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1. Introduction

Freedom of expression is a fundamental human right that lies at the core of a democratic society. Indeed, at its heart this freedom provides to individuals the liberty to express their thoughts, beliefs, and creativity with no fear of censorship or punishments from the state or other institutions. It allows for dialogue, open debate, and the exchange of ideas, essential for a free and fair democratic society.

It does not only foster democracy, but also provides protection to individual autonomy since it empowers individuals to express their own identities, culture, and beliefs, embracing diversity and fostering inclusivity.

However, this freedom can have positive and negative consequences on the society since it may be expressed through different means of expression that culturally and historically cannot be considered as socially acceptable.

Furthermore, freedom of expression can undergo restrictions, which can be imposed under certain circumstances, as for the sake of protection of national security, public order, or rights and dignity of individuals.

Restrictions can be imposed over some contents within an act of expression, through the use of means such as the harm principle proposed by the philosopher John Stuart Mill¹ for which restrictions are inevitable in case of necessity for the sake of protection from harm. The harm is not always legitimate for the application of restrictions.

The imposition of restrictions is contested and requires an analysis of the reasons that motivate the limitation of freedom of expression.

In this thesis, I am going to introduce freedom of expression with a focus on the core aspect of communication, and the different theories around it, focusing initially on the distinction between the democratic and individual autonomy approaches. Both the approaches base their claim on the Bill of Rights², and in particular on the text of the First Amendment which protects citizens' freedom of speech, assembly, the press, and to petition.

¹ Mill J. S. "On Liberty" (2001), pp. 6-69.

² The Bill of Rights (1791)

Furthermore, I will present the wide range of restrictions that can be applied over this liberty through the appeal to different motivations and definitions of harms.

As final chapter I will present other theories over freedom of expression that focus on the balance between equality and autonomy. In the discourse digressions will be present over pornography and the academic phenomenon of retraction.

At the end I will analyse a regulation which is currently applied in a university and assess whether it is an efficient policy to be taken as example.

This thesis aims at analysing and assessing to what extent freedom of expression can be restricted for the sake of equality, or can be left unrestricted for the sake of autonomy.

2. Communication at the core of expression

Freedom of expression is fundamental for the exchange of ideas and for the development of humanity as a community.

In the words of the political scientist C. B. Macpherson “Human society is the medium through which human capacities are developed”.³

Moreover, Mr. Justice Jackson of the American Supreme Court in explaining the cruciality of this freedom stated fairly that the “danger that citizens will think wrongly is serious but less dangerous than atrophy from not thinking at all.”⁴

John Stuart Mill⁵ with a utilitarian thinking described that freedom of expression is an optimal fuel in order for the intellect to bloom, and that with the exercise of it, through exchange of ideas, truth may emerge. Indeed, through the discussion with others, the individual takes part in the progress of knowledge and, as a consequence, of the community. At the core of freedom of expression is the communication, or the intent to convey a message; and, as a matter of fact, communication is essential for the development of human beings in society.

The professor Richard Moon defined communication in this way:

“An act of communication involves both an intention to represent or express some state of affairs or fact and an intention to convey or "communicate" that representation to another person. When people communicate they intend to effect in their audience an understanding of the meaning of their act. In recognizing that a person is attempting to communicate, the audience recognizes that the act is meaningful and endeavours to understand its meaning.”⁶

Communication is the action of making and providing to someone a representation intentionally. The scope of what can be defined an action of communication is wide; for example, Mr. Justice Beetz⁷ defined demonstrations as a form of action, and not of speech, so not as a form of communication to be protected. As a matter of fact, the values that are delivered by linguistic communication, may also be delivered by a non-linguistic

³ Moon R. “The Scope of Freedom of Expression” (1985), p. 346.

⁴ American Communication Association v. Douds 70 S. Ct. 674 (1939).

⁵ Mill J. S. “On Liberty” (2001), pp. 18-52.

⁶ Moon R. “The Scope of Freedom of Expression” (1985), 351.

⁷ Moon R. “The Scope of Freedom of Expression” (1985), 348-349.

communication. Hence, differently from the definition provided by Mr. Justice Beetz, also the act of communication shall lie within the range of the freedom.

The intentionality of the action of communication is indeed crucial to better understand whether the act of communication is to be considered to fall within the range of the freedom of expression. Even if communication can be interpreted in several ways, it is right to state that freedom of expression cannot incorporate all actions of self-expression. Important example is a work of art, which has the purpose to represent and express feelings; at first sight it would be right to say that it only involves the intention to express emotions and represent symbols, but after a careful scrutiny it is evident that the artist has the intention to communicate to others that representation.

While on the other hand, a case in point would be pornography. Bans on pornography have been applied many times in different ways, but the solution would be for the government to concentrate over the offensiveness and the content of pornography, as the cases which may depict acts of violence. However, even if the differences of art and pornography are many, the basic divergences analyzed above do not mark a strong gap between the two. The topic of pornography will be better analyzed when talking about the issue of restrictions and content regulations.

In addition to the intentionality of the act of communication during expression, it is important to introduce the different kinds of interests of recipients.

The interests of expression are expressed in three ways, and they are the interests of participants, interests of the audience and the interests of the bystander. They are divided since there are different ways in which expression as a form of liberty may jeopardize the interests of individuals in different ways. The main difference between the participant and the audience interests is the willingness to the exposure of expression. The audience, differently from participants, are not able to control the exposure.

Certainly, the private speech among participants is not always socially accepted but it is a right that needs to be granted, even though there is the necessity to protect this freedom and also to quantify the worth of what is going to be expressed. We might be tempted to think that the audience has control over the unwanted exposure, but in reality it is only a limited one since the effects of expression may be unwarranted, such as the creation of a misleading belief (misbelief), or the inevitable consequence of a false belief being spread and then being dismantled, because people are convinced that the exposure is false it does not mean that it

did not change the attitude that they had previous to the exposure. Expression may be considered to be good if it influences individuals on relevant reasons, but if it does influence our capability to consider these reasons it would be undermining the capability of individuals to ratiocinate. Example is the subliminal advertising since it may lead us to create a false belief or may lead individuals to the creation of a belief without the acknowledgment of doing so.

3. Democracy and individual autonomy

Questions have been raised about the relationship between autonomy and democracy, being this relationship at the core of the freedom of expression in a democratic society. Two interpretations have been carried out and they are the democratic approach for which freedom of expression is an important pillar of democracy and it needs to be protected, while the other approach is focused on the individual autonomy which needs to be protected for the sake of the flourishing of freedom of expression.

3.1 The democracy-based approach

The democratic interpretation is shared by the American philosopher and free-speech advocate, Alexander Meiklejohn⁸, who thought that this approach helps identify the limit of this freedom. He reiterated the separation between public and private speech, stating that the former has protection since it is related to self-government, while the latter does not. He stated that the First Amendment made possible the freedom to express whatever in the public sphere was considered to be obscene by the society, such as a poem about pornography. Indeed, Meiklejohn thought of the American constitution with a contractarian tradition, since he had the conviction that it requires citizens to obey the laws, which does not mean for them to become slaves, but that citizens are complying to their own order. He was convinced that the citizen was the legislator, taking into account the US First Amendment and the vote. In his account, there must be no limits to the flow of ideas and information in order for democracy to work through a fully informed electorate.

