racial discrimination by a private club does not violate the 14th Amendment. Recently, it decided that private racial discrimination does not infringe the equality guarantee implicit in the due process clause of the 5th Amendment; it only binds federal government. Hence, hate speech argued by a non-state person does not imply a clash between the right to freedom of expression and equality under the law, but between pro and con equality ideas. Hate speech by state-persons requires a different solution. First, authority should be concerned with all its members' welfare and values. Secondly, state-person statements may be enforceable as a discriminative norm. Hence, the right to expression of professors who use hate speech to justify their decisions on marks or admission clashes with the students' rights not to be discriminated against by the authority. Such a case amounts to restrictions.

A second flaw of egalitarian doctrines relates to the concept of democracy and groups rights. Codes supporters understand democracy within a group dynamics. They believe that democracy means that groups should be represented,³⁶⁷ and have the same share of power, dignity, etc. In trying to achieve a perfect society, egalitarians end up arguing inegalitarian solutions, such as Matsuda's theory on the victim's privilege. Her proposal, adopted by the California-Berkley University, is to ban only discriminative expressions uttered by members of the dominant class. In her "outsider jurisprudence," "historical

³⁶⁴ US Const. Amend. XIV #1, emphasis added

³⁶⁵ *Shelley v. Kraemer* (1948), 334 US 1,12

³⁶⁶ *Moose Lodge No. 107 v. Irvis*, (1972) 407 U.S. 163

³⁶⁷ Lawrence III, Bell, Cotler, among others, works cited

victims" are entitled to convey offensive expressions toward members of historically dominant class with the assurance that they will not be punished. Matsuda argues: "expressions of hatred, revulsion, and anger directed against historically dominant group members by subordinated-group members are not criminalized."³⁶⁸ Women's sexist speeches should be protected while those of men should be forbidden because women cannot oppress the historically dominant male.³⁶⁹ The core of the argument is: equality for minority groups can only be achieved through the oppression of the majority. This proposal is taking root in academia as Prof. D'Souza proves: "Hammer [a Black student] said that the only overt racism she has encountered at Columbia involves hostility directed against Whites. "I am told that as a member of a historically persecuted group, I cannot be racist against Whites. But Blacks can say anything about Whites and Jews."³⁷⁰ "Outsider jurisprudence" neglects even though there is a "traditional dominant class", not all its members are vilified or powerful individuals. "Who are the dominant class?" may well be asked by a blue-colour worker's son who makes his way to academia. However, they must receive hate speech of victims without retaliating. "Dominant class" may well argue that vilified groups' speech attacks their self-esteem and dignity.

The claim of a broad protection of the historically oppressed's speech in conjunction with the dominant class' silence amounts to proposing a dangerous strategy to conquer opponents. Indeed, a successful strategy of hate needs to objectify, through generic description, the group to discriminate against.³⁷¹ By polarising groups, social unity receives an irreparable blow. First, hatred recycles itself in dominant and vilified groups. Secondly, the self-polarisation "[the] defining [of] out-groups and finding [of] comfort in the conformity of others like us," is devastating because the isolation is self-imposed;

³⁶⁸ Matsuda, *supra* note 339 at 2361

³⁶⁹ For an extensive discussion on revert oppression see J. M. Craddock, *supra*, note 315

³⁷⁰ D'Souza, *supra*, note 272 at 10

³⁷¹ R. Whillock, *supra*, note 262

groups construct self-justifying reasons for remaining isolated.³⁷²

Matsuda suggests that the victim's privilege, the reversed oppression, should be kept until minorities become equal with the oppressor class. The vilified group has the right to determine when equality is reached. This is a claim for a perpetual unequal political power. It is likely that members of the vilified groups will try to maintain this asymmetrical situation as long as possible; what implies a reverse oppression because the ex-dominant class will be silenced forever by the former victim. If the reverse of oppression is defended as a means to obtain greater equality in the future, its qualifications as a proper tool must be debated rather than taken for granted as Lawrence and Fish do.³⁷³

The argument runs into inegalitarian solutions, because it evolves from two erroneous premises: (1) the 14th Amendment and s.32 protect every type of "equality"; (2) these legal dispositions protect groups rather than individuals. Codes supporters have a concept of equality broader than that of legal equality and in elaborating solutions they take groups rather than individuals into account. Egalitarians envisage minorities getting power, rather than their members having fundamental rights. In their scheme, hate speech is a political argument which prevents a redistribution of shares of power according to their wants. As MacKinnon maintains that pornography, a form of hate speech, is a political question, a question of sexual politics.³⁷⁴ Women are deprived of power. If pornography is a political matter, it cannot consistently be suppressed as long as there is an agreement on absolute freedom in political speech. Leaders of each group insists that its wants be considered "rights." Says a scholar: "The victims shield themselves behind the right to protection against group-vilifying speech."³⁷⁵ Beyond the validity of wanting to have a right to be protected against that type of speech, the "right" to it calls for much argument.

³⁷² *Ibid*, chap. "Political and Social Goals", at 34

³⁷³ Lawrence, *supra*, note 320.; S. Fish, *supra*, note 301

³⁷⁴ Catherine MacKinnon, "Feminism Unmodified" (Cambridge: Harvard Univ. Press, 1987) at 225.

³⁷⁵

Cotler, *supra*, note 362 at 20-5

Group representation rather than individual representation is a new concept of democracy. Traditionally, democracy recognises rights of individuals not of groups; its essence is the government of individuals rather than groups.³⁷⁶ Because individuals are seen as able to transcend parochial interests; liberal democracies hold that any person may represent others from different backgrounds. "Proportional representation for ethnic groups directly violates the democratic principles of equal opportunity for individuals, and the underlying concept of group justice is hostile both to individual equality and to excellence."³⁷⁷ Admittedly, the university is responsible for protecting all its components' rights. But those components are not minorities but individuals. By protecting each member's rights, the whole academic population is protected against discrimination.

A third premise of the egalitarian doctrine relates to its epistemological approach. Being primarily aprioristic, it overlooks social facts and human nature. Fish argues that not all types of discrimination are equal given that "discrimination is not a problem in logic but a problem in historical fact."³⁷⁸ He reduces discrimination as that practised "by the powerful at the expenses of a relatively powerless" -- equating the former with White and the latter with Black. He adds a sweeping statement: "being sensitive to the sensibilities of Asians and Blacks is a higher priority than being sensitive to the sensibilities of Whites."³⁷⁹ He neglects that racism is not only from the majority, but also from minorities against minorities and ignores that society not only faces racial discrimination but gender and religious discrimination. WASPs are no longer the dominant class or Blacks the only oppressed minority. North America displays a large Hispanic population, an increasing population of Catholicism, as well as large ethnicities from different countries of Asia preserving their own cultural identities. Historically, none of those groups can be regarded as oppressors. More often than not, hate speech is delivered

³⁷⁶ See Bunge, *supra*, note 1

³⁷⁷ D'Souza, *supra*, note 272 at 55

³⁷⁸ S. Fish, *supra*, note at 301 at 75

³⁷⁹ *Ibid.* at 77

by one racial group against another (e.g. Black against Jews), by one religious sect against another (e.g. Witness v. Catholics), and of course, by the majority and minorities against a new arrival (Whites and Blacks against Hispanics). Then, it is not clear which minority will have the privilege of the victim. And more important, who will decide which is the most victimised minority. Ultimately, all groups in society may be restrained for speaking their minds. Jeffries' hate speech proclaiming the superiority of the African people over the Jewish people, or Black supremacist Farrakham discussing inferiority of women are hard cases for Matsuda's theory. A Neo-nazi female professor's hate speech against Jewish males may be banned or not, depending on whether priority is given to gender or racial oppression. These contradictions surge because those scholars ignore a social fact: most members of the majority are as economically or intellectually oppressed as the historically oppressed minorities.

Fish, Matsuda and their colleagues ignore that discrimination may be historical or not (although always in a historical context), from the powerless or not. If only historical victims qualify for the "outsider jurisprudence," vilified Asians and Hispanics are excluded from it. This outcome may seem to be against of their very argument. Norman writes: "Not surprisingly, the idea of positive discrimination has proved controversial. Adopted in the name of equality, it nevertheless offends the very idea of equality, since it requires that certain groups be given preferential treatment."³⁸⁰

Finally, policies which restrict hate speech and obviate all other discriminative remarks amount to saying that some discriminative messages are worse than others but without defining a principle that enables subjects to distinguish why a sexist epithet is more disgusting than a sexist advertisement. Code supporters claim for censorship of hate speech with the purpose of eradicating discrimination attack the consequences, not the root of the problem. The news - existing prejudice toward women, Blacks, Ethnic, etc. in Western society

³⁸⁰ See Norman, *supra*, note 29 at 121. Singer Peter, *Practical Ethics*, chap 2 at 40-7 largely addresses reverse discrimination.

- is brought by annoying and ugly messengers: hate propaganda and pornography. Even if the messengers were put away, the message would remain. Both extreme expressions are symptoms of discrimination spread on the whole "social web."

In brief, the point is not that equality is dangerous for freedom of expression, but is rather a value among others. It can be overridden, if other principles carry greater weight. A liberal society's commitment is not to equality as, Prof. Lorraine Wenrib maintains.³⁸¹ Quite the opposite, the commitment of a free society is to a scheme of values whose order of priorities is not fixed once and for all.

ii. **FREEDOM OF EXPRESSION V. FREEDOM OF EXPRESSION: IMPAIRING SPEECH TO ALLOW MORE SPEECH**

Another pro-censorship position obviates the equality issue. Owen Fiss maintains that hate speech has a silencing effect on vilified groups. While egalitarians posit the conflict expression-equality (an anthropologic feature vs. an ideal condition of a human being to stand before the law); he posits the conflict between First Amendment and First Amendment values. He argues that by emphasising on negative images which remain in the audience's and bystanders' minds, hatemongers create a feeling of inferiority in target groups, individually and collectively. This demeaning effect is so pervasive that victims refrain from entering into the debate. Then, hate speech, though speech, should be banned to foster more speech. MacKinnon asks for censoring pornography in order that vilified groups may have "equal speech"³⁸². She alleges "the more the speech of the dominant is protected, ... the less the subordinated are heard from."³⁸³ She follows "groups defamation is a verbal form inequality takes" which prevent victims from "equality of opportunity."³⁸⁴ Owen Fish premises that hate speech both leads society to despise victims, who in turn, withdraw from society;

³⁸¹ She says: "The commitment is to the dignity and equality of individuals, regardless of group identification, through the eradication of hate propaganda, so that all are members of a free and democratic society." Lorraine Esseinstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) *Supreme Court Law Review*, 10:429

³⁸² MacKinnon *supra*, note 347 at 77. In *Only Words*, she equates pornography to hate speech.

³⁸³ *Ibid*, at 72

³⁸⁴ *Ibid.*, at 99

then he proposes curtailment of extreme expressions because "[hate promotion] undermines freedom of expression by attacking the credibility of speakers of a vilified group."³⁸⁵

Asking for victims to have an equal chance "in influencing on policies", those theorists really seek "equal opportunity to convince". They ask for legal mechanisms able to improve the credibility of victims' speech. Ignoring that factors, such as the background and beliefs of the listeners, which lead an audience to be convinced by some idea, are far beyond any state's faculty to equalize; they do not realise that the state can provide means so that a speaker gets his/her point across, but it does not have the power to guarantee speakers (victim or not) be taken seriously by those who they want to reach. As Madam McLachlin J., in *Keegstra*: put it: "Freedom of expression guarantees the right to lose one's ideas on the world. It does not guarantee the right to be believed."³⁸⁶

There is no logical or empirical reason for thinking that the ban of hatemongers will automatically increase a vilified group member's wish to re-enter society to argue his message. What experience does prove is that suppression of a party's speech increases its opponents' chances of convincing, not because of its powerful arguments, but because of the lack of a countermessage. By asking for silencing opposition, supporters of hate-speech codes ask for an exclusive opportunity to convince. Indeed, they ask for their idea be dogmatically accepted and protected against challenges. At risk of repeating myself, hate speech conveys an idea. The picketers shouting "baby-killers" express a denial that women have the right to choice; anti-gay hatemongers convey their conviction that human beings do not have the right to choose their sexual lifestyle; Nation of Islam's hate propaganda expresses that some members of society should be annihilated, so on and so forth. All those hate expressions convey ideas opposed to democratic ideals; nevertheless, they are ideas. Thus, the demand that some democratic ideas -- such as women's free choice, gays' rights,

³⁸⁵ Owen Fiss, "The Silence Effect Of Speech" Address at McGill Univ. Dec. 15, 1994 emphasis added. See Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, Colo.:Westview Press, 1996)

³⁸⁶ *Keegstra*, *supra* note 111 at 97 and ss

women's equality -- not be challenged is objectionable from a democratic position, regardless of the negative or positive consequences on the audience. Any suppression favouring one message over others amounts to the unequal treatment of individuals, to consider that one group thinks better than another. Emerson argues that, in theory, any limitation upon the freedom of someone "expand the freedom of a greater number."³⁸⁷ A hatermonger may rightly ask why he is not entitled to have a similar voice to others. Egalitarians premise that all men should be treated uniformly in every respect, unless there is sufficient reason not to do so. To let some message prevail because of a lack of a countermessage is anti-democratic.

Some main points can be made against this position. First, it is worthy of analysis whether vilified group members are prevented from participating in the public debate because of the hate expressions or because of the neutral position of the whole society and whether there is a different reaction depending on whether victims belong to a religious, racial or alternative lifestyle group.

Secondly, the sense of worth is a diffuse psychological concept, a very personal feeling. Scholars, who claim self-esteem as a highest good, owe reasons to show why the choice of this good was made. A sense of one's own worth recognises several origins. Generally speaking, it is built from words of our social sub-systems (family, school, church, etc.) rather than from strangers' or even foes' words. The discriminatory messages by members of the group to which a person belongs undermine her self-esteem a great deal more than hatermongers' preaching.³⁸⁸ Several reasons, among them psychological ones, make it more difficult for some persons to participate in public debate. To reduce them to hate speech is a oversimplification. It is a fallacy that only "groups" with a strong sense of self-worth participate in public discourse. Only individuals possess self-esteem; then, "groups" do not participate in debate but its components do, especially those with a strong

³⁸⁷ Emerson, *supra*, note 107 at 948.

³⁸⁸ See N. Hentoff, *supra*, note 327; van Dijk *supra*, note 231

sense of self-esteem. Moreover, to participate in public debate, speakers need not only self-esteem but also to be well informed and to have persuasive skills. Those features are required from minority and majority members. The possibility of equality of power in democratic debate, even on a small-scale, bows to these skills. Everyone has a vote in the final decision but for reason of time, skills and space only a witty few can speak. Then to ask for censorship to improve the victim's self-esteem seems inconsistent. Low self-esteem (a non-legal concept) calls for a remedy other than censorship (a legal one). Furthermore, afflicted individuals can demand a myriad of remedies to build up their "self-esteem" but solicit an encroachment of other's speech. Often, in electoral campaigns partisans attack opponents' self-esteem with the aim of influencing popular opinion against them. Offended leaders have the right to reply but they are not entitled to seek censorship of their opponent's expressions.³⁸⁹

Thirdly, Fiss' arguments are aprioristic; the silencing effect of hate speech is assumed. Though there are no studies on the effects of hate speech, research on pornography, allegedly a form of hate speech, show results opposite to general suppositions.³⁹⁰ Expressions are the result of social, psychological, physical, and economic processes, and it is the task of empirical science to discover the interaction among those factors. Curtailments of a freedom that meets an undeniable anthropological need for the sake of a supposition can only be justified in a totalitarian state.

Finally, university administrators who respect the academic community, as responsible and self-governing agents, have no business preventing them from becoming convinced about

389 See A. Borovoy who argues against any restriction; "Language as Violence v. Freedom of Expression: Canadian and American perspective on group defamation", (1988) 37 *Buffalo L. Rev.* 337

390 Pornography does not seem to be a major factor shaping the sexual attitude of sex offenders or ordinary people. In countries where pornography is permissible (e.g. Netherlands) women are recognised as equals and occupy important positions in society, while in countries where pornography almost does not exist (e.g. Islamic countries) women are the silent group. For statistics and conclusion on this theme see Donnerstein & others "The Question of Pornography" (N.Y. Free Press, 1987) and Hawkins and others, *Pornography in a Free society* (N.Y.: Cambridge Univ. Press, 1991)

whether or not it is worthy to take part in the public discourse, or about their own self-esteem and credibility.³⁹¹ Moreover, regulations on the process of communication affect the outcome; instead of enhancing the quality of debate, they have the opposite effect. Campus communities, adult intellectual elites, can neither be prevented from being persuaded with an idea nor be imposed an idea, as Spinoza explains.

iii. HATE SPEECH AS A HARM TO INDIVIDUAL'S OR GROUPS' RIGHTS

At the time of producing rationales, supporters of hate speech codes maintain that hate speech causes both (1) an indirect harm to the whole community because of its pernicious effects on the majority's beliefs ³⁹²; and (2) a direct harm, a psychic injury on the target group, individually and collectively. Even if racist speech falls within a hoped-for neutral exception, it should be suppressed.³⁹³ Delgado teaches that hate speech is a blow that interrupts the dialogue, a harming action rather than speech.

1) Code supporters argue that hate speech indirectly harms the entire campus community because of its power to imprint on the "collective mind" ideas of hatred, which sooner or later lead subjects to act against minorities. Says Matsuda: "racial inferiority is planted in our minds as an idea that may hold some truth..."³⁹⁴ The violent message is acquired from the speaker by the listener who in turn inevitably acts against a target group causing a breach of the peace. Speech able to prompt unacceptable behaviour must be curbed. From a position quite opposite to that of Spinoza, code supporters regard subjects as irrational who automatically react to the stimulus of hate speech. This approach is objectionable on several grounds. First, the current scientific literature lacks proof of those alleged harms.³⁹⁵ Secondly, the argument that hate speech shapes our attitudes towards minorities is

391 See Wojciech Sadurski, *On Seeing Speech Through an Equality Lens: Do Hate Speech Bans Equalise Opportunities* (1995) Cornell Law Rev.

392 Delgado, R. & Stefanic, J. "Hateful Speech, Loving Communities: Why Our Notion of "a Just Balance" Changes So Slowly" (1994) 82 Calif. L. Rev. 851 at 855

393 M. Matsuda, "Speech, Equality and Harm" (Address to "Speech, Equality and Harm Conference", University of Chicago Law School, 3 March 1993) [unpublished].

394 Matsuda, *supra* 353, at 2339-40 (emphasis added)

395 See Whillock, *supra*, note 230 at Introduction

an oversimplification. As already argued, many factors, among them education and persistent images from the media, shape our conceptions.³⁹⁶ Thirdly, the harm theories claim to suppress hate speech because of its persuasive capabilities. Indeed, all expressions promote a positive or a negative attitude towards an issue; this is exactly the purpose of communications. To be consistent, any speech that plants, in our mind, an unpopular idea should be forbidden. Some may argue that this rationale leads to a slippery slope; prohibitions on hate speech leave the door half open to restrict more expressions. However, this rationale is epistemologically wrong but not because it may lead to a slippery slope. When society prohibits extreme form of speech to prevent its message from being accepted, it is at the very bottom of the slope.³⁹⁷ Defenders of the harm rationale ignore the fact that freedom of expression covers the power of each individual to persuade others. Those who invoke hypothetical indirect harms not only neglect to bring scientific proofs of their assertions but also ignore moral grounds for the discussion. Human beings are rational and autonomous agents. Campus members are not automatically prompted to act against minorities because of hate speech. They evaluate it among other variables before taking a stance or action. Only if someone proceeds and causes a measurable harm, as responsible agents, is this person punished. Likelihood of harms does not justify an encroachment of freedoms of free individuals.

Scanlon gives another reason to prevent academia from banning hate speech given the likelihood of illegal conduct flowing from it. He wisely argued in what he called the Millian Principle that: "There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expressions, where the

396 Van Dijk supra, note 231

397 See James Weinstein, "A Constitutional Roadmap to the Regulation of Campus Hate Speech" (1991) 38 *nl Wayne L. Rev.* 163 at 184

connections between the acts of expression and the subsequent harmful acts consists merely in the fact that expression led agents to believe (or increased their tendency to believe) these acts to be worth performing."³⁹⁸

2) Another harm is argued to support hate codes: a direct harm, emotional injury, either to (a) a specific student or to (b) the entire vilified group, an injury which in turn interferes with their educative process.

(a) Emotional injury to an individual is a powerful argument to ban hate speech. Hate speech may adopt the mode of slander, insult and offence to a specific person, thus causing a distress (e.g. constant insults in a mandatory course). Liberal defence of free expression has always stopped short of protecting speech which really harms. If a real harm flows from hate speech, then eagerly fighting for the marketplace of ideas is an irresponsible position; we must elaborate on the emotional harm. Our legal system punishes a behaviour which has caused a harm. Although the already caused harm of emotional distress to a student is difficult to evaluate, if proved, it should be punished. In Spinoza's theory harms, to others require immediate action by the state. But the harm must fulfill several requirements. An element of the speech is crucial: the *animus injuriandi*. The speaker's intentions let authority distinguish between hate speech which conveys a discriminatory idea and speech used as a tool to assault a specific individual. The former is punishable because the social agreement is based on the protection of freedom of each and every subject. In Spinoza's theory the shout of "fire" in a crowded theatre is punished only if there is intention to cause panic; the speech aimed to harm is punishable.³⁹⁹ The presence of three elements -- a clear damage (to reputation, or emotional distress) made with *animus injurandi* to a specific victim -- amounts to punishment. Only if those three elements are present in a case of hate speech on campus, is it properly punished. However, in such a case, existing

³⁹⁸ Scanlon, *supra*, note 1230 at 160. It must be highlighted that Scanlon rests his theory on a negative concept of liberty rather than on a positive right of individuals. His principle applies to government rather to individuals.

³⁹⁹ Pitt, *supra*, note 77 at 31

legislation should suffice.⁴⁰⁰ The enactment of anti-hate codes for those specific cases is at least superfluous.

The hypothesis: hate speech causes emotional distress to some member of the vilified targets raises the question whether the speech *qua* speech or the idea it conveys causes the emotional distress. Emotive hate speech conveys in heated terms an idea which can also be conveyed in a polite way.⁴⁰¹ A very skilful rhetorical skewering, though constitutionally protected, is as devastating as a direct racial or sexist epithet. As Altman says: "racist, sexist or homophobic speech couched in a scientific, religious, philosophical or political mode of discourse" is harming, nevertheless protected.⁴⁰² Conveyed through polite words, the same discriminatory ideas may be delivered under constitutional protection. Harm is caused not by heated terms but by a painful knowledge of the existence of discrimination already acquired either by the victim or by the bystander.⁴⁰³ The idea, rather than hate speech *qua* speech is harmful. Someone may ask to be kept from those ideas in order to avoid the potential emotional injury they cause him. Spinoza would advise the persons who feel injured that they will overcome their pain by understanding that the hatemongers are mistaken. The causes of pain are under their control.⁴⁰⁴

Are academic authorities entitled to punish speakers because someone refuses to know speakers' attitudes and prefers to be kept in ignorance in order to avoid a harmful experience? If so, university authorities may follow one of the two strategies to justify hate codes. They may grant a right not be told about any unwelcome belief which inflicts emotional pain and censor hate speech and moreover, all other painful speech, even bad news; this would be preposterous. In the task of cleansing public discourse of all expressions

400 See Andrew Altman, "Liberalism and Campus Hate Speech: A Philosophical Examination", (1993) 103 *Ethics* 302 at 309-12

401 The following paragraphs benefit from the research and conclusions of Weinstein, *supra*, note 397 at 193 and ss.

402 Altman, *supra*, note 400 at 303

403 See Judith Thomson, *The realm of rights* (Harvard Univ.Pres, 1990) at 253-59
Her thesis: offence is not ground sufficing to suppress speech.

404 Pitts, *supra*, note 79 at 31

able to cause emotional harm, administrators, such as those at Stanford, run the risk of banning speech not for a real emotional distress but for its offensiveness. The theory of evolution may be highly disturbing for a extremely religious student. A second strategy may ban only heated hate speech. In this case, if the same distressing message can be conveyed in a polite fashion, what is the point of forbidding emotive hate speech? Once it is understood that hate speech is able to interfere with the educational process because of the idea it conveys, universities should act to combat racist ideas through education rather than to censor the expression of them.

(b) Another direct harm is argued as a rationale for justification of codes: emotional injuries or distress to the entire vilified group⁴⁰⁵. Says William Kaplin "The feelings of vulnerability, insecurity and alienation that repeated incidents of hate speech engender in the victimised groups may undermine the conditions necessary to constructive dialogue on campus."⁴⁰⁶ Hate codes are justified in a new version of the fighting words doctrine. Both in Canada (S.298-301 of the Criminal Code) and in the US the offence of defamatory libel applies to an individual. Code supporters extend the principles of defamatory libel and fighting words to hate speech because, at some point, every person in the target group is reached by the defamatory attack.⁴⁰⁷ The argument that hate speech causes emotional distress to all members of target groups is a weaker one. This harm is less provable than psychological injury (caused by fighting words) or economic harm (caused by false advertising). There are no scientific studies to prove the connection of hate speech to emotional distress, or on the effects and intensity of the harm, taking into account whether the victims belongs to religious rather than an ethnic, or sexual orientated minority. Medical or psychological reports are not available to prove, determine and measure the

⁴⁰⁵ Matsuda, *supra*, note 353 at 2336, and Lawrence III, *supra*, note 301 at 462; Delgado, *supra*, note at 356 at 861

⁴⁰⁶ William A. Kaplin, "A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech" (1992) 63 *The Journal of Higher Education* 517 at 519

⁴⁰⁷ See Cotler, *supra*, note 362 at 20-30

emotional distress of children and adults exposed to hate speech.⁴⁰⁸ There is no scientific data on the influence of personal features, such as biological factors, social and economic status, in the development of symptoms.

Admittedly, some expressions cause an effective psychological or economic injury to a specific student. This harm calls for the university's intervention. But, can the fighting words argument be extended from individual injuries to collective injuries? Kaplin argues that "a pervasive pattern of hate speech on campus" creates a denial of equal education opportunity to a specific group.⁴⁰⁹ He equates the direct harm, supposedly caused to a group by hate expression, with the direct harm caused to a specific person by hate expression. Hate speech denies equal opportunity to a "group" in abstract. The assumption is that all members of the group will be affected in their learning process in the same way. This is far from being proved. Are university officials entitled to punish speakers even though the harm and its consequences are uncertain?

The justification of codes on the basis of emotional harm to a whole group of students, presents great difficulties when reason and logic rather than feelings are used. In applying Spinoza's principles, although he does not specifically deal with the indirect effect of speech, it may be inferred that he would not allow restriction on it. The argument ignores two very important facts: (a) A group is an aggregation of individuals and only each of them has emotions, needs and mental functions, (b) a group does not suffer, think or feel offended. Says a feminist scholar: "Central is the goal of integrating feminist theory and an understanding of racial inequality into a class analysis so that we may understand the status of all women under capitalist patriarchy."⁴¹⁰ It seems that there is only one status for 'all' women. Those, who elaborates on groups' harms, ignore both that groups are not homogenous but their members show tremendous social, cultural and economic differences, and

⁴⁰⁸ For a discussion on lack of data see Whillock, *supra*, note 262 Introduction; and arguments by the majority Supreme Court in *Ross v. Mocton Board of School Trustees, District 15* [1993], 110 D.L.R. (4th) 241, hereinafter, *Ross*

⁴⁰⁹ Kaplin, *supra*, note 406

⁴¹⁰ Jane Lee, as quoted by D'Souza, *supra*, note 272 at 212 (emphasis added)

that human beings are not intrinsically different because of race and gender. That position, by stereotyping, prevents students from distinguishing between reality and idealisation. The indirect harm to a group does not exist as long as a group is not a spiritual entity (as Neo-kantians and hermeneutics argue).⁴¹¹ Societies and groups are concrete systems composed of concrete persons. Only each individual can experience pain through neuronal plasticity; that experience, needless to say, varies from person to person. Using an exclusively holistic approach those scholars overlook that thinking is an inalienable function of each human being. Groups can think, act, reason, will only in and through individual human beings. A group does not feel dignity; but all, some, or none of its members do. *Ergo*, it is irrational to justify censorship because hate speech attacks the self-esteem of a group or its equal educational process. A woman, rather than "women", may be affected by pornography. A man rather than "men" may be offended by feminists claims. A religious individual rather than "Christians" may be emotionally distressed by hearing on the theory of evolution in class. A socialist, rather than "socialists," may be disturbed by a heated free-market speech.

Harm theories are ethically as well as epistemologically flawed. They are conceptually fuzzy because they revolve around vague concepts such as: self-worth, dignity, self-esteem, assaultive words, group's self-esteem. Indeed, they defy common understanding of what speech is. First, when a hate speech phenomenon is analysed as an isolated case, it is ignored that, far from being circumscribed to few persons, or being a pathological practice of "others", hate in a lesser or greater degree is part of the human experience. Hence, any policy enacted to deal with it must analyse whether hatemongers have the silent support of the society at large. If they do have it, law-makers will enact discriminatory laws. Even if those laws were challenged, they would be upheld. What is worse, if a law to foster fundamental rights were enacted – as in the case of the anti-hate laws of Bavaria (1930) –

⁴¹¹ Several scholars assume that all members of vilified group suffered the harm in the same fashion, or at least, all of them are affected by it in a lesser or greater degree. Conf. Delgado, *supra*, note 392, Cotler, *supra*, note 362

it would hardly be enforced.⁴¹² "Noxious" ideas held by a group (Christian Coalition, pornographers, anti-Semite, Zionists, or Nation of Islam) must be repelled through arguments that discredit them. That is what democracy means. Should anti-democratic ideas prevail, Western society would be facing one of its institutional ruptures. In such a case, censorship would be useless, like French Kings' censorship was useless to eradicate the ideas of 'liberté, égalité et fraternité.' Greenawalt holds that a stance for extreme freedom is risky and may suggest that its supporters do not know what they are for.⁴¹³ On the contrary, if democracy means something it is to be ready to run the risk of a chaotic situation in order to reach a consensus on issues that totalitarianisms solve by coercing last solutions.

Secondly, any harm hate speech allegedly causes to subjects, groups or society is indeed caused by the idea it conveys rather than by the very utterances. Hatred could be expressed in a reflexive way, and nevertheless, it can disturb social peace, cause a psychological injury or attack individuals' self-esteem. The harm to listeners is done even through polite words. While some expressions are instrumental to commit a crime (e.g. treason words) hardly can hate speech be separated from the idea it conveys. The university does not have preservation of psychic health as a paramount goal. On the contrary, part of its mission is to shake assumed ideas and disturb consciences.⁴¹⁴ Hate speech conveys a political idea, which I personally find offensive. Nevertheless, the concept of free speech was developed to protect controversial and disfavoured ideas such as equality and religious dissent. Indeed, the idea of democracy was able to cause emotional distress among the First State, offensiveness among the members of the Second State, and it led the Third State towards cruel actions.

Thirdly, harms theories are aprioristic for not using observation, experiment or statistics. Their supporters overlook the social roots of criminality and do not take pains

⁴¹² Emerson, *supra*, note 104 at 895

⁴¹³ Greenawalt, *supra*, note 344

⁴¹⁴ Walkers, *supra*, note 186

to explain a scientific connection between the speech and the psychological harm (either to target groups or to its members). There is no scientific research on the incidence of hate propaganda in generating violent attitudes and the withdrawal of groups from society. Harms are merely stated but not substantiated.

By affirming that "the message is the harm," without pointing out: a specific victim, the existence and extension of a damage, "harm" is a term diffuse to the criminal law or even to remedy policies. Nor has the real deterrent effect of restrictions been scientifically studied. Thus, freedom of expression, and all other freedoms which depend upon it, hang on an epistemology that would not stand a chance in a scientific and objective analysis. Harms theories neglect that law deals with non-random facts, whether causal or accidental, not with probable events. The whole juridical system is based on the principle that harm described as punishable conduct has to be proved, not assumed. The law does not "prevent" a behaviour, rather it clearly describes a harmful conduct; if acted, then punishment or compensation follows. Western legal systems do not encroach upon rights based on the supposition that some hypothetical harm may occur. Men are not prevented from walking down streets after 10pm for fear that some of them may commit rape. If a man's conduct fall under the legal description of rape, then the rapist is punished. The establishes a sanction for a drunk person who drives because statistics and medical reports prove that such a person is a clear and present danger. Nevertheless, society does not prevent a drunk person from driving. The individual may choose to break the law or not. That choice -- whether to break the law or not, whether to act against a minority or whether to withdraw from society -- is taken away from listeners of hate speech when such a speech is censored in order to prevent individuals from breaking the law. Then, the harm, if any, is made by censorship attacking the autonomy of individuals in the Kantian sense.

Punishment after the harm has occurred plus economic compensation to the victim seem fairer than to restrict expressions just in case some harm may occur. An individual effectively harmed by hate speech should be entitled to sue the hatemongers, just as we are

entitled to sue for slander. Awarding compensation for a tort to a person harmed by hate expression is a better deterrent than censorship. That solution does not jeopardise civil rights because compensation for damages implies that a measurable and effective harm has been proven.

In brief, regarding the "harms" theories, I do not contradict the corrosive effects of hate messages on some members of target groups or its noxious effects on assumed values of society. First, the point that, without denying its power, hate speech *per se* neither leads to wrongdoing nor drives victims to withdraw from society. An autonomous individual's choices depend on many factors: level of formal and informal education, experience and knowledge, exposure to other cultures and other societies, and the ability to evaluate consequences and envisage alternatives. Those exposed to hate speech will accept it or be affected by it depending on all those factors. Egalitarian and harm theories fail to recognise that vilified group and the 'dominant class' are not entities of some featureless amalgam. Each person who acts against someone or withdraws from somewhere follow his own judgement, having previously evaluated, rightly or wrongly, rationally or irrationally, hate speech arguments and any other information available. Spinoza strongly argued that one's beliefs result from an internal act of reason; they are neither directly caused by others' acts or words, nor objectively determinate by external historical or social forces.

Secondly, the effects hate speech may have are not corrected with repressive techniques. Censorship, driving discrimination underground, makes it harder to eradicate.⁴¹⁵ Both types of theories wrongly envisage law "almighty" able to transform people into "good" entities. Against this argument Spinoza took pains arguing: "[men] cannot be made to speak by the book. On the contrary, the more the attempt is made to take away freedom of speech from men, the more stubbornly do they resist it..."⁴¹⁶ By suppressing hate speech, hate is

415 See S. Diamond, "Pornography: Image and Reality", in V. Burstyn, eds., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 40 at 41. See V. Burstyn, "Political Precedents and Moral Crusades", in V. Burstyn, ed., *ibid.*, 4 at 12, 17-20.

416 *Tract. Theo-Pol.*, *supra*, note 7 at chap XIX

not suppressed. Because hate expressions and pornography convey ideas, the state has no power to eradicate them "by law". Throughout history, censorship, even associated with the death penalty, has not prevented the dissemination of dissenting ideas. The Inquisition did not succeed in destroying Luther's ideas. The strong atheistic policy in the Communist Regime in the former U.S.S.R. from 1917 until 1990 did not prevent the religious spirit from springing up in society. In 1925, Bavarian laws did not succeed in preventing Hitler's anti-Semitic objectives. It may be argued that they were not enforced against him. Might this be precisely because of the implicit support his ideas received from society. Moreover, events in former Yugoslavia after Tito's death showed how uselessness of the strong enforcement of anti-racism laws in order to eradicate hate.

