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FREEDOM OF EXPRESSION AND HUMAN DIGNITY

**A thesis
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of the requirements for the Degree
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ABSTRACT

The question of what limits should be placed on the right to freedom of expression is among the most intractable in human rights law. The central importance of the free flow of ideas to democracy means that tolerance of opposing views is a necessary precondition of that form of government. Freedom of expression also protects activities such as artistic endeavour, which further individual self-fulfilment. However, the need to protect freedom of expression must be balanced against the need to remedy the emotional harm it can cause. Hate speech (consisting of group defamation and insult) inflicts emotional injury, and thus impairs an important human interest. Some argue that sexually explicit material also has harmful effects. It is with the balance between freedom of expression, on the one hand, and the need to remedy harms, on the other, that this thesis is concerned.

The thesis examines the strengths and weaknesses of both the existing approach to freedom of expression, which is founded primarily on the Millian argument from truth-seeking, and the equality-based approach, in terms of which hate speech and pornography are characterised as forms of discrimination. The conclusion reached is that neither strikes a satisfactory balance between expressive rights and other human interests. The suggested alternative is that the concept of human dignity be used both to justify freedom of expression and to set suitable limits to it.

Whereas dignity, in the sense of autonomy or privacy, is known to Anglo-American jurisprudence, the concept of an actionable right to remedy offence to dignity is not. Here it is argued that the principles underlying the *actio injuriarum* of the Roman-Dutch law of South Africa would be useful in setting limits to freedom of expression, as the *actio* provides a civil remedy for impairment of dignity, including impairments taking the form of insult and defamation. The thesis examines the compatibility of the principles of the *actio* with the interests served by freedom of expression, and concludes that where dignity is impaired by meaningless abuse, liability can be imposed without compromising such values, but that where harm takes the form of derogatory statements of fact, the correct balance between free speech and personality rights requires that the plaintiff bear the burden of proving the falsity of such statements.

So far as pornography is concerned, it is suggested that where material depicts harmful conduct in such a manner as to incite those exposed to it to emulate what is depicted, publication should be seen as an impairment of the dignity of the individuals or groups against whom the incitement is directed. Publishers should be held civilly liable to such individuals or groups where it can be shown that the material depicts a combination of sex and violence in such a manner as to incite consumers. In accordance with general principles governing incitement, liability would arise irrespective of whether the incitees acted upon the incitement. However, liability could be imposed only where the conduct depicted was harmful in the sense that it was non-consensual, or was of a type to which the law should not recognise the validity of consent.

PREFACE AND ACKNOWLEDGEMENTS

At first glance it might seem strange that a thesis written at a University in New Zealand should explore the relationship between the law relating to freedom of expression in North America and the concept of dignity found in the Roman-Dutch law of South Africa. Yet upon consideration this unusual mix is perhaps not so incongruous after all - human rights law is by its very nature universal, and therefore it is to be expected that doctrines from one jurisdiction should be drawn upon in interpreting human rights charters in others. This has already happened in New Zealand in cases arising under the New Zealand Bill of Rights Act (1990), and the influence of overseas authorities will no doubt increase as the Act is litigated. Furthermore, cross-fertilisation between jurisdictions has become more common as the increasing availability of on-line databases has made it more feasible - writing this thesis was not only educative in so far as its substance was concerned, but also revealed that the spread of electronic information means that legal argument and decisions will be informed by developments in other jurisdictions to a far greater extent than ever before.

But it would be inaccurate to suppose that the combination of North American and Roman-Dutch law found in this thesis is to be explained solely by reference to research methodology and to the universality of questions raised by the concept of freedom of expression, significant as these factors undoubtedly were in the execution of the project. Personal factors also had an influence, and so mention should also be made of these. The intellectual environment in which one first encounters a discipline naturally has a long - lasting effect on one's approach to it, and the fascination with Roman-Dutch law which I had developed as both student at Rhodes University and as a lecturer at the University of Natal continued even after beginning an academic career at the University of Waikato in New Zealand. Furthermore, the transition to democracy in South Africa and the renewal of international contact with that country seemed to make timely a piece of work which would demonstrate the potential of Roman-Dutch law to offer new insights to human rights issues that had long been debated in other jurisdictions. The fact that I chose freedom of expression as the subject area for this comparative study made it almost inevitable that I should select the United States and Canada, with their enormous body of case law dealing with this freedom, as the jurisdictions with the law of which I should compare these

Roman-Dutch principles. This thesis can therefore be seen as both retrospective and prospective - exploring the extent to which a long-standing Roman-Dutch common law action for impairment of dignity could be used as a criterion to determine limits of freedom of expression in modern human rights law. Furthermore, although this thesis does not deal with New Zealand law, I am hopeful that publications that may flow from it will make some contribution to decisions New Zealand courts will be called upon to make in interpreting s 14 of the New Zealand Bill of Rights Act (1990). If so, this apparently "foreign" thesis will have succeeded in returning something to the environment in which it was produced.

Mention of the environment in which this thesis was produced brings me to acknowledge the assistance I received while writing it. Firstly I would like to thank the University of Waikato, and in particular the School of Law, which granted me special overseas leave to travel to South Africa in 1993 and study leave to complete the thesis in 1995. Thanks are also due to the staff of the University Library, and in particular of the Law Library whose assistance with regard to accessing on-line databases was especially useful. Special thanks are also due to the University of Waikato Research Committee whose research grant made possible my visit to South Africa. Next I would like to acknowledge the assistance I received during my research in South Africa from December 1993 to February 1994 at the University of Natal. I received encouragement and assistance at both the Durban and Pietermaritzburg campuses - from Professor David McQuoid-Mason, Dean of the School of Law of the University of Natal, Durban, and other members of the School, and in particular from Professor George Devenish, from staff of the Malherbe and the Howard College libraries, and from staff of the School of Law at the University of Natal, Pietermaritzburg and of that School's Law Library. Information was also provided at very short notice by staff of the Law Libraries at the University of Otago, the University of Nebraska at Lincoln, the University of Mississippi and William Hill University. The law stated is as it was available to me at the end of June 1995.

Special mention must be made of the assistance and direction provided me by my supervisors. The encouragement of my Chief Supervisor, Professor Margaret Wilson, founding Dean of the School of Law, University of Waikato, was a constant support to me, particularly during often very difficult periods of my research. Her willingness to hear arguments which she did not necessarily agree with, made supervision sessions both positive and challenging. My Co-supervisor, Professor Jonathan Burchell, Dean of the School of Law of the University of Natal, Pietermaritzburg, whose writings on the *actio injuriarum* sparked my interest in this

area of the law, gave unstintingly of his time both during my visit to South Africa and by fax, telephone and e-mail thereafter, and for this I am very grateful.

Finally however, and above all, I would like to record profound thanks to my wife, Ronnie, without whose unfailing love, encouragement, and support this thesis would not have been written, and to whom it is therefore fittingly dedicated.

Hamilton, September 1995

BEDE HARRIS

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INTRODUCTION

The question of what limits should be placed on the right to freedom of expression is among the most intractable and passionately argued in human rights law. The central importance of the free flow of ideas to democratic government means that tolerance of opposing views is an entitlement that each citizen can justly claim from fellow citizens and from the state. Furthermore, freedom of expression also serves important interests relating to self-fulfilment - engagement in artistic endeavour being an obvious example of this. But, if the need to protect freedom of expression is to some extent self-evident, so too is the need to remedy the emotional harm it can cause. Wrongs such as defamation and insult inflict emotional injury, and thus impair an important human interest. It is with the balance between freedom of expression, on the one hand, and emotional tranquillity, on the other, that this thesis is concerned.

Perhaps the most influential of all exponents of the instrumentalist view of freedom of expression was John Stuart Mill. His argument that freedom of expression is necessitated in order to maximise chances of discovering truth remains the most frequently used, and is traceable as the source of the principle embedded in First Amendment law in the United States that viewpoint-based restrictions on freedom of expression are impermissible. Chapter 1 of this thesis thus focuses on Millian theory, and it is against the background of his philosophy that First Amendment case law is surveyed. An examination of the cases reveals that the courts have been inconsistent in the manner in which they have balanced Millian values against harms caused by expression. Thus, taking defamation as an example, the law evinces a high level of solicitude for the injured feelings of plaintiffs, to the extent that the defendant in a defamation action is required to prove the truth of the defamatory material in order to escape liability. By contrast, however, no remedy is provided for those who have been subject to either group defamation or to insult (that is, to language which is abusive but is not actionable as defamation, either because it contains no statement of fact or because it is not published to third parties), despite the fact that it is this type of expression that most usually constitutes what is commonly referred to as "hate speech". Nor even have the courts been consistent in the principle that only prevention of harm can justify limitation of freedom of expression - obscenity stands as an exception to other types of expression in that regulation of sexually explicit materials is justified on essentially subjective, moralistic grounds, rather than with reference to objective harms. Obscenity law also exposes a significant limitation in the Millian argument from truth seeking which, because it is restricted in its

application to expression which serves an ontological end, is unable to accommodate expressive activities which are directed towards individual self-fulfilment rather than towards truth-seeking.

Undoubtedly the most significant development in free speech law in recent years has been the formulation of a new approach which seeks to remedy the shortcomings of existing theory. Noting the failure of the law to provide a remedy for hate speech or articulate a harms-based rationale for the regulation of sexually explicit material, scholars have argued that these types of expression foster discriminatory attitudes and should therefore be seen as acts of discrimination. They further argue that in such instances the harm caused to equality rights justifies limitation of freedom of expression. Chapter 2 examines the equality-based approach, contrasting the position in the United States with cases decided under the Canadian Charter of Rights and Freedoms, which, in sharp distinction to United States case law, show that the courts have been prepared to use this approach to justify their upholding statutory restrictions on hate speech and pornography. This has been so even in the case of statutory provisions imposing criminal liability for group defamation, in relation to which truth is either not a defence or has to be proved by the defendant. The equality-based approach is clearly incompatible with Millian theory: First, by equating the expression of discriminatory ideas with the performance of discriminatory acts, the approach conflates speech and action. Secondly, because it permits - indeed mandates - the restriction of expression precisely because of the ideology underlying that expression, the approach essentially requires the courts to find certain ideas to be impermissible, and thus violates the principle of viewpoint neutrality.

In view of the shortcomings of traditional free speech doctrine and the alternative that has been proposed, a new approach is called for. This, I argue, is provided by human dignity, which is a broad concept with two distinct but overlapping meanings. Chapter 3 examines dignity as understood in Anglo-American jurisprudence and in modern international human rights documents - that is, as analogous to autonomy. Although the courts in the United States and Canada have not gone so far as to read into their constitutions a general right to autonomy, the United States Supreme Court has made significant, although somewhat uneven progress in this direction through its expansive definition of the implied constitutional right to privacy. Furthermore, there are several dicta in which courts acknowledge that the right to autonomy or dignity encompasses expressive rights. Characterising freedom of expression as an aspect of a broader right to autonomy clearly has advantages over the narrower justification

based on truth-seeking, in that it encompasses the full range of expressive activities, of which truth seeking is but one. Indeed, it is interesting to note that Mill's philosophy is itself compatible with such an approach, as his general defence of liberty is able to accommodate expression as an aspect of human conduct which, like any other, should be left unregulated provided that it causes no harm to others.

Useful as the broad concept of dignity undoubtedly is as a general *justification* for human rights, including freedom of expression, it takes one no further in determining what principles should be used to determine the *limits* on such freedoms. It is here that the usefulness of the second, more specific, meaning of the term dignity, ascribed to it by the Roman-Dutch law of South Africa, becomes apparent. In contrast to legal systems rooted in English common law, South Africa's Roman-Dutch law of civil wrongs, or delict, contains an action received from the Digest of Justinian, the *actio injuriarum*, which permits plaintiffs to recover damages for impairment of *dignitas*, defined as one's sense of self-worth and mental tranquillity. Chapter 4 provides an overview of the *actio injuriarum*, tracing its reception from Roman law into the law of the Netherlands and then its development through modern case law. Here it is shown that since the action for impairment of *dignitas* can be brought to vindicate a wide range of personality interests, it should be equated with the broad concept of dignity that underpins modern human rights theory. This indeed is hardly surprising, given the central role played by Roman-Dutch law authorities, such as Hugo Grotius, in the early Enlightenment. Of specific interest to freedom of expression, however, is the fact that the *actio injuriarum* can be brought to remedy impairments of dignity taking the form either of defamation or of insult. Thus it is argued that an examination of the balance that the courts have struck between the expressive rights of defendants and the dignitary rights of plaintiffs in Roman-Dutch law might provide answers to other legal systems seeking to balance the same interests.

The imposition of liability under the South African law of delict depends upon a finding by the court that the defendant's conduct (or omission) was "wrongful", in that he or she either infringed a legally recognised right of the plaintiff or, alternatively, failed to discharge a duty of care which the law recognises was owed to the plaintiff. The test for wrongfulness is policy-based, and takes into account the competing interests of both plaintiff and defendant as well as societal interests. Chapter 5 examines how the test for wrongfulness has operated in cases involving expressive activity. In so far as impairment of dignity by insult is concerned, a survey of the law reveals that in the overwhelming majority of cases, liability was imposed where the defendant's expression amounted to "meaningless abuse" - that is,

was expression which conveyed nothing other than a sentiment of animosity or disrespect towards the plaintiff, manifested through the use of offensive epithets. This is significant, as meaningless abuse is a category of expression that can be proscribed without compromising Millian values. The policy-oriented nature of the test for wrongfulness means that it is particularly suited to the type of inquiry that courts engage in when balancing competing rights because, although it should not be seen as requiring the court to act as the mouthpiece of majoritarian sentiment in determining what expression is "insulting", the test does require judges to have regard to the meaning words have in the context of the circumstances in which they were uttered and the broader context of the society concerned. Furthermore, because the *actio injuriarum* can be used to remedy insults directed towards *any* characteristic of the plaintiff, restrictions placed on freedom of expression through such an action would catch a wider range of insult than would one designed to vindicate equality rights, as the later would be available only where the insult related to prohibited grounds of discrimination.