Similarly, the American legal scholar, John Hart Ely⁹ had the conviction that an imprecise balance between interests would rise in the definition of the limits of the right of expression, but for Ely this democratic interpretation has the important function to establish the freedom against the legislature and the judiciary. In his eyes, the US Supreme Court should interpret the Constitution with the aim to strengthen democratic processes and popular self-government in order to ensure a fair political process. Indeed, he thought that judges are detached from the condition of citizens, hence they are inadequate in the making of value

⁸ Moon R. "The Scope of Freedom of Expression" (1985) p. 335 & Scanlon, T. "Freedom of Expression and Categories of Expression" (1979), pp. 529-535.

⁹ Moon R. "The Scope of Freedom of Expression" (1985), pp. 336-340

judgments. He had the belief that citizens of a representative government should have the capacity to exchange information and communicate with their representatives. Indeed, he thought that citizens of a democracy should have the alternative of arguments in order to stimulate their critical decisions in the best way possible.

Following this line of thought, the implication is that citizens must enjoy freedom of expression in order to communicate with their representatives.

Both Meiklejohn and Ely believed that the wider are information and ideas exposed to citizens the more informed will the citizen be. Furthermore, Meiklejohn stated that citizens of a democracy should have the alternative of arguments in order to stimulate their critical decisions in the best way possible.

Hence, it is right to say that for both Meiklejohn and Ely the idea of representation is central in the explanation of the freedom of expression; however, Meiklejohn goes further with the reference to the moral ideal of the citizen, focusing the value not only on the choices taken but also to the ability to take choices. And it is essential for a democratic government to enhance these abilities. Indeed, Meiklejohn strongly believed that self-government was advanced by the freedom of expression which encourages the citizen to take intelligent choices.

The interpretation of Meiklejohn can no longer be considered consistent since restrictions to freedom of expression proved to be necessary in order to enhance the freedom itself. The democratic thesis identified a connection between a representative government and freedom of expression since both encourage abilities to individuals; however, the dilemma would rise whether it would be a political theory if strongly focused on the political representation, or an individual rights theory, focusing on the freedom of expression at the individual level.

Therefore, it is right to say that this theory is left to the conceptual confusion.

As an example in favour of the theses of the mentioned authors, let's take into consideration the episode of a newspaper in a state where a statute is applied which establishes as illegal to publish false information that may harm the reputation of a political candidate. If this was a judicial case and the candidate would win, the newspaper would become too much cautious, and its freedom would be hindered.

3.2 The autonomy-based approach

The other theory is the one focused on the individual autonomy. Following this approach, freedom of expression grounded on autonomy is narrower than the one interpreted as democracy-based, because here this freedom will comprise expressions that are of importance for the development of the individual capacity to think intelligently and morally.

The thesis is that the government shall respect the autonomy of citizens without interference to their freedom of expressing themselves and of receiving expressions of others. The authors of this theory do not think that any act is protected by the freedom, but actually focused on the act of communication. Autonomy of individuals consists in them having the freedom of their choice and thought, but also to communicate and receive thoughts of others.

The American philosopher Thomas Scanlon¹⁰, differently from the democracy-based authors, did not resort on the First Amendment to define freedom of expression, while he differed from Mill in distinguishing this freedom from other freedoms.

He based his theory on the so-called “Millian Principle”, which consists of the theses expressed by Mill in chapter II of *On Liberty*¹¹ and illustrates the justification for some harms that may occur consequently to actions of expression. This principle may be a perfect demonstration of the risks that restrictions over freedom of expression would determine, however, it is incomplete and limited since the state would not be hindered in its authority of limiting the freedom of expression, not only about political aspects.

T. Scanlon here justifies this Principle by stating that the First Amendment is a restraint on the authority of government, and not an individual right, since its purpose is to preserve the stream of information which is fundamental for the working of the political process.

The philosopher, being rooted on Kantian thoughts, believes on the rationality of individuals and their capability to remain autonomous in their judgments and reasons, and in their relationship with the state. The individual should be able to opt whether to obey or not.

T. Scanlon focuses on the duty of the respect that the government must demonstrate towards the individual autonomy. The Millian Principle will be better introduced in a sequent section.

¹⁰ Scanlon T. “Freedom of Expression and Categories of Expression” (1979), pp. 519-542.

¹¹ Mill J. S. “On Liberty” (2001), pp. 18-52.

Through the words of Scanlon: “An autonomous person cannot accept without independent consideration, the judgment of others as to what he should believe or what he should do.”¹² He has the belief that freedom of expression has the purpose to exclude motives of restrictions of expressions, rather than to protect certain acts of expression due to their value. In other words, he believes that the government must be forbidden to limit the access of individuals to information with the justification that the individual is not considered to be able of having an independent judgment. Scanlon, referring to both the listener and the speaker in the act of communication, thinks that freedom of expression owns a moral meaning, and autonomy refers to a moral view of individuals, who are not all equal in their ability of decision-making, but nevertheless they must have the possibility to exchange information and communicate.

Differently from Scanlon, R. M. Dworkin poses his attention to the individual expressing his own ideas rather than the individual listening. Indeed, in an issue the author referred to the concept of censorship as being “degrading because it suggests that the speaker or writer is not worthy of equal concern as a citizen or that his ideas are not worthy of equal respect; that censorship is insulting because it denies the speaker an equal voice in politics, and therefore denies his standing as a free and equal citizen; or that censorship is grave because it inhibits an individual's development of his own personality and integrity.”¹³

Another author, John Rawls in “A Theory of Justice”¹⁴ sustains that freedom of expression is a requisite of justice. Through his innovative construction of the “original position” where individuals are considered to be rational and free, and under the “veil of ignorance”, situation in which they cannot know their abilities, they have the necessity to cope through a sort of compromise between the “rational”, the motivation of the individual, and the “reasonable”, the limits to available information. This “original position” provides a moral view of individuals who do not accept one “conception of the good” that would make others worse off, but they would choose a distribution of “primary goods” which in the words of Rawls are “things that every rational man is presumed to want”¹⁵. Among the primary goods is the freedom of speech. Certainly, it is rational to protect freedom of speech because it would

¹² Scanlon T. “A Theory of Freedom of Expression” (1977), p. 216.

¹³ Dworkin R. in Moon R. “The Scope of Freedom of Expression” (1985), p. 341.

¹⁴ Rawls J. “A Theory of Justice: Revised edition” (1999), pp. 10-19.

¹⁵ Rawls J. “A Theory of Justice: Revised edition” (1999), p. 54.

foster speech over silence, and communication over isolation. Clearly, with the protection it is forbidden to restrict this freedom to other individuals if their discourse is not conventional or is offensive. The protection of free speech is necessary for the promotion of open discussion, communication, and social exchanges. However, Rawls may result naïve in the elaboration of the “original position” since it seems to be premised on certain values, without a strong explanation.

A further justification of non-restriction to freedom of expression is provided by both Rawls and Dworkin stating that the freedom is crucial for the self-development of the individual. However, the concept of development is wide since an individual obliged to remain silent is still developing since he has the control over his thoughts and reason.

In conclusion, we can say that Dworkin, Scanlon and Rawls have the conception of freedom being limited to the act of communication and speech. The problem is that none of their explanations has connected the freedom with communication, and the autonomy can be perceived as the ability of the individual to create judgments and the process of decision-making, and this is not automatic for the individual, but something that must be developed through the endorsement of the political community.

