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Group Defamation and Harm to Identity

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RÉSUMÉ

Le droit relatif à la diffamation collective se voit habituellement confronté par des objections sur deux fronts. D'une part, s'agissant du délit (civil) de diffamation, la loi exige du demandeur qu'il prouve que l'expression diffamatoire le vise personnellement et que, par conséquent, le préjudice soit individualisé. Les tribunaux ont ainsi traditionnellement refusé d'admettre la requête du demandeur lorsque le groupe était trop grand. En effet, il est alors présumé que le préjudice découlant de ce type de diffamation est atténué en raison de sa dispersion et de sa formulation généralisée. Par conséquent, il s'ensuit qu'une telle expression ne peut constituer un préjudice suffisamment subjectif sur un membre particulier s'identifiant au groupe ciblé. D'autre part, dans une perspective plus large de droit constitutionnel, les règles relatives à la diffamation des groupes apparaissent incompatibles avec l'ordre du système des droits fondamentaux vu l'importance accordée à la liberté d'expression dans les sociétés démocratiques.

La présente thèse va à l'encontre de cette vision. Elle soutient que le préjudice causé par diffamation visant les caractères raciaux ou ethniques d'un groupe devrait pouvoir donner lieu à un préjudice individuel car c'est une forme de préjudice rattaché à l'identité de la personne. Ainsi, la thèse réexamine le droit relatif à la diffamation collective, incluant les lois et la jurisprudence pertinentes, ainsi que les traitements constitutionnels réservés à ces dernières face à la liberté d'expression dans les systèmes américain et canadien. La thèse offre un cadre axé sur la notion d'identité pour reconceptualiser le préjudice provoqué par l'expression diffamatoire dégradant des caractères fondamentaux d'un groupe.

Mots clés: *Diffamation, Expression, Préjudice, Identité, Individu, Groupe, Communautarisme, Libéralisme, Liberté d'Expression*

ABSTRACT

The law of group defamation is habitually confronted by objections on two fronts. First, in the tort of group defamation, the law requires that the member claiming injury is able to establish that the defamatory statement was "of and concerning" him personally, and thus that the prejudice was subjective and individualized by nature. Courts have traditionally refused to admit cause of action if the involved group was too large. The harm caused by such group-targeting expression is presumed to be somehow lessened by its generalized formulation, defaming the group as a whole as opposed to individual member(s). Therefore, it does not constitute sufficiently individualized harm to an identifying member of the group. Second, on a broader, constitutional level, group libel laws appear to contravene the very order of system of fundamental rights given the reverence freedom of expression commands in democratic societies.

The present thesis argues otherwise. The study opines that the harm in group defamation that degrades fundamental characteristics such as race or ethnicity can indeed give rise to individual prejudice because it is a form of harm to identity. In doing so, the study first critically reexamines laws on (group) defamation, related relevant laws, and their constitutional treatment in the American and Canadian legal systems. The thesis offers a new way of reconceptualizing harm in group defamatory speech grounded on an identity-based framework.

Key words: *Defamation, Speech, Harm, Identity, Individual, Group, Communitarianism, Liberalism, Freedom of Expression*

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PREFACE & ACKNOWLEDGEMENTS

When my interest on free speech first began forming months before the start of the Program, things were very much up in the air. Like most initiating doctoral candidates, I found myself in an uncertain struggle in search of the right subject. This was back around the closing months of 2014. Little did I know then which route to undertake. To be completely frank, I was more preoccupied as a recovering patient from a brutal back surgery in that year's summer in Seoul immediately following the completion of my Master II in Paris.

Then Charlie Hebdo happened.

The attack had occurred in January 2015, literally three days into my doctoral Program. One would likely think that such an event would serve as either a moment of illumination or even affirmation of previously held dispositions. Instead, the incident somewhat aggravated my underlying conceptual confusions. I gather partly because it was an emotionally charged time. It was difficult to see the cobbly Parisian streets I so casually used to stroll barely months ago in distress. Theories of culture wars and lamentation over the imminent death of free expression overwhelmed the public discourse as I watched their unfolding as the City's past inhabitant and now a distant observer across the Atlantic. The prevailing sentiment at the time was that a collectively chosen freedom, *une valeur de la République*, was under siege. And for those afflicted, it was impossible to escape the sequelae of sweeping national fury. Yet, I also understood what it meant to be on the other side of the fence. Do not misunderstand my meaning here: I most certainly do not condone those acts of violence. What I am referring to, rather, is the general condition of being publicly and deliberately disparaged in the most consistent fashion for the primordial affinities one is born into. While I cannot speak for religiously offended outrage, I have grown all too familiar to the repetitive exposure to shame for something as rudimentary as the color of my skin as part

of the price of growing up as an Asian kid in Africa. After eight such years carved into my childhood, every subsequent encounter of racist treatment in Europe or North America forced me to revisit my own past experiences of racism and racist expression. The fact that I was raised as a son of a Presbyterian preacher in a deeply religious household did not help either. Two sides thus clashing, there was a certain powerlessness into the torn self that enfeebled and mocked my eagerness to learn, dispute, and materialize the kind of inexplicable fire in my stomach that I felt at the time of the Charlie Hebdo incident.

It would take well up to a full year into the Program through my earlier 'entretiens' with the Dean (then Vice-Dean) and mandatory methodology courses for me to cogently decipher and articulate that block of uneasiness under the broad spectrum of freedom of expression yet concise class of speech that is group defamation targeting essential characteristics of persons. Inflammatory religious-incompatibility thesis was replaced with legal and sociological evaluations of the Charlie Hebdo event and similar instances involving general ascription and imputation of disparagement pertaining to identifiable groups of peoples. In other words, even before group defamation emerged as a viable trajectory, some of my deepest pre-conceived 'myths' and suppositions had to be washed away to make room for clear-eyed, scientific approaches. *Bref*, it took me awhile to unsubscribe myself from Huntington's Clash-of-Civilization-sort of mindset and exorcise the specter of Houellebecq's *Soumission*.

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I owe my debts of gratitude to several persons and Institutions. I must begin by

thanking the Law Faculty of Université de Montréal and the FESP for a number of important bursaries. In particular, I was blessed to receive *La Bourse d'Exemption* that exempted me from otherwise required international student tuition fees for all six semesters of doctoral seminars in the first two years of the program. If not for that bursary, the present thesis would not even have begun. I thank the FESP for *La Bourse de fin d'études doctorales* (< *4ans*) as well.

I also want to thank the Late Very Honorable Chief Justice Antonio Lamer and the Honorable Madam Danièle Tremblay-Lamer for the attribution of their bursary. I am most humbled that this scholarship was extended to a foreigner-by-status as myself and I recognize the weight of that extension. Reciprocally, I would like to express my gratitude to the People of Quebec. Of all the lands in four continents I have dwelt over the course of my twenty-eight year-long life journey, I can state without reservation that this society has been the most hospitable and open-minded. Quebecers gave me an identity to hang onto during this journey. From the bottom of my heart, Thank You.

I would like to thank my supervisor, the Dean of the Law Faculty, Jean-François Gaudreault-DesBiens. I have learned to admire his sense of candid humility and far-reaching intellectual broadness. I thank him for taking me in under his wing prior to the commencement of the Program and for the *Bourse de Perfectionnement* in the course of this road. Above all, I thank him for his managerial efficiency, pragmatic leadership, and patience to oversee this Project through to its completion. I thank him also for being understanding of my health issues.

My profound gratitude also goes to Professor Noura Karazivan. From the start of the writing phase, she has been present throughout the process. She has been of crucial aid with regard to technical aspects required at the doctoral level of writing to providing timely

materials to provoke critical thinking. Only under her strict regime of guidance could this thesis bare its present form before the four-year mark into the Program. She has been a role model for me to develop my own sense of professional accountability. I owe her immensely.

I want to thank my father for his lifelong mentorship and his unyielding financial investment in my studies starting with my bachelor's degree in Paris. He is a man of great fortitude and self-discipline to whom I begrudgingly owe my fondness for higher calls of self-distinction and the perpetual drive for dissociation from the close-mindedness of tribal inclination.

This thesis was written in isolation. This is for the most part due to the distaste I have cultivated toward the disease that is the communitarian regression, after witnessing my whole life those who squander the gifts of cultural or intellectual learning by closed segregation. But in doing so, I have also paid the price of the strict individualist and its consequences in the last four years.

This thesis was also written in constant moving and in deprived health. The state of my back obliged me to conceptually formulate and rearrange words and phrases *not* sitting on a chair in a room. In fact, most of the writing was first effectuated during walks (and in swimming pool), often under the rain or snow, before its transfer onto the laptop. For those familiar with Montreal weather, this should be telling.

And so lastly, I thank my God. There is no denying that bitterness and cynicism have taken deep roots in my faith in search of my own identity. This is of course an implicit way of admitting that this Project has been a personal one. The question of identity has, in its various forms, most intensely deranged me over the last four years. I nevertheless remain to acknowledge Him as my God, as He was God of Abraham and Jacob, and to Moses and Isaiah. He had tasked me with a doctoral thesis on identity. Now that I look back, what a

befitting task this was. The Lord indeed works in mysterious ways.

Montreal, October 9th, 2018

Pyeng Hwa Kang

This thesis is dedicated to my grandmother who passed away during my pursuit of this quest.

"Here is the great temptation of the modern age, this universal infection of fanaticism, this plague of intolerance, prejudice and hate which flows from the crippled nature of man who is afraid of love and does not dare to be a person. It is against this temptation most of all that the Christian must labor with inexhaustible patience and love, in silence, perhaps in repeated failure, seeking tirelessly to restore, wherever he can, and first of all in himself, the capacity of love and which makes man the living image of God."

Thomas Merton in *Disputed Questions* (1960)

LIST OF ABBREVIATIONS

ACM:	Association for Computing Machinery
ALR.:	American Law Report
Am J Public Health:	American Journal of Public Health
AQ:	Arrêts du Québec
ACM:	Association for Computer Machinery
AFP:	Agence France-Presse
Alberta L Rev:	Alberta Law Review
App Div:	Appellate Division (US)
Ariz L Rev:	Arizona Law Review
BUL Rev:	Boston University Law Review
BCCA:	British Columbia Court of Appeal
BCSC:	British Columbia Supreme Court
Bull Crim:	Bulletin des arrêts de la Chambre Criminelle de la Cour de Cassation
CA:	Jugements publiés et inédits de la Cour d'Appel, Québec
C de D :	Cahiers de Droit
CCC:	Canadian Criminal Cases
CCQ:	Code Civil du Québec

CCSM:	Continuing Consolidation of the Statutes of Manitoba
CLR:	Commonwealth Law Reports (Australia)
CPC:	Code du Procédure Civile du Québec
Cal Ct App:	California Courts of appeal
Cal L Rev:	California Law Review
Can JL & Juris:	Canadian Journal of Law and Jurisprudence
Cardozo L Rev:	Cardozo Law Review
Cass Crim:	Chambre Criminelle de la Cour de Cassation (France)
CBC:	Canadian Broadcasting Corporation
CCSM:	Continuing Consolidation of the Statutes of Manitoba
CDA:	*Communication Decency Act of 1996* (US)
CERD:	Committee on the Elimination of Racial Discrimination
CHRC:	Canadian Human Rights Commission
CIA:	Central Intelligence Agency (US)
Clev – Mar L Rev:	Cleveland Marshall Law Review
cmt.:	Comment section in the *Restatement of Torts*
CNN:	Cable News Network
Colo App:	Colorado Court of Appeals
Colum Hum Rts L Rev:	Columbia Human Rights Law Review

Colum L Rev:	Columbia Law Review
Comm & L:	Communications and the Law
Comm L World Rev:	Common Law World Review
Conn L Rev:	Connecticut Law Review
Cornell L Rev:	Cornell Law Review
CSC:	Canada Supreme Court cases
CSCW:	Computer-Supported Cooperative Work
CTV:	Canadian Television network
D Minn:	District Court for the District of Minnesota (US)
DC Cir:	Court of Appeals for the District of Columbia Circuit (US)
DACA:	*Deferred Action for Childhood Arrivals* (US)
Depaul L Rev:	Depaul Law Review
DIA:	Defense Intelligence Agency (US)
DNI:	Director of National Intelligence (US)
Duke J Const L & Pub Poly:	Duke Journal of Constitutional Law & Public Policy
Duke LJ.:	Duke Law Journal
ECHR:	European Court of Human Rights
Edw I.:	Acts of the Parliament of England under Edward I (Eng)
Emory L J:	Emory Law Journal

Eng Rep:	The English Reports
EWCA:	Court of Appeals of England and Wales
F Supp:	The Federal Supplement (US)
FRD:	Federal Rules Decision (US)
FBI:	Federal Bureau of Investigation
Fla Dist Ct App:	Florida District Court of Appeal
Ga App:	Georgia Court of Appeals
GOP:	The Grand Old Party (US Republican Party)
HL:	House of Lords (Eng)
HARPER's MAG:	Harper's Magazine
Harv CR-CL L Rev:	Harvard Civil Rights – Civil Liberties Law Review
Harv JL & Pub Poly:	Harvard Journal of Law & Public Policy
Harv J on Legis:	Harvard Journal on Legislation
Harv L Rev:	Harvard Law Review
Hastings Const L Q:	Hastings Constitutional Law Quarterly
HKEC:	Hong Kong Electonic Citation
Howard L J:	Howard Law Journal
HRTO:	Human Rights Tribunal of Ontario
IR:	The Irish Reports

ICCPR:	International Covenant on Civil and Political Rights
Ill Crim Code:	Illinois Criminal Code (US)
Ill Rev Stat:	Illinois Revised Statutes (US)
Indiana LJ:	Indiana Law Journal
INoC:	*Information Needs of Communities*
Int J Environ Res Pub Health:	International Journal of Environmental Research and Public Health
Intl Migration Rev.:	International Migration Review
IRPP:	Institute of Research on Public Policy
J Crim L & Criminology:	Journal of Criminal Law and Criminology
JC & UL:	Journal of College & University Law
KB:	Court of King's Bench (Eng)
Ky.:	Kentucky
Law & Contemp Probs:	Law & Contemporary Problems (Duke University School of Law)
McGill LJ.:	McGill Law Journal
Melb U L Rev:	Melbourne University Law Review
Michigan LR:	Michigan Law Review
MIS Quarterly:	Management Information Systems Quarterly
Mod L Rev:	The Modern Law Review
NAACP :	National Association for the Advancement of Colored People (US)

NC L Rev:	North Carolina Law Review
ND Cal:	U.S. District Court of Northern District of California
NE:	North Eastern Reporter (US)
NE Mass:	North Eastern Reporter on Massachusetts court cases
NetzDG:	*Netzwerkdurchsetzungsgesetz* (Ger)
NJ C L:	National Journal of Comparative Law
NLRB:	National Labor Relations Board
Notre Dame L Rev:	Notre Dame Law Review
NSA:	National Security Agency (US)
NSCA:	The Court of Nova Scotia
NSPA:	National Socialist Party of America
NSR:	Nova Scotia Reports
Nw U L Rev:	Northwestern University Law Review
NY Ct Common Please:	New York Court of Common Please
NY Sup Ct:	New York Supreme Court
NY LS Rev:	New York Law School Review
NY L Sch Hum Rts:	New York Law School of Human Rights
NYU L Rev:	New York University Law Review
OAC:	Ontario Appeal Cases

OJ:	Ontario Judgments
OR:	Ontario Reports
Ohio St L J:	Ohio State Law Journal
OK CIV App:	Oklahoma Court of Civil Appeals decisions
ONCA:	Ontario Court of Appeals
ONSC:	Ontario Superior Court of Justice
Or L Rev:	Oregon Law Review
Osgoode Hall LJ:	Osgoode Hall Law Journal
PEI:	Prince Edward Island
Pepp L Rev:	Pepperdine Law Review
PLOS:	Public Library of Science
PNAS:	Proceedings of the National Academy of Sciences (US)
PPPA:	*Protection of Public Participation Act* (Ontario)
PSG FC:	Paris Saint-Germain Football Club
QCCA:	Quebec Court of Appeal
QCCQ:	Court of Quebec
QCCS:	Quebec Superior Court
QCTDP:	Tribunal des Droits de la Personne du Québec
RJQ:	Recueil de Jurisprudence du Québec

RJT:	Revue Juridique Thémis
RSA:	Revised Statutes of Alberta
RSBC:	Revised Statutes of British Columbia
RSC:	Revised Statutes of Canada
RSNB:	Revised Statutes of New Brunswick
RSO:	Revised Statutes of Ontario
RSPEI:	Revised Statutes of Prince Edward Island
RSQ:	Revised Statutes of Quebec
RSS:	Revised Statutes of Saskatchewan
Rev Const Stud:	Review of Constitutional Studies
Roger Williams U L Rev:	Roger Williams University Law Review
S Ct:	Supreme Court Reporter (US)
S Rep:	Senate Report (US)
S Tex L Rev:	South Texas Law Review
SCC:	Supreme Court of Canada
SCJ:	Supreme Court of Canada Judgments
SCR:	Supreme Court Reports (Can)
SD Miss:	District Court of Southern District of Mississippi
SD NY:	District Court of Southern District of New York

SNS:	Statutes of Nova Scotia
Signs J Women in culture & socy:	Signs: Journal of Women in Culture & Society
St Paul Minn Legis Code:	Legislative Code of Saint Paul, Minnesota (US)
St Thomas L Rev:	Saint Thomas Law Review
Stan Hist Educ Group:	Stanford History Education Group
Stan L Rev:	Stanford Law Review
Sup Ct Rev:	Supreme Court Review (US)
Tex L Rev:	Texas Law Review
Toronto LJ:	Toronto Law Journal
Trinity C L Rev:	Trinity College Law Review
U Col L Rev:	University of Colorado Law Review
U Ill L Rev:	University of Illinois Law Review
U Louisville L Rev:	University of Louisville Law Review
U Pa J Const L:	University of Pennsylvania Journal of Constitutional Law
U PA L Rev:	University of Pennsylvania Law Review
U Toronto Fac L Rev:	University of Toronto Faculty of Law Review
USC:	United States Code
UCLA L Rev:	University of California Los Angeles Law Review
UDHR:	Universal Declaration of Human Rights

UNCHR:	United Nations Commission on Human Rights
UNGA:	United Nations General Assembly
Va J Intl L:	Virginia Journal of International Law
Va L Rev:	Virginia Law Review
WD Va:	District Court of Western District of Virginia
Wake Forest L R:	Wake Forest Law Review
Wash & Lee L Rev:	Washington & Law Review
Wash L Rev:	Washington Law Review
Wash U JL & Poly:	Washington University Journal of Law
Wm & Mary L Rev:	William & Mary Law Review
Yale LJ:	Yale Law Journal
Yale LJ F:	Yale Law Journal Forum

INTRODUCTION

I. Group Defamation, Free Speech, and the Law's Problem

Whenever one engages in a discussion pertaining to harmful speech, innate obstacles rebound tirelessly. Should the State maintain the role of a neutral arbitrator even when group targeting vilification runs rampant in the streets? Or should it take a more proactive, interventionist approach through law's expression? If so, to what extent could that legal interference maintain its legitimacy vis-à-vis constitutional muster? If legal measures were activated, resulting in the curbing of speech in the public sphere, how do they surpass common impediments of speech regulations such as vagueness and overbreadth?

These are, of course, just some of the conventional challenges that are hardwired into any laws seeking to pose limitations on the exercise of free speech. Regardless of the validating argumentation behind a law (e.g. public orderliness/safety, collective moral standard, emotional injury, hate speech), the free speech objection often appears insurmountable, let alone when the contested expression concerns group defamation. That objection, *grosso modo*, is twofold.

The first challenge begins with the tort of group defamation. It is marked by the governing law's struggle to recognize *individuated* harm resulting from group defamatory speech. Group defamation involving large group of people based on race, ethnicity, or other similar types of identification does not allow an individual member to file for cause of action.[1] Not only does the size of the group disqualify the right to claim, defamation has been

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[1] "The general rule is that an attack on a substantially large and indeterminate group of persons does not give rise to a cause of action to any of its members, unless there is something in the publication or the facts accompanying it pointing to a particular member. An impersonal reproach of an indeterminate class is not actionable." Raymond E Brown, *Defamation Law: A Primer*, 2nd ed (Toronto: Carswell, 2013) [Brown] at 88-

effectively discouraged as the correct legal recourse to seek recovery.[2] For there to be a valid cause of action from a group member, the law requires that the harm in the defamatory statement concerning a group constitutes a direct, personal injury that results in individual harm in the eyes of an ordinary person.[3] This means that unless the speech was 'of and concerning' the alleged victim, there simply is no cause of action in the law's esteem. Accordingly, courts have extensively relied on the criterion of group size to determine the objective likeliness of personalized harm. As a result, individuals belonging to large and identifiable racial or ethnic groups are barred from bringing action. Under this analysis, *Beauharnais*[4] - the only U.S. Supreme Court decision dating back to 1952 that has directly affirmed the constitutional validity of a group libel law – would be a jurisprudential anomaly. Even the less assertive Canadian freedom of expression caselaw has recently rejected a class action for racial group slander, thus aligning with the development of international rights discourse in favor of freedom of expression.[5]

This reluctance to the admit individual action in the defamation of large groups supplements the secondary challenge that occurs at a broader, constitutional level. Contestation at this stage involves the weighing of important but conflicting rights and their appropriate balancing if required. Given free expression's instrumental function in enabling

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89. See especially *Bou Malhab v Diffusion Métromédia CMR inc*., 2011 SCC 9, [2011] 1 SCR 214 [*Bou Malhab*]. The decision denied a class action filed by a member of the defamed group (Montreal taxi drivers speaking Arabic language). There were more than 1000 persons falling into that descriptive category at the time of the incident.

[2] *Bou Malhab, ibid* at para 93, Deschamps J.

[3] "… it must be shown that the plaintiff is a member of the class and that the words have been directed at him or her as an individual. The plaintiff must show that the publication is of and concerning him or her personally." Brown, *supra* note 1 at 89. The test of ordinary person and intensity of suspicion is applied to see whether the defamatory comment has "created in the mind of the reasonable reader or listener that the plaintiff is the person within the class to whom the defamatory statement refers." (*ibid* at 92).

[4] *Beauharnais v Illinois*, 343 U.S. 250 (1952) [*Beauharnais*].

[5] *Bou Malhab*, *supra* note 1.

democratic operations in the current Western socio-political system in terms of participations in political discourse or more generally the flow of information and the self-expression of persons, any proposition to curtail its exercise is vigorously contested. There is a strong consensus that considers that freedom of expression occupies a core position in the system of fundamental rights. By virtue of this particular freedom's centrality, any claim to restrain it would be a pungent contradiction to the very order of those rights. The rebuke comes in many forms: that compromising free speech is already bad enough, the admission of racial group libel would be preposterous; chilling speech on important matters of public interest would start a descent down the slippery slope towards the death of democracy; and that accepting this view will open wide the floodgates, asphyxiating the workings of the judicial process.

Bref, the current state of defamation law assumes that the harm in group defamatory language loses its edge as the group gets larger, and thus the sharpness of the harm cannot be considered to have resulted in sufficiently direct injury upon the identifying individual member. The acuteness of the harm, it would appear, dissolves in generalized formulation. Put plainly, the source of the problem is a denial at the conceptual level that large group defamation cannot deal subjective harm. This is a misevaluation in my view. Underneath the law's stubborn refusal to accept individual cause of action in large group defamation is a deliberate ignorance of the situatedness and interconnectedness of the social nature of persons. It does not take into due consideration the intimate bonds of identity that exist between individuals and their group nor the nature of the harm in this category of speech aimed at inescapable affiliations constitutive of persons' identities.

The nutshell of the present thesis is simply this: that the harm inflicted via group defamatory expression of fundamentally degrading nature causes harm to individual member(s) because it is harm to their identity(ies). Group defamation of this sort denigrates

those either voluntarily *identifying with* the defamed group or arbitrarily *identified by* others, and this, regardless of the vagueness of the expression in question.

II. Methodologies and Limitations of Critical Race Theory (CRT)

> « Pour être juste, c'est-à-dire pour avoir sa raison d'être, la critique doit être partiale, passionnée, politique, c'est-à-dire faite à un point de vue exclusif, mais au point de vue qui ouvre le plus d'horizons. »
>
> - Charles Baudelaire in *Curiosités Esthétiques* (1868)

A. Part One: The Comparative Exercise

The first half of the thesis is a critical review of the laws governing defamation, group defamation, and to some extent relevant group hate propaganda in the United States and Canada, respectively. Logically, the realization of this principal objective will involve a comparative methodology that seeks to segregate and contrast the two legal systems' treatment of defamation/group defamation laws.

The comparative approach in its rudimentary sense, as Dannemann noted, consists of extracting similarities and/or differences between the subjects of comparison.[6] Differences in legal systems are those that define and separate them from one another, making up their originalities. But the approach also entails the ability to appreciate the diversity of legal systems in the study of those distinctions. Cotterrell criticized what he visualized as frequent shortcomings in comparative law that he attributed to too narrow a focus on the rigid surfaces

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[6] Gerhard Dannemann, "Comparative Law: Study of Similarities or Differences?" in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 383-419.

of judicial technicalities.[7] While the present thesis does not concern itself with projects of harmonization or unification of the American and Canadian legal treatment of group defamation, Cotterrell's observation still rings true with regard to the significance of recognizing and celebrating the abundance of varied legal systems. I see it as an urge to reach for deeper meanings or shared common principles within the subjects of comparison. Pierre Legrand termed it "jurisculture."[8] It is thus fundamental that the comparatist aims to see beyond the plateau of legal manuscripts. One must come to terms with the fact that the underlying spirit of general principles may not necessarily dwell at the surface of foreign codes. Nor should the comparatist feel pressured to appropriate the untranslatable into the familiar.

Simultaneously, it is critical that the comparatist avoids premature, doctrinal-based conclusions. In other words, the comparatist's analysis must not consist of anticipating or pre-giving certain predetermined meanings to the subjects of interpretation. This was one of Ponthereau's cautions to comparative disciples.[9] Instead, as Cossman had suggested, it may be helpful that the comparatist occasionally gaze back at oneself, and 'check in' his or her own *point de départ*. Clues to the art of gazing back can be found in Cossman's own research, where she went back and forth between the various legal aspects prevalent in Indian and Western familial cultures and observed women's functionality in those respective systems.[10] Rather than arbitrarily approaching the Indian legal system through the lens of Western interpretation of law and feminism, Cossman glanced back at the Anglo-American

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[7] Roger Cotterell, "Comparative Law and Legal Culture" in Reimann & Zimmerman, *ibid* at 709-37.

[8] See generally Pierre Legrand, *Fragments on law-as-culture* (Deventer: WEJ Tjeenk Willink, 1999) [Legrand].

[9] Marie-Claire Ponthereau, *Droit(s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at 68.

[10] Brenda Cossman, "Turning the Gaze Back on Itself: Comparative Law, Feminist Legal studies, and the Postcolonial Project" (1997) Utah L Rev 525 at 537.

scope, notion, basis, and constitution of law and feminism, and realized how that course of research had illuminated the manner in which her understanding of the compared subjects were shaped in the first place. Only in doing so could she discover the possibility of attaining the 'in-between' or 'beyond' hybrid cultural space that existed between the two legal systems. This is an efficient way to maintain a healthy, neutral distance to sidestep common errors of comparatists, from *préjugés* to ethnocentrism.

Following these precautions, the present thesis is a critical reassessment of the constitutional posture and receptiveness toward freedom of expression in each of the two countries and the significant collection of jurisprudence that has ruled on the subject. This is achieved by expressly comparing relevant constitutional interpretation and caselaw in each national legal system in the domains of group defamation and racial, group-targeting speech, as well as considering the historical context in which certain constitutional scrutiny has been developed by courts. The American juridical position has led to the creation and the establishment of free speech as a preferred right *de facto* essentially placed at the top of the American hierarchical system of rights. I will illustrate that the Canadian portrait offers a starkly different picture. Canada has expressly refused to crown free expression as the *trump* card above other fundamental rights. This comparative exercise demonstrates the ways in which the legal treatment of freedom of expression in Canada and the United States has resulted in a dissimilar constitutional landscape. In that vein, I opine that the constitutional interpretation of freedom of expression under the *Charter* is communitarian-oriented to acutely grasp the types of group harm found in racially-prejudiced defamatory speech. I argue that this communitarian, group-based harm recognition forms a substantial judicial basis for the Supreme Court of Canada to embrace an egalitarian stance when an expression has been found to cause prejudice to competing values of equality and the multicultural character of Canadian society.

B. Part Two: Legal Theorizing

The second half lies in legal theorizing. This merits further elaboration in terms of its *points forts* as well as its limitations before discussing the identity-driven framework.

This is hardly the first legal scholarship undertaken on harmful speech. My predecessors, most notably critical race theorists, have gone a long way to describe the harm in racist speech as pioneers in the field. They did this by providing first-hand stories based on personal and group experiences as they themselves were victims of racist hate speech.[11] The resonance of their messages was achieved by their positions, not distant spectators to the harm but as actively postured individuals shedding light into the victims' perspective. Critical race theorists frequently employed vivid descriptions of encounters of racist speech or group hate speech to "elicit broad empathy"[12] and invited the readers to ask themselves, "What is it like to be you?"[13] They sought to trigger self-introspection of "complex intellectual and affective capacities to gain insight into the other's subjectivity."[14] It thus involved taking the route of an unconventional methodology otherwise discouraged by legal purists. Critical race theorists were not content with pre-circumscribed boundaries of law but instead reached to external sources of history, social sciences, and psychology to supplement their claim: that

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[11] Mari J Matsuda, *Where is your body?: and other essays on race, gender, and the law* (Boston: Beacon Press, 1996) [Matsuda, "Body"]; Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87:8 Michigan L Rev 2320 [Matsuda, "Victim's Story"] (describing personal instances of racist hate speech encounters); Charles R Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan L Rev 317 (beginning with several personal stories of his from his childhood traumatic experiences exposed to racism) ["Lawrence, Unconscious Racism"].

[12] Diana Tietjens Meyers, "RIGHTS IN COLLISION: A NON-PUNITIVE, COMPENSATORY REMEDY FOR ABUSIVE SPEECH" (1995) 14:2 Law and Philosophy 203 at 213 (discussing Lawrence, Matsuda, and Williams' work methodology and arguing that their approaches all intersect on the importance of raising empathy from others) [Meyers].

[13] *Ibid*.

[14] *Ibid*.

speech can cause real harm to real people. I believe they did so because they understood the confines of law, and that those limitations and preconceived notions could not be overcome unless bridged and nourished by the academic siblings of law. I also believe that the approach was necessary to persuade others of the harm that is more often directed at peoples of color and social minorities. In other words, rejecting passivity was a way for them to provide unfiltered insight that only those who have been on the receiving end of hateful, group-targeting words could understand, relate to, and communicate to a larger audience, thereby remedying the gap in experiential racial or cultural relativism.

Given the seniority of the subject in both legal and extra-legal areas, at a glance one may very well be tempted to brush this proposition aside as just 'one of those' critical studies on harmful speech. Indeed, the harm has been given many names. It has been called harm to equality.[15] Others have equated it to harm to dignity.[16] Some pointed to its devastating effects on human psychology and social behavior.[17] It has been referred to as harm to equal citizenship right.[18] But none approached the harm from an identity-based point of view. No

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[15] This is perhaps one of the most frequent grounds raised against hate speech and its harm. Critical race theorists as well as First Amendment scholars broadly concur that (racist) hate speech prejudices the ideal of equality. See e.g. Richard Delgado, "WORDS THAT WOUND: A TORT ACTION FOR RACIAL INSULTS, EPITHETS, AND NAME-CALLING" (1982) 17 Harv CR-CL L Rev 133 [Delgado, "Words that wound"]; Richard L Abel, *Speaking Respect, Respecting Speech* (University of Chicago Press, 1998); Toni M. Massaro, "EQUALITY AND FREEDOM OF EXPRESSION: THE HATE SPEECH DILEMMA" (1991) 32:2 Wm & Mary L Rev 211; Matsuda, "Victim's Story", *supra* note 11; Charles R Lawrence III, "IF HE HOLLERS LET HIM GO: REGULATING RACIST SPEECH ON CAMPUS" [1990] Duke LJ 431 [Lawrence, "If He Hollers"]; Meyers, *supra* note 12; Alan Freeman, "RACISM, RIGHTS AND THE QUEST FOR EQUALITY OF OPPORTUNITY: A CRITICAL LEGAL ESSAY" (1988) 23 Harv CR-CL L Rev 295.

[16] Susane Baer, "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" (2009) 59 U Toronto LJ 417; Delgado, "Words that wound", *supra* note 15 at 143-44; Jeremy Waldron, *THE HARM IN HATE SPEECH* (Cambridge, Massachusetts: Harvard University Press, 2012) [Waldron, "Hate Speech"].

[17] Delgado, *ibid* ; Matsuda, "Victim's Story", *supra* note 11; Lawrence, "Unconscious Racism", *supra* note 11.

[18] Delgado, "Words that wound", *supra* note 15 at 144; Aleardo Zanghellini, "JURISPRUDENTIAL FOUNDATIONS FOR ANTI-VILIFICATION LAWS: THE RELEVANCE OF SPEECH ACTAND FOUCAULDIAN THEORY" (2003) 27 Melb U L Rev 458; Stuart Chan, "HATE SPEECH BANS: AN INTOLERANT RESPONSE TO INTOLERANCE" (2011) 14 Trinity CL Rev 77; Kathleen Mahoney, "HATE SPEECH, EQUALITY, AND THE STATE OF CANADIAN LAW" (2009) 44 Wake Forest L Rev 321 [Mahoney]; Kenneth L Karst, "PATHS TO BELONGING: THE CONSTITUTION AND CULTURAL IDENTITY" (1985-1986) 64 NC L Rev. 303 [Karst, "Paths To Belonging"]

one took the course of connecting the dots between speech, harm, and identity as a worthy subject of legal scholarship of its own. This absence of willingness, or the reluctance, to engage the subject of harmful speech through the lens of identity may first and foremost be attributed to the fact that identity is not exactly a legal concept *stricto sensu*. Notions such as 'equality' or 'dignity' or 'citizenship' are appealing ideals that are familiar enough by their ingrained presence in constitutional and doctrinal references. Identity is not. The concept of identity itself appears too complex and ambiguous. The notion is very much absent in fields of law, save for technical invocations in privacy law.[19] The other reason behind the reservation to juxtapose law and identity may have to do with the fear of essentializing certain features according to the scholar's subjectivity or the framer's convenience. The obvious example is that of race. In a world where cultural sensibilities run high, one may find himself ambushed under the accusations of being "race-minded,"[20] or exploiting "identity-grievance."[21] A basis of racially essentialized self-identity has the intractable effect of excluding those who do not belong to the biologically defined group.[22] It is not a far-reaching assumption to imagine that a white, middle-aged conservative male in the antebellum South

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[19] One author did make the connection between identity, privacy and racial defamation based on an expansive interpretation of the Plessy case. See Johnathan Kahn, "Controlling Identity: Plessy, Privacy, and Racial Defamation" (2005) 54 DePaul L Rev 755 [Kahn].

[20] Harold R Isaacs, *Idols of the Tribe (*Massachusetts: Harvard University Press, 1989) at 88 [Isaacs].

[21] According to Shelby Steele, identity grievance occurs when one mentions the persecuted history of his minority group to make himself be seen as a victim while inducing white guilt. "Today the angry rap singer and Jesse Jackson and the black-studies professor are all joined by an unexamined devotion to white guilt. To be black in my father's generation, when racism was rampant, was to be a man who was very often victimized by racism. To be black in the age of white guilt is to be a victim who is very rarely victimized by racism. Today in black life there is what might be called "identity grievance"-a certainty of racial grievance that is entirely disconnected from actual grievance." Shelby Steele, "The Age of White Guilt and the Disappearance of the Black Individual", *Harper's Magazine* (30 November 1999) 33, 40.

[22] Marjorie Mayo, *Cultures, Communities, Identities: Cultural Strategies for Participation and Empowerment* (New York: Palgrave, 2000) at 62-63 [Mayo] (warning against "the notion of an 'essential' self" and noting that "Organizing around identity has the potential for being exclusive as well as inclusive – "the very notion of "identity" always involves a certain degree of exclusion.").

would have had a relatively challenging time *really* understanding the fear of a black American's experiences of discovering nods in his college dormitory room or being called a "nigger" behind his back on campus grounds in the 1980's. Empathy can only cover so much. Thus, race-based arguments run the risk of negating "the multi-dimensionality of the individual… with their own derives and desires, shifting as they interact with different cultures' systems of social relationships."[23] Kimberlé W. Crenshaw understood the danger in relying on a racial identity argument, setting it aside as "an identity-driven performance of racial pride, a posturing that was reckless, immature, and ultimately counterproductive."[24] In other words, such argumentations may be piercing enough for a few concurring groups that have stared at the knifepoint of prejudices aimed at their predetermined appearances but that concurrence is ultimately not broad enough to find universal agreement. Thus, while it is important to recognize the contributions of the previous studies and to build on those steps, it is just as important to recognize the limitations of those studies. This does not mean adopting a completely colorblind model, as that would be a refutation of "the proposition that certain minority groups in this country have in fact suffered injuries in the past as a result of racist stereotypes that have been perpetuated in the public mind."[25] There is a reason why some, if not most, of the poignant voices in critical race theory have been in support of understanding historically disadvantaged or marginalized groups of peoples. My admission is simply that there is a need to see the stretching lines of those established premises and to go beyond them.

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[23] *Ibid* at 42.

[24] Kimberlé Williams Crenshaw, "Twenty Years of Critical Race Theory" (2011) 43 Conn. L. Rev. 1253 at 1284 [Crenshaw, "Critical Race Theory"].

[25] Hadley Arkes, "CIVILITY AND THE RESTRICTION OF SPEECH: REDISCOVERING THE DEFAMATION OF GROUPS" (1974) Sup Ct Rev 281 at 292. [Arkes].

III. Identity as a Liberating Theoretical Framework

We live in the age of the revival of identities.[26] It is a time when the tracking of ancestral tree is marketable;[27] the reminiscing nostalgy of the 'good old days' is renewed; regional and cultural identities resurface;[28] multiculturalism is derided as a failed social experiment; nationalistic claims are reasserted in various parts of the world.[29] It is the age of

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[26] That revival of identities is marked, in my view, by the disruption of nationalistic, regional, or particularly localized identities against the homogenizing and universalizing global order and the revolt versus the traditional political parties. The U.S. politics' extreme group polarizations, the return to the building of grassroots, localized politics, the recent Bavarian election in Germany (in which both the center-right CSU and center-left SPD suffered historic defeat), the 2018 Quebec provincial election, were all enduring testament to the fact that the question of identity is well alive. For the Bavarian election upset, see e.g. Christian Teeves, "Berlin Coalition Emerges Even Weaker", *SPIEGEL* (15 October 2018), online: http://www.spiegel.de/international/germany/bavaria-vote-spells-headwinds-for-merkel-coalition-a-1233351.html; Thomas Wieder, "La coalition de Merkel meurtrie par l'échec electoral bavarois", *Le Monde* (15 October 2018), online: https://www.lemonde.fr/europe/article/2018/10/15/la-coalition-de-merkel-meurtrie-apres-l-echec-electoral-bavarois_5369446_3214.html. Regarding the call of identity and Quebec immigration during Quebec election campaign, see e.g. Guillaume Bourgault-Côté, "Immigration: Legault joue la carte de l'identité", *Le Devoir* (7 Septembre 2018), online : https://www.ledevoir.com/politique/quebec/536119/immigration-legault-plaide-pour-un-etat-de-gros-bon-sens; Brigitte Pellerin, «Pellerin : Never say separatism is dead. Quebec's vote was still all about identity", *Ottawa Citizen* (4 October 2018), online: https://ottawacitizen.com/opinion/columnists/pellerin-never-say-separatism-is-dead-quebecs-vote-was-still-all-about-identity (correctly underlining the issue of identity in the election regardless of and despite of PQ's crushing loss) See also Jean Leclair, "Les élections québecoises de 2018: victoire du fédéralisme ou de l'individualisme?", *Agenda Publica* (13 October 2018), online: http://agendapublica.elperiodico.com/quebec-2018-victoria-del-federalismo-o-del-individualismo/ (version française)

[27] Currently, there are various methods in the market to conduct one's DNA test to determine the percentage of one's ethnic composition by paying as less as $79 CAD.

[28] At the time of this writing, Catalonia's claim for independence from Spain is still ongoing following years of dramatic conflicts and regional referendum; Much of the Rohingya minority group has been genocidally purged from Burma due to historical and religious animosity; racial discourse in post 2016 U.S. presidential election has resurfaced with the resurgence of far-right nationalists, and in response provoked far-left socialist democrats and ANTIFA (standing short simply for Anti-Fascist). It is to be noted here that ANTIFA has been known to engage in organized, often violent protests against far-right groups and even against particular governmental policies, ranging from physical altercations (such as fist fights, throwing projectiles) to online exposing of their targets' identities/private information). For general description of ANTIFA members' tactics, see "Who are the Antifa?" *Anti-Defamation League*, online: https://www.adl.org/resources/backgrounders/who-are-the-antifa

[29] The PEGIDA in Germany (German abbreviation for Patriotic Europeans Against the Islamisation of the Occident), Les Identitaires of France, and various anti-immigration extreme groups in Italy are growing; Widespread nationalist movements and gatherings have soared in Easter Europe, especially in Poland and Hungary in recent years. For instance, writing on the emerging appeal and the 'identitarian' traction in younger German and French generation, see "Racists in Skinny Jeans: Meet the IB, Europe's version of alt-right" *The Economist* (12 November 2016), online: https://www.economist.com/europe/2016/11/12/meet-the-ib-europes-version-of-americas-alt-right

disruption of universalization and traditions. Just as new forms of identities emerge from the amalgam of races, ethnicities, music, arts, and cultures, the desire to preserve or return to the original (or initial) representations of identities remain just as tenacious as ever.

Like people, law too has its identity issues. In Kelsen's adherence to the pure theory of law, personal storytelling methods utilized by critical race theorists could very well be perceived as a 'bastardization' of the scholarship. But this pervasiveness of self-definition through the construct of others is underpinned by the universality of identity that is elemental to every person. That universality can first be understood as a search for belonging. Indeed, the need to belong may be said to be truly essential to all humans. To be part of something, or somewhere, is a primitive feature of the human race.[30] From the moment we are born, we set ourselves on a perpetual journey to find the "home…, the womb, the emotional handholds of childhood, sometimes the physical place itself."[31] For one may endure all misfortunes created by human hands but none can stand to suffer what Balzac referred to as the "moral aloneness" or "the worst of all pains – complete aloneness and doubt."[32] Thus, every person becomes drawn to the question of belonging and identity at one point or another in his life. For some, the question presents itself in moments of self-reckoning. For others, it is something that has always lingered around: it is a quest of a lifetime. The question of "where do I belong," to paraphrase Helen Lynd Merell, inevitably leads to the question of "who am I?"[33] To question one's belonging is therefore to start a conversation on one's identity.

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[30] Harold R Isaacs described this instinct as the following: "…this is what has produced the quality and power of man's tribal solidarity, his overwhelming urge to belong, to identify himself with tribe or nation and above all with his system of beliefs." Isaacs, *supra* note 20 at 27.

[31] *Ibid* at 39.

[32] Honoré de Balzac*, The Inventor's Suffering* (1843) ("Illusions perdues" version originale en français)

[33] Helen M Lynd, *On Shame and the Search for Identity* (New York: Harcourt, Brace and Company, 1958) at 210 [Lynd].

It is important to place this abstract identity in today's postmodern context. The persistent attempt to quench the thirst to belong, seems to have become ever more articulate in the rising tides of globalization. The continuation into a prolonged – or, almost permanent – state of pluralistic societies appears to pose a particular challenge to the identities of persons. In contrast to the earlier generations of outsiders who largely stuck with their original ties that were imported along with their cultural baggage,[34] subsequent generations often found themselves trapped in-between the more traditional cultural identity of their families or local, ethnic communities, and the conformist call of the wider society. This inter-generational gap is a point of boiling confusion because there is a constant sense of self-contradiction, a war within the individual that is caused by a conflicting set of tribal norms and prioritization of values. It is the agony of a scattered identity. It is unquestionable that the amalgamation of "primordial affinities"[35] has complexified the sorting of individual identities.

Even this heightened perplexity, however, appears unable to extinguish the inherent drive to belong. On the contrary, the search for belonging is intensified; the more one's identity is entangled, the more one tries to wiggle one's way out to recuperate the fragmented parts of the self and to make sense of them all. To that end, some crouch further "inward."[36] Most often, this *inward* tilt will tend to introduce the seeker to small, localized communities composed of those who share his broad yet basic characteristics. Therein, the outsider will

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[34] *Ibid*.at 43 (noting "… it is the ark they carry with them, the temple of whatever rules one's forebears lived by, the "tradition" or "morality" or whatever form of creed or belief in a given set of answers to the unanswerables.").

[35] The term "primordial affinities" was first used by Edward Shils, in Edward Shils, "Primordial, personal, sacred, and civil ties" (1957) 8:2 British Journal of Sociology 130 [Shils]. It is these primordial ties that soothes a person's constant insecurity about belongingness. "This identity with nature, clan, religion, gives the individual security … The primary bonds give a person "genuine security and the knowledge of where he belongs." Isaac, *supra* note 20 at 35. (discussing Erich Fromm).

[36] Karst, "Paths To Belonging", *supra* note 18 at 306.

attempt to find solace and comfort in the familiar in opposition to an often-discourteous world. In contrast, others bravely step "outward,"[37] fighting to *fit in* with the wider society. In one way or another, we are on constant move to belong somewhere. This, is the universal truth of identity.

In the journey to discover one's belonging, we also seek to find signs that affirm that that identity. In times when that identity is contested by the arrival of other distinct identities, and by their visibility and audible coexistence in a defined territoriality, the drive to re-forge assurances and seek validations of identity becomes a powerful source of a common identity. The stronger that identity is in its historical and cultural rootedness, the more violent the friction will be when entering in contact with foreign identities. In many aspects then, the prevalence of group defamatory expression based on race, ethnicity, or religion, corresponds to the manifestation of these identity skirmishes where the speakers actively participate in the construction of the societal identity of the group they chastise through the attribution of inconsiderate or detestable qualities. The disfigurement of the *others* substitutes the defamed members' identity with a "counter-identity,"[38] an identity to which disreputable things that ought to be kept at bay and despised are foisted. This creation, this entry into the scene, of a subordinate *otherness* who assumes the "oppositional force of a symbolic other,"[39] bolsters the dominant group's identity as well as all those who wish to be identified with it. The distortion of the public selfhood of the *others* is for them a way of consolidating the legitimacy of their own social system, the reinstatement of the rightful "pecking order"[40] in

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[37] *Ibid*.

[38] Signe Engelbreth Larsen, "Towards the Blasphemous Self: Constructing Societal Identity in Danish Debates on the Blasphemy Provision in the Twentieth and Twenty-First Centuries" in Marcelo Maussen & Ralph Grillo, eds, *Regulation of Speech in Multicultural Societies* (New York: Routledge, 2015) at 194-211 [Larsen].

[39] Kimberli William Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1987) 101 Harv L Rev 1331 at 1372 [Crenshaw, "Race, Reform, Retrenchment"].

[40] Isaacs, *supra* note 20 at 44.

the social structure.[41] The "involuntary sacrifice,"[42] as the great late Derrick Bell called it, of the interests of minority groups serves as a galvanizing stimulant to reinvigorate the inner cohesion and solidarity of the dominant identity. It is in many ways a show of force but it also acts as a soothing mechanism to quell the growing dissent and inner disputes by re-arranging their own relationships in times when their grip on power is being questioned.[43] It fabricates, at least momentarily, "a burgeoning common identity," or an illusionary sense of unity, reminiscent of the glory of its former self, "whose identity and interests are defined in opposition to" the vilified.[44] Group defamation of this type thus reaffirms the basic mantra of identity construction: that any given identity requires difference to distinguish itself. In that process of self-definition, conformity to achieve uniformity is demanded. Where absorption and assimilation fail, resisting and unclassifiable differences are translated into the deviant, the undignified, and the evil.[45] If anything, the approach reminds us of the savagery of identity politics.

But of course, it is more than just that. The identity-based framework cannot be reduced into just assertions of self-certainty, its reassurance, and the consequent ability to provoke enduring divisiveness. If that were the case, we would still be captive to previous limitations with the reified conception of assumed belonging and due allegiance chained to one's racial or cultural group. Such an oversimplified understanding would fail to explain the depth of the nature of the harm in such a category of expression, while unknowingly guessing

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[41] Larsen, *supra* note 38.

[42] Derrick Bell, *Race, Racism, and American Law*, 2nd ed (New York: Aspen Publishers, 1982) at 29-30.

[43] *Ibid* at 30.

[44] Crenshaw, "Race, Reform, Retrenchment", *supra* note 39 at 1372.

[45] This is part of the major argument of Connolly in his observation of identity studies. See William E.Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Minneapolis: University of Minnesota Press, 2002) [Connolly].

some degree of perceived harm, and it would be pointless to proceed at that juncture. The advocated approach here, however, takes a big leap further. It allows identity to be unshackled from the previous outdated presupposition by recognizing – and not completely discarding - the situatedness of identity or the personal autonomy of the subject. Identity is both a grounded and a fluid concept. That is because it is a biocultural concept.[46] Connolly had warned against this common trapping of identity understanding.[47] The biological layers of identity will tend to solidify identity into something "fixed, genetic, and determinative"[48] while the cultural components of identity may attempt to liberate it from that "curse of biology."[49] Similarly, just as language, traditions, ethics, and particular social structures are "folded into different layers" over identity, physical inheritance cannot be simply effaced from that identity. The identity-based approach thus comprehends both the rootedness of inherited physical attributes of person and its flexibility through cultural belongings. It does not mandate that we "box-in" a single given image of identity to its supposed group of belonging. It is thus a liberating concept, not a binding one.

This is where the identity-oriented interpretation of harmful speech comes in. Perhaps the previous iterations based on harm as harm to equality or human dignity or citizenship cannot, and should not, be reduced into a single block conceptualizing harm in speech. But those theories are not sufficiently congruent to adequately sum up the vast dimensions of harm caused by harmful speech. An identity-based spectrum of harm in group defamatory speech or harmful speech is, however, spacious enough to nest all those arguments under its wing. This is possible precisely because the concept of identity indubitably shares points of

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[46] *Ibid* at XVII.

[47] *Ibid*.

[48] *Ibid*.

[49] *Ibid*.

interaction with the abovementioned notions. For instance, self-esteem, as a relational part of the self that is built in dependence to and with comparison to others,[50] would be unattainable if one was treated unequally in general society for reasons of race or religion or sexual orientation. Self-respect too, as "a proper regard for the dignity of one's person or one's position,"[51] can be held high only when there is "equal respect among the members" and at least "some substantial connection to the group of members"[52] to which he identifies himself with.

IV. Precisions with regard to the Terms used and the Scope of the Thesis

A few important disclaimers and precisions need to be made pertaining to the Project before entering into any detailed elaboration on the subject. I will first briefly clarify the key terms that frequently figure in the writing (A.). This is of course to provide their intended meanings in the present context. I will then clear the scope of the Project (B.).

A. Subject Terms Used

i. Group Defamation

The principal term that requires precision before any further discussion is 'group defamation.' To extend and apply the definition of (individual) defamation, group defamation is simply an expression that would lower the reputation of a group of people. In the present

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[50] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 273-74 [Walzer].

[51] *Ibid* at 278.

[52] *Ibid*.

context however, the writing is specifically concerned with the kind of group defamation that fundamentally degrades essential physical or cultural characteristics of identifiable groups of peoples. This would mainly include but is not limited to, race or ethnicity. Nationality or linguistic affiliation too, it could be argued, are prime examples of major culturally defining traits with regard to the identification of a large group. Language for instance will be a central point of demonstration with the illustration of the *Bou Malhab* decision throughout a later discussion.

The thesis dwells principally in the legal treatment of racial group defamation. This was done first, in consideration of the available materials and sources of inspiration and second, racist speech, slurs, and insults that come in one way or another through highly generalized formulation – or expressive manifestation of racism *tout court* – are an ongoing social malady. The ignorance, fear, and both the direct as well as nuanced exclusion of others is not, of course, a problem exclusive to Canadian or American societies. It is rather a universal condition and no society is immune to it.

Religious defamation, one could very well argue, too should logically figure as an integral part of the studied subject. I however deliberately chose to disengage myself from its inclusion. There are two reasons behind my delineation.

For one, I am persuaded that in the postmodern American and Canadian socio-legal contexts, gifting legal shield to religion or any association of the kind between the State's authority and religion would be inappropriate. Notice how I coined at the beginning of the previous paragraph, "religious defamation," and not "religious *group* defamation." That is mainly because of my deep skepticism toward the inherent danger in the idea of banning free expression in exchange for the legal insulation of religion as an ideology. The *Establishment Clause* and the *Révolution Tranquille* in the sixties' Quebec exist for a reason. The

proposition of instituting defamation of religions, advocated in great part by the Organization of the Islamic Conference (*OIC*), has never managed to amass sufficient approval throughout the debate between 2001 and 2011 to validate its claim. With a steady decline in support, the *OIC* had to alter its course to less draconian suggestions like condemnations of intolerance and discriminatory practice.[53]

Secondly, the task of evaluating the harm as perceived by the defamed religion's adherents is a tricky affair in the territories covered by the present thesis. In most secular societies in the West, religion has taken a backseat, pushed aside to the private space of individuals, where its acceptable manifestation is one that is "tamed" and "civilized," to behave like a good-mannered, caged animal.[54] This is understood as a strict separation operated between the public and private spheres of persons where religious practice is now informally designated to the latter. However, the continuous influx of immigrants whose cultural origins may not observe that distinction between the public and private tremendously complicates a simpler diagnosis. The regular streamline of those whose religion's

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[53] For instance, Resolution 16/18 largely centers the discussion on recognizing practices of religious intolerance and calls on Member States to foster and promote individuals' religious freedom and religious pluralism. See *Resolution 16/18 on Combatting intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, 12 April 2011, UNGA (HRC), 16th Sess, GE.11-12727 (2011) Agenda Item 9 (12 April 2011), online: https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf; But see e.g. *General Comment No. 34 on Article 19: Freedoms of opinion and expression* of ICCPR (HRC), 102nd Sess. (12 September 2011) at para 48, online: https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf. The paragraph explicitly states that, "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant." This effectively defeated any future propositions that even remotely resemble blasphemy laws. Th overall document also stresses on the fundamental and universal importance of freedom of expression to Member States.

[54] Silvio Ferrari eloquently describes the current detrimental state of religions in the western civilization: "Religions have lost their innocence: they no longer live in a Garden of Eden. They need to prove they can benefit civil society or at least prove they are harmless." Silvio Ferrari, "Individual Religious Freedom and National Security in Europe After September 11th" (2004) Brigham Young L Rev 357 at 376; Stanley Fish used the terms "stripped down and soft-edged." in Stanley Fish, "Mission Impossible: Settling the Just Bounds between Church and State" (1997) Colum L Rev 2255 at 2281. In the ruling of *Locke v Davey*, recently-passed Justice Scalia describes the ideal version of a tamed religion: *"*a tepid, civic version of the faith." *Locke v Davey*, 540 US 712 at 733 (2004). Robert Booth Fowler sarcastically commented: "Everyone will be "nice" and go their own way." Robert Booth Fowler, *Unconventional Partners:Religion and Liberal Culture in the United States* (Michigan: WE Eerdmans Pub Co, 1985) at 212.

pervasiveness overlap both the communal and individual circles of life may react very differently to insults to their beliefs than those who have grown accustomed to the excoriation of religions in secularized society. This alone makes a coherent examination of any harm subject to varying degrees of religious sensibilities a quasi-impossible determination. Combine with this the fact that religion and race or ethnicity are not neatly separable notions. Race is frequently associated with certain religions.[55]

Finally, the usage of the term group defamation as being "fundamentally degrading," is employed with an expansive meaning in the present writing. The notion most consistent in connotation would be that of 'group vilification,' a term used interchangeably with group defamation toward the latter part of the thesis. Group vilification, of course, is not legally coded vocabulary nor is there any American or Canadian law that defines it with clarity or relies on it as a conceptual justificatory ground to prohibit certain expressions. One could very well object to this sort of expansive, vague interpretation to challenge whether such a view could indeed be compatible with the subject of defamation law itself. It is an objection whose premise renders racial group defamation inconceivable. Such a position would be due to, as briefly mentioned earlier, the primary purpose of the law of defamation being rooted in the safeguarding of persons' reputation. I however beg to disagree with this view. Group vilification in this context involves the maligning, the demeaning, and the dehumanizing of the targeted members of a group. In doing so, it thus treats the subjects of vilification as being inferior beings not deserving of, to borrow Dworkin's expression, equal respect and dignity, and the basic decency owed to societal members and co-citizens. It often involves denying

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[55] It has thus been observed that "Because Muslims are often represented as coming from non-White groups, their religious identity becomes linked with racial identity… Muslims who identify as non-White and reside in an ethnic enclave report more discrimination than Muslims who identify as White." Goleen Samari, "Islamophobia and Public Health in the United States" (2016) 106:12 Am J Public Health 1920 at 1921-22. See also Justin Ward, "Yes, you can be racist against Muslims", *Medium* (2 July 2018), online: https://medium.com/@justinward/yes-you-can-be-racist-against-muslims-991df93f2c10

the humanity of the victims by assimilating and subjugating them to subhuman attributes and depicting them through bestiary calumny. If these do not constitute the lowering of their social consideration and esteem in the eyes of the reasonable person, and thereby prejudicing their reputation, I do not know what does.

ii. Free Speech & Freedom of Expression

I use the terms 'Free Speech' and 'Freedom of Expression' or 'Free Expression' frequently. As such, they are used interchangeably. The term 'Free Speech' is most consistently used in Part I, Chapter One (The First Amendment and U.S. laws), as part of the recognition of the constitutional and cultural embeddedness of the term in contrast to the Canadian or European general usage of 'Freedom of Expression.'

B. The Scope of the Thesis

Two aspects relating to the scope of the Project are addressed here. The first pertains to the broader *objective* or the *value* of the project (i) while the second is of ontological nature (ii).

i. Clarification regarding the objective or the value of the project

In the present thesis, I do not seek to argue whether speech is capable of causing harm.[56]

[56] See e.g. Lyrissa Barnett Lidsky, "Where's the Harm: Free Speech and the Regulation of Lies" (2008) 65 Wash & Lee L Rev 1091 (critically questioning harm in untrue speech) [Lidsky, "Regulation of Lies"]. See also Daniel F Watchtell, "No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law" (2008) 83 NYU L Rev 949; John T Bennett, "The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation" (2016) 43 Hastings Const L Q 445 [Bennett].

Nor is my objective to discern the empirical extent of that harm deserving of legal regulation.[57] I do not conceive a legal means to mitigate or criminalize that harm. Neither is the aim a deontological inquiry by buttressing some moral claim as to the relevance or the applicability of the harm principle to speech cases.[58] Rather, the argument is to offer a new conceptualization of the form or nature of the harm in group defamatory speech of fundamentally degrading character directed at identifiable groups of people. The purpose of this work is thus not to design a new tort of defamation or advocate new constitutional interpretations. Not every scholarly project's aim is to propose concrete legal propositions in upcoming law reforms or specific measures implementable by policymakers. The value of an academic work, as is the case here, can just as well be found in its act of signaling the existence of a dead angle, to reveal a missing piece to a greater puzzle, that invites us to intellectually engage ourselves to fill in that gap. This should be especially relevant in 'hard cases' pertaining to the exercise of free speech where theoreticians of law and constitutionalists often disagree on the appropriate role and the limits of law in the development of human affairs that do not really have clearly cut, 'good' answers *per se*. To me, the concept of identity represents the master key to the unlocking of those hard cases in the field of group defamation. And that is where the contribution of this project lies.

Nonetheless, in the fourth Chapter and in the conclusion, I will give a few hints about how the operationalization of a legal recognition of harm to identity in Canadian law should have yielded a different result in the *Bou Malhab* decision.

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[57] See e.g. Kevin L Kite, "Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, And the Future of the Incremental Harm Doctrine" (1998) 73 NYU L Rev 529.

[58] See e.g. Bernard E. Harcourt, "The Collapse of the Harm Principle" (2000) 90 J Crim L & Criminology 109.

ii. The Collective Question

I also need to discharge myself from a question that is most likely to visit the reader's mind at the encounter of the subject: The Question of Collective Rights. When it comes to group defamation, there is a natural inclination to perceive it under the lens of collective rights. After all, the present thesis involves group defamatory expression that denigrates identifiable *groups* of peoples based on their color or other fundamental characteristics. That inclination may find further support in characterizing the injury as one collective in nature, a prejudice that is suffered by the defamed group, *as a whole*. Was it not the case, for instance, in the village of Skokie by their ethnic origin, or in *Bou Malhab* by the taxi drivers' association to a professed language? I do not harbor particular hostility toward the above characterization of the prejudice nor with regard to the concept of collective rights generally speaking. In fact, I am inclined to say there is sound basis for a legitimate argument to be made on the grounds of collective rights in the context of group defamation when the prejudice is suffered collectively. Michel Seymour's version of *subjects* of collective rights also roughly corresponds to the type of groups treated in the present discussion.[59] That being said, borrowing the collective lens would be a deviation from the underlying inquiry of the thesis. Here is why:

As briefly called out in earlier remarks with regard to the problem of group defamation law, the whole basis of the problem stems from the law's unwillingness to consider that there is harm unless it is established that individual members have suffered on a direct, personal, subjective level. It concerns an *individual* member's right to claim justice for

[59] Seymour spends a great deal of descriptive effort through a quasi-mechanical process of elimination to arrive at his "subjects" meriting of collective rights. The worthy subject would amount to "an informal community that exists independently of being recognized in law, that is institutionally organized, that involves collective properties, and to which we are involuntarily attached." Michel Seymour, *A Liberal Theory of Collective Rights* (Montreal: McGill-Queen's University Press, 2017) at 164 -72 [Seymour].

an *individuated* harm that he may have endured as a result of being defamed through self-association or being associated by others with the defamed group. It is the harm to the *individual* identity based on his *individual* rights and interests. In other words, regardless of the group-targeting nature of expression, the ultimate *subject* of the prejudice remains *individual(s).* This explains why my prior acknowledgement of collective prejudice should not be read into too approvingly. I do not object to the notion of collective rights only insofar as primacy is afforded to individual rights.[60]

So, to come back to the abovementioned question of collective prejudice, it is not the right question to ask in this context. The right question, and the answer to that question, resides in the open invitation to the law to *re*consider or entertain the possibility that individuals *are* indeed harmed, that assaultive defamations on inescapable group associations *can* constitute direct and personalized harms, and that it is so because it constitutes harm to their identities. Individual persons self-identifying voluntarily or identifi*ed* by others involuntarily as belonging to the targeted group may suffer the prejudice on an intimate level. The fact that the prejudice is launched by a general expression does not somehow *lessen* that harm. The sharpness of the harm is maintained. It may cut even deeper.[61]

Furthermore, the collective aspect does find some footing toward a later segment of the third chapter where I do express my concern with the kind of 'social harm' in group

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[60] In this regard, I identify more closely with Kymlicka's group-differentiated collective rights than with Dwight G Newman's. I can accept the notion of group-related rights in "that persons have by virtue of their being part of a group." *Ibid* at 163 (distinguishing the two authors' viewpoints). According to Seymour, Kymlicka's version of collective rights believes that "the interests of individuals in the end are the ultimate justifications for group-differentiated rights," then he incorrectly criticizes, in my view, "even when the subject of the right is a group." (*ibid*). I say incorrectly, or at least not applicable to the present context because my inquiry deals with the search for establishing that harm from group defamation (can) result in *individualized* harm. So, to repeat with my own added correction, "the subject of the right is *individuals*," and *not* groups.

[61] See the sub-section on The Maintenance of Harm: Group Defamation as Intimidating Speech in Chapter 3 at 206-08.

defamation, or group vilification as I prefer to call it. Perhaps it is not as frontally engaged but that collective dimension of the amplified and accumulated harm which can create a hostile environment does not go completely unaddressed. But then again, at the end of the day, that social harm is endured by each and every individual member inhabiting that environment. Ultimately and yet again, the buck (of harm) stops with those individuals individually and personally.

Lastly, any connotation of group or collectivity constrains individual identity. Talk of community constricts even more so.[62] It creates boundaries, defines right to membership, and begins excluding non-adherents. Ironically, this is something that is done by speech-acts of group defamation of race or ethnicity when the defamer unilaterally imposes negative meanings and attributes onto the defamed. So from the viewpoint evolving around individual identity and the autonomy of that individual identity, there is a natural alertness of mine against any notion of the *Collective*. That general vigilance is warranted in my view because that connotation of the *Collective* always carries with it certain risks to disregard the malleable nature, the creative potential, and the stupendous capacity of adaptability of identity in various cultural settings.[63] The resulting essentialist, primordialist parochiality imprisons individual identity into a pre-defined, immutable category of people - an unworkable perspective in the age of multiple belongings.[64] This is where I break from Kymlicka's advocacy for group-differentiated rights.[65] Although our arguments are both

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[62] Dwight G.Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (Oregon: Hart Publishing, 2011) at 4 [Newman].

[63] For instance, a third generation Asian-Quebecer born and raised in Quebec is likely to identity himself with Quebec, its language, history, values, and cultural traditions, despite his physical appearance of Asian race.

[64] Seymour, *supra* note 59 at 172 ("because individuals can belong to several peoples at once"). "The channels that connect personal identity to collective identity in late-modern states are multiple and deep." Connolly, *supra* note 45 at 198.

[65] Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon, 1995) at 35 [Kymlicka, "Multicultural Citizenship"]; Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989) at 138-39

grounded on individual member's autonomy and despite our utilitarian, selective embrace of collective rights theory's validity only to the extent that it ultimately serves for individual rights and interests,[66] Kymlicka's position is no exemption to the reification of individual identity. His case for group-differentiated rights for the preservation of a specific cultural survival (of identity) cannot be maintained without to a certain degree conserving the purity of the candidate group – something he accomplishes through external (for the protection of group's claims against larger society) and internal (against its own members) restrictions to accompany his main line of theorizing.[67] To borrow Stanley Fish's expression, it is "the equivalent of an endangered species act for human beings."[68] It is both spatially/geographically[69] and temporally of limited usage.[70]

To sum it up, in my view, group defamation law is just as defensible by an individual interests-based approach as it is under a more collective prism. In other words, they are not mutually exclusive. Dwight Newman wanted to underline this aspect when he referred to a common ground of "pervasive compatibility" between individual and collective rights under

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[Kymlicka, "Liberalism"].

66 Newman, *supra* note 62 at 7; Seymour, *supra* note 59 at 163.

67 Kymlicka, "*Multicultural Citizenship*", *supra* note 65 at 35, 46-47.

68 Stanley Fish, "Boutique Multiculturalism or Why Liberals Are Incapable of Thinking about Hate Speech" (1997) 23:2 Critical Inquiry 378 at 382 (referring to politics of difference) [Fish, "Boutique Multiculturalism"].

69 It is spatially or geographically limited because such argumentation is only applicable to countries where multicultural policies are legally and socially ingrained to a sufficient degree. It requires a well-rooted and democratically mature government and citizens' accords to actively recognize and implement specific legislative or executive measures.

70 In an age that is marked with a rapidly intermingling of races, ethnicities, it is not an outlandish question to consider whether, for instance, Kymlicka's measures ought to be legally entrenched at the cost of potentially furthering division and weakening of national unity/identity. For instance, Canada's white majority will no longer be a solid majority by 2036. See John Ibbitson, "The politics of 2036, when Canada is as brown as it is white", *The Globe and Mail* (27 January 2017), online: https://www.theglobeandmail.com/news/politics/the-politics-of-2036-when-canada-is-as-brown-as-it-is-white/article33814437/ That is not very far. To Kymlicka's right, obviously his arguments were mainly formulated in the context of Canadian multiculturalism, with specifically applicable references to the claims of aboriginal peoples and to some extent, Quebec's cultural integrity.

overriding humanistic principles and their interrelated internal relations.[71] They should not be viewed as two hostile rights-conceptions but rather as a part of an interconnected tissue where the flourishing of collective societal bodies beneficially overlaps with the purpose of safeguarding the inherent value in individual interests. The central argument in this thesis evolves around this continuous exchange or dialogue between the individual and the group, the liberal and the communitarian, and this without falling into the traps of reification on either side.

Thus, for instance, in the first section of the third chapter's contrast between the communitarian and liberal conceptions of the self, the argument is *not* to convince those adhering to individualist views, by the forcefulness of the argument, of some particular form of group rights or collective moral rights. Neither do I argue in preference of one particular model of understanding of the self, nor do I presume the superiority of one over the other. In other words, the communitarian depiction of the self is deployed for its *utility*. It provides an adequate framework within which the screws of the rigidified preconception of the socially detached and self-sufficient individual can be loosened.[72] The communitarian illustration of the self neutralizes this preconception.[73] This enables comprehension of reputational harm as originally understood in the traditional sense of defamation laws. Newman's "axiological pluralism"[74] may be well-suited here.

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[71] Newman, *supra* note 62 at 102-5.

[72] This is necessary because in my view, that preconception of the self nullifies the individuated conceptualization of harm from group defamation, and hence is a major reason behind the inability of the law to consider it so.

[73] It does so, as will be demonstrated, by underlining the importance for every identity to be situated, and thereby socially connected through bio-cultural associations and interactions.

[74] He emphasized on this need to balance the two over and over again:

"By requiring the theory to be consistent with liberalism, we show instead that we need to achieve a balance between individual rights and collective rights, and not that we need to assert the primacy of collective rights over individual rights or the opposite. In the public sphere, we have to resist both ethical individualism and moral collectivism… We have to avoid ranking these two series of principles. Individual rights are just as

iii. Clarification regarding harassment in specific settings and speech inflicting 'harm to identity'

The last clarification I would like to make concerns harassing speech or more generally, harassment. This distinction is necessary because racially or ethnically discriminatory speech causing 'harm to identity' may lie outside the radar of civil liability (in common law or civil law) given the absence of proof of individuated harm, and yet be perceived as harassment in some settings.

Harmful speech in specific settings such as in work places can often be characterized as harassment and is treated as such. Most companies today have internal policies or regulations that expressly prohibit verbal and non-verbal harassment in professional (work) environment. Similar observations can be made with regard to universities. Indeed, the topic of 'speech codes' was a contentious issue in American universities in the 1980's and 90's, and many ended up adopting various guidelines and appropriate remedies regulating offensive or discriminatory speech (or more generally 'hate speech') in their institutional and academic settings. While there is plenty of room for debate on the creation of 'safe spaces,' of unreasonable political correctness, and of course the constitutionality of those 'anti-harassment' policies, harassment or harassing speech in those particular, quasi-controlled settings is not ground covered by the present thesis. Hence, while I briefly allude to those instances later in Chapter 3, I only do so to make broader points directly related to my argument on 'harm to identity' (e.g. at 250, to explain the external attribution and imposition of negative identity in work places, or at 263, with regard to the hostile environment and

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inalienable as the rights of peoples… The only way to correctly institutionalize the principles is to enshrine them in the constitution without ranking them… We must subscribe to a form of axiological pluralism at the moral level, and try to establish a balance between these two sorts of rights." Seymour, *supra* note 59 at 152-53.

compelled listening arguments to emphasize the pervasiveness and the interconnectedness of harm). This thesis instead targets the basic rules of civil defamation.

V. General Outline

The present thesis proceeds as follows:

Part One of the thesis is a critical review of the general laws of defamation and group defamation in civil and in some relevant instances criminal law, and the constitutional treatment of this sort of group defamatory expressions under the broader context of freedom of expression through American (Chapter One) and Canadian (Chapter Two) perspectives, respectively.

Chapter One begins with a general look into basic laws and case laws governing defamation and group defamation in the United States (1.1.). It also studies the First Amendment's constitutional conception of American free speech in the leading individualistic paradigms (the Marketplace of Ideas and Individual Autonomy) and the resulting posture toward this type of expression (1.2.). This Chapter also analyzes First Amendment landmark decisions (e.g. *Beauharnais v. Illinois*,[75] *Collin v. Smith*,[76] *New York Times v. Sullivan*,[77] *Virginia v. Black*,[78] *Kessler v. City of Charlottesville*[79]) (1.3.).

Chapter Two conducts the same study on the Canadian laws of defamation. It first entails a general overview of freedom of expression, including its development, meaning, and

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[75] *Beauharnais*, *supra* note 4.

[76] *Collin v Smith*, 578 F (2d) 1192 (7th Cir), *cert. denied*, 439 U.S. 916 (1978) [*Collin*].

[77] *New York Times v Sullivan* 376 U.S. 254 (1964) [*Sullivan*].

[78] *Virginia v Black*, 538 U.S. 343 (2003) [*Black*].

[79] *Kessler v City of Charlottesville et al*, No 3:2017cv00056 – Doc. 21 (WD Va 2017) memorandum opinion by Conrad J (memorandum opinion, 08/11/2017) [*Kessler*].

its scope as set forth by the Charter and interpreted by the Supreme Court of Canada (2.1.). It then focuses on the balancing of freedom of expression and key legislation on the subject matter by providing case studies of *Dagenais v. CBC*[80] and *R. v. Keegstra*[81] (2.2.). Following this, the Chapter presents the basic rules of defamation and group defamation laws in Canada with recent jurisprudential evolution accordingly (e.g. *Hill v. Church of Scientology*,[82] *Grant v. Torstar*,[83] *WIC Radio v. Simpson*,[84] *Bou Malhab v. Métromedia, inc.*[85]) (2.3.). Lastly, the Chapter includes a critical study of the legal treatment of group defamation under human rights legislations and related court decisions such as the *Taylor*[86] and *Whatcott*[87] cases, as well as controversies surrounding recent law projects (i.e. M-103 motion to ban Islamophobic expression) (2.4.).

Part Two of the thesis consists of two Chapters.

Chapter 3 is the presentation of the argument on the reconceptualization of harm in group defamation as harm to identity. First, the Chapter deals frontally with the underlying conceptual malaise which refutes the possibility of individualized harm from group-targeting expression. In this section, I draw a contrast between the ultra-individualistic conception of the self as opposed to the Communitarian's socio-culturally situated vision of the self, before describing the harm by referring to the notion of bonds of identity (3.1.). After having first worked at the conceptual level, I proceed by putting into perspective a relational approach

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[80] *Dagenais et al v CBC et al*, [1994] 3 SCR 835 [*Dagenais*].

[81] *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*].

[82] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Church of Scientology*].

[83] *Grant v Torstar*, 2009 SCC 61 [2009] 3 SCR 640 [*Grant*].

[84] *WIC Radio v Simpson*, 2008 SCC 40, [2008] 2 SCR 420 [*WIC Radio*].

[85] *Bou Malhab, supra* note 1.

[86] *Taylor v Canadian Human Rights Commission* [1990] 3 SCR 892 [*Taylor'*].

[87] *Saskatchewan Human Rights Commission v Whatcott,* 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*].

that reveals the disproportionate power dynamic that exist between the defamer and the defamed, with the illustration of harm in racial group defamatory expression (3.2.). Lastly, I highlight the more expansive pervasiveness of the harm in group vilification in a social, interconnected dimension (3.3.).

The last Chapter of the thesis gently withdraws from the specific problematic of group defamation to formulate points of rebuttals as replies to two potential lines of objections against my own claim of harm to identity in Chapter 3. Against the first objection grounded in the marketplace (of ideas) metaphor, I argue that the paradigm is already experiencing significant challenges of outmoded functionality in a rapidly expanding, diversifying speech ecosystem. The erosion of traditional journalism and interrelatedly, the phenomena of fake news, are provided as elements to substantiate my response (4.1.). To the second objection that the admission of harm to identity would chill the right to critical speech on important matters of public interest, I maintain that individual critical speech is a fundamental freedom as an active and a necessary participatory democratic right and that in contrast, an identity-based speech would serve as a liberating instrument for individuals to determine their own cultural identities against the majoritarian assumption of a given cultural image as well as the pressures of uniform conformity from within an individual's belonging group (4.2.).

PART ONE, CHAPTER ONE

A Critique of American Free Speech: The First Amendment's Inadequacy to Grasp the Harm in Group Defamatory Speech

Introduction

Free speech in America is an exceptional freedom. It carries with it not just the constitutional weight afforded by the First Amendment but also a common reference point that extends to social, political, and cultural realms. Its pervasiveness stretches from a New York law surcharging on credit card transactions in hair styling shops,[88] to protests within thirty-five feet of a reproductive health care facility in Massachusetts,[89] to restricting sex offenders' access to social media in North Carolina.[90] To put it mildly, its implications are real. Given this freedom's instrumental function in its' enabling of democratic operations in the current Western socio-political system – be it for participations in political discourse or more generally the flow of information and self-expression of persons – any proposition to curtail its exercise is vigorously contested. The suggestion of a compromise, even in its conceptual form, is often denounced as displaying demonstrably paternalistic inclinations.

It is no secret then, that legal restrictions on group defamatory speech enjoy an even greater unpopularity. To be more precise, there is a well-animated dispute regarding the constitutional validity of group libel laws. Ever since *Beauharnais v. Illinois*[91] – the first and the only American Supreme Court decision to directly affirm the constitutionality of group libel law applying to a racial group - the ruling itself but also similar laws have been subjected to spirited disapprovals from both judicial and scholarly inquisitions.[92] Ensuing

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[88] *Expressions Hair Design v Schneiderman*, 581 US __ (2017).

[89] *McCullen v Coakley,* 573 US __ (2014).

[90] *Packingham v North Carolina*, 582 US __ (2017).

[91] *Beauharnais, supra* note 4.

[92] Though *Beauharnais* was never explicitly overturned, the *Sullivan* decision. *Sullivan, supra* note 77. *Sullivan* effectively rendered it virtually impotent, advocating for the extension of the First Amendment protection on matters of public concern that defamation laws would not dare to interfere in "uninhibited, robust, and wide-open" discussions of important public issues. See e.g. *Am. Booksellers Ass'n Inc v Hudnut*, 771 F (2d) 323 at 331 n 3 (7th Cir 1985) referring to how the *Sullivan* decision had destabilized foundational rationales of *Beauharnais*; In *Nuxoll v Indian Prarie School Dist*, 523 F (3d) 668 at 672 (7th Cir 2008), Richard Posner J

this, there followed what many saw as a back-pedaling from *Beauharnais*, ultimately leading to the cases such as the *New York Times v. Sullivan*[93] and *Collin v. Smith.*[94] The former invited the application of the First Amendment standard into libel jurisprudence while in the latter the court struck down a local ordinance put in place to halt a Nazi march in predominantly Jewish community of Skokie. Even decades after *Collin*, the question as to whether the public dissemination of speech that maligns large and identifiable groups based on their racial, ethnic, or religious traits should enjoy First amendment protection remains an unsettled issue.

It is noteworthy that the legal treatment of group defamation is not a prevalent subject in the legal scholarship. And those who are versed in it are not shy of berating it as a set of inconsistent legal precepts that are "vague, fluctuating and incomprehensible."[95] Prosser and Keeton bluntly noted that it "contains anomalies and absurdities for which no legal writer ever has had a kind word … ."[96] One accurate way to portray the unfashionability of the subject would be by its' characterization as anomalous and conflicting: anomalous, because of various legal tests that were subsequently developed by the courts but applied in an such inconsistent manner that it appears as though courts liberally apply one standard over another depending on each case's specific variables, falling only a step short of self-

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noted, "Though Beauharnais … has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited."; *Brandenburg v Ohio*'s imminent lawlessness test indirectly questioned as to whether *Beauharnais* was still good law. *Brandenburg v Ohio*, 395 US 444 (1969) [*Brandenburg*]; Decisions like *Cohen v California,* 403 US 15 (1971) [*Cohen*] and *Hustler Magazine v Falwell*, 485 US 46 (1988) [*Hustler*] also implicitly invalidated *Beauharnais* as to whether libelous speech lies beyond the First Amendment protection.

93 *Sullivan*, *supra* note 77.

94 *Collin, supra* note 76.

95 John Townshend, *A Treatise on the Wrongs called Slander and Libel,* 1st ed (New York: Baker Voorhis & Co, 1868) § 15 at 24 [*Townshend*].

96 W Page Keeton et al*., Prosser and Keeton on the Law of Torts*, 5th ed (Minnesota: West Pub Co, 1984) § 111 at 771 [*Prosser & Keeton*].

contradiction; conflicting, because it appears to have no legitimate basis in today's modern, open society where values such as freedom of expression are held in the highest regard in the constitutional order. Any attempt to restrict free expression would translate into a pungent contradiction against the current arrangement of fundamental rights.

The purpose of the present chapter is to present a concise critique of the tort and constitutional treatments of group defamation in American law. It proceeds in three sections. The first section gives a critical overview of the current established rules of tort on defamation and group defamation (1.1.). Traditionally, courts have refused to admit cause of action if members of the targeted group have not suffered prejudice *individually*. Often the victim is asked to prove the narrow subjectivity of the prejudice he may have suffered on a personal level. Words may be deemed defamatory if a reasonable third-party would assume that the statement was "of and concerning" the plaintiff. The size of the group plays a crucial role in determining the cause of action of an individual member of the defamed group. There is obviously a general deficiency to form a consensus on some form of unified evaluative methodology governing group defamation. I opine that the current approach of group defamation – namely group size – is conceptually inadequate to address racial or ethnic group defamation. In my view, there is a troubling disconnect between the law's refusal to admit cause of action of individual members and the harm in defamatory expression made against that member's belonging group to which he is undeniably a victim.

The chapter then revisits the classic American First Amendment paradigms largely built upon liberal doctrines of individualistic aspirations (1.2.). Therein I attempt to portray free speech as a favored freedom if not a quasi-absolute freedom. The observation is that the traditional theories supporting free speech values, namely the marketplace and the individual autonomy frameworks, are conceptually inadequate to grasp the type of harm that extends to

individual members identifying with the defamed group. This observation on the theoretical level is crucial to understanding the First Amendment's underlying attitude toward individualistic speech freedom when counter-balanced against group defamatory utterances.

The third and last section briefly reevaluates some of the most significant jurisprudential evolutions that have largely defined admissible legal grounds for limiting speech freedom, specifically with regard to racially charged group-targeting expression (1.3.). American courts have developed a narrowly tailored constitutional scrutiny to enhance the protection of free speech rights that are specifically appertained to minimize acceptable grounds to restrict speech. The landmark cases assist in shedding light on the jurisprudential struggle to deal with group defamatory or broadly spoken speech that are of a fundamentally degrading nature.

Throughout the chapter, I observe the strong predilection granted to free speech in American constitutional life as demonstrated by both the First Amendment jurisprudence development and the laws governing group defamation while remaining critical on how that position disregards significant harm perpetrated in group vilifying speech.