More problematic than expression consisting of meaningless abuse, however, is that which consists of statements of fact or opinion. Hate speech taking this form (negative statements about groups being an obvious example) can be justified by Mill's argument based on truth-seeking. How then should one balance expressive and dignitary rights in such cases? Where the *actio injuriarum* is brought to remedy harm to reputation it, like the law of jurisdictions drawing on English common law, places the onus on the defendant to prove the truth of his or her statement. Chapter 5 discusses how to balance the strict Millian approach (which would not countenance proscription even of false statements) with the prevailing defamation law approach that not only are false defamatory statements actionable, but that they are indeed *presumed* to be false, with the onus on the defendant to prove their truth. The solution which, it is suggested, strikes the most suitable balance between free speech values and personality rights, is that false defamatory statements should be actionable, but that the plaintiff should bear the burden of proving their falsity.

As was noted earlier, the justification for the regulation of sexually explicit material has been based on a subjective concept of public morality. The equality-based approach, discussed in Chapter 2, is no more satisfactory, relying as it does on the argument that materials may be proscribed if they foster an inequalitarian attitude towards gender relations. Chapter 6 adopts a completely new approach to this area of the law. First, a review is undertaken of empirical studies which have tested the psychological response of subjects exposed to various types of sexually-oriented

materials. The results of such studies indicate that to the extent that pornography is thought to incite those exposed to it to harm others, only material that combines sex and violence has been found to have the effect of arousing significant aggression in subjects exposed to it, and that there is no conclusive statistical evidence that indicates that such aggression manifests itself outside the laboratory. However, since, under criminal law, liability attaches to the inciter *irrespective* of whether the incitee acts upon the incitement, it is argued that the mere act of incitement should be seen as an impairment of dignity in the same way as is insult, and that producers, distributors and publishers of such material should be held liable to those against whom harm is incited. Whether expression may be regulated on the basis that it amounts to incitement has been the subject of a significant body of First Amendment case law in the United States, and these cases are reviewed with specific reference to the level of intent to incite that must be present before expressive rights may be restricted. Furthermore, whether materials attract liability under such an approach would depend on whether the activities which they depict (and to which they incite those exposed to them) are considered "harmful". This in turn depends upon the limits imposed by the law on capacity to consent to harm. Furthermore, the context in which *prima facie* harmful conduct is depicted will also determine whether the conduct is being depicted in such a way as to incite those exposed to it to emulate it. Chapter 6 thus examines the law regarding the limits of consent, with a particular focus on sadomasochistic activity, and also addresses the effect context should have in determining whether a depiction incites harm.

The argument presented in this thesis is that a civil action for impairment of dignity, using the principles developed in the *actio injuriarum*, would provide an effective remedy for hate speech and the harms caused by material that combines sex and violence. Using a civil remedy has a two-fold advantage: First, the initiative in seeking redress is left with the offended party, rather than being dependant upon the exercise of prosecutorial discretion. Secondly, restricting expression by means of a civil action is less invasive of constitutional rights than are criminal provisions, and is thus more likely to survive constitutional review in jurisdictions such as the United States which afford a high level of protection to freedom of expression. Certain procedural problems do, however, arise in respect of civil actions. Most significant of these is the fact that since the injury caused by hate speech and violent pornography is suffered by large groups, the disparate nature of the harm would make it difficult for individual litigants to show *locus standi*. This issue is addressed in Chapter 7, where it is suggested that the class action procedure, coupled with liberal standing provisions similar to those found in some United States environmental

statutes, would provide a useful mechanism that could be used to give a right of action to representatives of large groups whose dignity have been impaired. Chapter 7 also contains a discussion of how the law regarding freedom of expression demonstrates the artificiality of the distinction between private and public law, and suggests how a constitutional right not to suffer impairment of dignity might be developed. The chapter concludes with a comparative analysis of the approach suggested in this thesis, highlighting the advantages it enjoys over the prevailing First Amendment approach in the United States and the equality-based approach adopted by the courts in Canada, and arguing that it strikes a satisfactory balance between expressive rights on the one hand and dignitary rights on the other.

CHAPTER 1

TRUTH AND EXPRESSION

1.1 Protection of freedom of expression

Freedom of expression is protected by bills of rights in the vast majority of jurisdictions that have such documents,¹ and has also been accorded limited recognition in the English common law jurisdictions of the United Kingdom² and Australia³ that do not. Some protection was accorded freedom of expression by the Roman-Dutch common law of South Africa even before a bill of rights was enacted in that country.⁴ Freedom of expression is also protected by all significant international human rights instruments.⁵ Nevertheless, despite this widespread

¹In a survey of Bills of Rights conducted prior to the negotiation of South Africa's post-apartheid constitution, the South African Law Commission identified 129 jurisdictions which had bills of rights, and of these only 6 did not protect freedom of speech or of expression (*Group and Human Rights*, Working Paper 25, Project 58, Pretoria, 1989).

²In *Derbyshire County Council v Times Newspapers Ltd and others* [1993] AC 534 the House of Lords denied standing to a local government body to sue for defamation, holding that since both local and central government bodies must be open to uninhibited public criticism, it would be contrary to public policy for them to enjoy a common-law right to sue for defamation.

³In *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 the High Court held that freedom of expression was implied by democratic government, and that therefore plaintiffs who are public officials ought not to recover damages for defamation, unless able to show that the defendant published untrue material reckless as to the truth or falsity thereof. Similarly, in *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80 the High Court held that because freedom of expression was to be implied from the Western Australian Constitution, a defendant who published defamatory material would be covered by qualified privilege where the publication related to a matter in which the public had a legitimate interest.

⁴See, for example, *Spoorbond v South African Railways* 1946 AD 999 at 1012-3, *Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) at 160E-F, *S v Turrell* 1973 (1) SA 248 (C) at 256G, *Argus Printing and Publishing Co. Ltd. v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 587F - 591E. See also *Zillie v Johnson* 1984 (2) SA 186 (W) at 195D - 197A (*Zillie* was subsequently overruled in *Neethling v Du Preez* 1994 (1) SA 708 (A) at 775I and 777D-H, but the latter decision is now in doubt, following the enactment of a bill of rights - see *Gardener v Whitaker* 1995(2) SA 672 (E) at 690E - G and 690H - 692A).

⁵Article 19 of the Universal Declaration of Human Rights (GA Res. 217 A (III) of 10 December 1948) states

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

This formula is adopted almost *verbatim* by article 10 of the European Convention on Human Rights. Similarly, article 19(1) of the International Covenant on Civil and Political Rights (G.A. Res. 2200 A (XXI) of 16 December 1966) provides as follows:

Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either totally, in writing or in print, in the form of art, or through any other media of his choice.

recognition of the value of freedom of expression, courts and academic commentators find seemingly endless challenge in the task of deciding what limits should be placed upon this right, particularly in cases relating to hate speech⁶ and obscenity.⁷ The richest source of case law on freedom of expression, at least in the English speaking world, has been generated by the First Amendment to the United States Constitution,⁸ and so the various approaches to freedom of expression⁹ that are discussed in this thesis will be examined primarily with reference to cases decided under the First Amendment, although some attention will be given to cases arising under s 2 of the Canadian Charter of Rights and Freedoms.¹⁰

However, in terms of Article 19(2) of the Covenant, rights protected by it are subject to limitation as follows:

The exercise of rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others; b) for the protection of national security or public order, or of public health or morals.

⁶See for example the recent collection of essays on hate speech in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992).

⁷A comprehensive selection of articles on pornography is to be found in Itzin, C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992)

⁸The First Amendment provides 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 people peaceably to assemble, and to petition the Government for a redress of grievances.

⁹Although the First Amendment protects freedom of "speech" rather than "expression", it is clear that protection is extended to a range of expressive activities that extend beyond speech itself (see for example the court's defence of symbolic speech taking the form of flag burning in *Texas v Johnson* 491 U.S. 397 (1989) and *United States v Eichman* 496 U.S. 310 (1990).

¹⁰Section 2 of the Canadian Charter of Rights and Freedoms (Pt. 1 of the Constitution Act 1982, Sch. B of the Canada Act 1982 (U.K.)) provides:

Fundamental freedoms

2. 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
 - (d) freedom of association.

Along with other freedoms, abridgment of freedom of expression is permitted in terms of s 1 of the Charter, which provides as follows:

Guarantee of Rights and Freedoms

1. *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.

1.2 Millian scepticism

A large body of First Amendment scholarship in the United States has been devoted to discovering what value is served by freedom of expression.¹¹ Rights do not exist *in vacuo*, they are recognised because they are necessary to preserve some human interest.¹² In analysing the approach of the courts to freedom of expression it is, therefore, useful to determine what underlying value the law seeks to preserve through this freedom, because one will thereby come to understand what interest is being balanced when determining whether and to what extent freedom of expression should be limited in the interests of preserving other, competing, human values in any given case.

Of the values identified as underlying freedom of expression, maximisation of the chances of discovering the truth is probably the most often cited. The most famous exponent of this view is John Stuart Mill, whose *On Liberty*¹³ contains a defence of freedom of expression based on a sceptical epistemology in terms of which it is argued that freedom of expression ought not to be suppressed because to do so would be to claim infallibility.¹⁴ According to this theory, because it is always *possible* that

¹¹Perhaps the most famous of these is the classic article by Emerson, Thomas "Towards a General Theory of the First Amendment" 72 (1963) *Yale Law Journal* 877 in which he identified the values served by the First Amendment. Chief among these were the achievement of individual self-fulfilment, an essential element of which is the opportunity to form ideas and to communicate them to others; the discovery of the truth, which is made most likely if the widest range of theories are available for consideration; participation in decision making which, if it is to be extended to as wide a range of individuals as possible, requires that each be able to express his or her opinion on matters of common concern; and a generally healthy balance in society between certainty and change, which requires that existing institutions be open to both criticism and defence through a process of reasoned discussion. The literature on this (and indeed on all aspects of the First Amendment) is enormous in volume, but a succinct survey of the theories justifying freedom of expression is to be found in Smolla, Rodney *Free Speech in an Open Society* (New York, Vantage Books, 1993) 6-17 and in Barendt, Eric *Freedom of Expression* (Oxford, Clarendon Press, 1985) 8-23.

¹²Although Schauer, for example, argues that the protection given to freedom of speech by the First Amendment is simply the result of the historical accident of specific textual protection. On this basis he concludes that there is nothing special about expression as a human activity *per se* (see for example Schauer, Frederick "Must Speech be Special ?" 78 (1978) *Northwestern University Law Review* 124) and that therefore it is vain to search for an underlying justification for free speech (Schauer, Frederick "Codifying the First Amendment: New York v Ferber" 1982 *Supreme Court Review* 285).

¹³The edition I refer to is Mill, John Stuart *J.S. Mill 'On Liberty' in Focus* Grey, John and Smith, G. W. (eds) (London, Routledge, 1991).

¹⁴Thus Mill (*ibid.*, 37) states

..the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to oppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.

And similarly (*ibid.*, 41) that

truths discovered by human reason are in fact errors which, if one is allowed to challenge them, may be replaced by a new "truth",¹⁵ even assuming that truth exists (an assertion that is itself open to question), one can never say that one has attained it. It follows, therefore, that answers to questions about truth are attainable only if there is freedom of thought, expression and inquiry.¹⁶ This illustrates what is perhaps the greatest strength of Millian theory - that it is compatible not only with those philosophies that assert the existence of truth, but also with those (increasingly popular) postmodernist schools of thought that emphasise uncertainty and skepticism as to the existence of truth.¹⁷ Indeed, one could argue that the less certain one is about either the existence or content of truth, the less justification one has for suppressing ideas. Of course the foregoing means that one who holds to Mill's justification of freedom of expression must admit the possibility that *that* theory is wrong and, in order to be consistent, must accordingly defend the right of those who disagree with it to do so.¹⁸ This, it has been argued, is another strength of the Millian theory, because it means that opponents of the doctrine themselves become indebted to it, in that by expressing their opinion that freedom of expression ought not to exist, they exercise the very freedom they would deny others.¹⁹ Finally, Mill stated that even assuming one does discover "the truth" about any particular matter, it does not follow that false statements are without value, as falsity brings about a "clearer perception and livelier impression of truth, produced by its collision with error".²⁰

Millian agnosticism is one of the major foundations of contemporary First Amendment theory, making its appearance in *Abrams v United States*²¹ one of the

To call any proposition certain while there is anyone who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side.

¹⁵Ibid., Chapter 2. See also Schauer, Frederick *Free Speech: A Philosophical Inquiry* (Cambridge: University Press, 1982) 24-9.

¹⁶Smolla, *supra* n. 11 at 8.

¹⁷See for example the discussion of uncertainty in Levit, Nancy "Ethereal Torts" 61 (1992) *George Washington Law Review* 136 at 136-8.

¹⁸As is stated by Hentoff, Nat *Free Speech for Me but not for Thee* (New York, Harper Collins Publishers, 1992) 9:

....nowhere in the First Amendment does it say that freedom of speech is limited only to ideas and symbols that further freedom, dignity, and non-violence.

¹⁹This argument is made by Bollinger, Lee *The Tolerant Society: Free Speech and Extremist Speech in America* (New York, Oxford University Press, 1986) 57.

²⁰Mill, *supra* n. 13 at 37.

²¹250 U.S. 616 (1919).

earliest²² Supreme Court decisions on freedom of expression where, in his dissenting opinion, Holmes J made his famous statement²³ that

...the best test of truth is the power of the thought to get itself accepted in the competition of the market..

Of course, success in the market place will not *necessarily* lead to ascertainment of the truth²⁴ - a majority of people may, after hearing all points of view, choose that which is, objectively speaking, not correct; but the market is necessary simply in order to create the *opportunity* for truth to be aired.²⁵ Furthermore, unless one claims infallibility, one must concede the pragmatic argument that if some ideas are excluded and there is even a *chance* that those ideas embody the truth, restriction of them diminishes the *likelihood* of discovering the truth.