Each theorist explained a liberty assumed to protect communication, but both democracy and autonomy-based theories explain that the freedom does not lie in the value of the social communicative exchange but rather in the value of representative government or individual autonomy.

It is difficult to assess whether it is right to limit the freedom of expression for the sake of stability and harmony of the community, or to guarantee an unrestricted freedom for the sake of autonomy of individuals. But it necessary to bear in mind the important features of an act of expression already mentioned: intentionality and the interest of the recipients.

Let's not forget that freedom of expression is a bound over the power of the State.

4. Restrictions

Intuitively it would be right to state that individuals have more right to speak and express themselves rather than in other areas of freedom.

As already clarified, arguments around freedom of expression tend to create categories of expression based fundamentally on the harm and on the belief of the necessity of whether the expression must be requested or not.

The issue arises when it is focused on how and to what extent restrictions and/or regulations are needed, since freedom of speech cannot exist if everyone speaks at once.

In order to better understand the distinction, it is right to classify categories of acts and categories of interests. Taking for example the political speech as a category, it is possible to identify the category of interests which are the ones of the audience and the participants in the spread and discussion of political issues, while the category of action in this case is represented by the expression concerning political issues or having the political purposes.

Furthermore, the thesis of freedom of expression is conceived as distinguishing some acts exempt from restrictions differently to other acts. The grounds on which the distinction is based is mostly consequentialist, for which the acts are categorized through the distinction between positive and negative consequences.

There are generally different kinds of actions that can generate harm.

In this chapter, are going to be discussed the different factors for restrictions and the justifications for not applying them by analyzing content/harm and interests around the act of expression.

4.1 Harms of acts of expression

Generally, as presented by Scanlon¹⁶, there is a list of expressive acts that can generate harms, and in consequence the inflicted harm can be the reason for the restriction of acts that produce them.

¹⁶ Scanlon T. "A Theory of Freedom of Expression" (1972), pp. 210-213.

Firstly, acts of expression that can cause damage through a direct physical consequence, such as disturbance of public peace due to a high tone of voice. When this act is considered to be intended or enacted through negligence, it is possible to conceive it as a plausible ground for penalty.

A second class of harm is based on the notion of assault, since by its definition it requires an individual placing intentionally another individual in the condition of fearing an imminent physical harm, hence it requires a form of communication that tends to create shock and apprehension. Even in this case this consequent harm may result in a justification of restrictions over expression.

Harm can also be the result of libeling someone publicly by forming an opinion that is adverse to that individual.

Another expressive act, which may result in catastrophic consequences, is the contribution of making someone else operate a harmful act. Indeed, the consequences would make it a crime for both the actions of the former and latter persons. As harmful as this case is the expressive action of shouting fire falsely in a public gathering since, even though the expression may seem naïve, its results may produce a disaster. The shouter would not be protected from the freedom of expression.

The last class of harm is represented by the expressive action of sharing information which may create much harm and instability around the population, such as an inventor who is able to create a bomb through simple ingredients easy to find in every home. He may start to pass around his recipe, and as a consequence, even though he expresses his freedom of expression, he raised the capability of other individuals to inflict harm. Even the spread of sensitive information of political propaganda can create the outbreak of a civil war.

From this different classes and examples of harm derived from expressive actions, it is possible to conclude that effectively the divergence between expression and other kinds of actions is less crucial than the difference between expression which influences others in acting through the designation of what is a good reason for action, and expression that provides to individuals other means to act in another way as differently thought.

The legal responsibility expresses well this concept by stating that the contribution to the origin of an action by an expressive act is supplanted by the judgement of the agent, but the situation is different when the contribution is made by an agent who supplies the agent with tools through which the goal is achieved.

4.2 Harm principle

John Stuart Mill explained, on his essay “On Liberty”¹⁷, the reasons why he brought about defenses of freedom of expression. He thought that restrictions are necessary in order to prevent harm to others, but he negated the necessity of content-specific restrictions of speech. Offensiveness does not consist in harm.

The Harm Principle provided by Mill states as follows:

“That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.” and he continues stating that “The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”¹⁸

Mill¹⁹ had the conception that individuals shall own their independence as absolute and have power over themselves, their bodies, and their minds. He considered the individual as sovereign. The harm principle must be the justification to restrictions imposed over individuals, and this principle is met when there is an imminent violation of interests of others over which they have a right. The harm principle is satisfied through provisions of criminal law such as laws against assault.

According to Mill, the harm principle is used as a method to limit freedom of expression. The restriction of high-value speech by the state may be justified through the pursuit of important interests, and the restriction should be the least limitative as possible. At the same time restrictions on hate speech would not be considered to be part of the group of legitimate restrictions since, following the harm principle of Mill, this speech does not seem to harm important interests.

¹⁷ Mill J. S. “On Liberty” (2001), pp. 52-69.

¹⁸ Mill J. S. “On Liberty” (2001), p. 13.

¹⁹ Brink D. O. “Millian Principles, Freedom of Expression, and Hate Speech” (2001), pp. 119-122.

Mill refers to the “intemperate speech”²⁰ as a broader group than hate speech, comprising words of sarcasm and invective. He does not consider legitimate restrictions on this kind of speech generally, but only when it is utilized for the expression of dominant views.

In other words, Mill retains necessary restrictions on the intemperate speech when it would prevent minority views to be heard.

It is important to bear in mind that there are many kinds of speech that are discriminatory but that are not comprised in the category of hate speech since some forms of expression may be used to foster stereotyping and bias without the employment of fighting words or insults. Important here is to understand that it would be necessary to establish a sort of ratio of true belief to false one, but it would be difficult to establish a fair rationale since it would rely on the fairness of the censor. Freedom of expression would be needed in order to prevent a belief considered to be true into becoming dogmatic.

He justifies the concept thinking that freedom of expression is necessary in order to pursue our nature as progressive beings, which is the practical deliberation. The feature that distinguishes humans from the other beings is that individuals have the capacity of reflective decision-making, through which they are capable of self-control and firmness to express their deliberate decision.

Here, though, there is the necessity to unite these capacities with morality as a way for responsible agents to deliberate over the appropriateness of their desires and control their actions accordingly.

In other words, individuals as progressive beings shall look for knowledge and justified true belief rather than mere true belief.

Hence, censorship, which may be of true or false beliefs, can deprive the speaker and the audience of ways through which they may explain their beliefs or actions.

It is important to understand that if there are choices and their implementation, there is the necessity of freedoms of action. In the conception of Mill, freedoms of thought and action are instrumental for the pursue of human happiness, and in the exercise of deliberative capacities, some liberties are more central than others.

Indeed, his thought is focused on the defense of basic liberties.

²⁰ Mill J. S. “On Liberty” (2001), pp. 51-52.

4.3 Millian principle

Acts of expression are acts that are intended to communicate something to others. This does not comprise only acts of speech, but every attitude or proposition intended to convey a message, such as demonstrations, and display of symbols. Harms deriving from an expressive act can be of different intensity, but they cannot be always taken as justifications for the application of restrictions.