1.1.Laws of Group Defamation

1.1.1. Rules of Civil Defamation Law

The primary objective of defamation law is to protect the reputation of person(s).[97]

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[97] Defamation law is designed to protect the social reputation of persons. For an excellent analysis on the purpose of defamation laws by presenting the traditional concepts and arguments of reputation as property, honor, and dignity and their contextualization in the American Constitution, see Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Cal L Rev 691 [Post, *Reputation and Constitution*]. Civil defamation law provides the legal means through which plaintiff may seek reparation and/or compensation for the damage caused to one's reputation. Prosser & Keeton, *supra* note 96. See also *Restatement of the Law, Second, Torts,* (Minnesota: American Law Institute Publishers, 1977) at § 559

This is because good reputation is essential for a person's social standing. How one is regarded by members of a local community or fellow colleagues in the workplace plays a critical role in securing one's position in today's highly competitive, structuralized social system. A person's standing with others around them is a living testament to their performance and broaden those same networks socially, financially and culturally.[98]

Although it could be argued that the notion of reputation may not be as intimately considered as it used to be in more closely-knit, traditional village-like communities in pre-industrial times, safeguarding one's name remains an important issue because modern reputation has become more vulnerable in new ways. One obvious example is the ways that digital technology has changed the ecosystem of information circulation. Hyperactive news cycles and the ease of access provided by internet connections make it such that it takes seconds to learn of incidents, crimes, affairs, or controversial issues of all kinds from around the world. Reputation, then, is at the mercy of the permanent connectivity of people to online platforms and social media. And while information transmitted through news media is generally verified for its authenticity, much is not. The recent social phenomena of fake news, the intentional fabrication of 'alternative facts,' and their active propagation have blurred the line between truth and fallacy. In this regard, technological progress has made it that much more facile to destroy someone's reputation. This is the new challenge of effectively countering reputational harm. Hence, it matters little that if the reputation is a professional one within a confined environment, such as in a university faculty,[99] or the

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[Restatement Second] that provides, "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

[98] L Eldredge, *The Law of Defamation* (1978) § 2.

[99] See e.g. Barbara Kay, "Did #MeToo activists target a top Canadian prof for his blunt lessons about Islam?", *The National Post* (12 October 2018), online: https://nationalpost.com/opinion/barbara-kay-did-metoo-activists-target-a-top-canadian-prof-for-his-blunt-lessons-about-islam#comments-area

reputation of a high-ranking member of government, whose moral decency is called into question due to a widely publicized extramarital affair.[100]

In this respect, the tort of defamation provides the legal means for the defamed to reclaim his name. The plaintiff may bring his case to prevent further defamatory publications. It provides legal recourses for the victim to seek compensation to redress the injury to his character.[101] In order for the plaintiff to recover damages as a result of being defamed, he must prove before the court a number of elements in his claim: the falsity of the said statement, the reference to the plaintiff by reasonable standard, the fault of the defamer, and actual injury to the plaintiff caused by the allegedly defamatory statement.[102]

New York Times v. Sullivan[103] remains the jurisprudence of authority on the matters of defamation in U.S law. Largely heralded as one of the landmarks decision that forever altered the landscape of defamation laws,[104] the decision has had consequential ripple effects on substantial aspects pertaining to libel law as well as on the constitutional standard to meet the First Amendment exigence. The ruling introduced the "actual malice" requirement for a

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[100] Michael Balsamo, "Judge Dismisses Stormy Daniels' Defamation Suit Against President Trump", *The Time* (15 October 2018), online: http://time.com/5425464/judge-tosses-stormy-daniels-suit-trump-avenatti/

[101] Prosser & Keeton, *supra* note 96.

[102] Restatement Second, *supra* note 97 at § 558. See also Slade R Metcalf, Robin Bierstedt & Elisa Spungen Bildner, *Rights and Liabilities of Publishers, Broadcasters and Reporters* (Colorado: Shepard's/McGraw Hill, 1982) § 1.01 at 1-6. Since *Gertz v Robert Welch, Inc*., 418 US 323 (1974) [*Gertz*], the proof of an "actual injury" is a requisite to claim any compensation from defamation ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Gertz* at 349). Although the Court did not specifically address what "actual injury," is, it may range from financial to emotional distress. *Ibid*. at 350. The plaintiff must first persuade the judge that he suffered actual harm as direct result of the defamation of his group because the failure to do so would most likely mean the dismissal of his case at an early stage of litigation.

[103] *Sullivan, supra* note 77.

[104] One commentator noted the accomplishment of *Sullivan* as follows: "A new focal point of a national commitment to free speech in the public sphere could not have been stated more strongly, and its march has been triumphant; it has defined a sacred place in the American constitutional canon and trumps other values." David F Partlett, "The Libel Tourist and the Ugly American: Free speech in an Era of Modern Global Communication" (2009) 47 U Louisville L Rev 629 at 631 [Partlett].

public official plaintiff to establish the cause of action for defamation. According to this rule, the plaintiff must prove that the defendant had made the alleged statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[105] The ruling reached in *Sullivan* was a judgment of well-founded constitutional concern regarding the potential 'chilling effect' that libel suits could bring to the fundamental freedom of the press and the rigorous fact-finding and critical inquiry it must exercise. The "reckless disregard" was later complimented with further precision in *St. Amant v. Thompson*,[106] in which the notion was defined as a "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[107] It is important to note that the 'actual malice' principle is still alive and well as was attested in *Masson v. New Yorker Magazine, Inc*.[108] The ruling in *Masson* quashed a summary judgment in favor of a media defendant when the question of material fact as to whether defamatory comment was made with actual malice had persisted. The 'chilling effect' too, as noted earlier, remains a permanent concern in a broader free speech context, to the extent that even a probable cause-based arrest, when deployed by the government as an intimidation tactic, would be considered to freeze a citizen's right to criticize on a matter of public interest. This point has been affirmed in the very recent case of *Lozman v. City of Riviera Beach*.[109]

The aftermath of *Sullivan* was almost immediate on libel law's playground. The legal distinction of 'public official' as demonstrated in *Sullivan* was later extended to 'public

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[105] *Sullivan*, *supra* note 77 at 279-80.

[106] *St Amant v Thompson*, 390 US 727 (1968).

[107] *Ibid* at 731. The decision further elaborates on to define 'recklessness' as such: "The finder of fact must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to be persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination … nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation." (*ibid* at 732).

[108] *Masson v New Yorker Magazine, Inc.,* 501 US 496 at 499 (1991).

[109] *Lozman v City of Riviera Beach*, 585 US ___ (2018).

figure' in *Curtis Publishing Co. v. Butts*[110] and *Associated Press v. Walker*.[111] *Gertz v. Robert Welch Inc*.[112] applied the 'public' distinction to even 'limited purpose public figures', to treat them as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[113] The expansionist interpretation of the public character is a common sensical recognition that can be attributed to the fact that private individuals do not possess the same effective means of rebuttal as those already nested under public light.

Modern developments in libel law are largely consumed by issues arising from 'forum shopping' in relation to transnational enforcement of foreign libel judgments. Forum shopping in the libel domain is a strategic move by the plaintiff to file the suit in the jurisdiction in which libel law would be advantageous to his cause of action in both substantive and procedural fronts.[114] This problem is nothing new. In fact, libel tourism has been festering since the emergence of rapidly evolving international press coverage of public figures domestically and abroad.[115] In its midst, the *Securing the Protection of our Enduring and Established Constitutional Heritage Act*[116] was enacted with the objective of discouraging libel tourism while enhancing the constitutional protection of free speech to

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[110] *Curtis Publishing Co v Butts,* 388 US 130 (1967) [*Curtis Publishing*].

[111] *Ibid* (*Curtis Publishing* and *Walker* cases were reported together).

[112] *Gertz, supra* note 102.

[113] *Ibid* at 345.

[114] Nicole M Manzo, "If You Don't Have Anything Nice to Say, Say It Anyway: Libel Tourism and the SPEECH ACT" (2015) 20 Roger Williams U L Rev 152 at 160-67 [*Manzo*] (noting the notable differences on substantial and procedural level in the law of defamation comparing the U.S. approach and the Canadian approach)

[115] See e.g. Jeremy Maltby, "Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts" (1994) 94 Colum L Rev 1978; Robert L Spellman, "Spitting in the Queen's Soup: Refusal of American Courts to Enforce Foreign Libel Judgments" (1994) 16 Comm & L 63.

[116] *Securing the Protection of our Enduring and Established Constitutional Heritage Act*, 28 USC § 4101 (2010) [*SPEECH Act*].

American defendants. The *SPEECH Act* effectively rendered foreign libel decisions unenforceable in American courts unless, alternatively, it can be established that the law abroad ensures the same degree of protection as awarded by the First Amendment in the United States; or if the plaintiff would have won his case if originally tried in the enforcing court.[117] The *SPEECH Act* has been the subject of sharp criticisms for its excessively narrow application[118] while also lacking a great deal of precision in its indifferent application by failing to differentiate legitimate from illegitimate forum selection.[119] It could very well be argued that the *SPEECH ACT* is unfair toward foreign plaintiffs who may have perfectly valid claims for their reputational harm.[120]

Unsurprisingly, technological advancements pose another challenge to libel laws, further muddying an already complex area of law. Much of the debate evolves around the application of the distributor-publisher standard. In determining the online libel liability, it was held in *Cubby, Inc. v. CompuServe Inc*.[121] that a distributor cannot be legally responsible for the content of a newsletter available on their online service given that the online service provider did not have editorial control over the uploaded content by an outside publisher nor did they have knowledge of the published contents. However, a mere four years later, *Stratton Oakmont, Inc. v. Prodigy Services Co*.[122] held an online service provider liable as a publisher (and not as a simple distributor) of defamatory statements by finding that the

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[117] Manzo, *supra* note 114 at 156.

[118] See generally Mark D Rosen, "The SPEECH Act's Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism" (2012) 53 Va J Intl L 99; Andrew R Klein, "Some Thoughts on Libel Tourism" (2011) 38 Pepp L Rev 375; Partlett, *supra* note 104.

[119] Manzo, *supra* note 114 at 154-56.

[120] *Ibid*.

[121] *Cubby Inc v CompuServe Inc*, 776 F Supp 135 at 139 (SD NY 1991): See also *Auvil v CBS "60 minutes*," 800 F Supp 928 (ED Wash 1992) (holding that the power to censor a broadcast is not enough because applying such a standard would force unrealistic monitoring duties on all of an affiliate's local stations).

[122] *Stratton Oakmont Inc v Prodigy Services Co*, 1995 WL 323710 (NY Supp Ct 1995).

provider did possess several necessary editorial/administrative means to exercise adequate control over the content published on their platform. Seeing the risk of overbreadth reached in *Stratton Oakmont, Inc.,* Section 230 of the *Communications Decency Act (CDA)* was eventually enacted to extend protection to private blocking and screening of offensive material, by providing that "no provider or user of an interactive computer shall be treated as a publisher or speaker of any information provided by another information content provider."[123] In 2006, *Barrett v. Rosenthal* exempted internet websites from being liable for libelous statements if the material was originally written by a third party.[124] Similar protection was extended to bloggers in 2014 in the case of *Obsidian Finance Group, LLC v. Cox*.[125] In this instance, the Court relied heavily on *Geetz* to re-establish that institutional press does not enjoy higher First Amendment protection than private individuals in defamation cases. The First Amendment, as the Court saw it, does not make that distinction, period. It hence ruled that as the defendant's blog post was expressing on a matter of public concern, it could not be held liable for libel without proof of negligence nor actual damages suffered by the plaintiffs.

Considering the broad leniency afforded by Section 230 of the CDA and subsequent jurisprudential development in the context of internet libel law, it is virtually impossible to indict internet websites of libel in the United States for statements that have not been directly written by them or personal statements made in view of public interest.

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[123] *Communications Decency Act*, 47 USC tit V § 230 (1996). For key judgments that applied this standard, see *Zeran v America Online*, 129 F (3d) 327 (4th Cir 1997) and *Blumenthal v Drudge*, 992 F Supp 44 (DC Cir 1998).

[124] *Barrett v Rosenthal*, 146 P (3d) 510 (Cal 2006).

[125] *Obsidian Finance Group LLC v Cox*, 740 F (3d) 1284 (9th Cir 2014).

1.1.2. Group Defamation

Conventionally, an individual member of a defamed group is barred from bringing a suit except under legally admitted conditions narrowly developed by jurisprudence. Behind this are both broad and specific reasons. There is obviously the First Amendment concern that allowing easy redress of alleged prejudice from group defamation may have a chilling effect on freedom of speech.[126] The floodgate argument – that permitting cause of action for all kinds of group defamation will overwhelm the judicial system with a plethora of civil suits making it a judicial nightmare to process them – remains a strong objection as well.[127] But traditionally, the core underlying argument from courts is based on the reluctance to acknowledge that defamations targeting groups can cause sufficiently subjective harm to individual members unless the plaintiff(s) is able to establish that he or she has been personally referred to and evaluated as such by reasonable ordinary assumption.[128]

This section provides the key elements in current rules and caselaw governing group defamation.

1.1.2.1. The Basic Principles of Group Defamation Laws

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[126] See e.g. this argument was raised in the *Sullivan* case cited earlier. As early as 1840, the First Amendment importance is seen to outweigh reputational harm caused by prejudice. In *Ryckman v. Delavan*, the Court notes:

> "It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation." *Ryckman v Delavan*, 25 Wend 186 (NY 1840) at 199 [*Ryckman*]. See also *Brady v Ottaway Newspapers Inc*, 445 NY SD (2d) 786 (App Ct 1981) [*Brady*].

[127] See e.g. *Michigan United Conservation Clubs v CBS News Inc*, 485 F Supp 893 at 900 (WD Mich 1980), aff'd, 665 F (2d) 110 (6th Cir 1981).

[128] See Irving Wilner, "The Civil Liability Aspects of Defamation Directed Against a Collectivity" (1942) 90 U PA L Rev 414 at 419 (referring to *Germain v Ryan*, 53 Rep Jud 543 at 544 (CSQ 1918), a case that concerned libelous publication regarding French-Canadians, the author noted that "the supposed absence of a tendency to cause personal harm is relied on by the courts as the governing reason for denying recovery in such cases.").

There is not a gallimaufry of existing laws on group defamation. As a general rule, an individual member of a defamed group bringing forth the suit must be able to prove that the defamatory statement referred to him to seek compensation for the suffered injury.[129] This general reasoning in common law on group defamation is thought to have first originated from *King v. Alme and Nott,*[130] an antique English case from 1700. The court had ruled *in dictum* that, "where a writing . . . inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel."[131] In *Sumner v. Buel,* [132] the first recorded American case on group defamation, the court largely reflected the predilection established by the English almost word by word.[133] This reductionist position continued with consistency, reflecting the customary rule governing group defamation.[134] The *Restatement (Second) of Torts*, a classic authoritative reference in matters of tort, further cemented this general approach, providing that:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,

(a) The group or class is so small that the matter can reasonably be understood to refer to the member, or

(b) The circumstances of publication reasonably give rise the conclusion that the is particular

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[129] Prosser & Keeton, *supra* note 96, § 113 at 802.

[130] *King v Alme and Nott*, (1700) 3 Salkeld 224, 91 Eng Rep 790 (*per curiam*).

[131] *Ibid*.

[132] *Sumner v Buel*, 12 Johns 475 (NY Sup Ct 1815).

[133] *Ibid* ("… a writing which inveighs against … a particular order of men, is no libel, nor is it even indictable. It must descend to particulars and individuals, to make it a libel.").

[134] "It is an old rule of the common law that, where words complained of reflect on a class of persons generally without making it evident that every person of the class is referred to, no member can maintain an action… . When, however, the words reflect on every member of a class, each one may have an action, because the charge is made broadly against all." *American Civil Liberties Union Inc v Kiely*, 40 F (2d) 451 at 453 (2d Cir 1930) [*Kiely*].

reference to the member.[135]

If the plaintiff is unable to demonstrate the subjective prejudice on an individual level, it has been the traditional position of courts to deny any cause of action.[136] The defamation must be "of and concerning" the plaintiff in such a way that a "reasonable person" would understand the defamatory comment refers to the plaintiff.[137] In other words, there can be no cause of action for group defamation unless it is established that the defamatory statement referred to the person of the plaintiff.[138]

This general rule of group defamation was affirmed in *Service Parking Corp. v. Washington Times Co*.,[139] and later in *Fowler v. Curtis Publishing Co*.[140] In the latter case, the court refused to hear the case of a taxi driver who wanted to prove the financial suffering of his business as a result of an article that described Washington, D.C. taxi drivers as impolite with their bosses. The court reaffirmed that a member of a defamed group simply has no cause of action.[141] *Church of Scientology v. Flynn*,[142] explicitly noted that while it is entirely possible that a corporation can file a legal action in libel, it cannot succeed unless the

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[135] Restatement Second*, supra* note 97 § 564A.

[136] See e.g. *Arcand v Evening Call Publishing Co*, 567 F (2d) 1163 at 1162 (1st Cir 1977). In this case, it was held that the twenty-one members of police department had no cause of action against defamation directed at an anonymous member.

[137] *Restatement of the Law, First, Torts,* (Minnesota: American Law Institute Publishers, 1976) § 564 A [Restatement First].

[138] See e.g. *Pratt v Nelson,* 207 Utah 41, 164 P (3d) 366 (2007).

[139] *Service Parking Corp v Washington Times Co,* 92 F (2d) 502 at 506 (DC Cir 1937) [*Service Parking*] (the plaintiff, who was the owner of a downtown parking lot, complained of a defamatory publication concerning downtown parking lot owners in the City of Washington. The Court held that the plaintiff had no cause of action in view of the fact that no action lies in respect to a libel against a class, unless the libelous publication expressly refers to the member of the class who brings suit).

[140] *Fowler v Curtis Publishing Co*, 182 F 2d 377 (DC Cir 1950).

[141] *Ibid* at 378. See also *Kiely*, *supra* note 134; *Latimer v Chicago Daily News*, 330 Ill.App 295, 71 NE (2d) 553 (1947); *Noral v Hearst Publications Inc*, 40 Cal App (2d) 348, 104 P (2d) 860 (1940); *Louisville Times v Stivers*, 252 Ky 843, 68 SW (2d) 411 (Ky Ct App 1934) [*Louisville Times*].

[142] *Church of Scientology v Flynn*, 744 F (2d) 694 at 697 (9th Cir 1984).

libelous statement in question was "of and concerning" the corporation. In determining whether the defendant's alleged statements in a newspaper interview that "Scientologists" or "some-one like (a) scientologists" had stolen or intercepted his court filing money were libelous, the Court ruled in the negative by noting that the statement had not been made against "the governing body of the Church of Scientology"[143] located in that specific area or community where the plaintiffs were most active as members of the Church of Scientology. This case is particularly noteworthy in that there was an interesting pondering on the judge's part toward the end of the judgment as to whether the plaintiff (the Church) could still initiate an action in libel as a form of derivative action on behalf of its members. To allow this sort of claim, however, the basis to assert individual action by the members would normally be required. After brief consideration, the judge set that option aside, concluding that "here, no individual scientologist possesses such right."[144] In other words, the judge refused the view that the alleged statements of the defendant could constitute subjective harm to the members of the Church, *individually*.

The personal reference of the defamatory expression should not be understood vacantly. The rule demands that there be certainty as to whether the personal reference contained in the defamatory expression was truly and specifically designating the person claiming to have been libeled. Also known as the 'Certainty Principle,' it hence views large group libel as being fundamentally incompatible with the law of libel.[145]

The "of and concerning" requirement remains true for individual defamation as well. Yet,

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[143] *Ibid.*

[144] *Ibid*.

[145] It has therefore been noted that "Libels against groups consisting of large numbers of persons cannot satisfy the fundamental requirements of the law of libel that a libel shall refer to a person certain and that person be the person who claims to be libeled." *per* Yankwich J in *Golden North Airways v Tanana Publishing Co*, 218 F (2d) 612 at 620 (9th Cir 1955) [*Golden Airways*]

the onus is substantially heavier for a plaintiff bringing suit in group defamation cases. The task becomes more difficult as the group gets larger, because the larger the group, the more arduous it is to convince the court that the alleged victim was *personally* referred to and thus harmed.[146] Consider for instance, *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning* case.[147] This libel case concerned a group libel action against a film depicting the public execution of a Saudi Arabian princess for infidelity for its insulting and thus defamatory prejudice to persons of Islam faith, or a class of nearly a billion persons in the globe. The Court rejected the claim, bluntly noting that:

"The law of defamation, however, does not give rise to such a cause of action. The aim of defamation law is to protect individuals."[148]

The Court further remarked,

"If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import."[149]

The inherent reluctance to accept libel suits concerning large groups was well noted in *Louisville Times v. Stivers*[150] in which the court observed, "as the size of the group increases, it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed, and presently it becomes impossible."[151] The attitude of courts is self-explanatory, because "the larger the collectivity named in the libel, the less likely it is that a

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[146] See, e.g. *Golden Airways, ibid.* See also *Party for Civil Rights and Livelihood of People of Hong Kong Ltd v Cable News International Inc*, (2009) HKEC 379.

[147] *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v Fanning*, 506 F Supp 186 (ND Cal 1980).

[148] *Ibid*.

[149] *Ibid*.

[150] *Louisville Times, supra* note 141.

[151] *Ibid* at 412.

reader would understand it to refer to a particular individual."[152] As the defamed group's size increases, the defamatory words are thought to lose their sharpness. This point continues to represent a major obstacle that almost automatically precludes individual actions in civil actions to launch group defamation suits.[153] Consequently, court decisions have been more favorable for members of smaller groups.[154]

1.1.2.2.Determination of the 'defamatoriness' and the basis of reputational harm

The requirement that the statement be defamatory raises a thorny technicality that touches on the legal determination of the exact 'defamatoriness.'[155] Once established that the alleged statement is deemed to contain defamatory characterization imputed to the plaintiff, should the reputational harm be evaluated on the basis of the local community or on a more expansive basis? To this question, English courts have traditionally referred to the 'general community' test, meaning that a statement would be defamatory if the general society *at large* would consider it to be so.[156] This global approach established the defamatory nature of the concerned statement if there is "disparagement of his (the plaintiff's) reputation in the eyes of right thinking men generally."[157] Although this general community test has had its

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[152] *Brady, supra* note 126 at 788. See also *Jankovic v Intl Crisis Group*, 494 F (3d) 1080 at 1090 (DC Cir 2007).

[153] "Note: Liability for Defamation of a Group" (1934) 34 Colum L Rev 1322.

[154] See e.g. *American Broadcasting-Paramount Theatres Inc v Simpson*, 106 Ga App 230 at 246, 126 SE (2d) 873 at 883 (1962). (only two group members); *Ryer v Fireman's Journal Co*, 11 Daly 251 at 253-54 (NY Ct Common Please 1882) (three group members).

[155] Lyrissa Barnett Lidsky, "Defamation, Reputation, and the Myth of Community" (1996) 71 Wash L Rev 1 at 9.

[156] Alan D Miller & Ronen Perry, "A Group's a Group, No Matter How Small: An Economic Analysis of Defamation" (2013) 70 Wash L Rev 2269 at 2278 [Miller & Perry]. The authors discuss the historical evolution of various scope of 'defamatoriness' tests. See e.g. *Tolley v JS Fry & Sons Ltd* (1930) 1 KB 467, rev'd, (1931) AC 333 (HL Eng) [*Tolley*].

[157] *Tolley*, *ibid* at 479.

fair share of critics,[158] it has never been explicitly overruled[159] and has largely retained its authority in common law jurisdictions.[160]

American courts first used to abide to this test.[161] However, the test has lost its applicability over time and became of limited use involving litigations of defamation *per se*.[162] Today, it suffices that the alleged expression is generally viewed as defamatory if considered to be so by the 'substantial or respectable minority.'[163] According to this standard, "a communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or all of his associates, nor even in the eyes of a majority."[164] The decision that set this principle into motion was *Peck v. Tribune Co.,*[165] in which the court ruled that a statement is defamatory if it "obviously hurt the plaintiff in the estimation of an important and respectable part of the community." Pronouncing as such, Justice Holmes departed from the expansive English approach, declaring that "liability is not a question of a

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[158] Miller & Perry, *supra* note 156 at 2284. The commentators observed, "Because the general community test is essentially an empirical one, it is sensitive to time and place. Public opinion may vary from time to time and across jurisdictions, even within a specific legal tradition…"

[159] *Arab News Network v Al Khazen,* (2001) EWCA Civ 118 (Eng) (noting that it would be complicated to deviate from the general community test and that the approach has been widely accepted by "a long series of powerful authorities") at 30.

[160] See e.g. *Reader's Digest Services Proprietary Ltd v Lamb* (1982) 150 CLR 500 (Austl) (noting that the defamatoriness of an expression "is ascertained by reference to general community standards, not by reference to sectional attitudes." at 507); *Mawe v. Pigott,* (1869) 4 IR R (CL) ("we can only regard the estimation in which a man is held by society generally." (*ibid* at 62). *Lyman v New England Newspaper Publishing Co*, 190 NE 542 (Mass 1934). [*Lyman*]

[161] Lyman, *ibid*.

[162] *Hayes v Smith* 832 P (2d) 1022 (Colo App Ct 1991). In this case, the Court embraced a rather restrictive interpretation of slander *per se* in determining whether alleging someone being homosexual in a religiously conservative community could be judged defamatory *per se*. The Court responded in the negative and reaffirmed the position even if it were to consider the defamatoriness of the expression under employment context (the plaintiff in the case was occupying a teacher position).

[163] Miller & Perry, *supra* note 156 at 2290.

[164] Restatement Second*, supra* note 97 § 559 cmt e: "… It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them."

[165] *Peck v Tribune Co*, 214 US 185 (1909).

majority's vote."[166] In more recent times, this rule was reaffirmed in *Jews for Jesus, Inc. v. Rapp*,[167] the Supreme Court of Florida ruling that "a communication can be considered defamatory if it 'prejudices' the plaintiff in the eyes of a substantial and respectable minority of the community."[168] To some extent, the abandonment of the global rule to the acquiescence of a more confined standard appears a natural evolution considering the great melting pot where much of the emphasis on reputation is placed on community life, the role, and the impact that individuals may be inextricably have. It could be argued, in fact, that it would be unfair to ask a national population to judge the defamatoriness of a comment made in a particularly culturally condensed or ethnically predominant local community. However, the *Restatement* has brought precision to this approach, insisting that the minority-community must still be qualified as being substantial.[169] Therefore, one single individual or a few people with unusual opinions on the subject matter in a community would not be sufficient.[170]

1.1.2.3.The Rule of Small Group Exception

If the defamed group is deemed small enough, members of the group have the possibility to pursue individual actions against the defamer. In cases involving small groups, the defamatory statement is reasonably assumed "to have personal reference and application to

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[166] *Ibid* at 190 (Holmes J dissenting)

[167] *Jews for Jesus Inc v Rapp*, 992 So (2d) 1098 (Fla 2008) [*Rapp*]. The decision also accepted defamation by implication – that is, defamation implied from when a juxtaposition of a series of facts is made to connect the defamed to those representations or by acts of omission of facts to imply that defamatory connection See Restatement Second, *supra* note 97 § 116 at 117.

[168] *Rapp*, *supra* note 167 at 1100, 1114-15. See also *Sharratt v Housing Innovations Inc*, 310 NE (2d) 343 (Mass 1974) ("it is enough that they do so among 'a considerable and respectable class' of people" *ibid* at 346); *Reisman v Pacific Development Society* 284 P 575 (Or 1930).

[169] Restatement Second*, supra* note 97.

[170] *Ibid* ("On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority").

any member of the group, so that he is defamed as an individual."[171] It is not necessary that the defamation referred to every one of the members but only some of them.[172] Several courts have applied this exception.[173]

Though in strict terms, there is no fixed number that clearly encapsulates what the legal definition of small group would be, twenty-five appears to be the magic number. William Prosser, in *The Law of Torts*, baptized the number twenty-five as the threshold number of persons in an acceptable group libel suit to move forward, noting that "the rule has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons."[174] The Restatement's position further rigidified this particular numeric standard observing that "the cases in which recovery has been allowed usually have involved numbers of 25 or fewer."[175]

Neiman-Marcus v. Lait,[176] illustrates this small group size exception. In this landmark case, the defendant had described "most" of the twenty-five salesmen working in a department store as "faggots" and "fairies".[177] Although the statement did not refer to *all* twenty-five salesmen, the plaintiffs were permitted to bring action against the defamer.

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[171] *Neiman-Marcus v Lait*, 13 FRD 311 at 315 (SD NY 1952) [*Neiman-Marcus*]; *De Witte v Kearney & Trecker Corp*, 265 Wis 132 at 137-38, 60 NW (2d) 748 at 751 (1953). See also William L Prosser, *Handbook of the Law of Tort*s, 4th ed (St Paul: West Pub Co, 1971) § 111 at 750 [Prosser*,* "Law of Torts"]*;* Restatement First*, supra* note 137 § 564A cmt b.

[172] Restatement First, *ibid* at § 564A cmt c. "Each member of a relatively small group may have cause of action even if the defamatory statement was directed to even one of them."

[173] *Neiman-Marcus*, *supra* note 171; *Cushnan v Day,* 43 Or App 123 at 130, 602 P (2d) 327 (1979) [*Cushnan*]; *Montgomery Ward & Co v Skinner*, 200 Miss 44, 25 So (2d) 572 (1946) [*Montgomery*].

[174] Prosser*,* "Law of Torts", *supra* note 171 § 111 at 750. See also *Barger v Playboy Enter Inc*, 564 F Supp 1151 at 1153-55 (ND Cal 1983). Affir'd, 732 F (2d) 163 (9th Cir 1984) [*Barger*] (noting "But where the group is large in general, any group numbering over **twenty-five members** the courts in California and other states have consistently held that plaintiffs cannot show that the statements were "of and concerning them.") (emphasis in bold added).

[175] Restatement Second, *supra* note 97 § 564A.

[176] *Neiman-Marcus, supra* note 171.

[177] *Ibid* at 316.

However, it is noteworthy that the same court in *Neiman-Marcus* refused to hear a case brought by the department's store's saleswomen citing the size of the group (382 saleswomen) despite the alleged fact that the defamer indiscriminately referred to *all* of them as "call girls."[178]

The small group rule was reinforced in *Farrell v. Triangle Publications, Inc.,*[179] in which the cause of action for defamation was allowed even though the defamatory comment was made to only some of the thirteen group members. *Cushman v. Day*[180] followed suit, where it was ruled that "when all or a significant portion of a small group are defamed, each individual in the group may be found to have been defamed."[181] In *Montgomery Ward & Co. v. Skinner*[182] too, the court found that there was defamation on the part of the defendant who had accused "one of you three" of stealing his money.

1.1.2.4.The Reasonable Man Test

Along with the group size criteria is the "reasonable man" test often applied to justify the rulings.[183] The *Restatement* also espoused this test, affirming that "it is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person

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[178] *Ibid* at 316.

[179] *Farrell v Triangle Publications Inc,* 399 Pa 102 at 105, 159 A (2d) 734 at 736 (1960).

[180] *Cushman, supra* note 173.

[181] *Ibid* at 327, 331-32.

[182] *Montgomery*, *supra* note 173. But see *Cohen v Brecher*, 20 Misc (2d) 329, 192 NY S (2d) 877 (1959). (finding that there is no cause of action against a remark saying that one of three was a criminal)

[183] For examples of this test applied, see *Ryckman, supra* note 126 at 203; *Haverilla v Lembick*, 18 Lux 183 at 184, 43 Pa C 639 at 640 (Ct. Common Please 1915).

intended."[184] This reasonable reference test was adopted in a number of case laws,[185] and more recently in a 2006 decision of *Gonzalez v. Sessom*,[186] in which the Court repeated the principle.[187]

If it appears to the judge that a jury would reasonably find that the group defamation referred to the plaintiff, the case would be submitted to a jury. The reasonable man test also keeps out large group defamation suits in the preliminary stages since courts can determine at an early stage "that no reasonable reader would take the statements as literally applying to each individual member."[188]

1.1.2.5.The 'Intensity of Suspicion' Test

Another route taken by courts in group defamation cases is the 'intensity of suspicion' test. The *Restatement* defines the test as such: "Even when the statement made does not purport to include all of the small group or class but only some of them … it is still possible for each member of the group to be defamed by the suspicion attached to him by the accusation."[189] This generous approach therefore examines the prominence of the plaintiff in their group to identify whether the defamatory slur lessened their position among its

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[184] Restatement Second*, supra* note 97 § 564 cmt b.

[185] See e.g. *Croixland Props Ltd v Corcoran*, 174 F (2d) 213 at 217 (DC Cir 1999); *Berry v Safer*, 293 F Supp (2d) 694 at 701 (SD Miss 2003); *Wolfson v Kirk*, 273 So (2d) 774 at 779 (Fla Dist Ct App 1973) (noting "the defamed person need not be named in the defamatory words if the communication as a whole contains sufficient facts or references from which the injured person may be determined by the persons receiving the communication.")

[186] *Gonzalez v Sessom*, 137 P (3d) 1245 at 1248 (Okla Civ App 2006)

[187] *Ibid* noting, "In group defamation cases, the defamer is not liable unless the recipient of the communication reasonably understands it to refer to the plaintiff."

[188] *Barger*, *supra* note 174 at 1153-55

[189] Restatement Second*, supra* note 97 § 564A cmt c.

members.[190] The merit of the intensity of suspicion test is thus in recognizing "that even a general derogatory reference to a group may affect the reputation of every member."[191] The rule will find its utility in ambiguous group defamation cases where the said group would not necessarily meet the generally applicable rules of small group size (and yet small enough) because the group size "is not the only factor to be considered."[192] Even if one or very few members were originally targeted by the defamatory statement, this standard is meant to cover other members who would reasonably believe to be attacked by the derogatory comment.

Additionally, circumstantial instances can provide a cause of action for an individual member of even a large group, "if some particular circumstances point to the plaintiff as the person defamed."[193] Hence, in *Price v. Viking Press,Inc*.,[194] the Court hinted at the possibility of an individual action in libel if "the context of publication raises a reasonable presumption of personal allusion"[195] regardless of group size.

1.1.2.6.Veiled Reference as Actionable Ground

When a defamatory comment is uttered as a disguised general reference to a specific individual of a group, courts have held that the concerned individual member could

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[190] *McCullough v Cities Serv Co*, 676 P (2d) 833 at 836 (Okla 1984). The case nevertheless rejected the claim for defamation by noting that the said publication was of impersonal nature of an indeterminate group of people, considering that there are about 19,686 persons who qualified to the description of the subject in the alleged publication at the time (*ibid* at para 26).

[191] *Ibid* at para 24.5.

[192] *Ibid*.

[193] Restatement Second, *supra* note 97 § 564A cmt d: "there may be circumstances that are known to the readers or hearers and which give the words such a personal application to the individual that he may be defamed as effectively as if he alone were named").

[194] *Price v Viking Pres Inc*, 625 F Supp 641 at 646 (D Minn 1985)

[195] *Ibid*.

reasonably be injured.[196] In doing so, they gave the defamed victim the possibility to seek redress for his injury when it is evident that though made in group terms, the vilification really was directed at that specific person. In this aspect, the willingness to see beguiled defamation as legal ground for cause of action may be considered a close purlieu to the French law of defamation, which treats statements made by insinuation though not personally referencing as defamatory comments.[197]

Marr v. Putnam[198] is an example of this exception. A local newspaper published an article accusing a group of radio repair businesses of stealing their customers' radios. Referring to them as "slickers,"[199] the publication put *en garde* their readers against the cunning practices of these businesses who only provided phone numbers for a free pick up of radios needing repair. It was reasonably clear for the court that the defamatory article, though made in veiled terms of groups, was in fact directed against the plaintiffs who were the only persons working in the radio repair business in that area. Thus, it was held that any reasonable readers would be under the impression that the article specifically pointed toward those radio repairmen.

1.1.3. The Critique

The overall critique of laws of group defamation can be summarized in two areas: The

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[196] See *Marr v Putnam*, 196 Or 1 at 18-20, 246 P (2d) 509 at 517 (1952) [*Marr*].

[197] Art R 624-3 of the Penal Code of France states: « La diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 4e classe. Est punie de la même peine la diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap. » However, a broader power of interpretation and margin of appreciation are left to judges as defamation can be constituted «*sous une forme déguisée, ou dubitative ou par voie d'insinuation.* » Cass crim 2 January 1980, (1980) Bull crim No 3.

[198] *Marr, supra* note 196.

[199] *Ibid* at 515.

inconsistency or the ambiguity of the application (1.1.3.1.), and the resulting underestimation of persons' importance to connecting affiliations (1.1.3.2.).

1.1.3.1.The inconsistency and ambiguity of small group size application

Despite some degree of concurrence on the small size group exception endorsed by American courts to permit cause of individual action in group defamation case in the previous section, that methodology has produced inconsistent results. In fact, a number of court decisions have deviated from the twenty-five -member numeric cap in determining whether an individual member could be considered to have been personally prejudiced.

For instance, going back as far as in 1931,[200] they found that a defamatory remark directed at "some" members" of the Oklahoma Supreme Court could not be understood as to defame each judge. The earlier mentioned *Service Parking*[201] decision is another example. In this decision, a defamation against a group as small as ten to twelve members was judged not to personally defame the plaintiffs.

Some courts have outright refused to be bound by the group size approach. *In Fawcett Publications, Inc. v. Morris*,[202] a publisher was sued by one of seventy members of the college football team for writing an article that accused the team's players of taking amphetamines during games. Although the Oklahoma Supreme Court observed that "while there is substantial precedent from other jurisdictions to the effect that a member of a 'large group' may not recover in an individual action for a libelous publication unless he is referred

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[200] *Owens v Clark*, 154 Okla 108, 6 P (2d) 755 (1931).

[201] *Service Parking, supra* note 139.

[202] *Fawcett v Morris*, 377 P (2d) 42 (Okla 1962).

to personally,"[203] the judges explicitly rejected the size-based approach as the predominant test to determine the cause of action, noting that "we have found no substantial reason why size alone would be conclusive."[204] For the court, the familiarity and prominence of the team's players in the local community were sufficient grounds to find the article to be libelous toward all members of the team. Following this, another appellate court equally showed a similar interest in considering other factors beyond group size.[205]

Heavy reliance on group size is prone to generating a mechanical processing of group defamation.[206] While introduced as a guideline and adopted by a number of courts, the twenty-five-number limit still cannot escape the critique regarding its potentially *ad hoc* randomness.[207] One can quite easily raise the question as to the admissibility of cause of actions for small groups lingering very closely to the twenty-five-member constituted group. Given the divergence of courts from the small group rule, it is difficult to assume with certainty that it holds sufficient authority in determining actionable individual suits arising from group defamation. True, each case must be evaluated on a case-by-case scenario.[208] Facts speak for themselves, to avoid painting with a brush too broad. Although each case is unique, and all relevant variables must be fully taken into account so that the best version of justice is achieved, the paucity of fixed rules may consequentially contribute to the erosion of judicial stability. It could play as an encouragement to forum shopping, where plaintiffs will focus on friendly jurisdictions, regardless of the real merits of the defamation in question,

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[203] *Ibid* at 51.

[204] *Ibid*.

[205] *Brady, supra* note 126.

[206] ET Marcus, "Group Defamation and Individual Actions; A New Look at an Old Rule" (1983) 71 Cal L Rev 1532 at 1537.

[207] *Ibid* at 1532 (noting the rule to be "illogical, unfair, and no longer necessary.")

[208] Kenneth Lasson, "Racial Defamation as Free Speech: Abusing the First Amendment" (1985) 17 Colum Hum Rts L Rev 11 at 48-50 [Lasson].

thus further gnawing at public trust in the common sense of judicial institutions. Strict or quasi-literal abidance to the twenty-five-rule may come across as being insensitive from avoiding antagonizing similarly small groups with valid claim but failing to meet the artificial criteria. The lack of uniformity with regard to a clearly set rule may further prejudice plaintiffs charged with already heightened burdens of proof. As important as common sense and reason are in evaluating this delicate field of law, there is a clear argument that can be made here: the rule establishing the legal threshold for individual actionability should not fluctuate excessively depending on judges or circumstantial vicissitudes.

1.1.3.2.Overlooking connections between individual members and group

As pointed out above, confiding in group size alone can result in inconsistencies in terms of jurisprudential stability and authority. Attempts to deviate from the sole reliance on group size demonstrates that the traditional approach is not sufficient to provide satisfactory redress to the aggrieved individual members belonging to the harmed group. To this problem, a commentator has suggested multi-factor approaches.[209] Other components such as the credibility of the defamer also play a vital role in distinguishing the existence of harm.[210] If the nature of defamatory comment touches on a critical issue of public importance, that ought to be duly considered by judges.[211] Other more original proposals rely on economic or certainty principles.[212] The variance of methodologies endorsed by courts underlines the extremely complex challenge to the law of group defamation. The fracture also points to a

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[209] JS Bromme, "Group Defamation: Five Guiding Factors" (1985) 64 Tex L Rev 591 at 608-19.

[210] *Ibid*.

[211] *Ibid.*

[212] *Ibid.*

more profound problem at the core of the legal treatment of group defamation cases: a stubborn refusal to acknowledge the harm of individual members' resulting from group defamation.

Courts are reluctant to admit an individual cause of action brought by a member of a defamed group. Judges are hesitant in this regard because it is difficult for the plaintiff to bring forth convincing evidence to establish that the defamatory statement was "of and concerning" him.[213] The acknowledgement of causation in dealing with the reputational harm from a group defamatory speech – a generalized, vague formulation - appears to be the root cause of this denial (to see individualized harm). Courts have a difficult time conceding that a group defamatory slur may cause individuated harm to an individual member of a group unless he or she was explicitly or implicitly (reasonably) referenced by that statement. Pinpointing to the precise connection between a defamatory publication and the actual harm suffered by an individual of the targeted group is an extremely elusive task. Some harms appear instantaneously. Other may emerge only after several years, at the end of an accumulation of exposure to harmful public statements. It is challenging to empirically prove the accurate liaison between general words and individualized injury.[214]

And yet, to automatically presume the non-existence of individual injury in group defamation involving large groups is to use unsound reasoning. First, harm to individual persons inflicted by hateful words or assaultive language has been widely established as a scholarly subject.[215] Second, the group size rule is inadequate to redress group defamation of

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[213] See e.g. *Golden Airways, supra* note 145; *Neiman-Marcus, supra* note 171.

[214] While it may be so, it could be argued that the requirement of empirical evidence of harm by speech may be relinquished in the evaluation of necessary legislative measure to allow infringement of harmful speech. I elaborate on this point in Chapter 3 (at 261-68). See also Frederick Schauer, "Review article: Expression and its consequences" (2007) 57 Univ Toronto LJ 705 [Schauer, "Consequences"].

[215] The assaultive harm in such type of speech is developed in detail in sub-section 3.1.1.1. "The Maintenance of Harm."

fundamentally discriminatory nature such as racial, defamation. The current state of group defamation law automatically excludes persons whose racial or ethnic identity is vilified. The refusal to admit individual cause of action in racial group defamation – and thereby ignoring the possibility of individuated prejudice is to deny the intimate nexus that each and every human being shares with social groups. I shall elaborate on this point in Chapter 3. Here, it suffices to note that the search for belonging through shared characteristics is not just a membership entitlement in the material sense.[216] It is the most abecedarian part of human nature: the empowerment of self-identity through *being found* in a vernacular communitarian animation that lies at the heart of human instinct.

Thus, when a category or a class of people are subjected to libel, the individuals who identify themselves with that group inevitably suffer.[217] To state that there is no causation between group defamatory speech and its' victims would equate to turning a blind eye to the very link that is intrinsic to the formational fabric of an individual's personhood: it is a harm to his identity. Proving individual member's intimate joining thread to his defamed group is just as crucial – if not more – than establishing the causation between the defamatory statement and actual injury.

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The first section of the present chapter was a brief but critical overview of the general rules and various tests of defamation and group defamation law in particular. The study of

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[216] Again, I explain further on this by making the distinctions of thin and thick models of group constitutions as part of my argument in Chapter 3 (at 220).

[217] On this point, see e.g. James J Brown & Carl L Stern, "Group Defamation in the U.S.A." (1964) 13 Clev-Mar L Rev 7 at 23-29; Arkes, *supra* note 25 at 292.

group defamation caselaw has demonstrated that the small group rule can be problematic due to its incoherent, mechanical application and more importantly an underlying problem as to the law's unwillingness to recognize the possibility of individuated harm from group defamatory expression. These having been evaluated, it is now important to place the problematic against a broader contextual, doctrinal background involving the constitutional right of free speech itself.

1.2.Free Speech Parochialism

American free speech is an overly mined domain. As a major part of the First Amendment's legal scholarship, it has been the source of articulate debates. A great many scholars and judges have put forward a profusion of arguments exploring its representative rationales and constitutionally acceptable margins. The doctrinal notions stemming from the ideals of free speech are not immemorial relics of course. They are a combination of ideological products conceived and scrupulously developed by judicial institutions and legal academia, mostly in the course of last century. True, the very first United States Congress passed the First Amendment on December 15th, 1791, and, with it, sought to constitutionally enshrine freedom of speech along with other fundamental freedoms: freedom of religion, of the press, of assembly, and freedom to petition for governmental redress of grievances. The ratification was swift, and the required supermajority of participating states was quite enthusiastic about the passage. However, it would take close to two centuries after the adoption of said Amendment for the application of well-tailored free speech principles to take shape beyond abstract theories.

Several theories attempt to provide justificatory rationales of free speech's moral backbones. Of those theories, three can be distinguished: the first argues for the furtherance

of knowledge in search of truth; the second claims the purpose of speech as serving the function of democratic self-governance; the third believes that individuals achieve higher autonomy and self-fulfillment by exercising free speech.[218]

While it is not the aim of this section to undergo the full panoply of all three theories, I shall briefly mention two of them in the following sections – namely those of marketplace of ideas and self-autonomy - in a compact manner for the sake of the contextualization.[219] My argument herein is twofold: Firstly, that these prevailing free speech doctrines suffer categorical parochialism; and secondly, as a consequence of their liberal conceptions, they are often premised on individualistic interpretation of the speech freedom, and this, often at the cost of broader, common interests. The First amendment thesis has struggled to identify a unified, definite explanation that is sufficiently broad to cover all the inherent principles that ought to be reflected within the American constitutional framework. In this aspect, the Supreme Court Justices have been feckly inconsistent in their decisions when confronted with questions of speech suppression, applying one theory over another with no uniform method. Among the variety of accepted doctrines, the liberal inclination of the First amendment – best encapsulated by the marketplace and personal autonomy paradigms - appears excessively mono-focused on individual liberty in free speech rights. This linear understanding manifests in the set of narrow criteria adopted by the Supreme Court jurisprudences to enforce the

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[218] For a general introduction and discussion of these theories, see especially Thomas Emerson, "Toward a general theory of the First Amendment" (1962) 72 Yale LJ 877 [Emerson].

[219] In the common parlance and literature of First Amendment, three dominant free speech arguments exist: marketplace of ideas, Free Speech as an instrument of self-government, and free speech as achieving personal autonomy and self-fulfillment. I deliberately chose to exclude Meiklejohn's theory (self-government) to demonstrate the liberal aspirations in the conceptual foundations of the American Free Speech ideal as it is the objective of this section. This is by no means to disregard the second theory's place in the First Amendment analysis. In fact, Meiklejohn's argument resonates better with equality and collective rights – rights that the liberal-leaning interpretation of Free Speech appears to be neglecting when assessing the harms in various speech types.

special protection of free speech often at the cost of equality and the common good.

1.2.1. Categorical Limitations

The land of the free speech doctrines in American constitutional law has been inhabited by a great many theoreticians since the constitutional conception of the freedom. From Supreme Court Justices to celebrated First Amendment scholars, the doctrinal field is rich in arguments, each bringing authentic contributions to the table. Given the meritorious amount of scholarship on the subject and the sheer volume of arguments on the purpose of free speech, it would appear rather facile for one to fall under the impression that at least *one* of the excavated precepts has succeeded in bringing together all the divergent theories under one sweeping paradigm.

And yet, there is yet to appear a definite free speech theory broad enough to encompass all the core elements entrusted in the ideal of free speech. Frederick Schauer's frank confession gives away a sigh of exasperation at the end of his apparent 'done-this-been there' ordeal: "If there exists a single theory that can explain the First amendment's coverage, it has not yet been found."[220] The shortcoming has resulted in a sense of general disunity that persists in the very foundational conceptions of the American free speech ideal, even as it stands today. Despite several solicitously-crafted theories, "scholars and jurists never achieved anything approaching unanimity on either the values served by the First amendment guarantee of free expression or the doctrinal principles necessary to implement those

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[220] Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience" (2004) 117:6 Harv L Rev 1765 at 1786 [Schauer, "Constitutional Salience"].

values."[221]

One primary reason for this doctrinal fragmentation is that the rationales of the theories are too categorically limited[222] in their basic line of reasoning in that they fail to adequately include modern constitutional values that ought to be instilled in free speech. The abovementioned three theories have provided the legal and moral basis for protecting speech to the courts. However, their judicial interpretations based on their respective conceptional spectrums are constrained within their respective *genus*. This hints at the problem located at the heart of the First amendment analysis on both ideological and jurisprudential fronts: Notwithstanding the partial verities each of the three First amendment theories contain, they are not sufficiently broad[223] to reflect the other fundamental values embodied in the Constitution as a whole. Free speech ensures the freedom to adhere to an idea of one's liking from the marketplace in genuine pursuit of whatever truth one seeks; it also grants the individual the liberty to freely speak one's mind in order to reach a more complete sense of autonomy. However, that liberty has remained focused on the individual's point of view as a speaker, ignoring how the exercise of that freedom may interact with and impact with listeners' rights and freedoms with larger implications. Individual discovery of truth is not all there is to free speech. Facilitating the function of democratic self-governance is another.[224]

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[221] Martin H Redish & Kevin Finnerty, "What did you learn in school today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox" (2002) 88 Cornell L Rev 62 at 73.

[222] Alexander Tsesis has been most vocal with this criticism on the orthodox doctrines of American free speech. See e.g. Alexander Tsesis, "Free Speech Constitutionalism" (2015) U Ill L Rev. 1015; Alexander Tsesis, "Balancing Free Speech" (2016) 96 BULRev 1 [Tsesis, "Balancing Free Speech"]; Alexander Tsesis, "Maxim Constitutionalism: Liberal Equality for the Common Good" (2012) 91 Tex L Rev 1609 [Tsesis, "Maxim Constitutionalism"]; Alexander Tsesis, "The Categorical Free Speech Doctrine and Contextualization" (2015) 65 Emory LJ 495; Alexander Tsesis, "Multifactoral Free Speech" (2016) 110 Nw U L Rev 1017 [Tsesis, "Multifactoral Free Speech"].

[223] Tsesis, "Multicultural Free Speech", *ibid* at 1018-21.

[224] The most renown proponent in this theoretical branch for the value of free speech was Alexander Meiklejohn. See his original argument in Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of The People* (Michigan: Oxford University Press, 1960).

Striving for a communal goal based on the principles of equality occupies another constitutional facet of the freedom.[225] The point here is that categorically bracketing free speech rationales results in the atomatization of a constitutional value that has an extensive range of implications.[226] Free speech cannot be mechanically reduced to a simple block of a government-versus-citizen approach. Freedom of expression is so much more pervasive: It also means expressive activities of inherently social interrelatedness such as commercial expressions, artistic displays of opinions, public protests and demonstrations, meetings and assemblies of associations, and a whole host of expressions that flirt along those artificial lines of pre-defined demarcation. The qualitative 'boxing-in' of the freedom is inconsistent with the rapidly multiplying forms and methods of connecting, and ever-developing means of distribution of expressions. The categorical confines thus do not do justice to the pervasive right that freedom of expression is inextricably seeped into the very matrix of human communicative manifestations.

1.2.2. Fundamentally Individualistic: Proclivity toward Individualism in Prevailing Free Speech Doctrines

Individual liberty and free speech are interchangeable synonyms in American constitutional life. That notion of individual freedom is embodied in the Declaration of Independence.[227] It echoes the Lockean natural law.[228] It is a stance which reaffirms that

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[225] See Tsesis, "Maxim Constitutionalism", *supra* note 222.

[226] Tsesis, "Balancing Free Speech", *supra* note 222 at 30.

[227] *The Declaration of Independence* (US 1776)

[228] On free speech embedded in natural law, see David A. Anderson, "The Origins of the Free Press Clause" (1983) 30 UCLA L Rev 455. After all, Locke wrote "that every Man hath … Natural Freedom, without being subjected to the Will or Authority of any other Man." John Locke, *Two Treatises of Government*, 2nd ed by Peter Laslett (Massachusetts: Cambridge University Press, 1967) bk II, c VI at § 54. Locke's view was that individual persons are bearers of rights and liberties to life, liberty, and estate. For a detailed analysis connecting natural law and the absolutist tone in free speech constitutionalism, see e.g. Raymond S Rodgers, "Absolutism and

liberty is something "sacred or inviolable"[229] and that this inalienable liberty endowed on each individual "has a central place in our shared scheme of values and opinions."[230] It is presumed, then, that any encumbrance placed on this liberty of free exercise of speech would be "but a short step from … suppression pure and simple."[231] Professor Martin Redish, stressing the liberal aspiration surrounding free speech, went as far as to assert that the freedom "ultimately serves only one true value … 'individual self-realization.'"[232] This position rings true to the Kantian chant that every man wishes to be "treated as an end in himself."[233]

In recent years, this individualistic aspect of free speech has come under siege. One prominent source of criticism has been from critical race theorists on the unbalance between the individual's freedom to harm peoples of color through self-expression. I shall discuss this in the last section of this chapter. But a broader line of criticism has flowed from the rights discourse. The charge is that American liberalism has been inefficient in translating the revelations from the rights conversation in order to effectively eradicate social inequalities at the structural level of the system.[234] The bickering over *my-rights-versus-yours* may have indirectly suppressed the growth of other creative and equally meaningful political discussions. Although part of that responsibility can be attributed to the rights talks'

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natural law argument: William O Douglas on freedom of expression" (1982) 48:1 Southern Speech Communication Journal 22-37.

[229] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Vintage Books: New York: 1993) at 74.

[230] *Ibid* at 70

[231] Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty" in Geoffrey R Stone, Richard A Epstein & Cass R Sunstein, eds, *The Bill of Rights in the Modern State* (Illinois: University of Chicago Press, 1992) at 228 [Fried].

[232] Martin H Redish, "The Value of Free Speech" (1982) 130 U PA L Rev 591 at 593 [Redish, "Value"].

[233] Fried, *supra* note 231 at 233 (referring to the Kantian idea emphasizing the importance of individual autonomy)

[234] On the general challenges arising from being overly preoccupied in competing of rights, see Mary Ann Glendon, *Rights Talk: the impoverishment of political discourse* (The Free Press: New York, 1991) [Glendon].

limitations in piercing thick walls of dogmatic intolerance; or its hindrance of real, urgent political issues; or for contributing to further partisan divides; there is one recurring point of disapproval: that rights are aversely 'individualistic'[235] In this context then, it is appropriate to examine how the American conceptualization of speech freedom has emerged as a prime example of the individualistic nature of the freedom when affirmed with such tenacity. How the individualized vision of this right is conceptually incompatible with claims of individuated harm from group defamatory speech is a task reserved for Chapter three. Here, the objective is to study the proclivity toward an individualistic interpretation of American free speech that is not only present in court rulings. We must begin the examination at the theoretical level belying the First Amendment.

1.2.2.1.The Marketplace of Ideas

Among the three major free speech doctrines, the first theory – that of the marketplace of ideas – has been an inspirational source of both the general framework and philosophical guidelines for American free speech tradition. First conjured by Justice Oliver Wendell Holmes, the essence of this theory is that ideas will compete against one another so that ultimately, the driving forces of a freewheeling market will determine the best idea (or truth). The premise is somewhat remindful of Darwinian nature's process of selection approach. The Great Dissenter as he later came to be known, Justice Holmes iterated this position in his masterful dissent in *Abrams*:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good

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[235] Jennifer Nedelsky, *Law's relations: A relational Theory of self, autonomy, and law* (New York: Oxford University Press, 2011) at 248 [Nedelsky, "Law's relations"].

desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market… ."[236]

It has since then served as a classic line for paladins against governmental intrusion on free exchange of individual expressions. Despite foreseeable criticisms of the consequences of such rationale, the theory has been woven into the fabric of First Amendment scholarship. It remains to this day one of the more dominant justificatory rationales. It is noteworthy here that Justice Holmes' version of speech theory closely espouses John Stuart Mill's liberty principle and its' ethics reasoning. Just as Mill had faith in the good nature of people to pick the truth out of fallacies, Holmes' marketplace entrusts in intellectual cogency and reasoning capacity to eliminate false ideas from the pool of competition so that eventually, the truth – or the best idea purchased by the buyer – would prevail. Thus, citizens must be able to enjoy their liberty to its fullest extent to speak up their mind and to exchange information without the paternalistic suggestions of the government that either inhibit or derange the fluid flow of differing viewpoints.

The theory is not perfect. The natural hindrances to this vision of free speech are twofold: over-inclusiveness and under-inclusiveness. It is too broad because supposedly all kinds of speech are given a place to shine on the platform of public discourse. This means that racist and obscene messages would somehow merit constitutional protection just long as their utterers claim to seek their version of truth, no matter how obnoxious or discriminatory their contents may be. This would mean that the First Amendment protection is extended to include dial-a-porn service,[237] entertainment,[238] and even graphically violent video games

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[236] *Abrams v United States*, 250 US 616 at 630 (1919) [*Abrams*].

[237] *Sable Communications v FCC*, 492 US 115 at 126-31 (1989) [*Sable Communications*] (holding that even low value speech enjoys protection).

[238] *Winters v New York*, 333 US 507 at 510 (1948) (holding that the line between the informing and the

marketed to children.[239] It is not the government's place to impose restrictions on oral debauchery exchanged between private individuals. The value in the content of speech (or absence thereof) does not justify infringement of that speech. The scope of the Holmesian free speech conception is also parochial because - as socio-economic maladies are generally formed in Capitalist societies – the voices of the financially and politically powerful are likely to drown out the claims of the less fortunate. This would result in unfair and disproportionate dissemination of opinions: the competitive machine will naturally overpower weaker voices that may be just as valuable as the dominant ones. Today's monopoly and the omnipresent coverage power of giant news companies in American news industry are good examples. In the face of surging fake news, the argument that the good-mindedness and the cognitive capacity of the audience would be able to discern the truth from falsity – *the* entire premise of the Holmesian marketplace – appears to be on a much shakier foundation. It is currently coming to a difficult realization that its basic belief is faltering in an overpopulated, online sea of self-thrusting 'truths.'[240]

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entertaining is too elusive for the protection of that basic right).

[239] *Am Amusement Machine Ass'n v Kendrick*, 244 F (3d) 572 at 577-78 (7th Cir 2001), (noting that "most of the video games in the record of this case, games that the City believes violate its ordinances, are stories" and holding that violent video games enjoy full protection under the Free Speech Clause). *cert. denied*, 534 US 994 (2001); Similarly, in more recent times, *Brown v Entertainment Merchants Association,* 564 US ___ (2011) (ruling that California's ban on sale or rental of violent video games to minors as being unconstitutional).

[240] Its' prime example is the recent American presidential election. Not only there were legitimate evidences to hint to an organized high-level Russian interference to muddle the result of the election by the means of cyberattacks in structuralized ways, there was a massive surge of erroneous so-called 'news' that were purposefully planted on online platforms and social networking sites that ultimately distorted people's perceptions of the candidates. See e.g. Tom Blackwell, "The scourge of the U.S. election: Fake news, exploding on Social media, is seeping into the mainstream", *The National Post* (4 November 2016), online. http://news.nationalpost.com/news/world/growing-fake-news-phenomenon-fuels-polarized-u-s-election; Kate Connolly et al., "Fake news: an insidious trend that's fast becoming a global problem", *The Guardian* (2 December 2016), online:. https://www.theguardian.com/media/2016/dec/02/fake-news-facebook-us-election-around-the-world (noting that this is not uniquely American phenomena but a global trend); Craig Timberg, "Russian propaganda effort helped spread 'fake news' during election, experts say", *Washington Post* (24 November 2016), online: https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.a6200c482b13 (on Russia's role in spreading fake news to influence the 2016 US Presidential election)

Accordingly, in more recent times, the marketplace theory is seeing less sunlight.[241] One main reason could be that, to repeat the parochiality argument earlier, the doctrine is too narrowly constructed, thus failing to address other types of legitimate speech forms. It is difficult to say whether fantasies and fictions, Hollywood blockbusters, art practices or even simple hyperbolic speeches contribute to the discovery of truth. As Robert Post rightly points out, the Holmesian standard applies only as long as the concerned speech is one that is "embedded in the kinds of social practices that produce truth."[242] Moreover, the truth-finding argument does not correspond well with the Supreme Court's standpoint as illustrated in *United States v. Alvarez.*[243] Furthermore, the key ingredients of the paradigm such as the free flow of information and governmental intrusion are infrequently invoked. Many groundbreaking decisions that had referred to the theory were rendered in the latter part of the twentieth century,[244] most notably during periods of war and ideological turmoil with an intrusive American government that led to the dial-a-porn decision[245] or regarding the publishing of a pamphlet speaking favorably of the Russian Bolshevik Revolution.[246] I shall return to some of the deficiencies of the marketplace theory in Chapter 4. At this stage, it

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[241] Speaking of the Marketplace of ideas doctrine, Professor Alexander Tsesis notes, "… but as an overarching theory, it is on the wane." Tsesis, "Balancing Free Speech", *supra* note 222 at 8.

[242] Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence" in Lee C Bollinger & Geoffrey R Stone, eds, *Eternally Vigilant : Free Speech in the Modern Era* (University of Chicago Press: 2002) at 153, 164 [Post, "Reconciling Theory"].

[243] *United States v Alvarez*, 567 US 709 (2012) [*Alvarez*]. In this case, the justices found unconstitutional a criminal federal state that sanctioned lying about being a recipient of a military medal, noting that "some false statements are inevitable if there is to be an open and vigorous expression of view in public and private conversation, expression the First Amendment seeks to guarantee." (*ibid* at 2544). The statute in question was the *Stolen Valor Act*, 18 USC § 704 (b). Even an intentional telling of untruth, according to this decision, would appear to fall within the protection of the First Amendment. This constitutional guarantee extends to even the most elusive types of speech such as satirical parody as demonstrated by *Hustler, supra* note 92. In deciding that the parody in question "could not reasonably have been interpreted as stating actual facts about the public figure involved the Court returned to *Sullivan*'s requirement of actual malice in order to recover for intentional infliction of emotional distress (*ibid* at 50-56).

[244] See sub-section section From Schenck to Cohen of this Chapter (1.3.1.1.).

[245] *Sable Communications*, *supra* note 237.

[246] *Abrams, supra* note 236.

suffices to underline the theory's strong individualistic proclivity while acknowledging its advantages and weaknesses as demonstrated above.

1.2.2.2.Personal Autonomy

Another notable doctrine that is widely recognized in the common parlance of the First Amendment is that of personal autonomy. This school of thought has gathered some well-known followers. Martin Redish deemed this value as the "only one true value"[247] of free speech, viewing the other models as falling into its sub-categories.[248] David A.J. Richards was another subscriber to the theory, estimating that other rationales of free speech such as the marketplace of ideas of political speech are "less powerful".[249]

The argument perceives speech as a powerful medium capable of empowering an individual who exercises it. It is an intrinsic element constituting human autonomy, assisting the individual in promoting his self-actualization through the exploration of one's own thoughts and in sharing them with other autonomous, engaged individuals. From this angle, speech plays a vital role in *letting out* one's expression. It emphasizes the dignitary interest that free speech gifts every human being with. The Supreme Court has noted, that the goal of freedom of expression is to "assure self-fulfillment for each individual."[250]

However noble these extenuations may be, they repetitively run into the same enigma of other speech paradigms: the thought of achieving personal autonomy and self-fulfillment is

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[247] Redish, "Value", *supra* note 232 at 593.

[248] *Ibid* at 615-16, 618.

[249] David AJ Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" (1974) 123 UPA L Rev 45 at 52.

[250] *Police Dept of Chi v Mosely*, 408 US 92 at 96 (1972).

not sufficiently commodious to provide the kind of constitutional assurance to other types of speech. For instance, self-autonomy does not explain why freedom of speech may be curtailed in free speech conflicts in more public contexts such as breach of peace, group defamation or incitement of violence. It fails to provide adequate reasoning when confronted with circumstances in which a balancing act is required between individual speech freedom and fundamental social values, such as anti-discrimination or the general well-being of the community. Surely, speech for the fuller realization of the individual self is crucial. But it could very well be argued that speech's value in galvanizing public discourse, the ability to compete, share, compare, and argue with other autonomous beings is just as important. Social communication and engagement in political and cultural human activities expand the peripheries of that value. Contrary to Edward Baker who saw "the value of speech conduct to the individual"[251] and "not as a means to a collective good,"[252] the value in speech may be found in serving not only individual causes but broader societal projects too.

A fine example illustrating the First amendment's individualistic valuing of free speech over the common interests of a collective is *44 Liquormart, Inc. v. Rhode Island.*[253] In this case, Rhode Island had asserted that the social ills associated with the consumption of alcohol justified restrictions on alcohol advertising.[254] The Supreme Court struck down the Rhode Island prohibition on price advertising, noting that Rhode Island could always directly regulate the sale of alcohol but that "a state legislature does not have the broad discretion to suppress truthful, non-misleading information for the paternalistic purposes…"[255] As

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[251] Edward Baker, "Scope of the First Amendment Freedom of Speech" (1978) 25 UCLA L Rev 964 at 966 [Baker, "Scope of Speech"]

[252] *Ibid*.

[253] *44 Liquormart Inc v Rhode Island,* 517 US 484 (1996).

[254] *Ibid* at 502-08

[255] *Ibid* at 510.

important as it was in terms of judicial reversion from a similar precedent,[256] the court vigorously rejected legal paternalism over speech, distinguishing it from conduct, even at the expense of arguably important community interests (discouraging alcohol consumption). The individualistic favoritism was recently reaffirmed in the controversial *Masterpiece Cakeshop* case.[257] To many, the case was a full show-down between an individual's right to refuse service that would violate his religious conscience and free expression and a homosexual couple's right to be treated as equal members of society protected under the law. The Court nevertheless ruled in favor of the defendant's individual right to self-expression, stressing the nature of the defendant's required input of particular artistic and expressive commitment to commissioned 'work' and the State Commission's hostility toward the defendant that disregarded their religious neutrality obligation.

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All in all, the two leading theories of free speech share the same liberal individualistic bed. In hindsight, they are consonant and self-explanatory: The self-realization theory represents the popular liberal creed that advocates for one to be treated as an end in and of itself while the marketplace provides its' cocoon, the kind of unregulated habitat for expressions to have exposure. This in turn begs an important question as to the proper would-be role on the part of the State. Recall how I began my introductory remarks to this chapter with regard to the conceptual divergence in terms of the place of the State in speech regulation. In this regard, the abovementioned view would dictate that the State, as the

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[256] In *Posadas de Puerto Rico Association v Tourism Company*, 478 US 328 (1986) (the Supreme Court sustaining Puerto Rico's ban on casino advertising on the ground that speech that does not benefit the community)

[257] *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, 584 US ___ (2018).

impartial arbitrator, be obliged to provide the same level of basic tolerance to repugnant speech as it owes to uplifting expression. This is where liberalism's individualistic interpretation of free speech becomes demonstrably incompatible with any leaning toward curbing defamatory, group-targeting speech. The content neutrality principle would disallow the State from interfering with the free exercise of speech. Universal respect for the autonomous choices of those who speak and purchase those expressions would have to be upheld. This, is the liberal dilemma of American free speech.

1.2.3. American Exceptionalism: Free Speech as a *de facto* Preferred Freedom

As indicated above, the First Amendment's sophisticated elaborations on what are now considered the classic free speech paradigms[258] has effectively made it a kind of a mecca to any in-depth conceptual discussion on freedom of expression. While abstract ideals alone do not breathe life into a constitutional right as rudimentary as free speech, it is nevertheless important to look into the judicial interpretative approach to the freedom. In this section, I make two observations suggesting why the American free speech enjoys such a particular standing in American constitutional life. I first refer to the originalist conception of free speech that abides by a quasi-absolutist (or at the very least strongly favored) interpretation of the First Amendment. Secondly, the historical attitude of pervasive distrust toward governmental intrusion on the fundamental freedom has forged a confrontational perception of free speech.

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[258] Emerson, *supra* note 218.

1.2.3.1.An Almost Absolute Freedom

If there is one word befitting the place free speech occupies in the echelon of American constitutional life, it is that of exceptionalism. Indeed, speech freedom enjoys an unmatched proclivity in American law. In particular, the extraordinary degree of protection granted to political speech[259] may appear almost outlandish to even its closest Western allies. In fact, among major democratic nations, America remains the sole country that has yet to adopt a comprehensive legal regime to suppress hateful speech. For instance, to draw one quick comparison with America's closest neighboring country, Canada has demonstrated that it is not hesitant to regulate group targeting speech if it infringes on other fundamental *Charter* values grounded on equality and multiculturalism.[260] A comparative outlook across the Atlantic reveals that numerous European positions generally permit some degree of reasonable limitation to speech freedom by recognizing the vulnerability of minority groups who may easily be antagonized or scapegoated by public verbal attacks. For example, Germany, on top their pre-existing speech regulations founded upon the safeguarding of human dignity, has recently passed the Netzwerkdurchsetzungsgesets (NetDG), that requires social media sites to remove hate speech, fake news, and illegal materials.[261] France too is in

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[259] Political speech and its relation to the First Amendment interpretation is a whole different subject that merits its own categorization. But as Justice Black stated, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs." *Mills v State of Alabama*, 384 US 214 (1966). See also, *Brown v Hartlage*, 456 US45 (1982). Financial contribution as a form of political speech has always been a thorny issue with the lingering of corruption or exchange of favors by money that would essentially create quid pro quo type of election-deciding practices. These particular challenges tied to political contributions and campaign finances prompted a number of cases, including *Buckley v Valeo*, 424 US 1 (1976) which has been the classic reference dealing with money as political speech [Buckley]]. Following this line of reasoning, see also, *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990); *McConnell v Federal Elections Commission*, 540 US 93 (2003). But recently the rationales in previous rulings have been undermined by more modern cases, notably with *Citizens United v Federal Election Commission*, 558 US 310 (2010) [*Citizens United*] and *McCutcheon v FEC*, 572 US 185 (2014). In contrast, Canada broke sharply from the libertarian approach of the United States (with the *Citizens United* case in particular) in *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827 in which the Court emphasized on conducting a fair election based on equal political expression.

[260] On this point, see sub-section The Two Harms in *Keegstra* of Chapter 2 (2.2.2.1.) for a detailed discussion.

[261] The law, passed in June 2017, came into force in October 2017, and internet sites were given until the end of

the middle of a debate on a legislation project concerning the increasing social ill of false news or propaganda.[262] In contrast, American courts have exercised strict constitutional control on legislation interfering with speech, not hesitating to strike down acts infringing the freedom except in very few limited instances.

One natural question that arises from this peculiar stance is that of the absolute character of free speech. This question has, in its subtlety, been answered by an interpretation in strong favor of free speech. The harbinger of the jurisprudential direction is located in the structuration of the First Amendment itself. It reads in part, "the Congress shall pass no law … abridging the freedom of speech."[263] Note that the said Amendment does not offer any distinction nor elaborate on any possible legal circumstances that would trigger the passage of a law by the legislative body limiting the freedoms mentioned therein. The Amendment flatly forbids Congress from taking any actions placing a cap on the rudimentary freedoms.

Some former Supreme Court Justices, adhering to the more original intent-oriented interpretation of the First Amendment, believed that "no law" literally meant "no law" at all.

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last year to adjust themselves to the law. Social networking sites would have 24 hours to take action to remove illegal materials and up to a week for more sensitive, complex cases. The failure to do so could result in a fine of up to 50 million euros.

[262] There has been ongoing discussion by the French President E. Macron, of proposition of a new law before the end of 2018 against the spreading of fake news during election seasons. Although now in its conceptual stage, one of the legal course of actions opened to interested party would be: "En cas de propagation d'une fause nouvelle, il sera possible de saisir le juge à travers une nouvelle action en référé permettant le cas échéant de supprimer le contenu mis en cause, de déréférencer le site, de fermer le compte utilisateur concerné, voire de bloquer l'accès au site Internet. » Le Monde avec AFP et Reuters, «Macron veut une loi contre les fausses informations en période électorale », *LeMonde* (3 January 2018), online: http://www.lemonde.fr/actualite-medias/article/2018/01/03/emmanuel-macron-souhaite-une-loi-pour-lutter-contre-la-diffusion-de-fausses-informations-pendant-les-campagnes-electorales_5237279_3236.html

[263] The First Amendment of the U.S. Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Contra* Robert H Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47:1 Indiana LJ 1. Bork raised some very important points as to the quasi-absoluteness of free speech and to what extent its constitutional protection should apply. In particular, he observed that:

> "… the men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness." (*ibid* at 22).

Justice Douglas, and in particular, Justice Black, were *the* practitioners of free speech absolutism. Obviously, Justices Douglas and Black had served much of their tenures on the bench together but my reason for invoking these two is that it was at their bar that *Beauharnais*, the only case before the Supreme Court to be directly treated as involving racial group libel, was decided. The period also appears to coincide with the Justices' heightened sense of vigilance against speech infringement emerging in the aftermath of an American history tainted with the ideological demonization and silencing of communists or other forms of expressive activities easily considered as subversive. In his dissenting opinion in *Beauharnais*, Justice Douglas hence found that the First Amendment rights are "couched in absolute terms."[264] Justice Black too, dissenting, opined:

"My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country, that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern."[265]

It must be noted that *Beauharnais* was hardly the only decision where Justice Black, who had inherited the judicial philosophy of Holmes, Hand, and Brandeis, left his distinctive mark as a staunch free speech absolutist. In *Konisberg*, he tenaciously defended free speech as a bedrock principle that cannot be compromised against any ostensible excuses for safeguarding government interests.[266] In *re Anastaplo*, he expressed the view that it was the

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[264] For instance, Justice Douglas dissented in *Beauharnais*, finding that the First Amendment rights are "couched in absolute terms." *Beauharnais*, *supra* note 4 at 285.

[265] *Ibid* at 270. (Black J dissenting).

[266] Writing for the dissent in *Konisberg v State Bar of California*, 366 US 36 (1961), he explicitly relayed this position, admitting that, "I believe that the First Amendment's unequivocal command that there shall be no abridgment of free speech and assembly knows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done."

Court's duty "to enforce the First Amendment to the full extent of its express and unequivocal terms."[267] Thus, it was wholly justifiable or even demanded, that a particular degree of repugnance toward any notion of balancing the freedom be on full display. His insistence on exhibiting his *mécontentement* was remarkable, even when the outcome of ruling was ultimately in alignment with his First Amendment position, as was in *Bates v. Little Rock*.[268] His outright hostility toward the mere possibility of encroachment on free speech continued a year later in the *Communist Party* case where he complained without withholding his remorse:

"I see no possible way to escape the fateful consequences of a return to the era [of the Alien and Sedition Acts] in which all government critics had to face the probability of being sent to jail except for this Court to abandon what I consider to be the dangerous constitutional doctrine of "balancing" to which the Court is at present adhering."[269]

As such, he referred to balancing act as a "constitution-ignoring-and-destroying technique."[270] And when the majority opinion deviated from his own loyalty to free speech, Justice Black did not flinch but caved further in his embrace of the absolutist position while lamenting what he saw as willful ignorance of lessons in not so distant history, as demonstrated by his concerned dissent in *Carlson v. Landon.*[271] Similarly, in *Barenblatt v.*

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[267] *re Anastaplo*, 366 US 82 at 97-98 (1960) (Black J dissenting).
[268] *Bates v Little Rock*, 361 US 516 at 528 (1960). Black J noted, "First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government." The case involved the weighing in of the demanding from the state requiring disclosure of NAACP membership versus the potential prejudice that disclosure could bring to the plaintiff."
[269] *Communist Party v SACB*, 367 US 1 at 164 (1956).
[270] *Time Inc v Hill*, 385 US 374 at 399 (1967) (concurring opinion) [*Hill*].
[271] *Carlson v Landon*, 342 US 524 at 555 (1952). (noting, "My belief is that we must have freedom of speech, press and religion for all or we may eventually have none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged.").

United States, he sternly warned:

"History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time."[272]

In a less notorious case,[273] he even went as far as to allude to John Bunyan's persecution and hardship and his gift to the Christian world, 'The Pilgrim's Progress,' during his twelve year-imprisonment sentenced by Lord Chief Justice Hale.

The absolutist view of free speech has waned away to some extent since those days. In fact, the position has been somewhat refuted since the *Chaplinsky* case,[274] with the Court narrating a number of exceptional instances in which speech would not fall under the protective ambit of the First Amendment. Still, as we shall discover in the following section, U.S. courts have been adamant if not extremely reticent to restrain speech activity, an attitude that was reinforced through a number of landmark jurisprudential developments that resulted in the denouncement of overbroad laws countering individual expressions. *Bref*, though the absolute character of free speech may have eroded, it is unquestionable that free speech

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[272] *Barenblatt v United States*, 360 US 109 at 150-51 (1959).

[273] *Uphaus v Wyman*, 364 US 388 at 389 (1960). The defendant in this case was in imprisonment while being investigated by the Attorney General of New Hampshire for subversion – hence the comparison to John Bunyan.

[274] *Chaplinsky v New Hampshire*, 315 US 568 at 572 (1942) [*Chaplinsky*] "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. … It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such 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."

enjoys an unequivocal predilection in American constitutional references. Free speech was, and continues to be, the first of the American freedoms.

1.2.3.2.American Free Speech as a Product of History

If this originalist interpretation of the First Amendment has crowned free speech as the favorite son among the liberties consecrated in the American Constitution, this unique propensity is to a great extent owed to the historical cultivation of overzealous skepticism against government[275] - a defining trait of American *jurisculture*.[276] From the conception of the nation to post-colonial era to modern times, there has been a simmering attitude of suspicion against governmental intrusion upon the fundamental liberties of its citizens.[277] *Ab ovo*, free speech was the people's point of gathering. It first entails free speech as a fighting instrument for the people against oppression of tyrannical colonial government backed by the British monarchy since the 1776 War of Independence. It was the embodiment of unity, the assembling ground, the means to call for a righteous revolution against an oppressive regime. Freedom of speech, at the time, literally signified the fundamental right to speak up against dictatorial rulers at the risk of severe repercussions if not losing one's life. During and after the Cold War era, this would transpire into a shield for diverging perspectives against the

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[275] In the words of Professor Krotoszynsky Jr., "our tradition of pervasive distrust of government." Ronald J Krotoszynsky, Jr., "Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment" (2015) 76 Ohio St LJ 659 at 670.

[276] On the notion of jurisculture, see Legrand, *supra* note 8 at 1-13. ("deep or thick understanding of a legal order" at 5). This involves seeing law as a "fragment of culture," an "outrageous and heterogenous collage" John Law*, A Sociology of Monsters: Essays on Power, Technology and Domination* (London: Routledge, 1991) at 18; Sacco termed it as "la dimension muette." Rodolfo Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris: Economica, 1991) at 106

[277] Professor Michel Rosenfeld introduces four distinct timeframes in American history to mark the varying functions and dominant character of free speech in America: the early period leading up to the War of Independence in 1776; the fight against the "wrath of the majority" opinions; the 1950's – 80's that is marked with conformity and consensus on social and ideological values; and the modern era, which is characterized by the rights talk and diversification of discourses. Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" (2003) 24 Cardozo L Rev 1523 at 1529-1532.

tyranny of the majority,[278] during a time where being found with the alternative philosophical side was an invitation to be shunned from the general society. In the 1980s up to this day, free speech is assuming a controversial place, a fighting vehicle in the era of rights discourse to cause political upsets at the most foundational level of society, to denounce racism and promote egalitarianism from the movie industry to the political arena.

When considering the contentious, defiant roles free speech assumed in American history, one may understand why this concept of free speech, and with it the manner and purpose of its evolution, was later suitably referred to as the "clash model."[279] The freedom is an unrestricted good *of* and *for* the people and its deprivation must be accompanied by a justification that satisfies First Amendment scrutiny. It ensues that a curtailing of free speech is not viewed as the mere violation of a constitutional freedom, but triggers a profound chord of vexation in the cultural minds of America. It is more than a criminality: it is the dispossession of a public good. Free speech has thus not only stuck as a permanent fixture in American constitutional life, but saw its stature extend to the transcendental cultural domains that is nothing short of American nativist identity. Put simply, to curb speech is un-American. This confrontational model has had a determinative touch on the projection of the cultural image of free speech. After all, the term means quite just that: *free* speech. It should come as no surprise that the particular formulation 'free speech' has outlasted the tides of time when virtually all other legal references in Western constitutional systems have settled on the more general wording 'freedom of expression.'

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[278] JS Mill first warned of this, saying, "… it leaves fewer means of escape, penetrating much more deeply into the details of lie, and enslaving the soul-itself… there needs protection also against the tyranny of the prevailing opinion and feeling…". John Stuart Mill*, On Liberty*, ed by D Bromwich & G Kateb (New Haven: Yale University Press, 2003) at 77 [*Mill*].

[279] *Dagenais*, *supra* note 80 at 839.

1.3.Jurisprudential Struggles with Group Vilifying Speech and Collective Harm

Outside the domains of abstract theories or conceptual frameworks, steps displaying a regulatory attitude to speech freedom have been, for the most part, met with a strong reluctance from judicial institutions. Through a meticulously developed set of scrutiny tests, American courts have nurtured both abstentionist and protectionist positions in the constitutional weighing of speech restrictions. This, of course, should not catch anyone off guard given America's legal amicability to free speech as explicated in the previous section. The result has been a reductionist interpretation of harm, a view that is wholly inadequate to attend to the concerns of sensibility harms purported to varied groups of peoples by group vilifying utterances.

1.3.1. From *Schenck* to *Cohen* to *Kessler*: Narrow Doors to Speech Restrictions

Beginning in the early twentieth century, the First Amendment jurisprudence has developed a series of elaborate rules that satisfy the necessary constitutional bar when attempting to restrain speech. Given their aged rulings, it could be validly argued that their mode of applicability may be outdated to adequately address the rising challenges in the field. This concern seems particularly urgent with regard to the complexities resulting from technological advancement, means of mass communication, and most problematically, the continuously self-evolving uses of the Internet's social networks. However, despite these well-founded concerns, the principles excavated from these cases have retained much of their initial influence in addressing modern constitutional challenges related to the treatment of hate speech issues in American law.