The acceptance of Millian epistemology has meant that laws imposing "content-based" restrictions on freedom of expression are highly likely to be struck down, while those that impose restrictions based not only on content but also on "viewpoint" inevitably attract a finding of unconstitutionality. First Amendment case law is replete with statements by the court that the law may not censor ideas or, in Mill's terms, prefer one version of the truth, over another. Thus, to give but four examples from among many,²⁶ in *West Virginia State Board of Education v Barnette*²⁷ Jackson J held that

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion...

²²This is not to say that there were no First Amendment cases before the ones discussed here, but the post World War I sedition and espionage cases are generally regarded as marking the start of serious development of First Amendment law by the courts. For a history of cases before these ones see Rabban, D. "The First Amendment in Its Forgotten Years" 90 (1981) *Yale Law Journal* 514.

²³250 U.S. 616 (1919) at 624.

²⁴Smolla, supra n. 11 at 6.

²⁵*Ibid.*, 7

²⁶Other affirmations of the same principle are to be found in *Hustler Magazine Inc. v Falwell* 485 U.S. 46 (1988) at 55-6, *City Council of Los Angeles v Taxpayers for Vincent* 466 U.S. 789 (1984) at 804, *Bolger v Youngs Drug Products Corp* 463 U.S. 60 (1983) at 65 and 72, *Carey v Brown* 447 U.S. 455 (1980) at 462-3, *FCC v Pacifica Foundation* 438 U.S. 726 (1978) at 745-6, *Young v American Mini Theatres Inc.* 427 U.S. 50 (1976) at 63-5, 67-8, *Buckley v Valeo* 424 U.S. 1 (1976) at 16-17, *Grayned v City of Rockford* 408 U.S. 104 (1972) at 115, *Police Department of Chicago v Mosley* 408 U.S. 92 (1972) at 95, *Bachellar v Maryland* 397 U.S. 564 (1970) at 567, *United States v O'Brien* 391 U.S. 367 (1968) at 382, *Brown v Louisiana* 383 U.S. 131 (1966) at 142-3, *Stromberg v California* 283 U.S. 359 (1931) at 368-9.

²⁷319 U.S. 624 (1943) at 642.

Similarly in *Street v New York*²⁸ it was held that it

...is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

In *Gertz v Robert Welch Inc.*²⁹ the court stated that

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Subsequently, in *Texas v Johnson*,³⁰ Brennan J stated

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society itself finds the idea offensive or disagreeable.

This accords with the oft-repeated "neutrality principle", which is that the state should be neutral as between ideas, and may thus not censor on the basis of viewpoint.³¹

Concern for the free flow of ideas has led the court to view with suspicion not only laws that regulate speech directly, but also those that do so incidentally in the pursuit of some other legislative aim. Thus in *United States v O'Brien*,³² the appellant, who had been convicted under a statute that prohibited the burning of draft cards, raised the First Amendment defence that he had been engaged in symbolic speech. Although the conviction was upheld, the court stated that where the constitutionality of conduct that combines expressive and non-expressive activity is at issue, the state could not regulate the activity unless in the furtherance of a substantial interest "unrelated to the suppression of freedom of expression",³³ and that the incidental restriction on First Amendment freedoms could be no greater than was justified in order to achieve the substantial interest. This case illustrates the difficulties inherent

²⁸394 U.S. 576 (1969) at 592.

²⁹418 U.S. 323 (1974) at 339-40.

³⁰491 U.S. 397 (1989) at 414.

³¹See, for example, *Cornelius v NAACP Legal Defense & Education Fund* 473 U.S. 788 (1985) at 806, *Perry Education Association v Perry Local Educators' Association* 460 U.S. 37 (1983) at 46 and 49 n. 9.

³²391 U.S. 367 (1968).

³³In this case the maintenance of a system whereby a person could be asked to give evidence of their draft status.

in distinguishing expressive from non-expressive conduct - the very form the conduct takes may be integral to its communicative intent and impact.³⁴ An example of the application of the *O'Brien* principles is *City of Renton v Playtime Theatres Inc.*³⁵ in which the court held that a zoning ordinance used to regulate the location of cinemas showing sexually explicit films did not amount to a content-based restriction on freedom of expression, because the ordinance was justified with reference to the effects that the location such cinemas had on crime, property values and retail trade (all of which were legitimate concerns for a municipality) rather than on any objection to the subject matter of the films. Similarly, in *Barnes v Glen Theatre, Inc.*³⁶ the court upheld a statute prohibiting total public nudity (and thus its particular application to total nude dancing in places of public entertainment), holding that even though nude dancing is expressive conduct,³⁷ the statute passed the *O'Brien* test in that its primary objective was to prohibit public nudity, and that the effects this had on expressive conduct were merely incidental. In his concurring judgment, Scalia J went even further, holding that only laws aimed at conduct *because of its communicative attributes* raised First Amendment issues, and that where (as in this instance) the law simply penalised public nudity in general, there was no need for a First Amendment inquiry. The *O'Brien* principle has recently been applied in a series of cases where First Amendment challenges were mounted to statutes under which defendants had been convicted for cross-burning in front of private dwellings inhabited by black residents. In each of these cases the outcome was determined by a finding as to whether the statutes penalised racist expressive activity *per se* or penalised threatening behaviour in general, of which cross-burning happened to be a particular manifestation.³⁸

1.3 Balancing truth and harm

The inevitable bias in favour of expression resulting from the elevated importance given to the search for truth does not mean that expressive rights are unlimited. As is shown below, there are a variety of instances in which the courts restrict expression, notwithstanding the risk that by so doing truth may be lost. From a Millian perspective this means that, in certain instances, the law puts a higher value on protecting a competing human value that may be harmed by the expression than it does on the protection of harmful expression, even though that expression might reveal truth. As McCloskey states, restrictions on freedom of expression are thus

³⁴Smolla, supra n. 11 at 55-64, Bollinger, supra n. 19 at 202-12.

³⁵475 U.S. 41 (1986).

³⁶501 U.S. 560 (1991).

³⁷As had been held in *Schad v Borough of Mount Ephraim* 452 U.S. 61 (1981).

³⁸These cases are discussed at 2.2.7.1 below.

based on a value judgement that the interest which the restriction serves is superior to the interest of never allowing the law to claim "infallibility".³⁹ Taking defamation as an example, the fact that in a successful defamation suit the court condemns the defamatory matter as being "false" means that this is an instance of the law deciding what is "true" or "false", which effectively means abandoning viewpoint neutrality in favour of viewpoint partisanship. This highlights what Schiffrin⁴⁰ accurately calls

...the basic First Amendment question: When can government perceptions of truth or falsity be imposed on the individual?

Ultimately then, the issue becomes *with what degree of probability* must one be able to say that an expression is false before one can proscribe it.⁴¹ This involves a weighing of the degree of harm caused or potentially caused by the expressive conduct in question, against the likelihood that any statements contained in it are true, and the loss to human knowledge suffered through the suppression of such statements if indeed they are true.⁴² Thus, to take McCloskey's example, in deciding whether to proscribe the expression of a statement in which the speaker urges parents to beat their children, one would have to weigh the degree of harm that could result from the expression (potentially very great if parents follow the exhortation), against the likelihood of the statement that it is good to beat one's children is true (very low, in the light of our knowledge of human society and child-rearing) coupled with the loss of knowledge suffered if the view *was* in fact true (significant, in that the statement relates to the important issue of child-rearing). The conclusion one would reach would in this case would be that the expression should be suppressed because the *very great* harm outweighs the *significant* loss of knowledge when the latter is

³⁹McCloskey, H. J. *Liberty of Expression, Its Grounds and Limits* 13 (1970) *Inquiry* 219 at 224-6.

⁴⁰Schiffrin, S. "Defamatory Non-Media Speech and First Amendment Methodology" 25 (1978) *University of California at Los Angeles Law Review* 915 at 954.

⁴¹Even this harm balancing approach would have been rejected by Mill because, as is stated by Monro D. H. "Liberty of Expression, Its Grounds and Limits (II)" 13 (1970) *Inquiry* 238 at 242-4, Mill would have raised the counter argument that it is possible to estimate the probability that the idea contained in the expression is either true or false *only if* we are free to express and consider all opinions. In other words, we are able to reject the idea that the earth is flat with a high degree of certainty *precisely because* people are free to advance the contrary argument but have not succeeded in doing so. However, if such freedom did not exist, we could clearly not be as confident that the argument in favour of a spherical earth was true.

⁴²*Ibid.*, 227. The reduction of legal theory to mathematical formula is dangerous, running the risk of over simplification at best and ridiculousness at worst (see for example Smolla, *supra* n. 11 at 109 where he criticises Hand J's formulaic attempt to weigh competing harms in *Dennis v United States* 341 U.S. 494 (1951)). Nevertheless, one could with some utility express the balancing process discussed above in the following form: $H > PL$ or, expressed verbally, that the question is whether the harm (H) caused by the expression is greater than the probability (P) that any statement of fact it contains is true factored by the loss of knowledge (L) that would be suffered if it was true.

factored by the *small likelihood* that the statement is true.⁴³ Particularly important is the factor relating to the likelihood that the expression contains a statement that is true: as will be argued later, if freedom of expression is primarily justified by reference to a theory related to truth-seeking, only in exceptional circumstances will the law prohibit expression of statements that are thought to be *true* (an example being cases of invasion of privacy, where the very fact that the statement is true constitutes the harm). On the other hand, fewest concerns relating to freedom of expression are raised where the expression contains no statement of fact or opinion *at all* (for example, the utterance of a racial epithet).

1.4 Limitation of expression under the First Amendment

The importance to First Amendment law of the principle that the state should not interfere in the "marketplace of ideas"⁴⁴ has already been noted. What countervailing values have been accepted by the courts as being of sufficient weight to justify limitation of freedom of expression? Before reviewing the case law on this issue it is necessary to note that whether constitutional rights of free expression need to be weighed at all depends upon the state action doctrine, which is to the effect that constitutional guarantees bind only the state in its dealings with citizens and not relations between private individuals.⁴⁵ Although the effect of this so far as free speech is concerned is that common-law relations between private legal actors are, at least in principle, not governed by the First Amendment (because in purely private suits, no state interest is involved), in practice a degree of relaxation has occurred in the application of the doctrine over the past fifty years or so.⁴⁶ Thus in a line of decisions beginning with *New York Times v Sullivan*,⁴⁷ the law of defamation and privacy has effectively been "constitutionalised" through the Supreme Court's application of the First Amendment to these torts. This issue is further discussed at 7.2.3 below, but is usually not problematic given that the "state action" requirement is in fact easily met in areas of the law governing freedom of expression because common-law rules (such as those involving defamation or privacy) have almost all

⁴³I would however argue for a different result if the speaker merely said that he thought that the beating of children was a good idea, but without actually urging parents to do it. In such cases the degree of harm would be diminished, because the statement simply invites debate on the issue of child-beating, while the likelihood of the statement being true and the degree of harm if it was suppressed would remain the same. This illustrates the importance of the distinction between expression that urges action and that which does not - the potential for harm is obviously far greater in the case of the former as compared with the latter. Indeed, in measuring potential harm, speech urging action forms an intermediate class between speech not urging action and action itself.

⁴⁴This theory is discussed at length by Baker, C. Edwin *Human Liberty and Freedom of Speech* (New York, Oxford University Press, 1989) 6-12.

⁴⁵The basic principle was enunciated by Bradley J in *The Civil Rights Cases* 109 U.S. 3 (1883).

⁴⁶In *Shelley v Kraemer* 334 U.S. 1 (1948) for example, it was held that court enforcement of a racially discriminatory restrictive covenant constituted "state action".

⁴⁷376 U.S. 254 (1964).

been codified.⁴⁸ Nevertheless it is necessary to bear in mind that in cases with no element of state action, constitutional guarantees of freedom of expression would not be relevant - for example were a private employer to impose restrictions on what his employees could say at their place of work.⁴⁹

The general principle governing review of content-based regulation of expression⁵⁰ is that such a restriction will be permitted only if it is "...necessary to serve a compelling state interest and is narrowly drawn to achieve that end".⁵¹ What interests have then been recognised as meriting restrictions on freedom of expression? The most convenient starting point of any review of limitations on First Amendment rights is *Chaplinsky v New Hampshire*,⁵² in which the Supreme Court upheld the conviction of a defendant who had violated a statute prohibiting the calling of people by "offensive or derisive" names in public - in this case by calling the arresting officer a "goddamned racketeer" and a "damned fascist". Speaking for the unanimous court, Murphy J propounded what later became known as the "two-level" theory of speech - that is, one which distinguishes between speech that is entitled to First Amendment protection and that which is not.⁵³

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. 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 might be derived from them is clearly outweighed by the social interest in order and morality.

⁴⁸See for example *Florida Star v B.J.F.* 491 U.S. 524 (1989) (statute imposing liability for invasion of privacy through disclosure) and *Hustler Magazine v Falwell* 485 U.S. 46 (1988) (statute giving an action for intentional infliction of emotional harm).

⁴⁹The issue of the speech rights (or rather the lack thereof) of private employees is discussed by Browne, Kingsley J. "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment" 52 (1991) *Ohio State L.J.* 481 at 511-15.

⁵⁰Tribe, Laurence *American Constitutional Law* (2nd ed) (Mineola, The Foundation Press, 1988) 798-9.

⁵¹For the most recent application of this principle see *R.A.V. v St. Paul* 505 U.S. 377, 120 L. Ed. 305 (1992) at 331. The principle is however a long-standing one - see *Perry Education Association v Perry Local Educators' Association* 460 U.S. 37 (1983) at 45, and *Grayned v City of Rockford* 408 U.S. 104 (1972) at 116-17 and the cases cited there.

⁵²315 U.S. 568 (1942).

⁵³At 571-2.