At this point, it is crucial to introduce another principle by J. S. Mill expressed in Chapter II of *On Liberty*, through which he introduces harms consequent to acts of expression that cannot be utilized as justifications for the restrictions of these acts. The Principle is presented by T. Scanlon in this way:

“There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a 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 expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing”.²¹

Not only the principle focuses on the question of responsibility, but it goes beyond by being able to be applied generally to expression rather than making appeals to rights or the value that different forms of expressions may have.

The Millian Principle²² must be analyzed since it regards the individual to be autonomous in his/her thought and expression.

Individuals must envisage themselves as sovereign in decisions over beliefs and in weighting reasons for actions in order to regard themselves as autonomous. Autonomous persons shall be independent in their own judgments which could imply the non-recognition of the obligations and the limitations of the state.

²¹ Scanlon T. “A Theory of Freedom of Expression” (1972), p. 213.

²² Scanlon T. “A Theory of Freedom of Expression” (1972), pp. 213-222.

However, the Millian Principle implies that when the threat levels of harms are high, the state can apply laws necessary to meet this threat.

In order for the state to maintain and exercise this special prerogative and to make it acceptable to the eyes of autonomous individuals, the prerogative must be limited in the two ways specified by the Millian Principle.

In analyzing the first part (a) of the principle, it is clear that autonomous individuals cannot allow the state to protect them against the acquisition of false beliefs, since it would implicitly establish that individuals would be bound to accept the judgements of the state about which views are true or false.

In a sense the individual would still be autonomous, but in a limited manner since the state would leave information and evidence to foster the individual reasoning, but the person would decide in conformity with the preselected evidence which support the state conclusion. Even if it would not be an obligation to accept the judgement of the state, the individual is deprived of the basis for the reasoning of an independent judgement.

The analysis of the second part (b) of the principle implies that the legal responsibility of the expressive agent is not to take for granted since it depends on the content and the aim of the agent and the aims and thoughts of the recipient. He argues that providing to the state the prerogative to declare some conducts to be illegal and prohibit its endorsement would not immediately imply the fact that what the law forbids must not be done.

However, it is right to think that if the state outlaws a conduct it will undermine the possibility of true opinions to prevail.

In other words, the conception that the state has the power to restrict expression and to command action is not appealing.

A plausible justification of the restriction by the state over freedom of expression is well represented by the example of an individual shouting “fire” in a crowded place where surely the action may create much damage and harm. In this scenario people are incapable to act in a rational manner, hence it is necessary an intervention of the state. However, restrictions by the state, without the justification of the limited rationality of the population, would result in paternalism since it may occur that limitations to individual actions are made for the sake of the individual wellbeing, but not always the government is able to assess what is best for everyone and it may limit the access to information of individuals.

When reading superficially the principles there are some restrictions which may actually be applied, such as bans on demonstrations, which can be justified through the wellbeing of individuals, ergo in a paternalistic manner.

Indeed, there are definitely cases when individuals shall have the right to information in order to carry out informed choices and certainly to make claims against the government if not in compliance.

Yet of course these restrictions would be intolerable to the population since there is an intuitive conception of freedom of expression based on the balance of competing goods.

Again, still is relevant the issue of calculation of the ratio between benefits and costs.

4.4 Comments on the Millian principle

Different authors have analysed the Millian Principle providing their comments.

As T. Scanlon stated, “The Millian Principle allows one, even in normal times, to consider whether the publication of certain information might present serious hazards to public safety by giving people the capacity to inflict certain harms”.²³

Indeed, Mill had the conception that the spread of an opinion, liked or not by the state, should be tolerated when it is disseminated through newspapers, but not when it is delivered orally in order to foment a mob.

T. Scanlon, as already mentioned in a previous section, focuses on the duty of the government to respect the individual autonomy, and he justifies the Millian Principle by stating that the US First Amendment is a limit to the authority of government, and not an individual right, since its purpose is to preserve the stream of information, fundamental for political and social processes. The question raised by Scanlon is whether it is legitimate by the government to restrict our freedom of expression, in one way endorsing individuals’ personal safety; but at the same time, if political, it may prevent political agitation up to an extent to no more be considerable legitimate.

The best answer would be that the regulation would be legitimate if it only involves and targets the not-so-significant interests of participants and audience.

²³ Scanlon T. “A Theory of Freedom of Expression” (1972), p. 224.

Scanlon provided a study of the Millian principle and based his theory on the definition of harm provided by Mill. Of course, the Millian principle and its clauses are not completely correct and applicable to every situation, since sometimes it may refer to justified paternalism, and the weight between costs and benefits that should always be taken into account in order to understand if an information is worth being spread and received. Actually, the Millian principle has the purpose of defending citizens from the authority of the legitimate government. The objection of course may be that restrictions of governments are necessary as safeguards of social wellbeing, after the weighting of benefits over costs.

The American legal scholar Harry H. Wellington²⁴, referring to the discourse of Scanlon about the Millian Principle, made the example of an individual named Smith who lives in a small town where different races coexist peacefully. However, Smith is convinced that black people are inferior genetically and wants to inform others of that. In a public meeting where Smith was meant to express his opinions, the audience is angry and would not like to listen to him. The mayor of the city, pressed by the behaviour of the audience, decides to intervene, and stop Mr. Smith. The audience cheers, but the next day many criticize the action of the mayor and through a report it is established that the mayor acted wrongly since it cannot be justified the denial to freedom of expression on the grounds of divisive and false ideas. Therefore, it would be right to say with certainty that the scope of freedom of expression cannot be limited to what is socially acceptable, because it would really become void. However, on the other hand, it is also right to stop the speech since it would bring issues to the fair harmony in the city.

Mill would not agree since he attacks the so-called “assumption of infallibility”²⁵ which consists of the certainty of individuals to think that something is a priori certain, and they assume its infallibility up to a point that there is no possibility for a different opinion. Mill thought of this assumption as an issue of strong decision that must be imposed on others, without giving them the possibility to express their opinion. This phenomenon would create irrefutable dogmas able to hinder freedom of expression. This kind of censorship, once applied, is difficult to control.

²⁴ Wellington H. H. “On Freedom of Expression” (1979), pp. 1126-1129.

²⁵ Mill J. S. “On Liberty” (2001), pp. 19-20.

The American philosopher Robert Paul Wolff²⁶, following the discourse of Mill, thought that whether fair or not the disturbance of social harmony is preferable to the silence of political repression. Wolff went further by stating that the real ideal of freedom of speech is not truth, but justice. Indeed, in his discourse he included the morals. The idea is that the expression is to be guaranteed as long as individuals are autonomous in their reasoning, and even if they come to create or believe to false beliefs they cannot be restricted in their opinion.

Focusing on the second part of the Millian Principle, it is not right to prevent the advocacy of illegal conduct, since it may be carried out for various reasons such as minority groups requiring political power. Indeed, it should grab more attention the potential excesses that the majority may carry out. In the case of the US Constitution as for many other constitutions, it is right to say that the separation of powers provides the possibility to check the actions of the majority.

The German philosopher Hannah Arendt²⁷, differently from the mentioned authors, does not think on the limitations or regulations, but rather on the importance that civil disobedience as a method for individuals to demonstrate their disagreement and request for a change.

In brief, the harmony between consent and majority rule is the main solution to the problem that has been introduced in the Millian Principle.