1.3.1.1. From Schenck[280] to Cohen[281]

The early years of free speech jurisprudence was marked by what could be easily viewed as violations of today's democratic standards. This is understandable when considering the extraordinary socio-political circumstances of a nation engaged in wars abroad at various intervals or social upheavals in the last century. Nevertheless, the decisions provided clear directions requiring sufficient basis to meet the constitutional bar when suppressing speech activity. *Schenck v. United States* introduced one such 'test'. In *Schenck*, the Supreme Court unanimously upheld the conviction of the defendant for violating the *Espionage Act* of 1917 for mailing thousands of pamphlets to drafted soldiers in which the defendant accused the government of having no right to send American citizens to fight war abroad. The Court embraced a contextual approach by evaluating whether the words in the leaflets were used in such circumstances and nature as to create a "clear and present danger."[282] The reasoning in *Schenck* was later extended to *Abrams*,[283] in which defendants' distribution of pamphlets denouncing the government, capitalism and military intervention overseas was judged as an expression that which Congress had reserved the right to forbid. The "clear and present danger" would eventually be somewhat discarded in *Gitlow v. New York*,[284] where the Supreme Court upheld a New York state statute that struck down a publication for its *tendency* to create danger to the public (in the case, a manifesto encouraged the readers to overthrow the government) even if it did not cause any immediate clear and present danger.

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[280] *Schenck v United States*, 249 US 47 (1919) [*Schenck*].

[281] *Cohen*, *supra* note 92.

[282] *Schenck*, *supra* note 280 at 52.

[283] *Abrams, supra* note 236. Interestingly, the original mastermind of the "clear and present danger," Justice Oliver W. Holmes dissented from the majority opinion's upholding of the defendants' conviction.

[284] *Gitlow v New York*, 268 US 652 (1925).

Whitney v. California[285] would expand on this 'bad or dangerous tendency' criteria, deeming it sufficient ground for denying the defendant's expression the constitutional protection provided by the First Amendment. Although these cases occurred in unstable times marked by America's extraordinary involvement in major international conflicts, it nevertheless illustrates that the courts were already laying the groundwork for future free speech problematics. In fact, in the first half of twentieth century, the U.S. Supreme Court was creating the kind of constitutional framework for future First Amendment conflicts by setting a set of peremptory rules in stone (with regard to political dissent in particular).

This adherence to stringent constitutional scrutiny was reinforced with even more rigid conditions when public discontentment over racial inequality spilled over into the streets in the latter half of the American century. In a time of profound social fractures and unrest, one timely decision concerned the question regarding the expressive display of historically racist expression. In *Brandenburg v. Ohio*,[286] it was held that regardless of how inflammatory speech may be, it could not be justifiably subdued unless it is "directed at inciting or producing imminent lawless action."[287] Pronouncing *per curiam*, the decision effectively discredited *Schenck* by condensing the speech suppression test even more narrowly. Then came *Cohen v. California,*[288] further tightening access to speech restriction in a case that involved an individual wearing a jacket marked with "Fuck the draft," a conduct considered offensive enough to earn the wearer a criminal conviction under a California statute for disturbing public peace. The Supreme Court quashed the conviction, judging that the expression worn by the defendant did not incite nor threaten to commit any acts of violence

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[285] *Whitney v California*, 274 US 357 (1927).

[286] *Brandenburg, supra* note 92.

[287] *Ibid* at 447.

[288] *Cohen, supra* note 92.

nor was it a part of the list of "fighting words" enunciated in *Chaplinsky*.[289] Operating a distinction between speech and conduct in the involved question, the Court reemphasized the idealism of the marketplace of ideas in ensuring diversity of opinion without making value-judgments. The presence of dissenting or often uncivil words, in the Court's esteem, was "not a sign of weakness but of strength,"[290] and "one man's vulgarity (is) another man's lyric."[291] Despite the concern raised with regard to the onlookers' offended sensibilities as a captive audience, that argument did not constitute a compelling enough basis to prohibit the protester's freedom of expression in the eyes of the Court.

R.A.V. v. City of St. Paul[292] elevated the bar for speech inhibition by reaffirming the two pillar principles of the First Amendment: content neutrality and view-point selectivity. In declaring unconstitutional a local ordinance prohibiting speech that "arouses anger, alarm or resentment in others … on the basis of race, color, creed, religion or gender",[293] Justice Scalia delivered a scathing rebuke for operating "special prohibitions on those speakers who express their views on disfavored subjects."[294] The ordinance had to pack a subsequent punch for exercising selectivity for having "proscribed fighting words of whatever manner"[295] (as opposed to the "particularly intolerable mode of expressing whatever idea the speaker wishes to convey) that can result in "handicap(ing) the expression of particular ideas."[296] One modern hate speech case involving quite similar circumstantial elements (cross burning) to

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[289] See footnote274.

[290] *Cohen, supra* note 92 at 25.

[291] *Ibid*.

[292] *RAV v City of St Paul,* 505 US 377 (1992) [*RAV*].

[293] *St Paul Bias-Motivated Crime Ordinance*, St Paul Minn Legis Code (1990), § 292.02.

[294] *RAV*, *supra* note 292 at 391.

[295] *Ibid* at 393-94.

[296] *Ibid* at 394.

R.A.V. was *Virginia v. Black.*[297] In this case, the Supreme Court toned down the tenacity demonstrated in *R.A.V.* by partially upholding that a state could enforce a content-based restriction on true threats if the expressive activity was tainted with intent to intimidate.[298] The Supreme Court however did strike down part of the Virginia statute's *prima faci*e evidence provision of intent to intimidate because the Court saw it as a violation of the First Amendment which protects symbolic speech such as a statement of ideology or a symbol of group solidarity.[299]

1.3.1.2. Changing Times, Unchanging First Amendment: *Collin*[300] and *Kessler*[301]

The above-cited key rulings have largely defined the American law's dealing with improper speech ranging from political dissents, to expressions of incivility, to racially charged symbolic speech. But of all these important cases that have put color into the judicial landscape of the First Amendment's jurisprudential relationship to group hate/vilifying speech, one particular case stands out: The judicial saga surrounding the village of Skokie. The *Collin* decision offers images simply inconceivable in Canadian or European freedom of expression constitutionalism. The national controversy that unfolded surrounding the Village of Skokie, in my opinion, illustrates the starkest contrast to America's constitutional neighbors.

The incident in Skokie involved the National Socialist Party of America's (NSPA) threat

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[297] *Black, supra* note 78.

[298] Like in the *RAV* case, the *Black* case involved the violation of a state's statute prohibiting burning of cross as a *prima facie* evidence of intent to intimidate a person or group.

[299] *Ibid* at 366-67.

[300] *Collin, supra* note 76.

[301] *Kessler, supra* note 79.

to publicly march wearing SS uniforms in a Chicago suburb that was predominantly inhabited by Jewish population, many of whom were survivors of the Nazi atrocities. Combined with this were other tactics of visual intimidation deployed by the organized protesters who swarmed the entire Northshore area of Chicago with thousands of leaflets that read in part "We Are Coming" with degrading pictures of Swastika signs chocking a stereotype Jew. Setting aside all the circumstantial intricacy and upstaged political points used to garner national outrage, the constitutional challenge brought forth in *Collins* was never frontally addressed because the Supreme Court denied certiorari of the distressed Village of Skokie. Rather, nobody would have predicted that a similar 'march' would occur in Charlottesville, Virginia, thirty-nine years later. In 2017, one organizer of the right-wing rally had sued the City of Charlottesville and the city council manager on First Amendment grounds for unilaterally trying to relocate the originally requested rally site. The U.S. District Court for the Western District of Virginia granted an injunction that authorized the organized rally to proceed.[302] Among cited reasons by the Court was the City of Charlottesville's viewpoint that discriminated against political speech. The march would go on to take place on August 11th and 12th, 2017 as planned, echoing chants of "Blood and Soil," lots of burnt tiki torches, one dead woman along with dozens if not hundreds injured in some way, and the moral equivocation of White Supremacists with their ANTIFA counter protesters.

When historically contextualized, the two incidents are obviously different. The former was a march that was purposefully tailored to hit a specific area with a large number of Jewish inhabitants with incurable memories of the Holocaust; the latter was initially triggered by a series of nation-wide confederate statutes removal operations in various states. However, the First Amendment grounds that were invoked both by Collin of NSPA in 1978 and Kessler

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[302] *Ibid.*

of 'Unite The Right' rally in 2017, and the subsequent court authorizations protecting Nazi's freedom to political speech had hardly changed. The requirement of viewpoint neutrality is still a principle of force in First Amendment cases, as have been illustrated in *Rosenberger*,[303] and more recently in *Christian Legal Society v. Martinez*.[304] Content-based speech regulation also remains an automatic generator to rigorous First Amendment evaluation. This position has been reaffirmed in several cases concerning obscene expression in the early 2000's.[305] Also noteworthy, in *Republican Party of Minnesota v. White*,[306] the Supreme Court ruled that 'the announce clause' prohibited speech based on its content and placed a significant and unacceptable burden on political speech concerning candidates running for public office. In a case as recent as 2015, *Reed et al. v. Town of Gilbert*,[307] a municipality's sign code provision was deemed content-based and thus unconstitutional for restricting the ability to inform the public about a non-profit group assembly.

Despite the change in time, free speech in America appears to maintain its original structure even at the risk of being called out as a betrayal to the progress that has been achieved over the last few decades. The First Amendment does not flinch at potential risks of sensitivity harms posed by certain types of community-debasing expressions to the great melting pot. It does not recognize malleability in its scope nor does it leave any overture for reasonable adjustment. Instead, free speech – political expression in particular – knows no

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[303] *Rosenberger v University of Virginia*, 515 US 819 (1995)

[304] *Christian Legal Society v Martinez,* 561 US 661 (2010). In this decision, the Court ruled that a college's all-comers policy was a viewpoint-neutral condition for access to student organization forum. The Court thus validated a less strict scrutiny of speech test in limited public forum. But this also would appear to imply that younger students, though possessing First Amendment rights to political speech, do not enjoy the same degree of unrestrained liberty. See e.g. *Morse et al v Frederick*, 551 US 393 (2007). The Court in this case had ruled that it was not unconstitutional for school officials to prohibit students' speech promoting the use of illegal drugs because it undermined the school's communal mission to discourage drug consumption.

[305] See *United States v Playboy Entertainment Group Inc*, 529 US 803 (2000); *Ashcroft v Free Speech Coalition*, 535 US 234 (2002); *Ashcroft v ACLU*, 542 US 656 (2004).

[306] *Republican Party of Minnesota v* White, 536 US 765 (2002).

[307] *Reed et al v Town of Gilbert*, 576 US ___ (2015).

concession. For those feeling left *uncomfortable*, they need only "avert their eyes."[308]

1.3.2. Looking back at *Beauharnais*: Racial Group Defamation as Unprotected Speech

Of a handful of group defamation cases involving discriminatory utterances, only one case reached the consideration of the United States Supreme Court. In *Beauharnais*,[309] the constitutionality of group libel law was weighed by the high justices. The decision is most astonishing in that it constituted a principled affirmation that racial group libel does not enjoy First Amendment protection. One of the reasons as to why *Beauharnais* sparked such heated debate in the following years was because it was a sharply divided decision. When met with claims from the defendant that the libel law infringed his First and Fourteenth amendment rights, the Supreme Court affirmed the constitutionality of the contested statute by a five to four split.

The case involved a certain Joseph Beauharnais, a white supremacist and president of the White Circle League based in Chicago. On January 7th, 1950, Beauharnais, along with volunteers, distributed leaflets to people in downtown Chicago. He oversaw the manufacturing, distribution, and organization of the activity. The leaflets were an imploration to the city officials and city mayor "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro – through the exercise of the Police Power."[310] It also encouraged the readers to come as one and join his organization and to resist then-president Truman's civil rights actions as they are trying to "amalgamate the black and white races with the object of mongrelizing the white race"[311]. It

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[308] *Cohen, supra* note 92 at 21.
[309] *Beauharnais*, *supra* note 4.
[310] *Ibid* at 276
[311] *Ibid.*

ended with a dark warning, "if persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions … rapes, robberies, knives, guns and marijuana of the negro, surely will."[312] The name Beauharnais was unmistakably marked in the end of the text along with a fill-in application to become a member of the White Circle League.

Shortly afterwards, Beauharnais was arrested under the application of a group libel law in the Illinois penal code which read:

"It shall be unlawful for any person, firm, or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama, or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots …".[313]

After having been found guilty of publishing and distributing the leaflet in question, Beauharnais was convicted and fined a sum of $200. Appeal ensued and the defendant opined that the criminal libel law under which he was convicted violated his free speech. Furthermore, invoking the Due Process Clause, he argued that the group libel law lacked clarity.

The significance of *Beauharnais* resides in the court's decision to exclude group libel from the First amendment's protection. In fact, libel has been classified among other unprotected forms of speech. *Chaplinsky*[314] first listed it clearly:

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[312] *Ibid* at 252

[313] Ill Crim Code, § 224a, Ill Rev State (1949), c.38, Div 1 at § 471.

[314] *Chaplinsky, supra* note 274.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. … It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such 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."[315]

Justice Frankfurter at once recognized such speech lacked any moral or social grounds on which the First amendment rests. The "clear and present danger" in the *Schenck*[316] test did not deter him from determining that racist group defamatory utterances lied outside the scope of legal protection. A speech could be rightfully suppressed if there's proof of it inviting clear and present danger. He deemed it one of the "substantive evils that Congress has a right to prevent,"[317] noting that,

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary … to consider the issue behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."[318]

Frankfurter simply bypassed the test – to the dismay of Justice Jackson[319] - to qualify Beauharnais's dissemination of racist leaflets as non-speech or at least speech of so low of value. The issue of the vagueness of the statute did not appear to dissuade Frankfurter, as it

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315 *Ibid* at 571-72.

316 *Schenck, supra* note 280.

317 *Ibid* at 48.

318 *Beauharnais, supra* note 44 at 266.

319 *Ibid* at 302-05 Justice Jackson had dissented partly because the trial judge had offered the defendant no opportunity to prove a defense (fair comment, truth, privilege).

did his fellow Justice Reed[320], from his course. In Frankfurter's eyes, the criminal statute in question was clear enough. He states that opinion clearly by saying:

"The statute before us is not a catchall enactment left at large by the State court which applied it... It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage … and State court construction which determines its meaning for us."[321]

The strongest dissent was Justice Black's. He was the only Justice to view Beauharnais's actions as forms of political speech and thus merited complete protection under the First amendment.[322]

It would likely appear that a case with the kind of outcome reached in *Beauharnais* be treated as an extremophile in a judicial environment that strives to fiercely guard the right to free speech. Indeed, some of the same bloom has been coming off that rose for a while now, to the point of advancing that the ruling in *Beauharnais* has been effectively overturned by subsequent defamation cases. *New York Times Co. v. Sullivan*[323] and its progeny[324] are often cited to support the claim. But these objections ignore the particular context of *Sullivan*, which was a case that set strict limits to actionable cause that could be brought by public officials against their ordinary, muckraking citizen-critics. This is by no means an observation disregarding the momentous victory that *Sullivan* represented to fundamental

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[320] *Ibid* at 277-84

[321] *Ibid* at 253.

[322] *Ibid* at 267-75

[323] *Sullivan, supra* note 77.

[324] *Gertz, supra* note 102; *Rosenbloom v Metromedia*, 403 US 29 (1971); *Hill, supra* note 270.

civil rights. Credits must be given where it is due. Beyond peradventure, *Sullivan* is widely considered as a landmark decision with such grandeur that it has placed free speech "at the apex of democratic government."[325] With a stroke of the pen, reputation, which was historically given an edge in defamation suits to protect the "good men fall pretty to foul rumor",[326] was subjected to the constitutional test, with free speech as its' favored son. But as contextual disparities dictate, the *Sullivan* decision must be viewed as a case that limited the power of government officials to abuse seditious libel law to silence their critics. It differs from *Beauharnais* on a rudimentary level, as it involved no such relationship between the parties. Furthermore, the court in *Sullivan* acknowledged that speeches on political platform may become heated and the difficulty in verifying their veracity as they sprung up in daily aspects of life. In that sense, the court was right in being more stringent by requiring actual malice, meaning that the speaker had to utter the defamatory words with "reckless disregard".[327]

It may appear that libel suits have become even harder to win when the law extended to public *figures* (from public *officials*) like celebrities who do not necessarily occupy governmental positions.[328] This stretched to even unintentional and yet unfortunate mention in events covered by news media.[329] Be that as it may, the defamatory leaflets in *Beauharnais* were primordially containing racist speech, not political speech. Racist speech does not seek to inform the public nor offer critical perspectives to hold the powerful accountable like the

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[325] Russell L Weaver & David F Partlett, "Defamation, Free Speech, and Democratic Governance" (2005) 50 NY LS Rev 57 at 58.

[326] Norman L Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (University of North Carolina Press, 1986) at 251.

[327] *Sullivan, supra* note 77 at 280

[328] *Curtis Publishing, supra* note 110.

[329] *Hill*, *supra* note 270.

journalists in *Sullivan*. Instead, racially prejudiced speech is spoken with the objective of purposefully degrading its victims. Even *Ferber v. New York*[330], a case involving an obscenity issue, expressly pointed out that *Sullivan* should be regarded as but an exception to *Beauharnais*[331]. Moreover, other subsequent case such as *Roth v. United States*[332] only fortified the rationales of *Beauharnais*. In another case, the court cited *Beauharnais* with favor while also standing by the ruling in *Sullivan*, suggesting that the latter did not undermine the former.[333] *Beauharnais* has not only avoided falling from grace in subsequent jurisprudential elongation, contrary to what its' critics may have suggested, but has found its position reinforced.

The *Ferber* case is especially captivating because it not only follows reasoning similar to that in *Beauharnais* (that libel is unprotected speech), it goes even further to propose a legitimate content-based speech restriction. This is striking, knowing that the content neutrality approach has been a defining methodology of American courts when evaluating speech limitations. *Ferber's* suggestion would thus constitute a tergiversation to the long-standing Holmesian principle of cherry-picking a particular point of view. *Ferber* observed that obscenity, like racial defamation, is an "evil to be restricted so overwhelmingly" that, it "outweighs the expressive interests… ."[334]

One particular case in more modern times concerning racial or ethnic disparagement arose last year in *Matal v. Tam*.[335] Though this case did not involve defamatory words *per se*,

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[330] *Ferber v New York,* 458 US 747 (1982) [*Ferber*].

[331] *Ibid* at 763

[332] *Roth v United States*, 354 US 476 (1957) (utterly without redeeming social value). See also *Miller, supra* note 250 (taken as a whole, lacks serious literary, artistic, political, or scientific value).

[333] *Garrison v Louisiana,* 379 US 64 at 70 (1964).

[334] *Ferber, supra* note 330 at 763-64.

[335] *Matal v Tam*, 582 US __ (2017) [*Tam*].

it nevertheless peaks our interest because disparaging expressions based on racial or ethnic characteristics understood connotatively through social standards of common sense do coincide with racial or ethnic group defamatory expressions that are often demeaning and degrading toward groups of people based on precisely those traits. In the *Tam* case, it was the term "Slants"[336] that was at the heart of the issue, a term that was repetitively refused by the U.S. Trademark Office for registration as the band's name at the request of Simon Tam and his band who had embraced it as their "badge of pride." The Office had invoked the Disparagement Clause of the Lanham Act of 1946 in support of their refusal, which prohibits trademark names that contain "immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[337] When the case arrived before the Supreme Court, the Trademark Office had clearly operated a viewpoint discrimination by singling out an expression as being offensive and prohibiting its use in the public domain. Viewpoint discrimination is only applicable in very narrowly defined expressions such as fraud, defamation, and incitement to violence. A music band's name pending the approval of the Trademark Office was not in those interdicted categories. While the Court did limit its interpretation in Tam as not extending to other provisions of the *Lanham Act*, it still remains notable in that the public exposition of general racial invectives could be so easily permissible. The Supreme Court's decision in *Tam* case may explain why the American Pro-Football team, the Washington Redskins, would consider it their victory as well.[338]

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[336] While there is no determinate meaning to this slang language, The U.S. Trademark Office had interpreted it as a racial slur, regardless of whether the actual usage of the term in American society or the actual intent on the part of the band members.

[337] *Trademarks registrable on principal register; concurrent registration*, 15 USC 1052(a).

[338] The team had been embroiled in legal dispute as to whether it could keep its team name that which native

1.3.3. Confronting First Amendment Objections: A Perspective from *Outsider* Jurisprudence (CRT)

Earlier sections have enumerated the traditional frameworks justifying free speech values and the court decisions implementing constitutional protection to speech freedom. Naturally, advocates of free speech base their own arguments in favor of uninhibited free speech exercise on those rationales. Those rationales however tend to run into walls. For instance, it is recondite how racist or other discriminating messages seek to explore truth. It is unlikely that expressions that propagate the inheritance of a darker skin color as a representation of intellectual or behavioral inferiority or certain religious adherences as an inherent threat to national security, could be viewed as furthering the truth. Nor does hateful speech invite individuals to productive, critical public discourse. The racially charged words hardly inform other citizens of any substantial, attention-worthy knowledge. The same could be said of free speech as a medium of empowerment for the self and society. Messages of racial bias do not assist in developing one's inner potential nor fulfilling tasks of higher aspirations that grants the sentiment of self-accomplishment. Instead, bigotry and racial prejudice hinder the moral growth of the speaker and deter them from enjoying fuller, more harmonious interrelationships with other people who may not exhibit racial bias.

There are, of course, other sophisticated arguments that were developed to reinforce speech protection and counter oppositions that sought to curtail discriminatory speech. Some of the popular logomachies are these. That freer (more) speech is the solution, not censoring dissenting speech. Or that offensive speeches must be given constitutional protection regardless of the harm it may cause, because once restrictions begin to be imposed on speech

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Americans found offensive. *Pro-Football v Blackhorse*, 112 F Supp (3d) 439 (ED Va 2015).

rights, the slippery slope will lead to the death of democracy itself. The courts have set strict standards and narrow conditions to limit speech in a few extreme cases. And ultimately, tolerance – as one of the values we cherish – is required for even the most heinous content that some speech demonstrates and that this harm toleration is the dear price we must pay to live in a free, open society.[339]

These assumptions, especially the last one, appear unrealistic, if not exceptionally egoistic given that it is very often the victims of the discriminatory messages that happen to belong to minority groups in society. Mari Matsuda criticized this type of discourse by instructing that free speech without equality is meaningless.[340] This may be a question of important self-introspection in any given society. Why is it that often the most powerless should disproportionately carry that burden of freedom of speech? There may be a legitimate basis for a society to inquire into its role in reducing this imbalance by engaging in value-judgments.

Lines of defense for free speech, aspiring to First amendment romanticism, have been particularly relevant in the context of university campuses. The 1980's and 90's saw an important surge in racist groups and attacks against minorities in American university environments. White supremacy associations were formed to distribute messages of intimidation.[341] Abusive speeches directed at black students soared[342] and Jewish students

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[339] Matsuda, "Body", *supra* note 11 at 95; Frederick Schauer, "Uncoupling Free Speech" (1992) 92 Colum L Rev 1321 at 1321-22.

[340] *Matsuda, supra* note 11.

[341] *Klanwatch Intelligence Report: a project of the Southern Poverty Law Center*, Report No 42 (Feb 1988) (Montgomery, Ala: The Center, 1996) [Klanwatch Report] In Northwest Missouri State University, white supremacists distributing flyers that says, "The Knights of the Ku Klux Klan are Watching You."

[342] Earl Lewis, "Amid Push for Diversity, Smith struggles with Racism", *Boston Globe* (4 May 1989) § 1 at 1 col. 2. The passage depicts an incident in Smith College where a black student receives a message slipped under her door that reads, "African Nigger do you want some bananas? Go back to the Jungle."

faced various acts of violence ranging from subhuman depictions to bomb threats.[343] As countermeasures, proposals for discriminatory speech bans were advanced, and in some cases, implemented. These initiatives did not go unaddressed. One of the fiercest argumentations against racist speech suppression was that the academic circle should be the last place on earth where ideas should be silenced. To bolster intellectual growth and nurture important political debate that concerns students, even the most venomous content must be permitted in learning institutions. There were strong disagreements as to whether a competent public authority (if such special administrative council or board existed) or university administration should have the power to limit assaultive speech on campus. Whatever the pros and cons were, the intractable feud always appeared to be between freedom of expression and equality.

A number of critical race theorists like Charles R. Lawrence III have urged that racist expression be duly regulated, not only face-to-face encounters but visible racist epithets and vilifications altogether because they target entire groups.[344] Professor Delgado was quick to recognize that the traditional First amendment approach is ill-suited to "deal with systemic ills, such as racism or sexism, that are widespread and deeply woven into the fabric of the society."[345] Take for example, racially stigmatizing speech. The problem of racist messaging – or of racism *tout court* – is highly relevant in this discussion of the harm at issue. Racist remarks cause real harm. This is an area of study that has been well-documented. In this aspect, critical race theorists like Delgado and Mari Matsuda have written on the harm of racist messages, denouncing positions underestimating the harm or defending free speech

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[343] Klanwatch Report, *supra* note 341. An incident that occurred at Memphis State University where there were bomb threats made at Jewish Students Union.

[344] Lawrence, "If He Hollers", *supra* note 15 at 436.

[345] Richard Delgado & Jean Stefancic, "Images of the Outsider in American Law and Culture: Can Free Speech remedy systemic social ills?" (1991) 77 Cornell L Rev 1258 at 1259 [Delgado & Stefancic].

regardless of the harm. Psychological, medical, and social experts have provided extensive proofs relying on real, empirical results that highlight the many immediate and long-term harms that victims may suffer as a result of being exposed to racially charged speech. Professor Delgado, in proposing a tort action against racist speech in his groundbreaking article,[346] has described in detail the various harms in racist speech on both the individual level and larger scopes of life. On an individual level, the victim may suffer extreme emotional distress that pushes one to question one's worth resulting in feelings of isolation and humiliation. It may push the individual to alternative escape routes such as alcohol and drugs, amongst other anti-social behavior.[347] It is a "slap on the face"[348] that will most likely provoke irrational and even violent reactions from the victim. With regard to social aspects, racist speech injures the person's social relationships with others. It incapacitates the victim from maintaining a neutral reaction toward certain groups. It may disfigure his relationship with his own racial or ethnic groups[349] because of a defaced sense of self-worth and the ripening of self-hatred through repetitive reminders of belonging to a lower class. The normalization and acceptance of racist messages may have the effect of deepening systemic mistreatments denying equal economic and social opportunities to fellow citizens of color. Career pursuit is jeopardized[350] when the listener becomes withdrawn or excessively cynical and pessimistic.

The public who is exposed to racist remarks is the recipient of harmful effects as well. Bystanders or onlookers who (unfortunately and unwillingly) witness racist speech may be

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346 See in general, Delgado, "Words that wound", *supra* note 15.

347 *Ibid* at 138.

348 Lawrence, "If He Hollers", *supra* note 15 at 452.

349 Delgado, "Words that wound", *supra* note 15 at 137

350 *Ibid* at 138, referring to a study by the *Joint Commission on Mental Health of Children, Social Change and the Mental Health of Children* (1973) at 99-100.

deeply offended. Exposure to repeated, continued reiteration and its underlying core rhetoric – that of superiority and subordination – will eventually shape the overall image of the targeted groups in a negative light.[351] Racist speech thus rejects the very principle that all social members are equal beings with merits, an idea definitional to the foundation of democratic societies.

Chapter 1 Conclusion

The first chapter took a close look at the general rules governing the American tort of defamation and group defamation. The conceptualization of free speech as a constitutional and fundamental right was analyzed. The chapter finally investigated key First Amendment free speech jurisprudences that sought to discover how the legal validity of laws that prohibited group defamatory or vilifying expression had fared against constitutional challenges.

It is clear from this analysis that the basic principles of group defamation suffer from inconsistencies. In particular, the arbitrary twenty-five member cap for the admissibility of the group, while applied in many cases, was explicitly rejected in other notable cases, thus undermining its jurisprudential authority. The general rejection of large group defamation deters defamed group members from bringing forth their cases. The traditional reluctance of courts to grant cause of action to an aggrieved individual member of a defamed group is demonstrative of the law's underlying conceptual refusal to admit that there can be substantial injury that is sufficiently individualized resulting from large group defamation. Such posture disregards the kind of intimate threads and the associative nature of people in

[351] On this turning of subjective into objective perception effect in hate speech, see sub-section on The Interconnectedness of Harm of Chapter 3 (3.3.1.).

the types of groups that are the focus of the present thesis.

On the constitutional level, the study has illustrated that American free speech is an exceptional freedom in American constitutional references. Although the First Amendment is deficient of the broader paradigm of free speech that is capable of encompassing all the diverse aspects of implied practicability of free speech exercise, it nevertheless has nurtured a highly individualistic conceptualization of free speech. The philosophical rationales justifying the values of the freedom attest to this. Although the freedom is not absolute *per se*, it has historically enjoyed a preferred status in the American constitutional echelon, some former Supreme Court Justices expressly subscribing to the absolute theory of free speech, along with case-law supporting this postulation.

This has overall yielded a First Amendment interpretation that has left extremely narrow doors to constitutionally legitimate speech regulation. Earlier free speech cases, although rendered in exceptional times of war or battling ideologies, have drawn up the basic frameworks that have proscribed specific, limited grounds on which speech may be suppressed. Of those cases, the study of *Beauharnais*, the only U.S. Supreme Court case to directly affirm the constitutional validity of a criminal (racial) group libel, has shown that it must not be analyzed under the context of the *Sullivan* case given that the former is not a case of public official-versus-private individuals/the press. It still holds its reasoning that strikes racial group defamation as unprotected category of speech.

In sum, free speech in America is a favored freedom that is vigorously protected by the First Amendment. With its tilt toward a strong emphasis on the safeguarding of individual liberty, it is difficult to foresee its predilection giving ground for a compromise against the sort of speech that is for one, thought to inflict sensibility harms and not interest-based harms, and two, group-targeting, in which the sharpness of the words is perceived as dissolved by their dispersion through generalized formulation.

CHAPTER TWO

Honoring Canada's Communitarian Commitment:

Toward an Egalitarian Model of Freedom of Expression

Introduction

At first glance, Canada may look strikingly similar to the United States in terms of the general *reconnaissance* toward freedom of expression. After all, the right to freely opine ideas through expressive activity is recognized by both countries as a fundamental liberty situated at the very core of a free and open society. This appreciation, among other shared constitutional values, has propelled the two nations hand in hand as leading examples of vibrant democratic states. Both countries share a profound sense of positive congeniality that freedom of expression represents more than mere symbolic words. As Justice McIntyre noted, freedom of expression "… is one of the fundamental concepts that has formed the basis for the historical development of the political, social, and educational institutions of western society."[352]

However, there are a number of important distinctions. It begins with a different conception of freedom of expression *vis-à-vis* what must be the proper role of government. This is to say, the relation between the said freedom and government is largely defined by the respective perception that views the latter as either a State authority imposing certain limits or safeguarding that liberty. It is doubtless that the long running American suspicion toward government fortifies a rather *protectionist* view of free speech as an unlimited good of and for the people. Thereby, a minimally interventionist approach has been warranted except in narrowly tailored instances set forth by the courts. By contrast, Canadians have a relatively easier time entrusting their government with guarding their fundamental freedoms.[353]

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[352] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 583 [*Dolphin Delivery*].

[353] I say "relatively" with the cautious hope of not coming off as if the Canadian struggle for independence from the British rule was without any struggle. But in terms of the process, it is generally agreed that there was a lot less bloodshed in comparison to, for instance, the path toward American Independence which was through a revolutionary war.

Americans also display great devotion to the value to free speech[354] as something that cannot be compromised unless the contested speech is literally fraught with death.[355] Free speech in America, by my understanding, is more than a constitutional right; it is a shared ideal, transcending the legal and cultural domains of American citizenry. In contrast, Canadian courts have been far from reluctant to strike down harmful speech by balancing it out with respect to other fundamental rights such as equality and the emanating relational values both expressly and indirectly implied by the underlying principles of the *Canadian Charter of Rights and Freedoms*.[356] There are striking differences in jurisprudential methodologies utilized by the respective courts when evaluating legitimate legal limitations on contested expressions. For instance, according to one commentator, the Canadian legal treatment of freedom of expression is not as complex as that of the United States.[357] This does not necessarily mean that the Canadian constitutional tests of speech are a collection of haphazardry or that they lack in substance compared to those of the United States. It is true however, that the most ardent defense of free speech was conceived in the First Amendment jurisprudence and further elaborated on by doctrinal sophistication. And over the course of

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[354] On this point, see American Exceptionalism: Free Speech as a *de facto* Preferred Freedom in Chapter 1 (1.2.3.). It is apt to note that the term 'freedom of expression' is the chosen legal term in the Canadian constitutional references (as in European legal texts). American jurists, however, have developed a unique flavor for the term 'free speech.' The expression of the specified kind was cemented in the American First Amendment romanticism. Brewed in the historical context of America, the notion of free speech reincarnates a cultural reference just as much it is invoked for constitutional purposes in legal terminology. It epitomizes the strong distrust against the government - against any governmental interference suppressing speech. Although the term has been more than often associated with and weaponized by Alt-Right movements, the expression 'free speech' remains a unique American invention. It surpasses pure juridical connotation; it also is a product of a socio-cultural evolution

[355] "… we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death…" Oliver Wendell J in *Abrams, supra* note 236 at 630.

[356] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[357] Kent Greenwalt, "Free Speech in the United States and Canada" (1992) 55 Law & Contemp Probs 5 at 10.

the last decades, while not slavishly copying the American way, Canada was attentive to the hard-earned lessons of the Americans' seemingly excessive penchant to unmitigated speech. The observation has helped Canada's legal minds craft an egalitarian-oriented interpretation of the liberty.[358]

Freedom of Expression as a Fundamental Liberty in the Pre-*Charter* era

A few words ought to be said on the undertaking of freedom of speech in the pre-*Charter* era. Though now an essential piece of the Canada's constitutional portrait, the acknowledgement of expression as an individual's fundamental liberty was not always a given. In fact, it is difficult to state with absolute certainty that free expression even has a long, cherished history in Canadian constitutional life. Its beginning was rather vague and left to further interpretation by means of references in-between the competent forces of the federal and provincial governments. The *Constitution Act, 1867*[359] is a good illustration. A forefather of the early Canadian Constitution, it contains important provisions, but nowhere can one find traces of any explicit reference to an individual's fundamental freedoms[360] with

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[358] On this point, see e.g. my analysis of the *Dagenais* decision where Canadian Supreme Court Justices explicitly compared and laid out the different conceptual approach favored by Canada versus the American model of freedom of expression, sub-section No such thing as absolute freedom: Refusal of Hierarchical System of Rights of this Chapter (2.2.1.) at 124-28.

[359] *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5. [*The Constitution Act, 1867* or *The Act*]. Also known as the *British North America Act of 1867*. A forefather figure of the Canadian Constitution, it was the law passed by the British Parliament creating Dominion of Canada at Confederation.

[360] *Ibid*. Instead, the *Act* does include a few important group rights. For instance, s 133 acknowledges the existence and practice of bilingualism in major institutions such as the federal parliament and provincial legislatures of Quebec. *The Act* also formally recognizes the rights of denominational schools, a right that is now transposed to and reaffirmed by s 29 of the *Charter* of 1982.

the exception of some linguistic rights.[361] From a modern constitutional point of view in relation to fundamental rights, this is most intriguing. The silence - or rather, the ambiguity - on individual rights, can best be overlooked as an unavoidable legal consequence of Canada being considered a fragment (a large one for sure) attached to the British Empire at the time. Although the imported *Constitution Act, 1867* was to provide Canada with a Constitution that ought to be "similar in principle to that of the United Kingdom",[362] much was left to the competent branches of powers and courts to determine what that actually signified once transposed onto Canadian soil.

That being said, the lack of mention of what we now consider individual constitutional rights should not come as a total surprise. In fact, observing globally, specific references governing protection of fundamental liberties applying to individuals on a constitutional level did not really emerge until mid-1950's in the vast majority of Western democratic nations or via concerted international legal projects.[363] As a consequence of this

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[361] Under s 133 of the *Constitution Act, 1867*, legislature members were permitted to use both English and French in federal courts and in Quebec courts (and in the federal Parliament as well as in the Quebec legislature). This obviously was not an 'official' establishment of the use of bilingualism in Canadian law but could nevertheless considered as one of the earlier openings toward the formal use of both languages in courts of law as defined. s 133 reads as follows:

1. Either the English or the French language may be used by any person in the debates of the houses of the Parliament of Canada and of the houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this act, and in or from all or any of the courts of Quebec.
2. The acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

[362] The Preamble of *the Constitution Act, 1867*. reads in part: "Whereas the Provinces of Canada … have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."

[363] For example, the Canadian Human Rights Commission (CHRC) was not established until 1977. The United Nations Commission on Human Rights (UNCHR – now replaced by the United Nations Human Rights Council in 2006) came into existence only in 1946. Similarly, Universal Declaration of Human Rights (UDHR) was not adopted until 1948 by the United Nations General Assembly. The International Covenant on Civil and Political Rights (ICCPR) came into force in 1976.

lacuna in the *Constitution Act, 1867*, the only indication as to which general direction to undertake was through the Preamble of the Constitution. The Preamble enunciates that the original colonies are to be federally united with a Constitution similar in principle to that of the United Kingdom.[364] This express referral by the Preamble has much importance to the system of Canadian federalism and understandably so.[365]

Protection of Freedom of Expression under the Bill of Rights and the Implied Bill of Rights Theory

The *Canadian Bill of Rights*[366] was not particularly effective in the actual safeguarding of free expression either. It too includes protection of free speech. Section 1(d) of the *Bill* explicitly states that freedom of speech be protected.[367] The *Bill* was significant in the sense that it constituted Canada's first major step on the federal level to solidify protection of human rights and fundamental freedoms. And to some extent, it retained its symbolic power until it was later superseded by the *Charter* in 1982.

However, notwithstanding the tenacity in its heralding tone, there were real limitations when it came to actually ensuring those freedoms. In addition to the fact that the

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[364] The Preamble of *the Constitution Act, 1867, supra* note 362.

[365] The well-implemented federal structure, the protection of civil liberties can be enhanced through an elevation of political pressure between provinces when grave violation is met with an inadequate response. Moreover, the two distinct levels of the government can be efficient by keeping each other in check. The Supreme Court may also 'relocate' a litigation from the hands of the provincial government to the competence of the federal level. Also known as the power allocation technique of judicial review. See e.g. *Union Colliery v Bryden,* [1899] AC 580 (in which the Supreme Court found that the legal treatment of aliens was to be ruled in the federal jurisdiction and not the province's).

[366] *Canadian Bill of Rights*, SC [1960], c 44. [*BoR*].

[367] *Ibid* at s 1(d). Other fundamental freedoms like freedom of religion (c), association and assembly (e), and freedom of the press (f) are equally included under the same section.

Bill of Rights was never constitutionally entrenched, as Dickson C.J. later remarked, "it was never entirely clear whether the Bill of Rights empowered the judiciary to strike down federal legislation or whether it was simply an aid to statutory interpretation"[368] More importantly, the phrasing of "… have existed and shall continue to exist"[369] in the *Bill* has resulted in what is now commonly referred to as a 'frozen concept' interpretation.[370] It was not for nothing that the Hon. Beverly McLachlin, in describing the entrance of the *Charter*, declared that the latter "… was seen as a rejection of the previous ineffectual model."[371]

If the *Bill* was ineffective *per se*, its notion as a whole should not be demerited altogether. Courts had to guarantee fundamental freedoms somehow. In this regard, the judicial theory of Implied Bill of Rights came to the rescues of the *Bill's* deficiency by recognizing that underneath the Canadian Constitution are embedded certain basic principles.[372] This is obviously not the most appropriate place to enter a full-fledged discussion on the exact impacts and the place of the theory in Canadian constitutional law. Nevertheless, because the theory proved its utility in protecting certain fundamental civil liberties to remedy the shortcomings of the *Bill* as a form of its extension, and because it was

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[368] Brian Dickson CJ, "The Canadian Charter of Rights and Freedoms: Dawn of a New Era" (1994) 2 Rev Const Stud 1 at 8 [Dickson].

[369] *BoR*, *supra* note 366.

[370] The protection of the rights was ensured by the *BoR* only in so far as up to its enactment by the Parliament in 1960, thus essentially halting its legal effect in that periodical window frame.

[371] The Hon Beverly McLachlin, "The Canadian Charter of Rights and Freedoms' First 30 years" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Ontario: LexisNexis, 2013) at 28 [The Hon McLachlin].

[372] On this theory as well as its critiques, see in general, Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966) 12 McGill LJ 497 [Gibson]; Eric M Adams, "Building a Law of Human Rights: *Roncarelli v Duplessis* in Canadian Constitutional Culture" (2010) 55 McGill LJ 437; Eric M Adams, *The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930-1960* (LLD Thesis, University of Toronto Faculty of Law, 2009).

"so radical a concept"[373] precisely due to what critics esteemed as an overreaching over the constitutional board,[374] the subject merits some degree of attention. It is even more justifiable so considering several remarkable decisions[375] handed down on the basis of the theory that defined a generation of Canadian constitutional jurisprudence.

The theory itself was frequently invoked in the 1930s to 1950s to redress overreaching provincial legislation that often impeded on fundamental freedoms like freedom of speech, religion, assembly, or association. Enacting criminal legislation that involves unconstitutional infringement on fundamental individual liberties was a power resting solely within the competence of the federal Parliament as exclusively reserved in s. 91 (27)[376] of the *Constitution Act, 1867*. Through a series of landmark decisions,[377] the Implied Bill of Rights theory proved to be a reliable judicial instrument through which courts claimed the underlying implication of constitutional freedoms that were to be "similar to that of the

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[373] Gibson, *supra* note 372 at 497.

[374] This interrogation involves the debate surrounding judicial activism and judicial restraint. But it could very well be argued that in instances where irreplaceable democratic, institutional rights find themselves endangered, it may be justifiable that the creative instincts of the judicial branch be legitimately and extraordinarily engaged. On this point, see Gibson, *supra* note 372 at 499; Paul Cavalluzzo, "JUDICIAL REVIEW AND THE BILL OF RIGHTS: DRYBONES AND ITS AFTERMATH" (1971) 9:3 Osgoode Hall LJ 511 at 529-31

[375] See e.g. *Reference re Alberta Legislation,* [1938] SCR 100 [*Reference re Alberta*]; *Saumur v The City of Quebec*, [1953] 2 SCR 299 [*Saumur*]; *Roncarelli v Duplessis* [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*]; *R. v Boucher* [1951] SCR 265 [*Boucher*]; *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [*Winner*]; *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 [*Switzman*].

[376] s 91 of the *Act* reads in part:

"…it is hereby declared that (notwithstanding anything in this Act) *the exclusive Legislative Authority of the Parliament of Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … *(27).*The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." (emphasis in italics added)

[377] See footnote 375.

United Kingdom."[378] For instance, in the decision of *Reference Re Alberta Statutes*,[379] following Duff C.J.'s affirmation clarifying the principles of divisions of power on the subject matter as "necessarily vested in Parliament,"[380] the Court explicitly drew the lines of limitations on provincial competence, stating that "the province cannot interfere with … his fundamental right to express freely his untrammeled opinion about government policies and discuss matters of public opinion."[381]

Another illustration is *Switzman v. Elbling*,[382] also known as the Québec Padlock case. The Supreme Court struck down the *Quebec Padlock Act* that prohibited any communication purporting to "Communist" or "Bolshevik" ideology, including its printing, distribution, or any form of its propagation in Quebec houses. Under this contested Act, houses where such 'illegal' materials were found, or where their dissemination occurred would be padlocked. The Supreme Court invalidated the Act on the basis that the passing and the enforcement of such law were matters of federal criminal law, a legislative competence that was within the Parliament of Canada. The Act then, would be *ultra vires* of the provincial legislature. The fact that an infringement on communicative activity was considered serious enough that its violation was not to be provincially resolved but addressed by the larger, federal involvement, is significant:

"Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual

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[378] See footnote 362.

[379] *Reference re Alberta, supra* note 375.

[380] *Ibid* at 134 (Duff CJ).

[381] *Ibid* at 146 (Cannon J concurring).

[382] *Switzman, supra* note 375.

liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion."[383]

It is noteworthy that Mr. Justice Abbott in the present decision went as far as to opine that, in his view, freedom of expression, *inter alia*, freedom of discussion and of assembly are of such importance that even "Parliament itself could not abrogate this right of discussion of debate."[384] In hindsight, this remark could be considered a recognition of the inalienable nature of the speech freedom and that the representative system itself necessitates freedom of expression to function.

As such, despite possible interrogations as to the exact efficacy of the *Bill of Rights* and its implied theory concerning the protection of what we now consider as fundamental/constitutional rights, the elevation of the intricate framework in consideration of individual liberties could be acknowledged as early positive signs leading to the arrival of the *Charter*.[385] Its significance was notable in the sense that it constituted Canada's first major step on the federal level to solidify protection of fundamental freedoms. In short, they played their part in their time.

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This chapter entails the constitutional and legal treatment of defamation, and group

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[383] *Ibid* at 306.

[384] *Ibid* at 328 (Abbott J).

[385] Dickson, *supra* note 368 at 6-7. For the former Chief Justice, such development should be viewed in a novel, positive light, even though much of the constitutional discussion surrounding the issues were "through the lens of debates about the division of powers." According to him, the *Bill of Rights* and later on the *Charter*, were in timely concordance with the universal emergence of human rights and individual liberties.

defamation of fundamentally prejudicial character in Canadian law. To do so, one cannot bypass the study the constitutional conundrums that are born from the conflict between such fundamentally degrading or defamatory words and the liberty of expression as guaranteed in section 2(b*)* of the *Charter*. For to understand the freedom of expression is to understand the scope and the limitations of the freedom. The first section thus studies the constitutionalisation of freedom of expression through *Charter* (2.1.). This involves exploring not only the constitutional recognition of the freedom but also the expansive scope as well as the acceptable limits set forth and defined for that freedom. The second section provides detailed analysis of key cases (*Dagenais*,[386] *Keegstra*[387]) that have shaped the constitutional landscape of freedom of expression vis-à-vis other fundamental rights as well as its justified limitations in the context of group targeting speech (2.2.). Following this, I provide an analysis of general rules and notable case-laws governing defamation in Canada, focusing on modern jurisprudential developments (2.3.). I also join a critique on the relatively recent *Bou Malhab*[388] decision. Finally, I include federal/provincial human rights legislation prohibiting group vilifying expressions and the landmark decisions relevant in this context (*Taylor*,[389] *Whatcott*[390]) (2.4.).

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[386] *Dagenais*, *supra* note 80.

[387] *Keegstra*, *supra* note 81.

[388] *Bou Malhab*, *supra* note 1.

[389] *Taylor*, *supra* note 86.

[390] *Whatcott*, *supra* note 87.

2.1. *Charter* Implications on Freedom of Expression: From Constitutional Recognition to Limits in a *Free* and *Democratic* Society

The adoption of the *Charter* has been lauded as the "most significant legal development in Canada in the second half of the twentieth century."[391] A former Chief Justice of the Supreme Court referred to the *Charter* as an integral "part of the modern Canadian identity,"[392] one that represents a "unique expression of the rights of Canadians,"[393] and a proud constitutional product with the label "*made-in-Canada*."[394] The *Charter* officially enlisted the freedom of expression in section 2(b) along with other fundamental individual rights. Considering the repetitive shortcomings in the pre-*Charter* era, this explicit recognition through an entrenched constitutional document was no small feat.

The significance of this phase in Canadian constitutional development must be understood in light of the overall objectives of the *Charter* as a groundbreaking constitutional project itself. Breaking away from the system of parliamentary supremacy that has long been the operating tradition following the days under the colonial British regime, the entrance of the *Charter* marked a clear transition into a constitutional democracy as it related to fundamental rights.[395] The previous arrangement recognized the rights of individuals insofar as they remained consonant to the overall will of the popular majority. It meant that there was ultimately some space for the democratic plurality to exercise majoritarian power to achieve

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[391] Remark made by Mark MacGuinan, the former Minister of Justice at the time of the adoption of the *Charter*.

[392] The Hon McLachlin, *supra* note 371 at 27.

[393] *Ibid*.

[394] *Ibid* at 28. (emphasis in italics added)

[395] See *Vriend v Alberta*, [1998] 1 SCR 493 at paras 131 and 135 (Iacobucci J).

its conception of the common good. Rights under the previous model were therefore more susceptible to compromise if cases arose where certain interests failed to align themselves with the conception of popular will. As such, the system was unfit if the state was to ensure that all rights – including those of the most disadvantaged – be shielded from, to borrow J.S.Mill's phrase, tyranny of the majority.[396] This former arrangement may succeed very well in a homogenic polity. An absence of diverging views somewhat facilitates governance. It is a whole different story in a multicultural state.

The *Charter* was meant to overcome this impasse. As one commentator has noted, "the *Charter* repudiates the majoritarian model of rights-protection found in systems of parliamentary supremacy."[397] The institution of the *Charter* effectively dispossessed the majority-led legislature or government of its power to impose the popular will that may result in the encroachment of a *Charter* right.[398] A *Charter* right, as expressly guaranteed, became that which *ought* not be a casualty of political maneuvering.[399] The *Charter* was a

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[396] Mill, *supra* note 278. Also, on the limits of parliamentary sovereignty (since we are talking about the 'tyranny of the majority' often to the detriment of the minorities), AV Dicey has long since maintained that parliamentary sovereignty could not have legal limitations: it was a purely legal concept in the sense that the parliament could legally legislate, unmake laws, and discuss whatever subject it wished to discuss. However, he did recognize that, in practical terms, there could be external and internal limitations to the notion. External limitations were "the possibility of popular resistance" as people may disobey to follow laws; and internal limitations were the refusal to respect laws due to a moral position held by people. See Michael Gordon, *Parliamentary Sovereignty In The UK Constitution: Process, Politics and Democracy* (Oxford: Hart Publishing, 2015) at 14 (quoting AV Dicey): See also AV Dicey, *Comparative Constitutionalism,* ed by JWF Allison (Oxford: Oxford University Press, 2013) at xxxvi.

[397] Jacob Weinrib, "What is the purpose of Freedom of Expression?" (2009) 67 U Toronto Fac L Rev 165 at 172.

[398] *Ibid*.

[399] Obviously in practical terms, it is not something that is set in stone. For instance, in the aftermath of *Ford v Quebec (Attorney General)*, (1988) 2 SCR 712 [*Ford*], the Bourrassa Government of Québec invoked s 33 (notwithstanding clause) of the *Charter* to deter judicial review for five years of his Bill 178 partially amending the Charter of the French language (which was incompatible with the Supreme Court's ruling). Saskatchewan used the clause in 1986 in case of a legislature ordering workers back to work, overriding the province's Court of Appeal's decision ruling the Act as unconstitutional in its infringement on workers' freedom of association. The truth is that in political world, the threat of invoking the notwitstanding clause always lurks around as the

reconfiguration button. Leaving behind skirmishes over jurisdictional competence, the *Charter* turned the tables upside down by now directly interrogating contested legislation's compliance with the standards set forth by the *Charter*. It is first and foremost in this broader context of the *Charter*'s passage that any study of a particular right must be approached.

2.1.1. Recognition of Freedom of Expression as a constitutional principle and its underlying values

The *Charter* recognizes freedom of expression in section 2 along with other fundamental and constitutionally guaranteed rights (2.1.1.1.). The enunciated freedoms, however, are subject to section 1's limitation (2.1.1.2.).

2.1.1.1. *Charter* Recognition of Freedom of Expression

With its official arrival, the *Charter* brought a seismic shift to the Canadian constitutional landscape. At the time of its' adoption, the drafters of the *Charter* affirmed the crucial importance of freedom of expression in our modern democratic system. In Section 2, the *Charter* provides that:

> Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion;
> (b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) Freedom of peaceful assembly; and

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last option for a government to put on a demonstration of executive power's 'heavy artillery' option often to gain negotiating leverage. It is invoked often to circumvent judicial rulings, as has been recently illustrated by Toronto's Premier with regard to reducing Toronto city council size.

(d) Freedom of association.[400]

It is noteworthy that at least three elements have been identified as the underlying values related to freedom of expression: Truth-seeking; participation in social and political decision-making process; and individual self-fulfillment through expressions designed to convey a meaning in a tolerant and diversified environment.[401] Described as such, the Canadian philosophical justification for this freedom appears to share the spirit of its American counterpart (which also promotes, in turn, the search for truth in the marketplace of ideas, self-government through democratic participation, and attaining higher personal autonomy).[402]

2.1.1.2.A Value-Driven Test

A violation of the exercise of freedom of expression is subject to the constitutional scrutiny of section 1[403] of the *Charter* developed in *R. v. Oakes*.[404] The *Oakes test*, as commonly referred to in Canadian constitutional literature, created a set of rules to assess the constitutional validity of contested laws infringing on freedom of expression. First, the objective of the law must be one that is sufficiently important to override the freedom in question, or at the minimum demonstrate its relation to matters of society that are "pressing

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[400] s 2(b) of the *Charter*.

[401] *Keegstra*, *supra* note 36 at 727-28.

[402] Emerson, *supra* note 218.

[403] s 1 of the *Charter* provides: "The *Canadian Charter of Rights and Freedoms* 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."

[404] *R v Oakes*, [1986] 1 SCR 103. [*Oakes*].

and substantial."[405] Second, the *Oakes test* evaluates the overall proportionality of the law undertaken by the means utilized to achieve the objective of that law. This second phase consists of three elements: (a) that the undertaken measures be fair and rationally connected to the objective sought by the law; (b) that there is only minimum impairment of the right in question; and (c) that there is proportionality "between the effects of the limiting measure and the objective."[406]

The Supreme Court of Canada had several cases involving claims of violation of freedom of expression where the abovementioned *Oakes test* was applied.[407] *Ford v. Quebec (AG)* was one of them. In this case, while the Supreme Court agreed with lower courts in that section 9.1 (of the *Quebec Charter*) "was subject, in its application, to a similar test of rational connection and proportionality" as in section 1 of the *Charter*, and that while the materials of both provisions did establish the seriousness and rational connection of the law's objective, it failed the proportionality test.[408]

It must be noted that this test has not been without its critics. Some authors have been highly critical of this rather simplistic-on-the-outset, one-two step methodology. One author hinted at the superficial character of section 2(b), noting that it is "nothing more than a formal step."[409] Others commented that such a systemic operation consequentially invites "case-by-

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[405] *Ibid per* Dickson CJ and Chouinard, Lamer, Wilson and Le Dain JJ.

[406] *Ibid*.

[407] See e.g. *Ford*, *supra* note 399; Keegstra, *supra* note 81; Taylor, *supra* note 86; *R v Zundel*, [1992] 2 SCR 731 [*Zundel*]; *Whatcott*, *supra* note 87.

[408] *Ford*, *supra* note 399 at para 73 ("The s 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials.").

[409] Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 Osgoode Hall LJ 337 at 339.

case manipulation,"[410] if not outright interpretational stability that is "unpredictable and unprincipled."[411] Another commentator has even characterized the criterion of measurement as a "methodological anarchy."[412]

That being said, a comprehensive approach to understand section 1 is to understand it as a values-laden analysis. Take for instance, the treatment of violent expression. Despite the expansive interpretation of expression under the *Charter* (as will be explained in the following section), violent expressions, or even expressions which threaten violence, are categorically excluded from *Charter* protection. In *Irwyn Toy*, the Court flatly laid out that "while the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no protection."[413] This categorical dismissal by the Court, ruling out violent expressions from the *Charter*'s realm is best understood through a *value-based* spectrum. The value-based approach identifies expressions that are of high or low value. Accordingly, a speech that is political by nature would generally be given considerable importance. To be able to freely express one's point of view and thereby contribute to political discourse is a cornerstone of any democratic system. Political expression would thus be located at the very core of the *Charter's* territory. Violent expression or even mere *threats* of violence, on the other hand, would linger outside the scope of socially acceptable speech. As such, a murderer or a rapist "cannot invoke freedom of expression in justification of the

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[410] Jamie Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun and Harper v. Canada"* (2005) 17 NJCL 71 at 71 [Cameron, "Anarchy"].

[411] Peter W Hogg, *Constitutional Law of Canada,* student ed (Toronto: Carswell, 2009) at 990.

[412] Cameron, "Anarchy", *supra* note 410 at 410.

[413] *Irwin Toy Ltd v Québec (AG),* [1989] 1 SCR 969 at 970. The Court also excluded from the scope of protected expression purely physical acts that do not convey meaning. (*ibid* at 969).

form of expression he has chosen."[414] This position refusing safe harbor for violent forms of expressions has been recently affirmed in *R. v. Khawaja*.[415]

What values then, undergird the exercise of one's freedom of expression? Dickson C.J. provided an indicative list of these values inherent to the healthy maintenance of a democratic system in *Oakes*. These entail "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of groups in society."[416] In addition to the recognition of human dignity, it is remarkable that the other values stated therein are strongly oriented toward relational rights that are consonant with the notion of equality. There is little doubt that racially taunting expression substantially detract from those values in this regard. While there may be grounds for an argument as to whether the speaker of such an expression may be exercising personal autonomy through self-expression, that argument does not erase the likelihood that his or her expression may raise animosity between racial groups.

The value-based approach is also congruent with the purposive analysis of freedom of expression. Dickson C.J. indicated that a *Charter*-based right, as all rights, must be interpreted following "… the purpose of such a guarantee."[417] It results from this guidance that the freedom in question must be evaluated against the very "interests it was meant to

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[414] *Ibid* at 970.

[415] *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555.

[416] *Oakes*, *supra* note 404 at para 64.

[417] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 116 [*Big M Drug Mart*].

protect."[418] This aspect of the purposive analysis resembles a mirroring exercise. It first identifies the interests enclosed in the freedom in the first place. Next, it determines whether the contested expression strives to fulfill any one of those identified interests.

For instance, in the *Keegstra* decision, some of those underlying rationales have been enunciated: truth-searching, participation in social and political decision-making, and individual self-fulfillment.[419] When applying these guidelines to the expressions of James Keegstra in that case, there was little doubt that indeed, his teachings were not likely to bring substantive truth-value because racist group hate speech is not based on a search for truth.[420] Nor was it likely that a racially charged expression would have contributed in any significant manner to the discussion and critical thinking amongst his students. In fact, such expression would be supplementary to the incitement of race or culture wars in today's diverse, polyglot societies. Discriminatory speech based on racial superiority or hatred is "antithetical to our very system of freedom."[421]

2.1.2. The Expansive Scope of *Charter* Expression

Determining whether a given expression is *Charter*-protected is a content-neutral analysis that occurs at section 2 of the *Charter*. The *Canadian Charter of Rights and Freedoms* has embraced a large and liberal interpretation of freedom of expression (2.1.2.1.).

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[418] *Ibid.*

[419] *Keegstra, supra* note 81 at 728.

[420] The First Amendment's marketplace doctrine protects speech regardless of its contested value or content it carries. But an expression that is premised on racial superiority/inferiority is in of itself distant from truth. For a detailed critique of the outmodedness of the marketplace paradigm in the face of new challenges of the modern age, see section A Reply to the First Objection: The Collapse of the Marketplace (of ideas) of Chapter 4 (4.1.).

[421] *R v Andrews*, [1988] 28 OAC 161 at 182.

In doing so, it has rejected speech/conduct distinctions (2.1.2.2.) as well as content/form differentiation, while recognizing the importance of the freedom as a linguistic and cultural right (2.1.2.3.).

2.1.2.1.A Large and Liberal Interpretation

A natural question following the constitutional recognition of freedom of expression involves the determination of its scope. What is to be considered as expression under the meaning that the *Charter* has prescribed? If qualified as expression under the *Charter*'s section 2(b), does that automatically translate into protection of said expression regardless of its form and/or content?

To start this inquiry, the expansive approach undertaken by the Supreme Court must be underlined. In *Big M Drug Mart Ltd*, the Justices instructed that a "large and liberal" interpretation be accorded to *Charter* freedoms, further reinforcing the inclusive analysis of the fundamental individual liberties as a whole and naturally, to the extent of freedom of expression.[422] The Court's expansive stand would later resonate in the *Ford* case as will be discussed in a later section.

With respect to defining the scope of freedom of expression, the Supreme Court of Canada has espoused a rather broad scope of expressive activity through a series of key decisions in the early years of the *Charter*. It was *Irwyn Toy* that cemented what the Court would ordinarily deem as expression. The decision regarding Quebec legislation (the *Consumer Protection Act*) that sought to prohibit commercial speech to persons younger than

[422] *Big M Drug Mart*, *supra* note 417.

thirteen years of age, yielded to an expansive understanding of expression, meaning that any "activity is expressive if it attempts to convey meaning."[423] Following this, the general presumption continues to this day that almost all forms of human expression, except violent or threats of violence, are presumed to be *prima facie* protected under section 2(b) of the *Charter*.[424]

2.1.2.2.Rejection of Speech/Conduct distinction

In the early constitutional instances involving freedom of expression, a gray line persisted as to whether *speech* should be distinguished from *conduct*. In other words, if the accompanying conduct shrouded the speech in any substantial way that would muddy the clarity of the intended message, the speech would be disqualified from the *Charter* category of expression. By consequence, such speech-conduct would thus be denied constitutional protection.

This distinction between speech and conduct was broached in the *Dupond*[425]decision before the *Charter* had come into effect. Beetz J. in the decision seemed to adhere to this categorical approach, discarding public demonstration through gathering from what he saw as legally qualifiable expression. He argued the activity of public demonstration strongly

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[423] *Irwin Toy*, *supra* note 413 at para 41.

[424] *Ibid*. It is noteworthy that the *Irwyn Toy* decision subjected the contested legislation in the case to the constitutionality test after finding that the purpose of the Act excessively restricted on commercial speech not just in terms of its time and place but directly based on its content.

[425] *Dupond v Montreal (City)*, [1978] 2 SCR 770 [*Dupond*]. The Court in this case had validated a Montreal city ordinance that restricted public gathering for up to thirty days. Although much emphasis centered on whether the forbidding of public assembly fell legitimately in the competence of federal or provincial matters, an important question arose as to whether demonstrations of public nature were a form of expression.

resembled "… a display of force rather than that of an appeal to reason,"[426] to the extent that "their inarticulateness prevents them from becoming part of language and from reaching the level of discourse."[427] Simply put, he referred to public demonstration as mere "collective action."[428] As such, the then-Supreme Court exercised a restrained vision of expression by eliminating speech that may be heavily animated – or more accurately, 'tainted' - with conduct.

This distinction however did not last long after the passage of the *Charter*. In *Dolphin Delivery*,[429] the Supreme Court broke from the previous restrictive interpretation in *Dupond* and opted for a more inclusive approach. At issue in the case was the matter of secondary picketing outside the facility of a company in British Columbia, which in turn applied for and obtained an injunction against the picketing. The Supreme Court recognized the act of secondary picketing as a legitimate form of expression, ruling that "in any form of picketing there is an element of expression."[430] The High Court's position hence shifted from a narrow interpretation to an expansive acceptance of the legal definition of expression following the *Charter's* coming of age.

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[426] *Ibid* at 797 (Beetz J noting that «Une manifestation n'est pas une forme de discours mais une action collective. C'est plus une démonstration de force qu'un appel à la raison»).

[427] *Ibid*. («la confusion propre à une manifestation l'empêche de devenir une forme de language et d'atteindre le niveau d'un discours»).

[428] *Ibid*.

[429] *Dolphin Delivery*, *supra* note 352. Although federal law would be competent on the matter before the local legislation, it was silent with regard to actions of secondary picketing. Common law naturally kicked in to pronounce on the matter. Although ultimately the injunction to restrict secondary picketing in question was upheld by the Supreme Court due to the non-application of the Charter to private litigations, it was nevertheless found to infringe on the freedom of expression of the picketers.

[430] *Ibid* at 587-88.

2.1.2.3.Beyond a simple expression: Linguistic Right as Cultural Right

There figured another attempt to sculpt the scope of expressive right: separating the *form* of the speech from its *content*. This argument was made in the *Ford* case,[431] a decision in which the Supreme Court struck down a provision in the *Charter of the French Language of Quebec* that had imposed a ban on the use of commercial signs in languages other than French. In this decision, the Attorney General of Quebec argued that it was the *content* of the expression that was constitutionally covered by the *Charter*, not the *form* of expression. According to his line of argument, the *Charter's* coverage did not extend to the *medium* of expression – that is to say, the intermediary form through which a message is relayed.

This distinction was quickly refuted by Dickson. C.J. Speaking for the majority, the then-Chief Justice stressed that language is "intimately related to the form and content of expression".[432] He went on to emphasize the indivisible nature of linguistic expression by adding that "Language is not merely a means or medium of expression: it colors the content and meaning of expression."[433] In his perspective, language and the message contained in the content of the expression were so closely interlocked that it would be senseless to deny public visibility to expressions simply due to the form that they are manifested through. He even went as far as to declare that the choice of language, which is a *Charter*-guaranteed right, "is a means by which a people express its cultural identity."[434]

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[431] *Ford*, *supra* note 399.

[432] *Ibid* at para 40.

[433] *Ibid*.

[434] *Ibid*. The combination of expression, linguistic right, and cultural identity is not a novel thing. The use of

2.2. Honoring the Canadian Communitarian Commitment: Toward an Equality-oriented Reconfiguration of Relational Rights

Every now and then, civilized societies decide to impose certain limitations on the fundamental freedoms they so cherish. Historically, this has been done due to some moral justification prevalent at that time or for reasons of public safety, in fear of violence breaking out. Safeguarding *les bonnes moeurs publiques* was both a legitimate and convenient rationale for the State to momentarily suspend access to a given freedom.

Consider for instance, the distribution of indecent materials or public gatherings certain to arouse an incendiary atmosphere. The exact wording of those justifications has obviously shifted with the evolution of social values. The very reason behind the interdiction of, for example, the distribution of erotic materials which once was for the "protection of moral fiber and well-being,"[435] is in more modern context, in the name of "prevention of harm to society."[436] At the end of the day, the relevant State authority intervenes to set certain limits when excessive freedom resulted in harm to either individual persons or society in general. In that regard, freedom of expression is no exception.

The Supreme Court of Canada has been far from hesitant to strike down expressions

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alien groups' dialects in public space, particularly in instances of commercial displays, is a long-debated issue. One critical race theorist summed up this struggle as a fight over 'linguistic space.' See e.g. Matsuda, "Body", *supra* note 11. The contention over the valid language for businesses is not mere skirmish over what is official and not. It goes much beyond that. The disputation over the right to use one's cultural language in public space is a representation of a much broader problematic. An original name of a proud small business owned by an adopted outsider may not be congruent with the dominant's view of what a true Canadian street is *supposed* to look like. In contrast, the liberty to freely choose the name of one's livelihood thus may be both a manifestation of individual self-expression as well as his sense of belonging to his cultural or ethnic group.

[435] *R v Great West News Ltd.,* (1970) 4 CCC 307.

[436] *R v Butler*, [1992] 1 SCR 452.

judged to cause harm. In particular, the Court has rendered a series of landmark decisions to uphold the constitutional validity of legal regimes that suppress the willful promotion of hate propaganda aimed at members of identifiable groups. Not only has the Court has acknowledged the bounds of *Charter*-protected expressions, it has also openly affirmed that the freedom of expression is no absolute right (2.2.1.). As a justificatory basis for balancing conflicting rights, the Court has adopted a *horizontal* approach to rights, mainly relying on other fundamental constitutional principles of equality and multiculturalism, as well as *Charter*-based rights. The evaluation of contested speech is largely carried out through a harms-based lens. If a speech is found to inflict harm to others, especially based on their fundamentally identifiable characteristics, assuaging that expression would be deemed acceptable in a free and democratic society. (2.2.2.).

2.2.1. No such thing as absolute freedom: Refusal of Hierarchical System of Rights

It occurs in the natural conduct of human interactions that rights run into one another. Constitutional claims of fundamental freedoms present particular gravity given their status enshrined in the *Charter*. The emanating questions ought not be decided lightly for they can have tangible consequences on the real lives of citizens. When rights do collide, two routes are usually presented before the Court. One path is to balance out the competing rights. The alternative is to declare one's right's superiority over the other, if applicable to the specific instance. This is more or less the classic juridical dilemma that virtually all modern constitutional courts around the world have to wrestle with. The Canadian Supreme Court grappled with the same question in *Dagenais*[437] with regard to the standing of freedom of

[437] *Dagenais*, *supra* note 80.

expression vis-à-vis its peers as enlisted in section 2(b) of the *Charter*.

The case concerned teachers of a Catholic institution who were at the time being tried in a separate litigation for allegedly abusing young boys who were in their care. During this time, the Canadian Broadcasting Company was planning to release a fictional mini-series recounting a similar abuse story based in Newfoundland. The defendants had applied for an injunction that would prohibit the broadcasting of the series as well as any public dissemination of information on the originally scheduled program until the end of the ongoing trial. After the Superior Court granted that injunction, the Court of appeal affirmed the validity of the injunction under the condition that it only be applied in the Ontario and Montreal regions. The Appeals judge also rescinded the restriction on the public spreading of any information related to the series. Ultimately, the case came before the Supreme Court of Canada to determine whether the restriction on the broadcast and the related expressive activities was unconstitutional.

From a general point of view, the Supreme Court faced a clear predicament. On one side, there was predictable risk that the public airing of the broadcasting company's work could influence public opinion and consequentially prejudice the fairness of the ongoing trial to the detriment of the defending party. Restricting the broadcast, on the other hand, would violate the fundamental freedom of expression that the *Charter* sought to protect. In the face of this seemingly two, clearly cut situation, a balancing act was expected. The identification of the expression in the scope of the *Charter* and the proportionality tests decreed by *Oakes* accomplished just that. However, an underlying question embedded in *Dagenais* persisted: is freedom of expression an absolute right?

The Americans had their turn with this quandary. I have demonstrated how free speech appears to enjoy a particular degree of appreciation in American constitutional

references in the previous chapter. The Canadian side portrays a different picture. Whereas the First Amendment provides no room for any potential maneuvering around the freedom, the Canadian *Charter*, in stark contrast, debuts in a distinctively different way. Section 1 of the *Charter* in fact commences with the possibility of limiting the fundamental rights even before they are proclaimed in the following section. The limitation is not mere decorum, as the test is really three-fold: that it be (a) lawful, that can be justified in a (b) free, and (c) democratic society.[438] This limitation clause indicates that the absolutist perception of rights has not created a foothold on Canadian constitutional soil. Freedom of expression is no exception. As one commentator has noted, "Canada has clearly rejected the idea of absolute principles."[439]

The Court in *Dagenais* explicitly noted that "a hierarchical approach to rights must be avoided, both when interpreting the *Charter* and when developing the common law"[440] to the point that "(T)he common law rule governing publication bans must thus be reformulated in a manner that reflects the principles of the Charter."[441] In doing so, the Court declined to rank one right over another. This resolute divergence from the American counterparts signaled the Canadian Court's willingness to establish a unique Canadian free speech jurisprudence without turning freedom of expression itself into some 'Trump card' reigning over other *Charter* rights. The Court discharged itself from a methodological impasse cornered to *grade* the status of constitutional rights according to their supposed importance. Instead the

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[438] s 1 of the *Charter*.

[439] Donald L Beschle, "Clearly Canadian ? Hill v. Colorado and Free Speech Balancing in the United States and Canada" (2001) 28 Hastings Const L Q 187 at 188.

[440] *Dagenais*, *supra* note 80 at 839.

[441] *Ibid*.

Canadian approach generated a level-playing field for future cases where *Charter* rights would collide. Surely, free expression is a fundamental freedom but that does not mean it should enjoy a whole supreme category of its own. The Court further distanced itself from the American narrative, noting that the "clash model is more suited to the American constitutional context"[442] but not Canadian social conditions. The underlying tone in *Dagenais* was overall *reconciliatory* rather than the contradictory tone that is more prevalent in the American judicial scene. It was even suggested in *Dagenais* that legal bans on publications – in this case the public broadcasting of the series and the dissemination of related information on the platform of public discourse – "should not always be seen as a clash between freedom of expression for the media and the right to a fair trial for the accused."[443] As such, the verdict in *Dagenais* was effectively a fair representation of what the Hon. Beverly McLachlin referred to as "a uniquely Canadian conception of rights … that accepts the non-absolute nature of rights…"[444]

Ultimately, it is unarguable that there is a lot to learn from the First Amendment's jurisprudential development. But Canada and the United States are not, notwithstanding the long list of overlapping similarities in culture, language, history and democratic values, the same countries. Variations in the birth of each country and Canada's unique promotion of its constitutional image necessarily imply different jurisprudential interpretations and applications of the very concept of the freedom itself. Defining the confines of a freedom inevitably places it in cross-paths of other freedoms. In this stage of the reconfiguration of

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[442] *Ibid*.

[443] *Ibid*.

[444] The Hon McLachlin, *supra* note 371 at 27.

rights, the notion of equality has emerged as an important competitor to counter-balance speech freedom when it steps out the line.

2.2.2. Harms-based Approach to Counter Hate Speech and Group Hate Propaganda

In the course of the last decades, the right to equality has emerged as a cornerstone principle that pulls back freedom of expression *in statu quo*. The Supreme Court of Canada has heavily relied on the idea of equality to even out excessive expressions that have gone too far out of the realm of the acceptable margins of a free and democratic society. The notion of equality here is not necessarily the kind that is opportunistically scouted from the competitiveness of the free market; the Canadian idea of equality in this context is one that is built on the inherent dignity within human value of persons.[445] The prevalence of equality in the Canadian context emphasizes the broader relational approach to *Charter* rights

This approach was first evoked in *Big M Drug Mart* case. Every *Charter* right must be interpreted in light of "… the meaning and purpose of the other specific rights and freedoms with which it is associated."[446] This hints at the relational nature of all rights. The rights' well-being – that is to say, for each and every right to maintain their constitutionally designated values – depends critically on deferential respect for the boundaries and balances. Thereby, their purposes must be analyzed in ways that are consistent with the interests represented by other rights.[447] When words are spoken to intentionally deal harm to others by

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[445] *Ibid* at 31.

[446] *Big M Drug Mart, supra* note 417 at 344.

[447] Also known as "interpretation fonctionnelle" or "finalist," the purposive interpretation of a Charter right, according to Professor Luc Tremblay, should be considered both an approach and a method that is an "ensemble des règles méthodologiques constitutives du processus d'interprétation constitutionnelle au Canada." On an

degrading their racial identity or attacking culturally-valued practices based on their country of origin, the expression in question denies the equal status of the targets. Such expression is uttered with the purpose of demeaning the dignity of persons and, consequently, to devalue their place in society. If so, freedom of expression would be subservient to societal exclusion along with the other lowliest of human aspirations. To this regard, Canada has adopted a number of specific legislative measures to combat hate speech or the spreading of targeted group hate propaganda in the public sphere.

2.2.2.1.Hate Propaganda and Anti-Hate Speech Laws

Canada has developed a number of sophisticated legal remedies to combat racial hate or fundamentally discriminatory propaganda. Most notably, Canada has enacted laws that punish the advocacy of genocide, public incitement or the willful promotion of hatred against identifiable groups throughout section 318 to 319 of the Criminal Code. Furthermore, human rights legislations exist on both federal and (in some) provincial levels to protect groups of people from being exposed to discriminatory treatment based on their fundamental characteristics. These proactive measures have equipped Canada with powerful tools to efficiently deal with group hate speech because these provisions are specifically designed to root out the spreading of publicly hateful comments uttered against groups based on their racial, ethnic, or religious traits.

Early efforts began on a provincial level. Provincial governments started to implement legal mechanisms to counter racist expressions that targeted vulnerable minority groups. Manitoba was among the first of them, adopting a provision against religious or racial group

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excellent explanation on the purposive interpretation of Charter rights and freedoms, see e.g. Luc Tremblay, "L'interprétation téléologique des droits constitutionnels" (1995) 29:2 Revue juridique Thémis 464.

defamation in 1934 by amending an existing libel law.[448] In 1944, the Racial Discrimination Act was passed in Ontario.[449] It was not until 1965, largely through the efforts of the *Special Committee on Hate Propaganda in Canada*[450] that there started to be a resemblance of a nationally concerted and organized legal framework to better counter group hate speech based on racial discrimination within Canadian society. Observant to the augmentation of hate propaganda in the 1980 and 90's, the *Cohen Committee* was created and charged with the task of studying the phenomenon of hate speech, with the central focus being the discovery of effective ways to balance freedom of expression and group hate activities operational in the Canadian constitutional framework. The mandate of the *Cohen committee* immediately recognized society's responsibility to draw a line to protect individual members or identifiable groups from being "innocently caught in verbal cross-fire that goes beyond legitimate debate."[451] After three years of intense debate in the House and compromises to include defense mechanisms that were not initially introduced by the *Cohen committee*'s report, three new provisions criminalizing of hate propaganda entered the Criminal Code in 1970.

Section 318[452] (1) of the Criminal Code makes the *advocacy or promotion of genocide* an indictable offence that is punishable by imprisonment of up to five years. Section 318(2)

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[448] *The Defamation Act*, CCSM 2002, c D-20, s 17 [*Manitoba Libel Act*].

[449] *Racial Discrimination Act*, SO 1944, c 51.

[450] Canada, Minister of Justice, *Report of the Special Committee on Hate Propaganda in Canada,* Chair: Maxwell Cohen (Ottawa: Queens Printer, 1966) [*Cohen Committee Report*].

[451] Maxwell Cohen, "THE HATE PROPAGANDA AMENDMENTS: REFLECTIONS ON A CONTROVERSY" (1970) 9:1 Alberta L Rev 103 at 113.

[452] s 318 of *Offences Against the Person and Reputation – Hate Propaganda.* RSC 1985, c C-46.

defines genocide as an action with the intent to destroy an identifiable group by either (a) killing members of the group or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction. 318(4) clarifies the notion of "identifiable group" by defining it as any group of society distinguishable by their race, religion, ethnic origin or sexual orientation.

Section 319(1)[453](a) institutes the offence of *public incitement of hatred* as an offence punishable with imprisonment for a maximum duration of up to two years if convicted. Public incitement of hatred in this context is to be understood as public communication by which one incites hatred against an identifiable group that is likely to cause a breach of peace. The term "communicating" is expansively interpreted to include communication by television or radio broadcasting, or even telephone calls. The same applies to the form of the communication, covering all forms of statement that is either orally expressed, written, or electronically transmitted.

The offence of *willfully promoting hatred* is established by Section 319[454](2) of the Criminal Code, making it an indictable offence punishable by imprisonment of up to two years if found guilty. Aware of the potential risk of violating freedom of expression, 319(3) was added to include a number of specific defenses available. According to this section, "no person shall be convicted of an offence under Section 319, subsection (2)," (a) if he proves the factual truthfulness of his statements; (b) if the expressed opinion was made in good faith and concerned a religious subject; (c) if the statement is of public interest for the public's benefit or his reasonable belief in the truthfulness of his statement; or (d) if it was he was

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[453] s 319 in *ibid*.

[454] *Ibid*.

pointing out, in good faith, matters relating to hatred against identifiable groups with the purpose of removal.

Neither the constitutionality of section 318 nor that of section 319(1) has been tested in a court of law to this day, although it has been invoked, for instance, in the *Mugesera* case.[455] To trigger the offence advocacy or promotion of genocide, an express consent from the Attorney General is required (charging by the offence of public incitement of hatred, however, does not). The constitutional validity of Section 319(2) was challenged in two cases (*Keegstra* and *Taylor*) for infringing upon freedom of expression as guaranteed under Section 2(b) of the *Charter*. The two decisions were jointly delivered by the Supreme Court that upheld the constitutionality of the criminal provision by a narrowly divided opinion of 4 to 3. What is highly interesting, especially in the *Keegstra* decision, is the Court's expansive understanding of harm as a justificatory basis to limit willful hate speech targeting members of an identifiable group.

2.2.2.2.The Two Harms in *Keegstra*

The decision that saw the *mise-en-scène* of the anti-hate group propaganda law was *Keegstra*,[456] the leading case in Canadian racial hate speech jurisprudence. The case concerned the abovementioned section 319(2) in the Criminal Code that prohibits willful promotion of hatred. The case involved one James Keegstra, a high school teacher in Alberta. For almost a decade, Mr. Keegstra passed onto his students his strong sentiment of hatred and personal views toward Jews. He propagated that it was the grand conspiracy of the Jews to

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[455] *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 40.

[456] *Keegstra*, *supra* note 81.

bring Christianity to destruction and gain control of the world.[457] For him, the many important institutions of society - the church, the banks, the media and even the universities and of course political actors - were all cover agents to advance that conspiracy scheme. James Keegstra went further to describing Jews in not so coy terms. In front of his students, he accused Jews of being "treacherous", "subversive", "sadistic", "money-loving" creatures who longed to grab power.[458] He even branded Jewish people as "child killers."[459] What was even more disturbing was that his students had to mirror their teacher's line of beliefs for the fear of being rebuked.[460] This way, Keegstra used his position of power as a superior to manipulate his students into his teachings following regarding Jews, implementing a basic reward-versus- punish system. When these actions came to light, he was let go from his position. One year after, Keegstra was charged and convicted[461] under section 319 (2) of the above-cited Criminal code for intentionally promoting hatred toward a group of people based on their ethnicity.

Keegstra appealed,[462] challenging the constitutionality of section 319 (2). His argument was that this law infringed on his freedom of expression as guaranteed by the *Charter.* The Supreme Court of Canada concurred that the criminal statute did in fact curtail Keegtra's expression. But in finding that the freedom of expression was hence violated,[463] the

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[457] *Ibid* at 713-14.

[458] *Ibid* at 714.

[459] *Ibid*.

[460] *Ibid*.

[461] *Ibid* at 713.

[462] *Ibid* at 714.

[463] *Ibid* at 730 (Dickson CJ).

Court also found the restriction to be wholly justified under section 1 of the *Charter*.[464] The objective of the statute, the majority of the high justices observed, was to thwart the spread of vehement expressions based on racial prejudice. This goal was rationally connected and did so with minimal impairment to the right of free expression. Justice McLachlin however dissented, citing the fear of the chilling effect from American doctrine. She voiced grave concern in this regard:

> "Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. (…) The result of a failure to do so may be to deter not only the expression which the prohibition is aimed at, but legitimate expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected."[465]

She also referred to past experiences demonstrating, in her view, that criminalization of racist group hate speech may not only achieve its objective but to the contrary, become counter-productive to that very objective.[466]

Notwithstanding these outstanding and legitimate concerns, it is important to take a closer look at the harms-based justification provided by the majority opinion of the Court.

i. Harm on Individual and Groups

There are obviously several reasons as to why *Keegstra* carries so much weight when it comes to the constitutional treatment of public hateful expression. First and foremost,

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[464] *Ibid* at 766.