Chaplinsky mentions a number of categories of expression that are not entitled to First Amendment protection. Obscenity and libel are dealt with in separate categories below. Here discussion will be confined to the "fighting words" exception, which remains the most problematic aspect of the decision.⁵⁴ First, although commentators⁵⁵ note that in *Chaplinsky* the court held that it would be constitutional to prohibit not only words that "incite an immediate breach of the peace", but also those which "by their very utterance inflict[ed] injury" (in other words that the first leg of the exception permits expression to be proscribed⁵⁶ if it causes what the court in *UWM Post, Inc. v Board of Regents*⁵⁷ referred to as "psychological injury, primarily in the form of emotional upset and injury to the 'sensibilities' of addressees"), applications of *Chaplinsky* over the past fifty years⁵⁸ suggest that such is not the case. As Strossen points out⁵⁹ the *ratio* of *Chaplinsky* is restricted by the fact that the statute in question prohibited only "words likely to cause an average addressee to fight"⁶⁰ and that therefore it is only the second leg of the fighting words dictum (that relating to words provoking retaliation) that survives.⁶¹ This has been confirmed in subsequent cases such as *Cohen v California*,⁶² *Gooding v Wilson*,⁶³ *Rosenfeld v New Jersey*⁶⁴ and *Collin v Smith*,⁶⁵ in which it was held that the "fighting words" doctrine applies only in cases where the words are directed face-to-face and tend to incite retaliation.⁶⁶ This means that emotionally hurtful words that demean the plaintiff and thus make it *unlikely* that he or she will respond violently,⁶⁷ and those which are not addressed directly to an individual but are overheard or are addressed to the public at large,⁶⁸ would not be remedied. As Lawrence points out, the

⁵⁴For the most recent analysis of *Chaplinsky* see Mannheimer, Michael "The Fighting Words Doctrine" 93 (1993) *Columbia Law Review* 1527.

⁵⁵Lawrence, Charles R. "If He Hollers Let Him Go: Regulating Racist Speech on Campus" 1990 *Duke Law Journal* 431 at 449-57.

⁵⁶*Ibid.*, 451-7.

⁵⁷774 F.Supp 1163 (E.D. Wis. 1991) at 1169.

⁵⁸Including in *UWM Post* itself.

⁵⁹Strossen, Nadine "Regulating Racist Speech on Campus: A Modest Proposal" 1990 *Duke Law Journal* 484 at 508-510.

⁶⁰*Chaplinsky* at 573.

⁶¹See also Mannheimer, *supra* n. 54 at 1528 and 1539-47.

⁶²403 U.S. 15 (1971) at 20.

⁶³405 U.S. 518 (1972).

⁶⁴408 U.S. 901 (1972).

⁶⁵*Collin v Smith* 578 F.2d 1197 (7th Cir 1978) at 1203 (*cert. denied* 439 U.S. 916 (1978)).

⁶⁶It is also of interest to note that where lower courts in the United States applied the first leg of the "fighting words" doctrine (to be overturned by the Supreme Court in every case that reached it), they did so in a disproportionate number of cases where members of minority ethnic groups used abusive language towards people in authority, usually police officers (see Gard, Stephen W. "Fighting Words as Free Speech" 58 (1980) *Washington University Law Quarterly* 531 at 561-580).

⁶⁷See *UWM Post v Board of Regents* 774 F.Supp 1163 (E.D. Wis. 1991) at 1172-3.

⁶⁸See Fleischer, Stephen "Campus Speech Codes: The Threat to Liberal Education" 27(1994) *John Marshall Law Review* 709 at 715, and Feinberg *Offense to Others* (New York, Oxford University Press, 1985) 235-6.

Chaplinsky standard is particularly inapt where the words are such as to produce an effect that cowers rather than provokes plaintiffs.⁶⁹

The second major criticism that can be levelled at *Chaplinsky* is that the second leg of the fighting words exception, relating to speech which "tend[s] to incite an immediate breach of the peace", which the court further defined as speech that was "likely to cause an average addressee to fight",⁷⁰ seems to condone the heckler's veto, in that it suggests that the hearer's inability to restrain him or herself justifies a denial of the speaker's expressive rights.⁷¹ The incompatibility of this approach with general principles governing freedom of expression was recently stated by the Supreme Court in *Forsyth County v Nationalist Movement*,⁷² where it was held that speech could not be suppressed simply on the ground that it was "unpopular with bottle-throwers" and held that "[l]isteners' reaction to speech is not a content-neutral basis for regulation". Similarly, as Douglas J held in *Terminiello v Chicago*⁷³

A function of free speech under our system of government is to invite dispute. It may indeed best serve its purposes when it induces a condition of unrest...or even stirs people to anger.

Furthermore, as the Illinois Supreme Court noted in one of the Skokie cases⁷⁴

Courts have consistently refused to ban speech on the possibility of unlawful conduct by those opposed to the speaker's philosophy.

⁶⁹Lawrence, supra n. 55 at 452-5. See also Greenawalt, Kent "Insults and epithets: Are they protected speech ?" 42 (1990) *Rutgers Law Review* 287 at 296-9. Also of interest is the analysis by Mannheimer, supra n.54 at 1543-4, who emphasises that the application of *Chaplinsky* in *Gooding v Wilson* indicates that the courts will find liability for fighting words only if there was a likelihood that a disturbance of the peace would be caused, which to some extent depends upon the likelihood that the particular addressee in his or her circumstances would have reacted violently. Thus Mannheimer argues that the "average addressee" test as applied is not wholly objective.

⁷⁰*Chaplinsky v New Hampshire* 315 U.S. 568 (1942) at 573.

⁷¹This point is also made by Bollinger, supra n. 19 at 183; Strossen supra n. 59 at 511 and Hentoff, supra n. 18 at 68-70.

⁷²112 S. Ct. 2395 (1992) at 2403.

⁷³337 U.S. 1 (1949) at 4.

⁷⁴*Village of Skokie v National Socialist Party of America* 69 Ill. 2d 605 at 616, 373 N.E. 2d 21 at 25. This case involved a First Amendment challenge to a statute passed by a Chicago municipality aimed at preventing members of the American Nazi Party from marching through a neighbourhood in which many survivors of Nazi concentration camps lived. The case is discussed in detail in Neier, A. *Defending My Enemy* (New York, Dutton, 1979). See also the discussions in Bollinger, supra n. 19 at 23-35, Hentoff, supra n. 18 at 250-7 and Abel, Richard L. *Speech and Respect* (London, Sweet & Maxwell, 1994) 9-11. The "heckler's veto" was also rejected by the United States Supreme Court in *Edwards v South Carolina* 372 U.S. 229 (1966).

The irony then is that the first leg of the *Chaplinsky* rule that had most to recommend it from the point of view of controlling insulting speech has been ignored, while the second leg, which condones the heckler's veto, and which seems to contradict basic free speech principles, became established.⁷⁵

Finally, looking at the *Chaplinsky* rule more generally, although the court offered no test by which to measure "social value", its linkage of First Amendment protection with the exposition of ideas clearly accords with the truth-seeking rationale for freedom of expression. On the other hand, one must be careful not to equate "social value" with social acceptance because, as Bollinger points out, it is precisely that speech which society thinks lacks value that most requires protection, and by protecting such speech that society's tolerance of the unorthodox is best exemplified.⁷⁶ Bearing this in mind, it is now convenient to examine various categories of expression with a view to discovering the extent to which their lack of social value has justified denial of constitutional protection.

1.4.1 Defamation

Defamation is a clear example of speech with limited social value, consisting as it does of a false statement concerning a plaintiff which causes harm in the form of diminution of his or her reputation. Under the English common law of defamation received in America, strict liability was imposed with respect to the truth or falsity of defamatory matter, and so even a publisher who entirely innocently published untrue defamatory matter would be visited with liability.⁷⁷ Furthermore, the defamatory material is presumed to be false, and the defendant must prove truth (the defence of justification) in order to avoid liability.⁷⁸ However, through the development of First Amendment law, the common law rules have been modified in such a way as effectively to create what has been called a constitutional privilege in this area. In

⁷⁵In this regard see Wright, R. George *The Future of Free Speech Law* (New York, Quorum Books, 1990) 75-6. Some scholars argue that the "fighting words" doctrine is no longer good law in view of the fact that the Supreme Court has reversed every "fighting words" conviction that came before it since *Chaplinsky* - see Strossen, *supra* n. 59 at 508-510, Gard, *supra* n. 66 at 536, Schneider, R. G. "Hate Speech in the United States: Recent Legal Developments" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: Article XIX, 1992) 269 at 272 and Shea "'Don't Bother to Smile When You Call Me That' - Fighting Words and the First Amendment" 63 (1975) *Kentucky Law Journal* 1 at 1-2. However, the better view is that it is still valid (see for example Smolla, *supra* n. 11 at 161-2 and Mannheimer, *supra* n. 54 at 1528), albeit minus its first element. This has indeed recently been confirmed by the Supreme Court in *R.A.V. v St Paul* 112 S. Ct. 2538 (1992) at 2542 and 2557-9.

⁷⁶Bollinger, *supra* n. 19 at 182.

⁷⁷Prosser and Keeton *The Law of Torts* Dobbs, Dan B., Keeton, Robert E., Owen, David G. (eds) (5th ed) (St. Paul, West Publishing, 1984) 802.

⁷⁸*Ibid.* 804 and 839-42.

*New York Times Co v Sullivan*⁷⁹ it was held that in order for a public official to recover damages for libel relating to the discharge of his or her office, he or she must show that the libel was false *and* that the defendant published it with "actual malice" - that is, knowing it to be untrue, or at least with reckless disregard as to its truth or falsity.⁸⁰ Thus in such instances the common law presumption of falsity of defamatory material is reversed, and the plaintiff is required to prove knowing publication and that the material was false, and even if the material is false, the plaintiff will not succeed unless he proves knowledge of falsity on the part of the defendant. This departure was justified on the basis that fear of defamation actions would lead to "self censorship" by those debating the activities of public officials. In *Garrison v Louisiana*⁸¹ the *New York Times* rule was extended to cover information about the private lives of public officials, while in *Monitor Patriot Co. v Roy*⁸² it was further extended to cover *candidates* for public office. Finally, in *Curtis Publishing Co. v Butts*⁸³ the court held that the rule applies not only to public officials, but also to "public figures".⁸⁴

Where however the material is defamatory of a private figure, the court has distinguished between material that relates to issues of public concern and that which does not: In *Gertz v Robert Welch Inc*⁸⁵ the court held that where a *private* individual was defamed by material addressing a *public* concern it was not unconstitutional for the law to require the plaintiff to prove a degree of fault lesser than "actual malice" provided that at least some fault was proved - in other words, the law could not impose strict liability on defendants, but it could require that the plaintiff prove negligence on the part of the defendant.⁸⁶ This was justified in part on the basis that

⁷⁹376 U.S. 254 (1964).

⁸⁰For a discussion of the *New York Times* case and its progeny, see Franklin, Marc and Bussel, Daniel "Defamation and the First Amendment: New Perspectives: The Plaintiff's Burden in Defamation: Awareness and Falsity" 25 (1984) *William & Mary Law Review* 825.

⁸¹379 U.S. 64 (1964).

⁸²401 U.S. 265 (1971).

⁸³388 U.S. 130 (1967).

⁸⁴In the words of Chief Justice Warren (*Curtis* at 164) these are persons who

...do not hold public office at the moment [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

The question of who is a "public figure" has spawned a significant body of case law - essentially a person may become a public figure either for all purposes because of the significance they have achieved, or in respect of a specific issue or issues because they have "voluntarily injected themselves" into the resolution of issues of public concern (Prosser and Keeton, *supra* n. 77 at 806).

⁸⁵418 U.S. 323 (1974). The decision in *Gertz* was reaffirmed and applied in *Time, Inc. v Firestone* 424 U.S. 448 (1976).

⁸⁶The only exception to the rule that actual malice did not need to be proved would be where the private plaintiff sought punitive damages, in which case proof of this higher degree of fault *would* have to be present.

private persons have not consented to the same level of exposure as have public officials and, furthermore, that they do not enjoy as easy an access to the media, and are thus less able to refute defamatory allegations.⁸⁷ However, so far as the issue of truth or falsity is concerned, the court in *Philadelphia Newspapers, Inc. v Hepps*⁸⁸ held that the rule regarding onus of proof found in the *New York Times* case still applies - in other words, the plaintiff bears the onus of proving that the material is false.

Where the defamation is of a *private* plaintiff and involves matters of only *private* concern then, as was held in *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*⁸⁹ a plaintiff need not prove actual malice even if punitive damages are sought. Whether this means that common-law strict liability still applies in such cases was not addressed by the court, although it should be noted that the rule in *Gertz v Robert Welch Inc.* (which admittedly involved a private plaintiff but matters of public concern) requires that at least some level of fault, which usually means negligence, must exist.⁹⁰ Whether expression touches upon matters of private or public concern is determined according to the broad test laid down in *Connick v Myers*,⁹¹ which simply requires the court to take into account the "content, form, and context of a given statement, as revealed by the whole record". *Dun & Bradstreet* was followed in *Philadelphia Newspapers Inc. v Hepps*⁹² where, the court not only re-affirmed *Dun & Bradstreet's* finding on fault, but also held that in cases involving private plaintiffs and matters of private concern, the First Amendment does "not necessarily force any change in at least some of the features of the common law landscape".⁹³ Therefore in private plaintiff / private concern cases it seems that the common law rule that defamatory material is presumed false and that the onus remains on the defendant to prove truth, still applies.

⁸⁷As the court stated in *Gertz* at 345, a private individual does not relinquish any part of

...his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

⁸⁸475 U.S. 767 (1986).

⁸⁹472 U.S. 749 (1985).

⁹⁰Prosser and Keeton, *supra* n. 77 at 808 and Rosini, Neil J. *The Practical Guide to Libel Law* (New York, Praeger, 1991) 42 and 92-3.

⁹¹461 U.S. 138 (1983).

⁹²475 U.S. 767 (1986).

⁹³At 775.