Indeed, as Wellington expressed “the state cannot prevent advocacy on the ground that individuals will come to believe this false doctrine. But when there is a clear and present danger of action, the state must have the power to stop advocacy. Action would plainly involve lawless violence.”²⁸

In conclusion of this section, the Millian Principle is useful to exclude some justifications for restrictions over expressive acts.

Starting from this Principle, governmental policies must be based on accounting the value of some types of expression over others and an equal distribution of means of expression since where there are few means of expression and regulations, the effects may be as dangerous as the restrictions that may be applied on the content.

At this point, the question is to what extent it is right to provide an active protection to freedom of expression, or to provide restrictions to prevent the annoyance to the public.

²⁶ Wellington H. H. “On Freedom of Expression” (1979), pp. 1134-1136.

²⁷ Wellington H. H. “On Freedom of Expression” (1979), pp. 1138-1141.

²⁸ Wellington H. H. “On Freedom of Expression” (1979), p. 1142.

4.5 Digression about academic retraction

At this stage, it is important to make a brief digression about the difficulties that academic authors and scholars are experiencing in their exercise of freedom of expression.

Indeed, it has occurred several times that academics' opinions, after receiving objections, have been retracted.

The discourse shall start from the issue of academic journals, which should offer a free and safe space while fostering debate; however, there is the wrong misconception and assumption that all expressions considered to be radical or polar are directly part of the class of hate speech. If they want to stay afloat, academics need to respect the social pressure whether they must follow dictates by universities, or by publishers and journals.

Indeed, issues at stake currently are the ideological censorship and the intellectual sanctioning through which the academic freedom of expression and the general freedom of expression divide themselves and the former becomes less liberal. Hence, academic publishing is experiencing a tug of war between the desire to create a free space for academic discussion and the imposition of manipulative forces. In the academic space, another issue arises which is the capitalistic predatory mindset in which profit is the uppermost aim and the publishing oligopoly is strongly interested in maximizing it, leading to an amalgamation of business, academia, and the public.

As a result, the phenomenon of retraction is becoming frequent among scholars since they tend to retract their own opinion if they are not positively met by the public and they are considered to be invalid or groundless.

This approach is harshly biased since the criticism of socially unacceptable opinions should be a reason for dialogue, and not for the elimination of that opinion. Retractions shall be utilized for the correction of erroneous research.

An example of wrong use of retraction is the case of Lawrence Mead²⁹, whose commentary has been retracted by Springer Nature over the accusations of excessive racism. Through disagreement of opinions within the public domain, the social media-based pressure and public outcry, the commentary has been canceled, even though the commentary is a tool for the expression of an opinion being by nature biased.

²⁹ Teixeira da Silva J. A. "How to shape academic freedom in the digital age? Are the retractions of opinionated papers a prelude to "cancel culture" in academia?" (2021), p. 4.

Important to note is that Mead's commentary has not been retracted on academic grounds or due to misconduct or errors, but due to social and political pressure.

This issue in academia is the perfect example of the issue that has been rising in the last decades. Through the use of social media and a more rapid access to information society has been evolving in a new form in which individuals tend to get less information contrasting with their views and prefer to receive information that substantiates their opinions and belief.

5. Content regulations

Restrictions imposed on the basis of harm are not the only type of restriction which can be imposed on expression; in fact, in this chapter are going to be discussed content regulations which are restrictions based on the content of the expressive act.

Firstly, with the reference to the First Amendment of the US Constitution, the Supreme Court³⁰ treats the freedom of expression as fundamental since open discussion plays a crucial role both in private and public discussions; however not all liberties are considered to be at the same level. Indeed, the Supreme Court made a distinction between high-value and low-value speech providing that the former is protected, while the latter is not considered to be comprised into fundamental liberties.

In order to better assess the distinction of speeches provided by the Supreme Court it is right to quote the case of *Chaplinsky v. New Hampshire*³¹ where fighting words were defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."³²

These fighting words just mentioned are capable to express the perspective of the speaker without articulating it.

The fighting words may be considered to be part of the category defined Hate Speech which is "expression that vilifies or harasses on the basis of the target's race, gender, sexual orientation, or other forms of group membership."³³

³⁰ Brink D. O. "Millian Principles, Freedom of Expression, and Hate Speech" (2001), pp. 127-131.

³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

³² Brink D. O. "Millian Principles, Freedom of Expression, and Hate Speech" (2001), p. 130.

³³ Brink D. O. "Millian Principles, Freedom of Expression, and Hate Speech" (2001), p. 131.

Secondly, the First Amendment distinguishes two kinds of restrictions: the content-specific, which account on limiting a form of expression based on its topic; while content-neutral, based on the limitation of manner, place, and time, but not on content.

Taking all these points into consideration, content regulations are focused on the content of the act of expression, and the scope of them are determined on the gravity and obscenity of the content itself.

As expressed by Joshua Cohen, content regulations “represent a direct threat to the expressive interest”³⁴ since they may have as a consequence the exclusion of some viewpoints from the commonsense reasoning, to an extent that it could create the possibility of prevention of individuals from expressing themselves.

Indeed, expressive and deliberative interests could be threatened by content-specific regulations, and much less by content-neutral regulations. However, it is not clear whether content-neutral regulations are sufficient when it is the time to address the problem of fair access.

In brief, not all speeches are considered worthy of protection, but based on their deliberative values, as individuals must be capable to form, assess and accept a belief.

However, speeches based on deliberative values may also produce harmful and false claims which may even hinder the assessment of issues.

5.1 Categorization

A way through which it is possible to handle content regulation is categorization, which helps to define possible regulation to expression within each category, and it would help to assess, through the different categories of expression, which can be considered to be obscene and eligible for restrictions.

Certainly, it is necessary to consider the connection between expression and fundamental interests, and the manner through which it is possible to address the harms.

³⁴ Cohen J. “Freedom of Expression” (1993), p. 235.

An important case is the political expression, which is closely linked to the fundamental interests, and because political speech tends to libel a group rather than an individual. Hence, in this case it is necessary that the group libel should be more protected than individual libel since the former is much dangerous, and it is easier to remedy to its injuries.

Some kinds of regulations have the aim to limit expression which is part of a class through the targeting of a subcategory of the class itself in order to prevent the harmfulness. Example is applying regulations over racially offensive fighting words, rather than fighting words in general. The application of subcategorization may raise questions of legitimacy and acceptability since a general regulation over hate speech would not be acceptable but more effective, rather than a specific regulation to subcategories.

In order to better understand the case in point it is necessary to present the case of *R.A.V. v. St. Paul*³⁵. *R.A.V.* was arrested after burning a cross inside the yard of a black family. The defendant challenged the St. Paul Bias-Motivated Crime Ordinance, through which he was arrested, and he argued that it was overbroad and content-based. The ordinance states as follows:

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”³⁶

The case became crucial since the Supreme Court overturned the Minnesota decision, which cited the violation of the First Amendment. Indeed, the Supreme Court noted that the St. Paul statute was aiming to forbid only expressions used to cause alarm, outrage, or anger with respect to gender, racial, or religious intolerance. However, other expressions equally devised to arouse outrage or anger were not prohibited. Therefore, the ordinance unconstitutionally isolated content-based viewpoints. Hence it was effectively a form of content discrimination. Now the question is whether it would be possible to produce a regulation focused on the subcategory of fighting words that were mentioned in the ordinance, which are hate fighting words. There are two different proposals: on the one hand, it seems an impermissible

³⁵ *R.A.V. v. St. Paul* 505 U.S. 377 (1992)

³⁶ Minnesota Legislative Code §292.02 (1990)

regulation, while on the other hand a regulation on this subcategory would be permissible since it is about low-value speech.