Lawmakers, jurists and philosophers of law often see laws able to overpower human tendencies. The juridical idealism believes that law, rather than regulating the social world, rules it. For example, Dworkin in "Law's Empire" says, in 1986, that laws make us spouses, employees, citizens and people who own things. However, as Prof. Bunge maintains, law on its own does not give life, jobs, mates and properties: it only regulates pro-social or antisocial behaviours -- and not always in the best way. Moreover, laws do not always settle disputes; most of them are settled in extrajudicial ways. Social control is largely extralegal self-control. This fact seems to be ignored by university officials. They, ignoring that any model of social control should include biological, cultural and economic variables, wrongly vest all the power of social control in enacted codes. Strong social changes intended to be implemented through law have been counterproductive when they were not accompanied by economic and cultural changes.⁴¹⁷ To point out the perverse effects of a legislation enacted to change society is not meant to propose the abolition of social control through law. Rather, it is to stress the necessity of (1) a rational evaluation of facts, methods and ends before enacting the law, and (2) complement it with educational

417 Ashis Nandy, *El Enemigo Intimo, Pérdida y Recuperación del Autocolonialismo* (Oxford: U.P., 1983)

reforms able to attack the causes of the problem they are to remedy. Hate preaching reveals the existence of bigotry and discrimination, but it does not produce them."⁴¹⁸ Campus speech codes will not eradicate bigotry because they do not attack the structural causes.⁴¹⁹

iii. HATE SPEECH VS. THE TRUTH

The insignificant value hate speech has to discover the truth⁴²⁰ is another rationale to justify codes. William Alexander⁴²¹ teaches that speech can only be protected if it conveys "thoughts [which] must be sifted through the mind's reflexive process before gaining any constitutional legitimacy when expressed." Given that hate speech lacks that mental process, the argument follows that it should be banned. He does not explain why a discriminative idea, politely or emotively expressed, does not flow from a rational process. Discovering the truth rationale carries a great weight on information issues, or in contexts where youngsters are taught society's truths. Quite the opposite, academia has no supervalues; the commitment to knowledge leads to doubt about every assumed truth. Those who distrusted old teachings discovered the heliocentric system, the body physiology, and the democratic government. If academia, which rejects final truths, treats equality as an absolute value, the bases on which this decision is made must be justified. If there are religious or ideological reasons on which academia can transform a value in dogma, the following question is whether it is entitled to set up other type of truths; and from then on, whether it is entitled to fix an orthodoxy; and if it is entitled, who is to decide on the rightness of an idea? The point is not whether hate speech has value, but that what is wrong or right in ideology cannot be answered *erga hominem* or imposed by law. As Greenawalt explains, the issue is not that free speech leads to the truth, but whether totalitarianisms or a free system lead the truth to prosper. Democracy is founded on the idea that it is better to run the risk that individuals make wrong decisions than allow an elite to decide

⁴¹⁸ Burstyn, *supra*, note 415 at 24

⁴¹⁹ See Diamond, *supra*, note 415 at 49 her discussion pornography as "a product of the economic and social conditions of our society, not vice versa."

⁴²⁰ See Alexander, *supra*, note 342 at 1374-75

⁴²¹ *Ibid.*, at 1349-50

what people may hear.⁴²²

iv. HATE SPEECH AND HOSTILE ENVIRONMENT

A novel argument, the prevention of a "hostile environment" is used to support hate speech codes.⁴²³ Drafters applied by analogy the principles stated in Title VII of the Act 1969. Though campus resembles the workplace, the task of assimilating both social enclaves, so that to apply in academia the principles of the Title VII is not an easy one. They differ in three main aspects: 1. system of government and distribution of authority; 2. objectives; 3. harms which may be caused by speech; and 4. harms caused by restrictions.

Extramuros institutions, either agencies or providers of services, show a more or less hierarchical structure of power.⁴²⁴ One chair, a board of chairs of departments, intermediate supervisors and workers with defined tasks and without decision making power. Efficiency in the job done, loyalty to the employer, co-operation between employees and departments, concern for the profits and losses of the company, strict adherence to directives are indispensable elements to accomplish goals of any enterprise in the economic world.⁴²⁵ Quite the opposite, university government may be regarded as the intersection of a hierarchical and a co-operative system. Moreover, not all universities are managed in the same fashion; some of them recognise a weaker or co-operative system, others have strong administrations. While administrators act as traditional hierarchy, many employees enjoy a high degree of independence and share in the decision making. Depending on the institution, academic departments and collegiate bodies have little, some or great autonomy regarding hiring, budget management, decisions on content and course schedules. Because authority in universities is diffuse any person who holds a position is seen by students, staff, faculties and public in general as representative of the authority. Hence, this person's outrageous comments are interpreted in a dispositive way, even if such a person is invested

⁴²² Greenawalt, *supra*, note 344

⁴²³ See as examples B.C. and Michigan Universities' codes, annexed

⁴²⁴ Emberley, *supra*, note 46

⁴²⁵ P. Drucker, *supra*, note 248 chap

with more apparent than real power. Finally, academic freedom, peer review and tenure are concepts foreign to public or private companies.

While the only objective in the workplace is to get a job done and human interaction is mostly reduced to transmission of information related to tasks, the main goal of academia is the advancement of knowledge through intense and continuous interaction. In universities "job done" means to educate; that requires a strong debate, even if it adopts an offensive and disagreeable fashion.⁴²⁶ Restrictions on campus members' speech very likely prevent getting the job done. In academia, a twofold purpose is at stake: the enhancement of a student's ability to learn, and the discussion of ideas. The engagement in free scholarly conversation, vital for the learning process, cannot be replaced by bookish education or even less by technological tools.

Given that workplace and academia differ in objectives, the harm speech may cause in each system differs too. First, in the workplace employers' and employees' speeches may seriously impair its paramount goal of efficient production and delivery of goods or service. Speech may undermine discipline and superiors' authority, or damage the *esprit de corps*⁴²⁷ between managers and workers, or attack the company's economic security or well-being (e.g. secrets to be kept). Thus, their expressions are regulated on a place and time basis to prevent specific and measurable harm to company goals. Any restriction of speech in the workplace means a place regulation; the exchange of ideas may take place after working hours. In universities, the same restrictions are not a regulation of place or time, but a restriction of ideas. Because of the very purpose of higher education institutions, the exchange of ideas cannot be deferred to another time or to other facilities. Everywhere on campus, discussions of ideas are always taking place in either a spontaneous or articulate way. Secondly, Title VII applies to those in charge rather than to employees; though

⁴²⁶ J. Craddock, *supra*, note 315 at 1049

⁴²⁷ See *Connick v. Meyers*, (1983) 461 US 138 at 154, 103 S.Ct. 1684 at 1693-94; *Pickering v Board of Educ.*, (1968) 391 US 563 at 570, 88 S.Ct. 1731 at 1735; *Rankin v. McPherson*, (1987) 483 US 378 at 401, 107 S.Ct. 2891 at 2905 (Scalia J, dissenting)

recently the US Court upheld restrictions on employees' speech which disrupt tasks, as discussed further.

Academia is not so much concerned with generating a product but with contributions to the exchange of ideas. While harmony is indispensable in the workplace, dissent and challenge to peers' and superiors' ideas is highly valued in academia. Arguably, some positions may demand fidelity to the administration, but faculty members and students need to express opposition without been threatened in their posts or marks. Thus, the 'chilling effect', insignificant in the workplace, strikes heavily on the university population.

Because of the important difference between both systems, the implementation of the concept of "hostile environment" in academia attacks its very purposes. First, circumstances of "hostile environment" in the workplace require not only offensive words but also actionable and persistent conduct able to affect "terms and conditions" of the labour contract. The US Supreme Court did not generally pay much attention to discriminatory words by themselves, but it took pains to determine whether they were persistent enough to alter contractual conditions. Given that in universities there are no "terms and conditions", for consistently applying this rationale, academia should define, for example, that development of learning ability is "the contractual terms" and forbid expression which impair that ability. In addition, given that "hostile environment" is created by a persistent conduct hates speech codes which target a single or unintentional remark cannot be justified according to this rationale. Secondly, "hostile environment" entails the idea of hostility which prevents the job done rather than the protection of individual sensibilities. The concern is that persistent discriminatory remarks impair workers' efficiency rather than to raise workers' self-esteem.

A third difficulty when applying this rationale to campus hate code is that in the workplace the owners and managers' expressions are targeted.⁴²⁸ Universities could only

⁴²⁸ This analysis benefits from the conscious discussion on the public employee's speech and the University as employer of R. Hieves, supra, note 244 at 307

restrict expressions of chair-persons or administrators but not students or professors' expressions on this basis. Emberly explains⁴²⁹ that those who see universities as enterprises believe that some university employee's discriminative speech may be restricted in order to prevent economic and reputation damages to the institution. In a public forum, academics are perceived as speaking in behalf of their institution or at least representing its leading philosophy. Individuals in *intramuros* and from society may think that speakers are able to enforce their statements either by enacting regulations or by applying sanctions to those, who under their authority, disagree with them. Outrageous expressions by high profile professors generate a crisis. Although any campus member may damage the interest of an institution, the higher the position, the more the remarks will affect the relation between the university and the extramural world. Administrators must invest energy and money to ease the wrath of alumni, private donors, government officials and community institutions. The frictions are evident in fund-raising, community help, alumni support and government assistance.

As Hieves argues, another type of economic or reputation damage may prompt officials to curb chairs' speech: there is a link between chairpersons' ideas and the economic and reputational success of their departments, which in turn affects the image of the whole university. Chairpersons play an important role in designing the policies of their department. This results in a greater student enrolment, a bigger budget, and more prominent scholars willing to join the department. On the contrary, if their ideas have no appeal, few, or no prominent academics will be willing to teach there, few students, or none will enrol in courses and finally the department will have such a low reputation that it will probably be closed.

Then, officials may consider themselves entitled to restrict speech to prevent those damages. A *prima facie*, academia seems entitled to restrict that type of speech. Nonetheless, the commitment of university to protect ideas should overwhelm other concerns

⁴²⁹ Supra, note 46, chap 6

and lead its administrators to hire professors from different backgrounds. Nevertheless, officials and trustees are expected to hold and defend the values held by the whole community,⁴³⁰ and their own speech, by showing a clear effort to expand higher education to minorities, should overcome any harm which may flow from a professor's reckless remark. Furthermore, academia, aimed at advancing knowledge, may properly require a strict adherence to professional standards from its members when expressing opinions, rather than an appeal to the fuzzy conceptualisation of equating workplace and campus.

Rationales to justify university codes - equality, truth, harms, or hostile environment- do not resist a minute analysis when contrasted with the facts they are meant to deal with. They do not outweigh the protective rationales. Those rationales are not even outweighed by educational or pragmatically reasons.

Educational reasons should prevent academia authorities from curbing discriminative statements or even hate speech. Female students profit from being exposed to discriminatory views, narrative and analytical, and learn how to discredit those ideas. Prejudicial statements help in understanding others' viewpoints and responding to them. Only after reading Rousseau and Aquinas can the evolution of sexist ideas be completely understood. Another example; when Hispanic students are labelled as lazy, that is a good opportunity to respond explaining the incidence of the absence of both parents at home, poverty, poor feeding, lack of encouragement in their childhood and tuberculosis or other illness on their low performance. D'Souza gives an interesting example of why minority students should be ready to hear discriminatory arguments to be better positioned in future discussions. The three- fifths clause is argued as a proof of racism among those who, like Lincoln, fought against slavery: "The South wanted to count Blacks as whole persons, in order to increase its political power. The North wanted Blacks to count for zero, not because Northerners denied the humanity of Blacks, but in order to preserve and strengthen the antislavery majority in Congress. Thus, reducing the percentage value of Blacks was the antislavery

⁴³⁰ See Rawls, *supra*, note 52 at 215 and ss

position; paradoxically, Black interest would have been best served had they counted for nothing."⁴³¹ This debate, doubtless painful, is needed to understand that social problems have several solutions which might well conflict with assumed values. Though the study of the wording and effects of slavery or misogynist laws, and the remainder of stereotypes may be painful, part of the goal of higher education is to develop skills to overcome the pain an idea inflicts and to argue against it. Without that possibility of debate on troubling issues, at some point, they will be simply be no longer teachable in a critical way.⁴³²

New civil rights leaders asking for enactment of anti-hate codes differ sharply from Gwen Thomas who claims that African Americans gain self-respect when she or he is prepared to engage in even offensive debate. She says: "We have to teach [our young people] how to deal with adversarial situation...They have to learn how to survive with offensive speech they find wounding and hurtful."⁴³³ The more restrictions on it, the more difficult is the negotiation of the inclusion of minorities.⁴³⁴

Furthermore, strategic reasons may lead scholars to restrain themselves from asking censorship opponents' discourse to enhance their own status in society. The victory of the battle for equality won through coercion does not last for a long time. Political power, sooner or later, is reverted and persecution is then more bitter, as history teaches. If a censored minority acquired power, in turn it would enforce the same gag against its previous censors. Alberr DeSilver, at that time director of the ACLU said: "we do not think that it is ever good policy for an organisation interested in human liberty to invoke repressive measures against any of its antagonists [creating] a precedent against itself."⁴³⁵ Moreover, obscenity laws have been used to ban gay and lesbian museum exhibitions and publications,

⁴³¹ D'Souza, *supra*, note 272 at 219

⁴³² A. Bloom, *supra*, note 145 at 98

⁴³³ ACLU, Board of Directors, Minutes, October 13, 1990, as quoted by Walker, *supra*, note 186 at 141

⁴³⁴ See Nat Hentoff arguing on threat to free speech from all portions of the political spectrum in *supra*, note 327

⁴³⁵ As quoted by Walker, *supra*, note 186, at 23

to forbid diffusion of contraceptives methods.⁴³⁶ Ironically anti-hate norms enacted to curb expressions against Blacks, Natives or women have been applied against the same minorities those rules are meant to protect: their targets were anti-American demonstrators, French-Canadian nationalists, pro-Zionist books, and Black students. Black leaders were prosecuted under the British Race Relations Act of 1965. In 1974, the resolutions adopted by the British National Union of Students, aimed at stopping fascist organisations and anti-Semitic propaganda, were used to prevent Zionist speech as a form of racist speech.⁴³⁷ At Michigan University there are more than twenty cases of White men charging Blacks with racial speech.⁴³⁸ The protection of the "vulnerable" as a justification of the criminalization of hatred is dangerous both for civil liberties and for disadvantaged minorities. Ghettos were always constructed to "protect the vulnerable groups" with the known consequences.

Given that neither philosophical or pragmatically reasons justify a curtailment of speech in academia, what may be deduced from the eager defence of the rationales justifying academia codes is the ideology behind them. Aimed at improving the functioning of a free and democratic academia, those who give priority to equality follow a group-rights based strategy and try to impose their position through totalitarian methods. As an example of totalitarian ideology and methodology in codes, it states: "(III.b) All doctrine and practices of racial superiority are scientifically false, morally reprehensible and socially destructive, are contrary to the policies of this institution, and are unacceptable." Similarly, Queen's University Principal's Advisory Committee on Race Relations declares that " (2. Definitions.b.) an explicit anti-racist position as the only morally and educationally acceptable position for a just and humane institution." Like many American universities, Queen's declares that one of the objectives is to modify the admission policies in order "(2.c.4) To increase accessibility to Queen's for racial minority students who may not meet

⁴³⁶ See *Legal Fight Goes on as Disputed Exhibit Ends*, N.Y. Times, May 26, 1990, and *A fine for selling obscene music* N.Y. Times Dec 13, 1990

⁴³⁷ Conf. Sandra Coliver, ed, *Striking the Balance*,. Introduction (Essex, U. K.: Univ. of Essex, 1989)

⁴³⁸ D'Souza, *supra*, note 272

traditional admissions criteria." As discussed in Part I, while from a individual-right strategy totalitarian methods cannot be consistently used to impose a value (individual always chooses his ends), group-goals strategies may follow a path from liberalism towards totalitarian postures and, at the same time, be coherent with their ideology (society represented by elites chooses ultimate ends of individuals).

Jane Tompkins showed the nexus between moral and cultural relativism and political activism: "When discourse is responsible for reality and not merely a reflection of it, then whose discourse prevails makes all the difference."⁴³⁹ Hence, it is easy to understand why factions in the hate speech debate so eagerly ask for silencing others' discourse. Hans-Georg Gadamer⁴⁴⁰ argued that every textual interpretation is situational; the text is created, or better 'recreated', by the cultural perspective of the reader, and has no existence in and of itself. He maintains that language has become the very first object of inquiry because reality depends upon it. Structuralism, deconstructionalism and semiotics maintain that literature is empty of meaning; language is the tool of oppression.⁴⁴¹ The "linguistic turn" have gone beyond the literature field, and has greatly impacted on political scientists.

According to leading scholars of this movement, words have their own world. Stanley Fish states: "The usual and common sense assumption is that objects are prior and therefore at once constrain and judge the description made of them. Language is said to be subordinate to and in the service of the world of fact. But in recent years, language has been promoted to a constitutive role and declared by theorists of various stripes (poststructuralists, postmodernists, feminists, Bakhtinians, New Historicists, lacanians, among others) to bring facts into being rather than simply reporting them."⁴⁴² Texts, even constitutional ones, must

⁴³⁹ Jane Tompkins "An Introduction to Reader Response Criticism" in *Reader Response Criticism: From Formalism to Poststructuralism*, Jane Tompkins, ed., (Baltimore: John Hopkins Univ. Press, 1980), "Introduction" at xxv

⁴⁴⁰ Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer & D. Marshall, 2nd ed., (New York: Crossroad, 1989)

⁴⁴¹ Bunge, *supra*, note 1, chap 9-10

⁴⁴² S. Fish, *supra*, note 301 at 56

be read with the understanding that they have both served to support a political agenda, and have prevented other ways of knowing. Thus, all legal texts have to be re-interpreted from the victim's perspective. Fish goes on to argue: "free speech principles don't exist except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny."⁴³ In his views, "free speech" is really generated by an ideological constraint that their supporters put forward.

Scholars, who see speech as a tool to implement a partisan vision, logically ask for their own interpretation to be put forward and opposing speech be curbed. They overlook the very nature of freedom of expression, and aimed at getting power for minorities they intend to use speech as an ideological weapon. First, authors congenial to their postulates have a paramount place in their dissertations. The authority of Marx, Foucault, Lacan, Derrida, and Malcom X is never challenged like the Classics are. Secondly, expositors of the victim's jurisprudence are reluctant to teach authors who are opposed to their positions.⁴⁴ Minorities programs and feminism courses discard as biased materials that fall outside their familiar literature. Thus, a dogmatism is always present in the "Studies" programs.⁴⁵ Minority and feminists professors frequently appeal to an unquestionable authority. Their writings, lectures and seminars are impregnated with phrases such as: "Most feminists think;" or "widely agreed among feminists," or "the ideas of Black people." Those phrases have a definite purpose: to foster an ideology. An example of what is said are the words of a group of feminist scholars acting as *amicus curiae*: "We believe as feminist scholars that we have a responsibility not to allow our scholarship to be used against the interest of women

⁴³ *Ibid.*, at 112

⁴⁴ Tompkins, *supra*, note 439. She says: If "discourse is responsible for reality and not merely a reflection of it, then whose discourse prevails makes all the difference." at "Introduction", xxv

⁴⁵ As D'Souza explains intimidation of non-feminists or non-pro-minorities in the classroom is routine; counter-arguments ignored. Those who challenge this intellectual framework are labelled as oppressors and unable to understand crimes perpetrated against historical victims. Authentic debate or intellectual diversity is rarely accomplished because the risk is always run that someone may be deeply offended by viewpoints that fall outside the conceptions of the victim's sensibilities.

struggling for equity in our society."⁴⁴⁶

Dogmatism has a perfect place in churches, but academics are to distrust indoctrination. Women's Studies professors teach feminism as a religious conviction, it is not open to question. Likewise, some minority professors see equality as a super-value that cannot be contested. The very essence of totalitarianism is that some truth can be imposed upon those who do, or do not believe in it. Having started their own process of development with calls for tolerance of different lifestyles, the new scholarship has shifted to require that oppositors be identified and excluded.

From this philosophical perspective, freedom of expression loses its traditional value. It is no longer seen as a tool for self-development or for enhancing political debate or for discovering the truth. Rather it is the tool for advancing a substantive agenda. Fish follows: "Free speech, in short, is not an independent value but a political prize..[it] is never a value in and of itself but it always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."⁴⁴⁷ Within this epistemology, restriction is the constituent element of freedom of expression; it always implies the exclusion of other's speech. Despite Fish's assertions, what gives meaning to freedom of expression is not its nature of political prize to foster an assumed set of values, but its nature of meeting an anthropologic and social need inherent to each human. An anthropologic consideration rather than an ethical pruritus is against the belief that some expressions may be allowed to foster a determined agenda, while others may be restricted to overcome the opposite agenda. As largely argued based on Spinoza's findings, given the basic human feature of language and communication, the state cannot avoid ideas being expressed, just as it cannot prevent someone from believing something. Despite strong censorship, at some point, inner convictions surface. In a futile effort to prevent its

⁴⁴⁶ *EEOC v Sears, Roebuck and Company*, Decision of U.S. District Court for Northern Illinois, Daily Labour Report, Feb 2, 1986, at D1-D-43. See Karen Winkler, "Two scholars conflict in Sears sex bias case sets off war in Women's History" (1986) *Chronicle of Higher Education* at A-8

⁴⁴⁷ S. Fish, *supra*, note 301 at 102-04

emergence, group surveillance is put in place.

Part I developed the idea that the departure from the basic principles of Enlightenment has led to the establishment of Platonian guardians. The willingness to impose an idea started with the design of courses, the choice of case-books, and the organisation of the "Studies" programs. After a process of indoctrination, the ideology was moulded into anti-hate codes. It does not come as a surprise that the next step was to enforce group surveillance; Harvard, Stanford, York,⁴⁴⁸ Queen's and Toronto Universities codes or reports, among many others, suggest appointing students whose function is to act as racism and sexism monitors and point out discriminatory remarks. For example, there are "designated race relations tutors" which were established by the Dean of minority affairs in Harvard University, Hilda Hernandez-Gravelle. "Their job is to "monitor the racial atmosphere", report "violations of community", and "raise consciousness" of the students. The presence of local sensitivity monitors had upset some students who compared them to the neighbourhood spies in totalitarian countries, but Hernandez-Gravelle dismissed the analogy as absurd."⁴⁴⁹ Far from being an absurdity, that comparison (student surveillance-neighbourhood spy) should be a red alert. Academia members are receiving the message that, on campus, where the duty to truth is beyond ideological positions, they are on-the-spot because of their expressions.

The current philosophy started from specific premises: all values and rules are arbitrary and unjust because they are imposed for the benefit of White *bourgeoisie* males; academia does not stand for specific sets of values; rights are the privilege of a few, that can be put aside for the achievement of groups' claims; intimidation and official prosecution rule the debate; the end justifies the means; power, rather than knowledge and academic accuracy, is the end; multiracial commitment excludes the same rules from being applied to every person regardless of sex, colour or ethnicity; minorities' members are not important individually, but only in reference to their group; the concern for diversity is

⁴⁴⁸ See Reports annexed

⁴⁴⁹ Quoted by D'Souza, *supra*, note 272 at 217

reduced to keeping group-quotas. None of those premises are really compatible with a democratic milieu. Thus, it does not come as a surprise that the goals behind them are intended to be imposed by non-democratic methods. If reality is shaped by speech, censorship of inegalitarian discourse is the best to put in place the ultimate solution to equality issues.

Egalitarians, in their commitment to equality, ironically forget democratic values and propose inegalitarian solutions. Academia, like democratic society, does not have untouchable values. Equality is a laudable value, that should be fostered but not at the expenses of the freedom which better protects it. Students should be empowered to fight for equality rather than prevented even from hearing it challenged. To forbid argumentative lines in order to set up an institutional orthodoxy, which cannot be questioned except at the risk of discipline, affects academic excellence. While universities subjected to strong orthodoxy, such as Spanish ones until the last century, did not produce scientific discoveries, those institutions willing to discuss every new idea were rewarded with great theories and discoveries which flowed from their cloisters.

It can be argued that the equality orthodoxy is worthy of being enforced to avoid serious harm to a paramount value. It seems that Lincoln would not have compromised the principle of equality to avoid the present and clear danger of a bloody civil war.⁴⁵⁰ In early XXth century North American society and academia chose to run the risk of endangering the peace; then, unorthodox individuals, who supported free love and the abandonment of traditional bonds of marriage, defended the theory of evolution, defended women's equality and the dissemination of birth control methods, could get their point across.⁴⁵¹

d. SPEECH CODES IN LIGHT OF THE AMERICAN AND CANADIAN SUPREME COURTS' JURISPRUDENCE

The main question from a constitutional point of view is: can universities enact rules that impair a fundamental right? This question poses two aspects: a descriptive and a

⁴⁵⁰ A. Bloom, *supra*, note 145 at 28

⁴⁵¹ See Blanchard, *supra*, note 108 at 20

normative one. Furthermore, the answer may adopt different modes whether the codes are enacted by American or Canadian academies. Given a challenge by them, while the former has to deal with the constitutional difficulties of the well-set jurisprudence of First Amendment, the latter must find the challenged policy justifiable in "a free and democratic society." The following analysis focuses on wording and rationale underlying the enacted hate speech codes in light of recent jurisprudence of the Supreme Courts of Canada and the US, in order to envisage how they would decide if those codes were under judicial review.

i. THE AMERICAN EXPERIENCE

(a) SOCIAL BACKGROUND

The legislative approach and judicial review largely depend on the social, cultural and legal tradition of each society. Such a tradition evolves around the emphasis the society places either on individual or on community values⁴⁵². In turn, this tradition influences the wording of the supreme law and affects the way constitutional adjudication is rendered. Those facts, joined to historical reasons explains why the US and Canada -- two liberal and democratic neighbour countries strongly committed to the protection of individual rights -- have taken different paths in the way they protect freedom of expression. In rendering judicial review on free speech issues, the Supreme Courts of both countries have to decide whether to adopt a restrictive or broad protective approach, a "balancing" or a "categorical" principle, whether to pay a high or low degree of deference to the other branches of the government. The Canadian and the American Courts have chosen differently in each option.⁴⁵³

The Human Rights Watch maintains that: "The United States stands virtually alone in having no valid statutes penalising expression that is offensive or insulting on such grounds as race, religion or ethnicity."⁴⁵⁴ The anti-censorship movement Article 19 has held

⁴⁵² The following analysis on the American background largely benefits from the works of Walkers, Blanchard and the authors quoted in this section.

⁴⁵³ Emberly, *supra*, note 46 at

⁴⁵⁴ Human Rights Watch, "Hate Speech and Freedom of Expression: A Human Rights Watch Policy Paper" (New York: Human Rights Watch, 1992) at 7

that on freedom of expression issues there are only two positions: the United States and the rest of the world.⁴⁵⁵ While the US has developed a unique policy which protects speech in the broadest way, all other countries have considered it necessary to incorporate in their policies art. 19 and 29 of the Universal Declaration of Human Rights. Art, 29 disposes: "In the exercise of his rights and freedoms [included that of expression] everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of *morality, public order and the general welfare* in a democratic society." (emphasis added) A clash between freedom of expression and other right is solved by favouring the general welfare. Article 19, same convention states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Most of the domestic laws have been influenced by article 20 of the International Covenant of Civil and Political Rights (I.C.C.P.) which states: "Everyone shall have the right to freedom of thought, conscience and religion" (art 18) this legal body adds in its paragraph 3 "[the right of expression] carries with it special duties and responsibilities." The I.C.C.P. goes on to establish that freedom of expression may be limited: "(a) For respect of the rights and reputations of others; (b) For the protection of national security or of public order [*ordre public*], or of public health or morals." Art. 20, paragraph 2 states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The International Convention on the Elimination of All Forms of Racial Discrimination (C.E.R.D.), adopted in 1966, calls for banning any organisation aimed at disseminating religious or racial propaganda. Its Art 4 para.4 allows the state to prosecute its members.

⁴⁵⁵ Kevin Boyle, "Overview of a Dilemma: Censorship versus Racism", in Sandra Coliver, ed., *supra*, note 437 at 14

Those international instruments on human rights represent a revolution in international law; for the first time, they intervene in internal affairs of the signatory countries. They are meant to be applied in States with diverse regimes and cultures; then, some of its dispositions such as art. 19 (3) of the Political Covenant, state vague standards. Meron explains that those standards are defined: "broadly, which lend themselves to an almost unlimited abuse by states, bent on repressing the freedom of expression."⁴⁵⁶ On these bases the US had not ratified the Convention. In 1992, the US ratified both the I.C.C.P.R and the I.C.E.R.D., though with the reservation that the US was not bound by any provision which may violate the First Amendment.⁴⁵⁷

Aimed at protection of individual rights, while the rest of the international community has opted for a communal or group-rights based strategy, America has preferred an emphasis on an individual-rights based strategy.⁴⁵⁸ In the '50s, the international community drafted international human rights covenants clearly underlined by rationales used to justify group libel laws: individual rights must be protected but some limits -especially on offensive racial and religious utterances - are necessary to preserve the general welfare in a democracy. Within this trend, after WWII most Canadians believed it proper to restrict hateful expressions in a democratic society (Cohen Committee) while at that time, proposals for federal legislation to restrict hate speech had disappeared from the US political landscape.

The American political choice of an individual-rights based strategy to protect speech was neither spontaneous, nor born without controversy. The US history evidences severe peaks of intolerance. "The urge to censor runs deep in American souls, and the newer the medium of communication or the more pervasive its perceived influence, the more Americans want to

⁴⁵⁶ T. Meron, "Political and Related Rights" in T. Meron, ed., *Human Rights in International Law: Legal and Political Issues* (Oxford: Clarendon Press, 1984) at 115

⁴⁵⁷ See Sandra Coliver, Annexe B: "Reservation and Declarations Concerning Racist Speech and Advocacy of Racial and Religious Hatred", *supra*, note 437 at 394

⁴⁵⁸ Mary Ann Glendon, *Rights Talk*, (New York: Free Press, 1991) at 159

curb its dangerous tendencies."⁴⁵⁹ In a slow process, several factors worked together, so that the protection of speech, even in its most offensive fashion, became a unique national policy. As professor Walkers analyses, among those factors can be pointed out special social and religious facts, the wording of the First Amendment, the ACLU's arguments against libel laws, the Supreme Court's rulings which incorporated the ACLU's arguments, the feedback given by the Court's rulings to minorities' leaders, and the strong influence that the Court's decisions had on public opinion.

The American legal culture pays less attention to legislature and executive actions than the Canadian one. The US Constitution does not allow government to justify any infraction on individual rights because of any societal interests the challenged legislation may protect. Thus, in order to uphold legislation which favours society's ends, the US Court's jurisprudence has evolved around the idea that the constitution implicitly calls for a balance of rights and interests. It has chosen both a contextual and a categorizational analysis in the review of speech cases. That means, judges are to elucidate whether the case before them falls within a protected category. Given that any governmental action encroaching on a fundamental right is impermissible, the government has a heavy burden to prove a compelling reason and to show that the policy has infringed upon the right in the narrowest way. In the area of freedom of expression, the categorical approach determines what speech is. Some categories such as political speech are always protected; others fall within the category of lower value speech; in that case the standards for judicial review are more flexible. The boundary has been moved during the last seven decades to protect more and more speech. Nowadays, not only all speech related to political affairs, but even commercial communication, music, art, emotional expressions, symbolic acts and some defamatory words amount to protected speech. Obscenity, very controversially, remains unprotected.⁴⁶⁰

⁴⁵⁹ Blanchard, *supra*, note 108 at 138

⁴⁶⁰ Greenawalt, *supra*, note 344 at 15

It was been argued that the wording of the First Amendment has determined the US Supreme Court judicial review. That is partly true. However, the wording could be interpreted in other fashion. Despite the strong "Congress shall make no law..." the Court has extended, as subject of the clause, to any officer of the federal government. In the '60s "speech" was extended to symbolic expressions⁴⁶¹ in labour parade cases. In the turn of the century, the Supreme Court found very few cases where freedom of expression deserved protection. In *Schenck v United States*, the Justices, imbued with the ideology of the society from where they emerged, upheld a repressive policy permeated by super-patriotism. The doctrine of the protective role of First Amendment started during the early '20s with rulings on disturbing speech issues. The social question of how to integrate immigrants has always been a major concern in American society. Chronologically, there have been three solutions: Americanism, melting pot and cultural pluralism.⁴⁶² One of the main goals of the National Security League was to promote Americanism during the pre-war and wartime WWI.⁴⁶³ Its members fought eagerly to stop diversity and intended to fulfil their purposes by curbing the speech of pro-immigrants. The educational system was their primary target. The nation's children, especially those from an immigrant background, had to be indoctrinated in the American values. Educators were accused of not teaching a proper understanding of national values.⁴⁶⁴ Columbia University set up the first program in a private institution to investigate faculties' loyalty during WWI.

Another social factor contributed to the shift from a restrictive approach towards a more expansive one. While bigotry is commonly expressed through the majority's hate speech towards a minority, in America there was a special case: one minority vilified others.

⁴⁶¹ Blanchard, *supra* note 108, at 289. See her complete discussion and analysis of court cases regarding this theme.

⁴⁶² This last concept was introduced by Horace Kallen in his book *Culture and Democracy in the United States*, 1924 (meaning all cultures have made a worthy contribution to the development of the American society.) See Walker, *supra*, note 186 at 34

⁴⁶³ Blanchard, *supra*, note 108, chap. 3

⁴⁶⁴ Robert Ward, "The Origin and Activities of the National Security League, 1914-1919" (1960) 47 *Mississippi Valley Historical Review* 51 at 65

Jehovah's Witnesses, a small and highly aggressive religious group, was the source of hate speech against other religious minorities, specially the Catholic Church. As a result, the Witnesses raised the wrath of the society at large, and many of them were taken before the courts charged under libel laws. They became hatemongers and the objects of hate. During the substantiation of one of their cases, *Chaplinski*, the theory of fighting words was born. In another Witnesses case, the Court established regulations of time, place and manner to be applied "without unfair discrimination."⁴⁶⁵ In *Cantwell*,⁴⁶⁶ another case involving Jehovah's Witnesses, the Court decided that "false statement" and "vilification" were protected speech. The Court's message was that all members of any group belong to the American society and cannot be discriminated against. Those rulings of the Supreme Court played a significant role in the shift from the "Americanism" towards the "melting pot". The Court reaffirmed the principle of tolerance. All members of society were entitled to express their convictions, to associate and to worship. By guaranteeing each citizen's right, "the rights of a group" are protected too.

Another Witnesses case on flag salute meant a new turn to the hate speech issue. In *Gobitis* a federal district court stated: "[compel] to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions [was] a totalitarian idea." The Supreme Court reversed the decision and condemned the Witness. A violent reaction against the Witnesses followed that decision. Incidents of mobs, castration and assaults in several degrees sent the message that some group in American society did not deserve legal protection. Later on, three Justices, Hugo Black, William O. Douglas and Frank Murphy publicly regretted their decision in the case. Those terrible antecedents prompted the Court to rule, in the next flag case⁴⁶⁷, (at a time when the result of the WWII was uncertain) that not even in wartime is government constitutionally entitled to encroach on the right of conscience. The Court returned to the principle that every American belongs to the American

⁴⁶⁵ *Cox v New Hampshire*, (1941) 315 US 569

⁴⁶⁶ *Cantwell v. Connecticut*, (1940) 310 US 296

⁴⁶⁷ *West Virginia State Board of Education v. Bernadette*, (1943) 319 US 624

society, and have the same protection of their rights.