Defamatory material frequently takes the form of an expression of opinion, and given that in *Milkovich v Lorain Journal Co.*,⁹⁴ the court held that there was no "wholesale defamation exemption for anything that might be labelled 'opinion'", it is now clear that the various rules regarding fault and onus of proving truth as developed in the above-mentioned cases also apply in instances where the defendant's expression takes the form of a statement of opinion based on fact.⁹⁵ However, it is also clear that, as the court emphasised, the statement must at least imply an assertion of fact, and that opinions that do not do so will not be actionable.⁹⁶ Thus pure or "evaluative" opinions, such as "I think John is bad" cannot attract liability for defamation.⁹⁷

Finally it is necessary to consider the issue of group defamation. Under the common law, defamation of a group does not give rise to an action by an individual member of the group, unless there are circumstances that would lead a reasonable person to believe that that specific plaintiff was being referred to.⁹⁸ However in *Beauharnais v Illinios*⁹⁹ the Supreme Court upheld the validity of a criminal statute which prohibited any publication that

..portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, colour, creed or religion which...exposes [such] citizens to contempt, derision or obloquy, or which is productive of breach of the peace or riots.

The accused had distributed pamphlets that were defamatory of blacks and petitioned the mayor to prevent blacks moving into white areas.¹⁰⁰ The argument has been made that the *Beauharnais* ruling constitutionalizes enactments proscribing expressions of hatred directed at groups. However, prevailing opinion now is that developments

⁹⁴497 U.S. 1 (1990) at 18.

⁹⁵The *Milkovich* decision, it has been pointed out, removes any suggestion that by stating in *Gertz* that "under the First Amendment there is no such thing as a false idea" the court was giving free reign to defamatory statements framed as opinions. (Schiffirin, S. and Choper, J. (eds) *The First Amendment, Cases - Comments - Questions* (St. Paul: West Publishing, 1991) 80 fn (a)). Thus, to take the example cited by the court in *Milkovich* (at 18-19), whether the statements "I think Mayor Jones lied" and "Jones is a liar" will lead to liability will (assuming the case involves a public plaintiff and a matter of public interest) depend on whether Jones is able to prove that the speaker did not genuinely hold the opinion in the first case, or that he (Jones) did not lie in the second.

⁹⁶*Milkovich* at 19-20 and 25.

⁹⁷Prosser and Keeton, *supra* n. 77 at 814-15, Franklin and Bussel, *supra* n. 80 at 868-89.

⁹⁸Prosser and Keeton, *supra* n. 77 at 784-5.

⁹⁹343 US 250 (1952).

¹⁰⁰The pamphlet (cited at 252 of the report) *inter alia* petitioned the mayor "to halt the further encroachment, harassment and invasion of white people, their property, neighbourhoods and persons by the Negro", and warned that if "the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the..rapes, robberies, knives, guns and marijuana of the Negro, surely will".

since *Beauharnais* make it very doubtful that it is still good law.¹⁰¹ In the first place, the majority of statements which are disparaging of groups usually take the form of "evaluative opinions" in relation to which no finding of truth or falsity can be made, and which would therefore not be actionable under defamation law (this issue is discussed further at 5.6.4.2.4 below).¹⁰² Furthermore, *Beauharnais* was decided before *New York Times v Sullivan*, in which the court's solicitude for open political debate caused it to effect major changes in defamation law. Given that what would be classified as "group defamation" would frequently occur when disparaging remarks were made about groups in the context of political debate, it is highly unlikely that the courts would continue to apply *Beauharnais* in all its rigour. Finally, the correctness of *Beauharnais* has been doubted by the courts,¹⁰³ and in particular in *Collin v Smith*,¹⁰⁴ the famed Skokie case in which the courts struck down a city ordinance¹⁰⁵ modelled on that upheld in *Beauharnais*¹⁰⁶ which made it an offence to portray

..criminality, depravity, or lack of virtue in, or incite violence, hatred, abuse or hostility towards a...group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

The court also rejected the argument that the appellant's Nazi views were statements of fact which were defamatory of Jews, holding instead that they were "political ideas",¹⁰⁷ which it would be unconstitutional to proscribe. The court in *Collin* also indicated¹⁰⁸ that the precedent in *Beauharnais*, even if valid, was limited by the fact that the interpretation given to the statute in that case depended upon apprehension of violence being incited by the pamphlets distributed by the accused - in other words

¹⁰¹Tribe, supra n. 50 at 926-7, Strossen, supra n. 59 at 484 and 518 and Strauss, Marcy "Sexist Speech in the Workplace" 25 (1990) *Harvard Civil Rights - Civil Liberties Law Review* 1 at 20-21. For a contrary view see Jerome O'Callaghan "Pornography and group libel; How to solve the *Hudnut* problem" 27 (1992) *New England Law Review* 363.

¹⁰²See Weinstein, J. "An American's View of the Canadian Hate Speech Decisions" in Waluchow, W. J. (ed) *Free Expression* (Oxford, Oxford University Press, 1994) 175 at 178-85, Post, Robert C. "Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy and the First Amendment" 32 (1991) *William and Mary Law Review* 267 at 298 and Greenawalt, Kent "Speech, crime and the uses of language" (New York, Oxford University Press, 1989) 300-01.

¹⁰³*Tollett v United States* 485 F.2d 1087 (8th Cir. 1973) and *Anti-Defamation League of B'nai B'rith v Federal Communications Commission* 403 F.2d 169 (D.C. Cir. 1968) 174 n. 5 (*cert. denied* 394 U.S. 930 (1969)).

¹⁰⁴578 F.2d 1197 (7th Cir 1978) at 1205 (*cert. denied* 439 US 916 (1978)). In denying certiorari, Justices Blackmun and White dissented, noting at 919 that *Beauharnais* had not been formally limited, and that hearing *Collin* would have afforded the court an opportunity to resolve the tension between it and *Beauharnais*.

¹⁰⁵The text of the ordinance is reproduced at 1199 of the report.

¹⁰⁶See the report at 1204.

¹⁰⁷At 1203.

¹⁰⁸At 1204.

that its rationale was the same heckler's veto theory which has already been criticised in the discussion of *Chaplinsky* above.

Finally, it is convenient to mention here the abhorrence manifested by the courts to any prior restraint - that is, any attempt to prevent speech reaching the public. As is clear from the decision in *Near v Minnesota*¹⁰⁹ whatever the constitutionality of laws seeking to provide a remedy for allegedly harmful speech *after* the fact of its publication, "immunity from previous restraints and censorship" are almost always unconstitutional. In other words, the publisher will have the opportunity to publish and have the constitutionality of any resulting prosecution or civil action determined thereafter. Although *Near* was a defamation case, the principle is of general application. Thus in *New York Times Co v United States*¹¹⁰ (the *Pentagon Papers* case), the court held that¹¹¹

...any system of prior restraints on expression comes to this Court bearing a heavy presumption against constitutional validity [and the] government carries a heavy burden for showing justification for the imposition of such a restraint.

On this basis the court refused to enjoin publication of government documents relating to defence policy in Southeast Asia, even though willing to accept that publication would be harmful to the nation. As the court further held¹¹² "...[o]nly governmental allegation and proof that publication must inevitably, directly and immediately..." harm the nation could justify prior restraint. The presumption against the validity of prior restraint has been overcome in some cases - for example in *Times Film Corporation v Chicago*¹¹³ the court upheld the validity of a statute requiring films to be submitted to a censorship board for examination prior to public showing, although subsequently, in *Freedman v Maryland*¹¹⁴ the court emphasised that such measures will be held invalid unless accompanied by strict procedural safeguards guaranteeing speedy judicial review of any administrative finding of obscenity.¹¹⁵

¹⁰⁹283 U.S. 697 (1930) at 712-18.

¹¹⁰403 U.S. 713 (1971).

¹¹¹At 714.

¹¹²At 726-7.

¹¹³365 U.S. 143 (1961).

¹¹⁴380 U.S. 51 (1965).

¹¹⁵For a discussion of the circumstances in which prior restraints may be validated see Tribe, *supra* n. 50 at 1046-50 and 1059-61.

1.4.2 Privacy

Invasion of privacy, and in particular publication of private facts and placing in false light, have raised issues pertaining to freedom of expression.¹¹⁶ The distinguishing feature of actions for publication of private facts is that they arise where the defendant has made a *truthful* statement concerning the plaintiff - indeed it is the very fact that some intimate truth has been revealed that wounds the plaintiff's feelings. This clearly raises policy difficulties - as has already been shown in the discussion on defamation, the courts will grant a remedy for expression that is false only under stringent conditions. It is, therefore, unsurprising that it is even more difficult to surmount First Amendment concerns where the speech is admittedly true. Thus the courts have not hesitated to deny plaintiffs relief where private information which was *already* in public records was revealed.¹¹⁷ However, the Supreme Court has expressly declined to decide the issue of whether the publication of truthful private information can be prevented consistent with the First Amendment,¹¹⁸ and liability for invasion of privacy in such circumstances has been imposed by lower courts.¹¹⁹ The Supreme Court has however held that publication of truthful information might be prohibited given "a state interest of the highest order",¹²⁰ and most recently in *The Florida Star v B.J.F.*,¹²¹ although on the facts of the case¹²² the court denied relief to a rape victim whose name was publicised in a newspaper, the court made it clear that the First Amendment did not automatically protect speech simply because it was true and, more specifically, that the court did not rule out the possibility that imposition of civil liability for publication in a rape case might meet that standard. Moreover, it was relevant that the facts published by the newspaper in this case were found to relate to a matter of public concern (the commission of crime),¹²³ and thus how the

¹¹⁶Invasion of privacy by appropriation also involves expressive conduct, but this is an economic tort, where the plaintiff claims damages for loss of a proprietary interest. In *Zacchini v Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977) the court held that First Amendment rights were not infringed where a public performer had been awarded damages after unauthorised broadcast of his act. The court drew analogies to copyright law and upheld the performer's right to receive the economic benefits of his performance. In general on this form of invasion of privacy see Prosser and Keeton, *supra* n. 77 at 851-54 and Smolla, *supra* n. 11 at 141-4.

¹¹⁷*Cox Broadcasting Corp. v Cohn* 420 U.S. 469 (1975), *Oklahoma Publishing Company v District Court in and of Oklahoma County* 430 U.S. 308 (1977), *Smith v Daily Mail Publishing Co.* 443 U.S. 97 (1979).

¹¹⁸*Cox Broadcasting Corp. v Cohn* 420 U.S. 469 (1975) at 491.

¹¹⁹See for example *Virgil v Time, Inc.* 527 F.2d 1122 (9th Cir. 1975) (*cert. denied*, 425 U.S. 998 (1976)).

¹²⁰*Smith v Daily Mail Publishing Co.* 443 U.S. 97 (1979).

¹²¹491 U.S. 524 (1989).

¹²²Most significant among these was the fact that the newspaper obtained the information through the state's own negligent release of an official document containing the plaintiff's name, the statute did not require the plaintiff to prove fault, and the statute was found not to be even handed in that liability attached only to mass media. See Sims, Andrew "Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach" 34 (1992) *Arizona Law Review* 231 at 264 n. 242.

court would rule in a case where matters of purely private concern were revealed remains moot. However, in light of the court's attitude to private defamation as expressed in *Dun & Bradstreet*, it would seem safe to say that in such cases the First Amendment would not deny plaintiff's a remedy.

Invasion of privacy by false light involves publicly placing someone in a false light in a manner that would be "highly offensive to the reasonable person". The tort is very similar to that of defamation, except that no proof of diminution of reputation is required - a mere false depiction which the plaintiff reasonably finds offensive is sufficient to attract liability. In *Time Inc. v Hill*¹²⁴ and *Cantrell v Forest City Publishing Co.*¹²⁵ it was held that there is no First Amendment bar to recovery of damages for this tort, but that where the invasive speech involves matters of public interest, the plaintiff must prove malice on the part of the defendant in accordance with the *New York Times v Sullivan* standard.¹²⁶

1.4.3 Intentional infliction of emotional distress

The tort of intentional infliction of emotional distress¹²⁷ (sometimes known in English law as the tort in *Wilkinson v Downtown*¹²⁸) is one which entitles a plaintiff to recover damages where he or she can show that intentional and outrageous conduct by the plaintiff inflicted emotional injury.¹²⁹ Of course, the tort can take the form of words, hence the relevance of the First Amendment. The requirement that the

¹²³Although I would argue that whereas the *crime* was a matter of public concern, the *victim's name* was not.

¹²⁴385 U.S. 374 (1967).

¹²⁵419 U.S. 245 (1974).

¹²⁶The similarity of this tort to defamation no doubt motivated the importation of the *New York Times v Sullivan* rule. However, as is noted by Smolla (supra, n. 11 at 147-8) the law is inconsistent in demanding that a private plaintiff meet this standard, given that in *Gertz* it was held that proof of negligence should suffice.

¹²⁷It would seem that in American law, little distinction is drawn between the tort of infliction of emotional distress (which is addressed in the text above and elsewhere in this thesis) and that of emotional shock, which is typically caused when one witnesses injury to someone (this tort is discussed by Levit, supra n. 17 at 144-6 and 169-72). South African law, however, draws a distinction between these two types of action. Thus the action for emotional shock (discussed by Boberg, P. Q. R. *The Law of Delict - Volume I, Aquilian Liability* (Cape Town, Juta, 1986) 174-93), is brought as part of an Aquilian action, and remedies the *injury to the nervous system* arising from witnessing harm to a person (or even property - see *Masiba and another v Constantia Insurance Co Ltd and another* 1982 (4) SA 333 (C)). By contrast, the *actio injuriarum* (discussed in chapters 4 and 5) is used to remedy the *purely sentimental harm* caused by an intentional impairment of dignity - as occurs, for example, in cases involving verbal insult. It is, however, interesting to note that a single act may lead to both actions being brought. As the court indicated in, *Boswell v Minister of Police* 1978 (3) 268 (E), where a defendant deliberately caused emotional shock to a plaintiff by falsely telling her that a relative had been killed, the emotional shock could be remedied by the Aquilian action, and the emotional harm by means of the *actio injuriarum*.

¹²⁸[1897] 2 QBD 57. In this case the defendant caused emotional harm to the plaintiff by falsely telling her that her husband had been in an accident and had broken both his legs.