According to J. Cohen³⁷ there are three points representing a common ground where both the viewpoints agree:

- 1) Not every subcategory of a prohibitable category can legitimately be targeted.
- 2) Regulations can aim at certain subcategories of expressions which are prohibitable, on the ground of their content.
- 3) It is impossible to outlaw all expressions arousing alarm and anger.

Reasons of disagreement reside on the fact that content regulations menace to suppress ideas, and certainly a threat to deliberative and expressive interests. However, taking into account the fact that hateful fighting words are low-value speech and that injuries determined by hateful fighting words cannot be repaired with more speech, it is not convincing that regulations over this speech would have as a result the suppression of ideas.

Injuries brought by hateful fighting words are many and they can foster bias-motivated harassment and prejudices, undermining the societal harmony. Hence, regulations contributing to avoiding this harm are acceptable, with the condition of not suppressing ideas.

5.2 Digression on pornography

As it is clear now, categories of action rest on distinctions of intent and content. The problem of weighting categories would be to provide regulations to categories while foregoing others. The same argument can be applied to the commercial speech where for example the cigarette advertising has been banned for the safety and health of the population.

Pornography, a case in point, is a topic which has two characteristics: the intention to sexually arouse the audience, and the explicit content of sexual material. The pornographer, similar to an artist, has the intention to stimulate the consumer through his product, while the consumer does not analyze the product to understand the meaning; in this case the rationality of the consumer is minimal. Indeed, within the topic of pornography, interests may collide since someone is interested and consume, while others disagree on being forced to being exposed to such topic. The actual issue is the protection of participant interests being here

³⁷ Cohen J. "Freedom of Expression" (1993), pp. 252-253.

fundamental in order to preserve the freedom of expression in contrast to the control of the majority, and at the same time a certain protection to the unwilling audience is provided, even though not in an active manner.

Referring to the Miller test over obscenity³⁸, a work is not worth of constitutional protection if for the community it appeals to lascivious interests, it depicts offensive sexual conduct, or lack of the artistic content.

In other words, the assumption is that obscenity deserves less protection. The reason of the reduction of protection of obscenity is precisely offensiveness. Hence, it would be logical to assess that regulations targeting all offensive works would not raise concerns over the suppression of ideas and interests.

Bans on pornography and its distribution have been applied many times in different manners, but the actual solution would be for the legislature to focus on the offensiveness of pornography, as the ones which may depict acts of violence on women and transmit to the audience a negative and dangerous representation of sex.

However, a general regulation over pornography on the basis of offensiveness and injuries to women, would not be content-neutral, and more importantly it would not be acceptable since it focuses on violence on women, which is a subcategory, and as unfair as it may appear, this cannot be taken as a reason to apply a general regulation.

Ergo, here again arises the question of whether applying a content-neutral regulation which would apply generally, and it would violate the freedom of expression; or a content-specific one which would neglect other contents and categories.

Again arises the issue over autonomy, which is an important right, but it would not be legitimate to ground the freedom of expression exclusively on it since another element to be discussed would be the equality. This relationship will be discussed later in the next chapter.

³⁸ Miller v. California, 413 U.S. 15 (1973)

6. Freedom of expression and Equality

After discourses over restrictions and protections, now it is time to introduce other theories which focus on the tug of war between equality and autonomy.

Issues about the hate speech gave life to the debate over whether it would be right to restrict the freedom of expression for the pursuit of equality, or to avoid limiting the freedom and risking obliterating equality.

As expressed in “Equality and Freedom of Expression”³⁹ by Tomi M. Massaro: recently, three approaches have been proposed by legal scholars to deal with hate speech.

The first approach, represented by civil liberties theorists, advocates to allow hate speech in order to provide to everyone the possibility for individual expression and maximize the possibility for cultural regeneration, while it may risk undermining equality in the society.

The second approach, represented by the civil rights theorists, restrains hate speech through the use of sanctions for the promotion of equality among individuals; this approach is highly controversial since it would risk undermining the autonomy that every citizen enjoys.

The third approach is represented by the Accomodationists who attempt to outlaw only expressions targeted towards individuals based on their gender, religion, age, sexual orientation, ethnic origin, and other characteristics.

Let us take as example the Bill of Rights of the US Constitution which protects individual autonomy and equality, creating a constitutional dilemma: theoretical and practical difficulties arise on how to define the scopes of autonomy and equality, and which is the manner through which the government can be responsive to both claims. Hence, both the first two approaches are unable to correctly address the problem since both, through either suppression or protection, would risk threatening one of the two rights.

It is a concern of many that a regulation on hate speech would threaten the freedom of expression in many fields such as academic discourse, political satire, and even some forms of artistic expressions. And to regulate it may unleash other forms of confrontational and offensive speech, such as new epithets or the burning of crosses.

³⁹ Massaro T. M. “Equality and Freedom of Expression: The Hate Speech Dilemma” (1991), pp. 211-266.

Other worries focus on the fact that regulations over hate speech can be used as a tool in order to enforce politically correct conducts.

Hence, many individuals in favor to the protection of hate speech argue that there is no valid solution to hate speech.

On the other hand, advocates of hate speech regulations simply assess the fact that it is not possible to predict the outcomes of regulations; and even if a statute is merely symbolic it does not deem it useless since the educational outcomes can be strongly efficient.

All things being considered, it has been demonstrated the difficulties of balancing claims of unlimited expression and claims of civil discourse.

The Supreme Court of the USA has assigned different degrees of protection to types of expression since they depend on the social value and the harm they can deliver.

As already explained with pornography, the Court established that obscenity is not a form of protected expression. Hence, expression that falls outside the categories designated to be low-value speech cannot be outlawed or censored, if an imminent danger of harm is not present.

Currently, the Court holds that insults and epithets are high value speech and that they enjoy protection under the First Amendment, unless they do not happen to be fighting words pronounced vis-à-vis, increasing the danger of violence.

As interpreted by many scholars, hate speech regulations are already in existence, and they urge a rethinking of the parameters in order to extend it to other epithets. The supporters of hate speech suppression give much emphasis to the harm that hate speech delivers to victims, which can be psychological and physical.

In brief, civil rights theorists hold that the hate speech shall be regulated by governments more than the provided limitation over fighting words.

In conclusion of this section, it is important to note that all theorists and the Court itself agree that governments can regulate expression when the harm of allowing it outweighs the harm of suppressing it.

6.1 Civil liberties theorists

Civil liberties theorists urge a wider protection of expression on the ground both of the belief that people are able to withstand and defend themselves from offensive expressions, and also

of the fear that the tendency of categorizing offensive expression may become too much broad that it would abolish individual creativity and autonomy.

In brief, civil libertarians hold that governments cannot restrict expression, regardless of the degree of offense since they believe that freedom of expression is the basic requirement of democracy. However, in their opinion the government has the ability to limit this expression only when there is an imminent disruption. Indeed, these theorists argue that insults and discriminatory epithets cannot be regulated since it would implicitly favor one point of view over another, such as a regulation over racism which would favor non-white individuals over white individuals, with the latter considered bad or inferior. In their opinion such regulation would be content-specific rather than content-neutral, hence unconstitutional.