A third factor carried great weight in the American decision to adopt an individual-rights based strategy on speech: ACLU's arguments which connect with the raise and fall of libel laws. During the '20s two forces strongly argued for censorship policies. Victims of racist and religious hate speech, who had acquired some share of politic power, such as Jews, Catholics, and Blacks, concerted their efforts to defend themselves and asked for the curtailment of their enemies' speech. Similarly, conservative Americanists sought to limit some political discourse relying on the powerful argument of Karl Loewenstein. He pointed out⁴⁶⁸ that in order to strengthen itself, a militant democracy must compromise on its own principles in order to overcome anti-democratic enemies. The idea of a militant democracy underlies the legislation of most countries which dealt with political groups threatening constitutional government in the post war.⁴⁶⁹ Several years later, David Riesman continued the same line of argument: totalitarian groups take advantage of the system of freedom of democracy. To preserve itself, a democratic society has the duty to forbid their expressions. In justifying censorship, Reisman wrote that in the same manner law can be a weapon against democracy, as the German experience showed, it can be a weapon against Fascism in the hands of democracy.⁴⁷⁰ The defamatory feature of a speech which amounts to restriction should be determined by the context of where it is uttered, assessing the power of the medium conveying it, etc.

Both Americanists and victims of bigotry found strong opposition to their pro-censorship endeavours in the American Civil Liberties Union (ACLU). In fighting for the broad protection of individual rights, especially speech, it launched the arguments which in the '30s prompted the Supreme Court to become the prime defender of individual rights.⁴⁷¹

⁴⁶⁸ Karl Loewenstein, "Militant Democracy and Fundamental Rights, I" (1937) 31 *American Political Science Review* 417 at 432

⁴⁶⁹ See Rainer Hoffman, "Incitement to National and Racial Hatred: The legal situation in Germany," in Sandra Coliver, ed., *supra*, note 437 at 159-70

⁴⁷⁰ D. Reisman, *supra*, note 229 at 1318

⁴⁷¹ Two decisions are considered by scholars as the first cases affirming free speech rights: *Stromberg v California*, (1931) 283 US 359, *Near v Minnesota*,

ACLU's arguments were structured in two cases: one involving a young Communist woman (*Stromberg v. California*), the another an anti-Semitic, anti-black, anti-labour newspaper (*Near v. Minnesota*). Years later in *State v Klapprott*⁴⁷² the Court made direct reference to the ACLU's arguments as an "excellent brief."

ACLU's arguments and their acceptance by the Supreme Court, prevented Reisman and Loewentein's perspective from gaining adherents in the US and shared in the American unique fashion to resolution of hate speech issues. The loss of force of the pro-censorship movement was clear in the rejection of H.R.2328, a bill (1943-44) which entitled the Post Master General to bar from mails any material containing "defamatory and false statements" based on "race or religion."⁴⁷³ The American Jewish Congress stood alone to support the bill. NAACP, like the most civil rights movements (American Jewish Committee, the National Council of Jewish Women and the American Council of Christian Churches) stepped aside. The minorities leaders were, at that point in time, fully convinced that an absolute protection of speech, including hate speech, was the best way to advance their causes.

Despite the fact that several group libel laws were enacted in the US, there were no prosecutions.⁴⁷⁴ The principal American libel laws enacted in Illinois 1917, New Jersey 1934, Massachusetts 1943, were rarely enforced. A similar fate was verified in an European survey in 1992; few prosecutions have taken place in the countries where libel laws were enacted, and many times those dispositions were used to prosecute dissenters of small groups rather than members of powerful ones.⁴⁷⁵ Two cases involving group libel laws were landmark in the evolution of the free speech doctrine. The first one, *Terminiello*⁴⁷⁶, involved the condemnation of an anti-Semitic and Fascist organiser Catholic priest. The majority of the

(1931) 283 US 697. See Murphy Paul, *World War I and the Origin of Civil Liberties in the United States* (New York; Norton, 1979); Walker, *supra*, note 186

⁴⁷² *State v Klapprott*, (1941) 22 A.2d 877

⁴⁷³ Walker, *supra*, note 186 at 83

⁴⁷⁴ Walker, *supra*, note 186 at 82; Tedford, Thomas L., *Freedom of Speech in the United States* (New York: Random House, 1985) chap 5

⁴⁷⁵ Sandra Coliver, "Hate Speech: Do they work?" in S. Coliver, *supra*, note 437, at 363-74

⁴⁷⁶ *Terminiello v. Chicago* (1949) 337 US 1

Court reversed his conviction on the understanding that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." During the following three decades these reasons empowered civil rights movements, anti-War supporters and pro-life and anti-abortion advocates to use provocative utterances without fear of punishment.

One year after the Court struck down a libel law in *Terminiello*, it upheld other libel law in the *Beauharnais* case⁴⁷⁷. The Court ruled that group libel fell outside constitutional protection because society was entitled to defend itself against the social evil of racism. It upheld the conviction of the president of the White Circle League of America, an organisation aimed at fighting racial integration. The majority of the Court ruled constitutional the Illinois law which extended the traditional law of criminal libel from individuals to "designated collectivises." Amazingly, the advocates of suppression were reluctant to use the victory in *Beauharnais*. In 1950, this case gave them all what they could ask for. However, W. Douglas J., dissenting, warned that the decision of the majority of the Supreme Court endangered every minority's goals. "Today a White man stands convicted for protesting in unseemly language against our decisions invalidating restrictive [housing] covenants...tomorrow a Negro will be hauled before a court for denouncing lynch law in heated terms."⁴⁷⁸

There were two moments in the development of the freedom of expression doctrine: *Beauharnais* and *Chaplinski*. They were turning points when the constitutional protection of speech could have changed direction. Although the wording of the First Amendment is sharp, it is not determinant; it could be interpreted in another fashion. Both rulings relied on a group-rights based strategy to restrict speech: "social interest in order and morality." The Court made available the principles of fighting words, as defined in *Chaplinski*, and group libel laws, under the *Beauharnais* ruling, to fight hate speech, either before courts

⁴⁷⁷ *Beauharnais v. Illinois* (1952) 343 US 250

⁴⁷⁸ *Ibid.*, at 286-7

or authorities. Americans chose not to use them. Although vilified groups leaders had the alternative given by *Chaplinski* and *Beauharnais* to ask for curbs on their enemies' hate speech, they understood that the minorities' and powerless' interests were best served through the strongest protection of speech. As Judge Pound said: "Although the defendant may be the worst of the men... the rights of the best of the men are secure only as the rights of the vilest and most abhorrent are protected."⁴⁷⁹

Despite the fact that it was unknown which path the Supreme Court would follow, whether *Terminiello* or *Beauharnais*, the advice of Douglas J. was heard by minority leaders. The initial support given in *Beauharnais* to group libel laws was soon followed by a rejection. Gordon Allport in 1954 wrote that "reflecting the consensus among psychologists and social scientists who studied intolerance, the weight of opinion seems against group libel legislation".⁴⁸⁰ Even the strongest supporter of group libel laws, the American Jewish Congress, in 1960, adopted a resolution repudiating them as a remedy to fight discrimination.⁴⁸¹ The acceptance of the ACLU's arguments by the Court led Civil Rights movements leaders to come to the conclusion that the protection of individual rights was the best strategy to achieve groups' goals. The protection of one's own offensive tactics to achieve their goals requires the protection of other's expressions. Hate speech, it was concluded, is the price to be paid for a strong democracy. That trend was confirmed by successive cases in the following years. Departing from fighting words theory, in 1971, Justice Harlan held⁴⁸² that the emotional element of speech was central to its message.

The last stage in the Court's development towards the protection of even hate speech was the *Skokie* case. In 1977, when a small Nazi organisation wanted to march in Skokie, the Illinois group libel law had been struck down for 15 years. The Seventh Circuit Court of

⁴⁷⁹ Cuthbert Pound J. dissenting in *People v. Gitlow*, 234 N.Y. 132, 158, 136 N.E. 317, 327.; (1925) 268 US 652, hereinafter, *Gitlow*

⁴⁸⁰ Gordon Allport, *The Nature of Prejudice* (Reading: Mass: Addison-Wesley, 1954) at 469

⁴⁸¹ Biennial Conference Resolution, 1960; American Jewish Congress, Commission on Law and Social Action, *Cases and Materials*, American Jewish Congress Library

⁴⁸² *Cohen v. California* (1971) 403 US 15

Appeals ruled that censorship based on the content of the idea conveyed was forbidden by the First Amendment. Given that it was a peaceful demonstration, the *Beauharnais* precedent was not applicable. Addressing the claim that the parade would inflict a "physic trauma" on survivors of the Holocaust, the Appeal Court ruled that sensitivities do not overcome the exercise of a fundamental right. Despite their litigation victory, the group did not demonstrate in Skokie.

In the long process towards the adoption of individual-rights based strategies, most authors agree that the moral authority of the US Supreme Court played an outstanding role. Displaying a very libertarian perspective, it surged as a policy-maker. Conflictive social and political issues settled by the Supreme Court became a significant characteristic of American political life.⁴⁸³ Its rulings raised wide public debate and promises from presidential candidates to appoint more conservative Justices. Archimbald Cox said that hardly any controversial political issue was not taken before the Court for resolution.⁴⁸⁴ The advancement of civil rights claims was linked to claims of individuals demanding free speech and assembly, equal protection before the law and due process. Any curtailment of an individual rights was perceived by the Supreme Court as a threat for minorities rather than as a remedy for racial injustice. In deciding Jehovah's Witnesses cases, the Court conveyed the message that the American defence of individual rights was a safeguard to prevent foreign totalitarianism from surging in America.⁴⁸⁵ Terms such as "national security", "public order", "public health or morals" were rejected because of their vagueness and flavour of totalitarianism. "The trend in American constitutional law has been toward narrowing the permissible application of each of these rationales."⁴⁸⁶ The Court's powerful argument influenced all sectors of society who became convinced that the protection of individuals

⁴⁸³ See William Lasser, *The limits of Judicial Power: The Supreme Court in American Politics* (Chapel Hill: University of North Carolina Press, 1988)

⁴⁸⁴ Archimbald Cox, *The Warren Court* (Cambridge: Harvard University Press, 1968) at 1

⁴⁸⁵ Walker, *supra*, note 186 at 93 and ss

⁴⁸⁶ *Ibid.*

rights is a special feature of American constitutionalism able to avoid the European experience. Censorship lost its advocates.

(b) AMERICAN UNIVERSITIES CODES AND CONSTITUTIONAL BASES TO LIMIT SPEECH IN LIGHT OF THE US SUPREME COURT'S JURISPRUDENCE

At the same time that American society had made the protection of hate speech a matter of national policy, its universities were elaborating theories to justify the most successful struggle in American history to limit expressions: the enactment of campus speech codes. As discussed above, among the several factors conjugated to its ideological success, its set of advocates is the most outstanding. I will now proceed to discuss the probable response by courts to this new peak of censorship intentions. The analysis of the US speech codes in light of the US Supreme Court's most recent decisions on ordinances targeting flag desecration and cross burning is possible because ordinances and codes limit expressions on similar bases. First, they both intend to meet a direct impact of speech upon a certain class of listeners (preventing them from being emotionally injured, victimised, insulted, treated unequally). Secondly, they aim to stop speech which may lead society to develop demeaning attitudes about or assaults on a certain class of individuals.

In analysing university codes, one must bear in mind the importance granted to freedom of expression in the American jurisprudence. Statements from dissenting Justices were landmarks towards that outcome. Said Holmes J. in *Gitlow*: "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."⁴⁸⁷ Years later in *Schwimmer* he maintained: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought, not free thought for those who agree with us, but freedom for the thought that we hate."⁴⁸⁸ The words of other dissident judge, Douglas J., became immovable doctrine

⁴⁸⁷ Holmes J. in *Gitlow*, *supra.*, note 447 at 673

⁴⁸⁸ *US v. Schwimmer*, (1929) 279 U.S. 644 at 654-55 dissenting

during the subsequent decades: "I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics or any other field."⁴⁸⁹ The Court's protection of rights from an individual-rights based strategy was clearly stated: "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion."⁴⁹⁰

A second aspect to be considered in analysing the judicial review of codes is the Court's approach to equality. It does not seem ready to regard the protection of minorities as the crux of the 14th Amendment. It will unlikely set up a hierarchy of constitutional norms in which equality prevails indisputably over others. Recently, the Court explicitly ruled that affirmative action programs developed on racial grounds are likely to "promote notions of racial inferiority and lead to politics of racial hostility."⁴⁹¹

Thirdly, in light of *University of Pennsylvania*⁴⁹², the Court will unlikely consent to adding ideas to academic freedom beyond the core of ideas which constitute the doctrine of First Amendment on expression. Says David Rabban: "There are legitimate First Amendment reasons for protecting the political speech of public employees generally. Indeed, the Supreme Court has done so while rejecting the "right/privilege" distinction popularised by Holmes. But as the Supreme Court has recognised, it is the free speech clause, not the special first amendment right of academic freedom, that provides the constitutional basis for this protection."⁴⁹³ In this case, the University argued that it should not have to reveal confidential peer review materials gathered in its tenure process to the EEOC, which was

⁴⁸⁹ *Roth v. United States* (1957) 354, US 476

⁴⁹⁰ See *First Nat'l Bank v. Bellotti*, (1978) 435 US 765 at 777 n12

⁴⁹¹ *City of Richmond v. J.A. Croson Co.*, (1989) 488 US 469 at 493-94, categorisations on disadvantages White and disadvantage minority individuals.

⁴⁹² *University of Pennsylvania v. EEOC* (1990) 493 US 182; 110 S.Ct. 577

⁴⁹³ David Rabban, "A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment" (1990) *Law & Contemp. Probs.* 227, as quoted by M. Olivas, *supra* note 298, at 1846

investigating possible racial and sexual discrimination. The Court finds "that any interference with "the asserted academic freedom right of choosing who will teach" was speculative and remote, and that the link between the asserted right and the burden on it caused by disclosure was too attenuated."⁴⁹⁴ The Court recognises a wide academic freedom and a great autonomy to university officials concerning whom they will choose as professor or to whom they will give tenure. It does not necessarily follow that chosen professors will be regarded in future cases as having a greater degree of academic freedom in the classroom or in addressing public audiences. After *Jeffries II*, it is not clear whether the Court will rule that a professor's academic freedom outweighs the economic harm his speech may cause to his institution. According to Michael Olivas this trend started to emerge in *Connick v Myers* which accords greater weight to public employers' needs for worker "discipline... and ...harmony." Thus, an employee's right to dissent has been restricted. This author makes his point that the Court upholds professional autonomy interests against government restrictions "... it protects the interests of college institutions against state legislatures, not individual faculty members in their professional autonomy capacity."⁴⁹⁵

Given the current jurisprudence of the Court, any challenge to hate speech codes will be decided in light of well-set First Amendment doctrine, whose core is the neutral-content concept. Said the Court: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content... There is an 'equality of status in the field of ideas,' and government must afford all points of view and equal opportunity to be heard."⁴⁹⁶ Any restriction on speech because of its content is *prima facie* unconstitutional. Moreover, the Court stated that both the emotional and the cognitive content of speech falls under constitutional protection: "words are often chosen as much for their emotive as their cognitive force. We cannot

⁴⁹⁴ Richard Hiever, *supra*, note 244 at 302, footnote 89

⁴⁹⁵ Olivas, *supra*, note 310 at 1839,40

⁴⁹⁶ *Police Dept. v. Mosley*, 408 US 92 at 95-96, 92 S.Ct. 2286 (1972); *UMW Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) at 1173-74

sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or not regard for that emotive function which, practically speaking, may often be the more important element of the overall message..."⁴⁹⁷ "[T]he mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of 'conventions of decency'".⁴⁹⁸ In 1989, the Court, in a vigorous defence of offensive speech said: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable... Texas claims that its interest in preventing breaches of the peace justifies Johnson's convictions for flag-desecration. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning. The State's position, therefore, amounts to a claim that an audience that takes serious offence at a particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis."⁴⁹⁹ The Court required more than offensiveness to encroach upon freedom of expression.

The neutral-content doctrine cannot be put aside in the university context, the Court stated: "the precedents of this Court leave no room for the view that ... First Amendment protections should apply with less force on college campuses than in the community at large ... The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁵⁰⁰ Those precedents drove the Appeal Court in *Doe v. Michigan* to strike down the code which enforced non neutral-content restrictions.

The doctrine of neutral-content received a new momentum in 1992, when an ordinance of the City of St. Paul was struck down because "it prohibit[ed] otherwise permissible speech solely on the basis of the subjects the speech addresses. [This] is precisely what the First

⁴⁹⁷ *Cohen v. California*, (1971) 403 US 15, 91 S.Ct.1780 at 26

⁴⁹⁸ *Papish v. Board of Curators of University of Missouri*, (1973) 410 US 667, at 670. 93 S.Ct. 1197

⁴⁹⁹ *Texas v. Johnson*, (1989) 491 US 397, 414, at 407-8

⁵⁰⁰ *Healy v. James*, (1971) 408 US 169, 92 S.Ct. 1780

Amendment forbids."⁵⁰¹ In *R.A.V.* Justice Scalia writing for the majority dismissed the overbroad argument and focused on the inadmissibility of content-based restrictions on speech as immovable doctrine of the Court. Thus, supporters of hate speech codes, with the purpose to further the principles enshrined in the 14th Amendment, have put forth a number of constitutional arguments to justify a departure from neutral-content doctrine. They include: fighting words doctrine applied by analogy to vilified groups, imminent harm, secondary effects doctrine, and an application by analogy of Title VII of the Civil Rights Act of 1964 to university environment. Although already analysed, they deserve a closer look from a constitutional perspective.

(a) FIGHTING WORDS:

Clearly the US Supreme Court has declared that the First Amendment is not absolute; fighting words, defamation and obscenity may be banned.⁵⁰² In *Chaplinski*, the Court set up the doctrine of fighting words doctrine as an exception to the content-neutral doctrine and upheld the proscription of speech "of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.... [fighting words are] ... those [words] ... which by their very utterance inflict injury or tend to incite an immediate breach of peace."⁵⁰³ Fighting words provoke an immediate injury and violent reaction.⁵⁰⁴ Justice Murphy, writing for the majority, did not clarify what is meant by harm. It was interpreted as including the physical injuries resulting from the fight likely to follow the insult. It applies only to face-to-face communications; thus, utterances through electronic media, printed matter or films are excluded from this categorisation. The fighting words theory had great implications in

⁵⁰¹ *R.A.V. v. City of St. Paul, Minn.*, (1992) 112 S.Ct. 2538 at 2550

⁵⁰² For a complete analysis of the "fighting words" theory see Weinstein, *supra*, note 397, Greenawalt, *supra*, note 344

⁵⁰³ *Chaplinski v. New Hampshire*, (1942) 315 US 568 at 572

⁵⁰⁴ For a more comprehensive discussion on the meaning of fighting words, see M. Matsuda, *supra* note 353; Greenawalt, *supra*, note 344; C. Mackinnon, *supra*, note 347; K. Mahoney "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (1992) 55 *Law and Contemporary Problems* 77

religious and racial hate speech. Within the phrase " by their very utterance, inflict injury" may be included almost any opinion. In 1942, it was open to the jurisprudence of the Court to take one direction: to insist on fighting words and restrict a great deal of speech or the opposite one: freedom to speak one's own mind even with offensive remarks. The second option was followed. Today code supporters, trying to give new life to the doctrine, equate the direct harm inflicted to a specific person by an insult to the direct harm done by hate speech to a target group. Hate speech injures and leads to a breach of peace just as fighting words do. Though it is uttered in a non-face-to-face fashion, its offensiveness is likely to cause a physical reaction. Hence, administrators must restrict it even if *prima facie* it is covered by neutral-content doctrine.

During the 50 years since fighting words doctrine was announced, no conviction has been sustained under that rationale. Before 1992, it was doubted whether fighting words was an in force doctrine. In *RAV v City S Paul*, Scalia J. clarified its extent of application arguing that this category of speech does not completely lack constitutional protection "so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."⁵⁰⁵ Fighting words retain some value as a means to convey ideas. This exception to protection, does not entitle authority to distinguish on the basis of content of different types of fighting words. The St. Paul ordinance singled out certain discourses and viewpoints while giving full protection to others. It is that distinction -- the selection of proscribed words⁵⁰⁶ -- that led the Supreme Court to deem the St. Paul ordinance unconstitutional. Similarly, hate speech codes do not proscribe all fighting words (all words that are threatening, hurting, or psychologically injuring). They do regulate fighting words according to their content, singling out only racial and sexist utterances. The Court will likely strike down not only codes which forbid "dominant class" racist speech and allow historically victim's hate speech, but also codes which afford full protection to

⁵⁰⁵ Matsuda, *ibid.*, at 2538

⁵⁰⁶ *Ibid.*

all hurting expressions except those with racial or gender motives.

Scalia distinguishes between the "speech" and "non-speech" elements of communication.⁵⁰⁷ Said the Court: "Non-verbal expressive activity [may] be banned because of the action it entails, but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fire could be punishable, whereas burning a flag in violation of an ordinance against dishonouring the flag is not."⁵⁰⁸ Sometimes a conduct needs necessarily to take an expressive dimension to be achieved. Thus, a statute, which targets conduct even in its expressive dimension, must be upheld. The Court exemplifies: all those acts that import treason, including the words used to betray, are properly forbidden. Thus, a statute directed to conduct may incidentally restrict a content-based subcategory of speech.

Another issue addressed by the Court refers to alternative measures available to the City of St. Paul to prevent flag burning. Those acts could be forbidden on the basis that they increase the danger of fire in the community. All fires must be forbidden, including the burning of wood, flags, etc. Regulation of time, place and manner of expressions because of low value of those expressions, are allowed as long as there is no reference to the content of the regulated speech. Interestingly, the Court left the door half open to future regulations on content-specificity, in saying: "the existence of adequate content-neutral alternative undercuts significantly any defence of such a statute."⁵⁰⁹ A *contrario sensus*, given the absence of alternative measures a restrictive statute may be upheld.

Scalia's arguments are consistent with precedents. In *Gooding v. Wilson*, the Court expressly denied application of fighting words doctrine to words which are insulting or offensive to listeners. The prohibition of offensive words would sweep too broadly⁵¹⁰. Years later, in 1992, the Court ruled that fighting words which do not "incite lawless actions

⁵⁰⁷ For a more comprehensive analysis of Scalia J.'s distinction between "speech" and "non-speech" see J. M. Craddock, *supra*, note 315 at 1060-63

⁵⁰⁸ In *RAV* citing *Texas v. Johnson*, (1989) 491 U.S. 397 at 406-07

⁵⁰⁹ *Ibid.* at 2549-50

⁵¹⁰ *Gooding v. Wilson* (1972) 405 U.S. 518 at 527

must be regarded as protected speech."⁵¹¹ In 1978, it stated: "Speech does not lose its protected character... simply because it may embarrass others or coerce them into action."⁵¹² Thus, codes which limit speech that "victimises," or "stigmatises" a specific class of individuals would unlikely be upheld. The Court makes clear that even if a speech victimises, it does not lose its quality of speech. In the Court's opinion, the harm flows from the idea conveyed. Regardless of how dangerous a viewpoint may be, the majority ruled in *RAV* that there is no realistic possibility that the suppression of idea be allowed.⁵¹³ The Court makes explicit that fighting words surrender to the neutral content doctrine. The majority rejected the challenged ordinance because, it banned fighting words in a selective way. Similarly, universities codes only forbid those fighting words that injure one class of individuals on the basis of their specific features. That would deem them unconstitutional.

Codes which selectively regulate fighting words cannot be justified on this doctrine except if its drafters are able to demonstrate that those expressions represent a "clear and present danger", or they have "secondary effects" on an audience.

(i) *Schenck* gave birth to the "clear and present danger" doctrine. In *Dennis*, it was dramatically restricted. Years later in *Brandenburg*, the Court gave some guidance on how to apply the principles of fighting words doctrine to cases of imminent danger of violence.⁵¹⁴ The harm must be imminently clear, intentionally and objectively incited. Hatred advocacy must reach the point of direct incitement to criminal action to lose protection. A clear incitement to riot or violence against minority members meets the strict requirements of *Brandenburg*; in such a case, undoubtedly, speech can be restricted. The prohibition should

⁵¹¹ *NAACP v. Claiborne Hardware Co.*, (1982) 458 U.S. 886 at 928

⁵¹² *FCC Pacifica Foundation*, (1978) 438 U.S. 726, 745-46 See Blanchard, *supra* note 189 at 384 and ss.

⁵¹³ *R.A.V.* at 2544

⁵¹⁴ *Brandenburg v. Ohio* (1969) 395 US 44 "*Brandenburg* happened to be a Klan case, it was most relevant for Communists, affording them a degree of protection they had never gained in the many cases involving their members. Small irony given that Communist party had been a vigorous advocate of restricting the rights of the Klan and other racists groups." Walker, *supra*, note 189 at 115

be enforced when the anticipated harm "is so imminent that it may befall before there is opportunity for full discussion."⁵¹⁵

The Court in *RAV* ruled that the government is entitled to ban fighting words selectively only if the restricted ones can be perceived as equivalent to an immediate and personal physical threat.⁵¹⁶ If hatemongers' speech amounts to an imminent physical assault against Blacks, women, gays or Jews, its prohibition is justifiable. The aim is not to prevent the spread of an idea conveyed through means of hatred, but to avoid violence-producing speech. What is at stake is not the ideological message but the mode in which it is conveyed. To be upheld, restrictions based on imminent danger should be stated in such a way that not only racist speech intended and likely to produce violence but also any other violence-producing speech should be prohibited. Bombing as an expression of political opposition is forbidden not because it conveys ideas contrary to a government but because of the measurable and quantifiable harm of a blast. On the contrary, hate speech codes do not target personal and immediate threat. Speech which vilifies on religious, sexist or racist bases, and conveyed in a polite way, does not amount to an imminent reaction. Similarly, in the St. Paul ordinance, the codes single out words intended to "communicate messages of racial, gender or religious intolerance"⁵¹⁷ and "stigmatises" or "victimises" a determined group of individuals. To pass the fighting words constitutional test, a statute must limit all violence-producing fighting words rather than only some of them.⁵¹⁸ In that sense, the University of California, Berkeley seems to give compliance to the *RAV* decision. It states: "Fighting words are those personally abusive epithets, which when directly addressed to an ordinary person are, in the context used, and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words, include, but are not limited to, those terms widely recognised to be

⁵¹⁵ *Whitney v. California*, (1972) 274 US 357 at 377

⁵¹⁶ *R.A.V. supra*, note 469 at 2548-49

⁵¹⁷ *Ibid.* at 2549

⁵¹⁸ See J. Craddock, *supra*, note 315 at 1068

derogatory references to race, ethnicity, religion, sex, sexual orientation, disability and other personal characteristics..."⁵¹⁹

(ii) Secondary effects doctrine is another exception that supporters of hate-codes may use to justify the departure from neutral-content in university codes. The secondary effects doctrine was elaborated in *City of Renton v. Playtime Theaters, Inc.* It allows selective restrictions on a **subcategory** of speech which has harmful consequences to a particular group⁵²⁰ as consistent with the First Amendment. Secondary effects must derive from the conduct in its expressive dimension without reference to the idea that speech expresses. Long ago, the Court ruled that government should be able to prohibit speech on the basis of its likelihood to change society's attitudes. However, the Court highlighted that this prohibition would be upheld only if the anticipated harm "is so imminent that it may befall before there is opportunity for full discussion."⁵²¹ The harms, being either changes of attitude in society at large, or from the supposed withdrawal of minorities or possible physical aggression to minority members, are not so imminent harm that they cannot be discussed. Thus, curtailment of expression on those bases would be unconstitutional. St. Paul argued that its ordinance was purported to protect citizens from the secondary effects (victimisation of vulnerable citizens) of speech. Similarly, code supporters argue that hate speech on campus leads minorities to withdraw from society or prompts society to act against them; thus codes may validly depart from strict neutral-content principles.

Once again in *RAV*, the Court emphasised that regulations should not be based on content⁵²². The Court declared that the *Renton* doctrine could not be applied to uphold the St. Paul ordinance because "the emotive impact of speech on its audience is not a 'secondary effect.'" Furthermore, it stated in *Boos v. Barry*⁵²³ that "psychological damage" of

⁵¹⁹ University Guide Student Conduct, 51.00. Annexed

⁵²⁰ *City of Renton v. Playtime Theatres, Inc.* (1986) 475 US 41 hereinafter *Renton* at 48

⁵²¹ *Whitney v. California*, *supra* 377; Conf. Weinstein, *supra*, note 381 at 183

⁵²² *Reston*, *supra*, note 520 at 48-9

⁵²³ *Boos v. Barry* (1988) 485 US 312

individuals exposed to harming speech was not considered a secondary effect justifying of speech restrictions allowed in Renton. Speech codes do not pass the test of the secondary effects doctrine because they restrict expressions which arouse fear, anger, feelings of low self-esteem on the basis of gender, race, etc.

(b) TITLE VII OF THE CIVIL RIGHT ACT of 1964.

A departure from the neutral-content principle may be also justified on Title VII of the Civil Rights Act of 1964, which recognises the right of employees to a work environment free of hostility. Government, as employer, may forbid racially and sexually abusive language without proscribing all other types of offensive speech. Title VII proscribes discrimination "with respect to his compensation, terms, conditions, or privileges of employment because of ... [an] individual's race, colour, religion, sex, or national origin."⁵²⁴ Title VII bans discrimination on racial or sexual harassment conveyed verbally by an employer, while those expressions of hatred uttered by co-workers may be constitutionally protected. The harm some speech causes in the employees' ability to work with efficiency justifies a departure from the neutrality principle.⁵²⁵ While in early decisions the Court was aimed to strictly prevent a hostile environment in the workplace, later on it expanded the concept to "reasonable supposition of disruption." In *Pickering v. Board of Education*,⁵²⁶ the Court struck down the dismissal of a public school teacher, who made critical remarks in a public speech. The Court understood that the teacher's speech did not cause harm in his ability to teach or to relate properly to his superiors; therefore, his freedom of speech outweighed any minimal disturbance in the workplace. Later, in 1983, in *Connick v. Myers*⁵²⁷ the Court struck the balance in favour of the government, as employer, because the worker's speech had interfered with the proper functioning of the workplace. The decision analysed the nature of the worker's speech, his functions in the agency and the

⁵²⁴ 42 U.S.C. # 2000e (1990)

⁵²⁵ For a conscious discussion on the public employee speech and the First Amendment see R. Hieves, *supra*, note 244 at 305

⁵²⁶ *Supra*, note 427

⁵²⁷ *Supra*, note 427.

function of the agency itself. "Interference with workplace functioning" was the keyword in deciding whether to disallow the punishment imposed by the government employer on an employee's speech. Five years later, the Court made it clear that the higher a government official is positioned the lesser degree of freedom of speech he or she has. Said the Court: "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal."⁵²⁸ Recently, in *Walters*, the Court stated "[T]hough a private person is perfectly free to uninhibitedly and robustly criticise a state governor's legislative program, we never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing."⁵²⁹ In this case dealing with employee's speech which is able to impair the efficiency in the workplace, O'Connors J. developed a new trend in free speech: a "reasonable prediction of disruption" evaluated by a government employer will suffice to demonstrate harm to the workplace.⁵³⁰ The Court departed from the effective harm approach to a reasonable-predictable-harm one. Prior to *Walters* courts required that some harm to workplace deriving from employee's speech should be proved by the government employer. After *Walters* it seems to be established that employer's "reasonable prediction" of harm to the workplace will suffice to restrict bizarre messages.

Given that classroom and workplace speech are both non-public forum, code supporters apply this rationale by analogy to campus context. This task is arduous for two reasons. First, as discussed above, a university does not resemble a workplace. Secondly, Title VII dispositions apply to employers; therefore, its principles would be a valid rationale to ban administrators' but not professors' and students' speech. Nevertheless, a Title VII

⁵²⁸ *Supra*, note 427; 483 US at 390-1; 107 S.Ct. at 2900

⁵²⁹ *Walters v. Churchill*, *supra*, note 235 at 1887

⁵³⁰ *Ibid.* at 1887

rationale may have some chance in light of *Jeffries II*.⁵³¹ This interesting case both exemplifies what has been argued as a rationale to restrict state-person's expressions in Part I, and suggests that the Court may be predisposed in future cases to restrict expressions uttered by state persons who may disturb the proper functioning of their institution.

Professor Leonard Jeffries, Jr. as chairman of the Black Studies Department at City College was invited to lecture at the Empire State Blacks Arts and Cultural Festival, Albany N.Y., on multicultural education in America public schools.⁵³² Throughout his address, he used demeaning and mocking expressions against Jews and Whites and direct epithets against a previous speaker, an official in the US Department of Education. He maintained that the synagogue of Amsterdam was the centre of the slaving trade for the Dutch. According to him, converted Jews, allied with Queen Isabel of Spain, developed the slave system against Africans and native Americans. He said: "So rich Jews and the Catholic Church had an alliance for hundreds of years, selling white folks from Central, Eastern and Southern Europe into slavery in the Arab world - the White slave trade, which is the precursor of enslavement later." He claimed the racial superiority of African people, "the sun people" who developed science and philosophy at the time when Whites, the "icy people" lived in caves.

Faculties of Black Studies Department gave the strongest support to professor Jeffries' speech on the understanding that his views were historically correct.⁵³³ While the City College Faculty Senate condemned his offensive address in the most emphatic terms, nevertheless, it was agreed that any attempt to discipline him would conflict with his

⁵³¹ *Harleston v. Jeffries*, (1994) 115 S.Ct. 502; *Jeffries* 828 F. Supp 1066 (S.D.N.Y.) 1993; *Jeffries I*, 21 F.3d 1238 (2d Cir. 1994); *Jeffries II*, 52 F.3d 9 (2d Cir. 1995)

⁵³² Leonard Jeffries. Address before the Empire State Black Arts and Cultural Festival (July 20, 1991) reprinted in *Newday*, Aug. 19, 1991 at 3. The speech was broadcaster by an Albany cable television station, NY-SCAN. All quotes are from the speech as cited by R. Hiever *supra*, note 244, who analyses extensively the incident and its constitutional effects.

⁵³³ *Ibid.*, at 286

academic freedom. In March 1992, the University Trustees, acting according to the City College President's recommendation, dismissed Jeffries as Chair of the Black Studies Department, although he kept his position as professor in the same Department. Consequently, Jeffries sued the President and the Trustees of City College on the grounds that his freedom of speech had been violated. He won the trial and the university appeal before the Second Circuit. The trial judge and the Appeal Court determined that his remarks though "hateful, poisonous and reprehensible" were constitutionally protected. The university took the case to the Supreme Court which vacated the Appeal Court decision and remanded the case to be reconsidered in light of *Waters v. Churchill*. In *Jeffries II*, the Appeal Court reversed its verdict relying in the jury's finding that though the speech had not caused harm in the university's operations, the authorities had acted on a "reasonable prediction of disruption" that would follow from Jeffries' remarks, if he would have continued in his position. Thus, the trend in the judicial review is twofold: 1) protecting academic freedom (Jeffries was not dismissed from his teaching position), 2) and paying special attention to both the harm to institution interests and to individuals' right not to be discriminated against by a state-person, (Jeffries was removal from his chair position). Despite this tendency to narrowing the protection of state-persons' speech applying Title VII, this rationale would fall short from taking away the constitutional protection from most expressions targeted for censoring codes. First, while Title VII apply only to employers, codes target both high-position members' speech and any campus members' speech. Secondly, even if codes targeted only high profile persons' hate speech, they should ban all high profile person's speech which cause a hostile environment not only those which negatively impact on a certain class of listeners; on the contrary, they would not pass the neutral-content doctrine.