¹²⁹Prosser and Keeton, supra n. 77 at 56-7.

conduct must be "outrageous" does, however, significantly restrict the scope of this tort, and recovery is not permitted for "mere insult".¹³⁰ This is consistent with the general First Amendment position that speech which offends because of the idea it conveys cannot be proscribed merely because of that offensiveness,¹³¹ and accords with what Smolla calls the "emotion principle", which is that speech is afforded constitutional protection even where it arouses a negative emotion in the hearer.¹³² For this reason, mere disturbance of emotional tranquillity (what Smolla calls "reactive harm")¹³³ constitutes insufficient ground for regulation of speech - as he states¹³⁴

The mere capacity of speech to cause intellectual and emotional disturbance is never enough, standing alone, to justify its abridgment. The principle is no trifling matter, it is the essence of freedom of speech...

This is obviously justified from a Millian point of view in cases where the hearer's reaction is caused by his or her objection to the ideas being conveyed. However, the same principle is held to apply even in relation to the *form* of speech used - as was held in *Cohen v California*¹³⁵

¹³⁰Ibid., 59-62. See also Restatement (Second of Torts) (St. Paul, American Law Institute, 1991) §46, comment (d), which states as follows:

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 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

Similarly, comment (f) states:

It must be emphasised again, however, that major outrage is essential to the tort, and the mere fact that the actor knows that the other will regard his conduct as insulting, or will have his feelings hurt, is not enough.

¹³¹Of which the Nazi march in Skokie is a classic example, see *Collin v Smith* 578 F.2d 1197 (7th Cir. 1978) at 1205 (*cert. denied* 439 US 916 (1978)).

¹³²Smolla, *supra* n. 11 at 46-8.

¹³³Smolla (*ibid.*, 49-50) has constructed a useful table in which he categorises harm as "reactive", "relational" and "physical". He uses this to illustrate his argument that whereas the courts have refused to allow First Amendment rights to be limited in order to avoid reactive harm (such as infliction of emotional distress, invasion of privacy, or distress caused by intellectual disagreement with the content of speech); they are sometimes willing to allow restrictions designed to prevent relational harm (such as impairment of reputation, false advertising, and copyright infringements), and are most prepared to limit First Amendment rights where physical harm is threatened (incitement to criminal acts).

¹³⁴Ibid., 93.

¹³⁵403 U.S. 15 (1971) at 26.

We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

This argument is less easy to justify with reference to Millian values of truth-seeking: as will be argued more fully later, it is clearly possible to convey meaning in ways that are either more or less offensive, without sacrificing anything of their content.

Returning to the specific tort of infliction of emotional harm, in *Hustler Magazine v Falwell*¹³⁶ the court held that public officials and public figures may not recover damages where they have suffered emotional harm as a result of speech unless they prove that the publication contained a false statement of fact made with "actual malice". In other words, the court equated the interest protected by this tort action with that protected by defamation, and required not only that the same level of intent as was required by *New York Times v Sullivan* be proved, but also that the plaintiff show the additional element of a false statement of fact not otherwise required in such an action. The court cited with approval its finding in *Garrison v Louisiana*¹³⁷ that debate

...on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Thus the court squarely based its limitation of the circumstances in which the remedy is available on a concern that it might have an inhibiting effect on open debate.

¹³⁶485 U.S. 46 (1988). In this case a magazine had published a cartoon in which it suggested that Rev. Falwell, a nationally known preacher, had had an incestuous relationship with his mother. The magazine had, however, stated that the cartoon was not meant to be taken seriously - that is, the magazine disavowed that the cartoon contained any statement of fact about the plaintiff. The defendant was, therefore, able to escape liability because, since no facts were alleged, the plaintiff could not prove any to be false. The court also had particular reservations in so far as the element of "outrageousness" in the tort of intentional infliction of emotional harm is concerned, holding (at 55) that

'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular figure.

¹³⁷379 U.S. 64 (1964) at 73.

The approach in *Falwell* has, however, been criticised by Wright¹³⁸ who notes that the decision imports into the tort of infliction of emotional distress (at least in so far as public figure plaintiffs are concerned) the element of truth or falsity relevant to the completely separate tort of defamation. The *Falwell* approach also effectively immunises defendants from liability for emotionally distressing expression if they take the simple precaution of not including any false factual statement. This they did in *Falwell* by stating that the offensive cartoon was published as fiction. Smolla, however, applauds the *Falwell* decision¹³⁹ on the basis that the First Amendment does not, and ought not, permit restriction of freedom of expression and the search for truth because of emotional hurt alone, yet as has been shown, the courts are in fact willing to abandon the truth-seeking principle and impose liability for emotional hurt taking the form of invasion of privacy by revelation of truth, and in cases of infliction of emotional harm not covered by the public figure rule in *Falwell*. Nevertheless, the unwillingness of the courts to include "mere insult" within the bounds of this tort means that only truly egregious emotional hurt is remediable in American law. First Amendment cases involving this tort are explored in more detail at 2.2.1 below.

1.4.4 Incitement and threats

The *Chaplinsky* case dealt with speech that incited anger against the speaker on the part of his or her addressees. First Amendment cases on incitement relate to expression through which the speaker urges his or her audience to cause harm to others. The law regarding the constitutionality of prescribing speech inciting crime has undergone rapid development over the past seventy years or so.¹⁴⁰ However the

¹³⁸Wright, *supra* n. 75 at 35-6.

¹³⁹Smolla, *supra* n. 11 at 148.

¹⁴⁰Incitement cases were among the earliest First Amendment decisions by the courts. In *Schenck v United States* 249 U.S. 47 (1919) the court upheld convictions brought under the Espionage Act of 1917 against appellants who had fallen foul of the Act by distributing pamphlets critical of military conscription in contravention of its prohibition against "obstruction of the recruiting and enlistment service". In this case Holmes J made his famous statement (at 52) that restriction was permissible only if the words

...create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent...

Yet the facts of *Schenck* (and of *Debs v United States* 249 U.S. 211 (1919) decided at the same time) were such as to indicate that the only danger posed by the appellants' acts was that, having been persuaded that conscription was wrong, hearers might campaign against it themselves - in neither case was anyone urged to break the law. The sole crime of the appellants in both cases was to change attitudes concerning the draft. Moreover, the decisions in these cases are surprising in the light of the earlier decision in *Masses Publishing Co. v Patten* 244 Fed. 535 (S.D.N.Y. 1917) which was another anti-conscription case, but one in which the court drew a distinction between advocacy of illegal action, and criticism of government policy which might lead to such action, holding that in a free country the latter could not be made unlawful. Holmes himself came to accept this view as was demonstrated by his dissent against convictions for almost identical anti-government pamphleteering in contravention of the Act (in this case opposing the United States' intervention in Russia in 1918) in *Abrams v United States* 250 U.S. 616 (1919) in which he gave his Millian defence of free speech, held

position today is as stated in *Brandenburg v Ohio*,¹⁴¹ in which the court endorsed the distinction developed in earlier cases between merely theoretical support for unlawful conduct and actual incitement to such conduct,¹⁴² and also emphasised that incitement could not be punished consistently with the First Amendment unless unlawful action was likely to occur as a result of the incitement and that that unlawful conduct was imminent. Thus the court stated that¹⁴³

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is likely to incite or produce such action.

and then only if

...such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg was followed in *Hess v Indiana*¹⁴⁴ in which the court overturned the conviction of a demonstrator who said to his fellows "We'll take the fucking street later", holding that the appellant had not incited "imminent" lawlessness. Similarly,

that the expression of an opinion opposing government policy was protected by the Constitution, and made his famous statement (at 630) that

...the best test of truth is the power of the thought to get itself accepted in the competition of the market..

Furthermore, foreshadowing the formulation that would subsequently be adopted by the court, he opined (*idem*) that limitation of free speech was justified only if the words

...so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

¹⁴¹ 395 U.S. 444 (1969).

¹⁴² This distinction was first emphasised in *Dennis v United States* 341 U.S. 494 (1951), and subsequently in *Yates v United States* 354 U.S. 298 (1957) at 325 in which the court held that for the speech to merit suppression

..those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.

This was followed in *Noto v United States* 367 U.S. 290 (1961) at 297 where it was held that

...the mere abstract teaching...of the moral propriety or even moral necessity of a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.

¹⁴³ *Brandenburg* at 447.

¹⁴⁴ 414 U.S. 105 (1973).

in *NAACP v Claiborne Hardware Co.*¹⁴⁵ the court held that the *Brandenburg* statement had not been met where a speaker had said "If we catch you going in any of them racist stores, we're gonna break your damn neck". The court held that¹⁴⁶

[M]ere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment...the emotionally charged rhetoric of [the speaker] did not transcend the bounds of protected speech set forth in *Brandenburg*.

As is argued by Greenawalt¹⁴⁷ the breadth with which the *Brandenburg* rule was stated lays it open to criticism.¹⁴⁸ Indeed it is quite plausible to argue that, on the facts of *Hess*, the speaker was inciting lawlessness that would take place later that day, and that since this incitement was held to be not sufficiently immediate, the temporal requirement of immediacy means that even a gap of a few hours between the advocacy of unlawful action and the likely time at which it would take place immunises such speech against legal sanction. Furthermore, the requirement that the imminent lawlessness be "likely" means that liability for incitement is made dependant upon the degree of probability that the accused's urgings will be acted upon - thus incitement would be excused in cases where there was only a possibility, rather than a likelihood, of harm occurring. Most important however, is the relevance to the *Brandenburg* rule of the distinction between what Greenawalt calls "ideological" and "non-ideological" speech - that is, speech urging political crime as distinct from "everyday" crime. Although, on the face of it, *Brandenburg* makes no such distinction, it is clear that, as Greenawalt states, in practice the rule is impliedly limited by

...the long-standing assumption that punishment of agreements to commit ordinary crimes does not raise any constitutional difficulties.

A similar conclusion is reached by La Fave and Scott,¹⁴⁹ who opine that the First Amendment does not prevent the criminalisation of deeds such as solicitation, conspiracy or the obtaining of property by false words, and these authors too would

¹⁴⁵458 U.S. 886 (1982).

¹⁴⁶At 927-8.

¹⁴⁷Greenawalt, Kent "Speech and Crime" 1980 *American Bar Foundation Research Journal* 645 at 784.

¹⁴⁸Indeed it is difficult to see why the court chose this case in which to fashion a fundamental rule on incitement - all the speaker had said was that unless the government changed its policies "there might have to be some revengeance [sic] taken" - but there was no indication that such action would necessarily include unlawful conduct.

¹⁴⁹La Fave, W. and Scott, A. *Criminal Law* (2nd ed) (St. Paul, West Publishing, 1986) 170-1.

confine the import of *Brandenburg* to "...advocacy of the necessity or propriety of violence to accomplish political reform.." ¹⁵⁰ Whether a distinction *should* (or indeed can) be drawn between political and other types of crime of lies beyond the scope of this thesis. Here it is only necessary simply to note the existence of this distinction under United States law, and to appreciate that in cases involving "ordinary" crimes, First Amendment rights cannot be raised as a defence to a charge of inciting others to break the law. This is clearly accords with the Mill's own position which he expressed as follows: ¹⁵¹

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression as a positive action to some mischievous act.

Another category of expression that clearly falls outside the scope of the First Amendment is that of threats, which both case law ¹⁵² and academic comment ¹⁵³ show as being a category of speech that falls outside the scope of First Amendment protection.

1.4.5 Obscenity

It may be questioned whether any "artistic" expression is entitled to First Amendment protection, given that it is arguable that such expression does not *necessarily* involve the communication of "ideas". ¹⁵⁴ However while it must be conceded that the absence of ideas from the communicative content of artistic expression indicates the necessity for the development of a wider underlying value for freedom of expression than is provided by that of truth-seeking, the courts have not restricted the First Amendment to the realm of ideas. Instead they have held that it is not possible to distinguish between transmission of ideas and entertainment, ¹⁵⁵ and that the First Amendment protects emotive as well as cognitive communications. ¹⁵⁶ It is against

¹⁵⁰Ibid., 170 n 17.

¹⁵¹Mill, *supra* n. 13 at 72.

¹⁵²See for example *Watts v United States* 394 U.S. 705 (1969) at 707, *United States v Orozco-Santillan* 903 F.2d 1262 (9th Cir. 1990) 1265-6, and *United States v Mitchell* 463 F.2d 187 (8th Cir. 1972) (*cert. denied* 410 U.S. 969 (1973)).

¹⁵³Schauer, Frederick "Categories and the First Amendment: A Play in 3 Acts" 34 (1981) *Vanderbilt Law Review* 265 at 267-82.

¹⁵⁴See for example Bork, R. "Neutral Principles and Some First Amendment Problems" 47 (1971) *Indiana Law Journal* 1, where the author argues that the First Amendment covers only "political speech".

¹⁵⁵*Winters v New York* 333 U.S. 507 (1948), *Stanley v Georgia* 394 U.S. 557 (1969).

¹⁵⁶*Cohen v California* 403 U.S. 15 (1971).

this background that the courts have attempted to distinguish between that artistic expression which is protected and that which is obscene.¹⁵⁷

Proscription of expression on the ground of obscenity has a long history, although modern attempts to regulate sexually explicit material in the common law world date from the enactment of statutory prohibitions in the 19th century,¹⁵⁸ and in particular Britain's Obscene Publications Act 1857.¹⁵⁹ The motivation underlying this legislation was the protection of the morals of the consumer,¹⁶⁰ and this indeed was reflected in the definition given to the term "obscenity" as it appeared in the Act in the case of *R v Hicklin*¹⁶¹, in which Cockburn J held that a publication was obscene if it tended to "deprave and corrupt those whose minds are open to such immoral influences" and into whose hands the publication might fall. In the words of Cockburn J, such material would "suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of an impure and libidinous character".¹⁶² The *Hicklin* test was adopted in the United States in the nineteenth century.¹⁶³ Nevertheless it was criticised because it tied standards governing society as a whole to what would corrupt its most impressionable members, and because it took no account of the context provided by the entirety of the work in which obscenity happened to be found.¹⁶⁴ It was ultimately rejected in the 1930's¹⁶⁵ even before the Supreme Court first ruled on obscenity.¹⁶⁶

Obscenity was one of the categories referred to in *Chaplinsky* as not meriting First Amendment protection. The court's first opportunity to rule on obscenity came in *Doubleday & Co. Inc. v New York*,¹⁶⁷ although the 4-4 vote (which meant that the conviction under a New York statute was not disturbed) left no opinion by the court. The first reasoned decision was *Roth v United States*,¹⁶⁸ in which the court said that

¹⁵⁷For a comprehensive history of this endeavour see De Grazia, E. *Girls Lean Back Everywhere - The Law of Obscenity and the Assault on Genius* (New York, Random House, 1992).