Another case in point is the utterance of the epithet “faggot” towards a gay man, which instinctively may be considered as an expression to be restricted, but for libertarians this cannot be possible since this would provide one group, in this case homosexuals, of protection differently from other groups, which also would need regulations over the legal injury and social abuse they underwent, such as people with disabilities. This would implicitly provide the conviction that with no punishment for all demeaning insults, the regulation over discrimination on the ground of sexual preference is worse than other forms of insult towards other groups.

In this sense, civil liberties theorists provide the assumption that a content-neutral, rather than content-specific regulation, would be more adequate or, better, it would seem necessary a ban over all hurtful forms of expression to make equal regulations.

Indeed, as Toni M. Massaro stated: “Unless we ban all such insults and epithets, or equally hurtful means of expressing our unease with another's difference, then we seem to be endorsing government regulation of the content, if not the viewpoint, of the speech.”⁴⁰

In their perspective, the low inclusiveness of a content-specific regulation is an indication of governmental partiality on the idea of nondiscrimination.

⁴⁰ Massaro T. M. “Equality and Freedom of Expression: The Hate Speech Dilemma” (1991), p. 223.

Consequently, civil libertarians do not accept political justification for the suspension of speech since it would clash with the conviction that the First Amendment protects political dissidence.

Civil liberties theorists have as argumentation the fact that some restrictions over forms of expressions considered hurtful would collide with the majoritarian values.

However, the First Amendment would not allow to the majority to censor offensive speech based on a protected status, even if doing so would have promoted equality. Hence, the community cannot instill values of equality by obliterating the expression of individuals who disagree with them.

In other words, civil libertarians are distrustful of the dominant community, the majority, and are willing to maintain individual rights and liberties from its possible coercion, and the tool would be the First Amendment. In this sense, they perceive that if offensive speech is not considered to be worthy of protection it could result in a threat to individualism, and even to cultural pluralism. Civil libertarians underscore the risk of power abuses and harm of suppression since they claim that it is difficult to assess what is exactly hate speech, as opposed to offensive expressions.

Civil libertarians have been theorizing, through the use of rationalist assumptions, that freedom of expression must be defended for its aim of seeking truth.

However, currently, some skepticisms have been raised about the rationality of individuals, and the relativity of ideas rather than neutrality. Differently from what expected, liberals have concluded that liberalism is able to survive from the absence of rationalism, since without the rationalist component the aim of liberalism is still the open and free discourse. Hence the differences between the “old” and “new” liberalism are not profound, since both theories end up to the aim of balancing the individual’s autonomy and prevention of harm, while still defending hate speech. For the regulation of the content of expression is a threat to the liberal principle whereby truth can be traced within open and free discourse, hence for liberals only restrictions deemed to be absolutely indispensable to maintain the conditions of civil discourse can be applied; in fact, the requirement for a restriction over expression to be fair is the risk of incitement to physical violence. The harm is perceived in a restrictive meaning, with a lack of focus on psychological and emotional wounds.

6.2 Civil rights theorists

On the other hand, civil rights theorists have priorities opposed to the ones of the liberal theorists. In their opinion, equality is much more valuable than expression, and with no equality there is no possibility for meaningful freedom of expression.

Hence, they favor restrictions over hate speech in different forms, such as civil remedies, student discipline, and criminal sanctions.

Civil rights theorists have the belief that the harm determined by hate speech is equal to, or may exceed, the harm that results from the group of expressions that does not receive a complete protection by the First Amendment.

Hence, civil rights theorists maintain that racism is an abusive phenomenon and they criticize civil libertarians who refuse to assign to hate speech a high value. Indeed, through this refusal they do not give value to the seriousness of racial insults.

Civil rights theorists truly believe in the distinctive severity of the harm of racism compared to other forms, and currently this severity is starting to be applied even on other social groups which tend to be discriminated.

In a general sense, civil rights theorists think that a physical retaliation is not the right standard for the measurement of insults, meaning that the insult is to be weighted for its inflicted injury and the threat to social and mental peace.

Indeed, Richard Delgado⁴¹ explained that the injuries to victims of hate speech is serious, and the suppression of this speech seems fair, if the First Amendment is to be followed in the balance between harms and values. However, he is part of a category of civil rights theorists which focuses on the face-to-face individual altercation.

The more radical category of civil rights theorists set a great difference with the civil libertarians since it proposes to make hate speech illegal in all contexts, not only in face-to-face encounters. Differently from liberals, they emphasize the group dimension of an individual, stating that injuries to a group are matters of individual concern, hence racist insults targeting a racial group would determine the wounding of individual self-esteem.

⁴¹ Delgado R. "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling." (1982), pp. 143-149

An exponent of this category is David Riesman⁴² who explained the importance of pluralism over individualism for the sake of democratic principles.

Going further, Riesman recognizes the importance and risk of intergroup defamations because they can create a stronger group affiliation, but also perpetuate the existing stereotypes and epithets towards the group itself.

Hence, the limitation of hate speech in every context may appear as a threat to political speech.

However, when compared to the wounds that discrimination and defamation can inflict, it is right to question whether it is better to provide protection to hate speech favoring individualism, or better to suppress it and embrace pluralism. The answer is not simple and it seems to always lack the perfect points to be applied, since every time seems to favor either of them.

In recent years, scholars have embraced the viewpoint of Riesman, with an acknowledgment of the positive aspects of the community. These scholars are defined as Communitarians, and they provide further support to the suppression of hate speech. Communitarianism appeals to solidarity and the shared values of the community for the imposition of standards of education. Their aim is to reach a society in which human diversities are not the pretext for subordination.

Civil rights theorists, as communitarians, hold the criticism against civil liberals for which the question is not the presence or absence of restrictions over free expression, but rather the alternative between two forms of restraints, one applied by private groups outside the law, and one applied by the government under the constitution.

In other words, government is not the only tool for restriction, but it is the only one that can prevent the oppression of individuals. Hence, the government has the capacity to limit free expression for the sake of equality, since for civil rights theorists the contention between freedom and equality is always won by equality.

As an example, they provide the case of sexual harassment, where the speaker autonomy clashes with the victim equality.

⁴² Massaro T. M. "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991), pp. 235-238.

Like the civil liberal, also the civil rights theorists have been criticized for the vulnerability of their equality theory. Firstly, their theory fails to assess the fact that discriminatory hate speech must be restricted when targeting marginalized groups but not when targeting dominant groups. The justification for this lack of assessment is that equality does not consist of identical treatments, but it must take into account the inequalities in outcomes and distribution of resources.

However, in society it is difficult to accept a different account of equality.

Currently, definitions of equality range from a procedural equality for which everyone must be treated the same, to a substantive equality for which everyone must be entitled to an equal final outcome.

A second issue arising over the civil rights proposals is that their arguments over hate speech are only focused on racial discrimination, as they define the harm inflicted by racist speech to be a distinctive harm. Indeed, by following this thesis it may appear that they rank harm in ways that are not justifiable.

Another issue arising in the discourse is that racist speech not always is used with the aim to harm or insult. However, if regulations are to be applied only over intentional slurs it would mean that the core of the problem would not be solved since many slurs capable of equally harming would remain unregulated.