[465] *Ibid* at 850 (McLachlin J dissenting).

[466] *Ibid* at 853-54.

Keegstra distinguishes itself by its unstinting focus on the actual harms in racist hate speech. When faced with controversial if not hateful expression, as the American experience revealed, there is a tendency to overly focus on the immediate concern as to whether the State has overstepped with its censuring of freedom of expression. In the pre-*Charter* days, it was in the form of defining jurisdictional competence over involved matter. *Keegstra* liberated itself from those frames. *Keegstra* moves the cursor and transposes the angle on the harm that the victim of hate speech must endure.

These harms are primarily of, but not limited to, emotional or psychological nature inflicted upon individuals and their close groups. Indeed, Dickson C.J. directly acknowledged that "the emotional damage" that may be inflicted by this category of words can have "grave psychological and social consequence".[467] He went on to invoke the notion of human dignity and how this fundamental aspect, constituting the most basic person-being of the victim may come under attack by hate comments.[468] The harm is deepened, as he elaborated, since such speech assaults the "sense of human dignity and belonging to the community".[469] He acutely pointed out that the accumulation of "derision, hostility and abuse encouraged by hate propaganda … has a severely negative impact on" the target who identifies with the associated group.[470] The High Justice emphasized the fundamental link between an individual and his group. The harm cuts that much deeper because "he experiences attacks on the groups

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[467] *Ibid* at 746.

[468] *Ibid*.

[469] *Ibid*.

[470] *Ibid*.

to which he belongs personally and sometimes very deeply."[471] Even though the hateful remark may be general and vaguely aimed at a large group of persons, an individual member of that group may feel attacked on a personal level precisely because of the close *bond* that he or she may have cultured by natural and involuntary association with the group over time. This transposition of perspectives resonates with critical race theorists' position on racist hate speech. By attempting to see the harms of hate speech from the shoes of the victim,[472] the Court in *Keegstra* had an easier time grasping the depth of the wound. The approach was thus an abrupt departure from the traditional position that sought to instill either a 'State-versus-individual expression' or a 'right-versus-right' analytical positioning. And yet it was a refreshing and effective methodology to smoothen the rigid, formalistic edges of a fairly complicated field of law by inviting a humanistic approach to help understand the kind of harm that was at hand.

ii. Harm to Multicultural Society

The *other* harm is more global in scope. It is the harm that disorients the public. This harm upon "society at large" is no less severe than the harm on an individual target or the targeted group. The encouragement and insinuation contained in a hate message may cause "serious discord" within a community, if not outright acts of violence and discrimination.[473] The free presence of hate propaganda, when not moderated by the relevant State authority, pollutes the minds of the general public. No innocent bystander is immune to this

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[471] *Ibid* at 746-47.

[472] On this subject, see especially Matsuda, "Victim's Story", *supra* note 11.

[473] *Keegstra*, *supra* note 81 at 747-78.

phenomenon. Even a person with absolutely no preconceived notions may start viewing the vilified subjects under a negative light after exposure to even extremely nuanced, generalized group hate speech. Rather than perceiving them as ordinary people of equal stature, the group may be pictured in their imposed description. Effectively, the view of the public spectator would have been tainted. Such is the pervasive nature of group vilifying speech.

Aware of the risk in casting a net too broad that yielded the criticisms that had drowned the prosecutions in *Butler v. The Queen*,[474] Justice Dickson in *Keegstra* devoted a substantial portion of his opinion to truly *zero-in* on the term 'hatred' and to translate the seriousness of the harm contained in such a type of speech. To him, the notion of hatred "connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[475] Elaborating on the mushroom effect of harm that targets identifiable groups in society, Dickson C.J. understood that this category of public expression would subjugate group-affiliated members to be "despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."[476] In his view, the use of the term 'hatred' was so precise in its meaning and implication that it could not possibly be confounded with other milder hostilities. In short, expression of hate was to be seen only as "the most intense form of dislike"[477] and if it surfaced on public square, it would be ineligible for any tolerance.

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[474] *Butler*, *supra* note 436. Sopinka J put in a great deal of effort in stressing that apart from violent form of sexual acts, only the most explicit form of sexual act that degrades or dehumanizes the subject is prone to legal control (*ibid* at 486). She stressed that the harm must be substantial for the contested pornographic expression to be restrained.

[475] *Keegstra*, *supra* note 81 at 777-78

[476] *Ibid*.

[477] *Ibid*.

It is important to situate this *social harm* in the context of Canadian multiculturalism. The harm in racial hate propaganda amounts to harm inflicted upon the *multicultural* character of society. This was echoed at the Supreme Court level by Dickson C.J. as he explicated that "the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression."[478] This was an explicit recognition by the Court that multiculturalism is a constitutional interpretation of the *Charter*,[479] consonant with equality and standing tall next to speech freedom. The ruling in *Keegstra* effectively elevated what could otherwise be easily discarded as a mere political ideology into an actual right that is capable of taking precedent over free speech claims when the contested expression is judged to gnaw at the equal standing of fellow Canadian citizens.

The combination of equality and multiculturalism in the Canadian context demonstrates the nation's constitutional project's amicable inclination toward a group-based interpretation. The concept of group rights has a special place in the Charter and in Canadian constitutional references. In fact, individual rights come coupled with certain virtues like "tolerance and respect,"[480] both of which shape the relativist approach to the freedoms of

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[478] *Ibid* at 743.

[479] s 27 of the *Charter* provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[480] *McLachlin*, *supra* note 371 at 31. She describes the three cornerstone interests that have formed the basis of Canada's vision of rights inscribed in the *Charter*:

> "… individual rights, tied to a conception of tolerance and respect; group rights, tied to a recognition that pluralism is one of Canada's animating values, and public interests that may justify limiting rights in appreciation of the relationship of support and obligation between individual and community."

individuals and their necessary balancing with regard to collective interests.[481]

Unquestionably, individual freedoms are important. But when that freedom is utilized in such a way to disseminate and sow racially divisive messages, the collective dimension of Canadian society is menaced. To protect the "cultural and group identity" through the prism of equality, there can be no room for tolerance for expressions that malign entire social groups with a large brush. Constitutional rights belong to individual agents as much as they do to groups. The Canadian relation to freedom of expression is thus a communitarian one. As long as the Supreme Court maintains the culturally pluralistic vision of Canadian society, legislations displaying preferment toward collective interests are likely to triumph over free expression even at the cost of silencing piercing individual expressions.

2.3.The Legal Treatment of Defamation in Canada

The constitutional rules dealing with group targeting hate speech have been studied with respect to the relevant criminal provisions in the previous section. The present section consists of a general overview on defamation in civil and criminal law built largely on common law jurisprudence as well as detailed analysis of important principles that have been expanded through modern defamation case law developments.

2.3.1. Defamation Laws in Canada

The previous section having traced the constitutional treatment of group targeting (hate) speech, the present section turns to the general rules governing the tort of defamation

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[481] *Ibid* at 32-36.

(2.3.1.1.). I will then proceed to a detailed recapitulation of modern jurisprudential developments that have contributed to creating foundational principles in the field of defamation law (2.3.1.2.). It is important to clarify that the following study is on the tort of defamation. The civil law treatment regarding defamation will be viewed very briefly during the study of Quebec defamation jurisprudence, and later with the case study of *Bou Malhab* (2.3.1.3.). This will be followed by criminal libel (2.3.1.4.) and the spreading of false news (2.3.1.5.) in the latter part of the section.

2.3.1.1.The General Rules in the Tort of Defamation

Professor Brown summarily encapsulated what he understood to be the purpose of the law of defamation as the following:

> The law of defamation embodies the sound public policy that individuals are entitled to the enjoyment of a reputation unimpaired by false and defamatory statements.[482]

Thus, the recourse in tort against defamation is a "legal vehicle" through which defamed individual may "vindicate their personal and business reputation."[483] To prove that a statement was indeed defamatory, the plaintiff must be able to establish the following elements: that the published material was defamatory; that the statement referred to the plaintiff; and that in the eyes of a reasonable person, the statement in question would tend to lower the social consideration of the plaintiff.[484] In other words, the first condition evaluates

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[482] Brown, *supra* note 1 at 3 [*Brown*].

[483] *Ibid*.

[484] *Grant, supra* note 83 at para 28.

the 'defamatoriness' of the statement; the second standard looks for the subjectivity of the prejudice directed at the plaintiff; the third requirement is what is generally referred to as the reasonable or ordinary person test. If these conditions are satisfied by the plaintiff, the burden of proof then falls onto the defendant to prove otherwise.[485]

For the defendant, several defense mechanisms are available. For instance, a factually accurate – or truthful - statement is presumed not to be defamatory. Defense of privilege may protect a person from being held liable for defamation. There are two kinds of privileges: One is absolute, applying to highly discrete 'occasions' like statements made in a parliamentary hearings or legal proceedings. In *Elliot v Insurance Crime Prevention Bureau*[486] for example, the court held that absolute privilege applies to "any communications which take place during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings."[487]

The other kind of privilege is what is known as 'qualified' privilege. This privilege, though critical for "untrammeled communication,"[488] may only be invoked in particular circumstances and may be "defeated by proof that the defendant acted with malice."[489] Therefore, in *Caron v A*,[490] it was held that complaints of rape to the police were not

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[485] *Ibid* at para 29.

[486] *Elliot v Insurance Crime Prevention Bureau*, 2005 NSCA 115 (CanLII) [*Elliot*].

[487] *Ibid* at para 112. See also *Hung v Gardiner*, 2003 BCCA 257 (CanLII) [*Hung*] (providing absolute privilege to what the court considered as quasi-judicial bodies – in this instance, they being the Law Society of British Columbia and the Certified General Accountants Association of British Columbia that had carried out an investigation on personal conducts of the plaintiff).

[488] *Grant*, *supra* note 83 at para 30.

[489] *Ibid.*

[490] *Caron v A,* 2015 BCCA 47 (CanLII) [*Caron*].

protected by absolute privilege but instead fell into the qualified scope because the recipient (the RCMP) of the complaint does not possess the same "attributes to a court of justice" nor does it "act in a manner similar to that which such court act."[491] As *Rajkowa v Watson*[492] put it in 1998, "the police investigate, they do not adjudicate."[493]

Fair comments stated on matters of public interest may also be considered as non-defamatory.[494] This last defense will be further examined in the following sections.

2.3.1.2.Modern Development in Canadian Libel Jurisprudence

Canadian law of defamation is largely built on both common law[495] and statutory laws. Although criminal libel in Canada entered the book as early as 1874,[496] Canadian laws on defamation have remained largely unaltered to this day.

One obvious example of this antiquatedness is blasphemous libel. Not only has such law existed in Canada since the 1600's, but there were actual convictions under the provision, the

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[491] *Ibid* at para 24 (citing the test enunciated in *Hung*, *supra* note 487).

[492] *Rajkowa v Watson,* [1998] 167 NSR (2d) 108.

[493] *Ibid* at para 46 (Hood J).

[494] *Grant*, *supra* note 83 at para 31.

[495] The origin of common law of defamation has its roots in the English Star Chamber. At the time, prohibitions on libel existed mainly to safeguard the name of the royal house members, high-ranking noblemen, and clergymen, and to keep public peace in the streets from disorderliness or violent riots. With respect to libelous expressions aimed at a large group of people, the threshold of proof was high. The general rule at the time was that "if a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual" Willes J in *East v Holmes* (1858), 1 F&F 347 at 349 (Eng). As such, unless the plaintiff is able to convince the court that the defamatory injury has specifically caused him harm on a personal level, there is no cause of action. This position was reaffirmed in another English case, *Knupffer v Express Newspapers,* [1944] AC 116 (Eng) (and has since never been explicitly refuted. More on this case, see at 167.

[496] *Act respecting the Crime of Libel*, SCC 1874, c 38.

consequences of which ranged from short term imprisonment to paying a small fine.[497] No one has been successfully charged by the Criminal provision s.296 of 1892[498] since 1935. There were, however, a couple of particularly controversial instances involving the possible application of blasphemous libel concerning the theatrical play of *Les Fées ont soif* in the 1978 and Monty Python's film *Life of Brian* in 1980.[499]

Given the fact that statutes on defamation have been written in considerably conservative times, it was only a matter of time before this stubborn state of defamation law would clash against the evolution of a more free and democratic Canadian society where individual fundamental rights such as freedom of expression would come to occupy an increasingly central place. As such, the much dormant s.296, along with part of the definition of defamatory libel under subsection 299(c) that was judged unconstitutional for its overbreadth

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[497] Jeremy J Patrick, "Blasphemy in Pre-Criminal Code Canada: Two Sketches" (2010) 22 St Thomas L Rev 341.

[498] s 296 of the Criminal Code reads:

> (1). Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term no exceeding two years.
> (2). It is a question of fact whether or not any matter that is published is a blasphemous libel.
> (3). No person should be convicted of an offence under this section for expressing in good faith and in decent language or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

[499] The play 'Les fees ont soif' by Denise Boucher was a highly polarizing and publicized issue at the time. Of those who felt outraged by the depiction of Maria in the piece, Les Jeunes Canadiens pour une civilization chrétienne filed a suit to censure the public showing of the play. *Jeunes Canadiens pour une civilization chrétienne c Fondation du Théâtre du Nouveau Monde*, [1979] CSQ 181. The Superior Court of Quebec ruled against the claim, deciding that the action was inadmissible given that a generalized attack cannot result in personalized harm in each identifying individual. This basis of ruling was affirmed at the Court of Appeals. *Jeunes Canadiens pour une civilization chrétienne c Fondation du Théâtre du Nouveau Monde*, [1979] CAQ 491. The Supreme Court of Canada declined to look into the case, dashing any hopes of a different judicial outcome. On the question of efficacy of private law vis-à-vis the issue of censorship of offensive expression toward religions, see especially Jean-François Gaudreault-DesBiens, "La sexualization du sacré et la régulation des offenses à la religion. Un bref retour sur l'affaire des Fées ont soif" (2006) 15:1 Bulletin d'histoire politique 34-43.

in *R. v. Lucas*,[500] is expected to be repealed at hearings on Bill C-51.[501]

i. *Hill v. Church of Scientology of Toronto* and the Balancing of the "Twin Values"[502]

One modern case that captures the progressive-versus-archaic skirmish is *Hill v. Church of Scientology of Toronto*.[503] At issue before the Supreme Court was whether to uphold the decision of the Court of Appeal of Ontario affirming a 1993 judgment that had awarded Hill, a Crown Attorney who had sued the Church of Scientology for libel.[504] The appellants in this case, a barrister for and representative member of the Church of Scientology, had falsely claimed that Hill had misled a judge and violated court orders regarding certain sealed documents. Hill sued them to recover compensations for libel, and at the Court of Appeals' decision. was awarded $300,000 for general damages, $500,000 for aggravated damages by the Church, and a whooping sum of $800,000 for punitive damages. When the case finally reached the Supreme Court, the Court had to determine whether the common law of defamation was consistent with the *Charter*. This decision is striking in two senses.

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[500] *R v Lucas*, [1998] 1 SCR 439 [*Lucas*].

[501] Canada Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017, (as passed by the House of Commons 11 December 2017)

[502] *Church of Scientology*, *supra* note 82 at para 100 ("There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash").

[503] *Ibid.*

[504] The Church of Scientology had announced a motion through their lawyer that alleged Mr. Hill had misled the judge and divulged certain sealed documents in a previous case involving the Church of Scientology. After their allegations having been found baseless, Mr. Hill in turn had launched a libel suit, which was affirmed in the Court of Appeals of Ontario, and then by the Supreme Court of Canada, which resulted in one of the largest libel compensation in Canada (the lawyer of the Church and the Church jointly liable for $300,000 in general damage, $500,000 for aggravated damages, and another $800,000 for punitive damages).

First, broadly looking at the judgment as a whole, it is remarkable that the Court sided with the right to individual reputation over the freedom of expression, when the latter is generally perceived as *the* constitutional right in that it is increasingly lauded for its consistent democratic exercise, and this, not only in Canada but as a global trend of Western democratic nations. In upholding the lower court's decision, the Supreme Court made it known that infringement on the social standing of person is not something that will be easily excused by some ostensible cover of free speech. The Court indeed observed that "the appellants impugned the character, competence and integrity of Casey Hill."[505] While acknowledging the revered status of freedom of expression, admitting that "without this freedom … democratic forms of government will wither and die,"[506] the Court nevertheless reminded that this freedom "has never been recognized as an absolute right."[507] In fact, the Court laid out how defamatory statements run contrary to the values underlying freedom itself: "(defamatory statements) are inimical to the search for truth… cannot enhance self-development … nor lead to healthy participation in the affairs of the community."[508] Simultaneously, the Supreme Court seized on this occasion to emphasize the importance of individual reputation. Drawing the link between good reputation in a democracy, individual dignity and self-worth, the Court dedicated a good portion of the judgment to elaborate on the significance of good repute by noting that "It (the right to good reputation) is an attribute that must, just as much as freedom of expression, be protected by society's laws."[509] The Court

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[505] *Ibid* at para 75.

[506] *Ibid* at para 101.

[507] *Ibid* at para 102.

[508] *Ibid* at para 106.

[509] *Ibid* at paras 107-08.

went as far as to provide a detailed exploration of the historical development of the common law of libel from the days of the Old Testament and the Roman Empire.[510]

Secondly, to come back to the original question as to the consistency of common law of defamation vis-à-vis the *Charter*, the Court confirmed "the exclusion of private activity from the *Charter*"[511] and set it aside from cases arising over governmental infringement on individual's fundamental freedom. The latter would necessarily involve challenge to government action where the "cause of action is founded upon a *Charter* right."[512] Sounding the cautious alarm of the floodgate argument, Cory J. sternly warned against the import of the *Charter* analysis into the private domain.[513] Giving way for constitutional complaints in private litigations over defamatory comments could very well "strangle the operation of society."[514] For the Court, making this distinction helped them to set aside the "actual malice" criteria conceived by *New York Times v. Sullivan*.[515] While admitting that the common law of defamation must be compatible with *Charter* principles, the court refused to concede that defamation law was "(not) unduly restrictive or inhibiting." The Court was of the view that the impugned reputation of Mr. Hill was not some detachable notion from the person

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[510] *Ibid* at para 109-17.

[511] *Ibid* at para 68 (citing La Forest J in *McKinney v University of Guelph* [1990] 3 SCR 229 at 262).

[512] *Ibid* at paras 93-94 (referring to *Dolphin Delivery*).

[513] *Ibid* at para 97. Cory J regarded the conventional s. 1 Charter test as "not appropriate" in this instance but instead pushed for a "more flexible" framework where "The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary."

[514] *Ibid* at para 69.

[515] *Sullivan, supra* note 77.

("Reputation is an integral and fundamentally important aspect of every individual"),[516] nor a separate notion distinct from a reputation held by a government agent.[517] For the Court, the issue at hand was a dispute arising between two private parties. And "private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right… because, quite simply, *Charter* rights do not exist in the absence of state action."[518] Thus, in a legal affair that involves only private parties one can only allege the "inconsistency" of common law against *Charter* rights.[519]

ii. *Grant v. Torstar*'s[520] expansion of the Defense of Public Interest and addition of Responsible Communication Defense

Soon after entering the 2000's, Canadian defamation case law would continue to evolve. One remarkable decision took place in 2009, that embraced an expansive notion of public interest. The case, *Grant v. Torstar*,[521] extended the defense of public interest to incorporate essentially all subjects "ranging from science and the arts to the environment, religion, and morality."[522] Observing other nations' approach to public interest being too narrow in scope,

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[516] *Church of Scientology*, *supra* note 82 at para 72.

[517] *Ibid*. ("The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their persona life and the other to their employment status.")

[518] *Ibid* at para 95.

[519] *Ibid*.

[520] *Grant, supra* note 83.

[521] *Ibid.* In this instance, a journalist and the newspaper for which he worked were sued for libel by a local businessman. The published article quoted negative opinions of local residents regarding the construction of a golf resort in the vicinity.

[522] *Ibid* at para 106.

the Court was of the opinion that matters relating to public interest were not solely "confined to publications on government and political matters (…) nor is it necessary that the plaintiff be a public figure."[523]

In addition, the decision stepped away from the traditional principles of strict liability which is the norm in defamation cases, by consecrating a new defense of *responsible communication* on matters of public interest in light of the importance in "sustaining the public exchange of information that is vital to modern Canadian society."[524] To succeed at this defense, the defendant must prove that first, the publication was on a matter of public interest and second, that there was on the part of the writer diligence in attempting to verify the allegations.[525] This last defense will be continuously invoked, particularly in defamation lawsuits involving journal articles.

iii. *WIC Radio v. Simpson* and the Elaboration on the Fair Comment Defense

For the purpose of this thesis and with respect to some of the arguments that will later be elaborated in the last chapter, the defense of fair comment is relevant. This defense

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[523] *Ibid*.

[524] *Ibid per* McLachlin CJ.

[525] The Court laid out the elements to this responsible communication test:

> "B. The publisher was diligent in trying to verify the allegation, having regard to:
> (a) the seriousness of the allegation;
> (b) the public importance of the matter;
> (c) the urgency of the matter;
> (d) the status and reliability of the matter;
> (e) whether the plaintiff's side of the story was sought and accurately reported;
> (f) whether the inclusion of the defamatory statement was justifiable;
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
> (h) any other relevant circumstances" (at para 126).

mechanism best encapsulates the sort of ferocious promotion of free speech that is a prerequisite in a democratic society. That the culture of a "freewheeling debate"[526] involving opinions expressed on broad yet crucial social issues of our days be guaranteed, is the underlying idea behind the fair comment defense.

A fair comment defense in Canadian defamation law, although defeatable under the malice rule, is one that is strongly grounded on facts and objectivity. Binnie J. in *WIC Radio* quoted Dickson J's dissent from *Cherneskey v. Armadale Publishers. Ltd.*[527] to narrate statements that may be eligible for the fair comment defense:

(a) The comment must be on a matter of public interest;
(b) The comment must be based on fact;
(c) The comment, though it can include inferences of fact, must be recognizable as comment;
(d) The comment must satisfy the following objective test: could any man honestly express that opinion on the proven facts?
(e) Even though the comment satisfies the objective test the defense can be defeated if the plaintiff proves that the defendant was actuated by express malice.[528]

In the case of *WIC Radio*, a radio talk show host, known for his controversial, often unfiltered remarks, had drawn comparisons of the defendant, a social activist with critical views on homosexual persons, to Hitler, the Ku Klux Klan and the skinheads in a discussion concerning the introduction of materials dealing with homosexuals in public schools. The Court accepted that the comments made against the plaintiff were defamatory but that those

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[526] *WIC Radio*, *supra* note *84* at para 2.

[527] *Cherneskey v Armadale Publishers Ltd*, [1979] 1 SCR 1067.

[528] *WIC Radio*, *supra* note 84 at para 28.

comments were saved by the complete application of the fair comment defense. The Court also expressed some of the more traditional concerns for free speech to justify what they viewed as a much needed modification to the fair comment defense to eliminate the honest belief element:

"The traditional elements of the tort of defamation may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", it is contended, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. "Chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements."[529]

Lastly, it is noteworthy that the exceptional deference granted to the malice rule closely follows the 'actual malice' standard enunciated in the father of American libel jurisprudence, *New York Times v. Sullivan*.[530] *Hill v. Church of Scientology*[531] in the earlier section provided a detailed definition of the malice rule in 1995:

"Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes … any indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created… Malice may also be established by showing that the defendant

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[529] *Ibid* at para 15.

[530] *Sullivan*, *supra* note 77.

[531] *Church of Scientology*, *supra* note 82.

spoke dishonestly, or in knowing or reckless disregard for the truth."[532]

It appears, based on the recent, widely publicized decision of *Robinson v Furlong*[533] by the British Columbia Supreme Court that the act of critically responding to a journalist's reported allegations cannot be considered as defamatory expression spurred by malice. The case involved a counter-suit launched by a veteran journalist against Mr. Furlong who had denied the journalist's report that alleged that Mr. Furlong abused aboriginal children in a Burns Lake elementary school in 1969. In categorically denying her report that included claims by alleged individuals, Mr. Furlong did not mince his words when casting doubt on Robinson's journalistic methodologies, words which the latter party considered defamatory of her professional integrity and work ethics. The Court however ruled in favor of Mr. Furlong, holding that Robinson's report consisted of an attack on the character, conduct and credibility of the defendant and that defendant's 'lashing out' via press conference fell under the defense of qualified privilege, the scope of which he did not surpass, the occasion having been reactionarily caused by the plaintiff's reporting.

iv. Online Defamation

This section would be incomplete without a brief discussion about online defamation. Libelous expressions made on the Internet, and *restraining* (by legal means) the kind of intentionally vicious, unsubstantiated attacks on personal characters or business reputation is an endless obstacle. The traditional difficulties in reining in online defamation are laid out in

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[532] *Ibid* at para 145 (internal citations omitted).

[533] *Robinson v Furlong,* 2015 BCSC 1690 (CanLII).

the respective section of the previous chapter.[534] If the technological innovations initiated by the Internet have fundamentally transformed the ways in which communications are exchanged and information shared, its darker side has revealed that replication and propagation of untruthful statements at a limitless rhythm has become that much easier. Access to baseless rumors takes seconds to view, the only armament needed being an electronic device with Internet connection.

In recognizing that potential to inflict harm to reputation, Canadian courts have demonstrated a heightened degree of vigilance when online defamation suits have been brought before theirs bars. In *Henderson v. Pearlman*[535] for instance, the court was not hesitant in explicitly stating the destructive capacity of the Internet and its ability to deal reputational harm.[536] Facebook posts can very well be liable for defamation, as has been recently confirmed in *Van Nes v. Pritchard*.[537] In this case, after noise disputes between neighboring parties, the defendant had made derogatory comments about the plaintiff on Facebook, among which figured the labeling of 'pedophile' by her friends. She was held liable for both her own defamatory expression as well as the comments made by her friends on her original post. The often-punitive approach by courts to *mettre en garde* online defamation is also noteworthy in the Ontario case of *Rutman v. Rabinowitz.*[538] In this

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[534] (provide exact page numbers once chapters enjoined)

[535] *Henderson v Pearlman* 2009 CanLII 43641 (ONSC).

[536] *Ibid* at para 35. (citing Blair JA in *Barrick Gold Corp v Lopehandia*, 2004 CanLII 12938 (ONCA):

"Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation."

[537] *Pritchard v Van Nes*, 2016 BCSC 686 (CanLII).

[538] *Rutman v Rabinowitz*, 2018 ONCA 80 (CanLII).

instance, the Court emphasized the pernicious effect of defamation on the Internet in justification of the order to pay punitive damage. E-mail, even when sent to a single recipient, having become knowledgeable to the defamed party, can be held responsible for defamation.[539] Content in political blogging is not exempt from defamation charges, as has been demonstrated in the landmark decision of *Baglow v Smith*.[540] In this last case, although the defendants were ultimately saved by a successful fair comment defense, the judgment nevertheless has shown that special leniency does not apply to the political blogosphere. Beyond its' significance in that the case concerned a very specific type of speech that is political speech/blogging, *Baglow* was interesting in the Court's hiring of an independent expert in the area of Internet social media culture and communications. The decision also took in a rather restrictive vision of *Crookes v. Newton*,[541] in deciding that a moderator/creator of an online message board could be held responsible for libel (as opposed to *Crookes* which did not hold publishers of articles containing hyperlinks to defamatory materials liable). However, the applicability of the reasonable person test employed in this case remains questionable, given that users in the political blogosphere tend to be keenly familiar with the practices of personal insults and character assassinating insinuations prevalent in this type of online space, as attested to by the Internet specialist.[542]

As the use of the Internet evolved over the last two decades, the law of online defamation

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[539] *Sullivan v Harrington*, 2008 CanLII 42209.

[540] *Baglow v Smith*, 2015 ONSC 1175 (CanLII) [*Baglow*].

[541] *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269 [*Crookes*].

[542] Dr. Elmer who was employed by the Court to provide expert opinion in this case, noted for instance "that personal attacks are not uncommon on the Internet especially among those who engage in political debate and discussion" (*Baglow*, *supra* note 540 at para 114), that "the more partisan the more sarcasm, hyperbole and cetera is likely and the more likely to see a comparison to Stalin and Hitler" (*ibid* at para 125), that "political actors (those who post or comment) will know that the environment is harsh" (*ibid* at para 124).

had to evolve with it. Naturally, related questions of ambiguous technicality arose. One such dilemma was with regard to hyperlinking and whether one could be liable for libel for including hyperlinks on internet publication that led to defamatory materials. This is a significant question because it requires the Court to balance reputational right and free speech in the specific context of the Internet. In the *Crookes v. Newton*,[543] Abella J., writing for the majority concluded that an individual hyperlinking could not be held liable for libel. In the Court's view, hyperlinking to potentially defamatory sources could not be seen as an act of publication in of itself. The Court thus took a more attenuated stance, observing the "passivity"[544] of this type of publications and the lack of control over the materials behind the hyperlinks.[545] The Court instead stressed the fundamental role of the Internet and specifically, hyperlinking's function in providing and facilitating access to information.[546] This inherently enabling quality of hyperlinks, for the Court, was an attribute in promoting freedom of expression.[547] But the majority also noted that hyperlinking could still be defamatory if "the manner in which they have referred to content conveys defamatory meaning."[548] McLachlin C.J. and Fish J. took a different approach, arguing that the "publication of a defamatory statement via a hyperlink should be found if the text indicates "adoption or endorsement of

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[543] *Crookes*, *supra* note 541.

[544] *Ibid* at para 21.

[545] *Ibid* at para 26.

[546] *Ibid* at paras 30-34.

[547] The lack thereof would, in Abella J's view, "have the effect of seriously restricting the flow of information and, as a result, freedom of expression." (*ibid* at para 36).

[548] *Ibid* at para 40.

the content of the hyperlinked text."[549]

Another thorny issue in online defamation is whether the writer of a defamatory publication can be held liable for reputational harm inflicted by subsequent republications or distributions of the original material. Recently, it was affirmed in *Weaver v. Corcoran* that the four journalists of the National Post who had written an article (later judged to be libelous) about a university professor and the publisher were jointly responsible for the damage caused by repeated republication and distribution of their article,[550] but not for the readers' comments (as timely measures were taken to moderate).

One inevitable topic that is often raised in legal debates of transnational defamation in the age of the Internet, is the choice of forum/jurisdictional competence. Would a Canadian court have a say over a libel action against foreign defendants based abroad for online defamation? The Supreme Court of Canada ruled in the affirmative in a 2012 case of *Breeden v Black*.[551] In this instance, the top officers of a U.S. company in Chicago had made allegedly defamatory statements about the plaintiff. The material in question, including press releases and reports on the company's website about the defendant, were available online and three Canadian major newspapers The Globe and Mail, the Toronto Star and the National Post had downloaded and republished them in Ontario.[552] The Supreme Court rejected the appeals of American appellants based on the methodologies first discovered in *Morguard Investments*

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[549] *Ibid* at para 48.

[550] *Weaver v Corcoran*, [2015] BCSC 165 (CanLII).

[551] *Breeden v Black*, 2012 SCC 19, [2012] 1 SCR 666 [*Black*].

[552] *Ibid* at para 6.

Ltd v De Savoye[553] and *Muscutt v Courcelles*,[554] and later refined in *Van Breda v Village Resorts Limited*.[555] In the Court's view, there was a substantial connecting factor between the action and the jurisdiction given that the reputation of the defendant was debased in Ontario through redistribution of the defamatory material by Canadian newspapers and expressions that were undoubtedly aimed at a Canadian audience.[556] As for the question of *forum non conveniens*, while the Court did acknowledge that both the Illinois and Ontario forums each had justificatory advantages, nevertheless leaned towards the latter to define it as the more appropriate forum.[557]

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[553] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077.

[554] *Muscutt v Courcelles*, 2002 CanLII 44957 (ON CA) [*Muscutt*]. The Court laid out eight factors:

(1) The connection between the forum and the plaintiff's claim;
(2) The connection between the forum and the defendant;
(3) Unfairness to the defendant in assuming jurisdiction;
(4) Unfairness to the plaintiff in not assuming jurisdiction;
(5) The involvement of other parties to the suit;
(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
(7) Whether the case is interprovincial or international in nature; and
(8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere. (at paras 77 – 106).

[555] *Van Breda v Village Resorts Limited*, 2010 ONCA 232 (CanLII) [*Van Breda*]. The case brought further clarification to the test in *Muscutt* and laid out a two-step approach. The first stage would decide if there is a real and substantial connection. The second stage is a resumé version of the eight factors, combining abovementioned *Muscutt's* 1 & 2, 3 & 4, 7 & 8, while separately maintaining the 5th and the 6th elements.

[556] To determine the issue of *Jurisdiction Simpliciter*, the Court found it rather easily by locating "a presumptive connecting factor – the alleged commission of the tort of defamation in Ontario." The fact that the defamatory information was downloaded and republished by three Canadian newspapers in Ontario and knowing that republication of defamatory material is an act of new publication, the requirement of real and substantial connection between the plaintiff's libel actions and the jurisdiction of Ontario was well established. (see *Black* at para 20).

[557] *Black*, *supra* note 551 at para 29. The Court in *Black* employed a test developed in Québec in *Opprenheim forfeit GMBH v Lexus maritime inc*, [1998] AQ n° 2059 QL) (CA) at para 18, the elements that which ought to be considered globally:

(1) The place of residence of the parties and witnesses;
(2) The location of the evidence;
(3) The place of formation and execution of the contract;
(4) The existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;
(5) The location of the defendant's assets;

With highly mediatized *Black* and most recently, *Hareetz v Goldbar*,[558] there is no question that the legal sector of defamation, and especially defamations suits of transnational and online nature will continue to assume importance and exert significant jurisprudential implications as the digital connectivity progresses even further. Canadian courts have been quite assertive in establishing their jurisprudential competence, often to the benefit of Canadian plaintiffs, even when the alleged harm has been committed online. Just last year, the Supreme Court of Canada cleared way for a Facebook privacy lawsuit[559] claim brought by a British Columbian resident to move forward in the defendant's jurisdiction and not in California, contrary to Facebook's explicit forum selection clause. The judgment cited the "gross inequality of bargaining power"[560] existing between social network users and the company where through the forum selection clauses, there would be an encroachment on the public good. Just one week after that decision, the same Court upheld a B.C. appeals court's injunction to exclude websites - - owned by a company accused of stealing the plaintiff's company's trade secrets - from appearing on Google's search engine.[561] In this instance, despite having been ordered to cease and desist, the accused company vanished from the province and began operating exclusively online. The global approach the Court sought as the

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(6) The applicable law:
(7) The advantage conferred on the plaintiff by its choice of forum;
(8) The interests of justice;
(9) The interests of the two parties:
(10) The need to have the judgment recognized in another jurisdiction. (at para 25).

[558] *Haaretz.com v Goldhar*, 2018 SCC 28.

[559] *Douez v Facebook Inc*, 2017 SCC 33, [2017] 1 SCR 751. The defendant, Deborah Douez had sued Facebook alleging that her privacy rights under BC law were violated. Her name and picture were featured on Facebook's "sponsored stories" platform product without the defendant's knowledge nor consent. Overall, the Justices saw this infringement as presenting a serious problem to Canadian citizens' basic rights are Canadian values.

[560] *Ibid per* Karakatsanis, Wagner and Gason JJ.

[561] *Google Inc v Equustek Solutions Inc,* 2017 SCC 34, [2017] 1 SCR 824 [*Google*]

best remedy to fight borderless information-exposure underlines the fundamental recognition of the Court of the Internet's universal operation. But the decision may also have acute implications in future online libel cases between private individual parties (in this instance, it involved corporations), where defamatory contents published online would be ordered to be dropped, - not by the authors but - by a worldwide tech-giant like Google, which would effectively be global in its application. There are already concerns that the decision may further empower the use of Google as an instrument to censure freedom of expression, as nations may selectively seek to block contents via Google that are damaging to a government's interests[562] - an argument that is partially reflected in the subsequent U.S. court's decision to halt the Canadian injunction for "threaten(ing) free speech on the global internet."[563]

v. Professor Young's Empirical Study of Defamation Cases and Ontario's *Protection of Public Participation Act* (*PPPA*)[564]

The jurisprudential landscape of Canadian defamation law may continue to undergo some alterations as new studies emerge and legislative reforms are undertaken. One such

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[562] See e.g. Sean Fine, "Canada's top court upholds worldwide injunction against Google", *The Globe and Mail* (28 June 2017), online: https://www.theglobeandmail.com/news/national/canadas-top-court-upholds-worldwide-injunction-against-google/article35485762/ (quoting Dinah Pokempner, Human Rights Watch's General Counsel as one of 11 groups that intervened in the case); Tonda Maccharles, "Free speech advocates shocked after Supreme Court orders Google to block websites of company accused of stealing trade secrets", *The Star* (27 June 2017), online: https://www.thestar.com/news/canada/2017/06/28/google-must-block-search-results-of-tech-company-worldwide-supreme-court-rules.html. But Abella J, who wrote for the majority, refused to see the issue at hand as an entanglement of free speech. She noted, "We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods." *Google*, *supra* note 561 at paras 45, 48.

[563] Edward J Davila J in *Google LLC v Equustek Solutions Inc et al*, ND Cal (2 Nov 2017). A month later in that same year, the same Court made it a permanent injunction by issuing a default judgment at the absence of defense by Equustek Solutions Inc. *Google LLC v Equustek Solutions Inc et al*, ND Cal (14 Dec 2017).

[564] *Protection of Public Participation Act, 2015*, SO 2015, c 23 (*PPPA*).

academic work is Professor Hilary Young's 2016 study of the Canadian defamation action.[565] The very first of its' kind, it is an extensive empirical paper on the results of defamation law actions in Canada between 1973-1983 and from 2003 to 2013. The study's observations based on quantitative methods provide insightful takes on the trends of defamation law suits such as: higher claims of corporate defamation actions (as opposed to libel actions brought by individuals), higher successful rate of liability in the more recent period studied, higher frequency of punitive damages awarded to corporations than in claims involving private individual parties, a plateau effect in awarded damages between claims against journalistic publication as compared to other defamation suits (the former used to be significantly higher), and a double-increase in average damages awarded between the earlier and later periods of the study.[566]

In terms of legislative reform, Bill 52 in Ontario has been the latest significant law reform with regard to the reconfiguration of interplay between libel law and freedom of expression by moving toward a more efficient procedural protection concerning discussion on matters of public interest. Formally known under the '*Protection of Public Participation Act*,' or *PPPA*,[567] the 2015 bill was intended to provide a legal mechanism to people caught up in vexatious defamation law suits, often actioned by corporations or well-sourced individuals. As such, *PPPA* is a direct counter against *SLAPP*, or *Strategic Lawsuit Against Public Participation*. Colloquially known as 'gag proceeding,' these are legal actions that powerful individuals or organizations resort to effectively silence expressions that do not fit

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[565] Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95:3 The Canadian Bar Review 591-630 [*Young*].

[566] *Ibid.*

[567] *PPPA*, *supra* note 564.

their interests. Ordinary citizens who speak critically of certain projects or business deals, for instance, may get hit with (a) meritless *SLAPP*(s) that are meant to cause emotional drainage and financial exhaustion. This in turn, may prevent others from speaking out as well. To amend this malpractice, *PPPA* is designed to 'defreeze' the would-be chilled zones of public yet sensitive issues.

More precisely, *PPPA* brought changes to the *Courts of Justice Act*,[568] *Libel and Slander Act*,[569] and the Statutory Powers procedure Act.[570] For instance, s. 137.1 (3)[571] of *PPPA* grants the judge the power to dismiss the plaintiff's claim if the defendant is able to establish that his or her expression is on matters of public interest. The burden of proof to convince the judge against the motion to dismiss then befalls the plaintiff. They must demonstrate the existence of substantial merit to their claim, the lack of valid defense on the part of the defendant, and the seriousness of the harm suffered that which outweighs the public interest.[572] S. 137.1 (7)[573] also gives the defendant the right to have all his legal costs covered or reimbursed by the party that initiated the legal action.

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[568] *Courts of Justice Act*, RSO 1990, c C-43.

[569] *Libel and Slander Act*, RSO 1990, c L-12.

[570] *Statutory Powers Procedure Act*, RSO 1990, c S-22.

[571] s 137. 1 (3) of the *PPPA*, *supra* note 564 reads: On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

[572] s 137. 1 (4) of the *PPPA*, *ibid*. states these conditions as follows:

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that, (a) there are grounds to believe that, (i) the proceeding has substantial merit, and (ii) the moving party has no valid defense in the proceeding; and (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[573] s 137. 1 (7) of the *PPPA*, *ibid*. reads: If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

Overall, *PPPA* seems to be an appropriate and measured legislative step that will eventually diminish the number of strategic lawsuits that stifle legitimate criticism of public interest. Bill 52 is serving its purpose, as recently demonstrated in several decisions since its passage, such as *United Soils Management v. Mohammed*,[574] *The Globe and Mail v. Bondfield Construction Co. Ltd*. (although rather timidly in the latter case).[575] Three years into its adoption however, there are concerns being raised that the *PPPA* may be too one-sided in favor of the defending party (moving to dismiss suits under this law), such that the notion of public interest has been given an exceptionally broad interpretation since the *Grant* ruling.[576] Therefore, while the onus on the plaintiff's party may be low, the standard of required proof by the plaintiff is high by contrast. Additionally, the conditions to be established by the plaintiff are not some vague notions but demand specificity of endured harm,[577] absence of real defense,[578] and substance to the claim;[579] Furthermore, the possibility that the motion to dismiss be brought up at any time during the trial (instead of at the pretrial stage), and court scheduling challenges that further complicate respecting the hearing of the motion with the first sixty days as prescribed – may strategically benefit defendants who

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[574] *United Soils Management Ltd. v Mohammed*, 2017 ONSC 4450 (CanLII).

[575] *Bondfield Construction Co v The Globe and Mail*, 2018 ONSC 1880 (CanLII).

[576] Compare above to *Accurent LLC v Mishimagi*, 2016 ONSC 6924 (CanLII) (holding that the defendant's expression on an ongoing judicial proceeding cannot be considered as a statement concerning public interest).

[577] See e.g. *Fortress Real Developments Inc v Rabidoux* 2017 ONSC 167 (CanLII) (requiring evidence of specific damages suffered by the plaintiffs). See also *Hudspeth v Whatcott,* 2017 ONSC 1708 (CanLII); *Veneruzzo v Storey*, 2017 ONSC 683 (CanLII); *Thompson v Cohodes*, 2017 ONSC 2590 (CanLII).

[578] See e.g. *Able Translations Ltd v Express International Translations Inc*, 2016 ONSC 6785 (CanLII) (the plaintiff must convince the court that "there is a reasonable probability that none of these defenses would succeed if examined in depth following a full trial." at para 5.

[579] *Ibid* at para 49 (it must be demonstrated that "there is credible and compelling evidence supporting the claim as being as serious one with a reasonable likelihood of success"). But see *1706406 Ontario Ltd v Pointes Protection Association,* 2016 ONSC 2884 (CanLII) (low threshold for the plaintiff countering motion to dismiss under *PPPA*).

would prefer dragging the procedure out while the plaintiff's reputation is left to bleed out. Finally, a case rendered earlier this year refused to dismiss a defamation action under *PPPA*, on the ground that hate speech "raises no issue to the public interest."[580] The decision was the first to weigh in directly on the entanglement of hate expression and the public interest defense invoked under this Bill. The judge drew a clear line that the new law will not be perversely conjugated to tolerate hate or defamatory speech.

vi. Defamation in Quebec

The province of Québec, of course, operates on a slightly different juridical basis since it abides by the rules of its civil code inherited from the French civil law tradition. In Québec, there are no specific statutes that treat defamation. Instead, an action in defamation is governed by the general rules of tort liability enunciated by Article 1457 of the Code Civil du Québec.[581] Accordingly, defamation is established by three elements: fault, injury caused by the defamatory expression, and the causation between the fault and the said injury. The burden of proof falls upon the plaintiff, while the determination of the defamatoriness of the statement is put to the reasonable person test. Furthermore, just as freedom of expression and of opinion are recognized as fundamental rights in Article 3 of Québec's *Charter of Human*

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[580] *Paramount v Johnston*, 2018 ONSC 3711 (CanLII). The defendant, during his participation in a protest critical of the Canadian Government's settlement of Omar Khadr, outside a restaurant hosting a fundraiser for the Prime Minister, was caught on video saying one "gotta be a jihadist" to eat in the restaurant and that "you need to have raped your wife at least a few times to be allowed in there."

[581] Art 1457 of *CCQ* states: « Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui. Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel. Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde».

Rights and Freedoms, the rights to reputation, dignity, and private life are closely guarded by Article 4 and 5 of the same *Charter* respectively.[582] The right to reputation is also recognized by Articles 3 and 35 of the *Code Civil du Québec.*[583]

Since the adoption of Québec *Charter*, Québec courts have brought precisions to the province's evolving line of libel jurisprudence over the last three decades. Two cases stand out the most. The first of the two, *Société Radio-Canada c. Radio Sept-îles inc*.,[584] ruled that a journalist's (defendant) liability can only be engaged if his or her professional due diligence was not fulfilled. Assimilating journalistic responsibility to the context of professional liability, the Court required that for there to be defamation, it must be established that the journalist's work has been carried out "… en prenant des précautions normales, en utilisant des techniques d'investigation disponibles ou habituellement employées."[585] This is to determine, taken as a whole, if the work was done "avec un soin raisonnable à la preparation de l'article ou du reportage."[586] The Court also fixated on the existence of fault, an element that can be constituted as such "que si l'on retrouve une violation des standards professionnels de l'enquête et de l'activité journalistique."[587] Eight years later, the second case, *Prud'homme c. Prud'homme*,[588] was rendered in similar spirit to its predecessor. This

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[582] Art 4 of the *Charte des droits et libertés de la personne* [1975] c 6, art 4 [*Quebec Charter*] reads: "Every person has a right to the safeguard of his dignity, honour and reputation."
Article 5 of *Quebec Charter* provides: "Every person has a right to respect for his private life."

[583] art 3 and 35 of *CCQ*.

[584] *Société Radio-Canada c Radio Sept-îles inc*, 1994 CanLII 5883 (QCCA).

[585] *Ibid per* LeBel J.

[586] *Ibid.*

[587] *Ibid.*

[588] *Prud'homme c Prud'homme*, 2002 CSC 85, [2002] 4 RCS 663.

case is significant in that it further distanced itself from the common law approach of strict liability in defamation law by discarding the defenses of qualified privilege (*immunité relative*)[589] and fair comment (*commentaire loyal*) – whose transplantation unto Québec civil law the Court saw as being "non seulement injustifiée mais aussi inutile."[590] The Court also affirmed that the element of fault can be the result of either malice or negligence,[591] and that while good faith is presumed,[592] the notion of fault must be interpreted based on its particular context.

More recent cases have largely reflected or expanded upon the principles established in the jurisprudential domain of defamation law pronounced by the Supreme Court of Canada or in other landmark cases: the importance of maintaining the continuation of discussions concerning matters of public interest (*Gestion finance Tamalia inc. c. Garrel*[593]); clarification on professional responsibilities applicable to journalists (*Gilles E. Néron Communication Marketing inc. c. Chambre des notaires du Québec*[594]); justifiable awarding of punitive

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[589] *Ibid*. The Court, first having had to operate a qualification as to whether the expressions of the defendant (conseiller municipal/administrateur) fell under public or private common law defense (the former being the case), expressed great reluctance in adopting the common law defense of qualified privilege ("la solution de l'importation de l'immunité relative ne paraît ni souhaitable ni necessaire" (*ibid* at para 59); noting also, "Il serait en effet fort imprudent d'importer en bloc des notions juridiques élaborées dans un autre système de droit sans d'abord verifier leur compatibilité avec les règles du régime juridique de responsabilité civile du Québec" (*ibid* at para 54).

[590] *Ibid* at para 63. The defense of fair comment being a "notion de common law privée … la recevabilité d'une telle defense particulière dans un régime de responsabilité civile qui n'en admet qu'une seule, soit l'absence de faute, appelle quelques réserves, ne serait-ce que par souci de cohérence… la méthode analyse juridique qu'exige le recours à la défense de commentaire loyal et honnête est incompatible avec l'économie du droit de la responsabilité civile délictuelle. »

[591] *Ibid* at paras 35 and 58.

[592] *Ibid* at para 57 (citing art 2805 *CCQ*).

[593] *Gestion finance Tamalia inc c Garrel,* 2012 QCCA 1612.

[594] *Gilles E Néron Communication Marketing inc c Chambre des notaires du Québec*, 2004 CSC 53. And more recently, *Chiara c Vigile Québec*, 2016 QCCS 5167.

damages (*Fillion c. Chiasson*[595]); *SLAPP* defamation suits (*Développements Cartier Avenue inc. c. Dalla Riva*[596]and *3834310 Canada inc. c. Pétrolia inc*.[597]); and jurisdictional competence by identification of real and substantial relation to libel across international borders (*Editions Ecosociété Inc. c. Banro Corp.*[598]). Online defamation on social networking sites have also received the attention of the courts.[599]

Lastly, it is important to remember that Québec has led the impetus to adopt anti-SLAPP legislative initiatives, before Ontario or any other Canadian jurisdiction. In 2009, Québec passed Bill 9, *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*.[600] To safeguard continued discussions concerning matters of public interest, this Act allows a legal action to be declared unfounded either by the request of the defending party or at the determination of the judge. As provided by other anti-SLAPP legislation, under this law, a judge can order the plaintiff to reimburse legal fees and/or damages if the suit is dismissed or vice versa if the suit is to be continued. The onus of proving that the action has merits and is with reason placed upon the plaintiff bringing the action.

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[595] *Fillion c Chiasson*, 2007 QCCA 570. See also *Delage c Cousineau*, 2016 QCCQ 889. Art 1621 of *CCQ* provides for the attribution of punitive damages as long as the sum not exceeding its preventive function. Additionally, Art 49 of *Québec Charter* also provides that: « En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs ».

[596] *Développements Cartier Avenue inc c Dalla Riva*, 2012 QCCA 431.

[597] *3834310 Canada inc c Pétrolia inc*, 2011 QCCS 4014.

[598] *Editions Ecosociété Inc c Banro Corp*, 2012 CSC 18.

[599] For recent defamation cases arising from Facebook posts, see e.g. *Dupuis c Misson*, 2014 QCCQ 11472; *Lapensée-Lafond c Dallaire,* 2014 QCCQ 12943; *Rankin c Rankin*, 2014 QCCQ 8981; *Lapointe c Gagnon*, 2013 QCCQ 92; *Carpentier c Tremblay*, 2013 QCCQ 292; *Lapierre c Sormany*. 2012 QCCS 4190.

[600] *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate, 2009*, RSQ 2009, c C-12, amending RSQ c C-25.

2.3.1.3. Group Defamation in Canada and *Bou Malhab v. Diffusion Métromedia CMR Inc* [601]

The general laws and the jurisprudential development of Canadian defamation law having thus been explored, it is now time to examine the rules of group defamation in Canada. As it will become clear soon hereafter, Canadian laws on group defamation very much resemble their American counterparts. Hence, while I will not go to as great a length detailing the law as I did in the first Chapter, it is still important to briefly discuss the general rules governing group defamation laws in Canada and study key jurisprudence in the matter (i.). Following this, I will devote a substantial portion of this sub-section to address a case study of a racial group defamation ruling handed down by the Supreme Court of Canada in 2011 (ii.). It is crucial that the case be dissected at this stage, as it will reappear in numerous references in the next Chapter. Consider it the Canadian rendition of *Beauharnais* – only with opposite result.

i. The General Rules of Group Defamation in Canada

Canadian law on group defamation is symmetrical to the American law in numerous aspects. Principles governing group defamation are largely derived from one influential English case – *Knupffer v. London Express Newspaper Ltd*.[602] The case served as a foundational jurisprudence that established the general rule of group defamation that the defamatory comment be "of the plaintiff"[603] for there to be cause of action. It is clear that the

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[601] *Bou Malhab, supra* note 1

[602] *Knupffer*; *supra* note 495.

[603] *Ibid* at 118.

Canadian position takes this condition seriously, as a vital check to libel law's clash with the interest of free speech given its repeated citation in key group defamation cases.[604] Canadian courts also often quote American case law and doctrinal authorities to further supplement or compare their own rulings.[605]

To establish valid cause of action in a group defamation case in Canadian law, the plaintiff must prove that he was personally referred to by the alleged statement. In *Arnott v. College of Physicians* for instance, the libel action was thrown out by the Court partially due to the absence of evidence in a statement of medical article with regard to a particular method of cancer treatment that had identified the plaintiff by neither by name nor by a description.[606]

The requirement of personal reference by name is not, however, absolute.[607] Nevertheless, the plaintiff must at the very least be able to demonstrate that the statement would be reasonably understood to be referring to him by the ordinary person exposed to the statement. An important case that demonstrated the standard of reasonable reference was *Sykes v. Fraser*.[608] The case concerned a city mayor alleging in two press conferences bad

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[604] The *Knupffer* case is either quoted or cited in a number of important Canada's group defamation cases. See e.g. *Arnott v College of Physicians*, [1954] SCR 538 at 554 [*Arnott*]; *Sykes v Fraser* [1978] SCR 526 at 559 (Laskin J dissenting); *Butler v Southam Inc*, 2001 NSCA 121 (CanLII) at para 21 [*Southam*]; *Aiken v Ontario (Premier)* (2000), 1999 CanLII 14822 (ON SC), 45 OR (3d) 266 [*Aiken*].

[605] See e.g. *Church of Scientology, supra* note 82 at para 73 (Cory J); *Southam*, *supra* note 604 at 53, 57 (Cromwell J explicitly enumerating several American doctrinal authorities on group defamation).

[606] *Arnott, supra* note 604 at 553 and 556 (*per* Kellock J)

[607] See e.g. *Moummar v Bruner et al,* 1978 CanLII 1676 (ONSC) [Moummar]. (observing that « It is not necessary that the words should refer to the plaintiff by name, provided that the words would be understood by reasonable people to refer to the plaintiff. Stated in a different way, it is a question of what the words would mean within the general knowledge of the ordinary man knowledgeable of worldly affairs, and their association to the particular person."). On similar note, see also *Misir v Toronto Star Newspapers Ltd*, 1977 CanLII 717 (ON CA) (finding legal ground for libel against the paper's series of twelve articles over a course of five months, that in the first eleven articles did not refer to the plaintiff by name, but the final one did); *Hayward v Thomson*, [1982] 1 QB 47 (CA) (an article published in a weekly newspaper that had not identified the plaintiff by name but only referred to "a wealthy benefactor of the Liberal party" in the first week, but had named him in the second week's article).

[608] *Sykes*, *supra* note 604.

faith and deceptive professional practices by a chief lawyer negotiator for a general development plan and a proposed shopping center. Ritchie J. agreed that,

"… when the words used in the appellant's statement are read in light of the circumstances giving rise to their use, they are clearly capable of referring to the respondent and do in fact refer to him."[609]

With regard to the intensity of suspicion test, as explained in the American counterpart,[610] an immediate suspicion at the encounter of the statement does not necessarily give rise to cause of action. This was attested to in *Booth v. British Columbia Television Broadcasting System*[611] which involved a television interview of a prostitute alleging that "some" Vancouver policemen were "crooked" and that three members of the "Morality Squad" and two of the "Narcotics Squad" had gotten paid off. In the present affair, the plaintiffs were all eleven members of the Vancouver City Police Force's Narcotics Squad at the time of the interview recording in 1972. Lambert J.A. put it this way:

"… but that suspicion is more a matter of the mind of the person who heard the statement and his or her association with particular members of the police force. A neighbor who knows only one police officer, for example, and hears something about the police force would think immediately of that police officer, whether the words that are used have any real link to that police or not. So, an immediate suspicion is not necessarily an indication that the words are capable of being considered as published of and concerning the particular plaintiff."[612]

Canadian courts also regularly apply 'obviously unsustainable' test to efficiently

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[609] *Ibid,* Ritchie J at 545. Also at 528, noting that "Accordingly, he was, in fact, singled out for particular mention in the statement."

[610] See The 'Intensity of Suspicion' Test in Chapter 1 (1.1.2.5.) at 52.

[611] *Booth v British Columbia Television Broadcasting System*, 1982 CanLII 251 (BCCA).

[612] *Ibid* at 33. (Lambert J).

eliminate libel action "if it is very clear that, assuming the alleged facts are true, the action must fail."[613] The test appears to have originated from an English case of *Morgan v. Odhams Press Ltd*.[614] in which Lord Reid enunciated "… it is plain and obvious that the plaintiff has no case."[615] This test has been applied in a number of landmark group defamation cases such as *Elliott v. Canadian Broadcasting Corp*.,[616] *Keating v. Southam Inc*.,[617] *Aiken v. Ontario (Premier)*,[618] and *Roach v. Random House of Canada Ltd*.[619]

The case of *Southam*[620] sheds important light onto what would be considered an 'admissible' action in group libel. The case went to great lengths to explain that the size of the injured group, while not "a controlling factor,"[621] is nevertheless "a relevant one."[622] It is interesting to look closer into *Southam* as it deliberately summed up four reasons behind the reluctance to admit cause of action involving large groups. The first reason concerned "a multiplicity of claims and the risk of imposing virtually indeterminate liability."[623] The second reasoning from the Court had to do with the size of the group, as the larger the group the more challenging it would be to apply the reasonable reference test to assess whether the statement could have referred to any one member of that group.[624] The third argument that contributes to the Court's hesitancy is the general assumption that "group defamation lacks a

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[613] *Southam*, *supra* note 604 at 32.

[614] *Morgan v Odhams Press Ltd*, [1971] 2 All ER 1156 (HL Eng).

[615] *Ibid* at 1159.

[616] *Elliot v Canadian Broadcasting Corp*, 1995 CanLII 244 (ONCA)

[617] *Keating v Southam Inc*, (2000), 189 NSR (2d) 153 (SC).

[618] Aiken, *supra* note 604 at 275.

[619] *Roach v Random House of Canada Ltd*, [2000] OJ No 2585 (QL) (SC) at para 8.

[620] *Southam, supra* note 604 at 54.

[621] *Ibid.*

[622] *Ibid*.

[623] *Ibid.*

[624] *Ibid.*

tendency to cause personal harm."[625] The last concern was with regard to the fear of chilling critical speech aimed at public institutions.[626] The first two explanations are thus reflections of the traditional obstacles to advance any cause of action in group libel case, whereas the last argument is the constitutional alertness to stifling or silencing free speech in a democratic system. The third reasoning by the Court in *Southam*, however, is a literal confirmation that goes to the heart of the problematic of the present thesis as narrated in the general Introduction. It is that same stubborn, pre-supposed belief that an expression as vague and generally formulated as group defamation is unable to cause subjective injury to an individual member identifying with the defamed group.

ii. *Bou Malhab*: A Case Study of Racial Group Defamation

Now that the general rules of Canadian group defamation law have been briefly addressed, I would like to narrow down the study to the present group defamation case involving what could broadly be understood as racial group defamation. If one were to recall an instance of a legal action for defamatory remarks attacking the racial or religious characters of an identifiable group of people in Canada[627] let alone in Québec, it is difficult to conjure up a case except for the 2011 decision I am about to embark on. Perhaps the most publicized case that fits the description goes back some hundred years ago in what has come to be known as the *Ortenburg* case or *Affaire Plamondon*, in which a Québec notary man delivered a vicious antisemitic conference in a Christian school.[628]

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[625] *Ibid.*

[626] *Ibid.*

[627] See *Moummar, supra* note 607.

[628] For a detailed analysis of the incident in its historical context, see Sylvio Normand, «L'affaire Plamondon:

The most recent case, however, that directly involved racially charged defamation via class action was *Bou Malhab v. Diffusion Métromedia CMR Inc*.[629] I find it highly pertinent to dedicate a concise commentary to this particular case for two reasons: firstly, because it involved group defamation; and secondly, because the statement in dispute was of racially degrading nature and therefore it directly concerns the subject of the thesis. The decision is also relatively recent, thus letting us catch a glimpse of the current direction of the Court on racial group defamatory speech.

The case involved a statement of André Arthur during the hosting of a morning radio show in 1998. The statement, translated from French, was as follows:

"Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that's French and English? . . . I'm not very good at speaking "nigger" … taxis have really become the Third World of public transportation in Montreal. . . . my suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. When I see something like this, I can only think of corruption. Taxi drivers in Montreal are really arrogant, especially the Arabs. They're often rude, you can't be sure at all that they're competent and their cars don't look well maintained."[630]

Mr. Bou Malhab, a taxi driver whose mother tongue is Arabic, asked Quebec Superior Court to validate a class action[631] brought against Mr. Arthur and the radio station, only to be

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un cas d'antisémitisme à Québec au début du xxe siècle» (2007) 48:3 C de D 477.

[629] *Bou Malhab*, *supra* note 1

[630] *Bou Malhab, supra* note 1 at para 3.

[631] Originally (at the time of this case), a class action was governed by Art 1003 of Code de Procédure Civile (*CPC*), which had said:
«Le tribunal autorise l'exercice du recours collectif et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:
a) les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou

denied on the basis of the large size of the group.[632] The Quebec Court of Appeal reversed the decision[633] and allowed the class action to proceed. Finding that Mr. Arthur's comments were defamatory in nature, the Court of Appeals ordered the defendants to pay $220000.00 to the Taxi Drivers' Professional Association. The appeals court's ruling was then challenged to have the Supreme Court pronounce on the matter.

While generally noting that the "reconciliation" between freedom of expression and the right to the protection of reputation must be done whilst respecting s.1 of the *Charter*,[634] Deschamps. J. cautiously acknowledged that the balance must shift as "what was an acceptable limit on freedom of expression in the 19th century may no longer be acceptable today."[635] In particular, she referred to the importance of being able to freely express on matters of public interest.[636] Observing the trend of the international response toward

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connexes;
b) les faits allégués paraissent justifier les conclusions recherchées;
c) la composition du groupe rend difficile ou peu pratique l'application des articles 59 ou 67; et que
d) le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres ».

This provision has now been replaced by Art 575 and following of the new *CPC*. that came into effect in Québec since January 1st, 2016, which now states:
«Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:

1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;

2° les faits allégués paraissent justifier les conclusions recherchées;

3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;

4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.»

[632] *Bou Malhab v Diffusion Métromédia CMR inc*, 2006 QCCS 2124, [2006] RJQ 1145.

[633] *Bou Malhab v Diffusion Métromédia CMR inc*, 2008 QCCA 1938, [2008] RJQ 2356.

[634] *Bou Malhab*, *supra* note 1 at para 16.

[635] *Ibid* at para 19.

[636] *Ibid*.

defamation cases, she expressed her inclination toward a protective stance of freedom of expression. [637]

A list of six key elements was deployed to determine the existence of reputational harm in *Bou Malhab*. These included: (1) the size of the group; (2) the nature of the group; (3) the plaintiff's relationship to the group; (4) the real target of the defamation; (5) the seriousness or the extravagance of the allegations; (6) the plausibility of the statements and their tendency to be accepted; and finally, extrinsic factors.[638] Of this contextual methodology, some components were more pertinent than others. For instance, the first, second and fifth standards were borrowed from the *Southam* case in which the judge had initially considered them to enlighten his evaluation on the defamatoriness of the statement in that case.[639] One of the main grounds the Court relied upon, perhaps more decisively than others, was naturally the size of the group. Like the American laws on group defamation, the size of the group was a key indicator that could play a determining role on judges' consideration.[640] The traditional logic has been the larger the size of the group, the harder it would be to prove there was harm on individual level.[641] There were approximately 1100 taxi drivers whose native language was Arabic in the city at the time of the proceedings. This

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[637] *Ibid* at para 21.

[638] *Ibid* at paras 57–79.

[639] See *Southam*, *supra* note 604 at para 60 – 102.

[640] "The size of the class or group may affect the plaintiff's ability to persuade the court that he or she has been personally singled out by a defamatory statement. The larger it is, the less likely it is that a reader or listener will understand that the defamatory remarks refer to a particular person. Thus, where the reference is to everyone within a large class or group of persons it is unlikely tha the court will find that anyone in particular is pointed to." Brown, *supra* note 1 at 90-91.

[641] "The general rule is that an attack on a substantially large and indeterminate group of persons does not give rise to a cause of action to any of its members, unless there is something in the publication or the facts accompanying it pointing to a particular member." (*ibid* at 89).

obviously complicated the case for the plaintiffs.

But to use a contextual method is to take into consideration the contextual factors surrounding the contention of the freedoms in a case. It also signifies understanding the position of powers that each party holds in local society. Taxi-driving is generally not associated with being financially rewarding or highly regarded in the employment industry. In contrast, the speaker of the statement was a former provincial deputy with considerable political capital and supporting constituents. As a radio host, he had the professional means to spread the message. In short, he was a public figure with a megaphone, a platform and an audience for his message. One prominent individual in a position of power was berating a group of identifiable people from a social minority with an audience, making public imputations insinuating that their depraved behavior was caused by linguistic and ethnic associations.

Another relevant criterion was the plaintiffs' relation to the alleged group. As pointed out previously, racially prejudiced statements – no matter how vaguely they may be formulated – are destined to cause real harm upon individual members who, willfully or not, identify with the targeted group. If the vilification aims at the color of skin or some intimate cultural aspect defining the group, an individual member of that group inevitably becomes the captive of that vilification. There is no avoiding natural characteristics nor negative associations made in the public square.

The plausibility of the statements and their tendency to be accepted was another essential part of the contextual examination. The Court considered the extent to which the statement of the defendant would be plausibly seen as truthful to the general audience. To this end, the ordinary person test was put in place. That is to say, if an ordinary person were to hear Mr. Arthur's comments, would that person reasonably be led to believe that "the

remarks, when viewed as a whole, brought discredit on the reputation of the victim."[642] While showing no reservation in considering that Mr. Arthur's "racist speech can have a pernicious effect on the opinions of the members of its audience," Deschamps C.J. observed that,

> "an ordinary person certainly would not have associated the allegations of ignorance, incompetence, uncleanliness, arrogance and corruption with each taxi driver whose mother tongue is Arabic or Creole personally."[643]

While the statement may ring true to some, the application of the ordinary person test is an illustration that places much faith on human capacity to reason and to reject the demonization and vilification of groups. In the heat of charged rhetoric during hyperpolarized political campaigns and climates of divisive partisanship, it is questionable whether the integrity of the ordinary person's test can objectively be maintained. For instance, people often vote with their emotions rather than needs or fact-based reasons.[644] Untruthful statements or hyperbole can easily become acceptable in public discourse where degradation of others is the new norm. Repetition of lies (which are essentially defamatory statements that are false) may often convince people of their "truth" or influence untainted perspectives. The challenge and more importantly, the danger, in that normalization is whether the creation of

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[642] *Bou Malhab*, *supra* note 1 at paras 90, 92. (Deschamps CJ)

[643] *Ibid*. This ordinary person test, I am inclined to argue, has become somewhat irrelevant if not obsolete in the current development of socio-political atmosphere. Today, the line between truth and falsehood is blurred with the rise of fake news and active operative effort of disinformation to misguide, influence and even manipulate the public opinion. As such, to entrust the rational capacity of human agency to separate the wheat from the chaff is naïve at best and perilous at worst. As Dickson CJ noted, "individuals can be persuaded to believe 'almost anything' … if information or ideas are communicated using the right technique and in the proper circumstances." *Keegstra*, *supra* note 81 at 747 (Dickson CJ).

[644] On this, see especially Diana C Mutz, "Status threat, not economic hardship, explains the 2016 presidential vote" (2018) 115:19 PNAS E4330-E4339 [Mutz]; Julia Belluz and Brian Resnick, "Trump understands what many miss: people don't make decisions based on facts", *Vox* (8 Februarly 2017), online: https://www.vox.com/policy-and-politics/2016/11/16/13426448/trump-psychology-fact-checking-lies; Eyal Winter, "Voting is irrational. Emotions always win", *The Guardian* (Op-ed in Psychology) (7 May 2015), online: https://www.theguardian.com/commentisfree/2015/may/07/voting-irrational-emotions-politics-ideology

an atmosphere breeding public racial invectives may overlook the deep-cutting harm on individual victims as well as on their community as a whole. As already observed, there is a real risk that there exists in these types of cases, a certain degree of "(…) reluctance to take seriously the harm caused by Arthur's racist remarks"[645] Whether this type of harm merits the proactive interference of the law, even in the absence of some empirically established proof of that harm, and whether the ordinary person test is inadequate in racial group defamation cases are important questions that will be further addressed in Chapter 3.

2.3.1.4. Criminal Libel

Criminal libel is governed by sections 298 to 301 of the Criminal code. According to section 298, defamatory libel is a "matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published."[646] Section 299 legally defines the "published" status of defamatory libel. Defamatory libel can be considered published if it is publicly distributed with the intent for the defamed individual(s) or others to read it. Additionally, section 300 provides that a publisher who publishes with the knowledge of the falsehood contained within the published material, is equally guilty of defamatory libel. [647] Section 301 concerns itself with the punishment for

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[645] Kent Roach & David Schneiderman, "Freedom of Expression in Canada" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Ontario: LexisNexis, 2013) at 468.

[646] Section 298 of the Canadian Criminal Code. RSC 1985, c C-46.

[647] *Ibid* at s 300.

defamatory libel.[648]

It is important to note that Section 301 has since been found unconstitutional for its overbreadth in at least two cases: *R. v. Lucas* and *R. v. Gill*.[649] On top of a general hostility toward defamation statutes, the judges in these decisions had a difficult time reconciling the fact that an individual could be charged and convicted under Section 301 even if the defendant's expression was factually true. What is also interesting is that these cases brought before the court under Section 301 involved an agent of the Crown.[650] After all, *Sullivan*'s rationale[651] may well find a warm application in some Canadian instances to the extent that the legal action concerns a private citizen versus a public/government official.

It remains disputable whether criminal libel *should* be used to prosecute defamatory comments that demean a group of people based on their color or ethnicity. This is because there already exist specific legislation in the Criminal Code that is intended to punish expressions of hate propaganda aimed at people based on their fundamental characteristics such as race or ethnicity.[652] If they are not treated by those criminal provisions, expressions of this kind are almost certain to be contested on provincial or federal human rights provisions in a broader anti-discrimination law context. In fact, the *Bou Malhab* decision explicitly advised that the law governing defamation is not suitable to redress the type of

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[648] *Ibid* at s 301.

[649] *Lucas*, *supra* note 500; *R v Gill*, [1989] 1 SCR 295.

[650] For example, in *Lucas*, John and Johanna Lucas were accused of defaming a Saskatchewan police officer.

[651] *Sullivan*, *supra* note 77.

[652] See previous section Hate Propaganda and Anti-Hate Speech Laws on hate speech/hate propaganda laws).

racially prejudicial injury involved.[653] It thus remains an unsettled question, whether defamatory libel laws should be extended to large social groups, or if their application should exclusively treat individuals or groups of determinable size.[654] The potential extension of group libel law to 'racial' group libel would not be illogical in my view, given that the primary objective of defamation laws is to protect the reputations of persons.[655] Public demeaning and degradation of individual persons based on their identifiable characteristics does malign their social esteem in the eyes of other members of the community, along with a lessened sense of basic dignity, respect, and equality for the individuals in question. However, it is doubtful that defamation law would be the most efficient track to pursue justice, provided other specifically tailored legislation does exist to counter these very expressions. In the U.S. for instance, the only decision that which punished racially charged expression by the instrument of criminal libel law was nearly 70 years ago,[656] and that judgment was severely criticized afterwards.[657]

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[653] *Bou Malhab*, *supra* note 1 at para 94 (McLachlin J).

[654] On this point, see sub-section The Question on the Exigence of Empirical Proof of Harm and the Limitation of the Societal Harm argument in Chapter 3 (3.3.3.). This, of course, is a symptomatic of a much profound irritancy of liberal individualism that stubbornly refuses to accept a group-based conception of rights. I approach this problematic by distinguishing between artificial associations such as professional occupation or political affiliation (which one can voluntarily opt in or out from) and primordial affinities such as race or ethnicity, and to some extent religion (which are broad identity characteristics that are imposed upon persons from their birth without any choice).

[655] While it is quite true that, after all, individuals belonging to a vilified group based on their intimate characteristics are to some extent subjected "to hatred, contempt or ridicule" (*Keegstra*, *supra* note 81), defamation laws have been centered on the idea of reputational harm and social consideration, whereas the sort of group defamation on race or ethnicity has been approached through a human dignity lens.

[656] *Beauharnais, supra* note 4.

[657] Ioanna Tourkochoriti, "SHOULD HATE SPEECH BE PROTECTED? GROUP DEFAMATION, PARTY BANS, HOLOCAUST DENIAL AND THE DIVIDE BETWEEN (FRANCE) EUROPE AND THE UNITED STATES" (2014) 45 Colum Hum Rts L Rev 552 at 578 (noting that "the decision is no longer treated as good law").

2.3.1.5. Spreading False News (*Zundel*)

Section 181 of the Criminal Code defines the spreading of false news as a willful publication of "a statement, tale or news that the publisher knows is false and that causes or is likely to cause injury or mischief to a public interest." The offence is punishable by imprisonment of up to two years. Historically stemming from an archaic English statute dating back to 1275,[658] the criminalization of spreading false news was originally created to prohibit the mushrooming of slander against the Crown and its' officials. Designed with the purpose of reducing the animosity spread through controversial or inflammatory rumors spoken against high ranking members of the English kingdom, the statute rarely saw light in court until its' official abolition in 1888.

Despite its antiquated usage, the offence retained its place in the Canadian Criminal Code. The main reason for its survival (or thriving even) could be attributed to the fact that the offence was the only instrument that equated to a legal regime befitting group defamation. To what effect this section could be useful in combatting the rise of fake news in modern times is of great interest going forward.

There are at least three convenient reasons that may have fueled litigants to resort to Section 181. The first concerns the proof of *mens rea*. It is relatively facile to demonstrate before the court that there was a deliberate dissemination of factually false information on the part of the defendant. In contrast, the steep requirement of establishing the actual intention to promote hatred in anti-hate propaganda law (Section 319(2)) discouraged those who sought reparation for group defamation. In addition, there is no special defense tactics available to

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[658] *Slanderous Reports Act of 1275*, 3 Edw I, c 34 (Eng).

the defendant if charged under the offence of spreading false news. Section 319(2) on the other hand, generously provides several specific defense options to the accused. Lastly, a private prosecution does not require the consent from the relevant Attorney General, unlike in Section 319(1) where it is a prerequisite to trigger its procedure.

However, the false news provision did not escape constitutional philippic in *R. v. Zundel*.[659] In the ruling, the statute was found to violate freedom of expression in Section 2(b) of the *Charter* and its' limits unreasonable under the *Charter's* Section 1 standard. The obvious factor that overwhelmingly swayed the Majority (albeit the decision was closely divided by a margin of 4 to 3) to strike down said provision was its overbroad character. In their view, Section 181 casted a net simply too wide that targeted an indiscriminately broad range of speeches. Comparatively, the anti-hate provisions invoked in *Keegstra* were narrowly constructed to apprehend specific instances of group hate speech. It is also pertinent that the purpose of preventing the spread of false news could not be alternatively used to fight racist group defamation – or anti-Semitic claims in *Zundel*'s case.[660] Again, from the collated angle of *Keegstra*, the anti-hate expression legislation faithfully stuck to a well-constricted and clear objective, as originally instructed in its creation by the Parliament.

2.4.Racial Group Discriminatory Expression under Human Rights Provisions

Canada is an adhering member to several international covenants that condemn actions that infringe on the rights of ethnic or religious minority groups and/or discriminatory practices or policies that promote racial hatred and tensions between groups in society. For

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[659] *Zundel, supra* note 407.

[660] This shifting purpose doctrine was explicitly rejected in *Big M Drugmart*, *supra* note 417.

instance, Canada is a Member State to *United Nations Committee on the Elimination of all Forms of Racial Discrimination* (CERD)[661] and the *International Covenant on Civil Political Rights* (ICCPR).[662] By being a signatory to these treaties that expressly denounce the said practices, Canada has a legal obligation to not only uphold the international agreements but also to *tune* its national laws to actively reprehend those activities. Indeed, Dickson C.J. confirmed Canada's commitment to respecting the engagements made on the international legal stage by affirming the legal compatibility between the CERD, the ICCPR and Canadian national legislation and reaffirming Canada's obligation to integrally follow through on the engagements of the treaties.[663]

Nationally speaking, there is federal and provincial human rights legislation that provides legal remedies and other viable recourses against discriminatory speech aimed at identifiable groups.

2.4.1. Federal Human Rights Legislation

In addition to the provisions contained in the Criminal Code, Canada has passed human rights legislation on both the federal and provincial levels to reduce racial group defamation. These, along with the aforementioned criminal provisions have formed an important block to keep expressions of hate against Canadian society's minority groups in

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[661] Art 4(a) of CERD invites member states to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination… and to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination."

[662] Art 20(2) of ICCPR reads: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

[663] *Keegstra, supra* note 81 at 752.

check. One main difference between criminal and human rights provisions in terms of their respective objectives would be that the former seeks to penalize (and hopefully deter) the illicit expressions. That is why the wording of criminal provisions are constructed narrowly with great precision to establish the *mens rea* element; Human rights' texts, in contrast, are coined in much broader terms generally designed to denounce or repair discriminatory behaviors.

Section 3(1) of the same *Canadian Human Rights Act* provides the possible grounds for prohibited discrimination, including "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted."[664] Before its repeal, Section 13(1) of the same *Act* made it a discriminatory practice to repeatedly communicate by telephone "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."[665] Although Section 13(1) targeted telephone communications, the covered domain extended to acts communicating hate propaganda on the Internet.[666]

A well-known case decided under this provision is *Canada (Human Rights Commission) v. Taylor.*[667] In a case that involved an anti-Semitic telephone message service in Toronto, Mr. Taylor was charged under the abovementioned Section 13 of the *Canadian Human Rights Act* after repeatedly failing to obey the Court's order to cease the

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[664] *Canadian Human Rights Act*., RSC 1985, c H-6, s 3(1).

[665] *Ibid* at s 13(1).

[666] *Anti-terrorism Act*, RSC 2001, c 41, s 88.

[667] *Taylor, supra* note 86.

discriminatory activity. In numerous regards, the ruling in *Taylor* proceeded with a similar line of reasoning as was utilized in *Keegstra*. Despite locating Taylor's expression under the ambit of the *Charter's* scope, the Justices in *Taylor* ruled that combatting racist practices and denouncing the roots of anti-Semitism were tasks of 'pressing and substantial' priority. And the means to do so – that is to say, the usage of Section 13 of the Human Rights Act to suppress Mr. Taylor's "White Power Message" – was in fact wholly compatible with the *Charter's* spirit while only minimally impairing his speech freedom. The burden of proof resting on the defendant's rather than on the Crown, Mr. Taylor had to persuade the Court that section 13(1) of the Human Rights Act of Canada has caused a serious infringement on his freedom of expression. In other words, it was up to the defendant to convince the court that his speech contained *some value* that contributed to the advancement of the Canadian society and its constitutionally cherished objectives. Before a Court that saw the suppression of hate speech as an imperative in order to uphold "… the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality,"[668] this task turned out to be a very steep climb.

For the dissenting justices, section 13 (1) posed a clear problematic. The absence of the requirement of intention turned this provision into an excessive, far-reaching snare that could potentially tackle and chill speech with legitimate intentions. That alone, for Justice McLachlin constituted a law that "…clearly goes beyond the scope of its objects."[669] The *Human Rights Act* was, in her view, a direct intervention by the government to modulate the marketplace of ideas. Interference of this sort by the State and its implied consequences on

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[668] *Ibid* at 919.

[669] *Ibid* at 962.

freedom of expression had to be tailored with caution; otherwise, it could possibly amount to an arbitrary, State-coerced regulation of individual opinions "(…) which may be relevant to social and political issues."[670]

A more recent, high profile case treated by Canada's *Human Rights Act* was the *Mugesera* decision.[671] In this case, the Supreme Court reaffirmed the initial judgment to deport Mr. Mugesera, a Rwandan national with Canadian permanent residency back to his home country. In question was a hateful speech he gave before a gathered crowd of about 1,000 people in Rwanda, in which he referred to the Tutsi - the oppressed minority group - as "cockroaches"[672] to be "exterminated,"[673] among other less than flattering statements. The original deportation judgment's assessment concluded that Mr. Mugesera's expression committed abroad violated s. 464 (counseling others to commit offence – murder in this instance),[674] s. 318 (incitement to commit genocide),[675] and s. 319 (incitement of hatred against an identifiable group)[676] of the Criminal Code. The Court also equated the defendant's words as a crime against humanity, a ground on which, by the virtue of s. 19 (1)

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[670] *Ibid* at 969.

[671] *Mugesera, supra* note 455.

[672] *Ibid* at para 68. Mugesera had used the term "Inyenzi" against his targets in the speech. The term "… was used during the 1960s to refer to a group of armed refugees who were attempting to stage incursions against Rwanda from outside the country" and literally means "cockroaches."

[673] *Ibid* at para 50.

[674] s 464 of Criminal Code provides:

> Except where otherwise expressly provided by law, the following provisions apply in respect to persons who counsel other persons to commit offences, namely,
>
> (a) every one who counsels another person to commit an indictable offence is, **if the offence is not committed**, guilty of an indictable offence and **liable to the same punishment** to which a person who attempts to commit that offence is liable… (emphasis in bold added). Criminal Code, RSC 1985, c C-46.

[675] See earlier sub-section Hate Propaganda and Anti-Hate Speech Laws at 131-132.

[676] *Ibid*.

of the *Immigration Act*,[677] the Court can refuse entry or allow him to stay on Canadian territory. Although the proof of intent to commit genocide, for instance, was not a requirement in the Court's eyes, the decision hinted at the establishment of a direct link between hate speech and acts of genocide during the tumultuous time in Rwanda. There was an irrefutable co-relation in the Court's view, that the words of the defendant fanned the flames of hostility and hate that ultimately contributed to unspeakable violence toward the persecuted group within the country, resulting in one of the bloodiest genocides recorded in human history.

2.4.2. Provincial Legal Remedies

Provinces in Canada have also enacted a number of human rights codes.[678] Like the Federal version, they are rather large in scope, primarily designed to fend off discriminatory behavior by covering a wide range of potential instances. Manitoba, for instance, has enacted the *Manitoba Defamation Act* in 1934 that specifically prohibits publications likely to expose persons to hatred, contempt or ridicule.[679] Section 19(1) of *Manitoba Defamation Act* states:

> The publication of a libel against a race, religious creed or sexual orientation likely to expose

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[677] Section 19 (1) (*j*) of the *Immigration Act* states that:

> 19.(1). No person shall be granted admission who is a member of any of the following classes:
> (*j*). persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

[678] Quebec: *Charter of Rights and Freedoms*, RSQ 1975, c C-12; Ontario; *Human Rights Code*, RSO 1990, c H-19; Alberta: *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14; P.E.I.: *Human Rights Act*, RSPEI 1988, c H-12; Nova Scotia; *Human Rights Act*, SNS 1991, c 12; New Brunswick: *Human Rights Act*, RSNB 1973, c H-11.