¹⁵⁸See the historical overview of the regulation of obscene materials from classical to modern times in McLaren, J. P. S. "'Now you see it, now you don't': The historical record and the elusive task of defining the obscene" in Schneiderman, D. (ed) *Freedom of expression and the Charter* (Scarborough, Thompson Professional Publishing, 1991) 105-44.

¹⁵⁹20 & 21 Vict., c.83.

¹⁶⁰MacKinnon, Catherine A. *Only Words* (Cambridge, Harvard University Press, 1993) xi-xii.

¹⁶¹(1868) LR 3 QB 360 at 370-1.

¹⁶²At 372.

¹⁶³De Grazia, supra n. 157 at 12.

¹⁶⁴The fate of the *Hicklin* test in the United States is discussed in Pritchett, C. H. *Constitutional Liberties* (Englewood Cliffs, Prentice Hall, 1984) 87-8.

¹⁶⁵*United States v One Book Entitled "Ulysses"* 72 F.2d 705 (2nd Cir. 1934).

¹⁶⁶Although the Supreme Court did affirm the unsuitability of *Hicklin* in *Roth v United States* 354 U.S. 476 (1957) at 489.

¹⁶⁷335 U.S. 848 (1948).

¹⁶⁸354 U.S. 476 (1957) at 484.

obscenity was unprotected because of its lack of "redeeming social importance". The court defined "obscenity" as "material which deals with sex in a manner appealing to prurient interest",¹⁶⁹ that is "material having a tendency to excite lustful thoughts".¹⁷⁰ Whether material was of this nature would be determined by ascertaining "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Although this test marked an improvement over *Hicklin* in that it linked standards with an average in society¹⁷¹ and paid attention to the character of the entire work under examination, it was, like *Hicklin*, still rooted in concepts of social morality, and offered no explanation as to why such moral concerns should over-ride individual rights. It was both the moralism which penalised thoughts and the majoritarianism that sought to replace the moral judgment of the individual with that defined by society that were criticised by Douglas and Black JJ in their dissent.¹⁷²

In the years following the *Roth* decision the court added several new criteria to its definition of obscenity. In *Manual Enterprises, Inc. v Day*¹⁷³ the court held that for material to be obscene it must not only appeal to prurient interest but also had to do so in such a way as to be patently offensive, and in *Jacobellis v Ohio*¹⁷⁴ held that since the *Roth* test had been based on the *absence* of any redeeming social importance in obscenity, the *presence* of elements of redeeming social importance should save material from classification as "obscene". Furthermore, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Attorney Gen. of Massachusetts*,¹⁷⁵ the

¹⁶⁹At 487.

¹⁷⁰At 487.

¹⁷¹A defect in the *Hicklin* test was noted by the United States Supreme Court a few months before *Roth* when, in *Butler v Michigan* 352 U.S. 380 (1957) it declared invalid a statute which banned material that contained obscene language. The court rejected the argument that the legislation was justified by the need to protect minors, holding that that reasoning would lead to adults being able to read only what was fit for children.

¹⁷²The salient excerpts from the dissenting opinion (at 511-12) are as follows:

The standard of what offends 'the common conscience of the community' conflicts with the command of the First Amendment...Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned ?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency to "excite lustful thoughts". This is community censorship in one of its worst forms. If the First Amendment guarantee of freedom of speech and press is to mean anything it must allow protests against the moral code that the standard of the day sets for the community.....

¹⁷³370 U.S. 478 (1962).

¹⁷⁴378 U.S. 184 (1964).

¹⁷⁵383 U.S. 413 (1966).

court emphasised that in order to be proscribable, material must satisfy *all* elements of the test laid down in *Roth* and subsequent cases - in other words must not only appeal to prurient interest in a patently offensive way but must also be utterly lacking any redeeming social value. The only departure from *Roth* came in *Stanley v Georgia*¹⁷⁶ in which the court struck down a statute prohibiting mere private possession of obscene materials on the ground that it infringed rights of privacy, and *Redrup v New York*¹⁷⁷ in which it held that obscene material could be proscribed only in order to protect juveniles, or where individual privacy had been invaded by unwilling exposure to sexually explicit material.¹⁷⁸ The court refused, however, to extend the logic of *Stanley* to situations other than that of the private dwelling, holding that the distribution¹⁷⁹ and importation¹⁸⁰ of sexually explicit material, even if intended for private use, could be constitutionally proscribed.¹⁸¹ Furthermore, the promise of a harms-based rationale apparently offered by *Stanley* and *Redrup* proved illusory, as the court was soon to reject this brief deviation from *Roth* and its progeny in its landmark decision in *Miller v California*.¹⁸²

The profusion of additions to *Roth* had made obscenity law a morass of confusion, and it was to bring a degree of order to this area that the court in *Miller* propounded a new composite test, incorporating what had gone before. Thus it held that for speech to be obscene it had to satisfy a tripartite test, the elements of which were:¹⁸³ (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appealed to prurient interest; (b) whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacked serious literary, artistic, political or scientific value.¹⁸⁴ The court held that it was unrealistic to expect "community standards" to refer to a national standard, and that it was up to the jury in such cases to apply the standard of its particular community, even though this inevitably meant that expressive rights would vary from place to place. However, the court gave the following examples of material that might meet the requirements of the test: "patently offensive representations or

¹⁷⁶394 U.S. 557 (1969).

¹⁷⁷386 U.S. 767 (1967).

¹⁷⁸These cases are further discussed at 3.5.3 below.

¹⁷⁹*United States v Orito* 413 U.S. 139 (1973), *United States v Reidel* 402 U.S. 351 (1971).

¹⁸⁰*United States v 12 200-ft Reels of Super 8mm Film* 413 U.S. 123 (1973).

¹⁸¹The inconsistency of this approach in light of *Stanley* is criticised by Cole, David "Playing by Pornography's Rules: The Regulation of Sexual Expression" 143 (1994) *University of Pennsylvania Law Review* 111 at 141-3.

¹⁸²413 U.S. 15 (1973).

¹⁸³The test is found at 24 of the report.

¹⁸⁴The application of the *Miller* test is discussed in detail in Taylor, Bruce "Hard-core Pornography: A Proposal for a Per Se Rule" 21 (1987) *University of Michigan Journal of Law Reform* 255.

descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals".¹⁸⁵ These obviously broad categories could clearly be used to proscribe a virtually limitless range of explicit (or even not so explicit) materials. On the same day the court handed down its decision in *Paris Adult Theatre I v Slaton*,¹⁸⁶ in which Burger J explicitly endorsed the legitimacy of morals-based legislation, and rejected the "consenting adults" formulation inherent in *Redrup*. Douglas, Brennan, Stewart and Marshall dissented in both *Miller* and *Slaton*. In so doing Brennan, abandoned the position he had taken in *Roth*, holding in *Miller* that concepts as "obscenity", "prurient interest", "patent offensiveness" and "serious literary value" were too indefinite to provide the individual with a clear guide as to what was and was not proscribed, and in both cases that limitation of First Amendment rights was legitimate only to prevent involuntary exposure to adults or distribution to juveniles.

The philosophy underlying *Miller* continues to govern the law today - thus in *Barnes v Glen Theatre, Inc.*,¹⁸⁷ the court re-asserted that the government may validly legislate to preserve "morality",¹⁸⁸ and the only instance in which the court adopted a harms-based rationale for restricting sexually explicit material was in its decisions relating to the separate category¹⁸⁹ of child pornography (*Ginsberg v New York*,¹⁹⁰ *New York v Ferber*¹⁹¹ and *Osborne v Ohio*¹⁹², discussed at 3.5.3 below). Yet the *Miller* doctrine is clearly unsatisfactory - in *Pope v Illinois*,¹⁹³ for example, the court held that the community standards test was not applicable to the third aspect of the *Miller* test, because a work might have objective literary or artistic value even though it was offensive according to the standards of the particular community from which the jury was drawn, and that therefore an objective test should be applied in

¹⁸⁵413 U.S. 15 (1973) at 25.

¹⁸⁶413 U.S. 49 (1973).

¹⁸⁷501 U.S. 560 (1991).

¹⁸⁸*Barnes v Glen Theatre, Inc.* 501 U.S. 560 (1991) at 575. Strossen, Nadine "A Feminist Critique of 'The' Feminist Critique of Pornography" 79 (1993) *Virginia Law Review* 1099 at 1120-1 cites this case as evidence of the difference in treatment accorded sexual expression, which can be proscribed simply because the community finds it offensive, and non-sexual communication in relation to which content based restrictions are not permitted.

¹⁸⁹Depictions of minors engaged in sexually explicit conduct constitute a category of proscribed speech entirely separate from and unrelated to the category of obscene speech as defined in *Miller*, see Layman, William "Violent Pornography and the Obscenity Doctrine: The Road Not Taken" 75 (1987) *Georgetown Law Journal* 1475 at 1487 and Pollard, Deana "Regulating Violent Pornography" 43 (1990) *Vanderbilt Law Review* 125 at 145-8.

¹⁹⁰390 U.S. 629 (1968).

¹⁹¹458 U.S. 747 (1982).

¹⁹²495 U.S. 103 (1990).

¹⁹³481 U.S. 497 (1987).

determining redeeming value.¹⁹⁴ Yet surely the same argument could be made against the community standard in general? If the inherent subjectivity of the community standards test was recognised as making it inappropriate to determine matters of artistic value, was not its application in order to test prurience or offensiveness equally objectionable? Furthermore, as Brockwell argues,¹⁹⁵ even a supposedly objective determination of whether allegedly obscene material has artistic value would require a jury or judge to assume the qualification of art critics, as was shown by the controversy that arose when a Florida court held that the violent music of the rap group 2 Live Crew did not meet the third prong of the *Miller* test.¹⁹⁶ It is therefore unsurprising that in his concurring judgment in *Pope*, Scalia J urged a re-examination of *Miller* as a whole, while Stevens, Brennan and Marshall JJ again rejected *Miller*,¹⁹⁷ saying that the law ought not to punish mere possession or sale "absent some connection to minors, or obtrusive display to unconsenting adults".¹⁹⁸

The community standards test contained in *Miller* "balkanizes the definition of obscenity"¹⁹⁹ in that it effectively leaves First Amendment rights in relation to sexually explicit material to the vagaries of local jury decisions - with the result that defendants have put much energy into "forum shopping" in order to have cases heard in what they perceive to be the most favourable location whenever jurisdictional rules admit this possibility.²⁰⁰ Furthermore, the fact that the *Miller* test is subjective and morals-based, rather objective and harms-based,²⁰¹ means both that innocuous material may be proscribed if it breaches community standards, while in another locale, truly harmful material may escape regulation because it does not. Finally, the inconsistency in thinking underlying the obscenity doctrine and the rest of First Amendment law can no better be illustrated by Cole's observation²⁰² that whereas under part (b) of the *Miller* formulation the offensiveness of expression denies it constitutional protection, in relation to other types of expression the courts have been

¹⁹⁴Furthermore, in *Smith v United States* 431 U.S. 291 (1977) at 301 the court also held that the third element was to be tested by a national rather than local standard.

¹⁹⁵Brockwell, P. Heath "Grappling with *Miller v California*: The Search for an Alternative Approach to Regulating Obscenity" 24 (1994) *Cumberland Law Review* 131 at 136.

¹⁹⁶*Luke Records, Inc. v Navarro* 960 F.2d 134 (11th Cir. 1992).

¹⁹⁷As they would once more in *Sable Communications of California Inc. v F.C.C* 492 U.S. 115 (1989).

¹⁹⁸481 U.S. 497 (1987) at 513.

¹⁹⁹Wirenus, John "Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech and the First Amendment" 20 (1993) *Fordham Urban Law Journal* 27 at 33 n. 24.

²⁰⁰Pritchett, *supra* n. 164 at 96 n. 9.

²⁰¹Weinstein, *supra* n. 102 at 200 and 220.

²⁰²Cole, *supra* n. 181 at 112. This article contains a comprehensive examination of First Amendment law relating to obscenity, and highlights the fact that the difference in treatment accorded sexually explicit expression as compared with other forms of speech cannot be justified on any principled basis (see in particular 119-21).

unwavering in holding that speech may not be proscribed simply because society finds it offensive.

1.5 Summary

What general conclusion can be drawn from the above? Firstly, as is stated by Lockhart *et al*²⁰³ one must accept that the court has developed no general First Amendment theory²⁰⁴ but has instead produced a "complex and conflicting body of constitutional precedent". A large portion of First Amendment case law (specifically that dealing with large areas of defamation, false light and infliction of emotional harm) can be analysed in terms of a balancing process between the competing values of truth-seeking on the one hand and redress for emotional injury on the other. The courts have sought to adjust this balance primarily by casting upon the plaintiff the onus of proving the falsity of statements made by defendants who commit these torts. However, this "constitutional privilege" applies only where the plaintiff is a public figure or where the plaintiff is a private figure but the statement complained of refers to matters of public concern. In wholly private cases, First Amendment protections would not apply. But is this distinction between public and private figure plaintiffs well founded? Ought one to require public figures to tolerate greater emotional injury simply because they are public figures or, adopting the opposite perspective, why should constitutional protection not equally be given to private individuals?

In contrast to the law of defamation, the law governing invasion of privacy admits of a departure from Millian doctrine in that, expressive rights can be limited even though (or perhaps more accurately, precisely because) the statement that has been made is *true*. This area of the law does, however, bear some similarity to the law of defamation in that liability again depends on whether the plaintiff is a private or public figure and whether the facts revealed are of private or public concern.