Briefly, none of the exceptions proposed to the neutral-content protection has the viability to deprive most of expressions regulated by codes of the constitutional protection.

ii. THE CANADIAN EXPERIENCE

(a) SOCIAL BACKGROUND

Canada is a pluralistic and multicultural society, however its history displays a large legacy of racism and religious intolerance. The dispossession of the First Nations and the legal treatment as an "inferior race", slavery until 1833, segregation and discriminatory policies in Western Canada until 1930 against persons of Chinese and Japanese ancestry, segregated schools for "the coloured population," the bitter persecution of Doukhobors and other religious minorities, explicitly race-based exclusionary immigration policies until 1946, the refusal to accept Jewish refugees and internment of Japanese Canadians in the WWII period, -- all are scattered examples of a long history of hatred and discrimination.⁵³⁴ Hence, it does not come as a surprise that harassment and discrimination in facilities and services were for years part of daily life. At the turn of the century, the KKK was the major racist organisation which had set up a 'branch' in Canada.

In Canada, expressions of hatred are mainly conveyed by White supremacist organisations, essentially towards Jews. Canadian history does not display the struggle NAAPC, Communists or Witnesses had in the US. Moreover, often hate speech is plainly equated to anti-Semitic propaganda. Furthermore, Canadian minorities had not chosen the strategy of offensive speech to foster their goals. While American society and minority leaders sought to advance their goals by defending speech, Canadians eagerly defended libel group laws. Only well advocated ideas become policies. In Canada, censorship has had superb defenders.

Following the international trend, as expressed in the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *International Covenant on Civil and Political*

⁵³⁴ For an insightful discussion on this subject see W.S. Tarnopolsky et al., *Discrimination and the Law* (Toronto: Carswell, 1994) Chap. 1 The next discussion profits from the insights of E. Cotler, *supra*, note 362; and Emberly, *supra*, note 46

Rights⁵³⁵, Canadian society has chosen the group-rights based strategy to protect individual rights, and considered it necessary to restrict hate speech in order to achieve a peaceful multicultural society. "International law, then, as the Canadian Supreme Court determined in the post-Charter Canadian 'international jurisprudence'... plays a significant and variegated role in the juridical arsenal limiting racist speech ... since, racist hate propaganda has been defined by Canadian legislation - and Canadian courts - as "a discriminatory practice", and since the prohibition against racial discrimination may be regarded as a norm of customary international law; this international ... prohibition against racial hate speech is arguably part of Canadian law even in the absence of any transformation legislative act."⁵³⁶ Says McLachlin J.: "On the international approach, the objective of suppressing hatred appears to be sufficient to override freedom of expression. In the US, it is necessary to go much further and show clear and present danger before free speech can be overridden."⁵³⁷

Another factor to bear in mind in evaluating the hate speech phenomenon in Canada is that the Cohen Committee was functioning shortly after WWII, and the Charter was enacted after the ratification of international covenants on human rights which authorise severe restrictions on speech. The Canadian approach to hate speech issues mainly developed around the harms doctrine as espoused in the *Report of Special Committee on Hate Propaganda in Canada* (1966).⁵³⁸ It⁵³⁹ advises on the devastating effects of hate propaganda on society at large. In a very pessimistic conclusion, the drafters note that although thinkers in the XVIIIth and XIXth centuries assumed individuals were rational creatures able to distinguish truth from falsehood, "we cannot share this faith today in such a simple form". The report concludes that individuals can be convinced to believe "almost everything" when the adequate

⁵³⁵ Adopted by General Assembly Resolution 260 A (III), Dec. 9, 1948, General Assembly Resolution 2106 A, Dec 21, 1965, and General Assembly Resolution 2200 A(XXI), Dec. 16, 1966 respectively.

⁵³⁶ Cotler, *supra*, note 362 at 53; emphasis added

⁵³⁷ Keegstra, *supra*, note 111, McLachlin dissenting at 104

⁵³⁸ *Report of Special Committee on Hate Propaganda in Canada* (1966) at 211-215.

⁵³⁹ *Ibid.*, at 747-48

techniques of communication are used in the more opportune circumstances.⁵⁴⁰ A state acts irresponsibly when it ignores that citizenry under pressure and frustration is driven by hysterical appeals rather than by reason.

The ideology underlying the Report, which has influenced the debate on hate speech in society and in universities, deserves some remarks. First, the concept of person explained in the Report conflicts with the democratic conception that envisages persons as responsible and rational beings, rather than hysterical and emotional beings unable to manage conflictive situations. The underlying message in the Cohen Committee is that irrational beings, the society at large, need some enlighten minority able to keep calm and guide the rest of society along the only rational path. Secondly, the Cohen Committee equates reason with the right decision; "the right decision" is that chosen by those few able to distinguish truth from falsehood. The need of some individuals, namely those in power, guiding the thoughts of the whole society is recurrently stressed by the Supreme Court's majority in *Keegstra*: "The threat to self-dignity of target group members is thus matched by the possibility that prejudice messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society..."⁵⁴¹ Given that individuals are not intelligent enough, and unable to discern the consequences of their acts, their capacity of choice should be limited. They may think wrong, so it is better if someone thinks on their behalf. Thirdly, an important flaw in the Cohen Committee, and in courts' decisions relying on it, is to equate Hitler's propaganda with hate speech, neglecting both that Hitler was a state-person and hate speech includes more than Nazi speech.

The Canadian *Criminal Code*⁵⁴² criminalizes three different forms of promotion of hatred based on race, religion and ethnicity: advocacy of genocide, Section 318; public incitement

⁵⁴⁰ As quoted by Cotler, *supra*, note 362, at 20-64

⁵⁴¹ *Keegstra*, *supra*, note 111 at p.59, emphasis added

⁵⁴² *Criminal Code*, R.S.C. 1985, c. C-46, s.319 [previously R.S.C. 1970, c. C-34, s.281.2 (en. 1st Supp., c.11, s1)]

of hatred, Section 319(1); and group defamation, Section 319(2). Section 319(2) of the *Criminal Code* states: "Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of:

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction."

Section 319 (3) establishes the truth as a defence which the accused must prove. Similarly, proved that the promotion was an argument "upon a religious subject," or relevant to public interest, or, "in good faith, .. intended to point out, for the purposes of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada" the person shall not be convicted under s.319(2). Up to now, while the consistency between those dispositions and the principles of freedom of expression has not been under judicial review, the crime of wilfully promotion of hatred was challenged. The rulings and convictions on those cases constitute the jurisprudence of the Supreme Court on hate expressions.⁵⁴³

As a response to the increment of hate crimes, in June 1995, the *Criminal Code* was amended so that judges have to aggravate the conviction when it is proved that the crime was committed by racial, religious hatred or because of the ethnicity or sexual preference of the victim.⁵⁴⁴ The increase of violence from members of hate groups has prompted Toronto, Winnipeg and Ottawa police departments to organise special units to fight it.⁵⁴⁵

As part of one of the most comprehensive legal strategies to combat hate propaganda in the world, the Canadian governmental action to deal with hate speech and hate crimes is not reduced to criminal legislation, but it includes Federal and Provincial Human Rights Codes and administrative measures, namely, *Canada Post Corporation Act*, *Customs Tariff Act* and *Broadcasting Act*. Furthermore, several provinces, such as Manitoba and British Columbia

⁵⁴³ Cotler, *supra*, note 362 at 20-15

⁵⁴⁴ *Criminal Code*, R.S.C. 1985, C.c-46, as amended by S.C. 1995, c22

⁵⁴⁵ Cotler, *supra*, note 362 at 20-11

have enacted group libel laws. *Manitoba Defamation Act* provides: "(1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action."

Human Rights codes enacted during the 60s and 70s by provincial and territorial legislatures, and by Federal Parliament are remedial dispositions aimed at protecting against discrimination in services, accommodations and employment on the grounds of race, sex, sexual orientation, nationality, ethnicity, language, religion, citizenship, marital or family status, social status, disability, age and previous criminal conviction. Human Rights Codes have dispositions aimed at preventing the creation of a discriminatory environment, stopping several types of harassment and discriminatory notices. The *Ontario Human Rights Code* prohibits discrimination regarding any term and condition of employment on the grounds ut supra listed. The same code states: "(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance." *New Brunswick Human Rights Act*, Section 5(1), intends to prevent "poisoned environment" in the provision of educational services. All those pieces of legislation show how great a concern hate propaganda is for Canadian society. During the last decade, numerous cases on hate propaganda have been decided by lower courts under the federal and provincial human rights codes; among them, the *Harcus* case in Manitoba⁵⁴⁶, the *Liberty Net* case in British Columbia⁵⁴⁷, and the *Heritage Front* case in Ontario⁵⁴⁸ are the most

⁵⁴⁶ *League for Human Rights B'Nai Brith Can. (Midwest Region) v. Man Knights of the Ku Klux Klan* (1993), 18 C.H.R.R. D/406 (Can. Human Rights Tribunal.)

⁵⁴⁷ *Khaki v. CND Liberty Net* (1993) 22 C.H.R.R. D/347 (CND, Human Rights Tribunal)

⁵⁴⁸ *Canada (Human Rights Comm.) v. Heritage Front*, [1994] 1 F.C. 203 (T.D.); *Canada (Human Rights Comm.) v. Heritage Front* (1994), 78 F.T.R. 241 (T.D.)

resounding.

Despite the enactment of all those remedies (group libel laws and provincial Human Rights Codes), the increase of organisations and their membership is surprising. Moreover, while in the past decades those organisations were composed of middle aged males only, at the present, young individuals of both sexes are their active members. A report prepared by Julian Roberts, criminologist at the University of Ottawa, suggests that the number of hate crimes by year in Canada has risen to about 9,000.⁵⁴⁹

(b) CANADIAN UNIVERSITIES CODES AND CONSTITUTIONAL BASES TO LIMIT SPEECH IN LIGHT OF *KEEGSTRA*, *ANDREWS*, *ZUNDEL* and *ROSS* ⁵⁵⁰

The Canadian concern for the importance of community values in human life has impacted on the constitutional adjudication of free speech. Unlike the US, Canadian hate speech codes will hardly be challenged before the courts. Nevertheless, the recent decisions of the Supreme Court may give insight into the principles it would apply if such a situation were to arise. Its jurisprudence on hate speech was developed in rulings in the trilogy *Keegstra*, *Andrews* and *Taylor* which were decided during 1990. At that time, the Court was divided by 4-3 regarding the validity of S.319(2) of the CC and issues of expression under S.2(b) of the Charter. The *Zundel* case, decided in 1992 and the *Ross* case, decided in 1996, complete the list of *causes célèbres* whose adjudication by the Court constitutes its doctrine on limiting hate expressions under the Charter. In each of them, the Court circumscribed itself to two central matters: whether racial and religious hate expressions

⁵⁴⁹ Cotler, *supra*, note 362; W.Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper, Collins, 1994) at 7-19 argues that the hate movement has seriously increased. S. Scheinberg, "Canada: Right Wing Extremism in the Peaceable Kingdom" in B'nai Brith Canada, *The Extreme Right: International Peace and Security at Risk (Draft Report)* (Toronto: B'nai Brith Canada, 1994) argues that such an increment exists in the public perception.

⁵⁵⁰ *R. v. Andrews and Smith* [1990] 3 SCR 697, (1998), 28 O.A.C. 161, hereinafter *Andrews*; *Ross v. Mocton Board of School Trustees, District 15* [1993], 110 D.L.R. (4th) 241, hereinafter, *Ross*; *R.v. Zundel*, [1987], 31 C.C.C. (3d.) 97 (Ont. C.A.), *R. v. Zundel* (n2) (1990), 53 C.C.C. (3d) 161 (Ont.C.A.), *R.v.Zundel* [1992] 2S.C.R. 731, hereinafter, *Zundel*

are protected, and, if protected, how and to what extent limits on those expression may be reasonable justified in a free and democratic society. In all cases, the Court was divided by the same reasoning, and used, except in *Ross*, international human rights covenants as an interpretative source.

Before analysing those cases, it is proper to dive into the Canadian constitutional protection of fundamental rights. The Canadian Charter of Rights and Freedoms⁵⁵¹ is inspired both by an ideal of individual fulfilment and a strong commitment to foster identifiable groups' rights and multiculturalism. The Charter seeks to foster the conditions necessary for the development of multicultural life in a parliamentary society.⁵⁵² In exceptional cases, human and political rights can be overridden by the Legislative. The Canadian Constitution, contrary to the American, allows government to justify the overriding of the rights stated in s.2, ss 7 to 14 (legal rights) and s.15 (equality) as long as the law explicitly contains a declaration of override. Such a law cannot be overthrown. The government is not entitled to override rights stated in ss.3-5 (democratic rights) s.6 (mobility) and ss 16 to 23 (language rights) or s.28 (gender equality).⁵⁵³

Any other legislative abridgement of rights may be subjected to judicial review according to the standards of s.1. The Charter expressly defends fundamental rights yet simultaneously fosters the maximisation of the functioning of democratic government. Both paramount goals are likely to conflict and the constitution does not give clear guidelines to strike a balance. In interpreting the extension of this promotion, courts are explicitly required by s.1 to balance the protection of individual rights as the highest value in the legal order, against the protection of the competing individual rights that lead to the

⁵⁵¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *The Charter*].

⁵⁵² L. Eisenstat Weinrib, "Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*", (1991) 4 *McGill L.J.* 1448

⁵⁵³ See Hogg, *supra*, note 222 at 817. He calls the first "common rights" and the second "privileged rights." This distinction does not imply a hierarchy of rights to be applied in a given right-conflict.

promotion of majority values as expressed in Parliament's work. In other words, the Constitution requires the protection of fundamental rights simultaneously from goal-group based and individual-right based strategies. As argued, both type of strategies are deemed to clash. Thus, the core of the discussion about the protection of rights is not about which right will be given precedence, but from which one of the two constitutionally chosen strategies (individual-rights or group-goal) this preference will be given. In *Oakes* the Court affirmed its commitment to preserving guaranteed rights, but upholds limits on them if the government strongly proves that the exercise of those rights would be "inimical to the realisation of collective goals of fundamental importance."⁵⁵⁴

The Canadian balancing clause recognises, as antecedents, international conventions, such as: the I.C.C.P.R., and the European Convention of Human Rights. The Canadian Court expanded the scope of rights, knowing that S.1 easily allows it to impose limits on them. Its American peer, who cannot have recourse to an explicit balancing principle, has to rely on a "definitional balancing"⁵⁵⁵. Thus, it narrows the scope of the rights so that they may be accommodated to the policy intended to be upheld.⁵⁵⁶ In Canada, the Court defines the scope of a right independently of other rights and does not establish a hierarchy of rights. When two rights conflict in a challenged disposition, the Court appeals to justificatory principles of s.1 ⁵⁵⁷ The balancing principle, explicitly stated in the Constitution, suggests a strong deference of society towards legislative and executive wisdom. This idea is absent in the American system. That deference led the courts not to impose on the government more stringent standards of justification of encroachment upon rights. McLachlin J. in *RJR-MacDonald* stated that "greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state."⁵⁵⁸ The court must first decide

⁵⁵⁴ *R. v. Oakes*, *supra* at 103, 136. Hogg, *ibid.*, at 856

⁵⁵⁵ Hogg, *ibid.*, at 822

⁵⁵⁶ *Ibid.* #35.1. Conf. Greenawalt, *supra*, note 344 at chap 2

⁵⁵⁷ Hogg, *Ibid.*, at 819

⁵⁵⁸ *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3S.C.R. 199 at 331

whether the limit is prescribed "by law". Once this threshold is passed, the government must justify its actions under "pressing and substantial concern in a free and democratic society." In the *Oakes* test, the Supreme Court has ruled that, at continuation, the government must show that the law is rational connected with the objective, it impairs the freedom as narrowly as possible, and the effects are proportional to the objective. It must be highlighted that if a speech code were challenged it would obviously not pass the threshold, limits to speech in academia are not established "by law". Universities, administrative entities, are not entitled to encroach upon a right guaranteed by the Charter. Hence, the following discussion is to be applied to a hypothetical case of a law enacted to regulate speech on campus, as that proposal by the NDP in Ontario, discussed earlier.

Given the lack of constitutional guidelines, the Supreme Court has established that any interpretation leading the courts to determine whether limits placed upon protected rights meet the requirements of s. 1 must arise from the Constitution itself. The Court has developed an intricate interpretative network, and interlinked individual and collective values "distilled from the text of the Constitution" in order to establish consistency between the purposive approach of the challenged laws and the constitutional values.⁵⁵⁹ Courts have to evaluate several factors at once, among others: (i) the normative competition among individual and collective values; (ii) the normative requirement of s. 27 for multiculturalism interpretative principles; iii) the Canadian commitment to the tenets of liberalism present in the Charter and in the courts' background; (iv) the difficulties of elucidating the wording of the limitation clause and the values underlying freedom of expression. In that task, the Canadian judicial review is guided by several principles; one of them is the purposive approach to rights. The Supreme Court has explained that: "The purpose of the right or freedom in question [freedom of expression] is to be sought by

⁵⁵⁹ J. Magnet, *Constitutional Law of Canada, Cases, Notes and Materials*, 5th ed. (Cowansville, Quebec: Éditions Yvon Blais Inc., 1993) at 486.

reference to ...the meaning and purpose of the other specific rights and freedoms with which it is associated."⁵⁶⁰ Hogg holds that the purposive interpretation as an attempt to determine the purpose of each right, and then to interpret whether or not a behaviour is included in it. The judiciary is to evaluate which right will prevail in an specific institution taking into account the interests that the Charter embodies. In this process, the courts face two problems: the balancing principle enshrined in the wording of s. 1, and the wording of s.1 itself.

Another guiding principle is the balancing principle, which refers to weighing the normative values of the majority against the rights of individuals. The Charter states in s.1: "The Canadian Charter of Rights and Freedom guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The courts must calibrate the values of the majority as expressed in a government policy against the interests of individuals manifested in constitutional guarantees. Lorraine Eisenstat Weinrib says that s.1 has a dual function: "to guarantee the enumerated rights and freedoms and to provide the exclusive criteria for their limitation."⁵⁶¹ Maintains Brudner: "At first sight, the separation of the limitation section (section 1) from those guaranteeing rights and freedoms seems to invite a balancing of individualistic right-claims against collective goals and a definition of the scope of rights in terms of the general welfare... the Charter permits restrictions of the latter [individual rights] only to the extent necessary to achieve more beneficial results for others."⁵⁶² Many scholars agree that s.1 is a method through which society controls itself;

⁵⁶⁰ *R. v Big M. Drug Mart Ltd* [1985] D.L.R. 4th, 321 at 359-360, [1985] 1 S.C.R. 295 at 344. "In my view the analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom to the historical origins of the concepts enshrined and where applicable to the meaning and purpose of the rights and freedoms with which it is associated within the text of the Charter."

⁵⁶¹ L. Eisenstat Weinrib, "The Supreme Court of Canada and Section 1 of the Charter", (1988) 10 *Supreme Court L. Rev.* 469 at 493.

⁵⁶² Brudner, *supra*, note 200 at 479

only according to valid law can rights be restrained.⁵⁶³

Close related to the balancing principle is another principle guiding the judicial review, special deference to the legislature, which was made clear by Dickson, Chief Justice at that time, in *Keegstra*. He argued that a "powerful convincing legislative objective" of "utmost importance" was behind the prohibition of hate speech. Said Dickson J. for the majority: "Parliament has recognised the *substantial harm* that flows from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups."⁵⁶⁴ In *Zundel*, the dissenting minority argued that the Parliament's goal was to protect minorities within a framework of a multicultural society, against the harm false speech causes them. It addressed the issue of public interest in "preventing the wilful publication of statements known to be false which seriously injure the basic dignity, and thus the security and equality of others which sections 7 and 15 of the *Charter* strive to provide."⁵⁶⁵ In its deference to Legislature's work, the Court has chosen to strengthen the value-structure of lawmaking by giving another chance to the challenged legislation.⁵⁶⁶ The balancing principle entangled with the deference to Parliament has attracted remarkable criticism by those with a non-communitarian perspective. Section 1 jeopardises the legal order each time it "authorises the courts to do more than fine-tune the democratic functioning of the state."⁵⁶⁷

Within a utilitarian logic, the Legislature is entitled to maximise the aggregate welfare, and it is not possible to transfer this power to the courts. Eiseinstein Weinrib, adhering to a strict vision of democracy as a mere procedural system, argues that the

⁵⁶³ J. Magnet, *supra*, note 559, at 583-85. See against the balancing system: Henkin, "Infallibility under Law: Constitutional Balancing", (1978) 78 *Columbia L. Rev.* 1006.; Aleinikoff, "Constitutional Law in the Age of Balancing", 96 *Yale L.R.* 1004; R. Dworkin, *Taking Rights Seriously*, rev'd ed., (London: Duckworth & Co., 1987) chapter 7.

⁵⁶⁴ *Keegstra*, *supra*, note 111, at 750, emphasis added

⁵⁶⁵ *Zundel*, *supra*, note 550 at 820

⁵⁶⁶ *Ibid.*, at 2-7.

⁵⁶⁷ Weinrib, *Supra*. note 381

Supreme Court has become reluctant to strike down challenged laws, recognising that judges, although chosen by democratic process, remain beyond electoral influence, and are not as representative or qualified as Parliament to determine the common good.⁵⁶⁸ The Court seems driven by the idea that judicial review must be narrowly confined in order to interfere as little as possible with society's superordinate goals as stated in the legislative work. A divided Court has moved progressively towards a goal-group interpretation of statutes. This evolution is evident in the *R. v. Butler*⁵⁶⁹ and *Keegstra*, where the majority of the Court denied that rights are immune to the vicissitudes of political or social life.

To date, the trend in Canada, according to Hogg⁵⁷⁰, is that any individual right, as stated in s. 2, or legal right as stated in Ss. 7-14, or even equality as stated in s.15 will prevail insofar as it leads to the maximum social welfare: "the reasonable limits." Brudner maintains that even: "the equality guarantees of the Canadian Constitution, set out in section 15 of the Charter of Rights and Freedoms, differ from those of the American in that they are expressly subject to reasonable limits."⁵⁷¹ It is logical that any right may be limited because Canada has chosen to protect individual rights from a goal-group based strategy: given competing individual rights, the balance is struck in favour of that right which fosters better the society's present values. As discussed, that type of strategy is doomed to fail in protecting the inviolability of individual rights in the long term.

Canadian judicial review demands that courts elucidate the meaning of "free and democratic society." Those words may be interpreted as follows: either a) the welfare of the society at large has priority over individual rights, and any normative conflict among individual rights will be resolved in favour of that which better foster society's welfare; or b) in a "free and democratic society" the competition between rights have to be solved for the individual's own sake, even at the cost of the best social values. To this day, the

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *R. v. Butler*, (1992) 1 SCR 452 [hereinafter *Butler*].

⁵⁷⁰ Conf. Hogg, *supra*, note 222 at 817 regarding a hierarchy of human rights in Canada.

⁵⁷¹ Brudner, *supra*, note 200 at 470.

Canadian Supreme Court has chosen the first strategy. Despite the *Oakes* test, and its flexibilization after *Ross*, "reasonable limits" and "demonstrably justify" remain to be clearly elucidated.

Within this framework, by trying to strike a difficult balance between antagonistic normative elements, and by fluctuating between diametrically opposed strategies of justification of rights, judicial review has been erratic.⁵⁷² *Keegstra* and *Zundel* are an example of this duality. Section 2(b) guarantees freedom of expression to everyone: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." According to McLachlin J., since *Keegstra*, the Court has shifted gradually from previous decisions, which had emphasised autonomy of individuals, towards a more egalitarian assessment of rights. Before *Keegstra*, the Canadian Court evidenced a tendency "to protect speech even at the expense of other worthy competing values."⁵⁷³ This trend reversed, and now, equality values as enshrined in S.15 are given pre-eminence; the approach in speech cases is essentially communitarian rather than individualistic. The impact of speech on vilified groups led the Court to justify censorship on the bases of harm.

Besides the principles enumerated above, Canadian judicial review on a hypothetical challenge to a law enacting university codes will be directed by other guidelines which flow from the Court's jurisprudence as developed in the landmark cases: (1) the extensive interpretation of "expression," (2) the attachment to the harm-theories on expression, (3) the paramount value given to the multiculturalism and equality values, (4) and the contextual principle. In *R. v. Big M. Drug Mart Ltd.* the Court has linked free society with "equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s.15." Giving priority to s.15, the Court has posited the conflict on society's values-individuals rights, rather than individual right (freedom of expression)

⁵⁷² Hogg, *supra*, note 222 at 965. See R. Elliot, "The Supreme Court of Canada and Section 1. The Erosion of the Common Front", (1987) 12 *Queen's L.R.* 2177.

⁵⁷³ *Keegstra*, *supra*, note 111 at 86

v. individual right (equality).

(1) *Guideline: Extensive interpretation of "expression"*: In order to solve this tension, the Canadian Court did not adopt a categorical approach, as the American Court must do. It is not bound by any neutral-content theory, therefore, it does not appeal to the device that some categories of expressions are protected while others are not. There are no content-based restrictions on s. 2(b)⁵⁷⁴, even the messages with repugnant content are constitutionally protected. Any human activity intended to convey a message is expression, even hate speech, and protected by S.2. As long as the activity is communicative, and does not directly inflict violence, it is protected by s. 2(b).⁵⁷⁵ After *Keegstra* and *Butler*, it is clear that the Court favours an extensive interpretation of what is speech, even pornography, hate speech and threats⁵⁷⁶. In *Zundel*, the majority considered that false news is protected. As Greenawalt argues, the Canadian Court so easily extends the concept of what is meant by expression because the crucial issue in the Canadian constitutional adjudication is whether the government action can be justified under s.1. In *Keegstra*, Dickson J. refused to interpret hate speech as akin to violence, or an attack to equality values and Canada's international obligations. He framed the analysis within the principle "to weigh various contextual values and factors in s.1."⁵⁷⁷ In doing so, he invokes the *Oates* test guidelines to determine whether S.319(2) was a reasonable and demonstrably justifiable limitation under s.1. In Hogg's opinion, this is a dangerous approach: "if the rights are broad and the standard of justification under s.1 is low, then many more *Charter* challenges will come before the courts... and it would be difficult to devise meaningful constraints on the

⁵⁷⁴ Hogg, *supra*, note 222 at 974.

⁵⁷⁵ In the *Prostitution Reference*, [1990] 1 SCR 1123, the Court held that communicating for the purpose of prostitution, which was an offence under the Criminal Code, was protected expression under s. 2(b). The law was upheld under s. 1.

⁵⁷⁶ Threats of violence were an exception to this rule. In *RWDSU v. Dolphin Delivery Ltd.* the Court ruled that this category of speech falls outside constitutional protection, after *Keegstra* they are protected. *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 at 588

⁵⁷⁷ *Keegstra*, *supra*, note 111 at 734

process of judicial review."⁵⁷⁸ The expanded spectrum of guaranteed expressions and the relaxed rationale for justifying challenged laws allow judges to balance costs and benefits under s. 1 with a great measure of subjectivity. If an expression is considered as having low value, it is easier to justify limits and to relax standards of proportionality. In this battle for determining which right will prevail, freedom of expression has often been outweighed by competing values.⁵⁷⁹

(2) *Guideline: Attachment to harms theories:* In *Irwin Toy v. Quebec*, the Supreme Court, summarised three reasons -- from both individualistic and communitarian perspectives -- to protect freedom of expression: "1) seeking and attaining the truth is an inherently good activity; 2) participation in social and political decision-making is to be fostered and encouraged; and 3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated".⁵⁸⁰

Despite the *prima facie* protection granted to hate speech, further on in balancing the values of freedom of expression under S.1, the Court found that the harm which flows from hate speech is a pressing and substantial concern of society able to justify curbing some expressions. Its attachment to harm-based rationales to justify censorship likely will drive it to justify limits on expressions on campus, too. Dickson J. affirms: "[the] harmful effect of hate propaganda... is of pressing and substantial concern in its influence upon society at large."⁵⁸¹ The Court refers to personal and psychological harms and harms to the social body, either in its attitudes or in the democratic values. In the diffuse harm theory, as developed in *Keegstra* and *Butler*, restrictions are aimed at preventing the pain suffered by vilified groups and potential violence against them. The majority stated in *Keegstra*: "...Parliament's objective [to restrain hate propaganda]... is of the utmost

⁵⁷⁸ Hogg, *supra*, note 222 at 857.

⁵⁷⁹ See Mahoney, *supra*, note 265 at 253. She says: "When s. 15 is read with the multiculturalism section, it creates a formidable obstacle against those who would use the freedom of expression guarantee to promote hatred against identifiable groups."

⁵⁸⁰ *Irwin Toy*, *supra*, note 149 at 976.

⁵⁸¹ *Keegstra*, *supra*, note 111 at 37.

importance...and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada [Parliament] has decided to suppress the wilful promotion of hatred against identifiable groups".⁵⁸² The Court sees that extreme expressions cause a psychological harm, real and grave because they undermine the self-worth of members of target groups. In *Taylor*, Dickson revisits the harm theory: "As the harm flowing from hate propaganda works in opposition to these linchpin Charter principles, the importance of taking steps to limit its pernicious effects becomes manifest."⁵⁸³ It is worth remarking that the harm and the positive effects of censorship to create harmonious social relations, or to reverse changes in attitudes, or to prevent the harm that it is meant to prevent are always assumed. Furthermore, by arguing that something "is perceived...to be harmful" the Court upholds a presumption as a rationale for limiting a constitutional guarantee.

Though the three first landmark cases on hate propaganda offer several points of analysis, the arguments laid out in *R. v. Keegstra*, which were made more fully in the *Ross* decision, are likely to be used in a ruling on challenged codes. James Keegstra, a high school teacher in Excville, Alberta, and at one time, mayor of that city, was charged under S.319(2) of the *Criminal Code*. According to Dickson J., Chief Justice then and writing for the majority, stated: "Mr. Keegstra's teaching attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". According to him, Jews "created the Holocaust to gain sympathy" and are deceptive, secretive and inherently evil. His students were supposed to reproduce his teaching in class and on exams to avoid having their marks suffer."⁵⁸⁴ Tried and convicted by the lower court, Keegstra appealed to the Alberta Court of Appeal on the grounds that S.319(2) violates his freedom of expression as guaranteed in

⁵⁸² *Ibid.*, at 45

⁵⁸³ *Canadian Human Rights Commission v. Taylor* [1990], 75 D.L.R. (4th) 577 (S.C.C.)

⁵⁸⁴ *Keegstra*, *supra* note 111 at 714

S.2(b) of the *Charter* and imposes a reverse onus of proof upon the accused and violates the principle of presumption of innocence. The Alberta Court of Appeal overturned the conviction on the grounds that S.319(2) and (3) was not a reasonable limit, and the principle of presumption of innocence was violated by the norm. The Court found that there is not a necessary connection between the wilful promotion and the falseness of the message conveyed. The Crown appealed to the Supreme Court.

In 1996, the Supreme Court ruled on another hate propaganda connected to learning environment. Between 1977 and 1988 Mr. Ross, a school teacher, had expressed his anti-Semitic views in books, letters to newspapers and TV interviews. Unlike Keegstra, Ross did not express his ideas in the classroom. Given that the Attorney General of New Brunswick refused to prosecute him under S.319(2) of the CC, a Jewish parent filed a complain against the school board which employed Ross under s.15 of the New Brunswick *Human Rights Act*, before the New Brunswick Rights Commission. According to the complainant, the Board of Trustees of District 15 had failed to provide "services and facilities available to the public" without discriminating upon religion and ancestry. The claim was that the Board, in not removing Ross from the classroom, agreed with Ross' promotion of an anti-Semitic model and deprived Jewish and minority students from equal opportunity to education. The Commission recommended to the Minister of Labour that a Board of Inquiry investigate the matter. Only one member of the Board of Inquiry found that the School Board had discriminated against the complainant's children by allowing Ross to foster a "poisoned environment" which deprived them of the proper provision of educational services. The sole member of the Board of Inquiry ordered the New Brunswick Department of Education to modify the curriculum so that the Holocaust was studied, to suspend Ross without pay for 18 months, to appoint him, if possible, to a non-teaching position and to fire him if during that period he again published his ideological views. Ross took the Board order before the Court of Queen's Bench, which ruled the promotion of Holocaust studies and the prohibition of publishing new literature were made without jurisdiction. The Court found that the

impairment of Ross' freedom of religion and expression could not be justified under S.1 because of the lack of rational connection between it and the objective embodied in S.5 of the *Human Rights Act*. The Court upheld the relocation and the prohibition of teaching order. Ross appealed to the New Brunswick Court of Appeal, which in a divided decision ruled that his constitutional rights had been infringed. Given that his expressed views had not influenced his work in class, the majority argued that the goal pursued by the order -- to eliminate Ross' discriminative behaviour in classroom -- was not pressing enough to override Ross' fundamental rights. On the contrary, to uphold such order would mean facilitating future censorship of any politically unpopular opinion.⁵⁸⁵

Censorship of hate speech was mainly validated to prevent pernicious ideas which supposedly are able to change attitudes and influence behaviour. Along the same line of thought Sopinka J. had said in *Butler*: "While a direct link between obscenity and harm to society may be difficult ... to establish,... it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs."⁵⁸⁶ It is not explained why this assumption is "reasonable" given the fact that research shows exactly a different result: an absence of a link.⁵⁸⁷ Sopinka J. adds: "There is a sufficient rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which ... restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective."⁵⁸⁸ However, the whole free communication system is designed to enable individuals to express ideas aimed at influencing others. In a democracy, consumers of ideas should decide whether proposals are a good or

⁵⁸⁵ Ross, *supra*, note 550 at 248-257

⁵⁸⁶ Butler, *supra*, note 527 at 53, emphasis added.

⁵⁸⁷ Dorennstein, E; et al. *The Question of Pornography. Research, Findings and Policy Implications*, (New York: The Free Press, a Division of Collier Macmillan, Inc., 1987) at 103, 172; Hawkins & Zimring, ed., *supra* note 125 at 96. J. Callwood maintains that "several researchers ... at Toronto University and Fordham University (N.Y.) have reported no correlation between exposure to violent pornography and increased violent behaviour. J. Callwood, "Feminist Debate and Civil Liberties", in V. Burstyn, ed., *supra*, note 396 at 124-125.

⁵⁸⁸ Keegstra, at 2; Butler at, 24, 25. Conf. Hogg, *supra*, note 222 at 979.

evil influence upon their lives, not legal or political elite.

Similarly to Dickson J., La Forest J. relied on the harm-based doctrine to maintain that Ross' freedom of expression bows to society's needs. Similarly, in *Keegstra* the Court found that hate speech is not likely to be violence-producing. But neither freedom of speech nor freedom of religion are unlimited; if they harm they can be restricted "by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subjected to such limits as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others." Probably never before did the Supreme Court go so far regarding the grounds on which limits to freedoms are set.

Interestingly, the Canadian Court does not require a clear and present danger to restrict hate propaganda. In *R. v. Buzzanga and Durocher*⁵⁸⁹ the Court equated "wilful promotion" with a *means rea* of "intent," that is, a conscious desire to promote hatred. The crime of wilfully promoting hatred does not require that from the utterances a breach of the peace would likely result. Furthermore, the Court does not require proof of the harm, given that it is very difficult to prove it. As an example of the general spread of the idea that rights can be encroached upon without a real harm proved, Kathleen Mahoney argues: "Any requirement to prove 'clear and present danger' or scientifically verifiable harm would effectively ignore the realities of the crime, and ensure that very few, if any convictions would ever be obtained...Dickson J. made it clear that dry and sterile analytic techniques which effectively predetermine the issue will not be imported into Canada."⁵⁹⁰ One wonders if the very juridical certainty would have a chance if the same statement is applied to a ruling on any other crime.