Hence, it has been demonstrated the difficulties between the option of regulating every slur within and without the group and with or without intention, or the option of regulating only intentional insults with the risk of failing to protect marginalized groups.

In conclusion, provided the flaws of the civil rights theories there is reluctance in adopting the whole civil rights agenda since this theory highlights the nature and weight of the harm of hate speech, but it fails to provide a complete solution on how to reduce or prevent the harm.

6.3 Accomodationists

After the discussion over the weaknesses of civil liberties and the shortcomings of the civil rights theories, it is necessary to introduce another approach which is the Accommodationist⁴³ one. Theorists of this approach come to the conclusion that censorship is fairly applicable

⁴³ Massaro T. M. "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991), pp. 249-252.

over hate speech. More specifically, they want to regulate intentional denigration of an individual or group in a face-to-face confrontation, based on protected characteristics. Proposals are different among accommodationists and so are the protected characteristics at the base of the regulation.

In other words, accommodationists agree with the formulation of Delgado, but they want to extend it beyond racism and to comprise other protected characteristics. In the words of Toni M. Massaro “the accommodationist position is essentially a civil rights position that works within the existing constitutional framework.”⁴⁴

Accommodationism represents an effort to hear both liberal and civil rights theories. Although it may seem unsatisfactory to both approaches, at least it succeeds to show that discourse can affect thoughts.

Accommodationists are interested mostly on speech regulation on campuses where regulations of civility are necessary for the sake of equality and community welfare.

However, hate speech regulations are not much common currently and they are considered to be constitutionally problematic. Indeed, this kind of regulations has been adopted on campuses where it was deemed necessary, as a consequence of incidents like the use of racist speech, and the use of homophobic slurs, for example.

6.4 Stanford regulation

A case in point of hate speech regulations based on an accommodationist approach is the Stanford University Discriminatory Harassment Provision, which provides features of hate speech as employing fighting or insulting words, or symbols that are not verbal in face-to-face encounters with the purpose of insulting or stigmatizing on the premise of membership in groups which has been drafted by Tom Grey⁴⁵. The policy establishes that an expression can be considered as verbal harassment when it:

“(1) is intended to insult or stigmatize individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

(2) is addressed directly to the individual or individuals whom it insults or stigmatizes.

⁴⁴ Massaro T. M. “Equality and Freedom of Expression: The Hate Speech Dilemma” (1991), p. 251.

⁴⁵ Grey T. “Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment” (1990)

(3) makes use of insulting or 'fighting words' or nonverbal symbols that are "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, etc."”

The peculiarities of this policy are several. Firstly, it restricts regulation over speech when it is regarded to be necessary, meaning when there is the use of targeted verbal affronts, and most importantly when this speech is uttered in a face-to-face encounter. It is not much about the protection of these attacks, but rather about their prevention since the fear of verbal, or even physical, assault can affect behaviors of individuals.

Indeed, the Stanford policy is able to divide the slurs based on protected characteristics from other words that harm.

The crucial factor for the distinction is the implicit connection with physical violence. An example is a sexist epithet which may be an allusion to rape.

Another important feature of this policy is the fact that it is not restricted only to racial slurs since the protected characteristics mentioned are many. Indeed, it is not fair to distinguish among different types of pain, and even in doing so it is certain that epithets based on handicap, sexual orientation, religion, and gender can harm in ways analogous to the harm of racial slurs.

A third feature of the policy is that it is not one-way oriented but its outcome is, meaning that it has been elaborated in a sense that in the present racial slurs towards white individuals are not considered to be outrageous, but epithets against any non-white racial group may be regulable. Therefore, even if the policy does not follow the one-way theory, it has a one-way outcome since it considers the history of discrimination, which white people have not endured.

A fourth feature is the fact that it is able to set an example for policies to be applied in every context since it is grounded on the supply of equal access to everyone. Indeed, even if freedom of speech is strongly protected in campuses, at the same time in other contexts some individuals, like public employees, enjoy a restricted protection.

A final important characteristic is that the policy does not express the differentiation of settings as public to nonpublic, but rather it focuses on the nature of the uttered words and the proximity of the speaker.

In conclusion, the regulation is fundamental in order to prevent the damage on equality, and to not encourage an environment where discriminatory speech seems fair.

The policy highlights the fact that the main remedy for hate speech would be counter speech rather than suppression of it.

The policy is less susceptible to future misapplication, and noteworthy is the fact that the policy only sanctions the intentional misconduct, differently from the unintentional one, since it may undermine the good speech and hide hostilities rather than reduce them.

Certainly, there are different manners of expressing an opinion, and the regulation is not violated if time, place and behavior are respected. Indeed, it would be a responsibility of the speaker to foresee the outcome of his or her speech. On the other hand, it seems also responsibility of the audience to prevent the encounter and anticipate the harm.

However, a shortcoming of the Stanford regulation is that it does not express clearly the sanctions that would result from a breach of it, and it establishes as requisite that the offensive expression should meet all the mentioned conditions to be regulated. Hence, this regulation is not very restrictive.

7. Conclusion

Freedom of expression, as it has been analyzed throughout the thesis, is a difficult concept and right on which many discussions have been brought about. Starting from the first chapter it has been demonstrated the difficulty that is present between democracy and autonomy. The tug of war between the two concepts can only be solved through the realization that individuals immersed in a society have the need to be part of a flow of information for the development of the individual as part of an electorate.

Restrictions on the acts of expression based on the harm that they may produce raised another question on the extent to which the freedom can be limited. Through the categories of harms it is possible to understand that the harm cannot always be the justification for impositions of restrictions.

Furthermore, restrictions can be imposed for the content of the act of expression. This type of regulation raises a further question which is the dilemma of either regulating every insult uttered regardless of the intentionality, or regulating only intentional insults with the risk of failing to respect marginalized groups. Indeed, the example of pornography has been presented in order to show how a regulation can be oppressive or too loose.

Going on with the discourse over restrictions other theories have been introduced, which are interested in the relationship between autonomy and equality. Indeed, these theorists are divided on whether freedom of expression should have its foundations on autonomy implying the preference of unrestricted expression with few curtailments for the limit of the majoritarian view; or it should have its foundations on equality with the implication that without equality a fair freedom of expression would not be possible with restrictions of hateful fighting words.

However, the Stanford regulation has demonstrated that it is possible a halfway regulation through the encouragement to freedom of expression for the enhancement of a fair environment; in addition, the policy proposed restrictions over expressions intended to target individuals based on their protected characteristics.

This text had the aim to provide the different contradictions and issues that the concept of freedom of expression inherently has. Freedom of expression finds itself in a tug of war

between democracy against autonomy, and autonomy against equality. It is difficult to assess which theories are more compatible to the current, quickly changing, society.

I find myself strongly in favor of the Accommodationist approach since currently, through the use of new technologies and means of communication, it is always difficult to express themselves without the risk of arousing hate in other people, while it is much more difficult to get protected from acts of discriminations. Hence, in my opinion two points need to be considered.

It is necessary to provide to marginalized individuals the protection they surely need, through different restrictions over acts of expression.

However, it is unwise to grant power of restriction over expressions to the State, since it is unsure to what extent this power would be extended. The State is sovereign, but freedom of expression is crucial as a bound and check of the State.

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