[679] *Manitoba Libel Act*, *supra* note 448.

persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, professing the religious creed, or having the sexual orientation to sue for an injunction to prevent the continuation and circulation of the libel… ."[680]

Though the constitutionality of the section has yet been tested, it remains operational and unique among other provincial human rights codes. For instance, the *British Columbia Civil Rights Protection Act* also directly addresses the issue of racial group hate speech by prohibiting "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting (a) hatred or contempt of a person or class of persons, or (b) the superiority or inferiority of a person or class of persons in comparison with another or others, on the basis of color, race, religion, ethnic origin or place of origin."[681] Still, Manitoba remains the only province that has explicitly sought to deal with racial group hate speech under the legal mechanism and wording of group libel.

Saskatchewan Human Rights Commission v. Whatcott[682] is a notable case in which a provincial human rights legislation was put to the constitutional test against the claim of freedom of expression. Arguing that his action of distributing flyers vehemently expressing concerns regarding homosexuality to the general public was a matter of public policy, the defendant challenged the Saskatchewan provincial legislation prohibiting the exposure of individuals to hatred and ridicule on the basis of their sexual orientation. Although the case evolved around claims of religious freedom (as advanced by the defense team of Mr.

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[680] *Ibid* at s 19(1).

[681] *Human Rights Code*, RSBC 1996, c 210. Flexibly enough, the *Code* makes available to the claimant in either tort action (s 2) or an offence (s 5).

[682] *Whatcott, supra* note 87.

Whatcott), Justice Rothstein focused strictly on the inflammatory nature of the language as opposed to the content of the ideas expressed.[683] For him, even "one phrase or one sentence" of this kind of rhetoric would be susceptible for a legal ban on its publication.[684] The fact that the defendant had no option to confide in the truth defense (the provincial legislation not providing any) did not bother Rothstein. J., because "not all truthful statements must be free from restriction."[685]

This decision is discussed under a more critical light in the following section but at this point, it suffices to note that Justice Rothstein's argument constituted by far the most frontal deviation from the truth-seeking argument – a moral paradigm behind free speech justification that has been explicitly accepted as forming the basis of Canadian freedom of expression's core rationale. What Justice Rothstein's statement suggests is that an expression found to cause prejudice to others must be suppressed to the fullest extent of the law no matter its truth value and without consideration of whether it contributes to subjects of public policy that other co-citizens may wish to hear. The government was exempted from having to present any objective evidence to the Court that Mr. Whatcott's distribution of flyers actually caused harm to others.

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[683] *Ibid* at para 172. (Rothstein J writing for the unanimous ruling) (noting that the appellate court had precluded Mr. Whatcott's expression from hate speech once it had determined that the speech in question touched on sensitive public policy issue, and not considering the inflammatory nature of the speech, was, in Rothstein J's view, a mistake).

[684] *Ibid* at para 175.

[685] *Ibid* at para 141.

2.4.3. Canadian Human Rights, Freedom of Expression, and the Slippery Slope: Observations on M-103/Ban on Islamophobic Expression and Bill C-16 on Gender Expression

For those familiar with the history of constitutional conflict on free speech cases in Canada in the last two decades or so, a significant portion of those battles involved the alleged overbreadth of Canada's human rights legislations and its Commissions. The problematic provision, section 13 (1) of the federal Human Rights Act, has of course been deceased since the vote held by the House of Commons to repeal it in 2012.[686] The now-defunct provision had made discriminatory telecommunications, including through telephone and the internet, conversations that were likely to expose people to hatred or contempt.

One could very well argue that Professor Moon's 2008 report[687] on the subject was the nail on the provision's impending coffin (literally). Commissioned by the Canadian Human Rights Commission, Richard Moon prepared a report evaluating the section at issue, and arrived at the conclusion that hate expressions were best left to be managed by the mechanisms of criminal law. But long before the submission of the report, there were warning signs indicating a clear friction between section 13 (1) and the paramount place freedom of expression imperatively commands in liberal democracy. Numerous human rights complaints filed against Ezra Levant's decision to republish the disputatious Danish Cartoons

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[686] *An Act to amend the Canadian Human Rights Act and the Criminal Code*, RSC 2017, c 13, amending RSC 1985, c H-6.

[687] Canada, Canadian Human Rights Commission, *Submission to the Canadian Human Rights Commission concerning section 13 of the Canadian Human Rights Act and the regulation of hate speech on the internet*, by Richard Moon, (Ottawa: Canadian Human Rights Commission, October 2008). Available at Ontario Human Rights Commission's website: http://www.ohrc.on.ca/en/submission-canadian-human-rights-commission-concerning-section-13-canadian-human-rights-act-and

of the prophet Mohammed[688] – which was the cause of violent protests around the globe with massive international boycott movements of Danish products – and legal actions launched against Maclean's magazine's column of the American author Mark Steyn's book excerpt titled "The Future Belongs to Islam"[689] were all recurring points of that incompatibility. From journalistic points of views especially,[690] the continued reliance on section 13 (1) to intimidate critical expressions on Islam in particular was fiercely pushed back as an untenable position.

Closely related to the fear of chilling effect that may be induced by the problematic section was also that of overbreadth. An overbroad statute, aiming to impose limitations on freedom of expression can only lead to its defeat by constitutional challenge, as was recently put on display in *Crouch v. Snell*[691] concerning Nova Scotia's newly introduced anti-cyberbullying legislation. That legislation was struck down in disastrous fashion by the judge for failing the *Oakes* test[692] and for being overly broad, which may result in catching legitimate expressions.[693] One major concern was that the proceeding rules within human rights commissions were too loosely constructed in favor of the instigators.[694] Another point

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[688] The complaint was eventually dropped. Graeme Morton, "Muslim leader drops Ezra Levant cartoon complaint", *The National Post* (12 February 2008) online: http://www.nationalpost.com/news/story.html?id=303895

[689] Mark Steyn, "The future belongs to Islam", *Maclean's* (20 October 2006) online: https://www.macleans.ca/culture/the-future-belongs-to-islam/

[690] See e.g. "A bit late for introspection", *The National Post* (19 June 2008) online: https://archive.is/20080630220903/http://www.nationalpost.com/opinion/story.html?id=597251

[691] *Crouch v Snell*, 2015 NSSC 340.

[692] *Ibid*. McDougall J applied the test and saw that there was lack of rational connection between the law and its legislative objectives (at para 158), nor were the measures adopted by the legislation proportionally crafted (at paras 166, 175, and 188-91).

[693] *Ibid*. The judge severely criticized the overbreadth of the law (at paras 115, 129, and 185-87) as well as for the general lack of clarity (at para 137).

[694] This was part of the arguments advanced by The National Post's editorial board criticizing Canada's Human

of agitation, especially for the news media, was that the facilitation of complaints placed the unbearable financial burdens of court proceedings on journal companies and entanglements with the bureaucratic congestion of the Commissions' inner-working systems ultimately had detrimental effects on journalistic freedom, and consequentially, public interests.[695]

One particularly confrontational area of speech seems to be religious speech or the freedom of expression to speak critically of a religion. The above cited *Whatcott* case provides a peek into what could potentially be construed as a decision stepping toward the encroaching on the liberty of religious speech. To begin with, the bar in establishing important proofs, was set low. For instance, the challenged provision in the *Whatcott* decision, section 14 (1) of Saskatchewan's provincial Human Rights Code,[696] did not require proof of the intent of the speaker nor proof of actual harm inflicted to the plaintiffs. Instead, focusing on the *likelihood* of the harm in the defendant's flyers expressing insidious views toward homosexual persons, Justice Rothstein outright rejected what he judged to be a convenient "framing" of Mr. Whatcott's expression to fit into the contexts of the public's moral discussion. In his view, the defendant's religious expression, regardless of whether it constituted a genuine or honestly-held religious belief on a matter of ongoing public debate

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Rights Commissions. See footnote 690.

[695] *Ibid*.

[696] *Saskatchewan Human Rights Code,* RSS 1979, c S-24.1 s 14(1) (The Code was repealed by c S-24.2 in 2018 effective 1 Oct. 2018). The said section reads in part:

> 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
>
> (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of prohibited ground, of any right to which that person or class of persons is entitled under law; or
>
> (b) that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground.

regarding gay people's rights in Canadian society could not be a justification, so much so that if the formulation of "… even one phrase or sentence"[697] of the publication misshaped his overall message, it would then fall into the ostensible constitution of 'hate speech' as section 14 (1) sought to capture. The overriding of freely opined religious speech – that of which harmful intent not be established – with subjectively offensive sentiments - could be perceived as a real threat to religious conservatives. The disinterest toward developing more elaborate tests involving religious speech uttered in religious contexts and the laxness in not requiring the proof of actual harm in such speech may prove to be fatal to the constitutional scope of religious expression. In the U.S., this is presently a fierce point of debate between conservative Christian groups and social networking sites like Facebook that are traditionally seen as representing the more liberal policies in America.[698] The subsequent fear is that if one were to go down this road, the chilling would begin to concern itself with holy scriptures condemning homosexual activities.

Relatedly, the liberty to speak critically of a religion is another hot button issue. It is important to note the heightened level of anti-Islam sentiments around the globe, a creeping hostility that first begun in the aftermath of 9/11 and subsequent terrorist attacks in the name of that religion. It is not that difficult to come across the demonization of Muslim immigrants or their depiction as being fundamentally incompatible with Western democracies and how this rhetoric has seeped into the public and political discourse. Canada has not been spared.

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[697] *Whatcott*, *supra* note 87 at para 175.

[698] This surfaced during the U.S. Senate Hearings of Mark Zuckerberg's apology tour to the Capitol Hill after growing evidences showed that Facebook did not take appropriate measures to suppress the spread of fake news during the 2016 U.S. presidential election. On broader points, see e.g. Elliot Hannon, "Today in Conservative Media: Social Media Bias Is the New Liberal Media Bias", *SLATE* (8 March 2018), online: https://slate.com/news-and-politics/2018/03/today-in-conservative-media-social-media-bias-is-the-new-liberal-media-bias.html

Hate crimes against other minorities – among them a significant portion made against Muslims – have surged in 2017.[699] In Toronto, there was a controversial protest held in front of a mosque calling for a ban on Islam which is currently being investigated as a possible act of hate speech.[700] Most notably, a terror attack took place in a mosque in Quebec City in which a Laval University student shot and killed six praying Muslims.[701] There were acts of vandalisms against Mosques here in Montreal.[702] There are even those who prey on the unstable atmosphere to create false alarms to cause chaos as was demonstrated by the fake bomb threats in the Concordia University buildings in downtown Montreal by a self-proclaiming conservative association that turned out to be a dastardly act by a Ph.D. student of Lebanese ethnicity.[703] Muslims are not the only ones being targeted. In fact, there were numerous threats made against Jewish centers across Canada. Recently, there was a McGill University student representative who faced controversy after posting "Punch a Zionist" on

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[699] Rachel Law, "Hate crimes Spike in Montreal after Quebec City mosque shooting", *Global News* (31 January 2017), online: <http://globalnews.ca/news/3216639/hate-crimes-spike-in-montreal-after-quebec-city-mosque-shooting/>; Les Perreaux & Colin Freeze, "Arrest made after hate crimes spike following Quebec mosque attack", *The Globe and Mail* (2 February 2017), online: <http://www.theglobeandmail.com/news/national/police-report-rise-in-hate-crimes-after-quebec-city-mosque-attack/article33856702/>.

[700] Shanifa Nasser & Amara McLaughlin, "Protesters outside Masjid Toronto call for ban on Islam as Muslims pray inside", *CBC News* (17 February 2017), online: http://www.cbc.ca/news/canada/toronto/anti-muslim-protest-masjid-toronto-1.3988906.

[701] To have a general summary and outline of the incident, see Les Perreaux et al, "The Quebec City mosque attack: What we know so far", *The Globe and Mail* (10 February 2017), online: http://www.theglobeandmail.com/news/national/quebec-city-mosque-shooting-what-we-know-so-far/article33826078/.

[702] The Canadian Press, "Montreal's Tawuba Mosque Vandalized, Suspect Arrested in the area", *Huffington Post* (21 February 2017), online: http://www.huffingtonpost.ca/2017/02/21/montreal-mosque-vandalized_n_14903412.html.

[703] CBC, "Man charged in bomb hoax was Concordia PhD student, says man who sublet to him", *CBC News* (2 March 2017), online: <http://www.cbc.ca/news/canada/montreal/hisham-saadi-concordia-hoax-bombing-1.4007544>.

his twitter account.[704]

The continuous public hostility toward a particular religion may make one momentarily reconsider the revival of blasphemous libel. This, however, would be inconceivable in a secular democracy where religion has been attenuated to something of a private matter to be conducted quietly in individual's backyard. The zealousness to fend off Islamophobic expressions, in Canada however, did yield something quite concrete. On March 23rd 2017, M-103[705] – an anti-Islamophobia motion – handily passed the House of Commons by a vote result of 209 yays to 91 nays. However, it is doubtful whether M-103 can be more than just a political gimcrack in response to the rising level of social jaundice, given the pre-existing provisions in the Criminal code as well as broad, anti-discriminatory human rights legislation already in place. The motion is also silent on any definitional of criteria that *legally* define Islamophobic expressions[706] – a signature commonality of most hate speech

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[704] Graeme Hamilton, "Outrage rains down on McGill student rep who tweeted 'punch a Zionist' – and an offer to do just that", *The National Post* (12 February 2017), online: http://news.nationalpost.com/news/canada/mcgill-student-reps-punch-a-zionist-tweet-brings-calls-for-him-to-resign.

[705] Motion 13, *Systemic racism and religions discrimination*, 1st Sess. 42nd Parl, 2017, (as passed by the House of Commons 23 March 2017) The full text of the motion can be found here: http://www.parl.gc.ca/Parliamentarians/en/members/Iqra-Khalid(88849)/Motions. The motion has three main components. First, it calls on the government to recognize the need to diminish the political climate of fear and hate. Second, the bill exhorts the government to condemn Islamophobia as well as all other forms of systemic racism and practices of religious discrimination and to develop a governmental approach to combat them. The third noteworthy element in the motion tasks the Standing Committee on Canadian Heritage to come up with a study to reduce these prejudices by collecting data on hate crimes on impacted communities.

[706] The question of clearly defined contents has always been an entrenched impediment for any speech-limiting legislative proposals. M-103 is no exception to that and it utterly fails this clarity test. The motion pushes the government to condemn and reject expressions of Islamophobia. But nowhere in the proposition can be identified a clear, coherent definition of the term 'Islamophobia'. What exactly may be defined as Islamophobia? Is the distinction between an Islamophobic statement and what is not even *legally* graspable? To go even further, is science of law properly equipped to legally distinguish what legitimately constitutes an Islamophobic expression?

The difficulty is also found in the incendiary nature of the topic. It is a discussion that is embroiled with discontent voices ranging from civil and human rights advocates to cynics involved in the political process. The debate is further muddied by accusations of religious intolerance, left versus right, the clash of civilizations theories. Even those who do not necessarily take part in political discourse are *triggered* by this issue. To put it

regulation; it is unable to define with clarity the subject of its intended prohibition. It is non-binding and thus it does not impose any punishments if transgressed. And yet, however symbolic it may appear on its surface, grave concerns remain as to whether freedom of speech as constitutionally guaranteed by s. 2 (b) of the *Charter*[707] may be exposed to gradual erosion.

First, on a rudimentary level, there is an inherent danger in actively taking legislative measures to enhance the protection of a particular religion. Centuries of civilizational history have made it clear that the entanglement of the State and religion, or the national-institutionalization or endorsement of the latter, can cause serious harms to other constitutive groups in pluralistic societies. In extreme cases in history, genocide and war occurred in the name of religion, with a nation-state using that religion as a sacred cause to legitimize political conquests. There is a fundamental difference between protecting a *religion* as an ideology in this context from defamation and protecting that religion's adherents from persecution for their sincerely held beliefs – a critical distinction M-103 is silent on. In the case of the former, it will be a step backward toward a less tolerant, civilized society.

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mildly, opinions regarding the potential imposition of a controlling legal mechanism on the right of free speech vary massively and are diverse. The toxicity of the situation has attained a level where even an act of simply bringing up a subject of this category on the public floor (even without taking any side) has become a political suicide precipitated by either inflexible hard-lined conservatives or naive far-left keyboard warriors. This is a déjà-vu. Consider the following illustration:

"*Djihadism, radical Islamic terrorism, is the mortal enemy of democracy. We have to fight it with the weapons that fit the intensity of the threat." "I hate sovereigntists*."

Would those two statements uttered on public forum constitute a form of extreme speech and thus be susceptible to sanctions imposed by the law? Such was the question asked to the lawyer representing the Canadian Civil Liberties Association (CCLA) by Agnès Maltais, a member of National Assembly of Québec during a public hearing debating the proposed Québec's hate speech legislation, also known as Bill 59. Somewhat bewildered by this impromptu, the lawyer explained to the best of her ability that in both of those phrases, the presence of incitement to hatred was not clear. And there it was (Bull's eye!). Any person, depending on his personal history, political affiliations, religious beliefs or ethnic origin, could interpret those words in fundamentally different ways. This is not to mention taking into account the context in which the statements were pronounced.

[707] s 2(b) of the *Charter*.

The outcome of this vagueness casts an overbroad chilling net on any potential criticism concerning Islam. In an increasingly clangorous political atmosphere, it is difficult to identify the exact criteria with which we could qualify a speech as defamatory when they coincide with what has now effectively become tabooed topics such as Muslims' social integration in Western democracies. What if a public expression is an honest reflection contributing to a healthy debate on the group's integration into Canadian society based on objective scientific data? What of a public utterance that on the surface appears to conform to some degree of political correctness but nevertheless agitates hostile attitudes toward people of Islamic creed? The predicament is painfully protruding.

Let me go further. Singling out a religion and gifting it a blanket cover is but a symptom of a more profound malady inflicting post-liberal societies and their reasonable accommodations that frequently turn out to be unreasonable. The traditional liberal philosophy cherishes a person's autonomous capacity to pursue their version of life without having others (especially the State) define it in their place. Likewise, it sits well with the position proclaiming that regardless of an individual's religious affiliation or the color of their skin, every person is entitled to basic, inalienable rights and should be recognized as deserving of such. This is one fundamental block constituting the Taylorian "politics of equal dignity."[708] It is the rational agency in our human nature that transfixes the adumbrating ceilings imposed by alternate communities' over refined dissimilitudes to arrive at the discovery of that which is inherently universal in character to all human *genus*. It is first and foremost this capacity that attests to the integrity of one's personal autonomy that must be preserved.

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[708] Charles Taylor, *Multiculturalism*, ed by Amy Gutmann (Princeton: Princeton University Press, 1992) at 38, 41.

Instead, when one is committed to ensuring not just the basic acceptance of legitimacy of a culture but also actively extend the unreconstructed tolerance to its flourishing in society, that individual has now become an adherent to the cannons of the "politics of difference."[709] When Stanley Fish talks about going out of one's way to be 'a strong multiculturalist,'[710] M-103 is the precise incarnation of that example. What becomes unavoidable is that this munificent, good-intentioned multiculturalist will, in his over-zealous process to selectively protect-accommodate a culture to the fullest extent possible, inadvertently trample upon other cultures' toes. The result is a desultory return to being a "uniculturalist."[711] In other words, in his observance of conscientiousness and championing of the perfect degree of tolerance toward a culture's unremitting actualizations, he will indulge that culture even at the revelation of its being intolerant toward its natural foes under the compulsion of its native instincts.[712] Most take the alternative route to this: denouncing the untamed rituals of imported insiders they so strived to embrace *until* that intolerable point.[713] Unfortunately, that point coincides, to the self-betraying disappointment of the multiculturalist, with the most authentic moment of the other culture's blossom.[714]

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[709] The politics of difference teaches us to actively foster the distinctive traits of each and every culture we as a society welcome into our doors. (*ibid* at 38).

[710] 'A strong multiculturalist' can be characterized as a someone who devoutly believes in upholding all forms of cultures and profoundly respecting their unique traditions – that is to say, their practices and the values that stem from those practices no matter how alien they may be to his own- to their core. Fish, "Boutique Multiculturalism", *supra* note 68 at 382.

[711] Fish argues that one cannot escape from being a uniculturalist "if he sticks with the distinctiveness of a culture even at the point where it expresses itself in a determination to stamp out the distinctiveness of some other culture, he will have become … a uniculturalist." (*ibid* at 384).

[712] *Ibid* at 382 ('natural' as in when viewed under historical light).

[713] *Ibid* at 383.

[714] Fish provides various examples noting that "… the boutique multiculturalist resists the force of culture he

To depart from the cardinal rule of universal respect (which then translates into equal treatment *and* neutral attitude toward all) to instead make room in selective fashion for a particular religion is to proselytize the unyielding to extract their good blessings. Freedom of expression is traditionally a negative right. The most flagrant violation of this freedom occurs when words are put into individuals' mouths because that constitutes an infringement of human conscience.

A glimpse of this forcefulness also flickers in Bill C-16's proposed amendments to *Canada's Human Rights Act* and the Criminal Code in its requirement of the use of gender identity and gender expression.[715] While it is important to not misunderstand nor conflate the legal consequences of Bill C-16 (no, pronouns will not send you to jail), there is little doubt that an intentional refusal to use *reasonable* gender pronouns on the part of the speaker will paint him unfavorably before the human rights commission. What if a person genuinely refuses, by sincerely held religious creeds or cultural reasons, to pronounce the gender-neutral names? Would one be 'disciplined' for failing to actively utter a word to which every fiber of their conscience protests?

Human societies change. Their composition (demography, for instance) may even be altered in the course of development of human affairs. However, one cannot conveniently mold constitutional principles - principles that we collectively chose as a society. Selective cherry-picking or exclusion of expressions to soothe uncomfortable sentiments of a cultural dogma cannot, in my view, remain consistent with freedom of expression. The principle of

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appreciates at precisely the point at which it matters most to its strongly committed members, the point at which the African American tries to make the content of his culture the content of his children's education, the point at which a Native American wants to practice his religion as its ancient rituals direct him to…" (*ibid* at 379).

[715] Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, 1st Sess. 42nd Parl, 2016.

freedom of expression is not some item that can be bargained on an *ad hoc* basis. To do so would unmask the unprincipled liberal reasoning. And that is what is at stake here. Freedom of speech occupies a central place in our democracy; it empowers us to advance democratic governance by bestowing upon all citizens the fundamental right to be able to say something critical on matters of public concern. Free speech means the constitutional right to voice one's thoughts *free* from the coercing intrusions of the government. To impose by legal means obscure demarcations on the discussion of matters relating to any one particular religion is nothing but a fatal compromise to the underlying endowment of what free speech embodies. M-103 and C-16 are precisely that: a progressive (pun intended) yet predictable descent toward that very, very slippery slope.

Chapter 2 Conclusion

The second chapter studied the Canadian freedom of expression under the *Charter*, exploring its basic scope and constitutional limitations. Also was analyzed the balancing of freedom of expression vis-à-vis other fundamental rights when *Charter* freedoms are in collision. Furthermore, general rules of defamation laws and criminal legislations on group-hate speech were dissected, including relevant human rights laws.

The study has shown that in contrast to American free speech, Canadian freedom of expression is less assertive. The mere fact that Canada possesses in its criminal code a specific set of provisions to combat group hate propaganda already sets the country's legal system apart from the American's protective, minimally interventionist posture toward free speech. Freedom of expression in Canada most certainly does not enjoy the same kind of preferment. And when balanced against another *Charter* right, as was the case in *Dagenais*, a reconciliatory approach is invited, not a confrontational one. The evaluation of contested

speech is largely derived from a harms-based interpretation, as illustrated in *Keegstra*, thus placing the focus on the kinds of harms endured by victims exposed to such speech. The harm therein is not restrictively interpreted for individuals, but more expansively, thus emphasizing the nature of the perceived harm on the victims' place; as a member of an identifiable group, in a communal society of multicultural character.

This striking down of what the courts have deemed as harmful speech thus required of active balancing, there were instances in which the judicial interference may have gone too far, particularly with respect to the conflicting junctures between freedom of expression and religious freedom. Justice Rothstein's opinion in the *Whatcott* case as well as several controversial human rights commissions' conflicts are demonstrative of this fact. The proactiveness of the legislative branch in adopting M-103 banning Islamophic expression and C-16 instituting gender pronouns are also worrisome in terms of how they may either cast a chilling net on any *a*-religious speech or violate individuals' sincerely held beliefs or conscience.

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Part One Synthesis

In Part One, we have thus reviewed the legal and constitutional treatments of defamation, group defamation, and relevant group hate propaganda/speech-related laws in American and Canadian contexts. Through the critical review of the legal treatment of group defamation, it is clear that the laws and/or general principles governing this field of law are inadequate to seize the harm in question. The conventional rules upon which courts have relied are put in place for good reasons to act as safeguards for both free speech interests and the proper functioning of the judicial system. That being said, as the examination has demonstrated, the small group exception rule for instance, has been inconsistently applied, yielding to results made on an *ad hoc* basis. On a more troubling and fundamental note, the requirement of individualized injury and the ensuing quasi-automatic discard of large groups' cause of action by direct consequence of that rule, fails to address the harm at issue.

Furthermore, it can be observed from conducting the reassessment that the tort of defamation mono-focuses on the reputational dimension of the harm – as it should, given the primary objective of libel laws. But in doing so, it remains categorical in its interpretation and thereby its treatment of the harm is understood as such. This parochial posture of the law vis-à-vis the harm in racially charged defamatory words is unable to see that the harm produced by this particular class of group-targeting expression penetrates something other than reputational harm as catalogued by the law, or that it inflicts far deeper pain than traditionally implied. So far, the only occasions have been at the level of a constitutional contestation that the harm at issue has been approached as a form of prejudice upon the identity of individuals of the targeted group. For example, in the *Keegstra* decision, one main way that the harm in the defendant's hateful language toward Jewish people was digested was by recognizing that such expression injures the targeted group members' "sense of human dignity and belonging

to the community."[716] In other words, the Court did acknowledge that the purported harm damages the close associational link between individual persons and their groups of identification. Formulated as such, the Court understood to some extent why Mr. Keegstra's vilification may cause substantial harm to persons of Jewish ethnicity, and that that harm did not stop at the mere level of social esteem held by a group of people. Still, the Court did not frontally engage in addressing the harm as harm to identity.

Going into Chapter 3 and 4, my point is that this uncovered dimension of the harm by the current law's refusal or shortcoming does not have to remain unaddressed. Hence, the value of the thesis in offering a novel way of reconceptualizing the harm by the speech at issue, as will be elaborated in the following Chapters. A State that places great value in the equality and diversity of all its citizens can mitigate the harm without necessarily overstepping on the scope of critical speech and the fundamental exercise of speech freedom. In fact, it could very well be argued that the State has a certain responsibility in this regard.

This brings me to my second point that is to be derived from this comparative exercise with respect to freedom of expression. After having evaluated the two legal systems' general understanding and attitude toward this particular constitutional right, the question, in my view, ultimately boils down to whether there exists such thing as a principle of free speech in either of those systems, and if so, to what degree would that principle be respected when subjected to the measurement of constitutional inspection. That principle of free speech, Frederick Schauer put it as this:

"For if the state needs no stronger justification for dealing with speech than it needs for

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[716] See footnote 469.

dealing with other forms of conduct, then the principle of freedom of speech is only an illusion."[717]

In other words, as reformulated by Professor Martine Valois, there would be such a thing as a *free speech principle* if freedom of expression enjoys an independent treatment requiring a stricter standard of justification in case of its infringement. That is, if freedom of expression is in fact a particularly fundamental liberty that is central to truth-searching endeavors, facilitation of democratic participations, and furtherance of individual's personal autonomy, then an abridgment of that freedom as expansively and diversely understood as it is in today's modernized social context should face a heightened bar of scrutiny other than the one restrictions on other rights and freedoms are weighed against.[718]

The First Amendment constitutionalism, by all indications as observed in the Chapter One, would appear to harbor such a principle. This is apparent not merely in the literal formulation of the said Amendment and the consequential rigid interpretation of it, but first and foremost in its philosophical abstraction. The three representative theories, though imperfect in their parochiality, ground the important values of freedom of expression at the freedom's rudimentary conceptions. We have also seen how free speech in America is not simply a right in the legal domain *stricto sensu*, but that its reach exceeds far beyond to social, political, and indeed cultural realms of American exceptionalism and its deep-rooted alertness against the pervasive governmental intrusion upon individual freedoms. Lastly, a collection of First Amendment landmark cases spanning from the early 1900's to this day have demanded rigorous standards of justifying rationales from laws found to impede on the

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[717] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University, 1982) at 8. (Schauer, "Free Speech Enquiry").

[718] Martine Valois, "Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma" (1992) 26 RJT 373 (Valois, "Canadian Constitutional Dilemma"). Professor Valois described it as the following: "If a Free Speech Principle exists, the standard of justification for limiting speech is more stringent than the standard for restricting other liberties. If the standard of justification is the same, there is no Free Speech Principle." (*ibid* at 403) (emphasis in italic in original).

exercise of speech freedom. Viewpoint neutrality and rejection of content-based regulations are testaments to that posture. As such, when the freedom is contested, it has not been submitted to a proportionality test, at least not in the sense developed by the *Oakes Test* as embraced by the Canadian Supreme Court. In view of these observations, the United States truly seems to attribute a special class of its own to freedom of expression. It follows that the principle of free speech does exist there, and even flourishes under that propitious system.

In Canada, the significance of freedom of expression is recognized to the extent of its inclusion in section 2(b) of the *Charter*, while the justification of its infringement is subjected to the same proportionality test as other *Charter*-based rights. As such, in this aspect, speech freedom is thrown into the same pool of fundamental rights and freedoms, facing the same limitations that section 1 of the *Charter* announces. Whatever the degree of consideration freedom of expression commands, it is clear that it is not the recipient of a special treatment when that proportionality test itself disintegrates into a nuanced question of reasonable restrictions. Whether it be by the deployment of judicial deference to legislative choice argument to sidestep the issue at stake[719] or by engaging in the application of the reasonableness standard – the lowest bar of review when assessing the constitutional validity of a challenged law[720] – that *in fine* devolves into a balancing act of involved interests. The remaining commitment to freedom of expression seems to lose its rigidity if the evaluation of a constitutional right as essential as freedom of expression can be operated on an *ad hoc* basis

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[719] Professor Martine Valois cited in her abovementioned article, for instance, *R v Edwards Books and Art Ltd* (1986) 2 SCR 713, *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* (1990) 1 SCR 1123, and *Irwin Toy*, *supra* note 413. See Valois, "Canadian constitutional Dilemma", *supra* note 718 at 412-13.

[720] *Ibid* at 414 (noting that "This standard of reasonableness is the lowest standard in the sphere of judicial review of constitutional limitations… When a reasonable basis standard of review is applied, the burden of justification on the government requires only that it demonstrates that the legislation's objective and means chosen, are reasonable.") (international citations omitted). Whether this reasonableness standard is sufficient to justify limitation on speech freedom, even at the absence of empirical proof of harm, will be revisited toward the end of Chapter Three. On this, see The Question on the Exigence of Empirical Proof of Harm and the Limitation of the Societal Harm argument.

to accord rather gracious attunement to ever-changing social norms and demands.

So by the standard enunciated by Frederick Schauer's conditioning of a free speech principle, I all but am inclined to share Professor Valois' observation[721] that such a principle is inexistent in Canada when critically viewed from the American counterpart.

[721] *Ibid* at 415.

PART TWO, CHAPTER THREE

Group Defamation and Harm to Identity

Introduction

This chapter presents the core argument of the thesis. It is a critical study of group defamatory expression of fundamentally degrading nature via the lens of an identity-based framework as briefly discussed in the general Introduction.[722]

The chapter proceeds as following: the first section contains a communitarian critique of liberal individualism. It does so to address the conceptual inability of existing group defamation laws to recognize individuated harm resulting from group defamation of this nature (3.1.). The section thereafter engages in a relational approach to harm to identity by uncovering the relational power dynamic between *The Chooser* and *The Assigned* where identities are arbitrarily imposed upon others, and by specifically illustrating notable derivative forms of those harms in the case of racial group defamation (3.2.). The last section discusses group defamation under the more expansive light of group vilification. This is done to underline the harm's interconnectedness and pervasiveness as a form of social harm contributing to the making of a hostile environment (3.3.). The reconceptualization of the harm to individual members' identities and the reassessment of harm as both a personal and societal one leaves us with a crucial question regarding the requirement of empirical proof of harm and the State/the Law's role when dealing with harmful speech.

3.1. From Group Defamation, Individuated Harm

Group defamation involving large groups of people based on race, ethnicity, or other similar types of characteristics does not allow an individual member to file for cause of

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[722] The subject and the delineation of the covered scope having been announced at the beginning of the thesis, I will not repeat them here. See Identity as a Liberating Theoretical Framework at 10.

action.[723] Not only does the size of the group effectively disqualify their right to claim, the tort of group defamation is discouraged as the choice to seek recovery.[724] For there to be a valid cause of action from an individual member of the defamed group, the law requires that the harm in the group defaming statement constitutes a direct, personal injury that results in individual harm in the eyes of an ordinary person.[725] Cromwell J.A. in the *Southam* decision alluded to this in his own terms:

> "To put the matter another way, the issue is whether any potential harm to the individual's reputation is so diluted that it falls below the threshold of legal recognition."[726]

This, to cap it briefly, is the source of the basis of conflict. The assumption that nullifies the possibility of individuated harm in group defamatory expression corresponds with an excessively individualized conception of self that is irreverent toward what it views as an injury to a group, rather than to individuals. The former, unlike the latter, would be unfit to hold or exercise rights. Reflective of this logic is the inaccurate supposition that an expression cast at an entire group cannot possess the necessary articulateness to pin down each individual member belonging to that indeterminate pool of persons. From here originates the law's discomfort with the very notion of harm in group defamation in its individuated form.

To overcome the law's inaptitude, a contrast with a more relational, socially connected, situated construction of the self is needed (3.1.1.). A communitarian description of

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[723] See footnote 1 in the general INTRODUCTION (discussing the problematic in question).

[724] *Bou Malhab, supra* note 1 at para 93 (Deschamps J).

[725] "… it must be shown that the plaintiff is a member of the class and that the words have been directed at him or her as an individual. The plaintiff must show that the publication is of and concerning him or her personally." Brown*, supra* note 1. The test of ordinary person and intensity of suspicion is applied to see whether the defamatory comment has "created in the mind of the reasonable reader or listener that the plaintiff is the person within the class to whom the defamatory statement refers." (*ibid* at 92).

[726] *Southam*, *supra* note 604 at para 31 (Cromwell JA).

the self fits that description. That communitarian conception, however, while helpful in enabling the conceptual *flow* or the *transfer* of individuated harm descending from group defamation, is insufficient to grasp the *extent* or the *intensity* of the harm and to arrive at what I qualify as harm to identity. To do so involves distinguishing the constitution of group membership and necessitates the recognition of bonds of identity (3.1.2.).

Bref, it has been stressed many times: I put a great deal of effort in this present section to pierce though the law's conceptual blockage that refuses to acknowledge the possibility of individuated harm in group vilifying speech. The following section involves the dismantlement of that conceptual impasse.

3.1.1. Enabling the conceptualization of Individuated Harm in Group Defamation

In this section, I will first point out a common misconception about the harm in group defamatory expression. The harm is not lessened by the expression's general formulation; the harm maintains its directedness because it is a form of inherently intimidating speech. (3.1.1.1.). Following this preliminary clarification, I will then address the underlying conceptual inconsistency in the law regarding its requirement that an individuated harm emanate from the group defamatory expression (3.1.1.2.). Following this I will contextually contrast excessive liberal individualism with a communitarian background to underline the potential harm via the connectedness of individual identities and group membership (3.1.1.3.).

3.1.1.1.The Maintenance of Harm: Group Defamation as Intimidating Speech

Before expanding further, it is fundamental to first and foremost qualify racial group

defamation in terms of the type of speech it represents. This can be achieved by inquiring into the nature of the speech in question, but also by distinguishing and underlining the particularly harmful effects of the speech unto its subjects in order to avoid misplacing it under improper classification. For instance, such is the case when the notion of 'incivility' flirts with racial group defamation. The term 'incivility' oftentimes accompanies the subject of group defamation.[727] The association, intended or not, may give an allusion that seeks to conjoin group defamations' harmful effects to the various forms that incivilities take, such as ""public indecencies; verbal assaults in the streets; unconstrained, rowdy teenagers; lurid advertisements in front of neighborhood movies; tawdry paperbacks and magazines."[728] Hence, there is a sense of equivocation of the two that buries the harm of the former in the wide-ranging, unqualified, blanket notion of 'incivility.' The notion of 'incivility,' with its ambiguity and nuances, wraps the harm of racially degrading speech under the guise of some permissible ignorance of basic table etiquette. In my view, this approximation misconstrues the harm in group defamation. I submit that while there may be common denominators shared between particularly virulent manifestations of incivilities and say, racial group libel such as racial group epithets and pamphlets, the harm in the latter cannot be reduced to mere inconveniences resulting from general discourteousness.

This is because racial or ethnic group defamation is inherently intimidating speech.[729] Such group defamation has the effect of subduing the victims and the listeners at whom it is aimed at.[730] It is characterized by a certain degree of authoritative directness into it that is

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[727] See e.g. Arkes, *supra* note 25 (beginning the article with the notion and examples of incivility and linking it to introduce group libel).

[728] *Ibid* at 281.

[729] Donald A Downs, "Skokie Revisited: Hate Group Speech and the First Amendment" (1985) 60 Notre Dame L Rev 629 at 654 [Downs].

[730] *Ibid* (explaining this intimidating factor as a reason behind the reactions demonstrated by Jewish inhabitants of Skokie upon the threat of the proposed Nazi march).

self-imposing unto the target.[731] This element of directness assimilates racial group defamation to the class of speech similar to *Chaplinky's* fighting words[732] as "a form of direct intimidation"[733] That intimidating quality is recognized by its effects on victims, including "immediate mental or emotional distress"[734] that push the victims to withdraw from society.[735] Professor Alexis Tsesis portrayed intimidating speech as a form of destructive expression when referencing the prevalent use of intimidating symbols that carry messages of subordination and superiority forged during racially violent and unequal times in history.[736] The messages are destructive because of the specific meanings and the social context in which they were employed, grounded in "a long and pernicious history."[737] Intimidating speech viewed under such historical lighting purports to "diminish the objects' sense of welfare and security, making even mundane tasks, like going to the store, seem perilous."[738] This becomes self-evident when the speech-act of cross burning as a demonstration of "symbolic intimidation"[739] intrusively finds its way onto the front lawns of one's home, adding to the casual inducement of terror in what is supposed to be one's place of ultimate security and comfort.[740]

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[731] Delgado, "Words that wound"*, supra* note 15 at 140, 143.

[732] See footnote 274.

[733] Downs, *sup*ra note 729 at 657; Likening hate speech to the fighting words as ruled in *Chaplinksy*, Jack B Harrison, "Hate Speech: Power in the Marketplace" (1994) 20 JC & UL 461 at 467-69; Beth C Boswell-Odum, "The Fighting Words Doctrine and Racial Speech on Campus" (1992) 33 S Tex L Rev 261.

[734] *Ibid.*

[735] *Ibid*.

[736] Alexander Tsesis, "Regulating Intimidating Speech" (2004) 41 Harv J on Legis 389 at 390 [Tsesis, "Intimidating Speech"]. He also points to Allport's work on The Nature of Prejudice to describe "the sequence of degenerative events" that began with "antilocution" of aggressive public indoctrination and propaganda that eventually led to discrimination and violence (*ibid* at 391-92).

[737] *Ibid* at 390 (discussing *Black*, *supra* note 78 at 363).

[738] *Ibid*.

[739] *Ibid* at 391.

[740] *Ibid* at 390-91 (noting that "When they live in the very neighborhoods where the symbolic intimidation is perpetrated, victims may even be forced to move from their homes to avoid the foreseeable risk. Once a cross

Not to mention that racial or ethnic group defamation also has an assaultive bite to it. It is the sort of hurling of words onto the face of a person in extreme proximity as in a bar brawl or spitting on one's face. This parallel is substantiated by the fact that victims to racist speech, when provoked by words demeaning their racial identity, may respond in highly emotional, irrational, and even violent ways.[741] Only assaultive, direct, and fighting words can invite such instant blowback on the part of the victim.

Nor is the harm somehow *lessened* by its general formulation. Group defamation as presently understood is far from randomly casted expectoration. This type of defamation is a "targeted"[742] expression that deliberately concentrates on the basis of the victims' core traits. Such category of speech is designed to perpetrate direct, substantial harm onto its marks.[743] When words like "nigger," "kike," or "spick" are used,[744] they are intentionally deployed by a speaker who is fully aware that these words can only mean what they mean.[745] The specific meanings become "objectively available in the common reality"[746] where they are recognized by all, inter-relationally reminding us of the original intention and the subjectivity of the prejudice.[747] Their very utterance thus convicts the speaker of his deliberateness. Racial group defamation, then, may not be so group-oriented after all. The viciousness of the words in their original intensity is maintained, not lost, in its exertion. In these regards, the term

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has been burnt on its lawn, after all, a black family is likely to be leery about approaching its own house").

[741] Downs*, sup*ra note 729 at 654; Edward J Eberle, "Hate Speech, Offensive Speech, And Public Discourse in America (1994) 29 Wake Forest L Rev 1135 at 1210-11 (taking the example of harassment and taunting by burning cross in the backyard of a family home). Toni M Massaro & Robin Stryker, "Freedom of Speech, Liberal Democracy, And Emerging Evidence of Civility and Effective Democratic Engagement" (2012) 54 Ariz L Rev 375 at 394 ("… words likely to provoke an imminent disruption or physical violence.").

[742] "Targeted racial vilification" or "Targeted racialist speech." Downs*, supra.*note 729 at 657, 654 respectively.

[743] *Ibid* at 657.

[744] Again, to note the obvious, their historically constructed origin.

[745] Delgado, "Words that wound"*, supra* note 15 at 145

[746] Peter Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: First Anchor Books Edition, 1967) at 36 [Berger & Luckmann].

[747] *Ibid*.

"incivility" simply does not match the degree of harm induced by racial group defamation.

3.1.1.2.Group Defamation and the Requirement of Individualized Harm: A Reified Mismatch

Now that the common misunderstanding regarding the specific character of speech of group defamation has been amended, the underlying conceptual incompatibility in group defamation law must be addressed.

To understand the basis of the problem in law of group defamation law (the view that group defamatory expression cannot cause sufficiently individuated harm), one must begin with the law's relation to rights in general and recognize that there is a strong individualistic hold on rights. This is to say that there is an exclusivist view where rights are perceived as things that can be held and exercised only by individual persons. The liberal conception of rights as we know it is largely premised upon the endowing of inalienable rights onto individual(s) by virtue of their humanity. That attribution of rights, more often than not, is generally told from an individualistic narrative.[748] For instance, the *United Nations' Universal Declaration of Human Rights* is filled with express references to the "dignity and worth of the human person"[749] and the entitlement of basic rights of "Everyone."[750] Of all Thirty Articles in the *UDHR*, only a single article (Article 16) contains a reference to the subject in plural terms of "men and women"[751] with regard to the right to marriage and to the

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[748] An easy way to contextualize this is to trace back to the initial rise of international human rights. Most if not all major human rights texts is centered around the subject of individual person's inviolable rights and the related notions of equality and human dignity are built around that individual person.

[749] The Preamble of the Universal Declaration of Human Rights [UDHR]. Available online: http://www.un.org/en/universal-declaration-human-rights/

[750] The word "Everyone" is the beginning of all Articles of the UDHR, except for 1, 4, 5, 7, 9, 16, and 30. Arts 4, 5, and 9 too commence with "No one."

[751] Art 16 of UDHR.

formation of a family. Article 1 is but a general enunciation of "all human beings" in the broadest sense possible.[752] The remainder of the *UDHR* stresses the guarantee of human rights as held by *a* person in terms of fundamental liberties, dignity, equality, and the rule of law, in given nation-states. Part III of the ICCPR's Articles of the Covenant on rights (Articles 6 to 27)[753] does not deviate from this individualistic perspective either. Article 6 preserves a person's dignity as a right to life, Article 9 recognizes the right to liberty and security of a person, while Articles 12 to 19 stipulates fundamental individual freedoms such as freedom of expression, of religion, of privacy, of movement, and so forth. Yet again, the prominence of rights is ascribed to individual person(s).

The repetitive emphasis on the individual running through the liberal discourse showcases the "distinctive liberal way of life."[754] It is one that aspires "to increase and enhance the prerogatives of the individual."[755] It corresponds to the view that sees a person, in singular terms, as the righteous holder of the right; a qualification that grants the badge of rights that is to be worn only by the individual. John Rawls aptly put it as individuals being the "self-originating source of valid claims."[756] Following the long prevailing Kantian creed of ultimate ends, individual interests are inviolable matters that must not be sacrificed at the altar for some undefinable greater common good.[757] Distinct moral agency, it is believed, is

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[752] Art 1 of UDHR stipulates: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood."

[753] The International Covenant on Civil and Political Rights [ICCPR] Arts 6 to 27 are largely grounded on fundamental individual rights. Available online: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[754] Ronald Beiner, "What's the Matter with Liberalism?" in Allan C Hutchinson & Leslie J M Green, eds, *LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM?* (Toronto: Carswell, 1989) at 43 [Beiner, "Liberalism"].

[755] *Ibid*.

[756] John Rawls, "Kantian Constructivism in Moral Theory" (1980) 77 J of Phil 515 at 543.

[757] *Ibid*. And hence, his famous reasoning that any deeds ought to treat individuals not merely as means to attain an end but to see persons as an end in themselves

to belong to individual persons.[758] Considering that it is only the individual to whom legitimate moral agency is endowed, it follows that a group would therefore lack that capacity and henceforth would be unable to raise nor exercise any actionable capacities.[759] The hypothesis of attributing rights to groups is a political inconvenience[760] in the eyes of the strict individualist, if not an outright "metaphysical absurdity."[761] This supposition, however, is problematic.

This view is problematic because such a conceptualization suffers from a structural dualism.[762] It is "categorical"[763] in the sense that it reifies two competing dichotomies of rights in absolutist terms,[764] "imped(ing) our understanding of how social reality is actually constituted."[765] In other words, the resoluteness of the individualistic versus collective perception of rights overlooks the *flow* or the *transfer* of the harm being inflicted from the defaming speaker to the defamed listener. Hence, it is unable to acknowledge neither the

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[758] *Ibid.*

[759] This would fall under the argument of collective rights as rights of collective agents that focuses on the "capacity conditions of rights-holders." Leslie Green, "Two Views of Collective Rights" (1991) 4:2 Can. JL & Jurisprudence 315 at 318 [Green]. Demonstrating that "appropriate capacity is a necessary but not sufficient of having rights," however. (*ibid* at 320). (comparing the examples of claim to collective rights of Mohawk people imposing external duties to be performed the likes of Federal Government and Quebec's cultural/linguistic survival partially dependent on individual Quebecers choices and responsibilities)

[760] *Ibid*. Green argues that "in fact, general skepticism about collective rights is more often political than it is metaphysical. It is grounded, not in doubts of reality of non-individual actors or the extent of to which they are *recognized in law* or custom, but in worries about their moral or political standing." (*ibid* at 315) (emphasis in italics added).

[761] Adeno Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities" (1991) 67 Notre Dame L Rev 615 at 631 [Addis].

[762] Crawford heavily relies on sociologist Anthony Giddens to denounce the dualistic *encadrement* of many things from "individual vs. society, micro theory vs. macro theory, agency vs. structure, subject vs. object, methodological individualism vs. social holism." He argued for the rejection of this dualistic approach "because they reflect a legacy of epistemological concerns that draw attention from more "ontological" ones." Mark Crawford, "Regimes of Tolerance: A Communitarian Approach to Freedom of Expression and its Limits" (1990) 48 U Toronto Fac L Rev 1 at 12-13 [Crawford].

[763] Downs, *supra* note 729 at 648-49.

[764] *Ibid*.

[765] Crawford, *supra* note 762 at 13.

actual "nature"[766] nor the "empirical consequence"[767] of the harm in speech. And since the only possible outcome of harm from the viewpoint of reified individualism is the mirrored reflection of itself – that is, harm to an individual – it cannot reason otherwise but to conclude that an expression *aimed at a group* thus cannot result in individualized harm. Harm goes missing during its passage from group-targeting form of speech to the land of the individuated harm. The law as it currently stands, is afraid to make that crossing.

This is why in any given speech-harm situation, we must disengage ourselves from the trappings of feeling pressured to choose a side between the strict individualistic interpretation of rights and a more sympathetic attitude toward the notion of group injury or "collective prejudice", as I referred to earlier. The focus should rather be on the *movement* of harm and the resulting prejudice as experienced by the intended target of the defamatory words. The only way to assess that harm would ordinarily be by evaluating the kinds of associations that are shared between the group members and the identified group, a way that the individualistic promotion of the self effectively arrests.

3.1.1.3.Understanding Reputational Harm from a *Situated* Self

Once the conceptual absurdity has been underlined, we must return to the source of the problem that is the individualistic proclivity which denies individuated harm resulting from expressions aimed at groups. This requires a closer philosophical examination that has been the grand enduring debate between liberalism and communitarianism. This means revisiting the portrayal of the individual in the liberal context and how its methodological

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[766] Down, *supra* note 729 at 648-49.

[767] *Ibid*.

deficiencies have contributed to the hardening of the individualistic inclination.

The tension between liberal individualism and its communitarian critic has been well-documented. Existing literature has made the communitarian discomfort with the liberal theorizing of persons abundantly clear.[768] It is, however, noteworthy that the communitarian position has not been without its blemishes. Some suppositions of communitarians have themselves been the subjects of virulent criticism, notably from feminist legal scholarship,[769] let alone the traditional obstacles of moral authoritarianism or majoritarianism.[770] There is also valid point of objection that the communitarian rebuke does not really alter the substantial position undertaken by liberalism.[771] Evidently, the focus here is not in the re-presentation of that debate. While the goal is not to get into the brawl of it all, and notwithstanding the contributions made by the liberal philosophy in laying the groundworks for progressive thoughts, the contrasts in the conception of the individual self nevertheless serve our purpose in unmasking the abstract and impractical parochiality of the liberal model denounced by the communitarians to close in with the possibility of the individuated harm

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[768] See Self-sufficiency and A Detached Self at 212-17.

[769] For an excellent critique of the communitarian shortcomings by a feminist legal theoretician, see Donna Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero" in Allan C Hutchinson & Leslie JM Green, eds, *LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM?* (Toronto: Carswell, 1989) at 119-50.

[770] It has been pointed out that the communitarian ideal is unable to shake off its moral indolence that is often markedly revived in exclusive communities tending to hang tight to its values to desist winds of change. This applies to communitarians who excessively focus on *preserving* the essence of local communities. The fear is that the communitarian's devotion will, through the impositions of restrictions and local customs or 'réglements d'intérieur,' not only deter individual members from fully reaching their potentials but also end up creating overtly insular 'villages.' The communitarian depiction of the self may be enticing to individualists looking for cozy bundling, but it remains to be seen how much of that representation will survive. After all, the high and mighty sense of sharing and equal treatment may not be omnipresent to all – especially minority – members of the community. In other words, the "totalizing tendency" can become a vehicle nurturing a political enclave suitable for nationalistic inclinations. For no culture is neutral, the supposed "common meaning" for the nation's community may not mean the same thing to those living in the outskirts of the societal domain. Thus, when the current President of the United States repeatedly talks about bringing back the greetings of Christmas to the American calendar, it is more than just a love call to Southern hardcore evangelical voters. On the communitarians' "totalizing tendency," see Addis, *supra* note 761 at 645.

[771] See Beiner, "Liberalism", *supra* note 754 at 39-40.

from group defamatory expression. To develop my argument in a constrained fashion without getting lost in this larger philosophical disputation, I intend to pick on two particular inaccuracies that, in my estimation, substantiate what can only be illustrated as an "ultra-liberal."[772] This type of individualist is to be best understood as a product of postmodernism, the Nozik-kind of quasi-anarchical, possessive individualist.[773]

i. Self-sufficiency

First, self-sufficiency. The classic liberal theory promotes an independent self who is empowered by the unhindered freedom of free will to chart the course of his life. Here, the individual alone is the master, the sovereign, the captain of his destiny. In other words, it epitomizes the essential mentality of liberal individualism that is the freedom of choice, the individual's capacity to make autonomous choice where that "choice in itself is the highest good."[774]

The obvious criticism that follows is that the unencumbered freedom to choose may lack a moral compass.[775] If an individual's pursuit of happiness is through self-harm or profiting in unethical but not legally prohibited ways *per se*, what comes next?[776] Hence,

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[772] Charles Taylor, "Atomism" in *Powers, Possessions, and Freedom* ed by Alkis Kontos (Toronto: University of Toronto, 1979) at 48.

[773] Beiner, "Liberalism", *supra* note 754 at 40.

[774] *Ibid* at 45.

[775] This is of course a summary encapsulation of the much broader communitarian critique of liberal individualism. There is a number of literatures on this. See in general, Charles Taylor, *Hegel and Modern Society* (Cambridge: Cambridge Philosophy Classic, 1979) at 157. See also Charles Taylor, *Hegel*, 2nd ed (Cambridge: Cambridge University Press, 1977) at 561 ("a void in which nothing would be worth doing, nothing would deserve to count for anything"); Michael J Sandel, *Liberalism and the limits of justice*, 2nd ed (Massachusetts: Cambridge University Press, 1982) at 179 [Sandel]. Michael. J. Sandel shares Taylor's position when he says, "To imagine a person incapable of constitutive attachments… is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."

[776] On the discussion of intervention of law in case of self-infliction of harm, see especially Joel Feinberg, *The Moral Limits of Criminal Law*, vol 3 (New York: Oxford University Press, 1989).

while "rights typically protect a *range* of possible actions (and) that normally includes both egoistic and non-egoistic alternatives,"[777] they do not deter the individualistic penchants from immoderate prioritizations (of his own) rights while ignoring the common good (hence the liberal creed of "the right over the good"). To phrase this differently, there is no guarantee that "the unfettered pursuit of desire"[778] would not produce the worst kind of profligate individualist, in Richard Rorty's terms, that are "bland, calculating, petty and unheroic."[779] What is to stop the "socially corrosive form of individualism"[780] from eventually turning us into "an absurd collection of would-be Robinson Crusoes?"[781] Social trends of individualization, of customization, increasing emphasis on personal privacy, greed and nepotism, industrial products and programs that are manufactured for personal enhancement, pleasure, and self-improvement, (physically, economically, and even spiritually) are in my view overwhelming evidence that directly repudiate otherwise naïve presuppositions.[782]

The self-sufficient individual may thus be defined, at its most extreme, by his *disinterest* toward the needs of society. The individual becomes prone to the turpitudes of egoism, encouraging an unreasonable degree of competition[783] between similarly driven

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[777] Green, *supra* note 759 at 316. Green appears to have a great deal of confidence in the good nature of humanity as she continues to argue that "The right to a sum of money entitles one to spend it on oneself and to give it to charity; the right does not recommend acting only for one's own advantage." (*ibid*) That argument can be just as easily be turned on against itself. To her benefit, she does clarify that this type of discussion is an incorrect insistence on the nature of rights.

[778] Beiner, "Liberalism" *supra* note 754 at 46

[779] *Ibid* at 254 (quoting Richard Rorty) (internal citations omitted).

[780] Stephen Newman, "Challenging the Liberal Individualist Tradition in Amercia: "Community" as a Critical Ideal in Recent Political Theory" in Allan C Hutchinson & Leslie JM Green, eds, *Law AND THE COMMUNITY: THE END OF INDIVIDUALISM?"* (Toronto; Carswell, 1989) at 254.

[781] *Ibid*.

[782] Many words have been written by sociologists, philosophers, cultural historians, and psychologists on the social offspring of individual tendency from as early as toward the closing of 1800's. See e.g. Emile Durkheim, *Suicide* (1897); John Dewey, *Individualism Old and New* (1930); Erich Fromm, *Escape From Freedom* (1941); David Reisman, Nathan Glazer & Reuel Denney, *The Lonely Crowd* (1953); Max Weber, *On Law in Economy and Society* (1954); Kenneth Keniston, *The Uncommitted* (1965); Philip Slater, *The Pursuit of Loneliness* (1970); Robert Nisbet, *The Quest for Community* (1978); Christopher Lasch, *The Culture of Narcissism* (1979).

[783] Again, Green objects to this description because in her opinion, "having a right does not give one any reason

persons to accomplish self-seeking acts. It is the self, to borrow Benjamin Barber's words, "that exists only for itself, without regard to species, to justice, to equality, or to obligation."[784] Unsurprisingly, this perception of the self would be detrimental to achieving an egalitarian model of society.[785] The model nourishes the image of someone who has become desensitized to the needs of others, insouciant to the consequences caused by their own actions. Important universal humanistic values such as empathy and compassion would become alien concepts because the primary objective of a self-centered life lies in attaining self-contentment.

ii. A Detached Self

Secondly, there is the image of the detached self. Excessive individualism is marked by the abstraction of the individual. It offers an impoverished image of the self that is distant from real depictions of life, one that blatantly disregards the social nature of human persons. The abstractness of the individual is thus characterized by a certain supposed rootlessness. This version of the detached self is also known under as the 'atomistic' self in the common parlance of communitarian philosophers. Elizabeth Wolfgang compared this conception to

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to exercise it, let alone insist on it," thus mistakenly associating the function of rights and social conflict Green, *supra* note 759 at 316. But once more, and even as she admitted it ("it is not the function of rights to effect that transformation, and it is a poor argument that blames rights for failing at a task that is not their own;" "… arguments about rights can betray a narrowness of moral outlook." (*ibid*.), my disagreement is not in the characterization on the function of rights itself; it is on the nature of people's tendencies or inclinations to excessively lean onto their own individual rights when they are allowed to do so, let alone in highly contentious social environments.

[784] Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984) at 71.

[785] Michael Walzer employs the description of a "radical individualism," blaming the inaccurate depiction of the self and how that radical concept triggers a "radical competition among self-seeking individuals." Michael Walzer, *Radical Principles: Reflections of an Unreconstructed Democrat* (New York: Basic Books, 1980) at 92, 98. Hart also suggested that that private immoral acts loosen the moral bonds that bring men and women together in society and thereby "… threaten […] the moral principles on which society is based." HLA Hart, *Law, Liberty, and Morality* (Stanford, California: Stanford University Press, 1963) at 53.

purposeless molecules of gas:

"In Hobbes' picture of equal autonomous agents, people can be likened to molecules of gas bouncing around inside a container. Each molecule proceeds independently, is free to go its own way, although it occasionally bumps into others in its path. As molecules have their energy, people are driven by their passions, and their relations with one another reflect both their love of Liberty and love of Dominion over others. No atom helps or moves aside for another; that wouldn't make sense. They are a collection of unrelated units. This fundamental picture I call 'social atomism,' for it shows society as a simple collection of independent, self-motivated units."[786]

Needless to say, this has been one of the favorite assailing lines of communitarian critics against liberal individualism. Michael Sandel believed in the thickly-constituted self. The incoherence in the immature presupposition of the autonomous self unrelated to the choices making up one's self-identity deeply troubled him.[787] Charles Taylor too, made it known that passionate liberal advocacy for the enhancement of personal autonomy came through on the back of civilizational and historical situatedness.[788] Similarly, MacIntyre envisioned the historically embedded development of a moral character of persons and the virtues possible within.[789] He believed in the constitutive self and not the disembodied self. The distribution of goods to members of society, for Walzer, first necessitated a kind of basic awareness recognizing these goods to be products of shared meanings and communal traditions.[790]

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[786] Elizabeth Hankins Wolgast, *The Grammar of Justice* (Ithaca, New York: Cornell University Press, 1987) at 4-5.

[787] See footnote 775.

[788] Taylor's critique on disengagement and individualistic atomism is a recurrent theme in his works. See e.g. Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993).

[789] See in general Alasdair C MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Indiana: University of Notre Dame Press, 1981).

[790] See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (New York: Basic Books,

It follows that an individual does not, and cannot, exist by himself. A pre-constituted individual does not occur. An individual is necessarily *situated* in certain contexts because his "identity remains unintelligible unless it is located in a world."[791] A John Doe is not somehow *drifted* into some void. Every John Doe is born into a specific family of a particular race, a particular religion (or absence thereof), a set of embedded cultural norms and shared traditions, and all that comes with the "biological remembrance of things past."[792] A reductionist view of any given society, let alone a person, abstractly disengaged from surrounding historical or cultural influences would be a fictitious misrepresentation of mankind's nature to relate[793]

iii. Reputational Harm to *Situated* Person(s)

This *situatedness* or *rootedness* of a person, biologically and socially, necessarily implies their associations to group(s). Every person belongs to a group if not multiple groups by general practice of social categorization, such as social status, family role, or occupation. The importance of group membership, and the role it plays in relation to self-identity, is one that is supported and stressed by many. Connolly put it bluntly: "Identity is relational and collective."[794] In other words, the identity of an individual cannot be defined without the

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1983) [Walzer].

[791] Berger & Luckmann*, supra* note 746 at 174.

[792] Isaacs, *supra* note 20 at 38. Isaac expands on this moment of birth and what that implies to the baby coming into the world. Not only the baby is given the "shared physical characteristics of the group acquired through the parental genes (skin color, hair texture, facial features, etc.), he inherits his "birthplace," a "name" (individual/family/group), "is already a product of the history and origins," religion (of his family/group) and the "acknowledged holder of the nationality."

[793] I am not hereby denying the possibility of existence of such individuals. Individuals of extreme seclusion do exist. But they number in few relative to most human populations. In modernized society, the only individuals in complete solitariness would be self-chosen hermits or prisoners serving solitary confinement (but even the latter are in a way part of the larger prisoner community of that particular institution he/she is being held by his physical location and by the status of prisoners' group association).

[794] Connolly, *supra* note 45 at XIV.

necessary "collective constituencies."[795] It follows that, ordinarily, "every stable way of life invokes claims to collective identity"[796] which permeate "in various ways into the interior identification and resistances of those who share it."[797] As such, "any lived conception of personal identity"[798] is necessarily a representation that reflects certain features of "standards of collective identity."[799] To be without this membership means to lie outside a group. It symbolizes *a state-of-being* in exclusion, the sort of "anomie"[800] that severs off the individual identity from a greater entity, as Helen Merrel Lynd described:

> "(it is a) … dissociation between culturally prescribed aspirations and socially structured avenues for realizing these aspirations (that) brings about deviant, uncodified behavior."[801]

To be included in a group, to be *within* a group, implies that the individual identity benefits from the "naming, structure, social norms, ritualized detail, and closure or correspondence between stated cultural goals and ways of realizing them"[802], which in return "give security and protection."[803] The drive to maintain a connection to a larger, relatable body is also a recurrent theme in Michael Walzer's writing. He regarded it as a form of "social good."[804] "The distinctiveness"[805] of social groups, for Walzer, was a precondition

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[795] *Ibid*.

[796] *Ibid* at 158

[797] *Ibid*.

[798] *Ibid* at 161.

[799] *Ibid*.

[800] Lynd, *supra* note 33 at 65.

[801] *Ibid*. (internal citations omitted)

[802] *Ibid*.

[803] *Ibid*.

[804] Walzer, *supra* note 790 at 32.

[805] *Ibid* at 39.

without which individuals "cannot be conceived as (being) a stable feature of human life."[806]

What does this *situated* individual person mean, then, in terms of the harm in group defamation in its traditional sense, as a form of reputational harm? It would signify harm on two levels: personal and collective. The individual member whose social esteem is demeaned by belonging to the defamed group will be exposed to a prejudice to his social consideration. Group defamatory speech dissolves the defamed members' ability to create, form, and maintain his social bonds with other occupants of the society writ large because an injured reputation impairs that very ability. There is a violent "rupture of social bonds"[807] between the defamed group members and society. Considering that one's capacity to bond and blend in with others is quintessential to the development of every human being, there is substantial injury. Group defamation deprives the maligned individuals of that meaningfulness because they belong to a certain group of people who are to be scorned and shunned. The group too, suffers *as a whole*. When someone speaks ill of a member of a community and all those associated with him, it not only breaks down the walls of civility and respect; it effectively undermines the "foundations of collective life."[808] If defamation of a private individual causes cracks in the mutual trust and integrity of the defamed and perverts the community's view of him, *group* defamation is that much more grave precisely because an entire group of people can have their basic respect degraded. The vilified group suffers collectively because "as a group, they constitute a disenfranchised class"[809] in the eyes of the general public. The kind of disenfranchisement that neutralizes the group's capacity to defend its members' rights

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[806] *Ibid*.

[807] David Howarth describes the effect of this "rupture": "…for example, leave victims in a position in which they feel they cannot leave their own house." David Howarth, "Libel: Its Purpose and Reform" (2011) 75 Mod L Rev 845 at 859.

[808] MM Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1993) 14 Cardozo L Rev 351 at 353 [Slaughter].

[809] Walzer, *supra* note 790 at 59.

and interests and exposes them to further oppression and exploitation by the nature of their disenfranchisement.[810]

3.1.2. Harm to the Bonds of Identity

The harm in group defamation from the perspective of the relationally *situated* self informed us that it is indeed possible that individual members experience personalized harm, regardless of the generalized formulation of the defaming expression. The approach was useful in that, contrasting the inapt view of the abstract and atomistic self to an interconnected self, facilitated the conceptualization of the harm. The communitarian model, however, still falls short, providing an inadequate explanation as to *why* individual members belonging to and/or identifying with the defamed group might be profoundly hurt by group defamatory expression. In other words, it does not explain how this type of group defamation differs from other group defamation and consequentially how the harm differs. One quick way to see this is by looking at the reaction of the victim exposed to such speech. For instance, it has been found that racial slurs are likely to cause a poignant degree of offensiveness even in the absence of clear indication that the expression personally referred to the listener. It may very well provoke irrational responses,[811] stir up "underlying tensions"[812] and raise a particular form of viciousness.[813] To reiterate, regardless of the vagueness of group defamatory expression, it still causes prejudice to individual members by

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[810] *Ibid*.

[811] It is so because racism and racist attacks, verbal or physical, are irrational. On this, see e.g. Lawrence, "If He Hollers", *supra* note 15 at 468 (explaining how and why racism is "irrational and often unconscious"); Lawrence "Unconscious Racism", *supra* note 11 at 331-36.

[812] Rhonda G Hartman, "Revitalizing Group Defamation as a Remedy for Hate Speech on Campus" (1992) 71 Or L Rev 855 at 858-59.

[813] Downs, *supra* note 729 at 654.

attributing pejorative meaning to some shared racial, ethnic, or other fundamental characteristics between that member and the group to which they belong. The acuteness of harm does not dissolve in its generalization.

To distinguish this type of group defamation from other more 'ordinary' ones and seize the particular *form* or *intensity* of the harm therein, the constitution of the defamed group and the relationships linking individual members to such groups warrants a closer look – a task the previous communitarian example is not concerned with. Put differently, it does not distinguish between a *thin* or *dense* group. The former uses the most expanded and abstract sense of the word. It is one that resembles an aggregate composed of individuals who are "loosely associated"[814] with one another. Such qualification denotes a group that is mainly characterized by a "slender thread of interest"[815] among affiliated members. Thus, the connection between members is that much more uncompelling. For instance, in a relationship that is defined by contractual words and legal obligations to perform some measurable objective, there is a reduction in the genuine enjoyment of any human interaction.[816] In other words, the *shallowness* of such a group's constitution is unfit to understand the kind of harm in group defamatory speech that deliberately assaults the "primordial affinities"[817] of individual members. The artificiality of the membership is unable to appropriately take into account embedded contingencies that link the identity of individual members to their

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[814] J Angelo Corlett, "The Problem of Collective Moral Rights" (1994) 7 Can JL & Jurisprudence 237 at 238.

[815] They are what has been qualified as superficial models of groups. Like a group of consumer groups launching a class action, such model is "too thin" to describe collective rights. It is based on different morphological characters not necessarily indicative of *natural* relationships. On this point, see Seymour, *supra* note 59 at 141, 165; Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can JL & Jurisprudence 217 at 221 [McDonald]; Slaughter, *supra* note 808 at 383.

[816] This is what prompted Karst to declare that even a grand document like the Constitution ("that is no more than a contract") is unable to provide the sense of belonging. Karst, "Paths To Belonging", *supra* note 18 at 363.

[817] Shils, *supra* note 35.

group.[818]

Instead, a *dense* group is required. It is the kind where the members' "set of preliminary understandings, proclivities, and repugnancies that infiltrate the structure of perception, judgment, and decision"[819] are bound by their group membership. It is based "not simply (on) the result of shared interest, or shared properties, but about shared meanings (…) that are socially constructed – often on the basis of common struggles."[820] Seymour referred to this as an "informal community that involves collective properties, and to which we are involuntarily attached."[821] While such membership does not demand of its members particular fidelity or exclusivity,[822] it acts as a "function of basic group identity"[823] that provides an individual member's self-identity a source of "belongingness."[824] The individual is connected to a greater entity "through the medium of flesh and bone of social commonality"[825] but also by "a culture, a set of institutionalized roles"[826] and "shared values."[827] It is a group where membership becomes a "channel"[828] or "artery"[829] that establishes "an intimate nexus (that) exists between individuals and the groups or associations to which they belong."[830] It is a bond of identity and identification, "a deep commonality known only to those who shared in it, and only expressible in words more mythical than

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[818] Connolly, *supra* note 45 at 176.
[819] *Ibid* at 199.
[820] Mayo, *supra* note 22 at 45.
[821] Seymour, *supra* note 59 at 171.
[822] *Ibid* at 172.
[823] Isaacs, *supra* note 20 at 42
[824] *Ibid*.
[825] *Ibid*.
[826] *Ibid*.
[827] Karst writes: "The heart of community, then, is not so much the cool calculation of interests as the "moral cohesion" of shared values. Karst, "Paths To Belonging", *supra* note 18 at 184 (discussing the "moral cohesion" of Robert Nisbet)
[828] Connolly, *supra* note 45 at 199
[829] *Ibid*.
[830] Kenneth Larsson, "In Defense of Group-Libel Laws, or Why the First Amendment Should Not Protect Nazis" (1985) 2 NYL Sch Hum Rts Ann 289 at 293 [Larsson, "Group Libel"].

conceptual."[831]

Although the bond described here would be applicable to the identifying membership between a man and his racial, ethnic, national, or even a more narrowly defined group/community, like an African-American church,[832] a restrictive understanding of the notion should be rejected. This is because the concept of bond is ubiquitous.

First and foremost, the idea of bond should be understood as a primitive form of social linkage that binds one human to another human(s).[833] The best illustration of this version of bond is the maternal bond, or "the emotional connection of the mother to her infant."[834] It thus represents the most basic, natal form of bond that is "durable and

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[831] Isaacs, *supra* note 20 at 32. (discussing Erik Erikson's amazement at Sigmund Freud's description of his Galician Jewish identity).

[832] Barrack Obama summed up what 'Black Church' in America means to the members of community in his eulogy speech at the college of Charleston for Rev. Clementa Pinckney of the Emanuel African Methodist Episcopal Church in Charleston where a white supremacist shot and killed nine people on the evening of June 17th, 2015. He referred to it as "a place to call our own in a too-often hostile word (…), hush harbors where slaves could worship in safety (…), where their free descendants could gather and shout 'Hallelujah' (…) rest stops for the weary along the Underground railroad (…), bunkers for the soldiers of civil rights movement." It is more than their sanctuary: it is "our beating heart, the place where our dignity as a people is inviolate."

[833] Empirical findings are evidenced by sociologists and psychologists, notwithstanding anthropological and cultural historians' theories cited throughout the current and next chapters (e.g. H Isaacs, C Geertz, G Delanty, B Anderson). See e.g. James E Cameron, "A Three-Factor Model of Social Identity, Self and Identity" (2004) 3:3 Psychology Press 239 (examining the establishment of social identity by centrality, ingroup effect, and ingroup ties); Jay W Jackson & Eliot R Smith, "Conceptualizing Social Identity: A New Framework and Evidence for the Impact of Different Dimension" (1999) 25:1 Personality and Social Psychology Bulletin: SAGE Journals 120 (evaluating individual subjects' social identity based on the perception of the intergroup context, in-group attraction, interdependency beliefs, and depersonalization). The importance of bond is also found in the context of relational identification between a group's leader and its followers. See e.g. Niklas K Steffens, S Alexander Haslam & Stephen D Reicher, "Up close and personal: Evidence that shared social identity is a basis for the 'special' relationship that binds followers to leaders" (2014) 25:2 The Leadership Quarterly 296. It occurs even on virtual, online platforms. See e.g. Yla R Tausczik, Laura A Dabbish & Robert E Kraut, "Building Loyalty to Online Communities Through Bond and Identity-Based Attachment to Sub-Groups" (Feburary 15-19) CSCW: Proceedings of the ACM Conference on Computer Supported Cooperative Work in Baltimore, MD at 146-157; Yuqing Ren et al, "Building Member Attachment in Online Communities: Applying Theories of Group Identity and Interpersonal Bonds" (2012) 36:3 MIS Quarterly 841, noting, ""Experimental results show that both identity-based and bond-based features increased member attachment and participation compared to a control condition but identity-based features had substantially stronger effects" (*ibid* at 843) and that, "Online communities with a goal of fostering identity-based attachment, making *the* community and its activities repeatedly visible to members should increase member attachment to the community" (*ibid* at 844).

[834] Nicole M Else-Quest et al, "Breastfeeding, Bonding, and the Mother-Infant Relationship" (2003) 49:4 Meryll Palmer Quarterly 495 at 496.

multifactored a system"[835] that "clearly … develops over time,"[836] thereby assuring the appropriate mother-to-infant relationship. The stronger the bond, the "more responsive and sensitive caregiver and a higher quality mother-infant relationship (may) ensue."[837] Neural science has established this maternal emotional bonding, defining it as "highly complex comprising primarily affective, but also cognitive and behavioral processes."[838] This may explain the extraordinary protective instinct exhibited on the part of the mother when encountering a potential danger to her newborn – a natural intuition shown even by beasts. This maternal bonding begins with "the mother's acceptance of her pregnancy,"[839] and is characterized as a process in continuum "that begins immediately upon birth and continues throughout the infant's first week of life."[840] Here, the bond is a reciprocation of "complex interactions that superinduce bonding"[841] that also comprises of "biologically-determined behavioral sequences that the mother, infant, and the father engage in upon their first meeting."[842] To grasp the actual degree of intimacy in a mother-to-baby bonding-construction, one only needs a detailed description of its initiation process:

"… this sensitive bonding period begins with four to eight minutes of finger-tip touching the baby beginning with the infant's extremities. That touching period leads to massaging, stroking, and palm contact with the infant's trunk. Eye contact in the en face position occurs with alignment of the mother's head on the same plane of rotation as her infant's allowing their eyes to meet. The paternal voice pitches bring on entrainment. That occurs with the infant moving in rhythm to the voice he

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[835] *Ibid* at 497.
[836] *Ibid* at 514.
[837] *Ibid* at 498.
[838] Ming Wai Wan et al, "The Neural Basis of Maternal Bonding" (2014) 9:3 PLoS ONE 1 at 2.

[839] Cynthia A Sauchuk, *A Comparative Study of Maternal-Infant Bonding and Attachment as it Exists in Traditional Hospital Birthing Approaches and Certified Nurse-Midwifery Approaches* 51 (LLM Dissertation, University of Florida, 1984) 1 at 7.

[840] *Ibid* at 5.
[841] *Ibid*.
[842] *Ibid*.

hears. The mother's body odor and body heat also stimulate and heighten bonding interactions. Breast feeding is another positive contact conducive to bonding because it not only provides the infant with the resistance to infections, but it also offers immunities and aids the infant in relaxed respiration. These behaviors compliment each other and lead to increased parental interactions that augment bonding relationships."[843]

Given this, it is no exaggeration that this relationship has been illustrated as a "springboard for the infant's future subsequent attachments and a positive development of the infant's sense of self."[844] In fact, this initial bonding is considered so critical that it is key to "influencing other bonds that become established from birth throughout adulthood."[845] The unanswered "need and expectancy on the infant's part for synchronism and facial expression interactions" may result in "not only failure of communication and lack of development but tendencies toward basic violation of bonding interactions necessary for the infant's survival." It has therefore been concluded that,

> "without these interactions, there is a withdrawal from social relationships and a regression of development and physiologic development."[846]

That being said, the notion of bond is not something that is exclusively shared between two individuals, it is also present in closely-knit collective units of persons. An army unit, for example, is bound by this bond that empowers them to move as one surgical "cohesive unit", executing operations during intense life-and-death combat situations. An American General tried to explain the existence of this bond among his soldiers in wars as the following:

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[843] *Ibid* at 5-6.
[844] *Ibid* at 7.
[845] *Ibid*.
[846] *Ibid* at 6.

"What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hill under withering machine gun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to let down their buddies on the left or on the right. They do not want to betray their unit and their comrades with whom they have established a special *bond* through shared hardship and sacrifice not only in the war but also in the training and the preparation for the war. It is called *unit cohesion*, and in my 40 years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield."[847]

Even in a historical context, it must be underlined, the idea of bond surpasses simple relations between persons. It can apply to broader aspirations and abstract ideals such as national identity.[848] The bond in this sense would take the form of "the essentially irrational, psychological,"[849] the essence of which can further be broken down as "a sense of belonging"[850] or "a fellow feeling."[851] It is a "close link"[852] that connects "the individual and the collective self, namely the nation"[853] that exerts a call for togetherness built upon a "common conviction that they are ethnically related."[854] The substance making up this national thread consists of a whole range of "(presumed) ethnic ties to a shared public culture, common historical memories and links to a homeland and also a common legal and economic system."[855]

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[847] US, Senate Committee on the Armed Services, 103rd Cong, *National Defense Authorization Act for Fiscal Year 1994* (S Rep No 103-112) (Washington, DC: US Government Printing Office, 1993) at 274-75 (testimony of U.S. General H. Norman Schwarzkopf, United States Army (Ret.).
[848] The New York Times, "How Nations Make Up National Identities" (28 February 2018), online: https://www.youtube.com/watch?v=F9qF6FvwrHI
[849] Anna Triandafyllidou, "National Identity and the 'other'" (1998) 21:4 Ethnic and Racial Studies 593 at 595.
[850] *Ibid*. (quoting Connor) (internal citation omitted)
[851] *Ibid*. (quoting Geertz) (internal citation omitted)
[852] *Ibid*.
[853] *Ibid*.
[854] *Ibid*.
[855] *Ibid* at 599.

For many indigenous peoples, the notion of bond is a sacred one: a source of spiritual connection between the man and his homeland. Few commentators attempted to understand the use of terms such as 'Country' or 'Homelands' by the Aboriginal peoples in referencing their traditional lands. Soon into their inquiry it became clear that those notions are complex representations of "everything including the land, air, water and stories of "Dreaming."[856] The bond in the Aboriginal eye thus symbolizes a whole system of "dynamic and multilayered… rules, norms and beliefs of existence between species and humans"[857] which serves as a gateway "connecting Aboriginal peoples' back to ancestral beings from the time of creation."[858] This spiritual connection is most revealing of the ways in which they perceive the bonds to their lands as an affirmation of the "biophilia hypothesis"[859] – "which acknowledges humans have been connected to the land for thousands of generations, causing the brain to be hardwired innately to such bonds"[860] – but also as meaningful responsibilities and managerial know-hows to be passed down to future generations.[861] This connection or 'bond' to the land is paramount, such that it is understood as being directly related to the wellness of the Aboriginals.[862] This provides an insight as to why the disconnect between the people and the land would "compromise cultural connections and cause extreme distress and powerlessness commonly felt by many Indigenous groups worldwide."[863] It is a belief

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[856] Jonathan Kingsley et al, "Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing" (2013) 10:2 Int J Environ Res Public Health 678 at 682.
[857] *Ibid*.
[858] *Ibid*.
[859] *Ibid* at 688.
[860] *Ibid*.
[861] *Ibid* at 682. While it is not an inquired point here, an argument could be legitimately raised as to the possibility of an inherent danger, when excessively focusing on the notion of 'bond' particularly in a Native-American context, that it may lead to witch hunt-like assessment of possession of 'sufficient' membership for Métis individual members. It is an unavoidable consequence of identity politics (that oftentimes excludes those that do not share same basic characteristics), one that may be addressed by ways of rejecting extreme categorization and finding commonly shared aspects of cultural living and practices.
[862] *Ibid* at 682-83.
[863] *Ibid*. (internal citation omitted)

grounded on the view that "we are one with the land,"[864] an understanding modeled after "a relationship to the land that was based on interconnectedness and respect."[865] This connection always has, and continues to occupy the center of Aboriginal peoples' belief system[866] with its vital importance of affirming the "identity and provid(ing) an opportunity to reconnect with their past."[867] Take for instance, the ritual of 'giving back' to the land at the moment of reaping food or medicinal plants:

"Repeatedly during the day, in gesture or ceremony, the Elders show appreciation for the different aspects of life and always remember to give thanks, especially for their food before eating. They model the importance of "giving back" to the land. For example, before taking any plants, Elder Clara performs a quiet ceremony, modeling prayer, offerings, and thankfulness. She will then explain to students that they may now gather sage which can be used both a medicine and as a smudge - a cleansing wash of smoke from a medicine plant. You will hear her explain why and how to show the respect for the land and the life of the plant by "giving back" to the earth when something is taken from it."[868]

Finally, a bond may manifest itself in the form of social morality. It is the invisible moral fabric,[869] the glue that holds society together. Under this vision, it would amount to a collective bond of empathy and courage that allows people to overcome hardships and condemn deeds of injustice with a unified cry.