Which harms flow from Ross' speech? First, La Forest J. addressed a harm to society: society may believe that prejudice is acceptable. He quoted the Board's finding that "It may

⁵⁸⁹ *R. v. Buzzanga and Durocher* 1979, 49 C.C.C. (2d) 369 (Ont. C.A.) at 384-85

⁵⁹⁰ Mahoney, *supra*, note 110 at 10

raise fears and concerns of *potential misconduct* by the teacher in the classroom and, more importantly, it may be seen as a signal that others view these prejudicial views as acceptable."⁵⁹¹ The students described in detail the educational community in the school district. They gave evidence of repeated and continual harassment. Calling names, carving of swastikas and intimidation of Jewish students was a common behaviour of students. The Chief Justice considered that the poisoned environment in the school system could be traced to Mr. Ross' off-duty conduct. However, the Board did not find "evidence that any of the students making anti-Jewish remarks were directly influenced by any of Malcolm Ross' teachings." It added: "given the high degree of publicity surrounding Malcolm Ross' publications, it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students."⁵⁹² It seems unlikely a single person may induce racism in a whole social enclave.

Secondly, La Forest addressed the harm to the educational environment. He held that even though there was no conclusive evidence, it could be reasonably inferred that Ross' off-duty behaviour impaired his performance in class and created an educational environment which lacked equality and tolerance.⁵⁹³ It must be highlighted that nobody complained that his marking or treatment of his own students were unfair. Similarly, Dickson J. in *Keegstra* and Sopinka in *Butler*, though the lack of conclusive evidence of harm to the children or society, a presumption of reasonable link between freedom of expression and harm to a social enclave was enough to strike the balance against speech.

In *Ross* the Court expanded its theory of direct harm to specific persons: "A teacher's conduct is evaluated on the basis of his or her position, rather than whether the conduct occurs within or outside the classroom... Public school teachers assume a position of influence and trust over their students and must be seen to be impartial and tolerant."⁵⁹⁴

⁵⁹¹ *Ross*, *supra*, note 550 at 25

⁵⁹² *Ibid*, emphasis in original.

⁵⁹³ *Ibid.*, at 31

⁵⁹⁴ *Ibid.*, at 9

From the rest of the argumentation "position" may well be interpreted as "ideas".

Another type of harm flows from hate speech. According Dickson J.'s ruling in *Keegstra*, it pertains to the truth values. Expressions prohibited by s. 319(2) are only "tenuously connected with the values underlying freedom of expression."⁵⁹⁵ Says Dickson J.: "...hate propaganda contribute little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."⁵⁹⁶ He adds: "There is little chance that statements intended to promote hatred against an identifiable group are true or that their vision of society will lead to a better world."⁵⁹⁷ If hate speech is related to the "search for truth," no expression should be suppressed on that basis because arguably even hate speech can lead to the truth by exposing its own incoherence to listeners. Like Dickson J. in *Keegstra*, La Forest J. maintained that hate speech is "at best tenuously connected to the core values of freedom of expression". "R's religious belief, which denigrates and defames the religious beliefs of others, erodes the very basis of the guarantee in s.2(a) of the *Charter*." In *Keegstra* and *Ross* the Court ruled that "there is little chance that expression that promotes hatred against an identifiable group is true." Thus, does pro-life groups' hate speech against pro-choice supporters bear some truth? As discussed, the assumption that there is an ultimate truth and that expressions are only protected if they are coherent with that truth leads to easily censored expressions which do not lead to "the truth".

Another harm explained by the Court that will likely be argued to uphold hate speech codes connects to democratic values. Further on, Dickson J. argues that speech poisons the democratic atmosphere and stops target groups from integrating themselves in the political life of the larger society. Dickson J. said "Expression can work to undermine our commitment to democracy where employed to propagate *ideas anathema* to democratic values... while

⁵⁹⁵ *Keegstra*, *supra*, note 111 at 3.

⁵⁹⁶ *Ibid* at 760

⁵⁹⁷ *Keegstra*, *supra*, note 111 at 3. Italics supplied.

suppression of hate propaganda restricts the participation of a few individuals in the democratic process the degree of this limitation is not substantial."⁵⁹⁸ Two concepts flow from this judgement. First, the Court thinks that the rights of a few may be displaced by the rights of all individuals. Balancing competing individual rights -- equality and freedom of expression -- from a goal-group based strategy, Dickson J. leaves the door partially open to the same arguments being used in the future to curb any right in favour of a state value. Secondly, the judgement establishes a link between truth and quantity: majoritarian ideas are truth, which indeed leads to the tyranny of the majority. Thirdly, how many opinions can be restricted without limiting the democratic process in a "substantial" way?

The suppression of free expression to prevent a harm to democratic ideas is on the one hand fruitless, and on the other hand anti-democratic. McLachlin J. stated: "Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law...this type of legislation proved ineffectual on the one occasion when there was a real argument for it...[Nazis] used their trials as platforms to propagate their message."⁵⁹⁹ Moreover, it is an inconsistency to protect democracy by departing from its foundation: ideas are not imposed.

With respect to the connexion between expression and democracy, if expressions are protected to the strengthening of the democratic process, the democratic principles of freely discussing every idea, even noxious ones, connect hate speech to democracy and free choice. If the protection is based on individuals' need for communication, all expressions, even hatred ones, have value in and of themselves and are strongly, rather than tenuously, connected with the values underlying freedom of expression. Finally, if expressions are only protected on the utilitarian basis of betterment of society, then, just as in this case, extreme expressions can easily be forbidden on the basis that hate speech is "tenuously connected with the values underlying freedom of expression." By relying solely on societal

⁵⁹⁸ *Ibid.*, at 3

⁵⁹⁹ *Ibid.*, at 116, McLachlin J. quoting A. Borovoy, "When Freedoms Collide" (1988), at 50.

values, judges can justify almost any encroachment on expression.

The Cohen Committee saw persons not as rational and autonomous. Similarly, Dickson J. also states: "Even if the message of hate propaganda is outwardly rejected, the *premise of racial or religious inferiority upon which the message is based* may persist in a recipient's mind as an idea that holds some truth."⁶⁰⁰ He suggests that since humans are not invariably rational, many will accept messages which challenge preponderant values. Then, in order to maintain "harmonious social relations in a community dedicated to equality and multiculturalism,"⁶⁰¹ those messages must be curbed. No scientific evidence supports that assertion; however it is unlikely that the Court will look for scientific data to prove assumptions.

In *Keegstra*, McLachlin J. arguing for the minority, refuting Dickson J's position, explained that hate propaganda, even though offensive and propagandistic, did not constitute a threat because: "Freedom of expression guarantees the right to lose one's ideas on the world. It does not guarantee the right to be listened or to be believed."⁶⁰² She distinguishes sharply between words encouraging action and action in itself. Criminal actions are not protected. Inasmuch as hate propaganda is not coercive, it should not be limited. Clare Beckton discussing the three - *Keegstra*, *Taylor* and *Zundel* - maintains there was no evidence that violence was imminent from the statements made by these men.⁶⁰³

Another case related to hate propaganda. *R. V. Andrews and Smith* was decided by the Supreme Court on the same basis as *Keegstra*. However, a brief analysis of it seems proper for two reasons. It shows how unsettled the issue of censorship is in Canada, especially among the lower courts. Secondly, Cory J's argument equating hate speech to tentative of crime seems to present other type of 'harm' which deserves a special analysis. Meanwhile, *Keegstra* was before the Appeal Court of Alberta; simultaneously, a similar case was before

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*, at 52.

⁶⁰² *Ibid.*, at 99.

⁶⁰³ Conf. Beckton, Clare F., "Freedom of expression" in G. A. Beaudoin and E. Ratushny eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (1989) 195.

the Appeal Court of Ontario. The *Andrews* case presents a special interest not because its ruling before the Supreme Court, but because of the reasoning of the Ontario Court of Appeal. The reasoning of the Court of Ontario diametrically conflicts with the Alberta Court. Although the *Andrews* case is not directly related with the educative environment, the importance of its analysis is given by the fact that the arguments in the unanimous ruling of the Court of Appeal were then used by the Supreme Court in deciding both cases and setting up the very principles held by the majority regarding freedom of expression.⁶⁰⁴ Mr. Andrews was the leader of the Nationalist Party of Canada and Smith its secretary. Their anti-Semitic message was expressed through the *Nationalist Reporter* mimeographed sticker cards. Both men were charged and tried under the crime of wilful promotion of hatred against identifiable groups. Convicted by the District Court of Ontario, they appealed on issues of freedom of expression. The Court of Appeal found that though constitutionally protected, hate speech may be justifiably forbidden under S.1. Limits were reasonable because they were aimed at preventing a harm to the Canadian commitment to multiculturalism (S.27)

In a very interesting argument, Cory J. equated hate propaganda with attempts of crime. He maintained that attempted murder or conspiracy is a criminalized behaviour even if no real harm is caused. Thus, the criminalization of wilful promotion of hatred is justifiable "based upon the hard, chilling facts of history."⁶⁰⁵ However, hate speech cannot be equated with attempts. In the latter, there was an intention to cause harm and the crime was not committed because of external causes to the criminal; for example, the means to commit the crime was inappropriate. In the expression of hate, there is not always an intention to commit a crime. The hypothetical crime is not committed because causes external to the criminal prevented him from acting illegally, but because there was no intention to harm a specific person's right. When a KKK says that Blacks should be sent back to Africa, he is expressing an idea, he has no power to send them back to any place, and he knows that.

⁶⁰⁴ Cotler, *supra*, note 362 at 2022

⁶⁰⁵ *Supra*, note 550 at 180-81

(3) *Guideline: paramount value of multiculturalism and equality*: Another guideline flowing from Keegstra and Ross to which the Court will stick in analysing speech codes is the pre-eminence of equality values. While *Beauharnais* was rejected by the American supporters of group libel law and by the courts, quite the opposite, this case strongly affected the Canadian courts' jurisprudence. In *Taylor*, Dickson J. refers to this American case as closer to the Canadian perspective on how to afford protection to expressions.⁶⁰⁶ He makes clear that attacks to equality and multiculturalism values amount to censorship. He states: "the values of equality and multiculturalism are enshrined in s.15 and 27 of the *Charter* further magnify the weightiness of Parliament's objective in enacting section 13(1)."⁶⁰⁷ It is not clear how hate speech attacks the right to equality in the Canadian context. The right not to be discriminated against is conferred upon "an individual," not on minorities as a group. Hogg explains that equality is before the law, under the law, and ensures equal protection of the law and equal benefit of the law.⁶⁰⁸ Though hate speech intends to diminish women it does not deprive women of protection under the law. Specific individuals, who suffer discrimination are entitled to claim before the courts; thus, their legal equality is not compromised.

(4) *Guideline: Contextual approach*. In analysing a challenged code, the Court will interpret and balance rights involved from a contextual perspective. Wilson J. has stated that a right may have a different value depending on the context.⁶⁰⁹ No principle is simultaneously valid for all people or for all times. According to her, a discussion in a home does not have the same value as a political debate. Both expressions will have different consequences depending on the context in which they are delivered. In *Zundel*, part of the Court's ruling was launched from the contextual perspective recalling the horrors of the Holocaust: "In fact, it was in part the publication of the evil and invidious statements that were known

⁶⁰⁶ *Taylor*, *supra*, note 583 at 739

⁶⁰⁷ *Ibid.*, at 920-21

⁶⁰⁸ Hogg, *supra*, note 222, at 1155.

⁶⁰⁹ *Edmonton Journal v. Alberta (Attorney-General)* (1989), 64 D.L.R. (4th) 577, [1989] 2 S.C.R. 1326, 41 C.P.C. (2d) 109.

to be false by those that made them regarding the Jewish people that led the way to the inferno of the Holocaust... It is now clear that, in a multicultural society, the sowing of dissension through the publication of known falsehoods which attack basic human dignity and thus the security of its individuals cannot be tolerated. These lies poison and destroy the fundamental foundations of a free and democratic society."⁶¹⁰ Though deliberated falsehoods are protected, a contextual principle of interpretation leads the minority of the Court to justify limits on expressions under s.1.

Says La Forest J. in *Ross*: "McLachlin J. in *RJR-MacDonald*, *supra*, reiterated her statement in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp 246-47, that conflicting values must be placed in their factual and social context when undertaking a S.1 analysis." (at 45) Said La Forest J.: "the context must be considered when balancing R's freedom to make discriminatory statements against the right of the children in the School Board to be educated in a school system that is free from bias, prejudice and intolerance; relevant to this particular context is the vulnerability of young children to messages conveyed by their teachers. The employment context is also relevant to the extent that the state, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence... The anti-Semitism context is relevant as well because the Board's order was made to remedy the discrimination within the public school system that target Jews. (at 11 emphasis added)." This would be a crucial point in an analysis of hate speech codes: in some contexts beliefs are more praised than in others, academia would be one of those contexts.

It is worth commenting that the Court did not balance an individual right (*Ross*) against another individual right (complainant's children's right to learn). The Court did not link *Ross*' hate speech with the two students' harm with respect to learning in his class. Although the students described a continual harassment against them, they did not complain that *Ross* harassed them. The students did not prove effectively that the

⁶¹⁰ *Zundel*, *supra* note 550 at 820-21

environment had negatively affected their performance as students. Nor was proven that the complainant's students were treated unfairly by Ross. They sincerely expressed that their fear of attending a competition.⁶¹¹ The only harm was the spread of anti-Semitic ideas in an educational context. What was proved in trial was the existence of racism in the society and at school which was possibly traceable (no proof was needed) to off-duty conduct of a teacher (though previously the Court had said that there was no evidence to link both facts). The Court linked Ross' hate speech to the spread of ideas in a special "environment" where a class of students may be injured. "The Board found, without hesitation, that [Ross'] publications contain *prima facie* discriminatory comments against persons of Jewish faith and ancestry." Were his publications allowed, it would be a "loss in the community of confidence in the public school system."⁶¹² Said the Court: "a teacher's freedoms must be balanced against the right of school boards to operate according to their own mandates."⁶¹³

The contextual approach is consistent with the strong Canadian sense of community. In assessing the relevant conflicting values, the primary concern of the Court is to evaluate the impact of the priority given to a right over another upon society or upon a group. This is what I have called a group-right strategy. Not because individual rights are not important, but because given a right-conflict the right which leads to a maximisation of the communitarian goals will be given priority. The crux of the discussion was: neither Ross' right nor the right of his students to "not to be disturbed in their learning process because of membership in a religious group" were protected because of a principled reason. Rather the argument was that the protection of the students' rights was more kin to the attainment of societal values. The reason for choosing their right over Ross' was to "prevent a harm to multicultural values" not to foster the children's right to learn. Says La Forest J.: "Ours is a free society, built upon a foundation of diversity views; it is

⁶¹¹ Ross, *supra*, note 508 at 26

⁶¹² *Ibid.*, at 24, 29

⁶¹³ *Ibid.*, at 48

also a society that seeks to accommodate their diversity to the greatest extent possible."⁶¹⁴ In this sense, a judicial review of speech codes will take into account the educational, employment and the racist or sexist context in the academic milieu. While Ross dealt with young children, vulnerable to noxious messages, in a challenge to university codes, the Court cannot apply those terms to campus members. Nor may the professors' role model be invoked. What was at stake in Ross was a noxious idea that impacts negatively on easily influenced youth.⁶¹⁵

The principles and guidelines described above guide Canadian courts in the two-stage process of judicial review. Having determined whether the challenged disposition is "law", courts must answer: first, whether or not the law limits a guaranteed right; secondly, whether or not the legal limits may be justified in a free and democratic society. If both questions are answered in the affirmative, the challenged law is upheld.⁶¹⁶ In *Oakes*, the Court laid down criteria to be satisfied by a challenged law. Hogg summarises them: "1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter right. 2. Rational connection: The law must be rationally connected to the objective. 3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective. 4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies."⁶¹⁷

⁶¹⁴ *Ibid.*, at 52

⁶¹⁵ Despite the favourable weight of this argument in the overthrow of a law enacting codes, the relevance of the context adds a new element of legal uncertainty to already vaguely drafted laws. The nature of a right is the same value regardless of contextual circumstances. A law denying women the right to express at home would be unconstitutional because it attacks inherent power in Spinozian terms. Ethical relativism proposes that what is right varies according to the context. Ultimately, citizens cannot know in advance how the demarcation line between right and wrong will be drawn in their own cases.

⁶¹⁶ Hogg, *supra*, note 222 at 960. He argues that "the existence of the general limitation clause of s. 1 and the two stage review process which s. 1 mandates, reflect the influence of international human rights instruments and especially the European Convention of Human Rights and International Covenant on Civil and Political Rights. In these instruments, the guaranteed rights are qualified by limitation clauses expressed in terms quite similar to Canada s. 1." (*Ibid.*, at 852, 3).

⁶¹⁷ *Roth v. Oakes*, *supra*, note 573; Hogg, *ibid.*, at 867.

McLachlin J. explained that the Supreme Court has evolved through three stages, from a clear protection of the "primacy of the guaranteed rights over impugned legislation" toward a strong defence of the legislature's will. The first stage is the strict *Oakes* test where the state was required to show a rational connection to the legislative objective, minimal impairment of rights and proportionality in the limitations of rights. McLachlin J. believes early Supreme Court decisions were too interventionist.⁶¹⁸ Eisenstat Weinrib, referring to this first stage, comments on *R. v. Big M. Drug Mart Ltd.* that the Supreme Court's judgements have consistently resisted the importation of a "utilitarian" type of argument into the second step of Charter adjudication. In *R. v. Big M Drug Mart Ltd.*, the Court rejected administrative convenience as a justification for a religiously based law mandating Sunday as the weekly day of rest.⁶¹⁹ The second stage resulted in a partial retreat from the *Oakes* test, in cases such as *R. v. Gayme* and *R. v. Edwards Books*.⁶²⁰ McLachlin J. contends that a third stage, involving a departure from the *Oakes* test would be preferable⁶²¹ avoiding the insoluble problems of judicial review – unpredictability, excessive judicial discretion, among others – by deferring to the legislative will. Recently, the Supreme Court explicitly maintained that the *Oakes* test should be applied flexibly,⁶²² and added: "It is noteworthy, however, that under *B.(R)*, consistently with *Young*, it may not always be necessary to have resort to the full panoply of tests elaborated in *Oakes*. At page 385 of that case, I stated: "This is not to say that an elaborate examination of the criteria established in *R. v Oakes, supra*, will always be necessary."⁶²³ Further La Forest J. added: "The factors to be considered in applying the *Oakes* test have frequently been reviewed; most recently in *RJR-MacDonald Inc.*, where both the majority and minority agreed that an approach

⁶¹⁸ B. McLachlin, "Section One of the Charter" (Address to the Canada-Israel Law Conference: Chartering Human Rights, Faculty of Law, The Hebrew University of Jerusalem, 20-23 December, 1992) [unpublished] at 11.

⁶¹⁹ L. Eisenstat Weinrib, *supra*, note 381, at 488.

⁶²⁰ *R. v. Gayme* (1991), 66 C.C.C. (3d) 321 (S.C.C.); *R. v. Edwards, Books and Art*, [1986] 2 S.C.R. 713.

⁶²¹ McLachlin, *supra*, note 618 at 27-9.

⁶²² Ross, *supra*, note 550 at 10

⁶²³ *Ibid.* at 43

involving a "formalistic 'test' uniformly applicable in all circumstances" must be eschewed. Rather, the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, court must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement."⁶²⁴ La Forest J. Clarified that standards of scrutiny may be lowered" when the form of expression allegedly impinged lies further from the "core" values of freedom of expression."⁶²⁵

(1) *Important objective*: A law enacting a university speech code, must demonstrate that the objective pursued is important enough to justify limiting a *Charter* right. What are restrictive policies concerning speech campus on designed to accomplish? They are enacted to protected multiculturalism, to foster equality, to prevent harm to democratic values and to prevent hate crimes. Admittedly, legislators may be concerned that anti-democratic ideas overcome on campus. It may be well argued that to ignore the power of ideas and their expression, is suicidal. Heine said that the sword of *Critique of Pure Reason* kills European deism, Rousseau's works destroyed the Old Regime. Today, very few doubt the decisive role that Nitzche's and Max Schelling's writings had in the emergence of Nazism. Moreover, officials may argue that the aim of hate-speech codes is to foster multiculturalism. Given that in emphasising their cultural and religious differences, group cultures clash among themselves; then, in order to avoid discord and offense to group sensibilities, extreme expressions are not only regulated but forbidden. Another purpose pursued by anti-hate codes is the prevention of hate crimes. Though, as argued above, to justify the enactment of speech codes, campus administrators are constructing the crime; the Canadian Court will likely regard the interest served as compelling.

(2) *Rational Connection*. The second step in the *Oakes* test is to determine whether there is a rational connection between the law and the objective pursued by Parliament. "The

⁶²⁴ *Ibid.* at 45

⁶²⁵ *Ibid.*, at 51

requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose."⁶²⁶ Granted that codes pursue pressing goals, code supporters must show that they are able to attain them. In proving a rational connection ends-means, code supporters will not have to resort to scientific methods. In *RJR-MacDonald* and *Ross*, the Court manifested that only "civil standards of proof on a balance of probabilities" is required.⁶²⁷

The hope of censors is to make their ideas safe by eliminating from public circulation those which oppose theirs. Their ultimate goal is ideological: To stop the spread of ideas which contest their standards of good and evil for regulating social interaction, even if they are conveyed in a polite and rational way. Says Queen University code: "anti-racist position as the only morally and educationally acceptable." Do university codes meet the prevention of a harm to democratic values, or to equality? Can they stop the spread of hate or assaults? In Canada, the increase of hate speech, despite of strong anti-hate legislation, should be a sign of alert. While a stronger punishment or the creation of new offences leads to a decrease of other crimes; historical evidence shows that censorship is unable to stop ideas. Even if the expression of beliefs is prevented, the conviction remains and, sooner or later, will surface in campus or latter on in the professional life of alumni.

Writing for the dissenting minority in *Keegstra*, McLachlin J. held that, though the goal pursued by the legislation was of "the most worthy nature", S.319(2) it did not satisfy the requirement of the *Oates* test. In her opinion, the dispositions were not an effective means to combat racism speech and hatemongers may well get sympathy for their cause. Similarly, codes are not the proper means to attain the pursued goals.

(3) *Least drastic means:* The third step in the *Oakes* test will require that a hypothetical law enacting codes minimises the infringement of the right of expression to

⁶²⁶ *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713 at 770

⁶²⁷ *Ross*, *supra*, note 550 at 56

achieve its objective. The requirement of minimum impairment clashes with the propensity to over-prohibit in a vague way manifested in codes. Even assuming that there is general agreement in academia that hate speech should be forbidden, there is hardly general agreement about what should be restricted. Using Steward J.'s words: "How do we know that agreement [about pornography] is not totally illusory?"⁶²⁸ A similar question may apply to hate speech. University codes describe punishable behaviours using words such as "accepted practices [on freedom of expression]," or "vexatious conduct." Even though judges and lawyers cannot adequately explain their meaning, to say nothing of laymen, these words are used to curb rights. The goals pursued by codes are broader than prevention of off-colour jokes against women or minorities, or pestering them. Because it is impossible to calculate in advance what the harmful effects of expressions will be, and in an attempt to include the widest range of possibilities, codes are drafted without a clear degree of predictability of the legal consequences of an action. This fact prevents subjects from ascertaining exactly what the limits are and from choosing whether to cross them or not.⁶²⁹ Morrison Waite J., conscious of what a constitutional guarantee means, pointed out that: "every man should be able to know with certainty when he is committing a crime."⁶³⁰ A legislative abridgement is unsaveable by judicial review if the law is "so obscure as to be incapable of interpretation using the ordinary tools."⁶³¹

McLachlin J. found two differences between *Zundel* and *Keegstra*: the dispositions on false news were even broader and vaguer than those of s.319(2); and there were not identifiable objectives pursued by the legislation which would have led to the application of the proportionality test of *Oates*. In *Keegstra*, she argued that the vagueness, overbreadth and subjectivity present in S.319(2) breaches the "minimum impairment" principle. In applying S.319(2), legitimate speech may well be prevented. She maintained:

⁶²⁸ In *Jacobellis v. Ohio* (1964), 378 U.S. 184 at 199.

⁶²⁹ *Conf. R. v. Mood Video Limited*, [1987] 63 Nfld. & P.E.I.R. and 194 A.P.R. 73 at 74, Cummings J.

⁶³⁰ See *United States v. Reese*, (1985) 92 US 214 at 220.

⁶³¹ *Osborne v. Can.* (1991) 2 SCR 69 at 94

"section 319(2) of the Criminal Code catches a broad range of speech and prohibits it in a broad manner, allowing only private conversations to escape scrutiny... I conclude that the criminalization of hate statements does not impair free speech to the minimum extent permitted by its objectives."⁶³² Similarly, speech codes, vague and overbroad, are not the least drastic means consistent with the objectives.

(4) *Proportionate effect*: The Court has ruled that the state must show "a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'". "Proportionate effect" refers to the "price" to be paid for the benefits obtained by infringing upon a freedom. In *Keegstra*, McLachlin J. found that the cost of encroaching upon such a basic freedom to the democratic process was not outweighed by the "questionable" benefits of the legislation.⁶³³ In the case of a university code, part of this cost, is censorship's chilling effect. Members of campus willing to carry out a discussion about disturbing social issues, are intimidated by the fear of academic and pecuniary sanctions. That fact induces self-censorship. Even if suits against supposed lawbreakers are unsuccessful, they will tend to reduce criticism on troubling issues. Any investigation has intimidating powers. Legal costs are beyond the means of many professors or students. Everyone who has passed through the ordeal of a trial or a discipline committee, knows that regardless of the outcome, the procedure is a heavy burden.⁶³⁴ The chilling effect also prevents victims from defending themselves. They become a silent group afraid of violating the codes.⁶³⁵

⁶³² *Keegstra*, *supra* note 111 at 862

⁶³³ *Ibid.*, at 865

⁶³⁴ A. Borovoy, "When rights collide" 1995 UNB RD UN-B 44 at 51

⁶³⁵ In this sense, A. Neier - the executive director of the Civil Liberties Union during the period when the Neo-Nazi party marched in Skokie, Illinois - summarised the danger of censorship. Defending the demonstration, he, a German Jew who had escaped to England in 1939, said: "It is dangerous to let the Nazis have their way, but it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for support... The Nazis, I respond to those who ask how I, a Jew, can defend freedom for Nazi, must be free to speak because

Censorship has more important side effects in academia than in society at large. First, anti-hate regulations remind that there are taboo areas where discussion is no longer allowed, the last truth has been reached. Code supporters ignore that higher education is to seek the truth through the wide debate of ideas. If that paramount goal is lost from sight, why do we need academia? Secondly, while campus hate speech codes teach adult individuals to think of government and authority with fear, education requires the free disclosure and challenge of basic values. Thirdly, forbidding hate speech implies that university officials regard utterances of hatred as so powerful that they cannot be overcome by any other idea; they implicitly recognise an inability to fight against them. Educators, are too weak in resources, skills, creativity and courage to act in another way and answer back to hate propaganda.

Although denied by their enactors,⁶³⁶ paternalism pervades codes; enactors appear to be acting in the role of *loco parentis*.⁶³⁷ There is an inconsistency between allowing use of drugs or alcohol among students, or the lack of regulation of their sexuality, and the prohibition of offensive expression. Codes are inconsistent with the principle that adult, highly educated, self-responsible individuals are able to use their understanding without others' guidance and cannot be compelled to be developed after others' ideals."⁶³⁸ Given their lack of recognition of academia members as moral autonomous beings, and their impairment of the process of exchange of ideas in the learning process, the effects of hate-speech codes are disproportional to the objectives pursued; the price to be paid is too high.

The pervasiveness of codes is not proportional to the objective sought by the law. In

Jews must be free to speak and because I must be free to speak." Quoted in Blanchard, *supra* note 189, at 484.

⁶³⁶ See U. of Toronto Code

⁶³⁷ *Ibid*, at 41. Against this very position Kant argued: "The guardians who have so benevolently taken over their supervision of men have carefully seen to it that the far greatest part of them regard taking the step to maturity as very dangerous, not to mention difficult.", *supra*, note 38

⁶³⁸ Kant stated that: "Every person may seek happiness in the way that seems best to him, only if it does not violate the freedom of others to strive toward such similar ends and are compatible with everyone's freedom under a possible universal law. Kant, *supra*, note 38 at 72.

Keegstra, McLachlin says that remedies, such as human rights legislation, other than criminalization of hate speech should be used. Similarly, Scalia argued in *RAV*. that officials may resort to criminal codes, to federal and provincial human rights codes and to affirmative action programs to deal with cases of effective discrimination, or expressions conveyed with the intention to harm someone's right. Why, then, enact dispositions which will inevitably produce a worsening in the seeking of knowledge?

In brief, the Court will find all speech targeted by university codes as protected speech. Facing the balancing procedure, courts may strike down or uphold them depending on whether the limits can be justified in a free and democratic society. The balance will proceed according to a well set doctrine, within a contextual principle. In Canada, the unconstitutionality of anti-hate codes may be argued on the following bases. First of all, because they pursue, by antidemocratic methods the imposition of democratic ideas. Even if the idea to be coerced is a plausible one, codes do not meet the ends they are meant to accomplish: neither can good ideas be imposed nor noxious ideas be eradicated by law. Secondly, hate codes state limitations in ambiguous and ultimately arbitrary ways. Thirdly, they reflect a paternalism inimical to academia. The rationales underlying them do not outweigh the principles justifying the guarantee to express one's ideas in academia. Finally, the Court would likely evaluate the challenged regulations within a local context; thus the outcome is unpredictable. The jurisprudence ends up with one of particulars, constantly sensitive to local pressures. However, the contextual approach may be an advantage to someone challenging hate-speech codes. What is at stake, in terms of gains and risks, will have an important weight in the Court's ruling. Because the presumption in favour of speech is very strong in the university context, the threshold of protection for freedom of expression may be raised high enough to strike down a challenged code.

In summary, the First Amendment and the Charter do not force their citizens and courts to anything. If the First Amendment protects hate speech while the Charter does not cover it, it is because the people have chosen to interpret them in that way. As Walkers explains

along his book: the "people" is not the mass or average of American or Canadian subjects, but the elite policy-makers: lawyers, judges and activists who through their reports, argumentation, and rulings have shaped the public debate and influenced, though not determined, public opinion. Those interpretations are neither inevitable nor definitive.

Despite its undeniable commitment to freedom of expression, the Canadian society's strong sense of community has outweighed the competing values of expression. Limits on expressions were upheld on public interest and groups' rights bases. According to the Charter, rights are subject to the legislative override under s.33. In the balancing process, the courts must be guided by the provisions of s.27, the multicultural section, and s.28, the gender equality section. The wording of those sections is strong and clear, as strong as "Congress shall make no law." Although it may be argued that the Charter itself expresses the importance of the public values, the Court could well have interpreted those provisions differently. For example, they could have found that the protection of vicious speech, would amount to the highest public interest, because it releases social tensions or let hatemongers be discredited. The Court might well have ruled that "demonstrably justified" means that government must prove by scientific demonstration, the link between the abridgement of rights and the result sought. Not the wording but the political and philosophical antecedents led the Court to restrict expression more often than not. That trend can be reversed in the case of hate codes.

3. NO NEW RULES POLICY. "NEUTRALITY"

While most North American institutions have chosen to enact hate-speech codes, the rest of them have adopted quite a different policy: absolute neutrality. An example of this policy is an incident at Dartmouth College. In 1988, after hate articles in the conservative college newspaper "The Dartmouth Review", Dean J. Freedman charged editors with "poisoning .. the intellectual environment." Facing the disturbances that followed, the administrators did not take any measure. Similarly, the University of Toronto remained neutral in the 1989 incidents. Jean Cannizo's anthropology class was disrupted by Black activist groups who

demonstrated against her views. The University failed to protect her academic freedom and did not take any disciplinary measure against the anti-racist activists. Similarly, McGill University was faithful to its neutrality policy when Dr. Harold Lief's lecture was interrupted by a group of feminists disagreeing with his ideas on "false memory syndrome". The lecture was not rescheduled nor was an investigation made.⁶³⁹ Both academic events were interrupted by demonstrators who displayed threatening acts and physical actions. Those acts violated the rights of the listeners (students in the former case, general public in the second one) and the speaker's right to convey ideas.

The right to dissent may be used to create conditions hostile to alternative views through protest and conduct take-overs. One thing is the expression of ideas, quite different another is to impose ideas through their own right to free speech. Physical action preventing universities' employees from entering premises by demonstrators in picketing; refusal to leave a closed meeting, obstruction of paths and doorways, loud shouts outside the building so that it is impossible to continue a class, all those are not examples of academic discussion nor the exposition of ideas. Demonstrations aimed at obstructing the exposition of opposing ideas call for imminent action by officials. When the main goal of an expression is to take control through use of group pressure, then we are in Spinoza's supposition of harm to state.

The second limit on freedom of expression placed by Spinoza is the harm to the state's right to regulate conduct. In his views, this harm is highly deleterious to social cohesion. Without denying that Spinoza's social contract is an arguable theoretical argument to explain the constitution of society, it is a provable fact that there is a foundational agreement to set up academia as a social enclave of adult people, with goals and rights which must be protected by administrators. If officials do not take measures to prevent and solve the harm caused by subjects who interfere with its power to regulate conduct, they

⁶³⁹ See John J. Furedy, "Mill Perspective Applied to Current Canadian Cases" (1995) 44 *UNB LJ* 132

endanger the very existence of academia and its goals. Says Spinoza: "In a democracy ... everyone submits to the control of authority over his actions, but not over his judgement and reason; that is, seeing that all cannot think alike, the voice of the majority has the force of law, subject to repeal if circumstances bring about a change of opinion."⁶⁴⁰ He adds: "...the rights of rulers should merely have to do with actions, but that every man should think what he likes and say what he thinks"⁶⁴¹ Expressions which instigate with physical violence to overthrow authority and riots call for immediate state intervention. Permitting some professors and students to inflict their dogmatism, academia fosters revenge feelings and dissolution. If officials knew about discriminatory normative statements uttered by a professor causing harm in a specific student of junior faculty and they failed to take appropriate measures, they would be violating the legal equality principle.

In Spinoza's theory, freedom of expression is not a tool to confer upon speakers the power to legislate previously ceded to authority. The original power passes from the individuals to the sovereign, in Spinoza's words. Individuals give up their right to regulate actions and only reserve the right to plead for changes of policies. Freedom of expression ensures a valve to release the social tensions, reassures the fairness of the process of government and enables citizens to argue in order that the unjust law be overthrown through democratic procedures. The broad exercise of expression argued by Spinoza enables students and faculties to fight against any law restricting their natural right to choose ends, to foster their ideologies and theories. The counterpart of so extensive freedom is the absolute restraint of using physical or intimidatory acts to impose an idea.

Spinoza's strong protection of freedom of expression is not incompatible with officials' active role in facing conflicts. They have the duty to regulate conduct in order to foster both the peaceful exercise of rights of its members and the advance of knowledge. Implicit tolerance of threatening and abusive acts seriously undermines its authority. When

⁶⁴⁰ *Tract. Pol.*, *supra*, note 9 at 263

⁶⁴¹ *Ibid.*, at 265

incidents of threats and physical assaults occur among members on campus, even if there is not retaliation, silent administrators encourage chaos. Neutrality does not means weakness. It is a serious error of administrators to overlook the distinction between hate speech -- as the utterance of a discriminatory idea -- and hate crimes -- the act on a discriminatory idea. By ignoring assaults and threats, the university sends the wrong message: differences may be solved through violence. If the state does not intervene when minority members are attacked, they may feel entitled to use more physical and group pressure to defend themselves. If violent retaliation from a target group is condemned, on which fair ground will violence flowing from the majority be punished? Universities should have had rules on time and place regulations, so that activists would have been able to express their disagreement to Dr. Lief and to Professor Cannizo without interfering with the speakers' right to get their message across and with their own audiences' right to hear it. Officials have not only the right but, the duty to stop demonstrations which prevent other views from being heard and to provide the means so that academics can explain controversial issues without facing intimidation. An example of authority intervention to prevent a harm to its right to rule conduct is the *Stanford University Policy on Campus Disruption*.⁶⁴² Promulgated in 1997, it aims to "maintain on the campus an atmosphere conducive to scholarly pursuits." It punishes behaviour from faculty, staff or students who intent to "(1) prevent or disrupt the effective carrying out of a University function or approved activity ... (2) obstruct the legitimate movement of any person about the campus or in any University building or facility."⁶⁴³

Spinoza argued that the rational state takes rational policies to protect freedoms. Neutrality well understood, means first of all to foster a comprehensive approach. From this perspective one can analyse philosophical, psychological and social causes, which underlie hate speech and hate behaviour. A second stage is to improve communication. A third step is

⁶⁴² Annexed

⁶⁴³ Annexed

to resort to a myriad of options which are far more effective than censorship and do not risk a constitutional challenge. University administrators do not have the power, as Spinoza would say, to prevent someone from thinking whatever he/she wants and to express his/her ideas, but they have many resources to prevent that persons act on their hate.

There are legal, educational and social options. The most effective is the enforcement of existing laws which regulate conduct of all members of society, including campus members. In addition to resorting to laws which deal with physical assault, abuse of power, and destruction of property, officials may consider to apply fines and sue for compensation for damages caused to the university's property caused by responsible students or employees. As mentioned above, the harm, if any, hate speech causes is not that it advises that there is discrimination in the moral sense. The harm is caused because hate speech reminds us that in when discriminatory acts and assaults take place against vilified groups, a silent society will consent, and refuse to actively protect them. Therefore, it is crucial that the university both establishes clear rules as deterrent acts of vandalism and punishes any attack or assault motivated by racism or sexism. While officials' neutrality should be absolute regarding ideas, administrators' choice to be neutral with respect to crimes is suicidal. Hate expressions are quite different from hate crimes. Display of firearms and paramilitary exercises are not forms of expression. It is one thing to restrict speech by banning words and symbols, and quite a different thing to forbid conduct aimed at harming persons and properties while conveying an idea (beating, throwing eggs or stones, burning or destroying properties, blocking pathways, entrances or exists, physical attacks). Both conducts with an expressive dimension, and expressions intended to harm a specific individual's right calls for authority's intervention. It is extremely dangerous for the system to allege that a person who kills another in a riot or in a gang incident is not responsible. Someone may assess that those who act overpowered by the group or overwhelmed by disadvantaged pasts are unimputable. If we accept that uncontrollable external or internal forces determine our actions, then persons are not longer responsible for their

acts; consequently, democracy, the government of the people, is no longer feasible. A government of irresponsible men is by definition chaos. As Berlin and Popper say,⁶⁴⁴ Marx and Freud did a poor service to democracy, not because of their scholarly discussions on inequalities or mental illness but because their conception of the person is antithetical with democracy. When subjects are considered at the mercy of personal psychological traumas or as puppets of social forces, then a paternalistic state has to decide, on their behalf, to prevent them from hurting themselves or taking the wrong path. Democracy has as its foundation a quite different concept of humans: they are responsible self governing agents. Farrakham's followers, Neo-nazi supporters, a fanatic religious pro-life person, anyone of them who beat, kill, rape or destroy the possessions of a person of an antagonistic group is just a criminal who deserves the punishment of enacted laws. If society sends the message that they are not responsible for their crimes because of the uncontrollable influence of their leaders or their groups, then the violent circle begins again. Distrust of law and the desire of revenge is an inevitable consequence. To prevent that outcome Spinoza argues that while expression of ideas, even hatred ones are protected any harm to others, hate crimes, requires state action.

Consequently, only when hatemongers take the following step from words to actions -- even within an expressive dimension -- and attack specific persons or deprive individuals from their legal equality, authority must intervene. Is it too late at this point? No, first, society has a system of protection of its members (though it does not always work) able to interrupt the commission of a crime. Secondly, a suspected killer is not placed in jail except when there is evidence that he/she has committed a crime. A hatemonger -- who does not act on his words -- should be treated in a similar way. A system of rights, either in a democratic society or in academia, requires responsible citizens be accountable for the consequences of their actions. The Western legal philosophy runs risk that some subjects, in a responsible way, may choose to break the law, in doing so they are punished.

⁶⁴⁴ Sorman, *supra*, note 51, at 284, 264

A broad protection of speech including hate speech is not inimical with counter-speech options and denunciation of racism and sexism. Facing a discriminative discourse uttered on campus, administrators are expected to strongly repudiate it.⁶⁴⁵ They may provide special forums for discussion of events occurred, make declarations to the mass-media, etc. to foster democratic principles. A neutral administration should restrain itself from forbidding hatred expressions based on content and further heavily fostering democratic countermessages. Indeed, to remain silent in the face of attacks to the right of the state to regulate conduct or basic rights is not an option for academia.

Campus officials must provide the means through which all persons are able to express what they believe; for example, by supporting newspapers for minorities; enforcement of the right to reply is more useful than enacting censorship or ignoring the problem. Probably Matsuda is right when she says that: "students victimised by racist speech turn to the university administrators for redress, and are told that the First Amendment precludes institutional action."⁶⁴⁶ However, the problem is not that the First Amendment precludes any encroachment upon expression, and that nothing else can be done as some administrators may suggest. They are not helpless in protecting victimised students. Universities may lay down dispositions to secure that each one gets her or his message across, making available public spaces and forums, publishers, funding of minority newspapers and the like to every group.

Rather to set Procrustean monitors, university should hire and train special staff to deal in a rational and fair way with any breach of peace, and to support victims of sexual abuse or racial crimes, counselling services, and hall advisers. This special personnel is not meant to monitor discriminative acts, but to intervene in cases of breach of existing laws (riots, assault, gangs, crime against property).

Neutral administrators may set extracurricular programs in order to bring antagonistic groups together. Mandatory courses on racial integration, and special lectures

⁶⁴⁵

⁶⁴⁶ Matsuda, *supra.*, note 353 at 2370.

may be given with the specific purpose of persuading students and staff of the deleterious effects of bigotry in academia. Officials are to supervise the content of courses so that both sides of the debate are presented in a balanced way. Those attempts are consistent with the rationales of expression as the tool to defend rights and values.

CONCLUSIONS PART II

Deep political, economic and social changes Western society currently undergoes have led academia to split bitterly in the struggle to define a leading core of values and to apply them to substantive issues. In a rupture with the Western belief on eternal truths, inherited partly from medievalist religious conceptions and partly from modern comprehensive moral doctrines, nowadays we have no eternal values. That causes a profound insecurity manifested in a craving for debate on laws and values underlying them.⁶⁴⁷

The weakness of democracy is given by its own fundamental principles. Why should a free and democratic society tolerate the expression of ideas, through epithets or refined ways which cause pain, attack constitutional liberties and do not lead to the truth? Is Stone right when he argues that "counselled that guaranteeing the rights of such groups as the Nazis and the Kux Klux Klan was "part of the price we pay for democracy."⁶⁴⁸ This is the core question to be addressed by campus administrators before further steps are taken either to enact codes or adopt a neutrality policy. The debate is not about acts, or about symbols but about ideas. "Toleration" says Freund "is not based upon generosity, but on sound policy: on the consideration, namely, that ideas are not suppressed by suppressing their discussion, and that such discussion alone can render them harmless and remove the excuse

⁶⁴⁷ Drucker explains that periodically, for example in 1220, around 1500 and the late XIXth century, Western society goes through profound moral and technological changes or "ruptures" that make impossible for a person born decades after they took place to imagine how life was before. The great instability evidenced in each of those periods coincided with a great increase of heated expressions and the conviction that censorship could prevent the chaos. The present rupture is not an exception. Drucker, *supra*, note 248 at chap 1

⁶⁴⁸ I.F. Stone, editor, *New York Post*, "Hitlerism or Americanism?" *New York Post*, March 31, 1934, at 4 as quoted by Walker, *supra*, note 186 at 41

for illegality by giving hope of their realisation by lawful means."⁶⁴⁹ Admittedly, hatemongers claim for the antithesis of principles and values in a democracy. Hate speech, either from a minority or from the majority, ask for the exclusion of some group from society. However, as professor Elizabeth Wolgast argues, even the most fundamental principles in a democracy, such as whether each person's vote should be counted equally with others, or the principle of legitimacy,⁶⁵⁰ are "presumptive open to question and discussion," in an unrestricted fashion. She asks: "Why should this moral duty [of civility] exist, given that people's moral and religious values are often deeply held and important for them?"⁶⁵¹ Requiring that all citizens endorse specific values and principles is a "tyranny of reason". A democratic society can neither prevent the discussions of convictions nor impose them.

Spinoza took great pains to demonstrate that it is irrelevant for who does not believe that a group of individuals, that the state, or the Church declare something as ultimate value. Although the conviction in only one solution to social problems gives peace of mind and emotion; its existence is an utopia. Despite how presumably perfect a standard of judgement, derived from a vision of a perfect future be, is to be applied to solve a social conflict, sooner or later it will be used to justify Procrustean policies intending to fit some unforeseen fact within a predetermined pattern.⁶⁵² Given the ideologicalal turmoil and a new negotiation with respect to shares of power in society and academia, among economic and non-economic groups, any curtailment of freedom of expression, is more dangerous than any racial or sexist outburst. Once a democratic principle is compromised, sooner or later democracy in itself is endangered.

For decades relativist theories in academia -- recycling hate, fostering ethnocentrism

⁶⁴⁹ Ernst Freund, *The Police Power: Public Power and Constitutional Rights* (Chicago: Callaghan, 1904) at 509-11

⁶⁵⁰ Elizabeth Wolgast, "The Demands of Public Reason" (1994) 94 *Colum.L.R.* 1936, at 1941-42

⁶⁵¹ *Ibid.*

⁶⁵² Berlin, *supra*, note 4

and putting aside the cosmopolitanism as ethics, arguing all sets of values as the same value, denying young adults the ability to recognise themselves as belonging to a definite culture and moral -- have fostered rebellion and chaos. Today, egalitarians, for the sake of keeping the democratic value of equality, depend upon inegalitarian and anti-democratic means to keep their paramount value. Hate-speech codes are improvised legal policies, aimed at getting a temporary solution. Those policies have proved perverse because they attack part of the problem from a sectarian interest. They fail because those who consider them unjust will ignore or sabotage them.

Although law is a greater teacher, which impacts on the promotion of human rights and moral values, history shows that efforts to foster those values coercively are fruitless. The wording of the law lets us envisage the conception of "person" that a society has. Far beyond Spinoza's concept of person and his rationales to protect expression, the core of code supporters' argument is that irrational forces overwhelm individuals' reason. Hate speech is perceived as a trigger which compels society to despise and act against target groups, or victims to lose their self-esteem and sense of belonging to society. However, this feature of hate speech is assumed.⁶⁵³ To preserve the juridical security, laws must deal with facts, not with probable events. Its field is verifiable conducts of commission or omission that lead to the necessity to take legal action. Facts which, though known in an incomplete fashion, are objectively determinate: specific harm to specific persons, in specific circumstances lead to a condemnation.

Speech codes aimed at preventing both violence towards women or minorities, and an impairment of their equality, "construct" the crime instead of reconstructing it. Law criminalizes murder not the likelihood of committing a murder. Individuals are not deprived

⁶⁵³ See Thomas Tedford, "Unprovable Assumptions? The reasons and Empirical Evidence of Twelve Who Favor Censorship," in *Free Speech Yearbook: 1978*, G. Phifer ed., (Falls Church, Va.: Speech Communications Association, 1979) at 156-161 where he specifically refers to erotica. See Donnerstein, *supra*, note 587 chap 6. There are not studies at the present on the effects of restrictive policies on hate speech.

of their freedoms in order to prevent them from committing, for example, murder. However, if they have done some physical act aimed at killing (attempt) or have effectively killed someone, punishment follows. Aimed at preventing listeners from despising or attacking vilified groups, university codes deny listeners the capacity to choose in, a responsible fashion, whether to follow a hater's preaching and attack vilified groups or to reject the incitement to commit a crime. Stealing is a crime, and the failure to use a seat belt amounts to a fine; in both cases the citizen is able to decide to steal or not, to use the seat belt or not. By choosing to break the law, the individual is jailed or fined. Quite the opposite, hate-speech codes prevent recipients of censored expressions from choosing whether to accept the message or not, to break the law or not, to discriminate or not. The state has already decided on their behalf. Similarly, censorship aimed at avoiding victims' silence or withdrawal takes away from adult academic victims the right to choose either to accept a hater's message or respond to it.

Codes are not only ethically but also epistemologically flawed. Their supporters only differ among themselves in the degree of rejection to science and reason.⁶⁵⁴ Those scholars quote themselves though none of them has made a scientific point nor even use serious statistics. The discussion is replaced by dogmatism. Denied the value of scientific approach, corrections of errors is almost impossible; that leads academia to a new era of obscurantism which endangers freedoms and progress. Obnubilated by their own orthodoxy they skip that while freedom of expression is an essential anthropological characteristic, equality is an *entelechy* which demands a commitment to be put in practice. Such a commitment can only be achieved through a process of socialisation and culturization rather than coercive policies.

Code supporters do not see alternative options, such as more arguments, enforcing existing laws, convincing through education, proper use of media, etc., as valid methods to deal with expressions of hatred. Because of their conception of human beings, censorship is

⁶⁵⁴ Bunge, *supra*, note 1 at 170

the only resource at hand to prevent individuals from wrongdoing.

While a neutral policy does not demand judicial review, codes have been or will be challenged before them. The judicial intervention is different in the US and Canada. Both countries defend individuals' rights and equality. The difference between the two jurisprudences is given on the basis of justification. The US, defending individuals rights from a individual-rights perspective, and understanding the positive concept of liberty as a positive power without perfectionist goals, has chosen to give priority to a freedom which is associated with individualism. Somehow, this position is shifting in America. For the first time, minority leaders agree to ground their argumentation on a group-based strategy. The results of this shift have not yet made an impact in the US Supreme Court; however, the ideas that overcome are those with good advocates. Canada, protecting individual rights through a group-based strategy, and understanding the positive concept of freedom with a perfectionist goal to be imposed, has chosen to make equality a super-value. Canada, in protecting equality or expression, is driven by the consideration on the effect that protection will have on society as a "living entity." The Court's ultimate ratio to protect the rights of the students was the conviction that, overall, this protection better foster society's interests than the protection of Ross' rights. In similar cases, the US Court considered the impact of the protection on the individual as an abstract being. Possible harms to society were mostly ignored. Between these two extremes, no space is left to see that legal and social problems must be solved in a comprehensive way which considers the interaction between individuals and their social systems.

Paradoxically, the Canadian strategy has essentially prevailed in the academia of both countries. Might this be because the weight of international conventions have on many scholars in both countries. Canadian and American hate-speech codes are underlied by the group-goal based perspective, by a perfectionist concept of positive freedom and an understanding of equality among groups. An elite must determine what individuals really want as the general welfare and which right must prevail to achieve it. Chosen options may

coincide or not with the self-preservation of each individual (in Spinozian terms); then, if needed, a solution must be coerced. Given that a solution for the society welfare has been reached; any discussion is minimised. The Western distrust of ideas makes a silent majority more silent on these matters than ever before.

As pernicious as the enactment of hate speech codes is a policy which understand neutrality as passiveness. Attempt to create chaos and overcome the state's power to regulate conduct amounts to breaking the agreement in which subjects ceded their power to organised academia. The progression in this case is neutrality, revenge feelings, taking of justice into one's own hands, chaos, and totalitarian solutions to re-establish the system. Both the enactment of codes (totalitarian solutions from the beginning) or passive neutrality (which leads to chaos that leads to totalitarian policies) lead to the dangerous solution of restricting freedoms. Indeed, this is the sequence of "individualist historicism": facing a general rebellion beyond rational channels, in order to get a minimum of cohesion, totalitarian solutions must be coerced upon irresponsible subjects. History teaches us that anarchy precedes totalitarisms.

Given that speech codes are not an option, how must university deal with the revolution of minority victims so that it effectively achieves its legitimate aspirations? The point is not to suggest that their claims should be ignored, but to emphasise that the present strategies of censorship increase resentment while departing from democratic principles. Neutrality means that administrators put in place policies emphasising a common culture and goals rather than ethnocentrism. Any preferential treatment policy should give opportunity to individuals seriously disadvantaged because of their background and personal experiences rather than because they belong to a discriminated group.⁶⁵⁵ While some affirmative action is justified regarding work or housing or use of facilities even in primary or high school, in the academia context it is counterproductive as far as it atomises campus and minimises the merit of the beneficiaries of those policies. As Norman

⁶⁵⁵ See D'Souza, *supra*, note 272 at 251

puts it: "the role of education in creating this common culture and giving everyone access to it. To speak of a common culture is not to rule out the existence of a diversity of local and regional cultures, of ethnic traditions and sub-cultures. Underlying this diversity, however, at a more fundamental level, it is important that a society should possess shared traditions, a sense of a common history, a shared language of moral and political debate, shared values, and a literature which embodies and expresses them."⁶⁵⁶ Culture and education, rather censorship or *laisse fairer* connect with the idea of equality of power and a genuinely participatory democracy.

PART III. PROPOSALS

A. NEUTRALITY AND CODES: A NORMATIVE PERSPECTIVE

Having concluded in Part I that a democratic social enclave can only restrict expressions which cause a measurable harm to a specific individual's right, or to the state's right to regulate conduct; and having concluded in Part II that both hate-speech codes, which restrict expressions based on other rationales, and neutrality-policy, which endangers officers' right to regulate actions, are ethically, epistemologically and strategically wrong policies; from a normative point of view, the following proposals are aimed at justifying a negative by campus authorities, who have taken a moral stance against hate speech, either to enact hate speech codes or to adopt an absolute neutrality position.⁶⁵⁷

When a university is led from a managerial and bureaucratic perspective rather from an intellectual one, the main concern is stability.⁶⁵⁸ To achieve a maximum of order, such an administration enacts repressive policies without paying attention to historical origins of hate, or its manipulation in the struggle for power.⁶⁵⁹ On the contrary, a wise administration, imbued with a cooperativist spirit, may well analyse the social, labour and

⁶⁵⁶ Norman, *supra*, note 29 at 124

⁶⁵⁷ The proposals follow the scenario suggested by Weinstein and Kaplin, works cited notes 397 and 406, though the solution proposed in each case differs from that of those authors.

⁶⁵⁸ Emberley, *supra*, note 186

⁶⁵⁹ Drucker, *supra*, note 248 at 151 and ss

cultural incidents of racism, sexism, homophobia, and religious hate in their milieu and the probable incidence of its own policies in the increase of resentment. Officials may well consider solving those issues by using techniques of social control which are effective, morally acceptable and do not endanger freedoms. They may analyse three, at least, strong reasons as already discussed, to avoid the temptation of enacting restrictive codes: 1. Only those who do not have strong support of a powerful lobby are the ones caught by repressive policies. Well-placed individuals' hate speech are hardly caught by censorship. (Hitler was not charged under the anti-hate Bavarian law, Farrakhan in America or Le Pen in France are not prosecuted for their hate preaching.) 2. Speech codes awaken the victims by not enabling them to protect themselves. 3. University officials have at hand other recourses far more effective to deter the spread of discriminatory ideas and methods suitable to foster scholarly education within a framework of peaceful interaction among campus members.

Free speech principles does not eliminate absolutely all possibilities to regulate hate speech. However, "Among free men the deterrents ordinarily applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly."⁶⁰ Not only existing legislation and human rights dispositions are available to officials, but also the university has already set limits to prevent faculty's *carte blanche* in their academic activities: traditional norms of peers review, institutional standards, codes of ethics.

If the enactment of a code is seen as indispensable, few but fundamental principles are proper to be taken into account in their drafting. First, it is indispensable to have a clear distinction between regulation of conduct and speech. University authorities should carefully regulate conduct which endangers buildings, obstructs facilities, or effectively attacks students and faculties' rights, including rights to bodily safety and property. While words and symbols should be unrestricted, harming behaviours even with a communicative dimension should be punished. *Intramuros* regulations may refer to existing laws and insist

⁶⁰ Brandeis J. in *Schenk*, 274 US 357 at 378

on a strong enforcement of them. Freedom of expression meets the right to hear and convey a message, never does it cover the right to prevent someone from getting their message across through his/her own free expression. Officials should regulate expressions, so that they do not interfere with others' right to hear the message or with others' right to utter their own opinion.

Secondly, existing general law is applicable to society and to *intramuros* as well. Suppose the enactment of dispositions to punish slander, defamation, face-to-face insults, and the like. Those criminal behaviours are contemplated in existing laws too. Similarly, assaults or burglary, with an expressive dimension, are conducts targeted by existing laws. Individual defamation is prohibited by criminal codes and group defamation (racial, religious, sexual oriented groups) is a controversial issue.⁶⁶¹ University dispositions which forbid the former are superfluous; those aimed to forbid the latter run the risk of constitutional challenge.

Another principle to be followed is to distinguish whose speeches are targeted. The distinction between state-person and non-state person's speech, may be useful to avoid restriction of exchange of ideas without endangering institutional autonomy or faculty's traditional rights.

Any regulatory policy is likely to consider some or most of the following issues: physical areas where hate speech is delivered (public-forum, private forum and mixed forum areas), (2) persons who deliver it (symmetrical and asymmetrical relations of power), and (3) mode of utterances (individual-directed expressions and opinion directed expressions).⁶⁶²

Suppose that a code targets hate expression conveyed in streets and parks or public areas; given that they have identical nature to free speech places in society, they should

⁶⁶¹ See K. Greenawalt, "Insults and Epithets: Are they protected speech?" (1990) 42 *Rutgers L.R.*

⁶⁶² Thereinafter, I follow the stage set up by several authors, like Kaplin and Weinstein *supra*, notes 406 and 397 respectively. The solutions proposed here, however, differ from theirs.

be free of restrictions.⁶⁶³ More problematic is the issue of forbidding speech in areas which are not public forums, such as classrooms, student dormitories, lounge, paths, and other common use areas. Whatever a university's commitment to strict adherence to academic standards of discussion, its interest in eradicating a hostile environment that may impair students' capability to learn, or its goal to teach proper manners do not extent so far as public areas. Therefore, Stanford or British Columbia codes which forbid discriminatory statements in the classroom, and even in public forums, or in events off-campus prohibit what is permitted extramuros.

Principles of neutrality regarding ideas should be strongly applied to campus mass media: electronic communications, newspapers, books and every kind of written words. Therefore, no regulation should forbid professors from publishing an article conveying discriminative ideas, in college newspapers or local magazine.

Administrators may feel tempted to regulate hate expressions conveyed in the classroom, on the understanding that students targeted by discriminatory remarks are under the speaker's authority and cannot leave the classroom without jeopardising their marks or missing valuable instruction. Given this asymmetry of power, officials may consider protecting them from intimidation, verbal attack or threat of being judged and marked according to standards other than merit through restrictive codes. Those dispositions should be avoided for several reasons. Unlike society at large, in a classroom the exchange of ideas is indispensable to transmit data and impart superior education. The debate must follow academic and scientific standards. Unlike high school students, university students are not a 'captive audience'. They are supposed to be an active part of the learning process and to contribute data and experience in the development of the science, by challenging ideas. One of the purposes of higher education is to prepare students to challenge others'

⁶⁶³ *Papish v. Board of Curators of the Univ. of Mo.*, 410 U.S. 667,670; 411 U.S. 960 (1973) "The mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of 'conventions of decency.'"

theories, even those emanating from authorities.⁶⁶⁴

Admittedly, the classroom is, even today, a relatively insular place, where the exchange of ideas allows reformulation theories, clarification of conceptions, and challenges to beliefs. It is, at the same time and due to constraint of time and means, a place where students who dare to contradict professors' are perceived both by other students and by the leader of the class as outsiders disrupting the smooth flow of the meeting. Given these features of a classroom, what should be done when abusive language is used in class? A carefully drafted policy may well consider a threefold angle: 1) Hate speech uttered from asymmetrical or symmetrical positions of power, 2) the intention of the speaker: expression of an idea, or intention of offending, or a normative statement. 3) Mode of expression: opinions or individual directed statements. It may consider these elements separately or combined. The following discussion is aimed more to point out problems rather than to find final answers.

In a classroom, hate speech may adopt one of the two following types: expressions directed to specific individuals, or issued-based opinions, which may be subdivided in: *ad hominem* irrelevant comments and opinions germane to the course. A code may target individual-directed opinions uttered with the purpose of offending a specific individual. Given that those utterances may be conveyed from a symmetrical or asymmetrical position of power, university administrators may choose to ban only those uttered by professors or by peers, or both. Aimed at preventing intimidation, officials may enact speech codes targeting professors' discriminatory remarks. As rightly argued by codes supporters, judgement impaired by bias or conveyed in vulgar language is a serious lack for someone who is in charge of educating new generations of academics. In the classroom, an instructor may have strong beliefs but his/her judgement must stem from a rational process and it must be conveyed in conformity with professional standards of discussion. Direct insults expressed from an unbalanced position of power vis-à-vis professor-student constitute a sort of threat

⁶⁶⁴ See Jane Craddock *supra*, note 315

against those students to whom the opinion is aimed. A gay student facing a homophobic professor, a Jewish student enduring an anti-Semitic one are unlikely to refute their professors and jeopardise their marks. It is not only a question of fearing to authority, or a lack of willingness to rely on oneself, but a real position of unequal power. Does this asymmetry of power justify censorship in the classroom?

Racist, religious or sexist remarks uttered constantly by a professor in class against a student are very likely to interfere with the vilified student's ability to learn. This emotional harm is significant and real. Nevertheless, not only racist remarks against historically discriminated against groups but all pejorative words from a professor to any student causes a real harm to her or his ability to learn. There is no logical reason to assume that pejorative remarks from a Black professor to a White student will not affect the latter, unless we accept that a Black professor does not represent an academic authority for his White male students. Beyond the professor's race or gender, a student is always susceptible to his or her professors' remarks. Therefore, if the aim is to prevent harm to students' ability to learn, universities should ban all face-to-face insults whether or not racist or sexist, uttered by a professor directed to one or more specific student. The US Supreme Court in *Martin v. Parrish* dismissed the academic freedom of a professor who as intimidating tactics cursed *erga omnes* repeatedly to his students: "...undisputed that such language was not germane to the subject matter in his class and had no educational function."⁶⁵ *Martin* was not a case of racist slurs, though they affected the students negatively. In this case, the instructor's right of expression may be regulated in its mode: professors must express an idea according to standards on which the whole academic community has agreed upon. A university may single out outrageous verbal abuse to specific students in the classroom on two plausible grounds: to avoid a disruption of the student's concentration and ability to learn, and to encourage professors to keep academic standards.

⁶⁵ *Martin v. Parrish* 805 F.2d 538 (5th Cir. 1986). See Olivas, *supra*, note 298 at 1849

A mutual respect must be maintained at all times.

In the case of a professor's individual-directed remarks, uttered with *animus* to harm, the institution is entitled and has the duty to forbid them. Spinoza would have little problem dealing with this direct harm. Authority has the obligation to restrain a person from harming other's right through expressions. A similar solution must be applied to the case where a professor's remarks are uttered to judge or mark students according to their race, religion or gender. State-persons' remarks uttered to justify coercive decisions, if discriminatory, infringes upon subjects' right to equality. In such a case, S. 15 or the 14th Amendment cover the factual situation, and in Canada human rights codes would also apply. Thus, regulations on professors' insults or attacks upon the legal equality of their students are superfluous. Higher education is aimed at internalising in its members the conviction of responsibility. If a professor, who has gone through the path of higher education, is unable to develop his ideas without recourse to slurs, there is little -- if any -- possibility that civility can be taught to him through a regulatory code.

A university may well consider to target offensive remarks among peers in the understanding that in academia decorum and civility are not only desirable but at some point a *sine que non*. Thus, it may enact a code proscribing students' vulgar terms in the classroom as the best way to maintain a civil mode of discussion. As Greenawalt says: "It is not a coincidence that those less privileged culturally or more radical politically are likely to use words and phrases that might be judged to impair civil discourse." However, regulations of discriminatory remarks among peers seem improper. Not only because verbal offensiveness may be confused with the offensiveness of the idea, but also because words, which appeal more to sentiments than to reason, are often chosen for its emotional content to emphasise the idea. Indeed, extreme expressions among peers may provoke irrational answers which is far from being the goal of higher education. But at this point it is the task of a skilled professor to return the class to a productive debate using academic standards of discussion within a framework of mutual respect, as has been done successfully

enough by university professors in the last 1000 years. To insure a general decorum in the classroom fosters a minor goal in university in comparison with the exchange of ideas which is its paramount goal; so regulations on that basis should be avoided. Moreover, such regulations prevent students' from a preparation for the real world where offensive ideas are part of daily life. Often universities place students inside a protective crystal ball where everything is antiseptic and polite, that prevents them from developing mature and contesting attitudes. This pattern gives very good profits at the time they are governed, nothing is easier to govern than a flock. However, the loss of intellectual capital is irreversible. Although slurs show a lack of higher educational standards and should be regretted by the academic community, the professor (rather than a general code) should restrict, if appropriate, those utterances on a case by case basis. The academic body should trust in each professor's ability to guide his/her students to an enriched and scholarly debate. If slurs during class discussion are so widely spread that someone may require the enactment of a restrictive code, intelligent administrators should wonder, before further action, why is the academic level so low in their institution and who hired the faculties or admitted students with low standards.

Acknowledging that face-to-face hate remarks are contemplated by existing legislation, an administration may consider enacting a code which targets only discriminative remarks directed to the whole class, either by professor or students. *Erga homines* remarks have a twofold aspect: germane to the course or irrelevant to it. First, codes which target sporadic hate remarks, such as the British Columbia Code, impact on students and professors so heavily that discussions unlikely could be carried on in a honest way. Secondly, as mentioned above, words are often chosen not only for their cognitive strength but also for the emotive force embodied in them. "Baby-killers" are words that do not convey probably as much information but the intensity of their users' conviction that for them abortion is a horrendous crime. Is the classroom a place where emotionally loaded words should be suppressed? A separate analysis must be given to whether hate expressions irrelevant to the

subject of the course are conveyed by (1) professor or (2) students. The solution might be not necessarily the same for both cases.

(1) It must be considered whether or not they are uttered according to academic standards. The function of a university is to teach to seek the truth, in accordance with sound methodology. Professors, who express biased opinions without contrasting them with scientific information, are doing a harm to their students' right to acquire a higher education. The harm is caused by the lack of academic standards rather than by discriminative remarks *per se*; any sanction should be based on their lack of professionalism; their freedom of expression should remain intact.

If the line between what can properly be said or not is drawn according the forum purpose, it would be determined what is a "remark irrelevant to the course". It is suggested that professors should be constrained to say no irrelevant remark with a sexist or racist connotation so that the purpose of the forum - the transmission of information - could be carried out as smoothly as possible.⁶⁶⁶ Weinstein suggests that administrators may forbid hate expression in class, not because of the idea it exposes but because it is inimical to the forum's purpose.⁶⁶⁷ For his part, Stanley Fish maintains: "In the classroom, the established purpose -instruction as mandated by college and department requirements- would place obligations on both teachers and students that would restrict both the subjects to be discussed and the manner of their discussion."⁶⁶⁸

What is the forum's purpose? The ultimate goal of academia is to seek knowledge following certain standards. In this endeavour, both debate on subjects germane to a specific field and general themes are suitable. We have forgotten that the epistemology of a science is not inimical to the transmission of the data of that science. The debate on principles that should guide the behaviour of those involved in science is indispensable in the academic

⁶⁶⁶ See American Ass. of Univ. Prof. Annual Report 1991

⁶⁶⁷ Conf. *Cornelius v. NAACP Legal Defence and Educ. Fund., Inc.*, (1985) 473 U.S. 788, 806 the Supreme Court stated: [restrictions are] "reasonable in light of the purpose served by the forum and are viewpoint neutral."

⁶⁶⁸ S. Fish, *supra*, note 301 at 128

milieu. Biology students do not only learn about cells but to respect other's data, to analyse rationally every theory, to follow basic principles of superior education. In addressing the concept of "life", a biology student is not only confronted with bio-electric currents but also is faced with fundamental questions about "death, freedom, gods," the three fundamental questions that all humans ask to themselves, as Kant said. Arguments which suggest that a mathematics professor should not convey his/her opinion that abortion is a murder because this subject is not germane to the class purpose are worrisome. Often it is forgotten that university cloisters were created as centres where learning meant exploration of all transcendents. They were the paradise for the discussion of a particular, without losing sight of a globalization of knowledge. The current fragmentation of learning has led to a university without ideas. Karl Popper, who was fighting against moral relativism years before A. Bloom in the US and Alain Finklerlraut in France, explains that university has foolishly fragmented the knowledge in specialised disciplines.⁶⁹ In that way, students are prevented from thinking about the whole while they are overwhelmed by the increment of information about a narrow field. Equality and discrimination and all fundamental values in Western society are ultimately germane to the whole university body. Considering how contested several of those values are, discussion about them should not be restricted. Rather than enacting codes restricting discussion of irrelevant remarks in class, administrators should trust that the hired professors will spend in class an appropriate time discussing irrelevant and conflictive themes. If after the course is finished, officials evaluate that the themes of the course were neglected, they might consider disciplinary sanctions on that basis rather than restricting themes of discussion in class.

To require instructors be strictly attached to the theme of the course without uttering distracting remarks would be unwise. Those remarks may well benefit the advance of other areas of knowledge and students' political and social formation; also some irrelevant remarks many times within a joke context may be relaxing and recapture again the attention

⁶⁹ See *supra*, note 51

of the class which will ultimately lead to better learning.⁶⁷⁰ Humour may well be part of the teaching style; academia has become a fundamentally boring place. Nevertheless, a general policy of adherence to intellectual standards even with respect to irrelevant hate remarks should be rightly required for professors. According to Michael Olivas,⁶⁷¹ there is "a trend towards explicit protection of academic freedom in faculty contracts." A solution could be that those contracts include some clause explicitly requiring that faculties voice their opinion in compliance with academic standards of proof and scrupulous care in presenting material, rather than to target the mode or content of opinions in new dispositions, or make reference to "sensitiveness".⁶⁷² At the present time, professors are under constant pressure to keep good student-instructor relations and to try to cope with various forms of near-paranoia. "Insensitivity" is an answerable charge. A professor's freedom to teach is seriously restricted if he/she is misunderstood by minority students hypersensitized by indoctrination. It is difficult to teach a controversial theme without making students hear both bells, one of them by definition being offensive, or at least unpopular. The chilling effect would prevent professors from talking about important issues of race or sex for fear of being charged. Therefore, the learning process would be impaired the same. Dispositions which target offensiveness like Stanford, B.C. or Toronto universities are diffuse and censor a great deal more than intended. I adhere to Rabban and Oliva's thesis that "the professional speech is broadly protected though subject to norms of professional practice."⁶⁷³ Students' learning opportunities are jeopardised not only by the professor's or peer's hate speech but also by a professor overwhelmed by the tension of not been "insensitive". If the purpose is to improve the learning environment, administrators should avoid adding more doses of intimidation, putting aside any attempt to legislate on irrelevant remarks in class. A more contentious issue is how to deal with remarks which are not germane to the

⁶⁷⁰ *supra*, note 639

⁶⁷¹ Olivas, *supra*, note 298 at 1837

⁶⁷² *ibid*

⁶⁷³ See Rabban, *supra*, note 460

class-subject and which both cannot be proved, such as religious or political convictions, and collide with students' right to their own beliefs. Two cases in American jurisprudence illustrate that those remarks should be not subjected to general regulations. In *Bishop v. Aronov*,⁶⁷⁴ a psychology professor invited his students to review class theories in light of Christian principles. In *Cooper v. Ross*, a Marxist professor announced his aim to structure the course upon his own political beliefs though he did not require the students to endorse his views. Only the latter was taken before the Supreme Court which ruled in favour of the instructor, though it did not address the issue whether of the University is entitled to "prohibit teaching from a Marxist point of view."⁶⁷⁵ Students benefit from the academic analysis when it is elaborated by different professors with different political and religious perspectives who give them the opportunity to choose that which best suits their personal convictions.