It is worth noting that this bond of identity appears to exhibit particular tenacity and

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[864] Linda Goulet & Yvonne McLeod, "Connections and Reconnections: Affirming Cultural Identity in Aboriginal Teacher Education" (2002) 37:3 McGill Journal of Education 355 at 366.
[865] *Ibid* at 358.
[866] *Ibid*.
[867] *Ibid* at 356.
[868] *Ibid* at 362.
[869] David Brooks, "The Essential John McCain", *The New York Times* (19 October 2017) online: https://www.google.ca/search?q=david+brooks+invisible+moral+fabric&oq=david+brooks+invisible+moral+fabric&aqs=chrome..69i57j69i64.6049j1j7&sourceid=chrome&ie=UTF-8

resistance when it is built on a shared history of persecution.[870] In the case of many black Americans, it is a bond of identity that is painfully tied to a history of submission, loss of "languages, of cultures, of tribal ties, of kindship bonds, and even of the power to procreate in the image of oneself and not that of an alien master."[871] For them, that common bond resembles more of " a feeling or an intuition, not a reasoned conclusion"[872] that was forged in the carnage of shared experiences in times of structural racism and segregation policies.[873] Similar observations have been made with regard to Black peoples of Native heritage in a North American context. A "double-loss,"[874] it is argued, has stricken them in the forms of "suppression of their knowledge of their North American or Caribbean Indigeneity (and) the shattering of an African Indigeneity that can neither be affirmed as whole nor entirely relinquished."[875] This view is critical toward the undoing of the "mattering"[876] of the Aboriginal peoples in the literary writings of Black Americans depicting themselves "as being at the core of racial oppression and marginality in the United States."[877] While criticizing the erasure of "the generations of Native American slavery that preceded and

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[870] "It is by now a trite observation that oppressed peoples have an acute sense of their past. Well they must: it is the crucible of their identity and their cohesion. Without it their present oppression becomes either meaningless or natural." William M Wiecek, "Preface To The Historical Race Relations Symposium" (1986) 17 Rutgers L Rev 407 at 412.

[871] Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harv CR-CL L Rev 401 at 415.

[872] Karst, "Paths to Belonging", *supra* note 18 at 184. The sentiment of *belonging together* is not based on some measurable, provable scientific laboratory experiments.

[873] Bennett, *supra* note 56 at 482 (discussing W.E.B. Du Bois' observation of how the post-slavery family bonds actually strengthened in periods of rampant racism).

[874] Zainab Amadahy & Bonita Lawrence, "Indigenous Peoples and Black People in Canada: Settlers or Allies?" in *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada*, ed by Arlo Kempf (Netherlands: Springer, 2009) 105 at 124.

[875] *Ibid*.

[876] *Ibid* at 122.

[877] *Ibid*. It is thus noted that, for example, it is described "in African-American writing, (as if) White settlers landed in empty lands, bringing with them the African slaves who would represent the *other* America to the world. This erases the reality of colonization, and that the agenda of settler nations across the Americas is still to destroy all remaining Indigenous peoples, if not directly through murder then through forced assimilation."

accompanied Black slavery,"[878] it also observes "(…) the powerful *bonds* that this created between African-Americans and Native Americans."[879] In other words, it is a bond born out of and in-between two systemically aggrieved groups of peoples. Ultimately, these types of bonds would correspond to the type of more condensed, essentialist bonding that Frank I. Michelman, borrowing Robert Cover's term, would later refer to as the bonds present in "paideic"[880] communities. It is characterized by a common sense of collective enjoyment of "moral freedom" in the task of re-defining their wronged history and in that communal devoir finds ways to pave their new "normative universe"[881] going forward.

When we therefore recognize the existence of these bonds and their incredible power, group defamation is a harm to these very bonds. This explains why some of the Montreal taxi drivers of Arab ethnicity in *Bou Malhab* felt deeply wronged by the comments of the defendant. The offense did not arise from some dialectic mockery. Rather, it originated from the radio host's imputation attaching the targets' shared common language to incompetence, to a degradation of a public transportation system, to a lack of knowledge of the city, to arrogance, and to rudeness. That association was an assault on the members' bonds of identity "owned and claimed by a community."[882] It was those taxi drivers' sense of dignity and self-respect attached to that collective - and yes, individual identity. Bound as an ethnic people and historical community to the shared linguistic commonality that endow them the right of passage "to enter the public arena with distinct moral claims."[883] It did not matter that

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878 *Ibid.*

879 *Ibid*. (emphasis in italic is mine)

880 Frank I Michelman, "Foreword: Traces of Self-Government" (1986) 100 Harv L Rev 4 at 13.

881 *Ibid.*

882 Seymour*, supra* note 59 at 173.

883 *Ibid.* This may also explain as to the aggressively defensive posture of Quebec's linguistic policies feeling threatened by gradual encroachment of their linguistic majority-status by other languages. Connolly explains it as the following:

"no ordinary person" would take the allegations as truth; the harm was to the group members' conscious exertion of collective thriving from which they derive their sources of identity and shared meanings of life. The harm did not stop at mere reputational harm. The speech profaned the members' ties[884], the intimate bonds that coalesce them into who they are as individual persons, as a community, and as a group. It was a defilement of the bonds formative to their identity, the "process which establishes" the fusion of the individual self and "his communal culture."[885]

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In this section, I have focused heavily on the conceptual and descriptive elements of the harm in group defamation. First, I have demonstrated the conceptual possibility of individuated harm emanating from group defamatory expression through the communitarian model, in contrast to the liberal understanding of the self. Second, I have elaborated upon the quality of group membership and the intimate bond of identity shared between the group and individual members to help demonstrate the particular gravity of the harm perpetrated in this type of group defamation. The following section enters into the details of the actual substances of the harm, revealing both the inherent unfairness of the prejudice to identity as imposed by the defamers and the various consequential sub-categories of harms that such

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"These relations between personal and collective identity in a democracy provide one basis of that honorable and dangerous **bond of identification** between the individual and the state. When circumstances are favorable, the relation is one of patriotism chastened by skepticism of state authority; when they are unfavorable, the relation degenerates into either disaffection with the state or a nationalism in which the tribulations of the time are attributed to an evil "other" who must be neutralized." Connolly*, supra* note 45 at 199. (emphasis in bold added).

884 Clifford Geertz, ed, *OLD SOCIETIES AND NEW STATES: The Quest for Modernity in Asia and Africa* (New York: Free Press of Glencoe, 1963) at 109-19 (University of Chicago's Committee for the Comparative Study of New Nations).

885 Isaacs, *supra* note 20 at 32-33. (discussing Erik Erikson)

type of expression can inflict on the identity of the defamed individual members.

3.2.Group Defamation and Harm to Identity: Relational Deconstructing of Harm to Identity

This section is an expansion on the notion of harm to identity premised on the deconstruction of the relational conception of identity. The first sub-section underlines the uneven relational dynamic between *The Chooser* (the defamer or often the Dominant) and *The Assigned* (the defamed or often the minority group) in the context of group defamation, in which the latter's identities are unilaterally imposed upon them by the attribution of meanings that disregard their personal autonomy as well as cultural identities (3.3.1). The following sub-section takes this attribution of negative identity in group defamatory speech and applies it in the specific context of racial group defamation to reveal various notable forms of harms on victims' identity as result (3.3.2.).

3.2.1. The *Chooser* and The *Assigned*

Identity is a relational concept.[886] By relational identity, my understanding is that a person's identity is inter-relationally formed. For identity is not uniquely a product of self-construction; identity is given its shape in the formative process of the individual's interaction with other persons and within (a) specific setting(s). Sociologists Peter Berger and Thomas Luckmann put it this way:

"Identity is formed by social processes. Once crystallized, it is maintained, modified, or even reshaped by social relations. The social processes involved in both the formation and the maintenance

[886] Connolly, *supra* note 45 at XIV.

of identity are determined by the social structure."[887]

Through the continuous exchange of criticisms, validations, and negotiations of one's place in society, that identity articulates itself and finds its distinctiveness. An individual's identity may be autonomous but that autonomy and the capacity to make choices presented before oneself in life are relationally affected and influenced by other players interacting with that individual.[888] The individual will find the sense of the self constantly questioned, judged, and compared. Identity does not exist by itself, again to quote Berger and Luckmann, because it (identity) "is a phenomenon that emerges from the dialectic between individual and society."[889]

The relational view of self is, of course, not a novelty. The approach has been whole-heartedly embraced and advanced by those well before me.[890] In particular, Professor Jennifer Nedelsky, as one of the pioneers in the relational paradigm,[891] sought to replace the prevalent liberal individualistic model with her concept of boundaries in law.[892] In her cardinal emphasis on the institutionalizing role that law plays, Nedelsky underlined the image of the bounded self through examples in American administrative and property laws.[893]

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[887] Berger & Luckmann, *supra* note 746 at 173.

[888] This resonates with J. Nedelsky's overall transcending argument that it is in the very nature of humans to be "in interaction with others" where autonomy too is constituted relationally that involves social interaction. In short, one cannot exist "apart from (these) relations." Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 55 [Nedelsky, "Law's Relations"].

[889] Berger & Luckmann,, *supra* note 746 at 174.

[890] Among which figure Jennifer Nedelsky, Jocelyn Downie, and Jennifer L. Llewellyn to name a few.

[891] See e.g. Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1 Yale Journal of Law and Feminism 7; Nedelsky, "Law's Relations*", supra* note 888.

[892] *Ibid* at 4-7. Nedelsky believes the relational conceptualization will better understand egalitarian goals of society than the liberal individualistic perception of human beings.

[893] For instance, she argues that the particular interest in American property law stems from the original Framer's concern with individual's property due to their preoccupation that stressed an important connection between property rights and personhood (*ibid* at 94). She also uses the relational model to criticize American administrative law and how it can improve poor treatments toward welfare recipients by strengthening their autonomy. (*ibid* at 153).

When the relational view of the self is employed with the subject at hand, two benefits can be derived. For one, it reinforces the earlier objective in shattering excessive individualism. The social nature of the self, the belongingness or being 'situated' within a collectivity, and how that enables individuated harm from group defamation, are all enduring testaments echoing the relational interpretation of the self. Hence, the relational approach further corroborates that argument. Second, the relational interpretation is facilitative in 'setting the scene' through a clear *mise-en-scène* of the relational dynamic between the defamer(s) (often belonging to the Dominant group of society) and the defamed (often members of the minority groups), in which one group vilifies the other group as a means of consolidating power. It is this second point that I will be concerned with presently.

3.2.1.1.Imposing and Imposed Identities

The latter point in the relational approach intersects with classic observations and claims on the study of identity. William E. Connolly, who has written extensively in the field of identity studies from socio-political perspectives, emphasized this overlapping zone of the relational nature of identity in its process of self-definition. It was his view that identity is "established in relation to a series of differences that have become socially recognized."[894] For an identity to assert "its distinctiveness and solidity,"[895] and "secure its own self-certainty,"[896] it relies on its ability to define other identities that are different from it. In other words, identity first *needs* differences to achieve self-definition. And in the process,

> "… the maintenance of one identity involves the conversion of some differences into

[894] Connolly, *supra* note 45 at 64.
[895] *Ibid*.
[896] *Ibid*.

otherness, into evil, or one of its numerous surrogates."[897]

He later characterized this "drive to diminish difference to complete itself inside the pursuit of identity"[898] as the "paradox"[899] inherent to any identity-attainment.

It is crucial that this 'paradox' omnipresent in all identity construction is fully seized upon in the context of this study because it is an abetment of my postulation that group defamation is a method of "designation."[900] Group defamation that entails any reference to broad features of race or ethnicity is but "an ever-changing index to the ways in which people despise one another."[901] This framing allows us to understand the social context in which such group defamation occurs between the defamer or the *Chooser* who holds the power to select his own identity (often by his simple virtue of belonging to the dominant group of a given society), and the defamed members or the *Assigned* who do not have that capacity due to their social echelon (often belonging to a minority group of that society's race, ethnicity, religion, economic class, social status, etc.).[902] This contextualization of power and the autonomy (or the lack thereof) to choose one's own perceived image of identity is crucial because to do so is to acknowledge the uneven relational power dynamic between the *chooser* and the *assigned*. There is a relational dissonance, an unequal power interplay in which the defaming person(s) will use their position of power to cast (pejorative) identities on the *lesser* group. This way, natural properties that lie beyond the realm of one's volition become negative assignments, definitional to the identity of the defamed member as well as all those

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[897] *Ibid*.

[898] *Ibid* at XV.

[899] *Ibid*.

[900] Isaacs, *supra* note 20 at 78.

[901] *Ibid*.

[902] "Even in a highly pluralistic context like our own, it will be the case, contrary to received liberal dogma, that the most profound sorts of self-identification are non-voluntary and not a matter of choosing to identify with some group or other" McDonald, *supra* note 815 at 219-20.

involuntarily ascribed with those same properties.

This aspect of group defamation reveals the inherent inequity of the harm it purports to the identities of individuals belonging to the demeaned group. It consists of a forced imposition of identity that is thrust onto group members by reason of immutable qualities that are fixed "constituent(s) of their identity."[903] "The qualities of unalterability"[904] such as race or ethnicity differ from political or professional associations in the sense that in the former, one cannot simply "disengage."[905] There is no "contract(ing) out"[906] of one's racial group. This is the sort of group membership where withdrawing by one's own accord is not a viable option. To quote one observer, "they have not chosen their ancestry."[907] Their membership is transferred down like hereditary wealth or property goods from one generation to the next, but not in the form of privileges, rights, or entitlements but rather as badges to be discountenanced by association.[908] Arbitrary attribution of a vilified identity – or 'group defamation' – thus violates individual members' personal autonomy.[909]

This critical distinction recognizing the involuntariness in group association in group libel appears as early as 1952 in the *Beauharnais* decision.[910] In the judgment, Justice Frankfurter noted:

> "… a man's job and his educational opportunities and the dignity accorded to him may

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[903] Sandel, *supra* note 775 at 150.
[904] Downs, *supra* note 729 at 654.
[905] Arkes, *supra* note 25 at 292.
[906] *Ibid* at 293.
[907] Larsson, "Group Libel", *supra* note 830 at 294.
[908] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, London: Harvard University Press, 2009) at 21-43 [Shachar]. Shachar explored this as a way of reconceptualizing citizenship that is handed down intergenerationally in the context of global inequality.
[909] Downs, *supra* note 729 at 655. If and when this sort of speech is materialized, it can also have an intimidating effect onto the victims, literally inhibiting their physical autonomy of freedom of movement. See Tsesis, "Intimidating Speech", *supra* note 736 at 390 (noting "Whether they are opportunistic or spiteful, destructive messages directly limit victims' personal autonomy because they force them to avoid traveling in places where gratified swastikas, burning crosses, or gay-bashing slogans bode danger").
[910] *Beauharnais, supra* note 4.

depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[911]

The word that counts in the above deliberation is neither dignity nor reputation. It is the term "willy-nilly." Justice Frankfurter understood that the group libel before his bar involved a pilloried racial group association to which an individual member is affiliated irrespective of his volition. The overbreadth of the defamatory expression caught individual members regardless of their willingness to be identified as a member of the defamed collective. One commentator attempted to portray this "inescapable" [912] nature of the harm in group assaultive language in the following analogy:

"Where Jews or blacks are defamed as a group, the speaker's target is each Jew or each black. The same is true with any other racial/ethnic denomination. When a neo-Nazi bemoans the fact that Hitler "didn't finish the job [of exterminating Jews]," he is not likely to turn to a Jewish person and say, "Of course, I didn't mean to include you."'[913]

In other words, the speaker of group defamation cannot selectively assort the exact targets of his speech because the nature of such speech does not discriminate in-between its aimed group. There is an *unrestrainable* element to the speech. Delgado also underlined this effusive aspect of the harm in racial group libel:

"Unlike many characteristics upon which stigmatization may be based, membership in a racial minority can be considered neither self-induced, like alcoholism or prostitution, *nor alterable*."[914]

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[911] *Ibid*. Frankfurter J at 263.
[912] Larsson, "Group Libel", *supra* note 830 at 294 ("When destructive attacks on a group are permitted, individuals within the ranks inescapably suffer").
[913] *Ibid*.
[914] Delgado, "Words that wound", *supra* note 15 at 136. (emphasis in italics added).

This wide-casted net of group defamation exacerbates "the force of the libel."[915] Individuals identified as part of the defamed group are swept under and become captive of that "broader brush."[916] As such, individual persons belonging to that group are not somehow *less* defamed because of the absence of a specific reference; in fact, on the contrary, they may feel defamed just as much, if not more, because of the blunt inclusion enjoined upon them by the basis of the defamatory remark.[917]

It is noteworthy that the harm in racial group libel conceived as such would match Edward Baker's definition of coercive speech, the sort of harm that would exceed permissible harm exerted by otherwise non-coercive speech. Well-known for his envisioning of the value of speech as being grounded in the fulfillment of personal autonomy,[918] Baker saw speech as being fundamentally non-coercive and its resulting harm mostly acceptable.[919] He however alluded to what he would view as essentially coercive speech: speech uttered with the intention of causing bodily harm or taking away of another person's property; speech that assails the integrity of a person's thinking; and finally, the kind of speech that impedes another individual's self-autonomy.[920] The first category can be easily discarded as there is universal agreement in both American and Canadian constitutional jurisprudence that does not provide cover to violent expressions, including threats of committing violence. Speech that calls for clear and imminent danger or incites violence is not a constitutionally protected expression. Concerning the second class of coercive speech, the social harm argument in this type of speech does not fall far from the criteria of a coercive speech. When systemically or

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[915] Arkes, *supra* note 25 at 293.
[916] *Ibid* at 292.
[917] *Ibid*.
[918] See Personal Autonomy at 71. Baker's theory is elaborated in Baker, "Scope of Speech", *supra* note 251 at 994.
[919] *Ibid* at 998-99.
[920] *Ibid* at 1000.

individually propagated in today's interconnected world, the overt disfigurement of others disrupts the rational agency of many and demeans the general perception of the targets. It is more than likely that the devaluation of maligned individuals' place would damage their ability to interact with other members of the community as co-equal occupants of that community. Speech of the kind is not based on reason. Worse, as noted earlier, when spoken in a face to face situation, it may trigger irrational or even violent reactions from the receiver of those words. Finally – and to the point of the argument advanced here – this type of speech *does* interfere with a person's individual autonomy. Intimidating and assaultive speech of this nature hinders the listener's reasoning process and his decision-making by imposing a negative identity from which the target cannot be separated irrespective of their own will.

3.2.1.2.Caught In-Between: Harm to 'Unconventional' Identities

"C'est notre regard qui enferme souvent les
autres dans leurs plus étroites appartenances,
et c'est notre regard aussi qui peut les libérer."
-Amin Maalouf, in *Les Identités meurtières*-

When deconstructed as an act imposing identities, racial or ethnic group defamation somewhat resembles extreme labeling[921] and stereotyping[922] practices. This is because at their

[921] Karst, "Paths to Belonging", *supra* note 18 at 309. "Not only do the labels protect us from being paralyzed by awe; they also designate our places in society and thus reinforce our sense of self-definition" (*ibid* at 309). Labeling, of course, comes as a social process through which the society indicate each one's place in the system. We all are attributed labels that are charged onto us by the society. The terms such as 'mother' or 'international student' are all examples of general labels that are given to persons occupying that title in the structure of her family or class in social categories. Every person is a wearer of multiple labels since everyone simultaneously assumes several responsibilities or simply by the virtue of the society's bracketing. I will elaborate on this element of attribution of identities in group defamation as a giving of meanings/naming in the following section.

[922] Group-vilifying speech directly addresses the subconscious needs of the overtly or latently prejudiced hearer, including the needs to externalize self-hatred and anxiety, to project repressed desires, and to stereotype the target group in order to avoid uncertainty. Mark S Campisano, "Group Vilification Reconsidered", Note, (1979) 89 Yale LJ 308 at 312-13 [Campisano].

worst, the widespread acceptance and normalization of ill-defined, generic identities lay the foundation for the prevalence and materialization of group targeting expression. Alexander Tsesis thus observed,

"Hate speakers clad their arguments in stereotypes about outgroups, using readily recognizable, but inaccurate, generalizations. Vituperative stereotypes cause various harms. They not only trigger collective prejudices but also diminish the objects' sense of welfare and security… ."[923]

This is largely due to the reinforcing effect of externally attributed identities in this category of speech. Stereotyping, for instance, involves attaching a typified image or behavior through repetitive use of blanket language absent of significant variation. It makes a manufactured racial or cultural perception *stick* to persons of that race or culture. Stereotyping thereby omits to make distinctions, instead preferring exaggerated generalizations and diminishing any element of individuality.[924] And because stereotyping is an attitude that is descriptive of certain shared features of a group,[925] it is those very individuals belonging to the caricatured groups who will unavoidably be the subjects of stereotyping.

Let us take, to continue along the lines of stereotyping, the illustration of racial stereotyping in the movie industry (e.g. Hollywood). Personal story after story have shown that Asian actors were selected for casting to *fit into* certain roles that movie directors desire them for. And those images are not pretty. Asian male actors would be told to play

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[923] Tsesis, "Intimidating Speech", *supra* note 736 at 390.

[924] The ignorant misconceptions rhyme between assumptions such as, "because he is Asian, his main diet must be that which is based on rice combined with the use of chopsticks" or "since she is a Muslim, she must take out her carpet and pray in designated periods every day even in public place."

[925] Hence, Karst notes that, "Yet stigma, like caste, is a group experience. A characteristic like race, unorthodox religion, or ethnicity is identified as deserving of stigma, and the stigma is imposed on the whole group of people who share the characteristic." Karst, "Paths to Belonging", *supra* note 18 at 324.

desexualized, nerdy roles as assistants or doctors who are always secondary to the main persona (which is of course taken by a white actor).[926] Female actresses of Asian race are frequently employed for the sole purpose of bringing (typically) shy, submissive, and fragile characters to life on stage.[927] In some common instances, a Japanese comedian was cast to "… squeal a lot and speak in a very high-pitched cadence in Japanese. And giggle."[928] Another American actor of Indian race would recall how he had to work himself to match the racist, typified image of a "Ghandi lookalike," "snake charmer," and Pakistani computer geek in a perpetual state of perspiration."[929] Those Asian actors and actresses clearly did not see themselves as *deserving* of the labels that were forced upon them. Those roles were more of than not characters of secondary importance. It portrayed them as lazy beings by nature, thieves, and lacking in sophisticated cultural traditions. In its continued practice, it only contributes to deeply seated racial or cultural stereotyping, casting these actors as characters of undesirable qualities and low aspirations, if not outright inferior or evil.

The harm here resides first in the arbitrary thrusting of negative identity onto *others*, and second, in suppressing personal freedom to choose or 'rediscover' one's own cultural association by presuming and indeed imposing an uncritical identity defined *a priori*. That presumption is an outmoded one in societies where ethnicities and races have been entangled for generations, resulting in persons rooted to multiple belongings. It effectively denies the

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926 Sam Levin, "'We're the geeks, the prostitutes': Asian American actors on Hollywood's barriers", *The Guardian* (11 April 2017), online: https://www.theguardian.com/world/2017/apr/11/asian-american-actors-whitewashing-hollywood

927 *Ibid*.

928 *Ibid*. (quoting Atsuko Okatsuka, a Japanese standup comedian and actress)

929 *Ibid*. (quoting Kal Penn, an Indian-American actor known for his role as Kumar in *Harold & Kumar* movies. Those quotes are racist excerpts he had received, which he later tweeted, causing controversy and adding more fuel to the ongoing debate about racial prejudice in Hollywood culture) It is important to note that I am not advancing a position toward censuring generalized stereotypes. I am simply drawing a comparison in the overlapping basis underneath the motif of external identity-attribution in group defamation and the practice of racial or ethnic stereotyping of the most extreme and evident kind.

autonomy to determine one's own cultural identity and belonging, and it denies that identity's right to make new connections to new belongings. The call for identities' adherence to one single, homogenic image of the *others* is inherently prejudicial to people living in the full blossom of a globalized century where there is:

> "… a wealth of new levels of membership and affiliation, operating within and across territorial borders, as well as above and below the traditional organizational framework of the nation-state."[930]

Forcing individual members' identities into some predefined homogeneity of the familiar thus ignores today's "multilayered and potentially overlapping sources of identity."[931] This is because such speech constricts the identities of individuals by assigning established roles while subduing their attempts to deviate from that zone of consigned *Otherness*. It "congeals established identities into fixed forms."[932] There is a crystallization of the speaker's subjectivity occurring along with the stabilization of the others' identities.[933] Under this vision, there can be no "Asian-American" or "Black-Japanese." Under this vision,

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[930] Shachar, *supra* note 908 at 2.

[931] *Ibid.*

[932] Connolly, *supra* note 45 at 64. From history to art to politics, this 'congealing' drive to preserve a certain uniformity is literally omnipresent in every domain of human life. In Rap/Hip-Hop music industry for instance, there has been an undercurrent claim that the genre is 'Black' music. See Leon Neyfakh, "Hip-Hop's Alpha Conservative", *The New Yorker* (21 March 2014), online: https://www.newyorker.com/culture/culture-desk/hip-hops-alpha-conservative (citing Rapper Lord Jamar's interview addressing white rappers telling them "You are guests in the house of hip-hop… you know this is black man's thing. We started this. This is our shit." Regardless of the quality of music, "he's (white rapper) trying to push an agenda that he, as a white man, feels acceptable. Those proclivities and sensibilities are not at the core of true hip-hop"). This remark then saw a lot of backlash and recently triggered a response from Eminem's newly released album and song "Kamikaze" in which the white rapper retorted by his lyrics saying, "I belong here, clown, don't tell me 'bout the culture. I inspired the Hopsins, The Logics, The Coles, The Seans, The K-Dots, The 5'9"s, and oh brought the world 50 Cent." Ironically, Eminem himself is leading the battle for the preservation of rap genre's purity by dismissing the latest trending "Mumble-Rap," a new category of younger rappers since 2011.

[933] Berger & Luckmann, *supra* note 746 at 38. Berger and Luckmann refer to the linguistic capacity to retain personal subjectivity of the producer of words that is maintained even when conversation is not a face-to-face situation. In hearing oneself talk, the speaker's own subjective meanings become "more real." This explains how the speaker establishing the otherness during the process of self-definition to attain his own assurance of identity.

there is only "White European" and "Muslim Arab." And when unclassifiable identities refuse to submit themselves to the "established naturalization of identity,"[934] the "reassurance"[935] or "habituation"[936] to certain *set* identities expulses them as "exclusivist alterity forms."[937] "Whatever cannot be codified, classified, or labeled,"[938] is excluded as "deviants."[939] Due to their perceived impurity, nonconformers are "shuffled into a marginal existence through hone of the numerous categories of otherness constituted by the order."[940] Identities who fail to neatly qualify as one set identity or the established *Otherness*, will face the pressure of "intensive self-regulation"[941] stemming from what one observer described as "institutional double binds:"[942]

"… whereby, first, the screws of discipline are tightened and, second, a variety of socially constituted deviants are then blamed for stripping themselves of efficacy through deep-seated personal defects."[943]

One way of looking at this cruel situation is by alluding to the past treatments of children born from interracial relations in pre-colonial or slavery era:

"… one common result for the children of such mixed unions has been automatic identification downward into the lower status group – that "one drop of Negro blood" made a person a Negro by the laws and customs of white-supremacy America. A common outcome was rejection by or withdrawal from both parental groups and creation of a "new" group, relegated to a special marginal

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[934] Connolly, *supra* note 45 at 159.
[935] *Ibid* at 158
[936] *Ibid*.
[937] Ulf Hedetoft, "Discourses and Images of Belonging: Migrants Between New Racism, Liberal Nationalism and Globalization" in Flemming Christiensen & Ulf Hedetoft, eds, *The Politics of Multiple Belonging: Ethnicity and Nationalism in Europe and East Asia* (Aldershot, England: Ashgate, 2004) at 26 (emphasis in italics added)

[938] Lynd, *supra* note 33 at 65.

[939] Connolly, *supra* note 45 at 149.
[940] *Ibid.*
[941] *Ibid.*
[942] *Ibid*.
[943] *Ibid*.

inbetweenness."[944]

This is an aspect of identity-harm dimension that often goes overlooked. A changing world's heterogeneous cultural settings, developing demographics, and the possibility of multiple belongings enabled by hastened migratory movements and technological innovations requires a new set of frameworks that recognizes the fluidity and the multiplicity of identities. To ignore this would be a grave disregard for up-and-coming generations of children whose identities are rooted in multiple belongings. And the fixation of identities by the use of identity-controlling speech would be a terrible thing to inflict on those struggling to find a footing for their identities.

3.2.2. An Illustration: Harm to the Racialized Self-Identity

On the outset, one may wonder and even object to the choice of illustration of harm to identity via racial group defamation. In fact, that choice may seem peculiar if not counterproductive to the writing's overall objective, given my acknowledgement underlining the limitations in the works of critical race theorists. However, my choice stems from two observations which I believe justifiably override that concern in this particular context.

First, the present thesis is concerned with group defamation that degrades persons' fundamental characteristics such as race or ethnicity. It is the subject of this writing. There is

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[944] Isaacs, *supra* note 20 at 65. This same author would go on to compare this to the "half-caste" in India and other past colonies ruled by the West and children fathered but left by American soldiers abroad during wars in South East Asia. He noted that,

"their most common fate has been almost total rejection by all, isolation in orphanages ended in only a few cases by adoption by American families, or abandonment to whatever lives they could somehow manage to eke out at the furthermost margins of these societies.".

That pain and legacy continues today with "Ko-pino(s)" or fatherless children fathered by Korean males conceived by the irresponsible Koreans during their holidays or more accurately, "sex-tourism" in the Philippines. For further reading, see e.g. Se-jeong Kim, "Man fights for abandoned Kopino families", *The Korea Times* (6 August 2017), online: https://www.koreatimes.co.kr/www/nation/2018/05/119_234235.html

no bypassing that.

Second, it is important to recognize that racist group hate speech - or racist speech *tout court* - is an ongoing social problem. The practice of racially prejudiced speech purposefully thrown at persons belonging to certain race or ethnicity is a malady that continues to exist as a social and real-world problem. Racial equality may have been constitutionalized in statutes but the road toward racial inclusion is, to note the obvious, a work in progress. Racial differences, as "the very visibility of its mode of being as other,"[945] altogether constitute a significant obstacle to achieving lasting equality. It has been thus observed that,

> "even where all other conditions are or can be made equal, the physical characteristics themselves remain a barrier to status and belonging in the dominant group."[946]

In other words, racial group defamation is a representation or "a medium of expression" through which attitudes of bias prevalently embedded in that society are reflected unconsciously. It is fundamental that this connectedness between language and racial group defamation be understood in the present context as an ongoing, normalized phenomena.

Third, harm to identity and the related forms of harms, as I shall elaborate, transcend divisions marked by race. Feelings of shame and alienation, for instance, are not some sentiments reserved for a particular racial group; they are universal human conditions. These harms result in individuals when they are the victims of group targeting speech because of their racial characteristics. Therefore, it is important to address this directly because the study of these harms comprises the form and the substance of group defamatory speech. I will first

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[945] Connolly*, supra* note 45 at 65. (describing identity as an "insecure experience" that views the others of differences as "the threat (that) is posed not merely by actions the other might take to injure or defeat the true identity but by the very visibility of its mode of being as other.").
[946] Isaacs*, supra* note 20 at 64.

address how the negative characterization or attributes of the identities of the defamed group members often entail the commodification of their self-identity (3.2.2.1.). Next, I shall explain how shame, the harm to individual member's identity by racial group defamation, has destructive effects on the targeted person's sense of self-identity and his interpersonal relationship with others (3.2.2.2.).

3.2.2.1.Harm to Identity from Racial Commodification

Earlier I have noted that group defamation deals harm to identity by way of attributing (extreme) labels and stereotypes that attach general yet undesirable characteristics to members of a group. These designations are means of ascribing certain names. And names have meanings. This is how racial group defamation differs from other types of defamatory expression: it is marked "by its explicit intention to serve as an index of subjective meanings,"[947] meanings that are historically derogatory and meant to characterize "the enigma of the otherness."[948] James Keegstra referred to this otherness as being "treacherous", "subversive", "sadistic", "money-loving" "child-killers" who longed to grab power.[949] André Arthur described them as incompetent, degrading, ignorant, arrogant, and rude.[950] Bill Whatcott saw them, to borrow once more Connolly's expression, as incorrigible "moral failings or abnormalities."[951] The otherness thus embodied meanings.

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[947] Berger & Luckmann, *supra* note 746 at 35. Berger and Luckmann made an important correlation between language and signification. A linguistic expression means (signifies) something. Whenever we speak, we thereby engage in "the human production of signs." And language, as a "system of vocal signs," is the most important sign system of human society (*ibid* at 36-37).

[948] Connolly*, supra* note 45 at 44.

[949] *Keegstra*, *supra* note 81 at 714.

[950] See footnote 630.

[951] Connolly*, supra* note 45 at XV. While the *Whatcott* case concerned expression based on religious viewpoint, it nevertheless illustrates the similar type of creation of 'the other' in the present context.

Once more, one only needs to turn to history to understand the common practice of designating words unto alien identities. For example, the term "Negro" originally carried with it the meaning of "all the submissiveness of the past."[952] It was a word used interchangeably with 'slave.'[953] The word implied "all the obloquy and contempt and rejection"[954] that one ruling group had *given* to another subjugated group. Similarly, the notion of "Blackness" translated into "the ultimate derogation"[955] or a "badge of shame"[956] that was considered to besmirch the character of persons referred to as such. The imputations of blackness or being black associated the target with something that is "primitive, savage, and evil."[957] Thus, a word that could variably carry much richer, diverse meanings[958] such as "a heritage, an experience, a cultural and personal identity,"[959] was instead reduced to a label referencing a state of inherited inferiority by virtue of one's skin color. This explains why at first, calling a white man black or negro was considered in of itself a defamation. The connotation of the *others*, as the "out-group," was to be diminished to "dirty, lazy, oversexed, and without control of their instincts."[960]

Considering this basic function of racial group defamation forcing certain meanings onto the subjects of vilification, it is facile to comprehend that this results in the

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[952] Isaacs, *supra* note 20 at 86.
[953] *Ibid* at 88. (noting that "The slave traders called their African cargo "Negroes" or simply "blacks." Early in the slave trade, the word "Negro" apparently came to be used more or less synonymously with "slave.").
[954] *Ibid*.
[955] *Ibid* at 91.
[956] *Ibid* at 88.
[957] *Ibid* at 91.
[958] From the meeting with Jean-François Gaudreault-DesBiens and Noura Karazivan (23 November 2018) [The Meeting], in the Law Faculty of Université de Montréal, observing how the meaning of negro or 'négritude' has been predominantly occupied by American Critical Race Theorists who for the most part attributed extremely pejorative notion to the term, and the need to recognize or re-discover the historical diversity of meanings of the term that could just as well range from verbal embodiment of collective pride to weapon.
[959] Catherine MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7 Signs: J Women in Culture & Socy 515-516 (noting in Editor's Note that "Black" should not be regarded "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions.").
[960] Lawrence, "Unconscious Racism", *supra* note 11 at 333-34.

commodification of racialized identity.[961] Simply put, racial group defamation commodifies individual identities. Commodification of race involves a process that materializes physical attributes by placing certain market values on the commodified racial traits. In doing so, it supplants all individual qualities and buries them under the rug of race.

Take for example, the value of whiteness as a prized good in the market of racial commodities. It is often portrayed as the "good, privileged, pure, beautiful, supreme, law-abiding, standard English speaking meritorious."[962] It is inherently desirable. The non-whiteness, however, is deemed somehow "less than."[963] In this way, racial commodification capitalizes on racial commodities and ultimately profits from that merchandising. It trades on core characteristics constitutive of individual identity that are essential for that identity's "personhood"[964] and "human flourishing"[965] that ought to be "market-inalienable."[966] As such, a commodified racial identity is stripped of elements of its humanity.[967] A commodified racial identity is a racially devaluated identity which brings about the depersonalization of that identity. At the end of the process, they are left to live out as urchins underneath the bay

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[961] Cunningham referred to this 'racial commodification' as a result of identity alienation that "results from the fetishism of labeling people by commodified identity in every facet of their lives – working, shopping, driving, procreating, creating. All occur in the context of market identities. Commodified identities replace whole identities. Identity fetishism means that people are viewed in society according to the value of their commodified identities, and people view themselves as some function of their commodified identities. The uniqueness of whole identities is thus subsumed by commodified identities, which supplant whole identity in creating meaning in the world." E Christi Cunningham, "Identity Markets" (2002) 45 Howard LJ 491 at 502 [Cunningham]. Her view vastly corresponds with mine in that:

"Racial commodification affects all market actors in some way, and that the effects are detrimental to individuals, communities and society. Racial commodification is not about individual identity or the identities of communities of individuals. That is the problem. Race does not denote the unique essence of persons or communities. Identity commodified in the form of race supplants individual and community realities with commodified meaning. In this fashion, human flourishing is impaired." (*ibid* at 506).

[962] *Ibid* at 542.

[963] *Ibid*.

[964] *Ibid*. (quoting Margaret Jane Radin) (internal citations omitted).

[965] *Ibid*.

[966] *Ibid*.

[967] Downs, *supra* note 729 at 656. ("To vilify race is to allege that a person's race causes his behavior. It denies the very humanity of the target").

of bidding that thieved away their now-indigent sense of selves and disrobed their personhoods of dignity.

One frequent realization of racial commodification is in workplaces. Commodifying the racial characteristics of a person in a work environment alone can "create object-bondage" by the objectification of the worker's laboring. This can result in the misappropriation of the "meaningfulness of the labor" from the laborer.[968] An enormous, indirect pressure is placed on the shoulders of workers of certain colors to achieve higher performance than their co-workers of established identities to negate or overcome the negative stereotypes they are associated with.[969] Remember my earlier quotations on "intensive self-regulation"[970] and "institutional double-binds"[971] where screws are tightened against deviants to submit them into alignment with the familiar otherness. Workers feel the pressure to fit into the conventional images created and enforced thereby. Additionally, it has been noted that this overzealousness of *purifying* one's self-image can backfire too. Rather than successfully rooting out a negative assumption about oneself, the attempt may end up invoking or reinforcing other predispositions.[972]

Racial commodification is also a question of self-image. By definition, the

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[968] Cunningham*, supra* note 961 at 9 (discussing Radin and Marx)

[969] On this and "identity negotiation," see Devon W Carbado & Mitu Gulati, "Working Identity" (1999) 85 Cornell L Rev 1259 [Carbado & Gulati]. See also, Nancy Leong, "Racial Capitalism" (2012) 126 Harv L Rev 2151. While I draw this example in work places, I do so only to the extent of making a broader point with regard to my argument on 'harm to identity.' For my earlier clarification with regard to the covered subjects of the thesis, see the general introduction at 28-29.

[970] Connolly, *supra* note 45 at 149.

[971] *Ibid.*

[972] Carbado & Gulati, *supra* note 969 at 1291-93. The writers give a few very practical examples in which outsiders can encounter in daily work place. One such example is how to respond to a racist joke. If the outsider does not join the laughter, his colleagues may view him as someone "obsessed with race." If his enjoyment or participation in the racist joke is mild or "fake," people will judge him for being superficial. Another example is provided. An employee of South-Asian who tries to overcome the traditional image of the South-Eastern Asian male's lack of sexuality by undertaking cooking lessons. But instead, his appearance associated with cooking may only revive the "colonial image of the servile South-Asian man."

deconstruction of a given identity by racial commodification is inherently reductionist because it negates any element of creativity and the infinite potential residing therein.[973] It follows that, as alluded to earlier, the very act of attributing certain values to an identity by its race is in of itself the imposition of an oversimplified identity to those who *supposedly* belong to that group by (artificial or not) virtue of sharing (a) biological trait(s). When an acclaimed figure like Samuel Jackson demerits a fellow up-and-coming actor for not being "black enough,"[974] the critique is a paternalistic thrust of a generic identity, which is in and of itself persistent; the decades-old debris of a racially commodified self. It suffers from a presupposition that celebrates the cloaking of a victimized identity whereby, to belong, one must view oneself as a vandalized part of the greater collective, a fragment possessed by the permanently enraged consciousness.[975] In doing so, racial commodification or racialization in general asks the individual to re-shackle themselves as was once pre-mandated by the original oppressors.

3.2.2.2.Shamed Identity

Racial group defamation also induces feelings of self-hatred when exposed to repetitive expressions that malign a group's racial characteristics. This reaction is an emotive response that injects doubt on the sense of self-worth and identity.[976] Delgado once explained

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[973] One commentator expressed his dismay this way: "They have sacrificed, on an altar of racial protest, the unlimited potential of countless black lives." Glenn C Loury, "Individualism before Multiculturalism" (1995) 19 Harv J L & Pub Poly 723 at 724 [Loury].

[974] See Sadaf Ahsan, "'I resent that I have to prove that I'm black': Get Out's Daniel Kaluuya responds to Samuel L. Jackson", *The National Post* (14 March 2017), online: http://nationalpost.com/entertainment/movies/i-resent-that-i-have-to-prove-that-im-black-get-outs-daniel-kaluuya-responds-to-samuel-l-jackson

[975] Loury, *supra* note 973 at 724-25.

[976] "The psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. Consequently, it is neither unusual nor abnormal for stigmatized individuals to feel ambivalent about

how this symptom is exhibited in younger children who have grown accustomed to the association of dark skin to ugliness in their early days.[977] The "accumulation of negative images" drives one to "hate one's self… or to have no self at all, to be nothing."[978]

The harm in the hatred of the self – of one's own identity - does not end with itself. Harm spills over, from self-hatred to hatred of one's own racial group, negatively affecting the victim's ability to maintain a normal relationship with the members of his own group.[979] Alienation from one's natural group sows a deep sense of distrust and increases self-doubt because detestation of one's own group does not permit "trust in the dependability of one's immediate world."[980] In the aftermath of rejection and denial of oneself, a "flight from self"[981] occurs in the individual. This means that the harmed identity shifts its identification to join the aggressors, for instance, by "accepting whiteness as superior."[982] In this act, the victim ironically completes the original mission as initiated *by* and now *on behalf of* the utterers of racist speech. Thereby, the substitution of weak group identities with negative group identities is successfully achieved.[983] In doing so, the harmed individual ultimately defines himself through self-negation. At first, this progression from self-hatred to the unforced admission of the distorted self may be confusing but it only underlines the kind of

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their self-worth and identity" Delgado, "Words that wound", *supra* note 15 at 137.

[977] "When presented with otherwise identical dolls, a black child preferred the light-skinned one as a friend; she said that the dark-skinned one looked dirty or "not nice."' Ellen Mary Goodman, *Race Awareness in Young Children*, revised ed (New York: Collier Books, 1964) at 55, cited in Delgado, "Words that wound", *supra* note 15 at 142.

[978] Joel Kovel, *White Racism: A Psychohistory* (New York: Pantheon Books, 1970) at 195, cited in Delgado, "Words that wound", *supra* note 15 at 137.

[979] *Ibid*.

[980] Lynd, *supra* note 33 at 47. ("Doubt replacing basic trust in the way of life of one's social group or in one's place in it can undermine the sense of one's own identity… Shattering of trust in the dependability of one's immediate world means loss of trust in other persons, who are the transmitters and interpreters of that world… With every recurrent violation of trust we become again children unsure of ourselves in an alien world").

[981] Isaacs, *supra* note 20 at 91.

[982] Ari Kiev, "Psychiatric Disorders in Minority Groups" in P Watson, ed, *Psychology and Race* (Harmondsworth: Penguin, 1973) at 416, 420-21 cited in Delgado, "Words that wound", *supra* note 15 at 138.

[983] Isaacs, *supra* note 20 at 44.

powerfully coercive effect that this class of speech can deliver.[984]

An identity that is completed through negations of oneself and of others, is an identity that is "necessarily limited."[985] One author alluded to this limited identity by the analogy of a "racial mansion"[986] that is a mirrored reflection of "limited identity space"[987] for both the occupants within the mansion and those outside. The borders of those limitations set by racial lines grow only taller to eliminate any interchangeable growth of identities. This state of being 'cut-off' from interactions with other identities lead us to harm that is a shamed identity.

An identity whose racial-ness is attacked is also chagrined by an unspeakable sense of shame to its identity. A shamed identity is exposed to isolation and alienation[988] that does not originate from the fear of being despised but from the fear of abandonment.[989] Helen Merrel Lynd offered a particularly disturbing description of this experience:

"The experience of shame is itself isolating, alienating, incommunicable… leading to estrangement. (…) Being isolated, cut off, unable to find any way of being recognized by oneself and others as part of humanity is a peculiarly frightening experience."[990]

Part of the aggravating reason behind the misery of shamed identity is its quality of incommunicability, as there exists "no readily expressive language of shame, of identity, of

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[984] Again, to return to the study of language in relation to the interpretation of social reality, "it is coercive in its effect" even though it may be expressed externally. "Language forces me into its patterns" and "retains its rootage in the commonsense reality of everyday life." It thus has the ability to expand subjectivity because "language has the quality of objectivity." Berger & Luckmann, *supra* note 746 at 38.

[985] Cunningham, *supra* note 961 at 544 (noting "That is, the individual defines himself by juxtaposing himself with what he is not. In this way, the individual becomes invested in defining the content and parameters of all that he is not. Individualism built on negation is necessarily limited.").

[986] *Ibid* at 543.

[987] *Ibid*.

[988] Lynd, *supra* note 33 at 66. "Shame is an isolating experience" and "Shame sets one apart"

[989] *Ibid* (discussing Piers).

[990] *Ibid* at 67-68.

mutuality, no accepted form by which these experiences can be communicated."[991] When faced with the wall of incommunicability to share or simply 'let out' the experience of degradation inflicted by others and subsequently by oneself through the floggings of coerced self-detestation, the shamed identity often proceeds to forms of impersonalization and dehumanization of the self in an effort to conceal the suffering.[992] Like the devaluation of racialized identity, dehumanization can be detrimental to the harmed identity's ability to form healthy relationships with others.[993] This is because a depersonalized identity is unforgiving toward itself. Having been acquainted with the risks of rejection of his unpretentious identity, individuals will deny themselves moments of humanity to recognize the harm done to their sense of the self and to recuperate from it.[994] This self-imposed suppression of much needed self-indulgence and self-empathy represents, for the harmed identity, its own way of holding onto whatever remaining shreds of dignity and self-respect. While this method may provide the harmed self with the temporary relief of self-built, impenetrable security as if in a castle at subsequent racist encounters, it indubitably creates an illusion cultivating within that conjured boundary. False senses of self-distinction and pride of a vanquisher demands one to nullify any and all visible signs of vulnerability, no matter the occasional whimpering of agony leaking from the closet of neglected damages. This is because vulnerability spells out weakness. And for the shamed self, there is nothing more terrifying than the exposure of one's weakness, as that would validate the license of his oppressors' acts of humiliation. But in disregarding the damages done to the sense of self, the wounds of shamed identity, if left

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[991] *Ibid* at 66.

[992] *Ibid* at 70.

[993] "It is no surprise, then, that racial stigmatization injures its victims' relationships with others." *Delgado*, "Words that wound"*, supra* note 15 at 137.

[994] Lynd*, supra* note 33 at 71. (observing that "If I cannot communicate with others, then I will at last not risk openness, I will deny the possibility of openness, I will protect myself against it" (*ibid* at 70) "… refusing to recognize the wound, covering isolating effect of shame through *depersonalization* and adaptation to *any approved codes*." (emphasis in italics added).

unattended, will continue to fester, adversely affecting new relationships the individual seeks to engage in. This is because any hastened engagement with others "by any means however false or inadequate"[995] and forced "adaptation to any approved codes"[996] will not only fail to address the previous damage that the individual's identity has endured, but it will likely lure fake and superficial liaisons, thus starting another cycle of would-be doomed relationships.

While not every single person harmed by racially-prejudiced speech may encounter the sense of shame to the degree described above and to the extent where it would effectively disable the victim's ability to form interpersonal relationships, it has been observed that this type of exposure may cripple one's faculty to maintain racially diverse relationships. Delgado, for example, noted that,

"Racial tags deny minority individuals the possibility of neutral behavior in cross-racial contacts, thereby impairing the victims' capacity to form close interracial relationships. Moreover, the psychological responses of self-hatred and self-doubt *unquestionably* affect even the victims' relationships with members of their own group."[997]

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In this section, I sought to understand harm to identity in group defamation from a relational approach. When deconstructed, this contextualization clarifies the identity-attributive function of group defamation and how the nature of such speech constitutes a violation of the personal autonomies of injured identities of individual members belonging to

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[995] *Ibid* at 68 ("when the threat of isolation is acute the need of establishing some sort of relationship is so great that there is an attempt to break through the barriers by any means however false or inadequate.").

[996] *Ibid* at 185.

[997] Delgado, *supra* note 15 at 137 (emphasis in italics added).

the defamed group. This broader perspective allows us to see how group defamation reinforces an established image of the *others* through extreme stereotyping and how such harm, as illustrated by racial group defamation, is dehumanizing and detrimental to not just the identity of individual victims but also to their ability to maintain relationships with others. The next and final section explores a more collective dimension of the harm in group defamation.

3.3.Group Vilification and the Pervasiveness of Harm

If there is a particularly remarkable feature that underlines the harm in group defamation, or group vilification as I should prefer to call it presently, it is its ability to amplify and accumulate the disparagement of the defamed members and propagate that harm onto a social level. In doing so, the harm manifests itself universally. This section is dedicated to describing this potential of harm.

First, the interconnectedness of harm in this type of speech must be addressed that is found in the more micro level (3.3.1.). Second, the harm in group vilifying speech resides in its pervasiveness that contributes to the creation and the reinforcement of hostile environment that captures the listeners (3.3.2.). Lastly, by addressing the question of the empirical proof of harm, I express my reservation with regard to why the harm in group defamation should be legally recognized only in individual instances, despite the weight of the social harm argument (3.3.3.).

3.3.1. The Interconnectedness of Harm

It is a chilly morning in the winter of 2017. I find myself walking to the bank. After

almost two dozen minutes of waiting in line, it is finally my turn. As I step forward to claim my spot, an elderly man who had literally just entered the building audaciously launches himself before me, inserting himself between myself and the agent. I let my dismay pass, given the aged appearance of the man. The interceptor is wearing traditional Jewish clothes from his head to his toes, and with the length of hair that compliments the look. A mister waiting in line behind me catches a glimpse of my short-lived moment of annoyance, and approaches to my left side from behind. With a playful smirk, he murmurs into my ear: "Oui, les Juifs sont comme ça."

A year and half later, I am taking a stroll in the same neighborhood. In front of me is walking a man wearing Jewish orthodox garments. He is obviously not the same man from the bank in the year before. And yet, as I am looking, the words of the past commentator are ringing in my ears. And with them, reinforced images of furtiveness, disorderliness, and obtrusiveness begin devouring the man before me.

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It is early evening in the summer of 2018 and I am on my way home from a coffee shop. I hear loud giggles from behind. I intuitively turn around. There are two young teenagers of Arab ethnicity. One of them shouts at me: "CHING CHANG CHONG!" He then turns around to his companion and tells him with a sigh, "mec, y'a trop des putains des Chinois dans cette ville." I know I am not Chinese. I know that his insult is thus baseless. Yet, I feel my face reddening. I feel shame and trepidation. I feel as if something dirty that is not mine is thrown over my face.

A few weeks later, I am walking in the Vieux Port. There is a group of Chinese tourists shopping in a local store. I feel a knot in my stomach churning and tightening. Suddenly, the sight of them does not seem so welcome. I know I am not Chinese. But I also

know I'm not viewed differently from them. Self-pity abounds.[998]

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"It's not like I'm black, you know?"[999]

As illustrated in the first two stories, the harm in group vilification cannot be neatly compartmentalized. In other words, that harm cannot be contained within the original target of the expression; it almost always ends up spilling over. It contaminates the ears and perceptions of listeners and bystanders, managing to affect and influence their opinions regardless of whether they were direct victims or not. The harm is interconnected between the intended casualties aimed by the calumny and those who do not even share the exact vilified features. For instance, in both stories, the harm is in the discoloration of the *others*. Like a packaged deal, blindly strapping words attach the lack of civility or their mere presence to their ethnic or racial identity. The implication is that their race or ethnicity *causes* those behaviors. The speaker's depiction of the Jewish elderly man effectively pollutes the audience's opinion of *all* other Jewish persons. The speaker's rant about the implied 'invasion' or the 'taking over' of the Chinese alters the perception of the tourists' group. At the end of the day, the speaker has successfully perverted the unsullied esteem of *all* Jews from the bystander's point of view. It has corrupted society's opinion regarding the Chinese.

Typifying and anonymizing those particular events or experiences under the broad categories of "The Jews" or "Les Chinois," the imputation of attached denigration is

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[998] This and the story directly above it are both my personal experiences I encountered myself in Montreal. The first one was in the winter of 2017 and the latter incident took place in August 2018.

[999] Neymar da Silva Santos Junior, Football player in Brazilian National Football team and PSG FC.

duplicated to anyone who falls into that subsuming category.[1000] This practice, when habitually propagated, has the potential of effectively transforming a subjective reality into an objective one.[1001] Due to "its capacity to transcend the "here and now,""[1002] the group vilifying harm to those identities is not bound by spatial or temporal limitations. The defamation may have occurred in one reality, but it may very well have referred to another.[1003] Recall that neither the random Jewish man walking in front of me nor the Chinese tourists were direct victims of the group vilifying speech in respective situations. Neither of them was actually *at* the scene being exposed to the discrete whisper or howling of the speakers. Yet, it is still those individual members belonging to either of those groups who have had the perceptions regarding them *personally* denigrated. Regardless of whether individual members were situated in different geographical locations or time zones, the vilification of that group traverses through physical frontiers to assemble members into a despised whole.[1004] The harm is thus interconnected. It is interconnected not only between the speaker, the bystander, and the intended targets but also between the intended targets and every other individual perceived as being member to the same group.

The harm in group vilifying expression, however, is also interconnected in an even more expansive way. The harm is interconnected in its dispersion throughout streets, schools, public transport system, news articles, and the Internet. Its messages of hate and degradation retain much of their harmful effect, especially in terms of their visibility. In other words, the

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[1000] Berger & Luckmann, *supra* note 746 at 39.

[1001] *Ibid* at 39. (noting that "experiences are ongoingly subsumed under general orders of meaning that are both objectively and subjectively real.")

[1002] *Ibid*.

[1003] *Ibid* at 40. ("They are located in one reality, but refer to another.")

[1004] *Ibid* at 39. ("… bridges different zones within the reality of everyday life and integrates them into a meaningful whole. The transcendences have spatial, temporal and social dimensions.").

harm in this context resembles a permanent fixture of our ordinary, everyday-living spaces.

3.3.2. The Pervasiveness of the Harm

Harm to equality.[1005] Harm to equal citizenship.[1006] These are all harms that have been suggested as harms perpetrated by hate speech. But these are also *social* harms. These are harms, although they may be born of confrontations between private individuals, that affect "society as a whole."[1007] These are instances of speech that constitute "breach of the ideal of egalitarianism;"[1008] as such, not only the social value of equality itself is downgraded, it may also consequentially deter people from actively participating in important public discourse, having witnessed the inadequate legal responses to such speech. As groups of people are denigrated, it results in their categorization[1009] that solidifies their group status as second-class citizens. The very exercise of the speech gradually normalizes the verbal categorization in "the power of silent accumulation,"[1010] giving approval and legitimacy to the continuation of related discriminatory speech-acts that deny members their equally entitled rights as a result of imputations made to their shared ascriptive characteristics.[1011]

Racial group vilification, or group hate propaganda as my supervisor prefers to call it,[1012] is characterized by its ability to amplify the harm on the social level precisely because

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[1005] See footnote 15.

[1006] See footnote 18.

[1007] Delgado, "Words that wound", *supra* note 15 at 140-41.

[1008] *Ibid*.

[1009] *Ibid* at 144.

[1010] Connolly, *supra* note 45 at 150.

[1011] Waldron, "Hate Speech", *supra* note 16 at 56-57.

[1012] Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sysyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 McGill LJ 1117 at 1118. He notes his preference for the term Hate Propaganda as opposed to Hate Speech, the latter in his view, failing to "capture what often leads to hate crimes and to genocide" because of its "systemic, rather than individual, use of hateful discourse and the systemic nature of hatred that sometimes ensures its social acceptability. In such

the speech is directed at identifiable groups of people. The harm is doubled and quadrupled as individual members who share the characteristics of and belong to the targeted group may feel personally attacked. The Late Professor Cohen compared this destructive potential to the 'mushrooming effect' of the harm in hate speech in his Committee's report that eventually gave birth to the current hate propaganda provisions in the Criminal Code as we know it today:

"For, in time of social stress, such 'hate' could mushroom into a real and monstrous threat to our way of life… In the Committee's view, the 'hate' situation in Canada, although not alarming, clearly is serious enough to require action. It is far better for Canadians to come to grips with the problem now, before it attains unmanageable proportions, rather than deal with it at some future date in an atmosphere of urgency, of fear and perhaps even of crisis."[1013]

Note that this mushroom argument does not allude to the harm in its dormant state. It suggests that there is a 'clear and present danger'[1014] posed by racial group hate speech. The underlying tone is almost apocalyptic. The harm in the 'mushrooming' of hatred, the argument implies, is a perilous danger that can threaten the very existence of society.[1015] The observation is premised upon an absolute *necessity*, for the survival and preservation of norms of society.[1016]

Jeremy Waldron also concurs with the equivocation of harm in group libel to social harm[1017] that supplants the "public good of inclusiveness,"[1018] but he does so differently. He

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cases, hate speech, or hate propaganda, as I prefer to call it, is ingrained in a system where the social degradation of the Other plays a central role in political discourse."

[1013] *Cohen Committee Report*, *supra* note 450.

[1014] *Schenck*, *supra* note 280 at 52.

[1015] Stefan Braun, *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (Toronto: University of Toronto Press, 2004) at 79.

[1016] *Ibid* at 80.

[1017] Waldron, "Hate Speech", *supra* note 16 at 65.

[1018] *Ibid* at 4.

arrives at the conclusion by depicting the dead opposite of what he refers to a "well-ordered society."[1019] He provides a ghastly visual description of a society that is *not so well-ordered*, a society that is overrun by calumnies denigrating other groups of people:

"Its hoarding and its lampposts may be festooned with depictions of members of racial minorities characterizing them as bestial or subhuman. There may be posters proclaiming that members of these minorities are criminals, perverts, or terrorists, or leaflets saying that followers of a certain religion are threats to decent people and that they should be deported or made to disappear. There may be banners and swastikas celebrating or excusing the genocidal campaigns of the past. There may be signs indicating that the members of the minority in question are not welcome in certain neighborhoods or in polite society generally, and flaming symbols intended to intimidate them if they remain. That is what a society may look like when group defamation is permitted."[1020]

The harm here lies in its very visibility. The recurring concern is that the messages of hate will form a "permanent visible fabric of society,"[1021] incarnated by "attacks that are printed, published, pated up, or posted on the Internet"[1022] and that invade the everyday living spaces of our social environment. Differentiating libel from slander, he saw the harm in the "enduring presence"[1023] of the former, that arms those expressions with the force of unmovable disfigurement of the victims exposed to its savagery. The visualized form of harm is erected as "immense edifices and towers of symbolic representations"[1024] that bring back old prejudices from the not so distant past. This is what makes Waldron's argument so convincing, because he so powerfully encapsulates the visual moments in real life – imagined

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[1019] *Ibid* at 66.
[1020] *Ibid*.
[1021] *Ibid* at 3.
[1022] *Ibid* at 37-38.
[1023] *Ibid.*
[1024] Berger & Luckmann*, supra* note 746 at 40.

or not – to underline the pervasiveness of the "tangible feature"[1025] of the harm in the speech.

When the harm is "the bigoted invective that defiles our public environment,"[1026] the hostile environment may rightfully call upon the captive audience doctrine.[1027] The doctrine as traditionally understood, is normally invoked in limited contexts for the safeguarding of private interests arising from cases involving government-compelled listening, home privacy, equal protection and due process of patients, voting rights, and hostile work environment against harassment speech.[1028] The doctrine upholds the listener's right to privacy to trump over a speaker's right in those well-defined circumstances.[1029] The possibility of its alternative application has been raised with regard to the regulation of hate speech within the university campus – the dormitory to be exact – but the argument remains unconvincing because privacy and speech rights cut both ways: suppressing speech in the most private zones like student dormitories is just as problematic as denying the listener's right to be free from unwanted speech.[1030] Notwithstanding those situational boundaries, an expansive re-interpretation of the doctrine may well be warranted at the peak of the dystopian swarming of the harm that is generated by the hollering of racial slurs in school yards or bestiary mural sprays. This would be justifiable precisely because the harm is no longer a qualified harm restricted to one's private backyard; rather it is rampaging before our and our children's very eyes. One cannot simply "avert their eyes"[1031] from a toxic society that has become a prison to its own constituents. It becomes a matter of public concern. And what is the duty of the

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[1025] Waldron, "Hate Speech", *supra* note 16 at 45.
[1026] *Ibid* at 3.
[1027] The Captive Audience Doctrine has been recognized in *Public Utilities Commission v Pollak,* 343 US 451 at 468 (1952) (Douglas J dissenting). For the later mentioning of the doctrine, see especially *Frisby v Schultz*, 487 US 474 at 487 (1988); *Madsen v Women's Health Ctr*, 512 US 753 at 781 (1994).
[1028] Caroline Mala Corbin, "The First Amendment Right Against Compelled Listening" (2009) 89 BUL Rev 939 at 941, 943-51.
[1029] *Ibid*.
[1030] S Cagle Juhan, "Free Speech, Hate Speech, And the Hostile Speech Environment" (2012) 98 Va L Rev 1577 at 1608-11. See accompanying note to footnote 969.
[1031] *Cohen*, *supra* note 92 at 21.

State if not to address a matter of public concern, for "in this domain, its authority is absolute?"[1032] Just as employers have the obligation to actively ensure a work environment that is free from the harms of compelled listening,[1033] it is not too far-fetched to argue that the State too has a legitimate interest in guaranteeing a "well-ordered society"[1034] and thus an interest to shield its citizens from the exposure to such harm.

Now that I have laid out the case for possibilities of both individual *and* societal conceptualizations of harm in group defamation or vilification, we must now assess how these argumentations would fare if they were to be transposed onto the legal terrain.

3.3.3. The Question on the Exigence of Empirical Proof of Harm and the Limitation of the Societal Harm argument

The acknowledgment of the harm in racial or ethnic group defamation as a theoretical form of societal harm brings us to an important discussion regarding its permissibility. The collective harm described in the previous sub-section appears to run into the same wall that individual actionability in group defamation cases encounters. The deluge of harm is too *spread out* such that it is difficult to ascertain without ambiguity the causal link between said harm and its origin. As such, the *Cohen Committee*'s urge to dampen the potential mushrooming of hate speech, Waldron's picturesque harm in libelous posters, and the hostile environment's atmospheric harm, have a commonality. They are all grounded on an unverified, presumptive rationale that, in their views, would justify the interventionist role of

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[1032] Rousseau in *The Social Contract*.

[1033] J. M. Balkin has argued that employer's restricting of employee's speech to avoid hostile environment liability especially in instances involving sexually harassing speech, or "collateral censorship," is constitutionally permissible, noting that the captive audience doctrine may be extended to workplace and that its application is well-suited considering that "hostile environments are a method of sex discrimination." JM Balkin, "Free Speech and Hostile Environments" (1999) 99 Colum L Rev 2295.

[1034] Waldron, "Hate Speech", *supra* note 16 at 66.

the State to enact laws to deal with such type of speech at its infant stage before that slip becomes a full-on slide. Let me phrase it in another way. The reasoning enthusiastically espousing the existence of the societal harm that is *supposedly* caused by group vilifying speech has curiously exempted itself from the burden of providing empirical evidence that would - or *should* ordinarily - underpin the very validity of that assumption. The harm here, if admitted at the face value of that presumption, appears to be speculative at best, fictional at worst.

This became a reality in *Whatcott* when Rothstein J. thought that a vague proclamation announcing that "the discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians"[1035] would somehow absolve the Court from having to establish any burden of proof of harm. As reviewed in Chapter 2, the Court in this decision did not evaluate the actual harmful effects of Mr. Whatcott's flyers in question. This did not go unnoticed. Jamie Cameron, for instance, berated the ruling's laxness in its bypassing of the requirement of actual harm.[1036] I will not repeat here the full panoply of her criticisms toward the ruling but her main objections reposed on two grounds. The first concerned what Cameron saw as the Court operating a content-based evaluation of the expression at stake on the pretense that the contested s. 14 of Saskatchewan Human Rights Code only sought to regulate the modes of divulgation and effects of the said flyers. This view was quickly refuted by Cameron because the Court's rationale stemmed from *Keegstra's* methodology to essentially submit that hate speech was to a certain degree incompatible with s. 2(b) of the *Charter*.[1037] In any case, *even if* s.14 of Saskatchewan Human

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[1035] *Whatcott*, *supra* note 87 at para 135.

[1036] Jamie Cameron, "The McLachlin Court and the Charter in 2012" (2013) 63:2 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 15 [Cameron, "McLachlin Court"].

[1037] *Ibid* at 87 quoting *Keegstra* at para 114 ("hate speech is at some distance from the spirit of s 2(b) because it does little to promote, and can in fact impede, the values underlying freedom of expression.").

Rights Code were to be construed as to be tackling merely the modes of expression, it is doubtful whether such provision would survive the constitutional challenge considering that *Ford* had previously rejected to divorce the content from the form of expression.[1038]

But what calls our attention really is her second contention regarding Rothstein J.'s concept of harm – something she brilliantly referred to as "a form of harm in the making."[1039] Cameron hence observed that:

"The Court did not refer to evidence that hate speech leads to discriminatory acts or conduct by third parties, and the societal harm Rothstein J. spoke of was little more than a claim or argument, not supported by evidence."[1040]

I believe she was correct in her remark. Indeed, the harm as perceived by the Court was rather "prospective, and essentially contingent in nature."[1041] This is apparent in that Rothstein J. based his judgment on the *potential* eventuality of the imperilment were Mr. Whatcott's flyers allowed to be seen by the public. For the Justice, the expression at hand possessed the qualities of being the "*potential* cause of the discriminatory practices the human rights legislation seeks to eliminate,"[1042] the kind that exhibited the dangerous "*potential* to incite or inspire discriminatory treatment."[1043] Yet, he did not proffer an ounce of evidentiary data substantiating the risk of that harm, all the while indulging a low bar for his own court to advance the ostensible causal thread between the presence of the flyers in the public space and the would-be evil-doers acting on hatred toward homosexuals.[1044] In other

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[1038] *Ford*, *supra* note 399 at 748 (language is "intimately related to the form and content of expression" Dickson C.J.).
[1039] Cameron, "McLachlin Court", *supra* note 1036 at 34.
[1040] *Ibid* at 35.
[1041] *Ibid* at 34.
[1042] *Whatcott*, *supra* note 87 at para 2 (emphasis in italics added).
[1043] *Ibid* at para 48 (emphasis in italics added) See also para 111 ("by inspiring hatred, has the potential to cause the type of harm the legislature is trying to prevent").
[1044] Cameron, "McLachlin Court", *supra* note 1036 at 34 ("In this way, Rothstein J's concept of harm assumes that an actor who commits a subsequent discriminatory act was inspired by the speaker and, therefore, that the speaker can be held accountable preventively through the office of section 14.").

words, the basis for upholding the prohibition of the said expression was largely dependent on nothing more than common sense. The Court's incuriosity toward the search for actual proof of harm ensured that the ruling reached was superficially consequentialist. The fact that this 'likelihood' unchained the Court from the task of proving a definite link of causation and the actual harm as the direct outcome of the expression demonstrates that the s.1 standard had collapsed into a game of probabilities.

Let us call this the common-sense argument, for lack of a better term. It would be the sort of view held by reasonable, ordinary persons based on conventional wisdom informed by history. Notwithstanding the point made regarding *Whatcott*, there is import, I believe, in asking whether that presumptive argument void of hard evidence, could be easily discarded? In fact, when we look closer, it becomes quite evident that the table can be just as easily be turned around against the demandants of tangibility. Common sense could very well argue that it is of *necessity* that such speech ought to be suppressed by legal means even if it would result in the partial infringement of the speech freedom because the attainable harm, if left unchecked, would greatly outweigh the precociousness of that infringement. At this stage, the argument inevitably exercises Mill's utilitarian calculation of costs versus benefits. The pendulum seems to be swayed by the fear of the dormant harm that would justify the implied legal proactivity to decapitate the bud of harm before its' full blossom - a cost which the believer in common sense would gladly pay. After all, it is irrefragable, as common-sense would have it, that while group vilification or group hate propaganda directed at certain minorities may not be in and of itself the executioners of mass persecutions in the literal sense, those types of inflammatory and scrupulously engineered expressions *could* very well serve as ammunition contributing to the creation of an extremely hostile social environment, if not worse. To deny this would be to deny the history of some of humanity's gravest past wrongs or how, for instance, past authoritarian and totalitarian regimes under Nazi Germany

and Stalin's USSR systematically relied upon propaganda machines to dehumanize groups of peoples based on their origin or ethnicity that began as social segregation and ended in gas chambers.

Furthermore, it could be argued, once again as the voice of reason would whisper, that relying on empirical evidence would be the wrong way to approach the harm in racial or ethnic group vilification. To focus on that requirement would miss the mark, because in this context, the harm does not distinguish itself in its immediacy. Rather, the harm here boasts a long-drawn accumulation that slowly but most assuredly seeps into the intolerant atmosphere of society. There is no refuting that it may be difficult to provide determinate data associating group hate speech and the rate of hate crimes. Pinpointing with conclusive scientific proof that decisively establishes the direct correlation between the people living under the duress and toxicity of society and the harm of such speech as its cause is challenging.[1045] But that does not necessarily mean that the baby should be thrown out with the bathwater. A reasonable man would know to connect the dots. For instance, between incendiary speeches given during electoral campaign rallies that are deliberately designed to arouse agitative mobs, to tap into their fears, their economic disquiet, "the needs to externalize self-hatred and anxiety, to project repressed desires, and to stereotype the target group in order to avoid uncertainty,"[1046] and the general perception of that same targeted group after that rally. The recent saga of violence that consisted of mailed pipe bombs to the heads of political figures and the Pittsburg synagogue massacre of Jewish Americans[1047] is a good example of this.

Despite all these generally agreeable 'gumptions,' it remains disputable whether the

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[1045] Arkes, *supra* note 25 at 293. "It may be hard to make a precise connection in any case between the suffering of a harm and any particular publication that might have helped to sustain (or create) a climate of prejudice from which injuries may arise."

[1046] Campisano, *supra* note 921 at 312-13.

[1047] Ray Sanchez & Melissa Gray, "72 hours in America: Three hate-filled crimes. Three hate-filled suspects", *CNN* (29 October 2018), online: https://www.cnn.com/2018/10/28/us/72-hours-of-hate-in-america/index.html

common sensical argument supportive of this form of non-particularistic harm could be considered a good-enough justification to satisfy the scrutiny set forth in s.1 of the *Charter*. It certainly did for Rothstein J. in *Whatcott*. But it left the door wide open to stentorian criticisms, as we saw with Cameron's comments. Schauer too, displayed similar skepticism in his observations[1048] regarding L.W. Sumner's study on the friction between freedom of expression and obscenity,[1049] the theoretical framework of which was largely derived from the Millian proof of harm. Noting the ridiculousness were such expressions to be subjected to "meet the extremely high standard set by the 'demonstrably justified in a free and democratic society' language,"[1050] Schauer appears to suggest that the need to empirically prove harm is not explicit in s.1, as he rhetorically asks,

> "But although it is plausible to believe that s.1. requires pretty good evidence, it is less plausible to believe that no causal relationship can survive a s.1. inquiry unless the cause is the primary cause of the effect, or at least, a very major cause. But even if changing the culture would decrease (the level of sexual violence) … is it so clear that s.1. does say a (..) decrease of which we can be highly confident could *not* satisfy the s.1. requirements?"[1051]

But in doing so, the examination ultimately devolves into a full-blown excursion on the sufficiency of the submitted evidence, and whether *some*, non-demonstrable evidence grounded on a rational basis could be deemed satisfactory enough to exonerate s.1 from having to apply a higher threshold by asking for empirically substantiated elements of

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[1048] Frederick Schauer, "Expression and Its Consequences" (2007) 57 U Toronto LJ 705 [Schauer, "Consequences"].

[1049] LW Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004).

[1050] Schauer, "Consequences", *supra* note 1048 at 712.

[1051] *Ibid* at 716. (emphasis in italics added). See also *ibid* at 719 (noting, "And although s. 1 uses such terms as 'reasonable' and 'demonstrably justified,' these terms are sufficiently indeterminate that it is far from clear that, by themselves, they command a presumption in favour of freedom of expression.").

proof.[1052] Even then, Schauer himself had leaned toward the importance of empirical evidence requirement.[1053] In fact, some twenty years ago, Schauer had gone as far as to assert that in order to preserve a free speech principle, not only should the test for justification of its infringement be more rigorous than that applied in contestations of other fundamental rights, that rigor should remain so despite the possibility of speech causing harm by consequence.[1054] So in the end, it still is wholly unclear that the evidence raised by common sense could be, while not conclusive, good-enough to "produce considerably more benefits than costs"[1055] to be admitted at s.1's doorstep, nor how that level of adequacy should be met. The divergence and obscurity within these plural views thus goes to show that there is currently no general consensus nor trend in favor of or against non-evidence-based harm recognition.

In retrospective, there is little doubt that solid arguments can be made for imposing restrictions on certain category of words. Nor can it be contested that the harm to identity may take either individual *or* societal forms or both. But this argument – and any proposition of this sort in the field of freedom of expression for that matter - would be operational only in the former instances. This is because it is quasi-impossible that persuasive empirical evidence be provided to make the case for the latter. There has not been a comprehensive study that established, with methodological integrity and confidence, such finding, and it is highly unlikely that a study of that magnitude be produced in the future because it is in the nature of these types of human affairs that "the lines of causation here cannot be drawn with exactness

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[1052] On a related point, Danielle Pinard has written an excellent article on the question of uneasy treatment between social facts and the law in the evidence issues posed in constitutional law. Danielle Pinard, "Au-Delà de la Distinction du Fait et du Droit en Matière Constitutionnelle : Les Postulats Nécessaires" (2012) 48 RJT ns 1.

[1053] Schauer, "Consequences", *supra* note 1048 at 719 (noting that "the empirical support for the Millian foundation remains a necessary condition for any confidence that this is the appropriate or desirable basis for the protection of freedom of expression in the Canadian Charter.").

[1054] Schauer, "Free Speech Enquiry", *supra* note 717 at 12. Also discussed in Valois, "Canadian Constitutional Dilemma", *supra* note 718 at 404.

[1055] *Ibid* at 716.

between particular events."[1056] This should not be viewed as a statement of capitulation, for there is a real disparity in terms of a claim's validity that is in the company of empirical evidence from one that is unaccompanied. The requirement of empirical proof of harm and the fulfillment of that condition would undergird the objective and certainty[1057] of the prohibition if it were to be admitted (e.g. decrease in racially defamatory speech and its potential propagation), provided that the evidence be substantial and convincing enough to push the regulation over the finish line of 'justifiable in a free and democratic society.' In other words, the whole persuasiveness of the regulation rests on the conclusiveness of the provided evidence – evidence that cannot be performed by exercising "mind experiment."[1058] Presumption and common sense alone cannot be a solid basis for opening the floodgates to hand out legal remedies for unsubstantiated claims. Whatever the reason behind the proposition, it is both a question of principle and functionality of law that "empirical issue" not be assumed as being a "settled"[1059] question. For crafters of law and legal theoreticians in general, it would be highly irresponsible and intellectually dishonest, respectively, to let presumption do "almost all the heavy lifting."[1060] This reasoning is consonant with Professor Valois' critique regarding the application of the standard of reasonableness in matters involving constitutional rights. Hence, she had aptly observed that:

"This standard of reasonableness, also called the balancing of interests standard, is more appropriate to judicial review of legislative economic policies than for judicial review of infringement of constitutionally protected rights. When such a lenient standard is applied, the fundamental right or

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[1056] Arkes, *supra* note 25 at 293. "… the lines of causation here cannot be drawn with exactness between particular events, and many of the harms that result from the defamation of groups may not crop up until years after the fact.".
[1057] Schauer, "Consequences", *supra* note 1048 at 716 ("two different facets of how to evaluate the empirical evidence. First is the question of how much the advocacy of some conduct will increase levels of that conduct; second is how confident we are of the first conclusion.").
[1058] *Ibid* at 707.
[1059] *Ibid* at 719.
[1060] *Ibid* at 718.

freedom is more likely to be sacrificed to more timely and pressing concern of society."[1061]

Chapter 3 Conclusion

This chapter was premised on the reconceptualization of harm in group defamation as harm to identity. It is based on the argumentation that individual member(s) identifying and/or identified with the defamed group by fundamentally degrading group defamatory expression can indeed be harmed on a personal level that would arguably require law's attention, and that this individuated harm flowing from even generalized, group-targeting speech constitutes harm to their identity.

To buttress this argument, this chapter first sought to address the conceptual incompatibility that misconstrued the harm in such group-targeting expression stemming from its reliance on the inherently individualistic version of the self that is devoid of its biocultural situatedness. Once this conceptual deficiency was replaced with a communitarian depiction of the self and the perceived reputational harm described, I aimed to capture the notion of harm to identity by introducing the concept of harm to the bonds of identity. I then proceeded to the substance of the harm to identity. Therein, I first underlined the inherent prejudice that is the violation of personal autonomy by contextualizing the uneven relational power dynamic between the *Chooser* and the *Assigned*. I focused specifically on the problematic of racial group defamation to reveal how the commodification and shaming of racial identities constitutes a harm to the identity of the defamed group members. Lastly, the chapter assimilated group defamation under a more expansive umbrella of group vilification

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[1061] Valois, "Canadian Constitutional Dilemma", *supra* note 718 at 414.

to stress the interconnectedness of the harm and the pervasive decolorating effect of the others in a society where such expression is left to flourish.

Throughout this chapter, I sought to defeat the common misconception that the consequent harm in group defamation, demeaning of a person's essential and ascriptive characteristics, is somehow lessened as it dissolves through vague, unspecific, and generalized formulation. As I had stated at the very beginning, this is a misjudgment. Not only is racial or ethnic-targeting group defamatory speech a form of direct, assaultive speech within the category of fighting words, the expression is inherently prejudicial by making degrading imputations linking the individual members to naturally inherited groups from which they cannot unchain themselves regardless of their degree of self-identification.

CHAPTER FOUR

Postmodern Challenges to Freedom of Expression:

What Meaning and Place for Freedom of Expression in Communitarian Multiculturalism?

Introduction

This last chapter explores two of the major objections that could validly be raised in the context of my argument of harm to identity presented in the previous chapter. I hereby seek to provide, hopefully with some degree of adequacy, theoretical responses to potential challenges vis-à-vis the acceptation of legal recognition of harm to identity in racial or ethnic group defamation cases. This chapter is therefore a rebuttal to the counter-arguments to my original position.

In my view, two major lines of objections can be filed against my claim to harm to identity. The first objection draws on a classic theory of free speech particularly prevalent in the First Amendment's theoretical discussion. One may argue that the legal recognition of individuated harm to identity would be an open rebellion against the very ideal driving the marketplace of ideas – one of the three foundational justificatory rationales of free speech. The legal acknowledgement of harm to identity, the argument goes, would inevitably clash with the ideal of equal exposure of all ideas and opinions and the prizing of the diversity of expressions. It would effectively be a content-based regulation of expressions that would undermine the individual autonomy of speakers in the process.

The second objection is in line with the broader free speech concern against the fear of chilling effect. The argument is our courts' acknowledging harm to identity would eventually lead to the deterioration of the individual freedom to vigorously criticize important matters of public interest, specifically with regard to the ability to speak unfavorably of certain groups in our society. This would in turn have the adverse effect of encroaching on the protected scope of freedom of expression. These objections are legitimate and deserve a well-reasoned reply.

With regard to the first question, I opine that the objection is an invalid assumption.

Already, the model of the marketplace (of ideas) is demonstrably fallible and outdated. The marketplace is no longer recognizable, due to the rapidly expanding means of communication. The paradigm, as it was first conceived and advocated for, no longer adequately represents today's enlarged and diversified speech ecosystem. (4.1). To establish that the complaint regarding the marketplace is baseless, I will elaborate on its deteriorated state by pointing to two factors in particular: the erosion of traditional journalistic practice (4.1.1.), and the rise of fake news (4.1.2.). My view is that these pre-existing but recently-intensified conditions have directly contributed to the progressive descent into obsoleteness of the marketplace concept's applicability in the current speech environment. In this sense, it is also an indirect critique of the marketplace paradigm. The objection that the recognition of harm to identity would somehow discredit the marketplace of ideas would thus appear to be unfounded.

The second question, as I mentioned, is a fundamental concern of every free speech advocate. Would the legitimization of harm to identity result in the chilling of individual criticisms that are vital to the functioning of our democratic society? (4.2.) To understand the role of critical speech, we must place it alongside the notion of public discourse (4.2.1.). I argue that the individual liberty to speak critically is one that must be preserved because it is an active form of participatory democratic right (4.2.2.). Consequently, my claim to harm to identity does not threaten individual autonomy. On the contrary, critical speech would serve as a liberating instrument to redefine one's cultural identity independent of the majoritarian cultural imposition and from within one's own cultural group identity. (4.2.3.). I also include a brief delineation of what should be acceptable limitations on the freedom of critical speech (4.2.4.). Lastly, I will reframe the necessity of critical speech and freedom of expression in the backdrop of Canada/Quebec's communitarian multicultural social context to draw an interpretative link with Charles Taylor's use of "Common Meaning" as a follow-up to further

emphasize its importance (4.2.5.).

4.1.A Reply to the First Objection: The Collapse of the Marketplace (of ideas)[1062]

In 1919, Justice Holmes first invoked the concept of the marketplace of ideas in his powerful dissenting opinion in *Abrams* decision:

"… that time has upset many fighting faiths … that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market…"[1063]

Those words would later be morphed into a leading justificatory rationale[1064] of the First

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[1062] I have developed the critique of the marketplace of ideas, heavily centered in the American legal context for two reasons. One obvious reason is that the subject of the critique is a leading free speech paradigm of the First Amendment of the U.S. Constitution. Thus, it is only befitting to situate the overall problematic in that particular context, especially in consideration of available materials. Secondly, the important socio-legal issues through which I point out the shortcomings of the underlying rationale are social occurrences that have, though not exclusively, but principally occurred in the United States. The problem of fake news, for instance, is a subject that has been critically commented on in light of the 2016 U.S. presidential election. The related concern regarding the deterioration of traditional journalistic practices is also well demonstrated by clear examples provided in the American journalistic industries, both paper/online-based ones as well as the news media. With regard to the critique of the rights discourse, I do take a more global approach with specific examples of incidents occurring in Canada, France, and even in South Korea. However, on a more theoretical front, the marketplace theory should not necessarily be interpreted as an American constitutional or even socio-cultural property; in my view, the furtherance of free speech as both a constitutional principle and justification of the freedom in search for truth and less legal paternalism from the State are deontological grounds on which a wide range of political spectrum can generally agree on.

[1063] *Abrams*, *supra* note 236 at 630 (Holmes J dissenting); see also *Alvarez*, *supra* note 243 at 728 (illustrating Justice Holmes' quotation from *Abrams* decision as "the theory of our Constitution,' and noting that our "society has the right and civic duty to engage in open, dynamic, rational discourse"); *Citizens Against Rent Control v City of Berkeley*, 454 US 290 at 295 (1981) ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted."); *Red Lion Broad. Co v FCC*, 395 US 367 at 390 (1969) [*Red Lion*] ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail").