(2) A university may decide to restrict only students' discriminative *erga omnes* remarks which are not germane to course themes. This would narrow the exchange of ideas. When prejudiced and biased words are conveyed the rest of the class members have the opportunity to answer back assumed stereotypes. "Baby killer" gives the opportunity to discuss whether intrauterine life is a child or not, whether it has legal rights or not, and so on and so forth. Similarly, pejorative remarks on religious tenets may well be the beginning of a fruitful dialogue on convictions. *Ad hominem* hate speech should not be regulated. The civility of the discussion should be left to instructors' discretionary power. A diversity of responses by professors endorsing a wide range of ideologies to conflicting problems avoids campus orthodoxy, which indubitably will follow from a viewpoint-oriented code. While a code would single out all the same type of remarks in all classrooms, each professor would ban different ones. Interacting in class under the

⁶⁷⁴ 732 F.Supp. 1562 (N.D.Ala.1990) rev'd, 926 F.2d 1066 (11th Cir.1991) and cert. denied sub nom., *Bishop v. Deschamps*, 112 S.Ct. 3026 (1992) For an extended analysis See Olivas, *ibid*.

⁶⁷⁵ *Cooper v. Ross*, 472 F.Supp. 802 (E.D.Ark. 1979) at 814

direction of different instructors, students get a better idea of which and why discriminative general remarks are inimical from a principled point of view to the academic discussion. To forbid a word in a context limits its use in another. Moreover, what is an insult today may not be one tomorrow.

Students should know that their offensive or discriminatory opinions, germane or irrelevant to the course subjects uttered *ad hominem* in the heat of discussion, are protected. Students are already reluctant to engage in a vigorous debate and a cautious student fearing to be charged with making harassing remarks will withdraw from the debate keeping his/her thought to herself. Dispositions restricting *erga homines* hate speech makes the situation worse. A more useful solution would be to encourage students to internalise ideas of equality and respect, to encourage them to use academic standards of discussion, and above all be ready to stand for their ideas and voice them.

Finally, a university may decide to target professors' expression of controversial ideas and require that they refrain from making their classes uncomfortable when teaching within their field. "Harassment in classrooms is based on theories held by teachers, and that environment has prevented minorities from having the same advantages afforded others."⁶⁷⁶ Adopting such a policy, officials endanger both academic freedom and the advance of knowledge. What is argued above with respect to irrelevant remarks by professor is an even more pressing argument when dealing with opinions in a professor's domain of expertise. Rather than appealing to "comfort" or "offensiveness", university officials must require that any voiced idea be preceded by conscientious analysis, careful attention to others' works, honesty in the information delivered and construction of any theory in light of supportable evidence; all of them indispensable standards in academic work. Drawing overbroad critiques from limited data, or unfair remarks is a sign of poor scholarship. The greater the academic freedom, the greater the responsibility to act according to standards

⁶⁷⁶ Vice president of Academic Affairs as quoted by D'Souza, *supra*, note 275 at 141

of professional integrity, to take reasonable care in the handling of data, to abstain from plagiarism and falsification of data, and to resort to theories verifiable on scientific methods. What is said must be proven. Because this principle is deeply rooted in the academic community, officials may rightly punish or fire someone who does not keep those standards. But, by no means should the punishment be related to the ideas expressed or because of the sensitivity they may raise.

If as already argued, any regulation of irrelevant hate remarks by students, should be struck down, it is even more important that pejorative remarks germane to the subject matter should not be restricted. The chilling effect of censoring them would foreclose many valuable class discussions because it is part of the human nature to avoid problems. Controversial themes, ranging from gay rights, untraditional families, affirmative action programs, abortion, and religious themes, may just be put aside for fear that someone may feel offended and press charges. In that case, someone's right to convey or receive relevant ideas, even through inflammatory language, would be seriously impaired in order not to offend others. When the discussion of ideas is at stake, whether transmitted through irrelevant remarks or comments germane to the course, proscription of offensive, even abusive speech is ethically wrong. As Olivas says restrictions on an instructor's domain of expertise undermine "the autonomy essential to critical inquiry, and would deny students (and by extension, the community) the fruits of professors' labour."⁶⁷⁷

Authorities may consider regulations in private areas. Unlike classrooms or public areas, hate speech in dormitory areas offer a challenge to a wise administrator. While it seems clear that rooms in dormitory facilities are equivalent to private places and therefore individuals should be protected from offensive messages intended to violate their privacy⁶⁷⁸, it is not so clear which policy should be adopted on hate expressions in common

⁶⁷⁷ Olivas, *supra*, note 310 at 1844-46

⁶⁷⁸ See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) and *Cohen v. California*, 403 U.S. 15,21 (1971) The Supreme Court found "government [is entitled] to shut off discourse... upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."

places like paths and lounge areas. Within a general code of behaviour, authorities must prohibit all hostile messages, including all those conveying racial, religious or sexist hate remarks in rest areas to prevent hostility in housing in general, not only to avoid constitutional challenges but also to achieve a peaceful living. However, as Weinstein rightly points out, it seems unfair permitting pro racial diversity messages and forbidden those against it, displayed both in the same place.⁶⁷⁹

Regulations on students discussions in quasi private areas is a more controversial issue. First, if a discussion among residents takes place in quasi-private areas, the subject of the discussion transforms the forum into a public one; listeners are not a "captive audience". Privacy is not affected because it does not matter how offensive a discussion may be, the offended listener may leave the place. Secondly, while in the classroom concerns for academic standards and protection of fear to jeopardise marks may be valid, in lounges areas discussions are informal exchange of ideas. Even if individual-directed sexists or racist slurs are uttered in those quasi-private areas, it would be unwise and very impractical for administrators to restrict them on the bases of privacy or fighting words doctrine. However, for the sake of keeping a peaceful environment, administrators may encourage, through special programs rather than through a code, the restraint from the use of all abusive language, not only discriminatory gender or race remarks.

The issue of hate speech by authority, though extremely controversial and complex, may be considered by campus authorities in drafting policies on expressions. As rightly argued Rae Langton ⁶⁸⁰ "The speech acts of apartheid that legitimate discriminatory behaviour and unjustly deprive blacks of certain rights have an exercitive force that would be absent if they were made by speakers who did not have the appropriate authority." In drafting regulation on high profile persons' speech, the distinction between state-persons' speech,

679 Supra, note 397 at 230 and ss. , nonetheless he argues different solutions.

⁶⁸⁰ Rae Langton, "Speech Acts and Unspeakable Acts" 22 *Philos. & Publ. Aff.* (1993) 293, repr'd in Tom Campbell and Wojciech Sadurski, eds., *Freedom of Communication* (Aldershot: Dartmouth, 1994) at 103

which may rightly be interpreted as a defence of enforceable policies, and state-person's speech which expresses personal views seem crucial to draw the line between punishable and non-punishable speech. If the speaker makes clear that he/she is not speaking in behalf of the institution, his/her freedom remains untouchable.

Although argued above that a university could enact some dispositions to restrict only expressions from state-persons, the commitment to free expression of ideas must be kept in mind by officials. Intolerance to ideas may be a reasonable rationale in churches, business or military environment, but it is antagonistic to the challenge of ideas, which is the *raison d'être* of a university. Discriminatory speech by those in high profile position or of those perceived by peers and ordinary persons as speaking on behalf of authority should be regulated weighing the normative ingredient of legitimacy -- recognition of authority -- and the empirical element of control. Most hatemongers do not meet both conditions of legitimacy and power to enforce; they may move an audience but they cannot coerce it. On the contrary, hate speech from persons who do meet both conditions demand the intervention of academia to prevent a harm to its own right to regulate conduct and to prevent a harm to individuals' rights.

Finally, in order to avoid constitutional challenges or because of its strong commitment to freedom of expression, academia authorities may implement a policy of total neutrality. Spinoza holds that freedoms are compatible with a rational organisation of society. Each element -- protection of speech and provision of conditions for speech -- is not *per se* enough to defend expression but the combination of the two of them, in Spinoza's theory, is a unique deterrent to any encroachment. Campus officials should intervene not only when someone's expression harms other rights, but also when law and order are challenged. Subjects surrender their rights to oppose the law when they agree to enter in the social agreement. If there is to be authority at all, subjects can speak out against any law or policy, except against the sovereign's power to rule. If subjects reserve the right to be exempted from obedience, no social contract is possible. Academia is not an exception

to this norm. In carrying out a policy of absolute neutrality, academia risks failure to provide a peaceful environment for the exercise of rights.

CONCLUSIONS

The main concern throughout this work has been to revisit the basic foundations protecting and limiting expression in order to analyse whether the currently implemented policies in academia on hate speech are consistent with those principles and with its goals as centre of learning. Having started by analysing some errors in the interpretation of the Enlightenment principles and their negative impact on the jurisprudence of freedom of expression, and having briefly considered the current ideologies in universities, the main conclusion is that similar to the manner that many followers of early Enlightenment, the scholarly elite supporting speech codes evidences a totalitarian conviction: an elite may both decide on behalf of the members of a social enclave what is best for them to hear and say, and coerce that solution.

Perceiving academia at the verge of collapse, its officers envisage only two options to prevent it: either to make the fragmentation deeper, or encourage some kind of unity through coercive homogenising methods. Those who reject the idea that the university is a place of incubation for answers to the profound human inquiries ask that divisive problems be eradicated. Code supporters, either from a managerial perspective or from the avant-garde philosophical elite, envisage that the only possible response to hatemongers in academia is to silence them in order to prevent members of vilified groups from losing their dignity, and society from acting against vilified groups. They premise on the omnipotence of the law upon irrational individuals. If hatred and fears cannot be eradicated, at least, they have to be controlled through norms. Expositors of both positions coincide in the conviction that the current technological and social process make feasible a perfect university. In their attempt to foster the paramount democratic value of equality, they intend to impose it through totalitarian methodology which discredits humans as moral beings, endangers democratic values and does not achieve their goal of protecting equality. Hate speech codes

seem the panacea to disturbing problems.

However, despite arguments against it, words are symbols not acts; they are wrappers in which ideas are conveyed; therefore, expurgating words is doomed to fail if the ideas expressed through them remain. Indeed, what is intended to be curbed with hate codes is ideas not the means of expressing them, the speech. As a logic sequence, it follows that someone must determine which ideas deserve to be expressed, that is the moral agenda of academia. The imposition of any orthodoxy, in Spinozian and Kantian terms, causes a harm to humans as self-governing agents. When someone loses his freedom, even voluntarily, that loss does not increase the same individual freedom of others, but a loss of freedom occurs. This loss occurs even if, as a consequence of the loss of my freedom, other subjects gain another freedom.⁶⁸¹ It is a confusion of values to assert that a freedom can be exchanged for another. Freedom is an individual power to choose and when a such power is given up, either willingly or by coercion, this power is lost not transferred. Therefore, advocates of censorship have a heavy onus to justify any prohibition on expressions. They must clearly show the reason by which a restrictive policy gives priority to one right over other and reasons to justify why the chosen means meet the objective of that law.

Spinoza teaches that suppression or imposition of a belief is not only unfeasible but also, if attempted, it harms the harmony of social life. In his views, justice, mutual help, kindness and love are believed by man only when, through education, they become immanent and formative principles of his life and endeavour.⁶⁸² From a quite opposite epistemology, the main goal pursued by hate-speech code supporters is to set up, once and for all, the priority of equality as a supervalue within a framework of conflictless academic community. Academia has put aside the idea that humans are rational and responsible beings, seeing coercion as the only suitable way to foster values and solve disputes. It has resigned the idea that uncomfortable situations in class may be solved through private dialogue among

⁶⁸¹ Rawls, *supra*, note 52, chap The Use of Public Reason

⁶⁸² Duff, *supra*, note 6 at 480

offended professors or fellow students. The paternalism underlying North-American university codes treat students and faculties as minors or patients and denies their very nature of self-governing and responsible beings. Therefore, the resistance to such policies is inevitable regardless how much coercion the state applies.⁶⁸³ Instead of recognising that social problems are always complex and require a comprehensive approach they take recourse to partial solutions. Moreover, speech-codes represent an extra danger. Fearing charges, professors avoid conflicting themes. Students get used to accepting others being entitled to think on their behalf, unable to challenge what they hear, and ready to accept dogmatic transmission of information are likely to be at the mercy of future enemies of democracy. Alan Bloom says "education [could be] little more than propaganda, and propaganda that does not work, because opinions and values [must be grounded] in experience or passion, which are the bases of moral reasoning."⁶⁸⁴

Unless they were ready to transform universities into churches, their officers should look for alternative solutions, Emerson says: "the society may seek to achieve other or more inclusive ends, such as virtue, justice, equality or the maximum realisation of the potentialities of its members. These problems are not necessarily solved by accepting the rules of freedom of expression. But, as a general proposition, the society may not seek to solve them by suppressing the beliefs or opinions of individual members."⁶⁸⁵

Paradoxically, the trend is to look for solutions of very concrete problems in a very abstract realm. In a political and philosophical world where abstract ideas prevail -- the religion of State, the proletariat, the sensitivity of groups -- many believe that by repeating a quasi-scientific formula, the world is understood and society managed. As Bunge argues, in a return to obscurantism, many scholars disdain the conscientious minute analysis of facts for the sake of an outstanding achievement in a specific area.⁶⁸⁶ Such an approach

⁶⁸³ Conf Berlin, *supra*, note 4 at 35

⁶⁸⁴ A. Bloom, *supra*, note 148 at 61

⁶⁸⁵ Emerson, *supra*, note 104 at 880.

⁶⁸⁶ Bunge, *supra*, note 1

increases biased conclusions. Alleged harms, argued as basis to suppress extreme expressions, though not proved but chanted as a *mantra*, are offered as a reason to curtail the most distinctive human feature. Problems doubtless exist, but solutions have made them worse and have created many others,⁶⁸⁷ because in finding solutions to political issues, the study of individual facts is disconnected from their social context and carried out without absolute standards of truth.

First of all, codes send the message that statutory dispositions are able to build human relations according to a pattern chosen from the top. Instead of teaching that "perceptions" and "feelings of threats" be rationally assessed, students are encouraged to develop a "culture of complaint" as Robert Hughes as named it.⁶⁸⁸ Academia is assessed as a place where aggrieved groups, rather than individuals, are the parties.

Secondly, focused on partial solutions to pressing problems, the long term considerations are obviated. The predominate scholarship willingly ignores that the lack of ideas or their defence leaves the highly complex political forces at the mercy of irrational and primitive beliefs. Masterly, Berlin teaches that the late XXth century has a general disenchantment with ideas. A deep change in attitudes toward the function and value of the intellectual is the main difference between our society and that of the past. While in the past there was a devotion to answer transcendental problems relying on some ultimate moral authority, today there is a hostility to all ideas as such. Progressive and reactionaries claim to circumscribe the debate, determine from the top the range of what may be asked and what may not, and what definitive values are to be adopted in the community. As long as ideas may cause disturbances, they naively intend both to eradicate the conflict by removing debate, and replace it with dogmatism. Driven by the conviction that social matters have right and wrong answers which are *a priori* deducted, the predominate scholarship fantasises that a final agreement on ends has been reached. Thus, all moral and political problems can

⁶⁸⁷ Emberley, *supra*, note 46 at 61

⁶⁸⁸ Robert Hughes, *The culture of complaint: The Fraying of America* (N.Y.: Oxford University Press, 1993)

be solved by applying some technological method like speech codes.⁶⁸⁹

Within this scheme of thought, students and professors are asked to remain silent; no dissonant voices, which are not adjusted to the social, religious or political dominant model, should be heard. Academic community is advised not to think, there are enough people thinking on their behalf so that they may be happy. Struggling with global conflicts, in a epoch of social, economic and political instability, society and academia are ready to achieve security at any price. Old political principles of individual autonomy and responsibility are put aside. As Berlin maintains, Hobbes, rather than Spinoza, seems to be right: security is all what men look for when enter in to society. Paradoxically, neither security nor stability are the outcome of the compromise on basic principles. The obliterating of transcendental questions themselves, far from take away the existential troubles, has increased them.

In fact, because hate speech codes are a top-down solution, a great amount of incontestable power is needed to direct the social life. As the reverse of the coin: any concentration of power entails a threat to fundamental freedoms. Were the social patterns chosen by the majority of the members of campus, they would be established by extra-legal methods rather than by quasi-legal mechanisms. Universities do not need those regulations, but to reach consensus.

Recognising the danger of repressive policies, few universities have opted for ignoring the problem. However, the non-intervention policy also endangers freedoms. Because the very purpose of the state is to protect freedoms, Spinoza saw the state as entitled to restrict expression aimed at attacking fellows' rights. While restriction of expressions aimed at preventing hypothetical harm defies basic principles of justice, universities officials who overlook a proved and measurable harm, foster chaos.

689 It is paradoxical that while in academia everything must be developed in a smooth way, *extramuros* is witnessing one of the most convulsive periods of the last centuries with strong changes in social and individual patterns of behaviour. See Drucker, *supra*, note 248 chap.1

Both an absolute neutrality policy or repressive codes are unable to deal with the need of a renegotiating of new social contractual terms. When the scattered incidents in North American universities, and the wording and rationales of the speech codes are analysed dispassionately, it is seen that what is at stake is a fierce wrestling for power. Rightly, Stanley Fish argues that what is at stake nowadays is the debate of various political agendas.⁶⁹⁰ The imposition of a particular cosmos vision rather than a reflexive intention to adjust new sets of values guides the enactment of hate speech codes. The point is to govern rather than to convince. While S. Fish maintains that "free" speech does not mean "non-ideologically constrained" and concludes that speech which fosters a determinate ideology should be forbidden, indeed, in a democratic system because speech should always be fully protected because it is full of ideological context.

The previous defence of freedom of expression regardless the of consequences of speech may have, could be understood as: 1) I do not really believe that hate speech be able to overcome current societal chosen values, 2) or I believe that it is able to change society and we must be ready for facing those changes. Because I am of the opinion that speech is the emergence of ideas not the ultimate determinance of them, if society holds firmly democratic values hate speech will pass. On the contrary, if it is true that democracy is losing its appeal, the triumph of hate speech is the triumph of antidemocratic ideas already spread in society by many other means. In few words, university should deal with the hate speech issues in a comprehensive fashion rather than to take recourse to partial solutions.

Spinoza states: "He who seeks to regulate everything by law, is more likely to arouse vices than to reform them. It is best to grant what cannot be abolished, even though it be in itself harmful. How many evils spring from luxury, envy, avarice, drunkenness, and the like, yet these are tolerated -vices as they are- because they cannot be prevented by legal enactments. How much more then should free thought be granted." Even if men are under a

⁶⁹⁰ He states: "each of which pursues goals that exclude or de-emphasise the goals of its rival and none of which can legitimately claim to be more fair or more objective or more neutral than other." *supra*, note 301 at 75

censorship so as they "do not dare to utter a whisper, save at the bidding of their rulers, nevertheless this can never be carried to the pitch of making them think according to authority, so that the necessary consequences would be that men would be thinking one thing and saying another."⁶⁹¹ Consequently, having taken a moral stance against hate speech, universities, rather than insist in the present policies which have not solve the problem, may consider worthy to take a wider approach to the issue without putting aside the basic foundations to protecting speech in the academic context.

⁶⁹¹ *Tract. Pol.*, *supra*, note 9 at 262

BIBLIOGRAPHY

- ACKERMAN, Bruce *We The People: Foundations* (Cambridge, Mass.: Harvard Univ. Press, 1991)
- ALLPORT, Gordon, *The nature of Prejudice* (Reading: Mass: Addison-Wesley, 1954)
- ARISTOTLE, *Eudemian Ethics Books I, II and VIII*, trad. Wood, M. 2nd ed. (Oxford: Clarendon Press, 1992)
- AUSTIN, J.L., *Philosophical Papers* 2nd. ed., (Oxford Univ. Press, 1970)
- BARENDT, Eric, *Freedom of speech* (Oxford; Clarendon Press, 1985)
- BAKER, Benjamin, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (Princeton, N.J.: Princeton Univ. Press, 1988)
- BEAUDOIN, Gerald A. & Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., (Toronto: Carswell, 1989)
- BEAUDOIN, Gerald A. & Mendez, Errol, eds., *The Canadian Charter of Rights and Freedoms*, 3rd. ed., (Toronto: Carswell, 1996)
- BELL, Derrick, *And We are not Saved: The Elusive Quest for Racial Justice* 1st ed., (New York: Basic Books, 1987)
- BERLIN Isaiah *Concepts and Categories. Philosophical Essays*, c.1950 (New York: Viking Press, 1979)
- BERLIN, Isaiah, *Four Essays on Liberty*, 1st ed., (New York: Oxford Univ. Press, 1969)
- BERLIN, Isaiah *Vico and Herder. Two Studies in the History of Ideas*, 1st ed., (London: The Hogarth Press, 1976)
- BLANCHARD, Margaret, *Revolutionary Sparks, Freedom of Expression in Modern America* (New York, Oxford Univ. Press, 1992)
- BLACKSTONE, Williams, *Commentaries on the Laws of England*. (Boston: T.B. Wait, 1818)
- BLOOM, Allan: *The Closing of the American Mind* 2nd ed. (New York: Simon & Schuster, c 1987, 1988)
- BOLLINGER, Lee C., *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, (Oxford: Clarendon Press, 1986)
- BOROVY, Alan, *When Freedoms Collide, The Case for our civil liberties*, 1st. ed., (Toronto, Lestr& Orpen Dennys, 1988)
- BRADLEY, Francis H. *Ethical Studies*, 2nd ed. with additional notes by the author

- (Oxford: Clarendon Press, 1952)
- BRUN, Henri et BRUN, Pierre, *Charters des Droits de la Personne* (Montreal, Qb.: Wilson & Lafleur, 1996)
- BURSTYN, Varda, ed., *Women Against Censorship*, (Vancouver, Douglas & McIntyre, 1985)
- CAMPBELL, Tom & Wojciech Sadurski, eds., *Freedom of Communication* (Aldershot: Dartmouth, 1994)
- CANTU, Cesar *Historia Universal*, 1st ed., (Bs. As.: Sopena, 1944)
- CANTRIL, Hadley, ed. *Public Opinion, 1935-1946*, 1st. ed. 1951 (Wesport, Conn.: Greenwood Press, 1978)
- CLOR, Harry M., ed., "Censorship and freedom of expression. Essays on Obscenity and the Law", Judge Jerome Frank, Associate J. William Brennan, Charles Rembar, Walter Berns, Richard F. Hittlinger, Harry M. Clor, Richar H. Kuh, Willard M. Gaylin (Chicago, Rand McNally College Publishing, 1971)
- COLIVER, Sandra, ed., *"Striking the balance"* (Essex, U.K.: Univ. of Essex, 1989)
- COTLER, Irwin, & Eliadis, Pearl, eds., *International Human Rights Law: Theory and Practice* (Montreal: The Canadian Human Rights Foundation 1992)
- COX, Archimbold, *The Warren Court* (Cambridge: Harvard Univ. Press, 1968)
- COX, Archimbold, *Freedom of Expression* (Cambridge: Harvard Univ. Press, 1981)
- DELEUZE, Gilles, *Expressionism in Philosophy: Spinoza*, 1st. ed., trad. M. Joughin, (N.Y.:Zone Books, 1990)
- DONNERSTEIN, Edward; Linz, Daniel and Penrod Steve, "The Question of Pornography. Research, Findings and Policy Implications", (New York: The Free Press, a Division of Collier Macmillan, Inc., 1987)
- DRUCKER, Peter F., *La Sociedad Postcapitalista*, trad. M. Merino Sanchez, 2nd. ed., (Bs. As, Editorial Sudamericana, 1993)
- D'SOUZA, Denish, *Illiberal Education. The politics of race and sex on campus*, 1st ed. (New York Free Press, 1991)
- DUFF, Robert A., *Spinoza's Political and Ethical Philosophy*, rev'd ed., c.1903, (New York: Kelley, 1970)
- DWORKIN, Ronald, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* 1st ed (N.Y.: Alfred Knopf, 1993)
- DWORKIN, Ronald, *Taking Rights Seriously* (Cambridge: Cambridge Univ. Press, 1987)

- DWORKIN, Ronald, *A Matter of Principle* (Cambridge, Mass.: Harvard Univ. Press, 1985)
- ELSTER, Jon and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge Univ. Press, 1987)
- EMBERLEY, Peter C., *Zero Tolerance. Hot Button Politics in Canada's Universities*
(Toronto: Penguin Books, 1996)
- FISH, Stanley, *There's No Such Thing a Free Speech and It's a Good Thing, Too* (N.Y.: Oxford University Press, 1994)
- FISS, Owen M. *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, Colo.: Westview Press, 1996)
- FREUND, Ernst, *The Police Power: Public Power and Constitutional Rights*
(Chicago: Callaghan, 1904)
- GADAMER, Hans-Georg, *Truth and Method*, trans. J. Weinsheimer & D. Marshall, 2nd ed.,
(New York: Crossroad, 1989)
- GARRET, Don, ed., *The Cambridge Companion to Spinoza* 1st ed.,
(Cambridge, Ma.: Cambridge University Press, 1996)
- GILLIGAN, Carol, *In a Different Voice: A Psychological theory on women's development*,
1st ed (Cambridge, Ma: Harvard Univ. Press, 1982)
- GLENDON, Mary Ann, *Rights Talk*, (New York: Free Press, 1991)
- GREEN, Thomas H, *Lectures on the Principles of Political Obligation*. Introduction by
Lord Lindsay of Birker 1st ed., (Ann Arbor: Univ. de Michigan Press, 1967)
- GREENAWALT, Kent, *Fighting words. Individuals, Communities, and Liberties of Speech*
(N.J.: Princeton University Press, 1995)
- GROFFIER, Ethel & Paradis, M., eds. *"The notion of Tolerance and Human Rights" Essays
in Honour of Raymond Klibansky* (Montreal: Carlton Univ. Press, 1991)
- GROTIOUS, Hugo, *De Jure Belli ac Pacis. "The Law of War and Peace"*, trans. F. Kelsey,
(N.Y.: Bobbs-Merrill, reprinted by permission of The Carnegie Endowment for
International Peace. c.1925)
- HARE, Richard M. *Freedom and Reason*, 2nd ed. (Oxford: Clarendon Press, 1964)
- HAWKINS, Gordon & Zimring, Franklin, 2nd ed., *Pornography in a Free Society*
(New York: Cambridge University Press, 1991)
- HAYEK, Friedrich A. von , *The Constitution of Liberty* (Chicago, Ill.: University of
Chicago Press, 1978)

- HENTOFF, Nat, *Free Speech for Me - But Not for Thee. How the American Left and Right relentlessly censor each other*, 1st ed., (New York: HarperPerennial, 1992)
- HOBBS, *Leviathan*, 31st ed., trans. B. Jowett, R. c. 1952
(Chicago: W. Benton, Enciclopedia Britannica, 1989)
- HOGG, Peter W., *Constitutional Law of Canada*, 3rd. ed.,
(Toronto: Carswell, 1992)
- HONNING, Bonnie, *Political Theory and the Displacement of Politics*, 1st ed
(Ithaca: Cornell University Press, 1993)
- HOOKS, Bell, *Talking Back: Thinking Feminist, Thinking Black*, (South End Press, 1989)
- HUGHES, Robert, *The Culture of Complaint: The Fraying of America* (New York: Oxford University Press, 1993)
- HUMPHREY, John, "Political and Related Rights" in Theodore Meron, ed., *Human Rights in International Law*, (Oxford: Clarendon Press, 1984)
- KALLEN, Horace, *Freedom in the Modern World* Ed. H.Kallen. Lectures delivered at the New School for Social Research (Freeport, N.Y.: Book for Libraries Press, 1969)
- KALVEN, Harry Jr., *A Worthy Tradition: Freedom of Speech in America*, Kalven Jaime, ed., 1st ed., (New York: Harper & Row, 1988)
- KAMEN, H., *The Rise of Toleration* (London: Weidenfeld and Nicolson, 1967)
- KANT, Immanuel, *Kritik der reinen Vernunft*. English: *Critique of pure reason*, rev'd ed., (Garden City, New York: Doubleday, 1966)
- KANT, Immanuel, *Perpetual Peace and Other Essays on Politics, History, and Morals*, 1st ed., trans. T. Humphrey (Cambridge: Hackett Publishing Company, 1983)
- KELSEN, Hans, *Peace Through Law*, rev'd ed. (Chapel Hill: The Univ. of North Carolina Press, 1944)
- KINSELLA, W., *Web of Hate: Inside Canada's Far Right Network* (Toronto: Harper, Collins, 1994)
- KUPFERMAN, Theodore R., *Censorship, Secrecy, Access, and Obscenity. Reading From Communications and the Law*, 3, 1st ed., (Wesport, London: Meckler, 1990)
- LACOMBE, Dany, *Ideology and Public Policy. The Case Against Pornography* (Toronto, Ont.: Garamond Press. A Network Basics Book, 1988).
- LALANDE, A., *Vocabulaire Technique et Critique de la Philosophie*, 12th ed., (Paris: P.U.F., 1976)
- LASSER, William, *The Limits of Judicial Power: The Supreme Court in American Politics* (Chapel Hill: University of North Carolina Press, 1988)

- LEVI-STRAUSS, Claude, *Estructuralismo y Dialéctica*, rev'd ed. (Buenos Aires: Paidós, 1987)
- LINCOLN, A., *Select Speeches*, (Harry Williams, ed., New York: Holt, Rinehart & Winston, 1957)
- LOCKE, John, *A Letter Concerning Toleration* (London, Routledge: Focus, 1991)
- LOCKE, John, *Two Treatises of Government*, rev'd student ed., (New York: Cambridge University Press, 1988).
- LOCKE, John, *Two Treatises* (Chicago: R. Maynard Hutchins, Enciclopedia Britannica, 1989)
- MACEDO, Stephen, *Liberal Virtues* (Oxford: Clarendon Press, 1990)
- MACKINNON, Catherine A., *Only Words*, 1st ed., (Cambridge, Ma.: Harvard Univ. Press, 1993).
- MAGNET, J., *Constitutional Law of Canada, Cases, Notes and Materials*, 5th ed. (Cowansville, Quebec: Editions Yvons Blais, 1993)
- MALAMUTH, Neil & LINZ, D., *Pornography* (Newbury Park: Sage Publications, c. 1993).
- MCSHEA, Robert J. *The Political Philosophy of Spinoza* (New York: Columbia University Press, 1968)
- MEIKLEJOHN, Alexander, *Political Freedom: The Constitutional Power of the People*, rev'd ed., (Westport, Conn.: Greenwood Press, 1979, c. 1960).
- MERON, Theodor, *Human Rights in International Law. Legal and Policy Issues*, T. Meron, rev'd ed. c. 1984, (Oxford, Oxfordshire: Clarendon Press, 1988)
- MERON, Theodor, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process*, rev'd ed., (Oxford, Oxfordshire: Clarendon Press, 1986)
- MILL, John Stuart, *Three Essays: On Liberty, Representative Government, The Subjection of Women*, rev'd ed. (New York: Norton, 1975)
- MILL, John Stuart, *Principles of Political Economy*, D. Winch ed., (London: Harmondsworth, 1970)
- MILL, John Stuart, *Utilitarianism, On Liberty, Essay on Bentham*, Mary Warnock ed., (London: Fontana Library, 1962)
- MILTON, J., *Complete Prose Works: Areopagitica, 1643-1648, Vol. II*, rev'd ed. (London: Oxford Univ. Press, 1959)
- MILTON, John, *English Minor Poems Paradise Lost. Samson Agonistes. Areopagitica*, rev'd ed., (Chicago: William Benton. Encyclopaedia Britannica, Inc., 1989)

- MINOW, Martha, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell Univ. Press, 1990)
- MONTAGU, Ashley, *The Human Revolution*, rev'd ed., (New York, Toronto: Bantam Books, 1967 c. 1965)
- MURPHY, Paul, *World War I and the origin of Civil Liberties in the United States* (New York; WW.Norton, 1979)
- NAGE, Thomas, *Equality and Partiality* (New York: Oxford Univ. Press, 1991)
- NANDY, Ashis, *El Enemigo Intimo. Pérdida y Recuperación del Autocolonialismo* (Oxford: UP, 1983)
- NORMAN, Richard, *Free and Equal. A Philosophical Examination of Political Values* (Oxford: Oxford Univ. Press, 1987)
- PENNOCK, J.Roland and Chapman, John W., eds., 1st ed., *Equality* (New York: Atherton Press, 1967)
- PLATO, *The Dialogues of Plato*, 31st ed., trans. B. Jowett, R. c. 1952 (Chicago: W. Benton, Enciclopedia Britannica, 1989)
- POPPLER, Karl, *El Conocimiento Objetivo* (Bs. As.: Complexe, 1985)
- PORPORA, D.V. *How Holocausts Happen* 1st ed., (Philadelphia: Temple Univ. Press, 1990)
- RADCLIFF, P., ed., *Limits of Liberty: Studies of Mill's On Liberty*, 1st ed., (Belmont, CA.: Wadsworth Publishing, 1966)
- RAWLS, John, *Political Liberalism* (New York: Columbia Univ. Press, 1989)
- RAWLS, John, *Justicia como Equidad. Materiales para una Teoría de la Justicia* (Madrid: Technos S.A., 1986)
- ROBERTSON, Geoffrey, *Obscenity: An Account of Censorship Laws and their Enforcement in England and Wales*, 1st ed. (London: Weidenfeld and Nicolson, 1979)
- ROCCO, Alfredo, *The Political Doctrine of Fascism*, reprint in *Reading on Fascism and National Socialism* (Chicago: 1952)
- ROUSSEAU, Jean Jaques, *The Social Contract*, trad. G.D.H. Cole, c.1952 (Chicago: W. Benton, Enciclopedia Britannica, 1989)
- ROUSSEAU, Jean Jaques, *A Dissertation on the Origin and Foundation of the Inequality of Mankind*, trad. G.D.H. Cole, c.1952 (Chicago: W. Benton, Enciclopedia Britannica, 1989)
- SANDEL, Michael, *Liberalism and its Critics* (New York: Univ. Press, 1984)