[1064] Relatedly, personal autonomy and the theory of democratic self-governance are the two other notable justifications associated with the value of free speech in the First Amendment. The former recognizes speech liberty as a powerful medium through which self-fulfillment for each individual is made possible. This theory has garnered a number of well-known First Amendment scholars like Martin Reddish and Edward Baker. The democratic paradigm identifies itself closely with democratic function in enabling an informed citizenry, as professed notably by Alexander Meiklejohn. It advances the most collectivist vision of free speech among the three theories.

Amendment that resonates to this day.[1065] The paradigm has been described as "talismanic;" one that best embodies the "theory of (our) Constitution"[1066] It is a powerful idea that vehemently rejects any form of intervention to maximize the uninhibited flow of "the marketplace's natural and dynamic progression."[1067] The marketplace argument has amassed wide support in the constitutional study of free speech for its content neutral approach with minimal, if any, regulation on the freedom. After all, there is nothing more American than the wheeling sounds of a *free* market.

However, in the new age of communication and public discourse, there is now a growing voice among First Amendment scholars distancing themselves from the marketplace model.[1068] The conceptual cornerstones first formulated by Justice Holmes were conceived nearly a century ago at a time when the only real means of public communication was through pamphlets or town gatherings. There were no effective instruments of mass communication. Listeners were exposed "to a fairly homogenous, powerful few"[1069] voices

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[1065] In the study of these so-called 'paradigms/justifications/rationale' of free speech, one may wonder as to whether they are ultimately mere rhetorical devices in hindsight. After all, what would be the point in providing vague philosophical notions supporting the basis of this freedom (as opposed to coherently interrelated and concrete rules based on legal positivism)? For instance, Robin Elliot has argued that there does not appear to exist any coherent presentation nor logical link in the ways that the justificatory rationales developed by the Supreme Court of Canada in cases involving freedom of expression. He remarked:

"To this point, the Court has shown no interest in exploring the meaning of any of these values in a careful and considered manner. It has preferred instead to proceed on an ad hoc, case by case basis, saying as little as it feels it can about the connection between each of them and the particular kind of expressive activity at issue in each case in order to ensure that the doctrinal role in question has been adequately fulfilled – and that has been often very little interest." Robin Elliot, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I -Taking Stock" (2012) 59 Sup Ct Rev 435 at 511. Pointing to the self-realization argument, to take another example, he remarked, "All that we have from the Court is a collection of ad hoc assertions about the connection, or lack thereof, between particular kinds of expressive activities and self-realization." (*ibid* at 495).

[1066] Nabiha Syed, "Real Talk about Fake News: Towards a Better Theory for Platform Governance" (2017) 127 Yale LJ F 337 at 349 [Syed].

[1067] *Ibid* at 340.

[1068] For the list of scholars sharing this critical view, see footnote 1140.

[1069] Syed, *supra* note 1066.

and "communicating to the masses was unattainable to most."[1070] Befittingly for the better part of the nineteenth and twentieth centuries, *more* speech was the traditional remedy to minds in disaccord.

Today, the situation has drastically changed. In a world where the new normal is not too little but *too much* speech, the overcrowded marketplace poses a significant impediment to consumers of information. The role of conventional journalism is undergoing a fundamental mutation in the era of the internet. Alternative means of mass communication through social media have altered the very functionality of how public debates are conducted and the ways in which public opinions are formed. Groundbreaking technological and digital revolutions have modified the very mediums through which humans express, communicate, share and interact with one another. The growing "online epidemic," as one commentator characterized it,[1071] of fake news only adds to the thickness of the cloud looming over the marketplace. The ability of persons to critically discern truth from falsity, or evaluate factually accurate news from an emotionally charged advocacy or political partisanship, is being obscured. It is thus of no surprise that the marketplace of ideas concept has been experiencing paralyzing difficulties. Colloquially put, the concept has lost its sting.

Recognizing these blurred lines between the old and the new also invites a whole host of thorny dilemmas with regard to the State's role in maintaining the overall health of the marketplace. Doesn't the State have a compelling national interest in overseeing the floor of public debate? Should the government remain idle when exterior forces deliberately engage in active insertion of false information into the veins of political discourse to interfere with

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[1070] *Ibid*.

[1071] Lee K Royster, "Fake News: Political Solutions to the Online Epidemic" (2017) 96 NC L Rev 270 [Royster].

democratic procedures? What of expressions that fan the flames of incivility, call for race war, or incite violence against religious minority groups but operate within the thin margins of non-prosecutable speech? Should the democratic system and the capacity of self-government be left to whichever speaker successfully manipulates public opinion for unwholesome political maneuvers? What of the legal and moral responsibilities of social media companies that have become the platform of false news propagation? Behind these immediate interrogations lies a more fundamental inquiry: Has the marketplace speech paradigm become obsolete? By consequence and relatedly, how does that outmodedness impact the individual's autonomy both as the listener and participant in a democratic system?[1072]

The combination of all the above observations raises doubts about the concern alluded to earlier that the admission of the identity-based theory would prejudice the philosophical justification behind the marketplace of ideas. This is because there is no longer a marketplace, at least not in its intended, original sense. The diversity and the democratization of ideas promoted by the marketplace are already factual guarantees given the free roaming of mass information securely capacitated by technological advancement and the enlargement of the speech economy. Individuals are freer than ever to post their personal views online, using almost unlimited forms of expressions, on any kind of subject ranging from art, music, health, sex, academic studies, and of course politics. The only fragment of the objection with any substantial traction would be that of content-based regulation, as adopting identity-based harm would seem to announce a position against the use of racially charged expression. But even so, that concern is an overblown one. Content-based regulation of, for instance,

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[1072] One critique encapsulated the problem with the marketplace theory this way: "… the marketplace-as-platform theory only erects a building; there are no rules for how to behave once inside." Syed, *supra* note 1066 at 341.

historically constructed and *de facto* socially recognized racial slurs (e.g. nigger, chink, crackers, kike) should not be viewed as excessive interference on the part of the Regulator. In fact, interior standards or guidelines adopted by social networking sites,[1073] television broadcasting and major internet streaming platforms,[1074] or generally the pressure of public opinion,[1075] have always exercised some degree of reasonable prohibition on a limited category of racist words *per se*.

It is my view that now more than at any other time in modern history, the marketplace model is displaying practical inadequacies to deal with challenges induced by the pervasive

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[1073] For instance, Twitter has several general guidelines and policies regarding abusive behavior. This includes targeted harassment, intimidation, silencing, unwanted sexual advances, or encouraging others to harass a person or group of persons. For more details, see online: https://help.twitter.com/en/rules-and-policies/abusive-behavior (even provides specific examples); Similar rules apply to violent threats and glorification of violence, a policy used in the aftermaths of mass murders, terrorist attacks, or rape. https://help.twitter.com/en/rules-and-policies/violent-threats-glorification; Expressions encouraging or promoting self-harm or suicide are also prohibited in the Twitter platform. See online: https://help.twitter.com/en/rules-and-policies/glorifying-self-harm. The breach of any of these interdicted instances (especially when repeated) can lead to account suspension or permanent ban from Twitter. Facebook too has its own set of 'Community Standards' that does not permit violence or criminal behavior but also hate speech. See "12. Hate Speech" under Part III. Objectionable Content of Community Standards. Online: https://www.facebook.com/communitystandards/objectionable_content (last visited 8 November 2018).

[1074] A recent example here in Canada is Faith Goldy, a far-right candidate for Toronto Mayor who sued Bell for refusing to broadcast her campaign ad. On the controversy, see Joseph Brean, "Far-right fringe candidate in Toronto mayoral race sues Bell for refusing to air her campaign ad", *The National Post* (9 October 2018), online: https://nationalpost.com/news/canada/far-right-fringe-candidate-in-toronto-mayoral-race-sues-bell-for-refusing-to-air-her-campaign-ad; Meanwhile, *Television Broadcasting Regulations*, 1987 SOR/87-49, s 8 provides: "During an election period, a licensee shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election or referendum." https://laws-lois.justice.gc.ca/eng/regulations/SOR-87-49/page-2.html#h-6; Multi-Game and Entertainment Streaming Site Twitter too has developed its own Community Guidelines that explicitly forbid violence or threats, hateful conduct or harassment, sexual content, gore, or self-destructive behavior. The violation of these terms of services can result in permanent ban from using the platform as either a streamer or simply a viewer. https://www.twitch.tv/p/legal/community-guidelines/

[1075] So was the case, for instance, with Donald Sterling, who, after a recording of him making racist comments was divulged by his former girlfriend, was banned from all NBA games, his team's training facilities, business dealings, as well as being hit with a fine of $2.5 million USD. For a detailed story on the incident, see Ramona Shelburne & The Associated Press, "Donald Sterling receives lifetime ban", ESPN (30 April 2014), online: http://www.espn.com/los-angeles/nba/story/_/id/10857580/donald-sterling-los-angeles-clippers-owner-receives-life-ban-nba. The more recent and controversial incident was with Roseanne Barr, who got her show cancelled on ABC after she compared former U.S. President Barack Obama's adviser Valerie Jarrett to an ape in a tweet. Following mounting public outrage, Roseanne virtually disappeared from public life amid reports her mental condition worsened after the controversy. On the story, see Jane Coaston, "ABC canceled Roseanne's show over a racist tweet", *Vox* (29 May 2018), online: https://www.vox.com/2018/5/29/17406014/roseanne-racism-abc-trump-twitter

usage and communicative methods of the internet. Indeed, the marketplace framework is unfit to the extent that the paradigm is too bedraggled to deter the development of social instances that hinder democratic participants' critical ability to make factually (accurate) and informed decisions during public discourse as well as in the system of self-governance. On the contrary, the previous model "plays a role in reinforcing the alternate realities that modern technology and social norms facilitate."[1076] The current stage of free speech is witnessing a general enlargement and precipitated diversification in terms of the multiplicity of available methods and access to various platforms to convey all expressions. Thus, the shift toward a new emerging paradigm recognizing and adapting to the new speech environment may in fact already be occurring as the previously dominant model suffers from seemingly incorrigible defects.[1077] This *shift*, both reflected in theoretical and practical terms, should be of paramount interest to any constitutional lawyer specializing in free speech constitutionalism.

There are two major ways through which the marketplace of ideas is currently being obfuscated to the detriment of the democratic participants and in the formation of public opinion as a whole. The steady decline and change in traditional journalism is one (4.1.1.). Interrelatedly but distinctly, the flourishing of fake news is another (4.1.2.). Both have one common denominator: the internet. The rapid ascension of the digital age and its attractiveness in offering a permanently connected status have extensively reshaped, enabled,

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[1076] Michael C Dorf & Sidney G Tarrow, "Stings and Scams: Fake News, the First Amendment, and the New Activist Journalism" (2017) 20 U Pa J Const L 1 at 19 [Dort & Tarrow]. The authors further observed that "… efforts to uncover hidden information that the public has an interest in knowing – are legally vulnerable, while … the propagation of opinions and purported statements of fact that rest on false information – are generally protected" (*ibid* at 10), and that "Journalism receives no special protection against general laws … By contrast, dissemination information, even if false, is protected for fear of harassment of those expressing unpopular viewpoints." (*ibid* at 23).

[1077] For shifting paradigms, the classic manual remains to this day the work of Thomas Kuhn. See Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 2012 first published 1962).

and facilitated the ways of mass communication in the twenty-first century. As such, the impingement of the internet and social media should not be viewed separately in the context of the malfunctioning of the marketplace. Instead, they must be understood as an interrelated ensemble, a bloc of the overall symptom. As of now, the exact effects directly emanating from the usage of the internet linked to social media are yet to be determined. That said, the undeniable association – if not outright complicity – that the online social media platforms play in the emission and amplification of false news represents serious social and legal problems that cannot be understated.

4.1.1. The Blurred Lines: The Erosion of Traditional Journalism and Its Impact on Truth-Telling

"*Facts are stubborn things*."

-John Adams

Imagine a marketplace where merchants sell items that show no labeling indication of their origins. There is no way to know for sure where the products have been made. Nor is it possible to know the way the product has been treated. The customers who purchase one of those items will not be able to verify the quality of what they are consuming. And more fundamentally, they will not be able to wholeheartedly trust those merchants.

The above analogy captivates the dire situation the marketplace (of ideas) has found itself in by changes in traditional journalism. The ascent of the internet has profoundly transformed traditional journalism to the extent that the conventional journal industry as we

knew it is either quickly changing or even disappearing.[1078] All signs appear to indicate that the orthodoxy of journalistic work is undergoing a process of both unprecedented alteration and irreversible decline. The picture is indeed very, very grim. Today, the newspaper printing industry of the dailies is approaching near-extinction.[1079] All major newspaper industries 'transferred' to online publication sometime in the last two decades.[1080] 'Facts' are googled in milliseconds. Stories break not on the news of the day but through Twitter (in fact, reversely, news media frequently report on stories first relayed through Twitter posts). Facebook is the repetitive, news-spitting and reproducing hive of "churnalism."[1081]

[1078] Anthony J Gaughan, "Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration" (2017) 12 Duke J Const L & Pub Poly 57 at 64-65 [Gaughan]. The author observes that "Traditional news journalism has shrunk dramatically both in terms of consumers and profitability" and points out that, for example, the average readership of daily newspaper has hit a 50-year low.

[1079] Newspapers began experiencing significant problems since the turn of the century, suffering heavy losses especially in terms of sharp reduction in both circulation and advertising. For instance, Rocky Mountain News has completely stopped paper printing in 2009 and so have Seattle Post-Intelligencer which instead have gone exclusively to web publications. Lili Levi, "Social Media and the Press" (2012) 90 NC L Rev 1531 at 1537 [Levi]. It is noted that "newspaper newsrooms are now 30 percent smaller than in 2000, and (…) between 2006 and 2009, daily newspapers cut their editorial spending by 1.6 billion per year." (*ibid* at 1538) (internal citations omitted). Further supporting this observation is that, "Between 2000 and 2015, print newspaper advertising revenue fell from about 60 billion to about 20 billion, wiping out the gains of the previous 50 years." Derek Thompson, "The Print Apocalypse and How to avoid it" *The Atlantic* (3 November 2016), online: https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/

[1080] For example, The New York Times began publishing online in 1996; The Washington Post went online in the same year, so did The Wallstreet Journal.

[1081] The term has been used by British journalist Nick Davies, who in turn attributed it to Waseem Zakir, another journalist for BBC in 2008. 'Churnalism' is understood to be the kind of cheap journalism in which pre-packaged news reports or stories of other news or reporters are "churned" to be presented as news mostly to reduce time-consuming fact verification or undertaking necessary investigation before publishing. Nick Davies lamented the situation as the following:

"…now, more than ever in the past, we are likely to engage in the mass production of ignorance because the corporations and accountants who have taken us over have stripped out our (journalists) staffing, increased our input and ended up chaining us to our desks so that generally we are simply no longer able to go out and make contacts or make stories or even check facts. Where once we were active gatherers of news, we have become passive processors of second-hand material generated by the booming PR industry and a handful of wire agencies, most of which flows into our stories without being properly checked. The relentless impact of commercialization has been our journalism reduced to mere churnalism." Nick Davies, "Churnalism has taken the place of what we should be doing: Telling the Truth" *Press Gazette* (4 February 2008), online: http://www.pressgazette.co.uk/nick-davies-churnalism-has-taken-the-place-of-what-we-should-be-doing-telling-the-truth-40117/

See also, Amy Mitchell & Katerina Eva Matsa, "The declining value of U.S. newspapers" *Pew Research Center (FACT TANK)* (22 May 2015), online: http://www.pewresearch.org/fact-tank/2015/05/22/the-declining-value-of-u-s-newspapers/ The Article provides a very clear picture of the decline in value in the last two decades with the examples of The Boston Globe, Philadelphia Inquirer, Chicago Sun-Times, and

The slow yet certain death of the newspaper printing business is not a news in of itself.[1082] With the arrival of the digital epoch, the business of printing newspaper rapidly became unsustainable, forcing many to abandon the operation altogether.[1083] For the few journal/news companies that have managed to preserve some level of their core readership number from being swept away,[1084] these exceptions tend to be limited to a very few big players that are viewed as the 'elites' of journalism companies *par excellence* like *The New York Times.* Other less prestigious newspapers have not been so fortunate.[1085] Just in the span

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Minneapolis Star Tribune.

[1082] The grim foretelling is well accounted in a June 9th report delivered in 2011 by the Federal Communications Commission's Working group. US, Federal Communications Commission's Working group, *The Information Needs of Communities: The changing media landscape in a broadband age* (Washington, DC: The Commission, 2011) [Information Needs of Communities or "INoC"]. The report marked several major observations on the declining state of journalism and news broadcasting in the United States. For instance, it noted that:

"Ad revenue dropped nearly 48 percent between 2005 and 2010, and with it the industry's annual spending on reporting and editing capacity dropped by $1.6 billion, from 2006 to 2009, a reduction of more than 25 percent, according to the *Pew Research Center's Project for Excellence in Journalism* and Rick Edmonds of the *Poynter Institute*. The number of full-time journalists at daily newspapers fell from a peak of about 56,900 in 1989 to 41,600 in 2010, a level not seen since before the Watergate era." (*ibid* at 34).

The same report points out that, "By 2005, the Internet had begun seriously undercutting newspaper revenue. In 2000, total newspaper print advertising amounted to almost $48.7 billion. Ten years later, it had plummeted to $22.8 billion, a loss of more than 50 percent." (*ibid* at 39). The full report can be found at: https://www.fcc.gov/general/information-needs-communities#read

[1083] See e.g. *ibid* at 41 (listing newspapers that closed or eliminated a newsprint edition between 2007 and 2010). And even if they were to somehow maintain the printing department, that sector had to be significantly cut back to minimize financial loss. For instance, Wall Street Journal has decided to scale back its print edition outside the U.S. but instead focusing solely on digital subscriptions beginning mid-2017. Glamour magazine, one of Britain's leading magazine, too, went digital. It has since completely stopped monthly editions and instead publish essays twice annually; See also Gaughan, *supra* note 1078 at 65 (observing that "20,000 newspaper workers have been laid off since the 1990s, and the financial value of the newspaper industry has contracted precipitously.").

[1084] Jack Shafer, "Why Print News Still Rules" *Politico* (10 September 2016) online: https://www.politico.com/magazine/story/2016/09/newspapers-print-news-online-journalism-214238; see also Ed Grover, "New Research shows 89% of newspaper reading is still in print" *City University London* (1 February 2017), online: https://phys.org/news/2017-02-newspaper.html

[1085] For the list of newspapers gone bankrupt or severely lost their viewership, see footnote 1079. However, for premier newspapers like The New York Times, the business has been in fact booming lately. The New York Times has added a record addition of 139000 online subscribers in the first three months of 2018, thus boasting a total number of 3.7 million subscribers. The revenues from subscription and the dailies make up to 63% of the newspaper's revenue, as opposed to only 30% from ad revenues. As recently as in 2011, that ad revenue was more than 50% of income for The New York Times. Le Monde & AFP, "Le "New York Times" compte 3,7 millions d'abonnés", *LeMonde* (4 May 2018), online: http://www.lemonde.fr/actualite-medias/article/2018/05/04/le-new-york-times-compte-3-7-millions-d-abonnes_5294075_3236.html

For alternative means, newspapers launched online have attempted to increase their revenue by posting ads and offering subscription deals in the process of transition from paper-based to mobile forms of news

of the last year alone, at least 36 percent of American newspaper companies have had to dismiss some of their employees,[1086] while newsroom employment was cut by 23 percent between 2008 and 2017.[1087] Reduction in the number of staff members has reached a point where the *American Society of News Editors* has "stopped keeping track of the bloodletting in 2016 after the number of newsroom personnel had tumbled every year for the previous decade."[1088] Similar digression is also partially reflected in the television news industry.[1089]

One key factor contributing to the decline of traditional journalism is in the process of journalistic methods itself as well as the sprawling of new sources and amplifying public platforms. In fact, social media like Facebook and Twitter have become the new platform to break news or share first-hand information.[1090] YouTube is now home to hundreds of

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publications in the hopes of maintaining or increasing their business income, but this adjustment tactic has had a limited effect. For instance, it was found that newspaper advertising had decreased 71% by 2010 and 48% for advertising revenues. The commentator noted that the revenue generated from advertising that was transferred from papers to online news platforms was insufficient to make up for the loss of advertising from the print editions. Levi, *supra* note 1079 at 1539. The ad revenue disparity appears to be one of the more telling indicators as to whether newspaper printing industry was doomed to meet its demise when compared to ad revenues earned by online ads. For example. It was found that "from 2005 to 2010 online ad revenues for the newspaper industry grew more than $1 billion—but print advertising declined $24.6 billion." See INoC, *supra* note 1082 at 42.

[1086] Elizabeth Grieco, Nami Sumida & Sophia Fedeli, "About a third of large U.S. newspapers have suffered layoffs since 2917", *Pew Research Center (FACT TANK)* (23 July 2018), online: http://www.pewresearch.org/fact-tank/2018/07/23/about-a-third-of-large-u-s-newspapers-have-suffered-layoffs-since-2017/

[1087] Elizabeth Grieco, "Newsroom employment dropped nearly a quarter in less than 10 years, with greatest decline at newspapers*"*, *Pew Research Center (FACT TANK)* (30 July 2018), online: http://www.pewresearch.org/fact-tank/2018/07/30/newsroom-employment-dropped-nearly-a-quarter-in-less-than-10-years-with-greatest-decline-at-newspapers/

[1088] Paul Farhi, "As a secretive hedge fund guts its newspapers, journalists are fighting back" *The Washington Post* (13 April 2018), online: https://www.washingtonpost.com/lifestyle/style/as-a-secretive-hedge-fund-guts-its-newspapers-journalists-are-fighting-back/2018/04/12/8926a45c-3c10-11e8-974f-aacd97698cef_story.html?noredirect=on&utm_term=.eaa51342ad47

[1089] Peter Preston, "TV news faces a threat familiar to newspapers", *The Guardian* (17 April 2016), online: https://www.theguardian.com/tv-and-radio/2016/apr/17/tv-news-audience-decline-fast-as-newspaper-circulation-fall (citing a study conducted by the Oxford University in 2016 that concluded that there is an ongoing reduction of television news viewers at the same pace that newspaper industry is losing theirs, and in particular in young viewership). National television news broadcasting and cable news companies have all witnessed their viewership steadily decrease by more than 50 percent of the audience they had in 1980. See Emily Guskin, Tom Rosenstiel & Paul Moore, "Network News: Durability & Decline", *State of the News Media (2011) Pew Research Center* (19 March 2011), online: http:/stateofthemedia.org/2011/network-essay/ (last visited April 28, 2018). Television news is not the primary source of information for half of American adults

[1090] To cope with the growing number of journalists and information-gatherers/seekers, Facebook has even invented a new tool to assist them in their journalistic work. See *Facebook Journalism Project*, available at

dedicated, independent journalistic enthusiasts as well as major news organizations.[1091] In fact, there is evidence that social media platforms have effectively replaced conventional news as the primary source of daily news for almost half of the American population. [1092] This means that professional journalists and *citizen* journalists alike rely heavily on social media sites not just to announce a story but also to gather bits and pieces of information to either supply or complete their own news story.[1093] One way to view this 'interfusing' phenomena is that the conventional method of producing news is no longer a one-way operation. As opposed to professionally accredited journalists presenting their polished stories to the public, news nowadays is an ongoing process.[1094] In other words, news is in the making in real time, an imperfect production that is crescively finished by scattered information-gatherers. This transmuted the news-making process into an inclusive 'participatory' news-making procedure,[1095] giving a sense of empowerment to otherwise

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https://www.facebook.com/facebookmedia/get-started/facebook-journalism-project; E-Learning Courses for Journalists (brought by Facebook), available at https://www.facebook.com/facebookmedia/journalists (last visited April 28th, 2018).

[1091] Vice News is an excellent example of this, as it is almost exclusively distributed via its official Youtube Channel with a solid viewer base, that often bring first-person narrated, unfiltered production of reporting. At the same time, all major news media companies like CNN, Fox News, and MSNBC all have their official Youtube channels. Radio or Show hosts, political commentators and cultural critics have also found new homes (and source of revenue) on Youtube. On various implications and impacts on how Youtube has on journalism, see Tom Rosenstiel & Amy Mitchell, "Youtube & News, A New Kind of Visual Journalism", *Pew Research Center's Project for excellence in journalism* (16 July 2012), online: http://assets.pewresearch.org/wp-content/uploads/sites/13/2012/07/YouTube-the-News-A-PEJ-Report-FINAL.pdf; Matt Schiavenza, "How Youtube Changed Journalism", *The Atlantic* (14 February 2015), online: https://www.theatlantic.com/technology/archive/2015/02/how-youtube-changed-journalism/385523/

[1092] Gaughan, *supra* note 1078 at 65 ("Facebook, a social media website, is now a news source for 44 percent of Americans.").

[1093] See Paul Farhi, "The Twitter Explosion" (June/July ed 2009) AM Journalism Rev at 26-28 (describing journalistic adoption of Twitter for scoops and breaking news); See also Dylan Byers, "Bloomberg, 'Post' Tap Social Media Companies for GOP Debate", *ADWEEK*, (10 October 2011), online: http://www.adweek.com/news/technology/bloomberg-post-tap-social-media-companies-gop-debate-135679

[1094] See INoC, *supra* note 1082 at 16. For a description of crowd-based fact checking, (also *ibid* at 243).

[1095] Levi, *supra* note 1079 at 1548. Ordinary citizens as well as journalists can crowd-source information, supplement an incomplete story with new, actively developing factual elements, and ask for feedbacks from the audience. For example, CNN's iReport is a citizen journalism initiative allowing ordinary people, worldwide, to provide pictures of breaking news. CNN's iReport claims that its stories are not edited, fact checked, or screened before being posted. For further information about CNN iReport, see *CNN*, http://ireport.cnn.com/about.jspa). The creators of news can attribute or invite the news consumers with real time access by continuously updating a story.

ordinary consumers of the news to now be a part of the news production through various mediums of involvement. One commentator termed this a "democratization of information,"[1096] a sort of twenty-first century journalistic revolution characterized by transparency and realism, and produced by the sheer rawness of first-hand, unprocessed information.

One way to view the blurred lines creeping into what used to define conventional journalistic methodology, is that it is in the natural inclination in people to 'humanize' journalists and their work.[1097] Indeed, it is far more facile (and even appealing oftentimes) to relate to personally-motivated stories with a humane touch, rather than dry, corporate-smelling, or politically correct cable news, often accused of advancing certain ideological agendas. This humanizing tendency is nothing abnormal, considering people's desire to share one's subjective interpretations of given experiences with others.[1098] Whether the purpose of that sharing be to seek affirmation or engage in further discussion, people feel the need to invite others to partake in the decipherment of subjective interpretations.[1099] From this perspective, the modern day's journalistic penchant to activism in social issues or even biased political affiliation may be nothing out of the ordinary but "a return to the roots of

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[1096] Ghaugan, *supra* note 1078 at 65. In contrast, the often-conservative presentation or exclusive reporting of news has increasingly alienated viewers by its limited access to the news-production process. In the hyperactive 24/7 updating news cycle whose consumers need constant state of galvanization, the old-fashioned method of news output has become simply too *boring* to conserve loyal followers.

[1097] Renee Hobbs, "The Blurring of Art, Journalism, and Advocacy: Confronting 21st Century Propaganda in a World of Online Journalism" (2013) 8 ISJLP 625 at 633 [Hobbs].

[1098] *Ibid* (noting that "Humans need novelty and complexity in order to pay attention, and too often, standardized, familiar genres-like traditional journalism – can deaden our senses. The representation of reality needs constant renewal.").

[1099] *Ibid* at 633-34. According to Hobbs, be it writers, journalists, or artists, they aim to "wake up audience" through their works. He compares the blurred lines and motivations behind the blurring to filmmaking or theater, pointing out that "to represent reality, you sometimes have to fake it" (referring to documentary filmmakers beginning with Robert Flaherty's *Nanook of the North*), and that it is "an established principle of theatre, of art, that the audience completes the illusion – makes it more real than real." (quoting Anthony Kosner's comment on Mike Daisey and KONY 2012 in Forbes magazine).

journalism" itself.[1100] It would appear even more so given that the concept of journalism as purely factual presentation is a notion belatedly concretized during the twentieth-century.[1101]

Whichever benefits the changes in journalism have sown, however, did not go unpunished. If the new journalism has opened doors to positive changes to information discovery and dissemination, it also has brought along serious problems. The once-commanding authority of the institutional affiliations of the mainstream journals has been eroded[1102] as the pool of news-producing voices – often amateurish and unaffiliated – grew. The public's trust in the reputation of newspapers as a reliable source of information is not as it used to be. This is particularly true during (stretched) strained political periods that deepen right-versus-left polarizations. The right to news reporting is no longer seen as the sole legitimate possession of a few oligopoly of mega news media corporations. This has yielded the "deinstitutionalization" [1103] of the traditional role of the press.

These fundamental shifts in the traditional roles and work methodologies of journalism do not bode well with relation to reporting facts – or truth – as they are. The acceleration of journalism production with little to no regard for accuracy runs the risk of affecting the integrity of the foundational objective of the press: informing the public. The failure to do so strikes a fatal blow to the existential duty of journalism "because of its

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[1100] Dorf & Tarrow, *supra* note 1076 at 10.

[1101] *Ibid* at 24 (noting that "in prior periods, journalism was a branch of activism.") ("the media were shaped by politics from the beginning").

[1102] Levi, *supra* note 1079 at 1554.

[1103] *Ibid* at 1553. The commentator raises several negative aspects resulting from the deinstitutionalization of the traditional press, among which is on the accuracy front. Due to a hyperactive news cycle where the championing virtue is expeditiousness, fact-checking process has been pushed aside to something of secondary importance. The rapidity of news-sorting, the multiplicity of source gathering methods, and even accredited journalists who depend on second-handed online materials often find it inconvenient to confirm original sources. For example, Twitter has become lax with regard to fact checking and verification processes for journalists' and being more lenient with accuracy errors. (*ibid* at 1556). The decrease in staff workforce as well as multi-task joggling from microblogging to chasing down stories to writing actual news articles have made it difficult to apply strict conventional journalistic standards.

connection to truth telling."[1104] Fact, or truth, is best told by an impartial story-teller. And the best way to ensure that critical objectivity is through requirements of professionalism *and* the strict institutional structure that observes those professional standards. Yet in modern journalism, there is a growing intensification of blurred lines between journalism, hyper-partisan opinions, and advocacy that closely mimics journalism. The disappearance of the "detached professional stance"[1105] is an open invitation for partisan coloration or contextually misleading reporting of facts. Increasingly, official online pages of news outlets are taken captive by sensationalizing narratives that are intentionally fabricated to generate maximum click-bait. "Infotainment"[1106] is the new norm. Lack of professional training, and thereby lack of journalistic experience or expertise, can lead famished readers astray or even purposefully mislead and manipulate public opinion as it comes into contact with unassessed substances. The overall *cheapening*[1107] of postmodern online journalism overwhelmingly motivated by attention-seekers or profit-grabbers is destined to profit off the readers as revenue-generating 'clients,' rather than citizens whose public interests and decision-making abilities desperately rely on being keenly aware of important public policies. Deploring the current state of journalism, at least one author has gone as far in his critique as to propose that a new radical definition be baptized to the press, to exclusively reserve journalistic accreditation to journalists who serve certain First Amendment objectives.[1108] However, given the

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[1104] *Ibid* at 1558.

[1105] Jane B Singer, "Journalism Ethics Amid Structural Change" (Spring 2010) 139:2 Daedalus 89 at 93.

[1106] Hobbs, *supra* note 1097 at 628.

[1107] Tim Wu, "How Twitter Killed the First Amendment", *New York Times* (27 October 2017), online: https://www.nytimes.com/2017/10/27/opinion/twitter-first-amendment.html

[1108] Chris Edelson, "Lies, Damned Lies, and Journalism: Why Journalists are Failing to Vindicate First Amendment Values and How a New Definition of the Press Can Help" (2012) 91 Or L Rev 527 [Edelson]. The author is highly critical of what he calls the "balance trap" problem (creating false equivalence/two sides of the coin-argument that effectively facilitates lies by politicians and fails to hold wrongdoings accountable) and proposes to take away press membership from 'journalists' who do not abide by the First Amendment values of truth and democratic competence to inform the public. The notion is, evidently, quite extreme.

consideration that professional journalists working with institutional badges enjoy the benefits of the law only insofar as ordinary citizens in terms of the First Amendment protection,[1109] the suggestion seems far too rigorous.

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As this section has aimed to demonstrate, the general decline in traditional journalism practices combined with the rise of new forms of storytelling in the digital generation, with its pros and cons, has directly contributed to the tenuousness of the marketplace of ideas concept. Lack of professional accountability for accuracy, deinstitutionalization, and an absence of impartiality all blur the necessary lines required in the journalistic truth-telling task and its existential responsibility to the people. I have argued that it is the responsibility of journalists, as truth-reporters and fact-sharers, to conduct the necessary due diligence. Only then, will the information-consuming citizens be correctly equipped with facts to make decisions in ameliorating their society. And only then, will the credibility of the marketplace be secure and hopefully restored. Without these, it is only a matter of time that the condition of the marketplace deteriorates.

The problem, however, becomes a lot more serious when this uncomfortable state of journalism begins affecting important election seasons. It is one thing to do so in art, theatre, movies and even in description of cultural conflicts in the name of journalism. But it is quite another when it directly interferes with the democratic process of a sovereign nation. The next section therefore zooms in on the recent fake news phenomenon in the United States and

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[1109] The fact that journalists are not recipients of special treatment for their professional status is affirmed by caselaw. See *Zurcher v Stanford Daily*, 436 US 547 (1978) (holding that newspapers or media outlets do not benefit from special procedures); *Branzburg v Hayes*, 408 US 665 (1972) (ruling that there is no privilege afforded to reporters to hide confidential sources when there is a subpoena).

how that is detrimental to the maintenance of the marketplace.

4.1.2. Fake News in the Post-Truth Era

"*Falsehood flies, and the Truth comes limping after it*."

-Jonathan Swift

In early December 2016, a man was arrested at a D.C. pizzeria for assaulting the cashier of the restaurant with a rifle gun. The individual, identified as Edgar Maddison, drove from his North Carolina hometown to the restaurant in Washington D.C. to take matters into his own hands after reading an online story trending on twitter and reddit alleging that the then-presidential candidate Hillary Clinton and her husband used the pizza place for kidnapping and trafficking children.[1110]

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About six months before this incident, a news story claiming that Pope Francis had endorsed Donald Trump for the next president of the United States was heavily circulating on the internet.[1111] The story was one of the most trending in the five top fake political stories on Facebook that was shared and commented about 961,000 times.[1112]

[1110] For a detailed investigative report and findings on the pizzagate conspiracy's origin and propagation, see Amanda Robb, "Pizzagate: Anatomy of a Fake News Scandal", *Rolling Stone* (16 November 2017), online: https://www.rollingstone.com/politics/news/pizzagate-anatomy-of-a-fake-news-scandal-w511904 (last visited March 27th 2018). (it recounts how after months of in-depth investigation by two teams of researchers, how original pizzagate "seed" was planted by an old woman in Joplin, Missouri, how she may have been manipulated by other players as one of the many sources to disseminate the conspiracy theory using anonymous private accounts via Reddit and 4chan sites)

[1111] Pope Francis' supposed endorsement of Trump originated on the fake/"satirical" website WTOE 5 News, with the headline "Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement."

[1112] Craig Silverman, "Here are 50 of The Biggest Fake News Hits on Facebook from 2016", *Buzzfeed* (30 December 2016), online: https://www.buzzfeed.com/craigsilverman/top-fake-news-of-2016?utm_term=.fuL4Z7OG9#.eqYDWdm4k

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WND, a right-wing political online newspaper site, continues to insinuate at the time of this writing that the birth certificate of the forty-fourth president of the United States may be fraudulent.[1113]

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In 2016, a news story from the *Christian Times Newspaper* was appearing in people's social media newsfeed, alleging that "Tens of Thousands" of fraudulent Clinton votes were found in a warehouse in Ohio.[1114] It turned out that the article was a complete fabrication by a college graduate electrical technician in his early twenties. Before being found as a hoax, the article was viewed no less than 6 million times.[1115]

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4.1.2.1. Defining Fake News and the Law's Struggle

The above mentioned 'news stories' are only a few of the countless examples of how fake news successfully infiltrated the public discourse in the 2016 American presidential

[1113] The 'article' is still alive written by the a supposed pseudonym of "Bob Unruh" in WND's online site posted on Dec. 17th, 2016 (http://www.wnd.com/2016/12/evidence-obama-birth-certificate-fake-heading-to-congress/) The website continues to put forward the birth certificate theory most recently in the following month with an article, "CNN Resurrects Obama Birth Certificate Question" posted on Jan. 11th, 2018. (http://www.wnd.com/2018/01/cnn-resurrects-obama-birth-certificate-question/) (last visited on March 27th, 2018).

[1114] The story was fabricated by a Republican legislative aide in Maryland, Cameron Harris who had created a fake internet newspaper to circulate the story. On the details of the uncovering this fake news, see Scott Shane, "From Headline to Photograph, a Fake News Masterpiece", *New York Times* (18 January 2017), online: https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris; Ovetta Wiggins, "Aide to Md.Lawmaker fabricated article on fraudulent votes for Clinton", *Washington Post* (18 January 2017), online: https://www.washingtonpost.com/local/md-politics/aide-to-md-lawmaker-fabricated-article-on-hillary-clinton-rigging-the-election/2017/01/18/5219bd0c-ddd7-11e6-acdf14da832ae861_story.html?utm_term=.50b676a48e72

[1115] *Ibid*.

election.[1116] Although the cited instances are outstanding, like the D.C. pizzagate incident, they aptly illustrate the kind of facile pervasiveness and the real danger that can result when grossly baseless reports are translated by feebler minds. In the midst of the 2016 U.S. presidential election, the subject of 'fake news' came to receive national, and indeed international attention. Fabricated stories circulated online and flooded newsfeeds in widely used social networking sites.[1117] In short, false news overwhelmed discourse on virtual platforms.

Despite the popular usage of the term, the notion of 'fake news' knows no unitary definition. In fact, it is rather difficult to ascertain whether this phenomenon deserves a new look when considering that there always has been a heightened presence of hyper-inflated, misleading, and quite often factually inaccurate news in important election seasons. For example, in the history of American political life, the practice goes back as early as the 1800 presidential contest between Thomas Jefferson and John Adams.[1118] Mud throwing between

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[1116] This and specifically the fact that there were both foreign (Russian) and domestic spreading of false news in the said election have been substantiated by the various American Intelligence institutions. The premise was equally acknowledged by the three social media/tech companies (Facebbook, Twitter, and Google) before the Senate Judiciary Committee hearing in October 2017. The representatives of the Silicon Valley openly admitted that there were sophisticated, highly organized campaigns of both foreign entities and domestic organizations/individuals who systematically and purposefully spread false information on the internet through their companies' platforms with the common objective of affecting potential voters leading up to the election. See Tom LoBianco & Ryan Nakashima, "Senators blast Facebook, Twitter, and Google in Russia Probe", *The Associated Press* (31 October 2017), online: https://apnews.com/63707b60cfa2487d8fb277648df0ef00 (last visited March 27th, 2018). The answers of the counsels were unsatisfactory to many Senators sitting on the Committee even as they reluctantly admitted that they could've done better and that "In highsight, we should have had a broader lens" (Colin Stretch, Facebook's general counsel). For highlights of the hearing, see Callum Borchers, "Four takeaways from the Senate Intelligence hearing with Facebook, Twitter, and Google", *Washington Post* (1 November 2017), online: https://www.washingtonpost.com/news/the-fix/wp/2017/11/01/four-takeaways-from-the-senate-intelligence-hearing-with-facebook-twitter-and-google/?utm_term=.bec3aabd3e2b

[1117] For instance, according to Colin Stretch, the general counsel for Facebook, in addition to 126 million American Facebook users, another 4 million users of Facebook could have been exposed to Russian propaganda earlier as well as 16 million Americans on Instagram, thus totaling roughly 150 million Americans. See David McCabe, "What Facebook, Google and Twitter told the Senate Intel Committee", *Axios* (1 November 2017), online: https://www.axios.com/what-facebook-google-and-twitter-told-the-senate-intel-committee-1513306593-acf2d8d6-3459-45c5-963b-482e42071d52.html

[1118] Ann C Hundley, "Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas" (2017) 92 Tul L Rev 497 at 499-502 [Hundley]. She observes that the recent 2016 Presidential election is similar to the 1800 election in which the two contenders (Thomas Jefferson and John Adams) "flung mud so

politicians is no *new* news itself. Yellow journalism has always existed to taint or discredit an opponent's social regard in the hopes of swaying popular votes.[1119] One simple definition attributed to fake news in this context would be "false stories about political candidates or issues that are spread through social media sites (…) with the goal of "distort(ing) the electoral process."[1120] More broadly put, fake news is "the terms generally refer(ing) to baseless allegations republished in the guise of a genuine news story."[1121] As such, fake news is designed to deceitfully feint voters into changing their political leanings - and ultimately their votes - by influencing their views on a targeted political candidate. Presidential candidates are not the only piecemeal; it has been found that fake news is specially generated, focusing on highly divisive issues such as race, immigration, or religion.[1122]

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violently at each other that both were permanently stained" (*ibid* at 499). The intensity of personal insults grew so heated to the point that Jefferson's side illustrated their political foe as "a hideous hermaphroditical character which has neither the force and the firmness of a man, nor the gentleness and sensibility of a woman," before that same pen eventually vituperated Jefferson on rumors of his affairs with his slave/mistress. (*ibid* at 500, quoting from John Dickerson, "The Original Attack Dog", *Slate* (9 August 2016), online: http://www.slate.com/articles/news_and_politicis/history/2016/08/james_callender_the_attack_dog_who_took_aim_at_alexander_hamilton_and_thoimas.html).

[1119] Ghaugan, *supra* note 1078 at 67 ("After all, American politics have a long history of baseless and defamatory allegations."); Syed, *supra* note 1066 at 337 (noting that "fake news – construed as propaganda, misinformation, or conspiracy theories – has always existed… tabloids have long hawked alien baby photos and Elvis sightings" but distinguishes the present crisis by highlighting how "we have been suddenly inundated by false information – purposefully deployed – that spreads so quickly and persuades so effectively. This is a different concept of fake news…").

[1120] Joel Timmer, "Fighting Falsity: Fake News, Facebook, and the First Amendment" (2017) 35 Cardozo Arts & Ent JJ 669 at 670-71 [Timmer].

[1121] Ghaugan, *supra* note 1078 at 66.

[1122] Fake news advertisements on Facebook or fake Twitter accounts (or automated bots) selectively "target" specific political demographics among liberals and conservatives alike on a number of heated topics such as police brutality, Islamophobia and LGBTQ rights. See e.g., Olivia Solon & Sam Levin, "Divisive Russian-backed Facebook ads released to the public", *The Guardian* (1 November 2017), online: https://www.theguardian.com/technology/2017/nov/01/facebook-ads-russia-us-election-fake-news-released-public. This "targeting" practice by fake news is especially important because it further cements the assumption that the planters of fake news did so intentionally to divide and polarize voters in an election season and because Facebook revealed in September 2017 that a Russian Troll factory located in St. Petersburg in Russia (under the company name of *Internet Research Agency*) was behind all the purchases of more than 3,000 ads inseminated on Facebook that was worth more than 100,000 US dollars. See also, Clarence Page, "Don't let Russian internet trolls stir racial unrest here", *Chicago Tribune* (27 October 2017), online: http://www.chicagotribune.com/news/opinion/page/ct-perspec-page-trolls-russia-trump-blacktivist-1029-20171027-story.html (last visited March 27th, 2018). Nor is fake news an American occurrence. In fact, French President Emmanuel Macron suffered from false rumors spread by automated bots during his presidential bid. Davie Gilbert, "Russia's Fake News Machine is Targeting the French Elections", *VICE News* (23 April 2017),

Effective counter-measures against the spread of fake news have yet to be found. One source of confusion stems from the legal identification of the type of speech that fake news represents. One commentator has proposed that fake news be legally classified as commercial speech.[1123] That proposition may ring truthful, considering that for one, commercial speech does not enjoy the same degree of protection awarded to political speech if the proposition is accepted,[1124] and two, false news internet sites' income is heavily reliant on accompanying advertisements. But even so, numerous obvious contextual factors counter that proposition. Fake news tends to reach its peak in terms of intensification during important electoral seasons. The contents and the targeted subjects of denigration almost always concern political candidates running for public office at that time. For these reasons alone, it is unlikely that fake news can be treated as mere commercial speech.

Legally combatting fake news is no small challenge. Consider the option of filing a defamatory action against a false rumor made by an obscure online website, for example. We hardly ever hear of political candidates personally file an action for defamation against websites or owners of the websites that may contain articles falsely claiming or attacking the political figures' personal character or integrity. They do not confide in that legal trajectory

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online: https://www.vice.com/en_us/article/yp7npk/russias-fake-news-machine-is-targeting-the-french-elections South Korea, too, has experienced similar misfortunes during the last presidential and more recently, gubernatorial elections. Fabian Kretschmer, "Fake News in Korea", *Deutche Welle* (23 April 2017), online: http://www.dw.com/en/fake-news-in-korea/a-38550660; Kim Se-Jeong, "Fake New going rampant", *The Korea Times* (3 February 2017), online: http://koreatimes.co.kr/www/news/nation/2017/02/113_223196.html. Canada's upcoming 2019 federal election too have been warned. Levi Garber, "Federal government can't do much to fight fake news", *The Globe and Mail* (21 February 2018), online: https://www.theglobeandmail.com/news/politics/federal-government-cant-do-much-to-fight-fake-news-heritage-canada-documents/article38059860/; Joan Bryden, "Could Canada fall prey to an election cyberattack?", *Maclean's* (13 January 2018), online: http://www.macleans.ca/politics/could-canada-fall-prey-to-an-election-cyberattack/

[1123] See e.g., John Allen Riggins, "Law Student Unleashes Bombshell Allegation You Won't Believe: Fake News as Commercial Speech" (2017) 52 Wake Forest L Rev 1313 (arguing that fake news should be treated as commercial speech because it is a poor mimicking of journalistic value speech that is created to intentionally mislead the readers for financial incentive).

[1124] When evaluating First amendment protection of commercial speech, courts have focused on the methods and content of commercial communication as well as the intent of the speech. (*ibid* at 1319).

because it is foreseeably unrealistic. It is often difficult to identify or even locate the original writers of false stories. The Internet knows no physical boundaries and very often, false news is generated from abroad just as from inland as was the case with Russian troll farms and Macedonian teenagers. [1125] Contributors to false stories frequently use anonymity or fabricated pseudonyms. Furthermore, an action in defamation law is not what is used to be. The caselaw of defamation saw the enhancement of various defense mechanisms made available to libel defendants' legal inventory in the last decade. It is unlikely that a citizen's opinion concerning matters of public interest expressed on public forums would be convicted of defamation.[1126] Journalists benefit from either fair comment or responsible communication defenses as long as their professional diligence is duly completed.[1127] Furthermore, there has been legislative trends in Canada and in the United States to decrease the weaponization of defamatory lawsuits against the chilling effects on the First Amendment interests. For example, twenty-eight States in the U.S. have now registered anti-SLAPP dispositions in their States statutes while West Virginian and Colorado courts have recognized anti-SLAPP defense.[1128] Likewise, three Canadian Provinces (Québec,[1129] Ontario,[1130] and British Columbia[1131]) have embraced specific anti-SLAPP laws. But putting all these aside,

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[1125] Independent investigations conducted by Buzzfeed and The Guardian concluded that "more than 100 sites posting fake news were run by teenagers in the small town of Veles, Macedonia." It was also found that a site that was responsible for producing four of the ten most trending fabricated stories on Facebook was managed by a 24-year-old Romanian man. See Hunt Allcott & Matthew Gentzkow, "Social Media and Fake News in the 2016 Election" (Spring 2017) 31:2 Journal of Economic Perspectives 211 at 217.

[1126] Royster, *supra* note 1071 at 274 (citing a recent New York case in which the judge dismissed a defamation claim against President Donald Trump's statements made on his social media accounts during the presidential bid as being merely personal opinions. *Jacobus v Trump*, 51 NYS (3d) 330 at 39-40 (NY Sup Ct 2017).

[1127] These cases have been studied in Chapter 2. See *Grant*, *supra* note 83 (expanding on libel defense of public interest and responsible communication for journalists), *WIC Radio, supra* note 84 (establishing fair comment defense).

[1128] For the list of the twenty-eight States' anti-SLAPP statutes and major cases, their organized classification appears on https://anti-slapp.org/your-states-free-speech-protection/; http://www.medialaw.org/component/k2/item/3494

[1129] *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate, 2009*, CQLR 2009, c C-12, amending RSQ c C-25.

[1130] *Protection of Public Participation Act, 2015*, SO 2015, c 23 (Bill 52).

[1131] Bill 32, *Protection of Public Participation Act*, *2018*, 3rd Sess, 41st Parl, British Columbia, 2018.

individual defamation actions fail to address the collective dimension of the fake news head-on. As one commentator noted, too frequently "we analyze the problem of fake news by focusing on individual instances, not systemic features of the information economy."[1132] As such, the issue of fake news must be dealt as a *social* problem and not necessarily as separate, unrelated individual cases.

Another angle of fake news is requiring stricter control at the level of online transmitters of false materials. In other words, imposing tight regulations on social media giants like Facebook, Twitter and others. These calls have already been made in the aftermath of the 2016 U.S. Presidential election storm.[1133] The recent Congress' scolding session of Mark Zuckerberg's D.C. apology tour[1134] is an example. However, it is unlikely that any comprehensive government-crafted legislative measures could be enforced in social media's online domains. The very idea of regulating online speech does not serve the interests of social media companies in terms of its public relations in the first place.[1135] While Facebook

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[1132] Syed, *supra* note 1066 at 338.

[1133] For example, at the wake of recent revelations by a whistleblower regarding the misuse of users' data between Facebook and Cambridge Analytica, Apple's CEO Tim Cook called for more regulations. This was immediately followed by IBM chief Ginni Rometty's supporting the move. Julia Carrie Wong, "Apple's Tim Cook rebukes Zuckerberg over Facebook's business model", *The Guardian* (28 March 2018), online: https://www.theguardian.com/technology/2018/mar/28/facebook-apple-tim-cook-zuckerberg-business-model ; A number of tech companies' leaders have publicly deleted their personal or companies' associated Facebook profiles, including Elon Musk of Tesla and SpaceX. On this, see Jackie Wattles, "Elon Musk deletes Facebook accounts for Tesla and SpaceX", *CNN* (23 March 2018), online: http://money.cnn.com/2018/03/23/technology/elon-musk-facebook/index.html

[1134] After the Cambridge Analytica scandal recently broke out revealing that a private app-making group may have harnessed and used some 87 Facebook users' data for political purposes to benefit Trump's victory in the 2016 U.S. presidential election, Mark Zuckerberg voluntarily offered to testify before the U.S. congress. Although the two-day grilling session was not as harsh as many have expected or would have even liked it to be, there were some surprising admissions made by the CEO of Facebook, especially with regard to what he saw as an inadvertent regulation by the Government in social networking industry. See in general, Cecilia Kang et al, "Mark Zuckerberg Testimony: Day 2 Brings Tougher Questioning", *New York Times* (11 April 2018), online: https://www.nytimes.com/2018/04/11/us/politics/zuckerberg-facebook-cambridge-analytica.html

[1135] On this point, see Alex Heath, "Facebook is going to Use Snopes and Other Face-Checkers to Combat and Bury 'Fake News'", *Business Insider* (15 December 2016), online: http://www.businessinsider.com/facebook-will-fact-check-label-fake-news-in-news-feed-2016-12 [Heath]. Thus, Facebook explicitly rejects any role of an editor or "an arbiter of truth" and has worked very hard to keep it that way. Mike Isaac, "Facebook in Cross Hairs After Election, Is Said to Question Its Influence", *New York Times* (12 November 2016), online: http://www.nytimes.com/2016/11/14/technology/facebook-is-said-toquestion-its-influence-in-election.html [Isaac, "Facebook"]. It is in fact in the interest of companies like Facebook to convince the users of its indiscriminate online room that is spacious enough to harbor all tastes of ideas and opinions.

for instance has come to accept a heavier responsibility in this regard, [1136] its active introduction of new measures to combat the spread of fake news has not been so fruitful.[1137]

Whatever these measures are, they tend to yield limited results, however.[1138] This is because they overlook the question at the heart of the problem: How does a social media *objectively* decide the truth or falsity of a story in intense political seasons when the lines between bias and impartiality are quasi non-existent? This question, of course, is an ongoing accusation against social media organizations for their alleged left-leaning ideological bias.[1139] It is highly doubtful whether privately owned, powerful companies without governmental supervision or judicial oversight would be sufficient to truly address the

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It also does not help that Mark Zuckerberg, the chief CEO of Facebook allegedly scoffed at the accusation that his creation was somehow complicit in influencing the outcome of the 2016 Presidential election When the issue of potential influence of Facebook on the 2016 U.S. presidential election, Mark Zuckerberg allegedly is reported to said of the suggestion as "a pretty crazy idea." See David Zurawik, "Fake News a symptom of sickness in media ecosystem", *Baltimore Sun* (18 November 2016), online: http://www.baltimoresun.com/entertainment/tv/z-on-tv-blog/bs-ae-zontv-fake-news-20161118-story.html.

[1136] Heath, *supra* note 1135. "a new kind of responsibility to enable people to have the most meaningful conversations, and to build a space where people can be informed."

[1137] 'Flagging' for instance, has been disavowed by Facebook after the company's assessment concluding that the practice is counter-productive by possibly "entrench(ing) deeply held beliefs." On this, see Catherine Shu, "Facebook will ditch Disputed Flags on fake news and display links to trustworthy articles instead", *TechCrunch* (20 December 2017), online: https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead/.There are also talks and experiments about the future possibility to institute Artificial Intelligence algorithms that are programmed to automatically detect virally spreading story in real time. Jackie Snow, "Can AI win the War Against Fake News?", *MIT Technology Review* (13 December 2017), online: https://www.technologyreview.com/s/609717/can-ai-win-the-war-against-fake-news/

[1138] Despite these efforts, they immediately raise related problems. For instance, in the case of the "flagging" system, abusing the report/flag system was an obvious one. Users can always collectively 'flood' a new story they dislike. This 'flooding' or overwhelming with sheer popular number counts, is a practice that has been deployed on many occasions by army of trolls or hardcore supporters to essentially 'drown out' opinions that are inconvenient to their masters of dominant political regime. See e.g. Brian Whitaker, "How Twitter Robots Spam Critics of Saudi Arabia", *AL-BAB* (28 July 2016), online: http://al-bab.com/blog/2o16/o7/how-twitter-robots-spam-critics-saudi-arabia [http://perma.cc/5NW7-TRRD]; see also Samantha Bradshaw & Philip N Howard, "Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation" (2017) Oxford Internet Institute Computational Propaganda Research Project, Working Paper No 2017/12. Available online at: http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2o17/o7/Troops-Trolls-and-Troublemakers.pdf [http://perma.cc/KV48-B2Z4] (discussing how government, military or political party teams, "cyber troops," manipulate public opinion over social media).

[1139] This is one of the most frequent talking points for conservative politicians at this time. See Elliot Hannon, "Today in Conservative Media: Social Media Bias Is the New Liberal Media Bias", *SLATE* (8 March 2018), online: https://slate.com/news-and-politics/2018/03/today-in-conservative-media-social-media-bias-is-the-new-liberal-media-bias.html

complex issue of fake news. Be that as it may, relying on the self-accountability of tech and social media businesses to implement efficient internal measures appears to be the only consolation for the time being.

4.1.2.2.No Discernable Harm from Fake News as False Political Speech (yet)

Fake news is a type of political speech.[1140] Such qualification automatically rewards the speech in question with the greatest of constitutional protection of the First Amendment. Beyond the proximate concern that empowering the government to regulate political speech would be an open invitation to abuse,[1141] courts have vehemently refused to impose constraint on expressions of a political nature.[1142] Indeed, political speech, as "the essence of self-government,"[1143] is a beneficiary of the staunchest legal protection because the "discussion of political affairs lies at the heart of the First Amendment."[1144] It is in fact explicitly recognized

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[1140] See, e.g. Hundley, *supra* note 1118 (critically commenting the ways through which false news and false political expression undermine the marketplace of ideas); Gaughan, *supra* note 1078 (critiquing the state of approaching an illiberal form of democracy through illustration of fake news and hyper partisanship in major election terms); Dorf & Tarrow, *supra* note 1076 (raising problems in relation to fake news in the context of the First Amendment and the role of the news activist journalism); See also, Royster, *supra* note 1071; Timmer, *supra* note 1120 (tackling the problem of fake news with a specific focus on Facebook's role in spreading misinformation and the steps being taken to mitigate the problem); Syed, *supra* note 1066 (criticizing the marketplace as one that is increasingly outdated for better democratic governance).

[1141] William P Marshall, "False Campaign Speech and the First Amendment" (2004) 153 U PA L Rev 285 at 299 [Marshall].

[1142] See e.g. *Citizens United*, *supra* note 259 at 329 (striking down certain campaign finance laws as impermissibly chilling to political speech "central to the meaning and purpose of the First Amendment."); *Buckley, supra* note 259 at 14-15 (describing campaign finance laws as "operating in an area of the most fundamental First Amendment activities" and noting that "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."), *City of Ladue v Gilleo*, 512 US 43 at 54-55 (1994) (noting that a city ordinance restricting yard signs especially impacts political campaigns, and that "residential signs have long been an important and distinct medium of expression"), *Eu v S.F. Cty Democratic Cent Comm*, 489 US 214 at 222-23 (1989) (quoting *Williams v Rhodes*, 393 US 23 at 32 (1968)) (holding that a state law banning political primary endorsements "directly affects speech which 'is at the core of our electoral process and of the First Amendment freedoms.'"), *Roth v United States*, 354 US 476 at 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

[1143] *Red Lion Broad, supra* note 1063 at 390 (quoting *Garrison v Louisiana*, 379 US 64 at 75 (1964)).

[1144] Marshall, *supra* note 1141 at 298.

and even encouraged by the Supreme Court that public debates on important issues take place as they are "integral to the operation of the system of government."[1145] To that end, the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[1146] is, as a prerequisite for any democratic system, that which must be constitutionally ensured. This is where the First Amendment comes in: it is the inherent *devoir* of the First Amendment to provide that constitutional aegis to political discussions. It follows that "any regulation of political speech is a content-based regulation, and content-based laws are subject to strict scrutiny."[1147]

When mirrored, the Canadian position is not so different from the American counterpart. In *Zundel*, Justice McLachlin went as far as to state that false speech, including "exaggeration – even clear falsification (…) arguably has intrinsic value in fostering political participation" and "serves useful social purposes linked to the values underlying freedom of expression."[1148] In refusing to accept the premise upon which there is no value whatsoever in false speech, the incrimination of such expression in her view, would amount to "stifl(ing) a whole range of speech, some of which has long been regarded as legitimate or even beneficial to our society."[1149]

In retrospect, it is unavoidable that factually incorrect statements be made in the course of heated political campaigns. Candidates running for public office and their

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[1145] *Buckley, supra* note 259 at 14-15.

[1146] *Ibid*.

[1147] Hundley, *supra* note 1118 at 504. To overcome the strict scrutiny of the First Amendment, the speech infringing law must satisfy a compelling government interest through narrowly tailed means. (*ibid* at 505). Only a handful of political speech restriction has survived the constitutional muster imposed by the First Amendment. The author expands on two exceptional cases in which this speech infringement requirement was overcome: *Williams-Yulee v Fla Bar*, 135 S Ct 1656 (2015); *Burson v Freeman*, 504 US 191 (1992).

[1148] *Zundel*, *supra* note 407 *per* McLachlin J.

[1149] *Ibid*.

supporters frequently pronounce opinions that range from mistakenly inaccurate to fraudulently invalid claims. Legitimate news reports are attacked; polls are advantageously interpreted or refuted; statistics are conflated to solidify otherwise unsubstantiated arguments. If all false assertions were to be prohibited, then political discourse would be an impossibility. Therefore, although false expression like defamation is denied the First Amendment protection, "false statements generally are protected."[1150] To guarantee the kind of "breathing room"[1151] for political debates, the argument goes, political speech, even false, must be protected. Historically, it has been the traditional position of the First Amendment caselaw not to take an active role in curtailing false speech.[1152] The Supreme Court ruled in *United States v. Alvarez*[1153] that untruthful expression be given the same constitutional protection as truthful statement even if it was intentional. While the court in *Alvarez* did admit to some "instances in which the falsity of speech bears upon whether it is protected,"[1154] it refused both the argument that false speech is not constitutionally protected as well as the general presumption of the unprotected status of false speech. Instead, the court returned to the classic American skepticism on governmental power and the abuse that could result from gifting "the state to use its power for political ends."[1155] The Court thus refused to institute a whole new category of false speech to be inscribed in the First Amendment regardless of whether it lacks "constitutional value"[1156] - an observation supported by

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[1150] Hundley, *supra* note 1118 at 508.

[1151] *Sullivan, supra* note 77 at 271("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). There is an argument to be made that false expression began benefiting from the First Amendment starting with this landmark case as the intentional element (actual malice) is prioritized ahead of whether the statement in question was false to begin with.

[1152] Frederick Schauer, "Facts and the First Amendment" (2010) 57 UCLA L Rev 897 at 919.

[1153] *Alvarez*, *supra* note 243.

[1154] *Ibid* at 2546.

[1155] *Ibid* at 2564 (Alito J dissenting)

[1156] *Gertz, supra* note 102 at 340.

scholars.[1157] The absence of constitutional value in falsehoods was not the detracting point in *Alvarez*, however. In fact, it was not so much the inherent value in factually incorrect expression that bothered the judges but rather the fear that such categorical exclusion could have unintended chilling effects on even truthful speech.

Notably, the high justices rejected the argument that purposefully-stated false information may hinder the actual truths to be seen in the marketplace of ideas by noting that those concerns already "all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement."[1158] This is by far the most revealing part of the *Alvarez* decision with regard to fake news. It was an implicit acknowledgement by the Supreme court that it does not see the falsity of an expression and its related – intended or not – consequences as legally classifiable harm. This underscores the court's unpreparedness to consider harm from intentional dissemination of false information as deserving of law's notice.

4.1.2.3.How Fake News Destabilizes the Marketplace of Ideas

The exact effects of fake news on (American) public discourse in the marketplace remains largely unclear. In the 2016 U.S. Presidential Election for instance, one may never know, conclusively, how much of the voters' exposure to false news may have had a definite influence on their voting patterns. Given the continuance of false information creation, often amplified by the megaphones of important persons in public offices, the situation remains

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[1157] Edelson, *supra* note 1108 at 533 (noting Paul Horwitz's observation "that scholars basically agree that false statements lack epistemic and/or social value"; Mark Tushnet's conclusion that "there really is no social value in the dissemination of falsehood, particularly knowing falsehood"; and Robert Post's comment asserting that "Entrenched First Amendment doctrine affirms that 'there is no constitutional value in false statements of fact." (quoting *Gertz* citied above) (internal citations omitted).

[1158] See *Alvarez, supra* note 243 at 2545.

very fluid and a determinate diagnosis is yet to be made. Yet, it is also difficult to ignore the insidious reality that fake news may have affected voter's minds in one way or another.

Two preliminary conclusions can be put forward at the current stage. For one, the viral spreading of fake news is inherently detrimental to the democratic marketplace of ideas.[1159] False news undermines the essence of the democratic process by interposing factually incorrect information to the public. The infection of the public mind is doubled and quadrupled when the internet, mainstream news media, and broadcasting outlets augment the emission of concocted stories. In hindsight, the rampage of fake news only confirms that the Internet was always a double-edged sword to begin with: "As much as it has informed" the public, it also has "confused and misled" them.[1160] In the fever of major election seasons that are marked by polarized partisanship, fake news is crafted to erode the public's confidence in the democratic process itself.[1161]

Secondly, the propagation of false stories undermines the fundamental role of the press. [1162] The descent of traditional journalism's role as the 'gate-keeper' has been greeted with the ascension of misinformation.[1163] The press is uninterruptedly denounced and demonized as playing political/ideological bias or serving mega-corporate interests. The result is the loss of trust in the press, a bedrock institution that is pivotal for a functioning democratic system. The impoverishment of the public's confidence in the press diminishes its

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[1159]See Thomas B Edsall, "The Self-Destruction of American Democracy", *New York Times* (30 November 2017), online:https://www.nytimes.com/2017/11/30/opinion/trump-putin-destruction-democracy.html?mtrref=www.google.ca&gwh=F5A919E9C1D10E41D89721E9374B62E9&gwt=pay&assetType=opinion ; Ishaan Tharoor, "'Fake News and the Trumpian threat to democracy", *Washington Post* (7 February 2018), online: https://www.washingtonpost.com/news/worldviews/wp/2018/02/07/fake-news-and-the-trumpian-threat-to-democracy/?utm_term=.bc425ac73f15

[1160] Ghaugan, *supra* note 1078 at 74.

[1161] *Ibid* at 58 (noting that (fake news) "… not only threatens public confidence in election fairness but potentially could even undermine the long-term health of the nation's democracy").

[1162] Levi, *supra* note 1079 at 1553.

[1163] Gaughan, *supra* note 1078 at 59.

ability to critique and hold the government accountable to its actions. Thus, the consequence is more than just a self-inflicted injury or a well-deserved criticism of journalism. It puts into question the very place of the press itself as an institution in a democratic system.

For these reasons alone, I would argue that today's rise of false news merits the special attention of law. It is one thing to encounter sporadic incivility in public discourse; it is quite another when both foreign governments' coordinated efforts and domestic individual speakers diffuse misinformation with the malicious aim of systematically manipulating democratic practices. If this does not constitute a compelling reason for the government to take a closer look at the muddied marketplace for its own national interests, I am not sure what does.

The phenomenon of false news and the law's struggle to tamper it also signal an underlying disturbance at the more normative level regarding the *dysfunctionality* of public discourse in the current information economy. The very concept of the marketplace is premised, as one commentator observed, on two pivotal elements: that the truth be discoverable; and that those purchasing ideas in the marketplace "are actually seeking to uncover the truth."[1164] There is nothing to be done with regard to the second premise: The government or the judiciary is not the police of human conscience nor should it ever be. As to the first condition however, there must be an active and concerted governmental effort to reduce the spread of falsehoods to the extent that the affected visibility of the marketplace's visitors does not hamper democratic operations. Surely, truthfulness is out there, *somewhere* in the overpopulated market. But what good is that truth when it is buried, suffocating under the weight of innumerable farces that were deliberately bred to obscure the verity-seeking

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[1164] Hundley, *supra* note 1118 at 503.

vision? This is indeed the new challenge we face today with fake news: one cannot simply rely on the self-filtering wisdom of the free market. To confide in the belief that the truth will emerge victorious, *eventually*, is but a naïve, misplaced faith. Dickson C.J. understood this point when he observed that,

> "individuals can be persuaded to believe 'almost anything' … if information or ideas are communicated using the right technique and in the proper circumstances."[1165]

Falsehoods will almost always triumph over truth: their reach is further and quicker. This has been empirically proven.[1166] For truth to be seen, it must first be found. And chances are that the murkier the pool is, the more difficult it will be for truth to manifest itself.[1167]

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This section has sought to demonstrate how fake news is detrimental to democratic systems and therefore why the government has a legitimate interest in ensuring the functionality of the marketplace to the extent that correct information be discoverable in the eyes of ordinary citizens. The loss of faith in journalism and the rise of falsehoods are not, however, the sole contributors to the messiness of the marketplace. Claims of group rights and calls for social justice, too, have not been able to dissociate from their side-effects. These

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[1165] *Keegstra, supra* note 81 at 747. (Dickson CJ concurring)

[1166] Soroush Vosoughi, Deb Roy & Sinan Aral, "The spread of true and false news online" (2018) 359:6380 Science 1146. The extensive study, conducted by MIT Researchers, was the largest study of fake news by investigating the diffusion of verified true and false news stories on Twitter from 2006 and 2017. The studied data consisted of around 126,000 stories that were tweed by about 3 million people more than 4.5 million times. The study concluded that false news spread six times quicker, by 1,500 people on average, than an accurate story. For the study, see online: http://science.sciencemag.org/content/359/6380/1146

[1167] This argument hints at people's critical capacity to separate the truth from falsity being clouded by false information. This argument is reinforced when considering that on the internet, "people often have difficulty distinguishing fact from fiction… which makes it the idea forum for disseminating misinformation" in the first place. Ghaugan, *supra* note 1078 at 66; The author also cites a Stanford study that found that contrary to popular belief, younger generation are as easily misled despite the fact that they tend to be more aware with modern usage of technology. (*ibid* at 68).

have often led to corrosive effects to create toxic environments in the marketplace of ideas that are often contradictory to meaningful progress.

4.2. A Reply to the Second Objection: A Democratic Theory of Critical Speech as a Liberating Instrument for Individual Cultural Identity

We must now examine the second objection introduced at the beginning of the chapter. The concern there was that permitting legal cognition of harm to identity would impair the individual freedom to voice critical opinions on important matters of public interest. More generally, acknowledging the basis of the present thesis' claim would discourage concerned citizens from speaking out not only as a part of their attainment for self-expression but as a form of civic duty for the betterment of the democratic system. The risk in that impairment, it could be argued, would erode, in particular, the individual exercise of critical speech with regard to social groups within the multicultural fabric. This grouping of the chilling effect, the implicit silencing, and the resulting encroachment on the scope of freedom of expression, represent a unified defense line of free speech with one common beneficiary: the individual freedom of critical speech. After all, specific legislative actions had to be enacted to counter libel chill.[1168]

One may question why critical speech must be treated with enhanced constitutional protection as if it were some rare category of endangered species of speech in the first place? This is because it *is*. Critical speech is never intended to cajole to the prevailing public

[1168] See footnotes 564 and 1128.

sentiment or popular culture. It is designed, by definition, to ruffle some feathers.[1169] Thus, one's critical opinion almost always ends up being perceived as offensive or even outrageous in the ears of another. This qualification of 'offensiveness' is something that is a product of personal interpretation relative to those who interpret the meaning of the expression inter-subjectively.[1170] Not only the mere offensiveness or sensibility 'harm' as felt or determined by subjective minds alone can hardly form a sound legal basis for censorship, the offensive quality of an expression is not something that can be assessed as a hypothetical: evaluation of harm requires some contextualization of the offensiveness within the particulars of a given cultural and legal frame.[1171] And for those tired of tiptoeing for fear of stepping on the mines of sensibilities, one may even adhere to a popular free speech creed today that has developed precisely in opposition to the excessive culture of political correctness: that there is no such thing as the right *not* to be offended. After all, in a democracy, the quarreling spirit between jousting argumentations is what makes it a democracy. Democracy mandates that "unlike Furhrer, government officials … occasionally must tolerate offensive or irritating speech."[1172] This *confrontational* element (or even certain captiousness) of free speech displayed in exchange of critical opinions should be viewed as a healthy sign of a properly working

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[1169] The need to grow a thick skin in response to offensive language and the neutral, non-intervening stance regarding the exercise of expression freedom over personal sensibility is well elaborated in the *Restatement Second*, *supra* note 97 § 46 at cmt d (1965). It states in part:

> "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's [sic] feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam."

[1170] That subjectivity will depend on a multitude of factors of the individual, as elaborated in the previous Chapter: personal background, cultural norms, and their perceived acceptability in the situated community and of society in general.

[1171] Jean-François Gaudreault-DesBiens, "Religion, Expression and Freedom : Offense as a Weak Reason for Legal Regulation" (2010) 8 Cahiers de Recherche sur les Droits Fondamentaux 53.

[1172] *Norse v City of Santa Cruz*, 629 F (3d) 966 at 979 (9th Cir 2010) (Kozinski CJ concurring).

democratic government as was intended. "Generating open discussion on matters of public concern" must not be perceived as a merely permissible scope of acceptable free speech, but rather, it should be appreciated as an aspirational "duty" [1173] of national affairs. The failure to do so would be "the greatest menace to freedom" in its rendering of "inert people,"[1174] a recipe for impotent citizenry.[1175] Democracy indeed celebrates differing views because opposing expressions are symptoms of "strength and not weakness."[1176] After all, what separates a democratic society from a totalitarian regime is the kind of tolerance that accords "breathing space"[1177] for conflicting ideas. Suppressing dissent is ultimately suppressing the development of human virtue because "without contraries, there is no knowledge; without knowledge, there is no virtue."[1178] Thus, the right to speak critically goes to the heart of speech freedom.

However, this fundamental link bridging the right to critical speech and democracy does not necessarily imply that the former is a given. Even in 2018, a nurse can still be silenced for criticizing what she viewed as inadequate care of her dying grandfather.[1179]

[1173] *Whitney v California,* 274 US 357 at 375 (1927) (Brandeis J concurring).

[1174] *Ibid.*

[1175] It would be almost impossible for uninformed citizens to make wise political decisions.

[1176] *Cohen*, *supra* note 92 at 25; see also *Texas v Johnson,* 491 US 397 at 419 (1989) (Brennan J drawing a very similar comparison to *Cohen*'s holding, writing that:

> "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."

[1177] *Walker v City of Birmingham,* 388 US 307 at 344-45 (1967) (Brennan J dissenting):

> "To give these freedoms the necessary "breathing space to survive," .. . the Court has modified traditional rules of standing and prematurity. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise."

[1178] John D Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press, 2005) at 78 (quoting John Milton) (original citation omitted).

[1179] A nurse from Prince Albert posted a critical view on a Saskatchewan hospital facility's treatment that in her view was inadequate care of her dying grandfather. She was found guilty of professional misconduct by violating the ethics rules damaging the reputation of the facility's nurses' reputation and was fined to pay $26,000, even though she argued she had voiced her opinion in her capacity as a private individual (the

Public demonstrators can be threatened with imprisonment for exhibiting dissenting symbolic political expression.[1180] Former senior intelligence officers can be retaliated against for speaking critically of a sitting president.[1181] A news media company can be threatened with mailed bombs for its negative coverage of public figures.[1182]

In this section, I aim to demonstrate that the ratification of my identity harm-based interpretation of group defamation does not menace individual freedom of critical speech. I will first proceed by describing critical speech in the context of Robert Post's notion of public discourse and how the inner distinctions of speech categories do not matter as much in the current ecosystem of public discourse (4.2.1.). I will then affirm that the fundamental liberty of individual persons to opine critical views is a form of participatory democratic right that allows a society to revise and readapt itself (4.2.2.). In particular, the right of critical speech with regard to groups of peoples in our society is not threatened by the approval of my

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conclusion of the Investigation Committee can be found here: https://www.srna.org/wp-content/uploads/2018/03/Penalty-Decision-Strom_Redacted-2017-04-04.pdf). She later appealed, only to have it dismissed (*Strom v The Saskatchewan Registered Nurses' Association*, 2018 SKQB 110. The decision in full: https://www.srna.org/wp-content/uploads/2018/03/Penalty-Decision-Strom_Redacted-2017-04-04.pdf). The Canadian Federation of Nurses Unions immediately expressed strong objections to the court's decision via a communiqué (https://nursesunions.ca/canadas-nurses-are-disturbed-by-appeal-loss-in-strom-case/).

[1180] *Stern Taulats and Roura Capellera v Spain*, No 51168/15 and 51186/15, [2018] ECHR 229. The demonstrators in their acts of protest had publicly burnt an upside-down Spanish King and Queen's portrait during the Royals' visit to Girona, for which they were convicted and sentenced to 15 months of imprisonment (which was later reduced to a payment of fine of €2700. Spain's Constitutional Court dismissed their appeal for inciting hatred and violence against the country's monarchy, expression that which it viewed as lying outside the scope of freedom of expression. ECHR saw the Spanish court's judgment as a violation of Article 10 of the ECHR (freedom of expression, noting:

« … la Cour constate qu'il s'agit d'éléments symboliques qui ont une relation claire et évidente avec la critique politique concrète exprimée par les requérants … (at para 38) Elle (la Cour) note qu'un acte de ce type doit être interprété comme l'expression symbolique d'une insatisfaction et d'une protestation … une forme d'expression d'une opinion dans le cadre d'un débat sur une question d'intérêt public… La Cour rappelle dans ce contexte que la liberté d'expression vaut non seulement pour les informations ou idées accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour ceux qui heurtent, choquent ou inquiètent : ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de société démocratique» (at para 39) (internal emphasis omitted) :

[1181] Dan Balz, "Former intelligence officials bite back after Trump goes after Brennan's clearance", *The Washington Post* (18 August 2018), online: https://www.washingtonpost.com/politics/former-intelligence-officials-bite-back-after-trump-goes-after-brennans-clearance/2018/08/18/91efe7a0-a255-11e8-8e87-c869fe70a721_story.html?utm_term=.273633a5e70b

[1182] See footnote 1047.

argument on harm to identity. In fact, on the contrary, critical speech may serve as a liberating instrument to reassert one's individual and cultural autonomy in spite of the larger socially imposed identity of one's culture or against the homogenizing tendency from within one's natural group of belonging (4.2.3.). I will then underline the limits to this freedom of critical speech that should be a guiding compass for a distinction between what critical speech may be and the crossing of that line. (4.2.4.). Lastly, I will make my own case on the importance of critical speech in Canada/Quebec's communitarian multiculturalism by referring to Charles Taylor's notion of "common meaning." (4.2.5.).

4.2.1. Critical Speech in Public Discourse

It is imperative to raise the theory of critical speech from within the context of public discourse. Critical ideas are pronounced in public discourse. These personal opinions, formed by individual voices agreeing and/or disagreeing on important issues of society, represent the general consensus that morphs into influential forces of public opinions which government leaders (ought to) pay close attention to. The inability for attentiveness to the public's sentiment or the shift thereof, as a form of detachment from social reality and thereby from the *people*, will often result in the removal of the governors.

When it comes to the notion of public discourse in the realm of speech context, Robert Post has compiled a great deal of meritorious arguments.[1183] Post talks of the concept of public discourse and treats it almost as if it were a specific legal category deserving of its

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[1183] See Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell" (1990) 103 Harv L Rev 601 [Post, "Public Discourse"]; Robert Post, "Meiklejohn 's Mistake: Individual Autonomy and the Reform of Public Discourse" (1993) 64 U Colo L Rev 1109 [Post, "Meiklejohn's Mistake"]; Robert Post, "Participatory Democracy and Free Speech" (2011) 97 Va L Rev 477 [Post, "Participatory Democracy"].

own in the First Amendment scholarship. According to Post, the role of public discourse is "to enable persons to experience the value of self-government."[1184] This reference to 'self-government' is misleading. While the immediate conjuring of the term to accustomed readers would likely lead to Meiklejohn's democratic aspiration vis-à-vis the First Amendment as Post too built his own account on similar theoretical foundations, the value that Post saw as deriving from that democracy-speech relationship is quite different from Meiklejohn's. Meiklejohn took to a relatively reductionist understanding of the connection shared between the importance of free speech and democracy to the extent that the free flow of ideas produces an informed citizenry, and only to that extent.[1185] Meiklejohn valued free speech because of its relevance with regard to the democratic system's ability to attain wiser political decisions. It results that, to quote Meiklejohn's famous saying, "it is not necessary that everyone gets to speak, as long as everything *worth* saying is said."[1186] In other words, not every idea is to be considered as advancing the democratic objectives – a qualification that sounds alarmingly chauvinistic and elitist. Who would have the entitlement to cherry-pick what is or is not contributory to the furtherance of democracy? Such interpretation would unavoidably lead to a limited utilitarian take on the use of speech.[1187]

Post, on the other hand, developed a deeper socio-normative argument with an expansive approach by linking the function of public discourse and democracy.[1188] Public

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[1184] Post, "Participatory Democracy", *ibid* at 483.

[1185] See in general Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of The People* (New York: Oxford University Press: 1960) [Meiklejohn]. For a critique on Meiklejohn's speech theory, see JM Balkin, "Populism and Progressivism as Constitutional Categories" (1995) 104 Yale LJ 1935, 1985-86 [Balkin, "Populism and Progressivism"]: JM Balkin, "Cultural Democracy and the First Amendment" (2016) 110 Nw U L Rev 1053 at 1056-59 [Balkin, "Cultural Democracy"].

[1186] Meiklejohn, *supra* note 1185 (emphasis in italics added).

[1187] Balkin, "Cultural Democracy", *supra* note 1185 at 1056 (noting that "Meiklejohn's account does not treat culture – or speech, for that matter – as inherently valuable… Rather culture is instrumentally valuable to the extent that it assists political self-governance…").

[1188] See, e.g. Robert Post, *Democracy, Expertise, and Academic Freedom: A First*

discourse, for Post, represents much more than just a public medium where expressions are publicly put on display and exchanged between speakers; it is the very thing that gives legitimacy to democracy itself because it "is comprised of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained."[1189] In other words, this condition of *openness* or *access* for people to democratically participate in local and national conversations by expressing their personal views, demands, and discontents, via various streams of public opinions that together form the wider ocean of public discourse, is a way of assuring that elected leaders remain alert to the needs of the ordinary constituents. In other words, Meiklejohn's "informed citizenry" in Post's vision of public discourse, would not appear to be a one-way trip only applicable to citizens. Just as it is important that democratic participants be 'woke' to the development of political situations to arrive at the best collective decision-making, public officials too, must be attuned to what is expected of them and be held accountable for their elected positions. To put it in another way, people should be able to rely on the assumption that when their voices are expressed on public discourse, their leaders will act on them.

This explains why the notion of public discourse should be given the broadest explanation as possible, expansively stretching to various aspects of social issues. If public discourse was more narrowly defined, or somehow exclusively reserved to a few privileged within the system (who would then have the powerful monopoly to decide on the merits of those contributing), the fragile guarantee that the popular sentiment of ordinary citizens will be heard and acted upon will diminish with it. This is why it mattered so much to Post that,

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Amendment Jurisprudence For The Modern State (New Haven, Connecticut: Yale University Press: 2013) [Post, "First Amendment Jurisprudence"].

[1189] Robert Post, "The Constitutional Status of Commercial Speech" (2000) 48 UCLA L Rev 1 at 7 [Post, "Commercial Speech"].

contrary to Meiklejohn's rather selective scouting of opinions, ordinary citizens be provided "unrestricted access" to communications of public discourse.[1190] This way, Post saw the constitutional value in the right to participate in the formation of public opinion through communicative speech, one that ferociously deserves First Amendment protection. [1191] Its infringement could very well undermine the very faith that citizens hold in democracy.

Yet, when people think about public discourse, there is a general tendency to affiliate it to certain forms of very specific public discourse in the *political* sense. Thus, the notion of public discourse remains captive to the same problem of parochiality associated with the democratic functionality of free speech's narrow analysis limited with respect to the role and the scope of expressions contributing to democratic governance.[1192] Much First Amendment scholarship has put a great emphasis on the wide protection speech in political arena receives. This framed approach conceived around the political discourse, and more precisely, the liberty of ordinary citizens to criticize public officials or public figures has been the center of great many debates.[1193] It is a fixation that has been around the relational definition that pits the individual's constitutional freedom of speech against the government's legitimate justification to violate that freedom. This "politico-centric[ism]"[1194] identified with public discourse has increasingly proven to be a bounded assumption.

Currently, there is a dire necessity to readjust the model of public discourse with an

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[1190] *Ibid.*

[1191] Robert Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press: 1995) [Post, "Constitutional Domains"]; Post, "Commercial Speech", *supra* note 1189 at 4, 7 ("The possibility of participating in the formation of public opinion authorizes citizens to imagine themselves as included within the process of collective self-determination"), ("… speech that is constitutionally valued because it is itself a way of participating in the process of democratic self-governance") (*ibid* at 48).

[1192] Balkin, "Cultural Democracy", *supra* note 1185 at 1056-59. In the words of this commentator, "Meiklejohn has met LOLcats, and he is not amused." (*ibid* at 1059).

[1193] See e.g. *Sullivan*, *supra* note 77.

[1194] Balkin, "Cultural Democracy", *supra* note 1185 at 1054.

expansive approach as the 'pipeline of ideas' delivering all forms and contents of expressions. It is one that assimilates the notion of public discourse to a more unitary and fluid image, as opposed to a segregated and categorically constricted one, respectively. The right to criticize in general about a wide range of issues in human affairs goes far beyond the arena of political opinions. The extent of reach to share critical ideas just about anything in life is that much more pervasive.

For one, as hinted in earlier sections of the present chapter and even in the very first one, the marketplace (of ideas) has grown exponentially. The self-governing democracy argument of free speech that is mono-focused on political speech cannot avoid being exclusively categorical. What of critical expressions manifested through art and other creative activities? One illustration underlining this dilemma is Dworkin's interrogation on the "right to ridicule."[1195] Similarly, satire, cartoons, and dark humor fall into close classification of that speech. Obviously, this type of speech is a special category of expression that requires a very specific form of articulation in its originally intended fashion. To alter that method of manifestation would defeat the very purpose and existence of such expression.[1196] Beyond making fun of political candidates' scandals, a cartoon can be drawn to poignantly 'mock' religious practices or intimate affairs of a celebrity figure. Satires, stand-up comedy, literature, musical demonstrations, and Late Night television shows have come to assume popular means of conveying both personal and popular meanings of politics, society and

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[1195] Michel Bot, "The Right to Offend: Contested Speech Acts and Critical Democratic Practice" (2012) 24 Law & Literature 232 at 233 [Bot] (taking Dworkin's opinion piece published in The New York Review of Books (Ronald Dworkin, "The Right To Ridicule", *New York Review of Books* 53:5 (23 March 2006), online: http://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/) [Dworkin]).

[1196] Dworkin, *ibid* (noting, "Ridicule is a distinct kind of expression; its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended. That is why cartoons and other forms of ridicule have for centuries, even when illegal, been among the most important weapons of both noble and wicked political movements.").

culture.

Furthermore, it is rudimentarily challenging to distinguish the political from the a-political. The attempt to do so is in and of itself futile. Almost every subject in and of life is inherently political. Even elements which we may believe fall outside the political scope *can* and *will* be politicized at opportune moments because humans are political animals by nature. Take for instance, the recent mass shooting in a Florida high school.[1197] At first, and as has always been the argument, the privacy and dignity of affected families and community members' can be grounds on which all political sides can universally agree to respect amidst of the tragedy. And yet, the incident becomes the quagmire of gun regulation debates between those calling for long-due sensible gun control and the rigid believers of in a God-given Second amendment right.[1198] Surviving teenagers who speak up are vilified as professional liberal actors by conspiracy theorists.[1199] At one point, it is pointless to detach the development of human affairs from politics because anything and everything can be made

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[1197] For a brief summary of the incident timeline, see in general, German Lopez & Jen Kirby, "Marjory Stoneman Douglas High School Shooting in Florida: What We Know", *Vox* (16 February 2018), online: https://www.vox.com/policy-and-politics/2018/2/14/17013596/parkland-florida-high-school-shooting

[1198] Following the incident, CNN hosted a 'town hall' debate forum that included the affected community and Florida politicians as well as a representative from the National Rifle Association. CNN, "CNN town hall in wake of Florida school shooting", *CNN* (21 February 2018), available online: https://www.youtube.com/watch?v=ZaLh74eXTDo. In the aftermath of the shooting, democrats seized on the incident to push for tougher gun control measures while the GOP attempted to relent that argument by accusing their counterparts of politicizing a human tragedy. See e.g. Bob Bryan, "Top Republicans say there shouldn't be 'knee-jerk' political response to Florida school shooting", *Business Insider* (15 February 2018), online: http://www.businessinsider.com/florida-marjory-stoneman-douglas-high-school-shooting-gop-response-2018-2; See also Dave Holmes, "We Have No Other Choice But To Politicize It", *Esquire* (15 February 2018), online: https://www.esquire.com/news-politics/a18197478/parkland-shooting-social-media/

[1199] This has been fact-checked and independently verified by FactCheck.Org. Saranac Hale Spencer, "No 'Crisis Actors' in Parkland, Florida", *FackCheck.Org*. (22 February 2018), online: https://www.factcheck.org/2018/02/no-crisis-actors-parkland-florida/. A staff of Florida legislator who claimed that two surviving students who gave interviews on news advocating for tighter gun regulation as "crisis actors" was fired. Other far-right wing media began disparaging interviewed students following the incident as professional actors who were paid by the political left. See Travis M Andrews & Samantha Schmidt, "'I am not a crisis actor': Florida teens fire back at right-wing conspiracy theorists", *The Washington Post* (21 February 2018), online: https://www.washingtonpost.com/news/morning-mix/wp/2018/02/21/i-am-not-a-crisis-actor-florida-teens-fire-back-at-right-wing-conspiracy-theorists/?noredirect=on&utm_term=.31bcb8ba6e0a; Paul P Murphy & Gianluca Mezzofiore, "How the Florida school shooting conspiracies sprouted and spread", *CNN* (22 February 2018), online: https://www.cnn.com/2018/02/22/us/parkland-shooting-conspiracy-theories-trnd/index.html.

a stooge for political motives.

Also, note the 'public' character of public discourse. It is easy to consider the concept of public discourse in light of the 'public'-ness of expressions. However, the line between the public and private has become blurrier than ever. There is a necessity to disengage from the 'public' characterization of discourse. When an individual posts a comment or shares content on social media, that 'expression' is legally considered as being within the public domain regardless of whether the individual had intended to share his or her expression exclusively within a private circle of 'friends.' A private matter discussed privately can just as easily become a public matter at the moment of posting.

The enlargement of the marketplace (of ideas) and the indistinctiveness between the political from the a-political and the public and the private realm are all attributed, to a large extent (and to note the obvious), to the arrival of the internet age. Everyone is given a megaphone on online platforms through which they can transmit unhinged opinions with ease and speed. Youtubers create series in their channels entailing their social, political, and moral views; advocate citizens provide documentaries in the name of participatory journalism; Twitter, Facebook, and even Twitch.tv with their recent introduction of the interactive sections,[1200] offer zoomed focus into the intimate details of users' daily lives. This is the new economy of public discourse, a gradual explosion. Before, citizens were passive listeners,

[1200] Twitch.tv, a global, multi video gaming and entertainment streaming site (formerly separated from Justin.tv.) owned by Amazon, has launched the IRL section on December 2016 – the first of its kind that is not restricted to purely gaming contents. The section is meant to allow people to share their "everyday lives, thoughts and opinions with their communities." This quickly became the hottest controversy over e-gaming industry, with many arguing that gamers are losing their livelihood space as well as the delicate policing issues with regard to female streamers streaming while intentionally wearing sexually revealing clothes and suggestive behaviors. The IRL section has since been disbanded in late 2018 and categorically broken down to more pertinently defined sub-categories such as ASMR. For the detailed report on IRL section since its introduction and difficulties, see Julia Alexander, "Twitch's contentious IRL section sparked the platform's biggest debate in 2017", *Polygon* (3 January 2018), online: https://www.polygon.com/2018/1/3/16845362/twitch-irl-iceposeidon-trainwrecks-female-streamers

restricted to receiving and building on information provided from centralized institutions and oligarch media companies. The flow of information was very much in one direction (and so naturally, much focus was on the speakers' point of view). The monopoly of power held by a few powerful news media outlets has been drastically curbed back as the internet stepped onto the scene, and in doing so has opened the floodgates of available information.[1201] Today, there is a pluralization of public discourse through mutual and inclusive practices. The Internet's pervasiveness effectively broke down the confines of (or at least considerably weakened) what used to be the conceptual limits of Habermas' "public sphere"[1202] and the many once esoteric classes of expressions contained within those boundaries.

4.2.2. Right to criticize as an active form of participatory democratic right

While public discourse has blossomed in both noisiness and accessibility, the right to critical speech and more specifically, the expressive freedom to opine critical views interchangeably between various communities has dwindled. There is a genuine concern that the 'culturally sensible-harm' prevalent in multicultural discourse has somewhat lessened the ability to speak critically of other cultures.[1203] Diminished critical speech is no free speech.

The right to critical speech regarding a cultural group corresponds to the democratic conceptualization of free speech because it is a form of *active* participation in the democratic process. A democratic society's functionality relies on its citizens' active state of engagement in the formation of public opinion by expressing their views on important issues. A right to

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[1201] Ghaugan, *supra* note 1078 at 65.

[1202] See also Post, "Participatory Democracy", *supra* note 1184 at 486 ("Public discourse depends upon the maintenance of a public sphere, which is a sociological structure prerequisite to the formation of public opinion.").

[1203] Bot, *supra* note 1195 at 234.

criticize as a participatory democratic right[1204] is the key to the maintenance of a civic society. It is even more so in culturally a pluralistic society because while public affirmation of dutiful citizenship may not totally override divergent clangors of the cultural identities of all participants, it could "promote values of trust, commitment and solidarity – values which allow democracy to flourish."[1205] When under severe political pressures, critical speech provides the inherent ability for a democratic society to self-correct and revise itself from making wrong turns. Critical speech acts as the enabler to democratic innovation by openly welcoming the industrious pool of sharp-edged perspectives to constantly self-help and readjust the dull and the rusty to the changing norms and evolving standards of public opinion.

These participatory forms would include the more traditional ways of participation to public debate such as 'saying one's piece' in public forums or city council meetings and voting in political elections. But it does not stop there. Today, new means of self-expression to comment, share, and indeed critique are available through various platforms online and group gatherings initiated by people sharing similar interests.

Take for instance, the recent controversy of Megyn Kelly's 'blackface' comment. Megyn Kelly, a well-known former Fox News anchor and currently a major host of her own show on NBC, stirred up a public outcry when, during her show, she was discussing with her panel the appropriateness of wearing a blackface as a Halloween costume, in which she said:

[1204] For an elaboration on the theory of participatory democratic right, see in general, Post, "Participatory Democracy", *supra* note 1184; James Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine" (2011) 97 Va L Rev 491. For making an argumentative connection between linguistic pluralism and democratic participation and social/public institutions, see Cristina M Rodriguez, "Language and Participation" (2006) 94 Cal L Rev 687; But see Edward Baker, "Is Democracy a Sound Basis for a Free Speech Principle" (2011) 97 Va L Rev 515.

[1205] Gerard Delanty, *Community,* 2nd ed (London: Routledge, 2010) at 64 (discussing Robert Putnam's civic republicanism) [Delanty, "Community"].

"But what is racist? Because you do get in trouble if you are a white person who puts on blackface on Halloween or a black person who puts on whiteface for Halloween. Back when I was a kid, that was okay, as long as you were dressing up as, like, a character."[1206]

Since then, due to mounting public pressure, she has issued a public apology on air during her program and to NBC staff separately. The show then got cancelled and now it is being reported that she has fired her agent and is negotiating her exit from NBC. What this illustration demonstrates is the powerful impact of participatory democracy through the formation of public opinions. Megyn Kelly did not attempt to establish her version of belief as some universal truth (that it is not racist to wear a blackface as a Halloween costume or that labeling it as racist is oversensitivity) by engaging in derision or degradation of her opponents' views by making imputations to their race and the invalidity of their claims. The speaker was simply and critically contesting the meaning of a culture standard or perception on what is racist or not. The ability to maintain this dialogue assures that public discussion can be had if the American society wishes to debate the meaning of acceptable Halloween costumes in evolving times and, more importantly, about the social acceptability of racial appropriation. That national conversation must be had, regardless of whatever offense it may cause to some. That is the only way to ensure the participatory democratic means: through vigorous public discourse to revise and readapt to changing or unchanging norms.

In contrast, passivity does not honor a democratic system. This active-versus-passive analysis is tethered to the democratic legitimacy because "a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals (…) to confirm his or her standing as a

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[1206] On the incident, see Olivia Messer, "Megyn Kelly Defends Blackface on Halloween: How Is It Racist?", *The Daily Beast* (23 October 2018), online: https://www.thedailybeast.com/megyn-kelly-defends-blackface-on-halloween-how-is-it-racist

responsible agent."[1207] The failure to participate is a self-made victim "of collective action."[1208] Passive exercise of democratic rights devalues democracy and hinders collective self-governance. As are the old habits of cynics, non-participants reap in silence of their inaction.

4.2.3. The Importance of Critical Speech in advancing the Individual Autonomy of Cultural Identity

If critical speech resonates within the democratic frames of speech theories, it also remains congruent with the autonomy of individual persons. As postmodern societies convincingly move toward a model that is "homogeneous across cultures and heterogeneous within them,"[1209] critical speech serves as the doorway to freedom of individual cultural identity. By exercising critical speech, an individual is empowered to reject both *primary* and *secondary* impositions of cultural identities. Critical speech of culture or cultures permits individuals to refuse identity as seen by the dominant majority or the general perception; but it also grants the freedom to reinterpret and indeed redefine the sense of cultural belonging(s) independently from the established norms within their own cultural boundaries. Thus, critical speech embodies the freedom *of* and from *within* culture(s). As such, critical speech regarding cultural identities is a fight against the reification of cultural identity.

In response to precipitated beats of globalization and modernization, cultures have adopted a hostile posture to fight what they see as the "dilution"[1210] of their distinctiveness.

[1207] Bot, *supra* note 1195 at 236. (quoting Dworkin's "Foreword" in Ivan Hare, ed, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009 at v-ix, vii).

[1208] *Ibid*.

[1209] Madhavi Sunder, "Cultural Dissent" (2001) 54 Stan L Rev 495 at 497 [Sunder].

[1210] *Ibid* at 501.

The natural instincts of cultures (especially minorities) to "constrain"[1211] have intensified in the wake of the crumbling of cultural borderlands. According to this "cultural survival"[1212] mode, cultures insist on reinforcing the *hardened* concept of culture to preserve the purity or the "integrity"[1213] of cultural traditions and practices. Such poise recognizes diversity of separate cultures but "not within them."[1214] The denial of the plurality of sub-cultures within a culture results in the denial of individual autonomy. Individual's cultural identity is not freely chosen but rather thrusted by those who seek to conserve the stability of cultural categories. This has always been the venom of identity politics: to "exclude at their boundaries, and internally, they normalize."[1215] And once categorical boundaries are carved out, those whose identities do not neatly fall into pre-defined classifications are "render(ed) unintelligible."[1216] Those who manage to belong are neither exempt from the harm of "normalization discipline."[1217]

Critical speech, by contrast, empowers individual autonomy to broaden and branch out even within a restrained cultural identity. The freedom to speak critically of the general society's stereotype image of one's own culture *and* the liberty to do the same against dictations of cultural uniformity is paramount in recognizing individual aspirations to negotiate culture "in their own terms."[1218] Through critical speech, a member of a cultural

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[1211] *Ibid* at 503 (quoting Janet E Halley) (original citation omitted).

[1212] *Ibid* at 505. The commentator points out the dwelling of critiques of "cultural survival" was long restrictively posited or framed in the context of the classic confrontation between communitarians and liberals.

[1213] *Ibid* at 520 (noting how orthodox cultural "essentialists" often mischaracterize culturally dissenting opinions within its own cultural norms as "the product of *external* cultural influence" and therefore, "a threat to the community's integrity and survival."

[1214] *Ibid* at 500.

[1215] Clarissa Rile Hayward & Ron Watson, "Identity and Political Theory" (2010) 33 Wash U JL & Poly 9 at 21 [Hayward & Watson].

[1216] *Ibid*. The price of which is exclusion from belonging or sanctions.

[1217] *Ibid*. (discussing Connolly) (original citation omitted)

[1218] Sunder, *supra* note 1209 at 498.

minority group is free to shatter the mandated way to lead that culture's life; he has the freedom to contribute to the meaning-making within and outside unilaterally defined cultural frontiers, and indeed create a culture within a culture.

This in turn makes us reflect on the role of law with regard to ensuring the freedom to choose one's cultural identity. Law, in recognition of cultural identity, can be a powerful weapon to *flatten* cultural impurity within a culture in an ongoing effort to "reconstruct pure (cultural) identity categories."[1219] This is because, as one commentator bluntly admitted, "law's conception of culture matters."[1220] Law's role in this context should not be one that provides the legal means to a few elites of cultural groups to exclude individuals who seek to "challenge cultural orthodoxies and demand more equality and autonomy within their cultural contexts."[1221] In other words, the expressions of those who disagree with the *status quo* of the insular nature and associative binds of a given cultural definition should not be silenced. What is more important than having the liberty, by law, to tell the story of one's own identity?[1222] Critical dissents of assertive cultural identity must not be compromised by the tyranny of the majority within the minority cultural group's campaign to "preserve forever"[1223] and "freeze"[1224] a cultural identity. The same recognition of political (and therefore cultural) force by law should be extended to those who wish to contest the meanings of culture within their own groups.

This freedom of critical speech, as the right to the authorship of one's cultural

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[1219] *Ibid* at 502.

[1220] *Ibid* at 509.

[1221] *Ibid* at 498.

[1222] See in general Kahn, *supra* note 19.

[1223] Sunder, *supra* note 1209 at 502 (internal citation omitted).

[1224] *Ibid* at 503.

identity, is applicable in today's many social movements. The right to critical speech would mean that gay black men who, despite fierce backlash from their own racial communities, can muster the courage to denounce Black Lives Matter.[1225] Under this freedom, Hispanic and Black Americans who, tired of seeing the degradation of Republican values, could decide to take the wheel in rewriting those values. Similarly, the bravery of Muslim women who dare to throw away traditional garments as they reinterpret the teachings of Islam must be applauded, not mocked.[1226] Critical speech means the fearlessness of *women* and men who stand up to criticize the missteps of the #MeToo movement without betraying core feminist ideals.

Consider, for instance, the curious case of Kanye West. The American rapper had recently made several public comments during a TMZ interview,[1227] on his personal social media account,[1228] and at a nationally-televised meeting with the current President of the United States,[1229] among other occasions.[1230] Of his most controversial statements, he proposed that the Thirteenth Amendment of the United States Constitution be abolished.[1231]

[1225] See, e.g. Orville Lloyd Douglas, "I'm black and gay. Black Lives Matter Toronto doesn't speak for me", *CBC News* (12 June 2017), online: http://www.cbc.ca/news/opinion/blm-pride-toronto-1.4153736 (criticizing the Black Lives Matter movement's persistent decision to push to exclude gay Toronto police officers from the annual pride march).

[1226] See, e.g. Ursula Lindsey, "Can Muslim Feminism Find a Third Way?", *The New York Times* (11 April 2018), online: https://www.nytimes.com/2018/04/11/opinion/islam-feminism-third-way.html

[1227] See footnote 1232.

[1228] See footnote 1231.

[1229] NBC News, "Full Video: Kanye West's Meeting with President Donald Trump at The White House" (11 October 2018), online: https://www.youtube.com/watch?v=jLmQ57mEGFs

[1230] His recent rant on Saturday Night Live show's closing stage is one showcase of this. On the incident, see Joanna Robinson, "*S.N.L.*: Watch Kanye West Go on a Bizarre Pro-Trump Rant", Vanity Fair (30 September 2018), online: https://www.vanityfair.com/hollywood/2018/09/kanye-west-trump-rant-video-saturday-night-live-snl-chris-rock-instagram

[1231] This was sent out by a tweet but it has since been deleted and it is uncertain whether his social media accounts are still active given that he has been deactivating and reactivating his accounts himself over the course of last few months especially. To see the original tweet and the details of the story, see Morgan Greene, "Kanye West's tweet about abolishing 13th Amendment calls for civics lesson, critics say", *The Chicago Tribune* (1 October 2018), online: https://www.chicagotribune.com/news/ct-met-kanye-west-13th-amendment-20181001-story.html

He also had stated that,

> "When you hear about slavery for 400 years. For 400 years? That sounds like a choice."[1232]

His critical statement, no matter how ignorant or distastefully-perceived by many Black Americans or descendants of Black slaves in America, remains open to further discussion. He does not impugn the social esteem of Black Americans but demonstrates the willingness to continue the discussion on the subjects, albeit confrontationally. If his self-expressions are his modes of critically conveying an invitation to Black Americans whom he considers not "woke" to think freely (i.e. by suggesting that slavery can also be a mental state, not necessarily by physical bounds),[1233] then it is his way of arousing what he considers critical thinking among black folks in the United States.

4.2.4. The Limits of Critical Speech

And yet, critical speech as a form of democratic participation in collective self-governance or cultural freedom should be active *insofar* as it encourages further discussions and promotes the exchange of differing views; in other words, that forcefulness should not be one that "proselytizes"[1234] others. This line, however delicate, must be observed, for it is that which separates a critical speech which is acceptable in democracy from other forms of speech of lower aspirations grounded on cultural superiority, presumptiveness, and indoctrination of absolute incompatibility. The latter is based on a morally wrong posture. Instead of critical speech mainly consisting of "Socratic elenchus or refutation"[1235] through

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[1232] The viewing of this is available at TMZ's official Youtube channel. TMZ, "Kanye West Stirs Up TMZ Newsroom Over Trump, Slavery, Free Thought" (1 May 2018), online: https://www.youtube.com/watch?v=s_M4LkYra5k at 01m:14s – 01m:44s.

[1233] *Ibid*.

[1234] Bot, *supra* note 1195 at 238.

[1235] *Ibid* at 237-38 (describing the 'Socratic elenchus' that takes the form of "refutation, challenging or negating

ways of critical exposition to models of comparison or defying the established norms and practices, such speech purposefully thrives in its objective of "affirm(ing) a supposedly universal model of liberated … subjectivity."[1236] 'Criticism of this nature may lead to savage verbal attacking, degrading and dehumanizing, and self-evidently, to the muting of cultural pluralism. It is one that sees and exercises one's freedom of expression in the most aggressive sense as positive freedom that unitarily values "the freedom … to lead *one* prescribed form of life."[1237]

Generally, people have the tendency to view critical speech in a pejorative light. It is thought to be a kind of expression that necessarily speaks ill of a person or public policy. This is a common misunderstanding of critical speech. Critical speech, and critical speech aimed at a cultural community especially, is in fact grounded on *open-mindedness* in recognition of cultural pluralism. To begin with, critical speech requires a certain degree of willingness "to communicate with those beyond their own communities."[1238] Therefore in this context, critical speech is not critical speech if the speaker does not engage in cross-cultural dialogue. The critique must equally "value(s) and wish(s) to preserve that (cultural) heterogeneity."[1239] It follows that contrary to popular misconceptions, critical expression is actually the one that is originally predicated on the appreciation of a pluralistic vision of society. This is the precondition for critical speech: that the speaker possesses the willingness of mind to reach across the cultural aisle and respectfully engage in constructive criticism through exchange of curiosities, inquiries, suggestions, and opinions. It is one that is based on the conversational

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the authority of established dogma in the name of critical dialectics").

[1236] *Ibid* at 238.

[1237] *Ibid* at 178 (liking the notion to Isaiah Berlin's definition of "positive freedom" from *Two Concepts of Liberty* (1958).

[1238] Post, "Participatory Democracy", *supra* note 1184 at 635.

[1239] *Ibid* at 634.

quality of expression, "the capacity to listen and to engage in self-evaluation, as well as a commitment to the conventions of reason… objectivity, disinterest, civility and mutual respect."[1240] This 'good-will' component of the critical speaker automatically diminishes the risk of hate and group vilification. Those who seek to willingly promote cultural pluralism as a requisite for the maintenance of public discourse will not, by reason of personal belief, indulge in degrading comments of another's way of living nor transgress their inherent values as equal members of a diverse society. Instead, the critical speaker approaches the subject of the critique in equal standing with original merits in its own distinctiveness. Edward Baker understood what critical speech ought to be when he emphasized the "progressive ideal" of speech that should not "in any way (that) undermine(s), distort(s), or destroy(s) communicative action oriented toward consensus."[1241] A critical spirit's interaction with cultural strangers should not seek to coerce the counterparts into one's meaning of goods of life nor should he judgmentally impose his perspective onto others based on the standards of his own cultural norms. This is the essence of John Stuart Mill's "real morality of public discussion."[1242] Only then can cross-cultural dialogue absent of egocentric interpretation of *the others* be attained through bridging mutual understanding.

4.2.5. The Meaning of Freedom of Expression in Communitarian Multiculturalism

In every accommodating society, there exist(s) "common meaning(s)."[1243] These are

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[1240] Post, "Reconciling Theory", *supra* note 242 at 163.

[1241] Edward Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989) at 107.

[1242] Post, "Reconciling Theory", *supra* note 242 at 164 (internal citation omitted).

[1243] I utilize the term "common meaning" in the way Charles Taylor expanded on in Charles Taylor, *Philosophy and the Human Sciences,* Philosophical papers vol 2 (New York: Cambridge University Press, 1999) at 38-39 [Taylor, "Philosophy"].

products of time, forged by a long-running amalgam of history, culture, and the struggle for a coherent identity of (a) people(s). Take for example, Charles Taylor's explication of a common meaning for Quebecers:

"In a society with a strong web of inter-subjective meanings, there can be a more or less powerful set of common meanings. By these I mean notions of what is significant, which are not just shared in the sense that everyone has them, but are also common in the sense of being in the common reference world. Thus, almost everyone in our society may share a susceptibility to a certain kind of feminine beauty, but this may not be a common meaning. It may be known to no one, except perhaps market researchers, who play on it in their advertisements. But the survival of a national identity as francophones is a common meaning of Québecois; for it is not just shared, and not just known to be shared, but its being a common aspiration is one of the common reference points of all debate, communication, and all public life in the society."[1244]

Taylor saw this common meaning as being omnipresent in the discourse of Quebecers, as a concurring point of reference in the national conversation. It has a unifying commonality that exhibits an unforced embeddedness in every Quebecer's identity. The ability to maintain a French-speaking society epitomizes, Taylor saw, a way of ensuring 'La Survivance' of Quebecers' way of life. This 'common meaning' is for Taylor and Quebecers a specially rooted core element constitutive of Quebec's cultural identity that cannot be simply 'plucked out' even in the face of rising multicultural waves, one that keeps them grounded and helps them hold their own against the tides of time. This cultural identity is a part of the dominant societal culture[1245] happening in a partially fixed structure of a set

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[1244] *Ibid*.

[1245] Kymlicka suggested that we view minority groups and their claims as something of societal cultures defined by shared language, institutions, or history, instead of seeing them as particular group of people committed to a specific conception of good or way of life. See Kymlicka, "Multicultural Citizenship", *supra* note 65 at 101-05.

historical frame.[1246] Its character may change. This is what Kymlicka and Seymour meant in terms of the changeability of the "character of a historical community."[1247] As Kymlicka illustrated with the example of French-Canadians during the Quiet Revolution,[1248] it is indeed possible, or even inevitable that traditionally-held perceptions and customs descending from one historical period to another, become unpopular or eventually seldom practiced. It may arise from the occupying population whose social norms may change over time. It is the case for instance, one can argue, with regard to the adaptive measures concerning individual privacy, mass migration demanded by surging technological advancements, the decline of a particular segments of demographics, and the shattering of national boundaries respectively. So do social views on certain behaviors. What was once seen as inherently sinful and contrary to the public moral is not only legalized; it also receives acknowledgement as a freer self-actualization.[1249] It is the theory of natural evolution and no society is immune from this.

While the character of a given societal culture may change, the structure however, and to a certain extent the cultural identity of what it means to be, to continue with Taylor's analogy, a Quebecer, remain largely the same, for now. That structure is institutionally assured by the democratic system with its various judicial, executive, and legislative branches of government, and their delicate balance maintained by the principle of separation of

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[1246] Seymour, 59 at 156-57 (warning to not confuse cultural identity from moral identity, nothing "moral identity may vary, but individual does not change if his or her institutional identity remains the same).

[1247] Will Kymlicka, *Liberalism and Cultural Membership* (Oxford: Clarendon Press, 1989) at 166 [Kymlicka, "Cultural Membership"]; Seymour, *supra* note 59 at 157.

[1248] Kymlicka, "Cultural Membership", *supra* note 1247 at 167. Kymlicka provided two meanings of cultural change or as he put it, "demise of a culture." The first was, as cited through the French-Canadians, a result of the collective choice of Quebecers "themselves made from within their (stable) context of choice." (*ibid*). In his second meaning, he referred to the "danger to cultural membership… (that) arises in spite of the choices of aboriginal people, and undermines their context of choice." (*ibid*).

[1249] For instance, abortion, homosexuality, and currently, the recreational or medical use of marijuana are perceived very differently than from just a few decades ago, and this, not only by legislations but also by the general perception of society on these issues that have greatly shifted.

powers. Together with the fundamental principles of a democratic system and its rights and freedoms, or what Rawls summarily qualified as primary social goods, such as the rule of law, freedom of expression, of religion, of association, of the press, right to human dignity, equality and citizenship, act as pillars to ensure the continuance and functionality of that structure. These are of course more than just legal rights: these are collective values that are representative of a society's self-image conceived in its respective "inescapable horizons."[1250]

Yet, we also know that Québec, or Canada in general, is a multicultural society that is increasingly communitarian.[1251] *Ab ovo*, the *Charter* has been amicable toward concepts of group rights.[1252] The recognition of cultural group rights in the Taylorian sense come in three ways: (1) at the federal level (e.g: the usage of French language and the recognition of Indigenous peoples' rights); (2), with the attribution of rights to specifically-designated ethnic minority groups, and (3) with the acknowledgement of rights to disadvantaged groups.[1253] In

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[1250] Charles Taylor, *The Ethics of Authenticity* (London: Harvard University Press, 1991) at 31 [Taylor, "Ethics of Authenticity"]. The inescapable horizons for every individual are the kind of thinking of framework constructed from personal surroundings or social context in which the situated individual will derive significance.

[1251] On the definition of communitarian multiculturalism, see Delanty, "*Community*", *supra* note 1205 at 71-81. Delanty enunciates several different models of multiculturalism (liberal multiculturalism, liberal communitarian multiculturalism, liberal pluralist multiculturalism, radical multiculturalism, and postmodern multiculturalism). See also, Gerard Delanty, "The Limits of Diversity: Community Beyond Unity and Difference" in Christiansen Flemming & Ulf Hedetoft, eds, *Multiple Belongings in Europe and Asia* (Aldershot: Ashgate, 2004) at 45-57 [Delanty, "Limits of Diversity"]. The notion of multiculturalism as a political theory has come under severe attacks from many writers over the years. Delanty himself admitted that "multiculturalism was a model of management rather than of genuine integration," one that "was always based on the assumption of liberal tolerance rather than of participation in cultural identity…" (*ibid* at 45.) He continues, observing that "diversity has penetrated the cultural identity as a whole," making it "more and more difficult to define exactly what constitutes a group," which, in his view is related to the "social fragmentation" induced by capitalism and notes that "multiculturalism in many cases is entering this new and uncertain territory to which it may be ill-equipped." The concept of multiculturalism wrapped in the language of diversity "cannot provide a basis for new national identities/imaginaries and can even invoke divisiveness." (*ibid* at 46). See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2016).

[1252] s 27 of the *Charter* effectively registers multiculturalism as a Canadian value. Furthermore, the *Charter* includes specific sections that are specifically dedicated in respect and in recognition of minority language educational rights (s 23), denominational schools (s 29), and even extending the reconciliatory branch to the treaties with Aboriginal peoples (s 25). The place of group rights in the Canadian context and the "recognition that pluralism is one of Canada's animating values" are part of a distinct Canadian judicial identity. The Hon McLachlin, *supra* note 371 at 31. See also footnote 416 (cherishing of group values in *Oakes*).

[1253] Delanty, "Limits of Diversity", *supra* note 1251 at 47-48. Elaborating that this latter point was the argument

short, these measures all represent Canada's stance of granting legal *and* political recognition to cultural communities, and by implication, their cultural identities. This has made the Canadian soil fertile for the thriving of communitarian multiculturalism that is distinct from the more "republican constitution traditions" of French or American multicultural models.[1254] Delanty, for instance, went as far as to set apart Canada's communitarian multiculturalism from the classical liberal version of multiculturalism and multiculturalism in *stricto sensu*. [1255] This is in great part because immigration has played a key role in shaping political communities. And communitarian multiculturalism, as Delanty's observation continues, would in fact be a direct "product of settler societies."[1256]

Regardless of the accuracy of Delanty's diagnosis, demographic formations and spatial arrangements attest to a certain degree the prevalence of communitarian multiculturalism by clusters of the so-called 'ethnic enclaves' in and around large metropolitan cities.[1257] One does not need to search far to verify that this is indeed a simple

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of Kymlicka who took into great consideration to justify the recognition and necessity to do so in case of historically-oppressed indigenous peoples who suffered injustice and violent imposition through colonization, while operating a critical distinction on whether that same standard should apply to minority ethnic immigrants who voluntarily inserted themselves into Canada through immigration process and benefited from it.

[1254] *Ibid*.

[1255] As it (liberal multiculturalism) "… does not extend the multicultural ideal into the domain of political community. It stops short of a politics of cultural difference." Delanty, *"*Community", *supra* note 1205 at 77.

[1256] *Ibid*.

[1257] Evidently, there figure multiple reasons as to why immigrants or 'outsiders' seek to settle in their own communities. It is certainly an interrogation that requires a complex answer, mainly comprising of social and economic reasons. See e.g. Sandeep K Agrawal, "Neighborhood Patterns and Housing Choice of Immigrants" (2010) Region of Peel Immigration Discussion Paper at 3-4 [Agrawal, "Housing Choice Immigrants"]. It is also true that the Canadian view on ethnic or cultural enclaves is relatively positive than the American perspective, the latter having being found to focus much on the negative aspects as consequence of racial segregations. Again, one must take caution that, every society, even if it could be generally perceived as being 'multicultural,' is unique in its own way. The 'settlement' of imported culture, by generations and descendants of immigrants, against the majoritarian culture in which it is transplanted and cultured, varies in its historical context (for instance, the level of friction between groups, the liberal or illiberal tendencies of juxtaposing cultures, and so on).

The many advantages of ethnocultural *in*clination have been extensively professed by social scientists. Most notably advanced by the early pioneers of the "Chicago school," it has been noted that ethnic enclaves promote cultural diversity and create ethnicity or unobstructed culture-based economy. See Daniel Hiebert, "Ethnocultural Minority Enclaves in Montreal, Toronto and Vancouver" (2015) IRPP Study No 52 at 1 (Hiebert,

constat d'un état de fait. Whether it be some artificial rendering of a Westernized re-interpretation of Chinatown in rue De La Gauchetière or the predominant presence of Jewish people in the vicinity of Outremont, heavily centralized *uni*cultural 'villages,' along with more heterogenous sectors, constitute the multicultural constitution of the City of Montreal. Of course, long before the resurgence of Plateau Mont-Royal as the popular destination of French immigrants that was popularly baptized as "la Nouvelle France," there was the Little Italy. So is Côte-des-Neiges where one can easily hear the friendly rumblings of Russian-Jews, Vietnamese, and Haitians. Montreal is in no way alone in harboring distinct cultural units, or 'cities within a city.' Chinatowns are reciprocated on Fisgard street in Victoria and Gastown in Vancouver while Portuguese songs can be heard in Dundas street in Toronto. The K-Town in Los Angeles tells similar stories. Across the Atlantic, Quartiers Chinois in the 13e arrondissement to more ghettoized 93e and Pantin-Bobigny sectors are inhabited by overwhelmingly black and Arabian ethnic population of Muslim faith,[1258] are all components

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"Ethnocultural Minority Enclaves"). Ethnic enclaves are instrumental in providing a pivotal 'foothold' in the early years of starting immigrants via important cultural institutions or support systems like religious or job connections in tight-knit communities before subsequent "assimilation" into the larger, local market. Furthermore, culturally sensitive health care or socio-cultural issues can also be dealt with appropriate treatment within ethnic communities. See also Agrawal, "Housing Choice Immigrants", *supra* note 1257 at 2 (noting that "Neighborhoods with high concentrations of immigrants or ethnic groups may facilitate the delivery of some linguistically or culturally sensitive services because of the presence of a large group of people of similar background and needs in one area.").

The flip-sides of those advantages have not gone unnoticed. The risk of "ghettoization," fostering of mono-cultural community, isolation of upcoming generation from successfully integrating into the mainstream society, inhibiting access to broader job opportunities and reinforcing existing stereotypes, are some of the most notable downsides. That being said, there is consistency in empirical data firmly establishing the existence of dense unicultural communities within or in proximity of heavily populated metropolitan cities. For instance, Daniel Hiebert's up-to-date research on what is presumably one of the most extensive and comprehensive in-depth studies of ethnocultural enclaves conducted in Montreal, Toronto and Vancouver, notes the "growth of enclave neighborhoods, place that have become identified with particular ethnocultural groups and, especially, visible minority groups" as "the most notable feature" as the direct result from the massive immigration of 4.64 million people between 1980 and 2011 and their *deliberate* choice of *residence* in Canada. See Hiebert, "Ethnocultural Minority Enclaves", *supra* note 1257 at 1. Building on the findings of urban sociologist sand geographers, he also observes the increasing importance of recognizing a certain "connection between the spatial arrangement of society and social relations within it." (*ibid*).

[1258] I speak from my personal experience during my years in Paris. During my bachelor's and Master' degrees, I have lived in both the Pantin-Bobigny suburbs and 15th, 6th, and 7th arrondissement. The differences – of respective population, economic discrepancy, racial or religious composition in each sector, for instance, that of

that offer a more complete – and candid – look of fully disclosed Parisian experience.[1259]

Though the illustration of the ethnic enclave is a general observation occurring in most major metropolitan cities, the inward-association is not limited to residential concentrations. One's circle of friends or engagements to uni-cultural participatory activities in largely homogeneous communities may describe the modern communitarian. It may be individuals who appear cosmopolitan on the immediate outset by their broader geographical situatedness (residing in heterogeneous zones of the city for instance) and yet the majority of their self-associations are almost exclusively constrained to their own original cultural community members. Take for example, a great many South Koreans in Montreal.[1260] Many South Korean immigrant families' lives evolve around South Korean local churches in Montreal. This is not necessarily due to their unfaltering faiths but often for social reasons. They regularly participate, as family units or group of friends, in church-organized activities with other South Korean members of the community. I have hardly ever heard of church-going Korean immigrants participating in celebrations of Quebec's provincial holidays but Sunday services they do not miss. A substantial portion of these immigrants deliberately prefer to rent apartment units in Westmount (it being Montreal's most dense zone of Korean immigrant population), this often results in them residing in the same condominiums for an

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7th arrondissement when contrasted to the north-east suburbs of Paris – are remarkable.

[1259] I use the term "candid" to put into perspective the kind of social fragmentation Parisian society has long been criticized for, largely in contrast to what visitors may easily mistake what Parisian life is really like for ordinary people of modest means. The more inward one goes in Paris, the more bourgeois quartiers with mostly white population will be noticeable while the more outward – suburban of Paris – one moves, the economic social class and the majority of groups of people inhabiting those areas, in many cases, will tend to be people of color.

[1260] Obviously, one must take caution not to generalize every South Korean individual immigrant as falling in the present categorical description. I do speak, however, from personal observations and experiences amassed in the last four years during my residence in Montreal, visiting and being part of local Montreal-Korean churches, associations, university student groups, young immigrants as well as middle-aged parents with pre-school and/or elementary children. What gives only more confidence in my evaluation is that my observations on the vast majority of Korean immigrants in Montreal do not differ in any significant ways from my previous observations of Koreans' attitudes toward broader societies in Paris, Manila, and even in Cameroon – these being all places where I have spent most years of my life – in terms of their degree of integration to the local society.

even closer proximity. Many of them send their children together, to private, English schools rather than French schools, to join other Korean children who are already enrolled there. Younger, single adults are not too different, if not even more likely to practice a similar inwardness. Those who may be studying at university (again, overwhelmingly at Concordia, McGill, or other English institutions, and *not* in French language institutions, yet again, by their own choice) or other vocational schools too, generally show very little interest to reach outward, to the broader, yet local, Quebec society. Many who have spent more than four to six years during studies here prefer to limit their physical movements to Downtown or Westmount areas and do not know nor do they practice more than a spoonful of French words that they are likely to never use during their stay here. Even for the majority of those who have already obtained permanent residences or Canadian (Korean) citizens by birth in overwhelming instances strongly insist on using English rather than French. A handful of Korean immigrants in their twenties or thirties often dream of 'escaping' Quebec for a Torontonian life or living elsewhere in Canada almost immediately following their settlement in Montreal. To put it mildly, there is a complete lack of genuine (willingness to make) cultural acquaintance or intellectual curiosity to actually get to know the society they are inhabiting during a significant portion of their lives, other than to stay put in their familiar, localized bubbles. It is the kind of *communitas* described by Victor Turner, while not fixed (the members come and go as they please) nor spatially limited (existent virtually in every major 'multicultural' mega cities and especially younger generation being located in 'mixed' zones) in its forms, it is nevertheless resistant toward any notion of pre-conditioned norms or institutions, and nests in-between spaces of established structure, at its margins and edges or even beneath it, in "inferiority"[1261]: it is *anti-structure* by nature. I find it highly appropriate

[1261] Victor Turner, *The Ritual Process: Structure and Anti-Structure* (London: Routledge & Kegan Paul, 1969) at 128-29.

to quote here the way Jeremy Waldron described this set of insular communitarian mentality:

"From a cosmopolitan point of view, immersion in the traditions of a particular community in the modern world is like living in Disneyland and thinking that one's surroundings epitomize what it is for a culture really to exit. Worse still, it is like demanding the funds to live in Disneyland and the protection of modern society for the boundaries of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life. It is like thinking that what every person most deeply needs is for one of the Magic Kingdoms to provide a framework for her choices and her beliefs, completely neglecting the fact that the framework of Disneyland depends on commitments, structures, and infrastructures that far outstrip the character of any particular façade. It is to imagine that one could belong to Disneyland while professing complete indifference towards, or even disdain for, Los Angeles."[1262]

The insinuation is a dismal one. In other words, Taylor's "common meaning" of being Quebecers is of insignificance to the inwardly caving. Would it be a stretch to say, whether Quebecers' generational and ongoing struggle to preserve their own linguistic heritage would even mean something, if *anything* at all to *those* Korean immigrants? The "common meaning" of Quebecers, to put it bluntly, would be in peril. The concern is that communitarian multiculturalism may very well be reinforcing this tendency of *inward*-identification toward one's own groups of origin. While the Canadian model prides itself on diversity and the possibility of multiple belongings without having to choose one identity over the other or 'assimilate' – a term no longer used in Canadian context for its perceived hostility - to the dominant or broader (national) societal culture, the dislocation of this sort in the process of transmission of deeply rooted common meanings from the accommodating to

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[1262] Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Will Kymlicka, ed, *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) at 101 [Waldron, "Cosmopolitan Alternative"].

the accommodated may signal the disappearance of an anchoring weight that used to hold together a homogeneous society.[1263] Europeans have centuries of well-established, distinct national and cultural identities and they *still* struggle to keep it together. Americans have successfully created a national identity powerful enough by which newcomers learn (often brutally) to be Americans *first*. And when one attempts to reassert one's own ethnic heritage of identity before the supreme Americanness, it is made an exemplary subject of travesty and derision.[1264] In consideration of these factors, the question arises as to whether Canada's move toward a post-national, citizenship-oriented idealism may have been premature with its dilution of national identities.

My concern here is that the disinterest, or as Waldron put it, even "disdain" vis-à-vis the accommodating people's "common meaning" to a given language is a symptom hinting at a larger nonchalance toward the very structure that enables the coexistence of the accommodated. Group rights, benefits, provisions, entitlements, assisting institutions for cultural preservations and programs do not happen by themselves. They depend on the structure of the wider society. I have mentioned earlier that this structure is composed of democratic pillars, of its key institutions and collectively cherished values definitional of that

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[1263] It is only normal that disagreements between different cultures inhabiting under a single roof of society/nation will arise. The question of effectively governing those disputes with minimal infringement on fundamental rights and freedoms of those citizens has always been and will always remain as *the* challenge of the multicultural nation. The Americans have succeeded to create an American (national) identity, an ideal powerful enough to disintegrate (or at least set aside) one's racial/ethnic origin in the melting pot in pursuit of the American dream, an American identity. If Canada, in the absence of that sort of unifying ideal or as the current Prime Minister controversially put it, core identity, as a combined result of history and active encouragement to "preserve" one's cultural identity and diversity instead of a "Canadian identity", there should not be a reason why adhering to defining principles of democracy should not be a rallying point, than a mere complementary accessory heard only in courts of law, in harnessing a common identity of Canadians.

[1264] The most recent example is the case of Senator Elizabeth Warren who de facto announced her 2020 U.S. presidential bid, when she put out her DNA test result establishing that she is 1/1024 native American going back between 6-10 of her prior generations. She exhibited the result as a response to Donald Trump's taunting of her name-calling her as "Pocahontas" and pledging to donate one million U.S. dollars to the charity of her choosing if she took the test. The moment she came out with the test result, virtually every single news media to pundits to journalists to political analysts made a mockery of her assertion of "some" native American identity in her blood. Some even predicted that her move had effectively ended her presidential run before it even began.

very society. And freedom of expression would figure among these constituents as long as the current society is established on a democratic model of governance. Would then, freedom of expression, as a core component and source of aspiration for any democratic system - again to borrow Taylor's term - denote the same "common meaning" to those communitarians? In this regard, at first one may be tempted to apply a universalized understanding of freedom of expression. One would argue, that free speech is universally celebrated as a constitutional good which forms "common reference points" for believers and practitioners striving toward an optimal democratic system. Is it not the case that the maximally-unregulated approach to speech, tolerance of divergent views and their unobstructed circulation on public forums all have the "common aspiration,"[1265] as Taylor put it, to achieve the proper functioning of democratic operations through the participation of informed citizenry? Indeed, one could very well elevate freedom of expression as an integral part of a common identity that is, among other cultural traditions and social values, a prerequisite for "a stable democratic governance."[1266] Doing so, however, would be a mistake.[1267] For instance, it is doubtful as to whether the newly arrived Pakistani or Chinese immigrants, whose home counties favor defending religious hubris with blasphemy law at the expense of free speech or censoring Winnie the Pooh images online, respectively,[1268] would

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[1265] See footnote 1243.

[1266] Hayward & Watson, *supra* note 1215 at 18 (explaining that such is an argument advanced by liberal nationalists who may not be in fact multiculturalists given their lack of support of multiple identity groups).

[1267] This has been a widely criticized fault of liberalism. There is always a risk of falsely universalized understanding of rights imposed by a coercive State; thereby, to be able to discover and agree on certain liberal society's values, diverse understandings or views on those values be given "sufficient cultural self-confidence, political power, and opportunity to enter into a serious dialogue." Parekh Bikhu, "Minority Practices and Principles of Toleration" (1996) 30 Intl Migration Rev 251 at 256.

[1268] It could very well be argued that this is a presumptuous assumption. Those who disagree on this could advance that recently arrived immigrants, even from extremely intolerant and illiberal societies (compared to Canada for instance), are eager to integrate, by at least respecting, if not embracing, the values of their new home; that the very reason they chose to come to Canada was to flee from the chains of oppression and violation of the freedoms – freedoms that are constitutionally guaranteed in Canada. However, my doubt to that argument is twofold: First, to immediately presume that those originating from less tolerant places will be able to, or even be willing to exercise the fundamental rights and equally respect those rights and freedoms of others, is to ignore

share the exact "common meaning" of freedom of expression as ordinarily understood by Canadian citizens *and* especially if and when the mirage of communitarian hives prioritizes certain aspects of originating cultural membership over any linking threads of common meaning better reflective of the larger society. That point of convergence on something as broadly invoked as 'freedom of expression' is not perfect even within the U.S., with whom multiple cultural layers overlap and yet subtle constitutional interpretations persist to derail uniformity of that meaning. Thus, it is a false assurance to presume that freedom of expression would project the same "common meaning" to all.

To avoid to committing the same mistake of the liberal multiculturalist, and aware that the freedom does not hold the same degree of significance to a pluralistic society that is an amalgam of dogmatic cultural subjectivities, the second path becomes enticing. That is, to demote freedom of expression to the category of second-class rights by taming what I view as the essential aspect of free speech, and to come back to reassure the secondary *inquietude* raised in this Chapter: the right to critical speech, or, the *critical spirit* of speech. The incongruousness of the meaning of freedom of expression held by disparate cultural communities stems in great part from disagreement over the liberty to express a critical view on groups of people. In other words, the departing point on the tolerable limit on the wholesome exercise of this freedom begins with the voicing of critical views on certain

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the cultural embeddedness to which people have become accustomed to, in many cases, for their entire lives. Those arguments ignore the power of human habituation. Would it be possible to blame an elderly immigrant from Afghanistan as disrespecting sexual equality for refusing to be treated by a female nurse or refusing to shake hands with a female teacher of his grandchild? This is not to mention that the motivations behind immigration are very diverse, economic opportunities being a major reason. For a person to genuinely believe in, exercise, and perhaps most importantly, tolerate and respect these rights and freedoms of others even to the point when these are exercised to criticize him/her or the ethnic/cultural group to which he/she identifies with, is not some theoretical make-do. My second objection is that even for those who are willing to embrace those rights and freedoms themselves, the previously mentioned inward communitarian environments may hinder these willing folks from being exposed to the practices of those rights and freedoms. This could lead to these individuals from being more allergic to the exercise of critical speech against their culture or groups practices. At worst, it in of itself defeats the very purpose of their accommodation and acceptance since it could deepen social fragmentations.

groups, often minorities. To attune, or even *civilize*, free speech at the pleasure of political correctness may be a convenient option. One could even argue that to do so would be a natural development of governance to facilitate the administration of the multicultural realm. After all, the communitarian multiculturalist sees it as prerequisite to "compromise in order to maximize inclusion on social level."[1269]

To rephrase my line of argument, should the critical character and scope of free speech be malleable in accordance to varying cultural sensibilities? What if one's own ethnic group membership triumphs over the very structure that sustains and capacitates their very own parochial cultural sub-structure in the first place?[1270] What if Kymlicka's cultural right to live from within[1271] rejects critical opinions regarding a particular religious or ethnic community to be expressed on floors of public debates? What if the precepts and canons of one's inner group are thought to supersede other equal citizens' constitutional freedom to voice unpopular, critical views on news channels and radio shows? When a cultural community refuses even the practice of critical speech and the freedom of the speakers (often by branding the speakers as outright racists) to discuss the very issues which prompted the critique in the first place, it leads to the erosion of free speech's central tenet.

Chapter 4 Conclusion

The last chapter aimed to be a set of rebuttals to two main objections that could be raised against my claim to harm to identity. I first tackled the potential obsolescence of the

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[1269] Delanty, "Community", *supra* note 1205 at 78.

[1270] Waldron, "Cosmopolitan Alternative", *supra* note 1262 at 103.

[1271] This has been the entire impetus of Kymlicka's argument: cultural membership is an important right and that there is good reason to provide a cultural structure or context of choice in which individual can choose to lead a good life. His argument is presented in Kymlicka, "Liberalism", *supra* note 65 at 162–81.

marketplace theory, a defining paradigm underlying the First Amendment right to free speech. To support this claim, I have described two social phenomena. The drastic change in the traditional methods of journalism has negatively impacted its institutionalized role, damaging its functionality regarding its principal task of informing the public accurately and with impartial truths through its process. Relatedly, the rise of false news has further impaired the faculties of a discernable marketplace by its ability to self-propagate with unprecedented technological facilitations and to bypass otherwise conventional legal obstacles. Its dissemination, as we saw, was assisted by the First Amendment's unwillingness to recognize harm in false (political) speech. These have altogether effectively disabled truth-searching operation in the marketplace. The marketplace of ideas as a concept still holds its own in its advocacy for content-neutrality toward all ideas with minimal interventions from the State. It would be naïve, however, to blindly trust the rational capacity of the consumers of information to distinguish truths from falsehoods.

I have also retorted to the second objection with regard to the freedom of critical speech. Therein, I have argued for the safeguarding of the right to voice critical opinions, especially regarding cultures and groups in our society, fundamentally as a form of democratic participatory right. I have also stressed this point by assimilating the individual right to critical speech as a freedom to define one's own cultural identity unbound from one's own inner culturally-unifying imposition and away from the majority assumption. Personal opinions that pronounce on matters of public interest, should always have a place of deliberation to allow for societal adaptation vis-à-vis changing norms and necessary rectification in its future trajectory. I have also called for a careful self-introspection with regard to the place of freedom of expression in the Canadian/Quebec social context. Based on the Taylorian "common meaning," I have attempted to see whether that common meaning could be attainable for this freedom within the structure of a democratic system in a

postmodern, communitarian multicultural society, only to arrive at a disappointing yet alarming outcome. Should the critical speech as the one I have written in the previous sub-section be disallowed simply because it concerns an easily identifiable group of people? Of course not. As long as the intention and the actual contents are not formulated with malice to degrade or vilify a group of identifiable people by their ascriptive characteristics, discussions involving societal issues should be accorded breathing room just as much as governmental affairs benefit. Those debates should always be encouraged, and those debates must be had if we are serious about achieving any meaningful consensus and diminishing whatever disenfranchisement in the interests of a freer and equitable system of governance over all peoples. I am inclined to believe that a greater exchange of open-minded, direct addresses will always lead to better solutions than to let misunderstandings and underhanded political grand standing between constituents' groups foment intercultural divisiveness over time to chip away at the basic decorum of decency and respect.

Conclusion

When I was attending a French high school in Cameroon back in 2007, the Virginia Tech shooting occurred. The morning after the incident, our sixth-grade teacher was briefly mentioning the terror attack as the international topic of the day to the class. Toward the end of that discussion, she looked at me and bemusedly said: “What’s wrong with you Koreans?”

It was meant as a one-liner pleasantry, of course. But immediately following her remark, some in the class turned around to stare at me. Some whispered behind my back. Others outright burst out laughing. In my haste attempt to not stand out more than I already was as the only Asian kid in the room, I joined half-heartedly in their collective cackling. But deep inside, the only thing I was feeling at that moment was pure shame. I wanted to sink into the floor and disappear. What was truly ironic was that everybody knew: The teacher knew, my friends knew, and most importantly *I* knew, that I personally had nothing to do whatsoever with some deranged mass murderer located tens of thousands of miles away. And yet, there I was, being dragged into an awful association by reason of my passport-issuing country.

Fast-forward some eleven years later, I saw my teenage self again, this time, in a Syrian national who had recently immigrated to Montreal. During our casual hellos and conversations on life and universe, I noticed something remarkably strange. Occasionally, whenever the subject of our discussion touched on immigration or aftermaths of yet another tragic terrorist attacks, the Syrian would go out of his way to do everything in his power to dissociate himself from the terrorists in the news. As time passed, it became quite clear that he was attempting to eliminate even a hinge of associative cord being suggested to himself due to his country of origin, race, or religion. He would achieve this first by painstakingly demonstrating an overt eagerness to condemn the wrongdoers. After the public denunciation,

he would almost always follow up by describing himself as the 'good kind.' He wanted to persuade me that he was the French-learning, Quebec-loving, self-sustaining individual, and that he was nothing remotely close to 'those' folks you saw on tv. And to his own credit, he was just that: The French-learning, Quebec-loving, and self-sustaining individual by every social standard. But the signs of self-regulation were so protruding as to the degree of his sub-consciousness of the self and the fear of the unalterable parts of his inherited identity.

These lessons, as told in the above stories and via theories of harm in speech, are the claims that I have sought to communicate throughout the present writing. The premise of my argument rested on reversing group defamation law's denial of individuated harm resulting from generally formulated invective: that such expression may cause individuated harm onto member(s) of the defamed group because it is harm to their identity. To establish the claim, I engaged in the unlocking of the conceptual impasse by first discrediting the inaccurate depiction of the excessive individualistic understanding of the self to the benefit of the socially situated communitarian description of persons. The notion of bonds of identity was brought in to explain how racial or ethnic group defamation is a form of harm onto their bonds of identity. Ultimately, it is of little import that group-targeting speech is a general statement on its outset. A speech that vilifies the fundamental characteristics constitutive of a person-being cannot avoid destabilizing the core of the victim. Group defamation of this kind is no misnomer; it debases a person's identity and questions the content of his or her character by that misconstrued lens.

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I had begun this thesis by observing how we may be re-living a resurgence of identity clashes. In retrospective, there is nothing as natural as various identities jousting with one another to self-define and assert themselves to establish dominance in any given territorial

space. The 2016 U.S. Presidential election was in part just that,[1272] and the conflicting outcomes of the 2018 midterms were yet another illustration of how identity politics remains a constant staple in people's decision-making process. The rise of nationalism and the reminiscence of the 'good old days' in various parts of Eastern Europe (and to some extent, Western too) are all indicative signs of this. And of course, it is not only about race. While racial contentions have always existed as far as human civilization can be traced, identity wars are more than just race. They are a combination of social visibility, economic classes, linguistic spaces, and eroding demographics. It is a question of dominance and who holds the power to yield the 'pecking order.'

Consider for a moment, Thomas Merton's foreshadowing of this enduring adherence to identity and the drive to purge non-identities in the process:

"A mass movement readily exploits the discontent and frustration of large segments of the population which for some reason or other cannot face the responsibility of being persons and standing on their own feet. But give these persons a movement to join, a cause to defend, and they will go to any extreme, stop at no crime, intoxicated as they are by the slogans that give them a pseudo-religious sense of transcending their own limitations. The member of a mass movement, afraid of his own isolation, and his own weakness as an individual, cannot face the task of discovering within himself the spiritual power and integrity which can be called forth only by love. Instead of this, he seeks a movement that will protect his weakness with a wall of anonymity and justify his acts by the sanction of **collective glory and power**. All the better if this is done out of hatred, for hatred is always easier and less subtle than love. It does not have to respect reality as love does**. It does not have to take account of individual cases.** Its solutions are simple and easy. **It makes its decisions by a simple glance at a face, a colored skin, a uniform. It identifies an enemy by an accent, an unfamiliar turn of speech, an appeal to concepts that are difficult to understand. He is**

[1272] Mutz, *supra* note 644.

something unfamiliar. This is not "ours." This must be brought into line - or destroyed."[1273]

The accuracy of the above diagnosis is chillingly resonant with the current political and social atmosphere. Racial or ethnic group vilification, to recite the passage, also "does not have to take account of individual cases."[1274] Its relevance *should* oblige us to seriously ponder upon how this sort of group-targeting vilification are communicative actualizations of the frictions between peoples of varying cultures, religions, or races, in the form of speech. Speech in that sense is used as a medium for identity reassertion or its maintenance. When we thus understand that speech can be weaponized for the pursuit and the certainty of identity, we can also understand the harm it may cause to individuals who become captive in their own racial or cultural identities. This is why the relational deconstruction of such group defaming speech was so revealing to underline the uneven power dynamic between the choosers of their own identities (often by the virtue of their dominant group status) and the assigned whose undesirable identities are arbitrarily imposed upon them. Once this was established, the consequential variants of harm to identity were quick to follow. The merciless trammels of self-conventionalization to mandated norms of identity became visible to our eyes. I have narrated the substances of those harms with examples of racial commodification and its derivatives under a shamed identity (e.g. self-hatred, alienation, impaired ability to form personal interrelations).

Going forward, the challenge that is the recent increase of this particular class of speech also forces us to acknowledge law's limitations in this regard. If, as I am inclined to believe, no truly comprehensive speech-controlling legislation ordained with the surgical

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[1273] Thomas Merton, *Disputed Questions* (New York: Farrar Status and Cudahy, 1960) at 133-34 (emphasis in bold added)

[1274] *Ibid*.

precision to remove the tumor that is racially coded language from ordinary conversations can ever be created, it is then a question that should be resolved by the tone and the tenor of our political discourse. Although it would be naïve to place blind trust in the pursuit of Ayn Rand's kind of objectivism believing that the voice of reason will prevail in today's era of post-truths, it does not mean we should leave ourselves be outdone by hands-down, laissez-faire attitude. It is all the more reason for us, as dutiful citizens, to actively seek out truth in the disorienting marketplace. When we realize the significance of that responsibility, then it becomes difficult to ignore the disparagement of others when, as I hope to have demonstrated, such speech causes personally sufferable harm onto individuals belonging to the maligned group. This should be the case when we know the severity of the injury in its unfair imposition upon those whose only 'sin' was being born into a particular biological qualification or cultural situatedness. That realization should endow us the necessary mindset to come to the conclusion: That harm done to one equals harm to all.

"First they came for the Communists, but I was not a Communist – so I said nothing. Then, they came for the Social Democrats, but I was not a Social Democrat – so I did nothing. Then came the trade unionists, but I was not a trade unionist. And then they came for the Jews, but I was not a Jew – so I did little. Then when they came for me, there was no one left who could stand up for me."[1275]

At the end of the day, all this very much depends on how the State perceives its role and the extent to which the law is willing to recognize the harm. State intervention, in this instance, should not be viewed as a paternalistic thrusting of its own definition of the good life, but rather as a restauration of a "self-conscious collective"[1276] representation of that

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[1275] This is a poem by Martin Niemoller, a German Lutheran pastor, regarding the inaction of German intellectuals against the rise of German Nazis.

[1276] Connolly*, supra* note 45 at 201. (The ultimate agency of self-conscious political action, the official center of

society. There will always be plenty of room for discussion whether the responsibility of the State should be engaged even when harmful speech rampages on in the face of law's pusillanimity. It is a discussion worth having if the State wishes to escape, thanks to its leniency and inaction, the title of complicit enabler of hatemongering. A clue as to an inclusive governance where basic respect for peoples of different identities is not at the mercy of swaying popular views can be found in an excerpt from George Washington's letter addressed to the Jewish Congregation in Newport, Rhode Island in 1790:

"All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which give to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."[1277]

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But all platitudes and moral recommendations aside, I want to close by returning to the initial, archetypical case that served as this dissertation's springboard: the *Bou Malhab* decision. To note the obvious, the aim of this thesis was not to engage in a project that would lead to the elaboration of a whole new set of rules to be substituted to the current legal regime governing group defamation. I was suspicious about adopting such a trajectory from the very beginning. Yet, I feel bound to take a position on the question of law at issue. And law, ultimately a normative exercise,[1278] demands it. After all, the claims I sought to raise were

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self-conscious collective action. It is the institution of last recourse and highest appeal, the one that symbolizes what we are, for better or worse. The legitimacy of the state, as the sovereign center of collective action…").

[1277] Mark A Mastromarino, ed, *The Papers of George Washington*, Presidential Series vol. 6, 1 July 1790-30 November 1790 (Charlottesville: University Press of Virginia, 1996) at 284-86.

[1278] The Meeting, *supra* note 958 (discussing "la qualité tranchante ou décisionnelle du droit.")

largely daring alternatives against the *status quo*, pointing to the law's inability to see the harm in this class of speech as a form of individuated harm to identity. Three points can be emphasized here: First on the substance of the approaches employed by the Court in *Bou Malhab* (I), and two, on the broader question of law's role or instrumentalization in addressing racial group defamatory expression (II). I shall follow up with a proposal of an indicative guideline of factors in large group defamation (III).

I. The Inadequacy of approaches to determine the reputational injury in *Bou Malhab*

With regard to the first point, I was already critical regarding the approaches that the Court had relied on to arrive at its conclusion. The traditional methods used in group defamation law to examine the 'defamatory character' of the alleged expression are inadequate to determine the extent of the prejudice caused by racial or ethnic denigration onto the individuals who are subjected to vilification. For instance, the Court had referred to the 'ordinary person' test as an objective standard to establish fault. This ordinary person test, according to the Court was the following:

"This level of analysis (perspective of an ordinary person) is justified by the fact that damage to reputation results in a decrease in the esteem and respect that other people have for the person about whom the comments are made."[1279]

Ensuing this principle, defamation would have occurred if,

"the image reflected back to the person by one or more people is inferior not only to the person's self-image but above all to the image the person projected to others in the normal course of

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[1279] *Bou Malhab*, *supra* note 1 at para 27.

social interaction."[1280]

The Court went a step further to bring precision to the definition of ordinary person by comparing to the 'reasonable person' standard:

"In fact, the ordinary person is the counterpart, for injury, of the reasonable person used to assess fault. While both concepts are objective, they are not one and the same. The conduct of the reasonable person establishes a standard of conduct whose violation constitutes a fault. The ordinary person, by contrast, is the embodiment of the society that receives the impugned comments. Injury is therefore assessed through the eyes of this ordinary person who receives the impugned comments or gestures."[1281]

In other words, the assessment of the injury must not be held from the subjective viewpoint of the receipient of the message, but rather in the esteem of the general public. The existence of inquiry is proven by determining whether the statement had lowered the target's reputation in their (ordinary) eyes, and not the vilified subject. While the 'ordinary person' standard may be helpful in a relatively small, homogenous community (such as in pre-industrial times),[1282] it is questionable whether that standard is fit to assess reputational injury in societies sheltering increasingly multiethnic and multicultural populations. Even when the notion of ordinary person is meant to capture a law-abiding citizen of ordinary intelligence, the concept suffers from absence of clarity. What *exactly* would an "ordinary person" entail, in practical terms, in metropolitan cities inhabited by classes of persons differing (or meeting intersectionally) along racial, religious, economic, social, cultural, educational, occupational

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[1280] *Ibid*.

[1281] *Ibid* at para 30.

[1282] I employ the term "homogenous" in a plural way. A community can be racially or religiously homogenous but it can also reflect on the lack of variety in terms of job diversity in a given town, or level of disparities between economic classes and educational achievements per household. Thus, the word "homogenous" should not be understood in a constrained manner in this context.

lines? It is a question that requires further review, especially when accounting for the potential of dissemination and amplification of hate messages under the current speech ecosystem and its ability to undermine the rationality of the responses given to such messages. At a certain point, it raises doubt on the very definition of an ordinary person in a court of law.

On a broader perspective, inquiring as to the truthfulness of the statement is equally redundant vis-à-vis a speech that targets people on the basis of their race or ethnicity. While the Court in *Bou Malhab* did concede that the veracity of the alleged statement would be "(…) only one of the factors used to determine whether conduct is wrongful"[1283] and that the manner in which it is expressed may weigh in in determining the defamatory nature of the expression,[1284] there is little doubt that evaluating the truthfulness or factual basis of comment does play a significant role in establishing defamation. This is because in great part, making defamatory statements necessarily involves asserting some false, degrading, or outrageous claims with the objective of tarnishing the subject's reputation. Furthermore, and specifically in affairs concerning large group defamation, such type of speech excels at propagating what one may refer to as 'half-truths.' That is to say, due to the broad or quasi-indeterminate characterization made of the objects of the speech, it will ultimately end up scooping a few who would fall in that characterization and the consequential imputation made through that categorization. In other words, it is an uncertain certainty. Is it likely to be a Montreal taxi driver whose mother tongue is Arabic and who also is unclean or rude? One cannot rule it out. It is even likely that among over one thousand such taxi drivers at the time of the affair, at least a few would match the description. Yet, that does not validate the gross stretching of

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[1283] *Ibid* at para 25.

[1284] *Ibid* (noting "Even if a comment is true, it may have been made in a wrongful manner. Scandalmongering and lie are both punished.").

that fact to all other Arabic-speaking Montreal taxi drivers. The same could be said of 'dumb Americans' or 'descendants of cotton-picking niggers' or 'cocky Frenchmen.' It is not the pronouncement of undesirable qualities that is problematic in of itself. It is the act of imputation suggesting that one's race or country of origin *causes* those undesirable qualities that constitutes the nature of the prejudice.

Second, as I have mentioned earlier again,[1285] the likelihood of ordinary persons accepting the statement as expounding some truth solely focuses on the *reputational* aspect of the harm. This is apparent when the Court categorically refuses to associate concepts of dignity and equal treatment by the law with the harm resulting from defamation:

"In our society, every person can legitimately expect equal legal treatment. However, damage to reputation is at a different level. Defaming a person means damaging a reputation that has been legitimately earned. The effect of defamation is therefore not so much to interfere with the dignity and equal treatment recognized to each person… ."[1286]

Reining in the address to the harm as purely a reputational one, the Court curiously achieves something close to a chauvinistic self-contradiction. In other words, defamation can exclusively occur to a reputation that has been "legitimately" built by virtuous persons through their lifetime's accomplishment of hard-work and decency or by extraordinary talents. This appears to be a rhetorical criticism from the Court to deter premature approaches that may take the status of a 'good reputation' as a *given* (indeed, the Court explicitly states that it is "earned."). There is not much to dispute here except that the harm in racially degrading speech does not merely attack the reputation of a racially and culturally

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[1285] "It did not matter that "no ordinary person" would take the allegations as truth; the harm was on the group members' conscious exertion of collective thriving on which they derive their sources of identity and shared meanings of life. The harm did not stop at mere reputational harm." See in this thesis, Harm to the Bonds of Identity at 236-37.

[1286] *Bou Malhab*, *supra* note 1 at para 27.

identifiable group of persons. It goes beyond that. Although the law of defamation primarily seeks to maintain the targeted person's individual and social esteem, the intensity of the harm in defamatory speech that assaults the racial, ethnic, or national identities that are integral to the constitution of a personhood cannot be reduced to the law's technical grasp This is why I proposed recognizing a novel 'harm to identity' caused when and by group defamation maligning individuals belonging to a racial or ethnic group. In fact, that is what the whole thesis was about. Yes, addressing aggrieved consideration held by others is important. But the harm caused by the speech at issue cuts much deeper than just a stain on one's name. I call it harm to identity. And if good reputation is not to be taken for granted, identity of a person embodying inherent human essentials of dignity and equality should not be either, because these concepts *do* call upon law's responsibility and engagement.

II. Reluctance to use of criminal law or creation of a new tort of group defamation in matters involving freedom of expression

At this juncture, I fail to see if the creation and/or the eventual enactment of new provisions made in the image of identity harms would even be necessary in the domain of tort of defamation. As it has been pointed out previously, there is a significant risk in opening the floodgate of civil litigations if anyone were allowed to bring legal action simply because of one's subjective passion for self-identification to a certain category of subjects or persons. Permitting this without retaining some sense of realism grounded on factual basis and objective truths would amount to utter absurdity not just in legal terms but by common sense exhibited by ordinary persons of reason and intelligence.

Nor am I persuaded as to whether the insertion of an identity-based legal remedy via human rights legislation or tort law would yield sufficient authority to offset that fragile

equilibrium. I have strong reservations as to whether imposing mere fines and rendering "deterring judgments" would bring about the necessary degree of respect and gravity that, in my view, only constitutional or criminal law can realistically aspire at achieving in dealing with contested speech. Remedy via tort or even human rights commissions, in my respectful view, lack the sort of imprimatur that constitutional law decisions carry. In fact, I am of the view that speech targeting racial groups is, for the most part, adequately captured by existing hate propaganda provisions in the Criminal Code of Canada. These provisions have been formulated with great clarity, and have admirably managed to establish a delicate balance between free speech interests and the need to suppress the willful promotion of the most pernicious kinds of group hate speech (i.e. requiring consent from the Attorney General). And notwithstanding the fact that the said provisions deal primarily with hate speech, they do address the type of denigrating language that debases the social standing of members belonging to *identifiable* groups based on their *collective* ascriptive characteristics.

My reluctance to employ public law mechanisms is further augmented by the notion that criminalizing speech is so repulsive in and of itself. Such route will likely fail to find substantial support in systems that pride themselves in promoting freedom and democratic values. I think there is little debate that the idea of criminally regulating certain categories of speech in addition to the currently existing limitations would raise serious constitutional concerns, and would perhaps be viewed by the general public as an abhorrent move.

III. A Guideline of Four Factors to be considered in Group Defamation involving Large Groups

Yet, even as I am adamant toward the concept of a legislative reform derived from the arguments harnessed in this dissertation, the insights developed in Chapter 3 can be easily

incorporated to the existing tort of group defamation laws and bring necessary elucidation to which the latter has so far struggled to grapple with. These ideas may be taken into consideration either as indicative guidelines containing various factors for future judgements by both judges or lawyers when confronted with the type of speech at issue or eventual libel law reform project. Briefly, I would like to make four distinct arguments in this regard and apply them onto the *Bou Malhab* decision.

1. Assessing the *true nature* and the *degree* of the relationship between the Plaintiff (individual member) and his group.

The first argument relates to a conceptual approach of the harm in racial group defamation. We have seen how the threshold of individualized injury essentially eliminates the possibility of legal action from an individual member of the defamed group when the group in question is rather indeterminate or large. Yet, I have stressed on the importance of avoiding such an approach that creates a confrontational angle resulting in the categorical reification of the individual-versus-collective-rights view. This is both unnecessary and impractical in group defamation involving large groups of people. The emphasis, rather, should rest on the *link* that binds the individual member to the defamed group of his belonging. This way, the consideration and evaluation of the *degree* or the *intensity* of associative relationship and the *nature* of that affiliation should be the determinative factors to assess whether the harm in question indeed sufficiently descends upon the individual member to meet the "of and concerning" requirement. Placing the emphasis on the strength of relationship existing between the individual member(s) and the defamed group (the 'bonds of identity' as explored in Chapter 3) would appropriately focus on the transfer or the movement of the harm.

For instance, if the plaintiff is a member of a minority group, the examination should consider the extent to which the individual truly identifies to the said group. This would consist in weighing in the degree in which the plaintiff is actively engaged and implicated in maintaining the ties to his or her community. As such, the measurement of reputational injury should be in the eyes of the plaintiff's community upon proof of active participation of the plaintiff in his or her immediate community life, and not necessarily in the esteem of the larger society. Indeed, Canada's multicultural communitarianism accepts those who choose to identify within their originating national or ethnic group within Canada *as well as* those who integrate to broader mainstream society. In addition, if the group subject to defamation is a historically marginalized group of persons, the judge should take this factor under consideration in rendering his or her judgment.

2. Reconceptualizing Reputational Injury as Shame

The second point also reposes on the conceptual angle of the harm. I have critically underlined in Part I synthesis and in Chapter 3 how treating the harm at issue (harm to identity) as mere reputational injury is inadequate as it fails to recognize the harm projected by this category of expression. In this regard, I believe that the importation of the idea of *shame* can serve well to understand the harm as a reasonable middle ground-concept enjoining harm to identity and reputational harm. After all, the lowering of one's social consideration is a form of humiliation in the eyes of the public, and not solely as subjective sentiment felt by the person. The diminishment of one's general stature can equally be seen as a diminishment of one's place in society by his or her involuntary association to a racial group or national origin. I have discussed the idea of shamed identity at length as a derivative form of harm flowing from the wider argument on the harm in racist speech. The repetitive

exposure to racist speech may consequently lead to self-detestation and negatively impact the person's ability to form healthy relationships with one's immediate dependent group. This way, visualizing harm as shame could help make the case in grasping the seriousness of the injury that cuts far deeper than scratching at the surface of reputational harm.

3. Establishing the Intentional element of the Speaker: Existence of Actual Malice with the (literal) use of racially derogatory speech

The third argument concerns discovering the intentional element of the speaker. I realize that establishing intentional element to separate what is acceptable and/or unacceptable speech might not be a facile task. In that realization, my elaborating on the importance and the limits of critical speech was to describe in high abstraction the kind of *mental attitude* of the speaker engaging in a cross-cultural conversational exchange, rather than to erect barriers between permissible critical speech and defamatory speech *stricto sensu*. Having said that, in retrospective, one is also left to wonder whether the actual malice requirement would be warranted in cases involving racial group defamation. For instance, such a test could be useful in detecting the intentional element on the part of the speaker when he or she uses historically constructed and *de facto* socially recognizable terms of ultimate derogation.[1287] When one deliberately utters words commonly known to carry very specific meanings of submission and inferiority on an entire group of identifiable people on the basis of their race and occupation, there should not be too much left to look into when it comes to the underlying motive of the speaker. In short, their very utterance hints at the speaker's

[1287] When words like "nigger," "kike," or "spick" are used, they are intentionally deployed by the speaker who is fully aware that these words can only mean what they mean… Their very utterance thus convicts the speaker of his deliberateness.

intention.

4. Two Contextual Factors

The fourth point deals with the contextual approach in such group defamation cases to determine whether certain elements should be taken into account as potentially aggravating factors on the part of the defaming speaker. Two such instances can be proposed.

a. When the defamation takes the form of Slander: Intimidating and Assaultive Speech

One is when the speech is a form of slander pronounced in person by the speaker onto the listener(s) in a face-to-face type of situation in public setting. I have highlighted how such speech is intimidating and inherently assaultive speech comparable to bar brawls or spitting onto someone's face that could trigger irrational or violent reactions from the target. Such speech self-imposes onto the victim, thereby interfering with his personal sphere of autonomy. It is a clear form of coercive speech and its suppression would be wholly justified.

b. Public Figure Distinction

The second measure looks into the public character (or lack thereof) of the speaker. This qualification has been developed by American libel law jurisprudence that adopted a rather expansionist understanding of the definition that encompasses both public officials, public figures, and 'limited public figures.'[1288] As well-known persons already possess wide-

[1288] On this point, see footnotes 110-113.

ranging social platform to defend their own names (and even influence public opinion), their ability to disseminate injurious remarks regarding others based on their race or cultural identity should come into play. The logic behind is that such persons should exercise responsible speech. When denigrating speech is made, they should be held to heightened accountability by virtue of their social ascendency and prominence. The current climate of social network and hyperactive gossip-like journalistic culture only strengthens the argument to put in place mechanisms of safeguard in order to protect private individuals vilified under the guise of a 'group.'

5. Application of the Factors onto the *Bou Malhab* decision

In light of these enunciations, they only need be applied. We have repetitively encountered the impasse that results in the rejection of cause of action when the focus rests on the existence of personalized injury at individual level. The search should instead shift onto examining the nature of the relationship that the plaintiff allegedly maintains with his group of belonging and the degree to which individual is truly engaged in that group life. As such, in *Bou Malhab*, the Court's attention should have been invested in finding out, for instance, whether the plaintiff(s) was *actually* fluent in speaking Arabic or Creole[1289] to assess the type of organic link shared between the person and group. Furthermore, it would have been appropriate to inquire as to the extent to which the plaintiff(s) were active members of their racial/cultural community. As stipulated earlier, it suffices that their esteem was denigrated in the eyes of their immediate community, and not necessarily by Montreal's

[1289] As native speakers whose mothertongue is Arabic or Creole, either by the plaintiff's preferential use of the language or its use in the plaintiff's home setting.

city population as a whole.

Regarding the second factor of assimilating reputational harm to the concept of shame, I am inclined to reason that such approximation could have eased the Court into better grasping the harm at issue. There is something relatable between the lowering of one's social consideration and the profound sense of humiliation or ridicule in public square. Yet, the latter hints at a more severe injury that disdains the attacked person's dignity. That humiliation is not absolutely a subjective feeling. In this regard, I distance myself from Bich J. A.'s view on the danger of trampling on freedom of expression if purely individual sensibilities were allowed to triumph over the right of free opinions.[1290] One only need to picture the disgraced face of a taxi driver (falling under the defendant's net) in moments of driving a client while listening to the commentary of the defendant. That exposure would have brought discredit to the driver's self-esteem and self-respect in the eyes of the client regardless of the truth value into the said statement. The soaring of fake news and obfuscation of objective truths attest to the blurring of ordinary person's rational agency and decision-making by polluting the general perception of the subjects under a culture of vilification.

As to the third point concerning the intentional element on the part of the speaker, it is rather straightforward in *Bou Malhab*. In fact, the defendant had literally begun his radio show's disputed statement by saying "I'm not very good at speaking nigger."[1291] In doing so, he had indulged himself in the use of racially derogatory language *per se*. This is an undisputable proof that demonstrates actual malice with reckless disregard from the defendant when he knowingly engaged in public pronouncement of historically constructed and socially recognized words carrying meanings of subordination and superiority aimed at a

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[1290] As cited in *Bou Malhab* at para 29 (from *Prud'homme*, *supra* note 588 at para 40).

[1291] *Ibid* at para 3.

group of identifiable people based on their defining cultural characteristic (language) and racial identity.

The fourth point involving the contextual evaluation also suggests at a different outcome than the one reached by the Court in 2011. I have stated that defamation exerted in the form of slander in immediate proximity situation should be an aggravating factor against the speaker of the statement due to the intimidating and assaultive nature of the speech. In *Bou Malhab*, while the defendant had expressed on a radio show, his message was publicly disseminated. This brings me to the second element. The defendant had served as a member of the Parliament from 2006 and 2011 and was a radio host well-known for his often-controversial comments and outspoken style. In other words, he was a public figure by all stretch of imaginations. As such, the defendant possessed the dispositions to 'make his case' to the public and the platform to widely communicate his messages. Just as he had benefited from the advantageous position as a public figure, his action (of words) should have been held at a higher accountability. The relational approach as advanced in Chapter 3 discussing the uneven power dynamic between the *Choosers* (of their own identities by virtue of their dominant status in a given society) and the *Assigned* (to whom undesirable qualities are attributed) should make this argument only more cogent.

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In consideration of the inadequate methods employed by the Court in *Bou Malhab* to assess the alleged injury, and in view of the nature of the harm as individuated harm to identity onto members targeted by both their racial/cultural and professional characterizations, I find myself in disagreement with the legal rationales used and the outcome reached in the decision. The ruling in its aftermath may be perceived as legitimizing

(or at least condoning) future public racist expression of person(s) with considerable social influence and platform in the name of free speech by giving a constitutional pass to such speech antithetical to Canadian values of diversity, respect for multicultural groups, and human dignity. What one ignores, one empowers. And to the point of the thesis, it effectively refutes the idea that racial group defamation can cause personal harm to their identity.

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