- SCHAUER, Frederik F., *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982)
- SORMAN, Guy, *Los verdaderos pensadores del siglo XX*, trad. José F. Delos, 3rd ed., (Buenos Aires, Atlántida, 1989)
- SPINOZA, Benedict de, *Ethics*, trad. W.H. White (Chicago: Benton, Encyclopaedia Britannica, 1989)
- SPINOZA, Benedict de, *Tractatus Theologico-Politicus*, trad. A.G. Wernham, rev'd ed., (Oxford: Oxford Univ. Press, 1958)
- SPINOZA, Benedict de, *Tractatus Politicus*, trad. A.G. Wernham, rev'd ed., (Oxford: Oxford Univ. Press, 1958)
- SPINOZA, Benedict de, *The Chief Works of Benedict de Spinoza: A Theologico-Political Treatise. A Political Treatise. Vol. I* Ed. and trad. R.H.M. Elwes, 1st ed., (New York: Dover Publications, 1951)
- STORY, Joseph, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, 1833) rpt., M. Durham, ed., (NC: Carolina Academic Press, 1987)
- SUMMER, L.W., *The Moral Foundation of Rights*, (Oxford: Clarendon Press, 1987)
- SZASZ, Thomas, *La Ley, la libertad y la psiquiatría* (Buenos Aires: Payot, 1977)
- TEDFORD, Thomas L., *Freedom of Speech in the United States* (New York: Random House, 1985)
- TARNOPOLSKY, W.S. et al., eds., *Discrimination and the Law* (Toronto: Carswell, 1994)
- TOMPKINS, Jane, ed., *Reader Response Criticism: From Formalism to Poststructuralism* (Baltimore: John Hopkins Univ. Press, 1980)
- THOMSON, Judith, *The realm of rights* (Harvard Univ. Press, 1990)
- WALKER, Samuel, *Hate Speech: the History of an American Controversy* (Lincoln: Univ. of Nebraska Press, 1994)
- WEERAMANTRY, C.G. *The Impact of Technology on Human Rights* (N.Y.: Global Case-studies, 1993)
- WEILER, Joseph and Elliot, Robin, eds., *Litigating Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986)
- WERNHAM, A.G. *Benedict de Spinoza. The Political Works*, (Oxford: Clarendon Press, 1958)
- WHILLOCK, Rita & Slayden, David eds., *Hate Speech*, 1st ed. (Thousand Oaks, Ca.: Sage Publications (1995)

ARTICLES. SYMPOSIUMS ADDRESSES

- ABRAMASON, P.R. & HAYASHI, H., "Pornography in Japan: Cross-Cultural and Theoretical Considerations", in N.M. Malmuth & E. Donnerstein (eds.), *Pornography and Sexual Aggression* (Orlando: Florida Academic Press, 1984)
- Academic Freedom in a Changing Society. Symposium 1988 66 n7 *Texas L.Rev.* 1247
- ALBINIKOFF, A., "Constitutional Law in the Age of Balancing", 96 *Yale L.R.* 1004
- ALEXANDER, Michael, "Censorship and the Limits of Liberalism", (1988) *University of Toronto, Faculty of L. Rev.* 47
- ALEXANDER, William S., "Regulating Speech on Campus: A Plea for Tolerance" (1991) 26 *Wake Forest L.Rev.* 1349
- ALTMAN, Andrew, "Liberalism and campus hate speech: a philosophical examination" (1993) 103 n2 *Ethics* 302
- BARRON, J.N. & STRAUSS, M.A., "Sexual Stratification, Pornography and Rape in the United States", in N.M. Malmuth & E. Donnerstein (eds.), *Pornography and Sexual Aggression* (Orlando, Florida Academic Press, 1984)
- BECKTON, Clare F., "Freedom of Expression", in G.A. Beaudoin and E. Ratushny eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., (Toronto: Carswell, 1989) 195
- BECKTON, Clare, "Freedom of Expression. Access to the Courts", () 61 *Canadian Bar Rev.* 103
- BENN, Stanley I., "Egalitarianism and the Equal Consideration Of Interests", in J.Roland Pennock and John W. Chapman, (eds), *Equality* (New York, 1967)
- BERGER, Fred "Mill and the right of free expression" in Russel, ed., *Freedom, Rights and pornography* (Dordrecht: Kluwer Academic Publishers, 1991)
- BERLIN, Isaiah, "Equality", *Proceedings of the Aristotelian Society. New Series*, Vol LVI (London: Harrison, 1956)
- BERLIN, Isaiah, "Two concepts of liberty: An inaugural lecture delivered before the University of Oxford, on 31 October 1958" (Oxford: Clarendon Press, 1958)
- BICKEL, D. & Lake, P.F., "Reconceptualizing the University's Duty to Provide a Safe Environment [Second] of Torts" (1994) 20 *J.C. & U.L.* 261
- BLAKENEY, A., "The University and the Modern State: Some Reflections" (1988) 26 *Osgoode Hall Law School* 46
- BOROVY, Alan, "Language as Violence v. Freedom of Expression: Canadian and American Perspective on Group Defamation", (1988) 37 *Buffalo L. Rev.* 337

- BOROVY, Alan, "When Rights Collide" (1995) 44 *UNB L.J.* 56
- BOYLE, Kevin, "Overview of a Dilemma: Censorship vers Racism", in BRITTON, Glenn, "Is There Hate Speech?" (1995) 21 n3 *Ohio Northern Univ. L. Rev.* 913
- BROWNSTEIN, A.E., "Hate Speech at Public Universities: the Search for an Enforcement Model. (Campus Hate Propaganda and the Constitution in the Aftermath of *Doe v. University of Michigan*) (1991) 37 N3 *Wayne L.Rev.* 1313
- BRUDNER, A., "What are reasonable limits to equality rights", (1986) 64 *Canadian Bar Rev.* 469
- BYRNE, P., "Academic freedom and political neutrality in Law School" (1993) 43 n3 *Journal of Legal Education* 315
- BURSTYN, Varda, "Political Precedents and Moral Crusades: Women, Sex and the State", in *Women Against Censorship*, (Vancouver, Douglas & McIntyre, 1985)
- CALLWOOD, J., "Feminist Debate and Civil Liberties", in Burstyn, V, ed., *Women Against Censorship*, (Vancouver, Douglas & McIntyre, 1985)
- COLIVER, Sandra, in *Striking the balance*, Annexe B: "Reservation and Declarations Concerning Racist Speech and Advocacy of Racial and Religious Hatred" (UK, Essex: Univ. of Essex, 1989)
- COTLER, Irwin, "Hate Speech, Equality, and Harm Under the Charter: Towards a Jurisprudence of Human Dignity for a "Free and Democratic Society", in *The Canadian Charter of Human Rights and Freedoms*, in Beaudoin & Mendes, 3rd ed., (Toronto: Cadswell, 1996)
- COTLER, I., "The Right to Protection against Group- Vilifying Speech: Towards a Model Factum in Support of Anti-Hate Legislation" in Kaplin, W. & McRae, D., *Law, Policy and International Law Essays in Honour of Maxell Cohen*
- COTLER, I., "Human Rights: Selected Categories and parameters" in I. Cotler and P. Eliadis, eds., *International Human Rights Law. Theory and Practice* (Montreal: The Canadian Human Rights Foundation, 1992) 69
- COTLER, I., "Freedom of Expression (Section 2(b))", in *The Canadian Charter of Rights and Freedoms*, Beaudoin & Ratushny, 2nd ed. (Toronto: Carswell, 1989)
- COTLER, I., "Hate Literature", in Rosalie S. Abella and Melvin L. Rothman, eds., in *Honour of Justice Beyond Orwell* (1985)
- CRANE, M.C., "The University and its Students - a Very Public Relationship" (1994) 27 *U.B.C.L.R.* 338
- CRADDOCK, Jeanne, "Constitutional law, words that injure, laws that silence: campus hate speech codes and the threat to American education" (1995) 22 n4 *Florida State Univ. L. Rev.* 1047

- CULLERS, Michael, "Limits on speech and mental slavery: a 13th Amendment defense against speech code" (1995) 45 n2 *Case Western Reserve L. Rev.* 641
- DELGADO, Richard, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" (1982) 17 *Harv.C.R. - C.L.L.Rev.* 133
- DELGADO, Richard & Stefancic, Jean, "Hateful Speech, Loving Communities: Why Our Nation of 'A Just Balance' Changes So Slowly" (1994) 82 *Calif. L.Rev.* 851
- DIAMOND Sarah, "Pornography: Image and reality", in V. Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 40
- DWORKIN, Andrea, "Against the Male Flood: Censorship, Pornography and Equality", (1985) 8 *Harvard Women's L.J.* 1.
- DWORKIN, Ronald, "Do we have right to Pornography?", (1981) *Oxford Journal of Legal Studies* 1, (AT 177-212) repr. in "A matter of Principle" (Cambridge, Mass., Harvard Univ. Press, 1985).
- EMERSON, T., "Towards a General Theory of the First Amendment", (1963) 72 *Yale L.J.* 877.
- EISENSTAT WEINRIB, Lorraine, "The Supreme Court of Canada and Section One of the Charter", 10 *Supreme Court L. Rev.* 469.
- EISENSTAT WEINRIB, L., "Limitations on Rights in a Constitutional Democracy: Models of Judicial Review Under Canada's Charter", Univ. of Toronto [unpublished]
- EISENSTAT WEINRIB, L.,L. "Hate Promotion in a Free and Democratic Society: R. v. Keegstra", (1991) 4 *McGill L.J.* 1448.
- ELLIOT, R., "The Supreme Court of Canada and Section 1 p The Erosion of the Common Front", (1987) 12 *Queen's L.J.* 277
- FISH, Arthur, "Hate promotion and Freedom of Expression Truth and Consequences", (1989) 2 *Canadian Journal of Law and Jurisprudence* 111
- FISHER, L. "A communitarian compromise on speech codes: restraining the hostile environment concept (campus speech codes)" (1994) 44 1 *Catholic Univ. L. Rev.* 97
- FLEISCHMAN, S., "Brown v. Board of Education supports free speech on campus." (1992) 72 n5 *Boston Univ. L. Rev.* 953
- FUREDY, John J., "Mill Perspective Applied to Current Canadian Cases" (1995) 44 *UNB LJ* 132
- GILL, A., "Revising campus speech code" (1993) 31 *Free Speech Year Book* 123
- GOLDSTONE, David, "The Public Forum Doctrine in the Age of Information Superhighway. (Where Are the Public Forum on the Information Superhighway" (1995) 46 n2 *Hasting L. Journal* 335

- GREEN, M. and CORREIRA, M., "Freedom of Speech and teacher's duties: Ross Revisited" (1994) 5 *Educ. and Law Journal* 361
- GREENBERG, J., "Race, Sex, Religious Discrimination" in T. Meron, ed., *Human Rights in International Law: Legal and Political Issues*, Vol. II (Oxford, Oxfordshire: Clarendon Press, 1984) 307
- GREY, "Civil Rights v Civil Liberties: The Case of Discriminatory Verbal Harassment" (1991) 8 *Soc. Phil. & Pol'y* 93
- GREENAWALT, K., "Insults and Epithets: Are they protected speech?" (1990) 42 *Rutgers L.R.*
- GROFFIER, Ethel, "Les Aspects Juridiques de la Tolérance: Essai de Terminologies" in Groffier & Paradis, eds. *The notion of Tolerance and Human Rights* (Carleton Univ. Press, 1991)
- GUTMAN, J., "Lawrence Charles R. III. Critical Race Theory, Assaultive Speech and the First Amendment. (Books Review)" (1994) 41 n333 *Federal Bar News and Journal* 240
- HARTMAN, R.G., "Revitalizing group defamation as a remedy for hate speech on campus" (1992) 71 n4 *Oregon L. Rev.* 855
- HAGER, Philip, "Them's fighting words? A fine line separates the pursuit of civility from censorship." (1995) 15 n6 *Calif. Lawyer* 27
- HENKIN, "Infallibility under Law: Constitutional Balancing", (1978) 78 *Columbia L. Rev.* 1006
- HIERS, R.H., "Academic freedom in Public Colleges and Universities: O Say, Does that Star Spangled First Amendment Yet Wave?" (1993) 40 *Wayne L. Rev.* 1
- HIEVER, Richard, "The Marketplace of Ideas", (1995) 22 *Journal of College and University Law* 282
- HOFFMAN, Rainer "Incitement to National and Racial Hatred": The Legal Situation in Germany," in *Striking the balance*, Sandra Coliver ed., (London: Art 19, 1992)
- HOWEFELD, H., "Fundamental legal conceptions applied in Judicial reasoning", (1913) *Yale Law Rev.* 16.
- Human Rights Watch, "Hate Speech and Freedom of expression: A Human Rights Watch Policy Paper" (New York: Human Rights Watch, 1992)
- HYDE, H. & FISHERMAN, G. "The Collegiate Speech Protection Act of 1991: a response to the new intolerance in the academing. (Campus Speech and the Constitution in the Aftermath of Doe v. Univ. of Michigan)" (1991) 37 n3 *Wayne L. Rev.* 1469
- KAPLIN, William A., "A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech" (1992) 63 *The Journal of Higher Education* 517

- KENNEDY, Randall, "Persuasion and Distrust: A Comment on the Affirmative Action Debate" (1986) *Harvard L. Rev.* 1327
- JAMESON, Frederic, "Post-modernism", (199) 92 *Yale Journal of Law and Humanities* 391
- JOHNSON, H.L., "School Newspapers. Obscenity. Libel. Disruption. Fighting words. Application of Buckley Amendment" (1981) 12 *School Law Bulletin* 23
- JOHNSON, T., "Confronting campus hate speech: the First and the Fourteenth Amendments Collide" (1991) 79 n12 *Illinois Bar Journal* 644
- KAPLAN, "The Supreme Court of Canada and Witnesses of Jehovah", (1990) 39 *U.N.B.*
- KARST, Kenneth "Equality as a central principle in the First Amendment," (1975) 43 *University of Chicago Law Rev* 20
- KARST, Kenneth, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale Univ. Press, 1989)
- KENDALL, W., in "The Open Society and Its Fallacies", in P. Radcliff, ed., *Limits of Liberty: Studies of Mill's On Liberty*, 1st ed., (Belmont, CA.: Wadsworth Publishing, 1966)
- LANGTON, Rae, "Speech Acts and Unspeakable Acts" 22 *Philos. & Publ. Aff.* (1993) 293, repr'd in Tom Campbell and Wojciech Sadurski, eds., *Freedom of Communication* (Aldershot: Dartmouth, 1994) 103
- LAHEY, "The Charter and Pornography: Towards a Restricted Theory of Constitutionally Protected Expression", in Weiler, J and Elliot, R. eds., *Litigating Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 265
- LEPOLSKI, M.D., "Towards a Purposive Approach to Freedom of Expression and its Limits", *Cambridge Lectures*, 1.20.
- LEVI, W., "The Value of Freedom: Mill's on Liberty (1859-1959)", (1959-1960) XII *Ethics*. Reprinted in P. Radcliff, ed., *Limits of Liberty: Studies of Mill's On Liberty*, 1st ed., (Belmont, CA.: Wadsworth Publishing, 1966) 6
- MAHONEY, K., "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (winter 1992) 55 *Law and Contemporary Problems* 77.
- MAHONEY, Kathleen, "Pornography and Violence Towards Women p Comparisons Between Europe, the United States and Canada", in I. Cotler & P. Eliadis, eds., *International Human Rights Law. Theory and Practice* (Montreal: The Canadian Human Rights Foundation, 1992) 333.
- MAHONEY, Kathleen, "Regina v. Keegstra: A Rationale for Regulating Pornography?", (1992) 37 *McGill L.J.* 242.
- MATSUDA, Mari J., "Public response to Racist Speech: Considering the Victim's Story", (1989) 87 *Michigan L. Rev.* 2320.

- MCGLYNN GAFFNEY, Eduard Jr, "Campus Censors: University Religion Policy Raises Free-Speech Claim." *The Los Angeles Daily Journal* (1995) vol 108 52 p.6 col.3
- MCKEE, E., "Human Rights and University Students: Towards a University Policy on Racism and Sexism - the Dalhousie Experience" (1994) *Education III* 476
- MCLACHLIN, Beverly, "Section One of the Charter" (Address to the Canada-Israel Law Conference: Chartering Human Rights, Faculty of Law, The Hebrew University of Jerusalem, 20-23 December, 1992) [unpublished]
- MARTIN, C.A., "The Origins of Racial and Ethnic Conflict on U.S. College and Universities Campuses. (Campus Speech and the Constitution in the Aftermath of *Doe v. Univ. of Michigan*)" (1991) 37 n3 *Wayne L.R.* 1363
- MARTIN, Robert, "Speech Codes in Action" 44 *UNB LJ*, 135
- MARTIN, S., "Protection of Freedom of Expression in Constitutional and Civil Law," S. XIII *International Congress of Comparative Law*, 1990, National Report.
- MEIKLEJOHN, A., "The First Amendment is an absolute speech", (1961) *Sup. Ct. Rev.* 245.
- MEREDIT, C and PAQUETTE, C., "Discrimination in Higher Education: Survey of Students at Ten Law Schools in Canada" W.D. 1992-19c. (Ottawa Dept. of Justice, Canada, 1992)
- MILANI, Adam, "Harassing Speech in the Public Schools: The validity of School's regulation of fighting words and the consequences if they do not" (1995) 28 *N2 Akron L.Rev.*
- MOSAWI, Anthony, "Free speech and the European Court of Human Rights" (1995) 145 *New L. Journal* 683
- NEWCOMB HOHFELD, Wesley., "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913-1914) 23 *Yale L.J.* 16
- NOTE, "A Communitarian Defense of Group Libels Laws," (1988) 101 *Harvard L.R.* 682
- OLIVAS, Michael, "Reflection on Professional Academic Freedom: Second Thoughts on the Third 'Essential Freedom'" (1993) 45 *Stanford L.Rev.* 1835
- O'NEIL, R.M., "An inquiry into the legal and ethical problems of campus hate speech. (The meaning of the First Amendment 1791-1991)" (1991) 29 *Free Speech Yearbook Annual* 26
- O'NEIL, Onnora, "Vindicating Reason", in P. Guyer, ed., *The Cambridge Companion to Kant* (Cambridge: Cambridge Univ. Press, 1992)
- PITTS, Edward., "Spinoza on freedom of expression" (1986) 47 *Journal of the History of Ideas* 21
- RABBAN, David M., "The First Amendment in Its Forgotten Years" (1991) 90 *Yale L.Rev*

- RAWLS, J., "The Basic Liberties and their Priorities". (Address to the Tanner Lectures on Human Values, 10 April, 1981, Univ. of Michigan) Unpublished
- REDISH, M., "The Value of Free Speech", (1981-82) 130 *University of Pennsylvania L. Rev.* 591.
- REDISH, M. & G. LIPPMAN, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implication", (1991-92) 79 *Ca. Law Rev.* 267.
- REISMAN, David, "Democracy and Defamation" (1942) 42 *Columbia L.R.* 1318
- REISMAN, W.M., "Speech, Religious Discrimination and Blasphemy: a Panel: The International Holly Alliance and the Struggle to the Appropriate and Censor General Symbols", (1989) *American Society of International Law Proceeding* 83.
- REYNOLDS, J.L., "Free Speech Rights of Public School Teachers: Proposed Balancing Test" (1981) 30 *n4 Cleveland State L. Rev.* 673
- RICHARDS, D.A., "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment", (1974) 75 *University of Pennsylvania Law Review* 123.
- RICHARDS, David A. J., "Public Reason and Abolitionist Dissent" (1994) 69 *Chicago-Kent L. Rev.* 787
- SAAD, H.W., "The Case for Prohibitions of Racial Epithets in the University Classroom. (Campus Speech and the Constitution in the Aftermath of *Doe v. Univ. Michigan*)" (1991) 37 *n3 Wayne L.Rev.* 1351
- SANDEL, Michael., ed., "Liberalism and its Critics" (New York: Univ. Press, 1984)
- SANDLER, M., "Hate crimes and hate groups activity in Canada" (1994) 43 *U.N.B.L.J.* 269
- SCANLON, T, "A Theory of Expression" in R. Dworkin, ed. *The Philosophy of Law* (Oxford Univ Press 1977)
- SCHEINBERG, S., "Canada: Right Wing Extremism in the Peaceable Kingdom" in B'nai Brith Canada, *The Extreme Right: International Peace and Security at Risk (Draft Report)* (Toronto: B'nai Brith Canada, 1994)
- SEATOR, P., "Judicial Indifference to Pornography's Harm: *American Booksellers v. Hudnut*", (1987) 17 *Golden Gate University L. Rev.* 297. (NQ)
- SEDLER, R.A., "*Doe v. Univ. of Michigan* and Campus Bans on 'Racist Speech': the view from within. (Campus speech and the Constitution in the Aftermath of *Doe v. Univ. of Michigan*)" (1991) 37 *n3 Wayne L. Rev.* 1325
- SHAMAN, J., "The Theory of Low-Value Speech" (1995) 48 *n2 SMU L. Rev.* 297

- SHESTACK, J., "The Jurisprudence of Human Rights", in Meron, T., ed., *Human Rights and International Law: Legal and Policy Issues*, Vol. 1 (Oxford, England: Clarendon Press, 1984).
- SOLUM, Lawrence B., "Situating Political Liberalism" (1994) 69 *Chicago Kent L.R.* 549
- STEFANCIC, Jean & Delgado, Richard, "A Shifting Balance: Freedom of Expression and Hate-Speech Restriction" (1993) 78 *IOWA L. Rev.* 737
- STROSSEN, Nadeen, "Balancing the rights to freedom of expression and equality: A civil liberties approach to hate on campus" in Sandra Coliver, ed. *"Striking the balance"* (UK Essex, Univ. of Essex, 1989)
- SUMNER, L.W., "Hate Propaganda and Charter of Rights", (1990) *University of Toronto Faculty of Law Rev.* 16.
- SUSTEIN, Cass, "Beyond the Republican Revival", (1987) 97 *Yale L.J.* 1539.
- SUSTEIN, Cass, "Ideas, Yes, Assaults, No" (1991) *American Prospect* 35
- TEDFORD, Thomas, "Unprovable Assumptions? The Reasons and Empirical Evidence of Twelve Who Favor Censorship," in *Free Speech Yearbook: 1978*, G. Phifer ed., (Falls Church, Va.: Speech Communications Association, 1979) 156
- TOMPKINS, Jane, "An introduction to Reader Response Criticism" in *Reader Response Criticism: From Formalism to Poststructuralism*, Jane Tompkins, ed., (Baltimore: John Hopkins Univ. Press, 1980)
- WALTZER, Michael, "Philosophy and Democracy", (1981) 9 *Pol. Theory* 379
- WARD, Robert, "The Origin and Activities of the National Security League, 1914-1919" (1960) 47 *Mississippi Valley Historical Review* 51
- WIEGERS, W., "Femenist Protest and the Regulation of Misogynist Speech, a case study" (1992) 24 *Ottawa L.R.* 363
- WEINSTEIN, J., "A Constitutional Roadmap to the Regulation of Campus Hate Speech" (1991) 38 *nl Wayne L. Rev.* 163
- WINKLER, Karen, "Two scholars conflict in Sear sex bias case sets off war in Women's History" (1986) *Chronicle of Higher Education* Feb 5, A-8
- WOLGAST, Elizabeth, "The Demands of Public Reason" (1994) 94 *Colum.L.R.* 1936

TABLE OF CASES

US CASES

- American Bookseller Association, Inc. et al. v. Hudnut*, [1985] 771 F.2d 323.
- Beauharnais v. Illinois* (1952) 343 US 250
- Boos v. Barry* (1988) US 312
- Brandenburg v. Ohio* (1969) 395 US 44
- Cantewell v. Connecticut* (1940) 310 US 296
- Chaplanski v. Hampshire* (1942), 315 US 568.
- City of Renton v. Playtime Theaters, Inc.* (1986) US 41
- Cohen v California* (1971) 403 US 15
- City of Richmond v. J.A. Croson Co.*, (1989) 488 U.S. 469
- Collin v. Smith* (1978), 578 F. 2d 1197 (7th Cir.).
- Connick v. Meyers* (1983) 461 US 138 at 154, 103 S.Ct. 1684
- Cornelius v. NAACP Legal Defence and Educ. Fund., Inc.*, (1985) 473 U.S. 788, 806
- Cox v New Hampshire* (1941) 315 US 569
- Dennis v. United States* (1951), 341 US 494
- Douglas v. Jeannette*, (1949) 319 US 157, 166
- EEOC v Sears, Roebuck and Company*, Decision of U.S. District Court for Northern Illinois, in Daily Labor Report, Feb 2, 1986, at D1-D-43
- First Nat'l Bank v. Bellotti*, (1978) 435 US 765
- Gibson v. Florida Legislative Investigation Committee*, (1963) 372, US 539
- Gitlow v. N.Y.*, (1925) 268 US 652
- Gooding v. Wilson* (1972) 405 US 518
- Harleston v. Jeffries*, (1994) 115 S.Ct. 502; *Jeffries* 828 F. Supp 1066 (S.D.N.Y.) 1993; *Jeffries I*, 21 F.3d 1238 (2d Cir. 1994); *Jeffries II*, 52 F.3d 9 (2d Cir. 1995)
- Healy v. James*, (1971) 408 US 169, 92 S.Ct. 1780
- Jacobellis v. Ohio*, (1964) 378 US 184

Levin v. Harleston, 770 F. Supp. 895, (S.D.N.Y. 1991), *aff'd*, 966 F.2d 85 (2d Cir. 1992)

Martin v. Parrish (1986) 805 F.2d 538, 5th Cir.

Memoirs v. Massachusetts (1966), 383 US 413

Miller v. California, (1972) 413 US 15

Moose Lodge No. 107 v. Irvis, (1972) 407 U.S. 163

NAACP v. Alabama, (1958) 357 US 449

NAACP v. Claiborne Hardware Co., (1982) 458 US 886

Near v Minnesota, (1931) 283 US 697

Papish v. Board of Curators of University of Missouri, (1973) 410 US 667, 93 S.Ct. 1197

Paris Adult Theatre v. Slaton (1972), 413 US

People v. Gitlow, (1925) 234 N.Y. 132 N.E. 317, 268 US 652

Palko v. Connecticut (1937) 302 US 319

Pickering v Board of Educ., (1968) 391 US 563 at 570, 88 S.Ct. 1731

Police Dept. v. Mosley, (1972) 408 US 92 at 95-96, 92 S.Ct. 2286

Rankin v. McPherson,, 483 US 378 at 401, 107 S.Ct. 2891

R.A.V. v. City of St. Paul, Minn., (1992) 112 S.Ct. 2538

Roth v. United States (1956), 354 US 476, 237 F. 2d 796 (2d. Cir.)

Shelley v. Kraemer (1948), 334 U.S. 1

Stromberg v California, (1931) 283 US 359

State v Klapprott, (1941) 22 A.2d 877

Terminiello v Chicago (1949) 337 US 1

Texas v. Johnson, (1989) 491 US 397

US v. Cruikshank, (1876) 92 U.S. 542,

US v. Reese, [1985] 92 US 214

US v. Schwimmer, (1929) 279 U.S. 644

EEOC v. University of Pennsylvania (1990) US 182; 110 S.Ct. 577

UMW Post, Inc. v. Board of Regents of University of Wisconsin System, 774 F. Supp. 1163 (E.D. Wis. 1991)

Walters v. Churchill (1994) 114 S.Ct. 1187

Weiman v. Updegraff, (1952) 344 U.S. 183; 73 S.Ct. 215

West Virginia State Bd. of Education v. Barnette (1943), 319 US 624

Whitney v. California, (1927) 274 US 357

Wooley v. Maynard (1977), 430 US 705

CANADIAN CASES

A.G. Can. v. Law Soc. of B.C., [1982] 2 S.C.R. at 310

Donald Victor Butler v. Her Majesty The Queen [1991-1992], 134 N.R. 81 (S.C.C.) *R. v. Butler*, [1992] 1 S.C.R. 452

Canadian Human Rights Commission v. Taylor [1990], 75 D.L.R. (4th) 577 (S.C.C.)

Edmonton Journal v. Alberta (AG), [1989] 64 D.L.R. (4th) 577, [1989] 2 S.C.R. 1326, 41 C.P.C. (2d) 109

In the Prostitution Reference, [1990] 1 S.C.R. 1123

Luschener v. Minister of National Revenue, [1985] 57 N.R. 386.

Ontario Film and Video Appreciation Society v. Ontario Board of Censors, [1983] 34 C.R. (3d) 73

Osborne v. Can. [1991] 2S.C.R. 69, 94

R. v. Andrews and Smith [1990] 3 S.C.R. 697, (1998), 28 O.A.C. 161

R.v. Buzzanga and Durocher [1979] 49 C.C.C. (2d) 369 (Ont.C.A.)

R. v. City of Sault Ste. Marie, [1978], 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299.

R. v. Edwards, Books and Art, [1986] 2 S.C.R. 713.

R. v. Gayne [1991], 66 C.C.C. (3d) 321 (S.C.C.)

R. v. Keegstra, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1, 1 C.R. (4th) 129, 61 C.C.C. (3d).

R. v. Kopyto, [1987] 23 G.A.C. 81

R. v. Metro News Ltd., [1986] 56 O.R. (2d) 321.

R. v. Mood Video Limited, [1987] 63 Nfld. & P.E.I.R. and 194 A.P.R. 73.

R. v. Oakes [1986] 1 S.C.R. 103

R. v. Roth, [1986] 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 1 S.C.R. 103.

R. v. Wagner (Queen's Bench), [1985] 36 Alta. L.R. (2) 301.

Red Hot Video Limited v. Vancouver, [1983] 48 B.C.L.R. 381, [1985] 18 C.C.C. (3) 1, consd.

Ross v. Mocton Board of School Trustees, District 15 [1993], 110 D.L.R. (4th) 241

RJR-Mac-Donald Inc. v. Canada (A.G) [1995] 3 S.C.R. 199

RWDSU v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573

CANADIAN HUMAN RIGHTS TRIBUNAL DECISIONS

Canada (Human Rights Commn.) v. Heritage Front, [1994] 1 F.C. 203 (T.D.); *Canada (Human Rights Commn.) v. Heritage Front* (1994), 78 F.T.R. 241 (T.D.)

League for Human Rights B'Nai Brith Can. (Midwest Region) v. Man Knights of the Ku Klux Klan [1993] 18 C.H.R.R. D/406 (Can. Human Rights Trib.)

Khaki v. Cdn Liberty Net [1993] 22 C.H.R.R. D/347 (Cdn. Human Rights Tribunal)

REPORTS

American Association of University Professors, *Policy Documents and Reports* 3 (1990)

Report of Special Committee on Hate Propaganda in Canada (1966)

LEGISLATION

American Bill of Rights. Amendment to the Constitution of the United States (First Ten Amendments passed by Congress September 25, 1789. Ratified by three-fourths of the States December 14, 1971)

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11

Criminal Code, R.S.C. 1985, c. C-46, s.319 [previously R.S.C. 1970, c. C-34, s.281.2 (en. 1st Supp., c.11, s1)

Civil Rights Act of 1964 Title VII

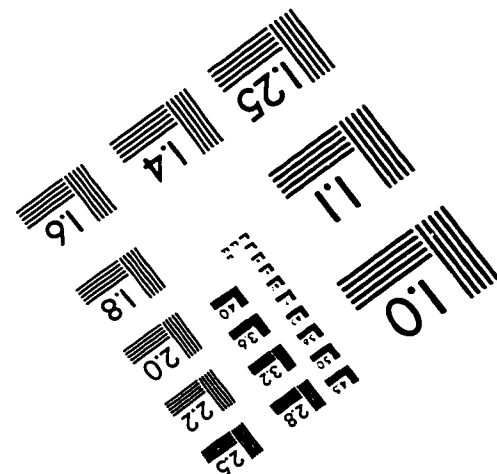
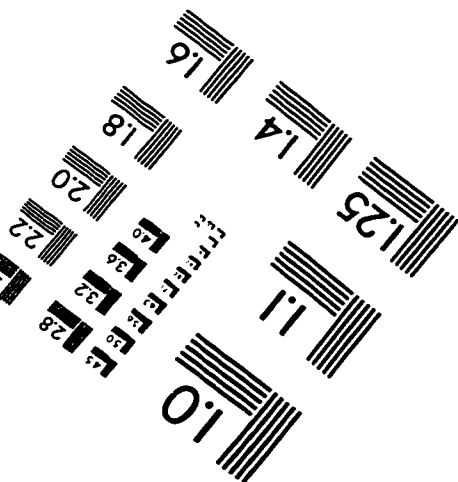
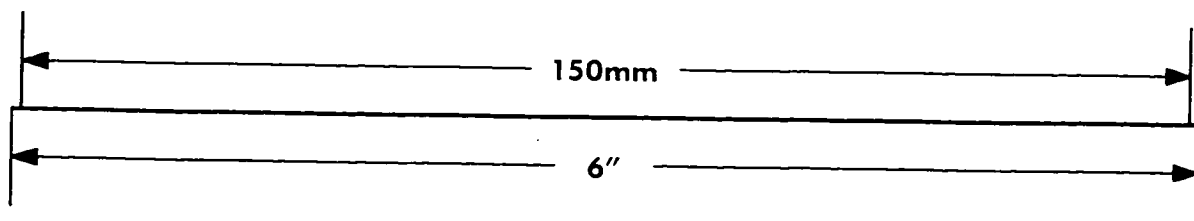
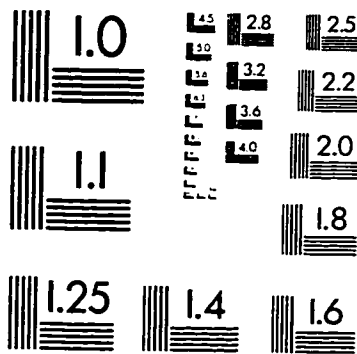
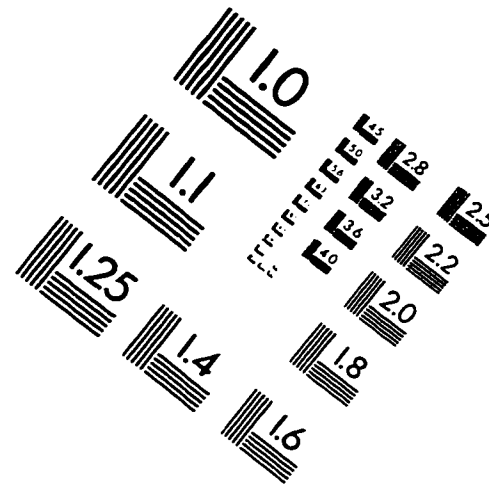
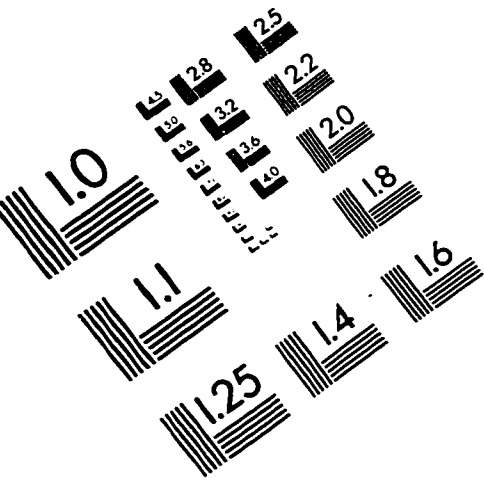
INTERNATIONAL CONVENTIONS

Convention on the the Prevention and Punishment of the Crime of Genocide, adopted by General Assembly Resolution 260 A (III), Dec. 9, 1948,

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) General Assembly Resolution 2106 A, Dec 21, 1965

International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A(XXI), Dec. 16, 1966

IMAGE EVALUATION TEST TARGET (QA-3)



APPLIED IMAGE, Inc.
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989

© 1993, Applied Image, Inc., All Rights Reserved