The rules regarding defamation, false light, infliction of emotional harm and invasion of privacy are all predicated upon the existence of a statement of fact or opinion, yet very often expression which causes harm (for example a racist epithet) contains no such statement. However, in so far as the *Chaplinsky* decision provides a remedy for such harm, it does so only where expression is likely to provoke physical retaliation, an approach which is flawed firstly in that it denies a remedy in cases where

²⁰³Lockhart, W., Kamisar Y., Choper, J., and Shiffrin, S. (eds) *Constitutional Rights and Liberties* (7th ed) (St. Paul, West Publishing, 1991) 375.

²⁰⁴For an interesting attempt at a diagrammatic representation of First Amendment law see Van Alstyn, William *Interpretations of the First Amendment* (Durham, Duke University Press, 1984) 21-49.

retaliation is not expected, and secondly, in that it seems to constitutionalise the "heckler's veto". Furthermore, the limited availability of the action for intentional infliction of emotional distress, and the doubtful continued validity of the decision in *Beauharnais* means that the law offers no remedy for expression amounting to "mere insult" or to group defamation.

Incitement constitutes a clear category of speech which can be proscribed on the basis of the harm it causes, the only exception being those cases falling under the *Brandenburg* rule relating to "political" crimes. Of course, it goes without saying that expression can be proscribed on the ground that it constitutes incitement only if it incites the addressee to conduct that is criminal - an important rule the implications of which will be explored later.

Not all artistic expression, or expression which is engaged in purely for purposes of entertainment, conveys an idea. Such activities, although clearly expressive in nature, cannot therefore be accommodated within the Millian justification of expression based on truth-seeking. Furthermore, whatever the anomalies in the categories discussed in the preceding paragraphs, the law relating to them is at least consistent in that regulation of freedom of expression is justified by reference to the need to remedy some harm. By contrast however, regulation of sexually explicit material is, in terms of current definitions of obscenity, not harms-based at all, but rather relies on the concept of public morality. To this extent, the law has not progressed beyond the point reached in *Hicklin*, although the test now used to determine when the moral code has been infringed is somewhat more sophisticated. The inherent subjectivity of the morals-based approach, and the majoritarian imposition of values it represents, cannot be justified in a society predicated upon individual freedom.

It should by now be apparent that the challenge presented by the law relating to freedom of expression lies in discovering a criterion which can be used to regulate freedom of expression in such a way as to minimise impact upon the values it serves, while remedying the harms it can inflict. Furthermore, it is clear that although many aspects of freedom of expression can be justified with reference to the value of truth-seeking, there are other areas that cannot. What is required is a justification for freedom of expression that is broader than that based on truth-seeking. It is also necessary to develop a harms-based criterion that can be used to set limits on all types of harm which freedom of expression may cause. The next chapter examines the equality-based criterion which some suggest could perform the latter role.

CHAPTER 2

EQUALITY - THE NEW CHALLENGE

2.1 Introduction

The conclusion reached in Chapter 1 was that although much First Amendment law can be explained in terms of the theory of truth-seeking, the explanation is neither comprehensive nor consistent: Dealing firstly with comprehensiveness, truth-seeking does not provide a justification for artistic expression, at least in the case of art that does not carry a "message". Not having to surmount arguments based on truth-seeking, the courts have been left free to regulate obscenity by means of the subjective morals-based test found in *Miller v California*. So far as consistency is concerned, we have seen that the courts regulate defamatory speech, notwithstanding that, contrary to Millian principles, defamation law requires the courts to make findings of truth and falsity, and requires plaintiffs not covered by "constitutional privilege" to prove the truth of defamatory statements in order to escape liability. Furthermore, defamation law itself is bedevilled by inconsistencies: The problematic public / private figure distinction is a major factor determining the availability of a remedy; and the fact that *Beauharnais v Illinois* is now thought no longer to be good law means that while individuals are entitled to a remedy for defamation, groups are not. On the other hand, whereas the courts have allowed defamation law to be used to recover damages for what is essentially the emotional harm suffered by the plaintiff as a result of the diminution of his or her reputation, the atrophy of the first leg of the "fighting words" exception in *Chaplinsky*²⁰⁵ and the narrow formulation of the common-law action for infliction of emotional harm as requiring "outrageous" conduct²⁰⁶ and not providing relief for "mere name calling"²⁰⁷ (further narrowed by the decision in *Hustler Magazine v Falwell*), means that the law generally offers no remedy where the same type of harm arises as a result of insult.

Against this background, recent years have seen the development of an approach based on equality which, its proponents argue, is the primary value against which freedom of expression should be weighed and which can be used to determine limits

²⁰⁵ According to Delgado, Richard "Words that wound: A tort action for racial insults, epithets and name calling" 17 (1982) *Harvard Civil Rights - Civil Liberties Law Review* 133 at 173-4, this aspect of *Chaplinsky* could well have supported an action for insult.

²⁰⁶ *Ibid.*, 151-7.

²⁰⁷ See *Dawson v Zayre Department Stores* 346 Pa. Super. 357 (1985).

on freedom of expression in cases involving hate speech²⁰⁸ and obscenity.²⁰⁹ This chapter examines the equality-based analysis of freedom of expression under those two headings.

2.2 Inequality and hate speech

The inequality-based approach to hate speech depends upon the argument that certain classes of emotionally harmful expression constitutes discriminatory conduct and may therefore be proscribed. The following sections examine this approach as well as the contrasting attitudes to it taken by the courts in Canada and the United States. Finally, attention is focussed on the question of whether there is any theory in terms of which the harms sought to be addressed by the equality-based approach could be remedied in a manner which is compatible with free speech values.

2.2.1 The need for a remedy.

At the heart of the modern critique of free speech law is a recognition of the failure of the law to give redress for emotional harm caused by expression other than in cases of individual defamation and in those limited circumstances where the expression meets the highly restrictive requirements of the tort of intentional infliction of emotional distress. Although the Supreme Court upheld a provision imposing criminal liability for group defamation in *Beauharnais v Illinois*, the discussion at 1.4.1 above shows that most authorities now believe this precedent to be limited to those cases where the defamatory statement meets the requirements of the "fighting words" doctrine found in *Chaplinsky v New Hampshire* - in other words, where a statement is made to the plaintiff face-to-face and in circumstances likely to amount to provocation to physical violence. Furthermore, as was also noted at 1.4.1 above, many emotionally hurtful statements will fall outside the confines of *Chaplinsky*, either because they are not addressed directly to an individual (for example, where they are accidentally overheard by the plaintiff or are addressed to the public at large²¹⁰) or because they have the effect of demeaning rather than provoking the average plaintiff.²¹¹ As Lawrence points out, the *Chaplinsky* standard is particularly inapt where the words are such as to produce an effect that cowers rather than provokes plaintiffs.²¹²

²⁰⁸See for example Coliver, supra n. 6.

²⁰⁹See for example Itzin, supra n. 7.

²¹⁰Fleischer, supra n. 68 at 715.

²¹¹See *UWM Post v Board of Regents* 774 F.Supp 1163 (E.D. Wis. 1991) 1172-3.

²¹²Lawrence, supra n. 55 at 452-5. See also Mannheimer, supra n. 54 at 1543-4, who emphasises that the application of *Chaplinsky* in *Gooding v Wilson* indicates that the courts will find liability for fighting words only if there was a likelihood that a disturbance of the peace would be caused, which to some extent depends upon the likelihood that the particular addressee in his or her circumstances would have reacted violently. Thus Mannheimer argues that the "average addressee" test as applied is not wholly objective.

So far as insults (which are distinguishable from defamation in that the derogatory comment is not published) are concerned, there are instances in which the courts have imposed civil liability for intentional infliction of emotional distress caused by the use of racial epithets.²¹³ However, it is clear from these cases that liability was imposed partly because of the existence of special circumstances such as an employment relationship or patronage of public facilities, and it is therefore difficult to determine whether liability would ensue in a case involving epithets but no special relationship.²¹⁴ Furthermore in other, almost identical, cases an action for emotional distress has been denied on the ground that the requirement of "outrageousness" means that no liability attaches for "mere insult" taking the form of an offensive epithet.²¹⁵ As Levit states²¹⁶

The emphasis of the tort on the outrageousness of the defendant's conduct, rather than the emotional injury suffered by the plaintiff, directed attention away from compensating plaintiffs for emotional injuries.

The practical effect of these common law and First Amendment rules is that no remedy is obtainable by plaintiffs who have suffered emotional hurt occasioned either by defamation relating to a group to which they belong or by personal insult. In this respect United States law is at variance with the principles contained in numerous international human rights instruments, as well as the law of many jurisdictions²¹⁷ which place limits on expression in order to prevent such harms. Although a review of this vast amount of hate speech legislation lies outside the scope of this thesis, it is useful to examine at least the international human rights documents, as this will help

²¹³*Alcorn v Anbro Engineering, Inc.* 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970), *Agarwal v Johnson* 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979), *Wiggs v Courshon* 355 F.Supp. 206 (S.D. Fla 1973), *Gomez v Hug* 7 Kan. App. 2d 603, 645 P.2d 916 (1982), and *Bailey v Binyon* 583 F.Supp. 923 (W.D. Ill. 1984), all for the use of the term "nigger" or "spic".

²¹⁴For a discussion of this case law and the limited extent to which this tort has provided redress for insulting speech see Yen, S. "Redressing the Victim of Racist Speech After *R.A.V. v St. Paul*: A Proposal to Permit Recovery in Tort" 26 (1993) *Columbia Journal of Law and Social Problems* 589 at 596-600.

²¹⁵Thus recovery was denied in *Johnson v Hackett* 284 F Supp. 933 (E.D Pa. 1968), *Irving v J.L. Mars, Inc.* 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977), *Bradshaw v Swagerty* 1 Kan. 2d 213, 563 P.2d 511 (1977), *Lay v Roux Laboratories* 379 So. 2d 451 (Fla. Dist. Ct. App. 1980) and *Dawson v Zayre Department Stores* 346 Pa. Super. 357, 499 A.2d 648 (1985), which also involved use of the term "nigger". These cases and those cited supra n. 213 are discussed by Delgado, supra n. 205 at 151-7 and by Love, Jean "Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress" 47 (1990) *Washington and Lee Law Review* 123 at 128-33.

²¹⁶Levit, supra n. 17 at 144.

²¹⁷For a discussion of laws prohibiting hate speech in various jurisdictions see Matsuda, Mari "Public Response to Racist Speech: Considering the Victim's Story" 87 (1989) *Michigan Law Review* 2320 at 2346-8.

identify the issues involved before considering the arguments in favour of restricting hate speech in the specific context of the First Amendment.

2.2.2 International documents.

Several human rights documents contain provisions which seek to impose limitations on racist expression. Perhaps the most important of these is Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD),²¹⁸ which provides as follows:

Article 4

States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this convention, *inter alia*:

(a) Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

In addition, Article 20(2) of the International Covenant on Civil and Political Rights (I.C.C.P.R.)²¹⁹ states that

²¹⁸G.A. Res. 2106 A of 21 December 1965.

²¹⁹G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966).

..advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Similarly, Article 7 of the Universal Declaration of Human Rights²²⁰ provides that people are entitled to protection from discrimination and "any incitement to such discrimination".

Although these three provisions share the common feature of restricting expressive rights in the interests of preventing discrimination, it is important not to miss the essential difference that distinguishes Article 4 of the CERD from the other two provisions. Close analysis of this Article²²¹ reveals that it prohibits six distinct types of activity: (i) dissemination of ideas based on racial superiority, (ii) dissemination of ideas based on racial hatred, (iii) incitement to racial discrimination, (iv) acts of violence against groups, (v) incitement to violence and (vi) the provision of assistance to racist activities. Clearly items (iii) to (vi) inclusive raise no substantive free speech issues - as was stated at 1.4.4 above, unlawful acts and incitement thereto fall outside freedom of expression on the Millian analysis. Items (i) and (ii) are a different matter however, because they prohibit the dissemination of racist *ideas* in the same way that Article 4 prohibits incitement to *unlawful acts*. As we shall see, it is this failure to distinguish discriminatory ideology from discriminatory conduct or, perhaps more accurately, the *equation* of discriminatory ideas with discriminatory conduct, which constitutes the greatest flaw in the theory that seeks to balance expressive rights against rights to equality. The controversy aroused by Article 4's prohibition of ideas based on racial superiority and race hatred, and objections by countries who foresaw a clash between these provisions and domestic laws guaranteeing freedom of expression, led to the inclusion of the "due regard" clause, which refers to Article 5 of the Convention which protects several freedoms, including freedom of "thought, opinion and expression". This has enabled countries to state that their compliance with Article 4 is subject to the protection given in their domestic law to freedom of expression, as indeed has the United States.²²²

²²⁰G.A. Res. 217 A (III) of 10 December 1948.

²²¹See for example Partsch, Karl "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination" in Coliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 21.

²²²*Ibid.*, 23-6. The United States ratified the Convention in 1992, but made a formal statement that nothing in the Convention would authorise legislation within the United States that was incompatible with its Constitution. Furthermore, among the reservations made by the Senate when ratifying the convention was one to the effect that

In contrast to Article 4 of the CERD, Article 7 of the Universal Declaration of Human Rights outlaws only incitement to unlawful acts as distinct from the advocacy of discrimination as an idea. Similarly, Article 20 of the ICCPR would also seem to outlaw only that expression that leads to harmful acts, although it is interesting to note that the United Nations Human Rights Committee rejected an appeal brought under this Article by a Canadian citizen who had disseminated anti-semitic messages by telephone, and had been imprisoned for failing to comply with a tribunal order that he should stop, notwithstanding the fact that the messages contained no incitement to unlawful action.²²³ This suggests that as applied Article 20 of the ICCPR should be seen as being closer to Article 4 of the CERD than to Article 7 of the Universal Declaration.

2.2.3 Discriminatory action and discriminatory speech.

Recent years have seen a substantial body of academic attention focus on the failure of American law to remedy emotional hurt caused by hate speech. Writers such as Lawrence,²²⁴ Matsuda²²⁵ and Delgado²²⁶ have described how such expression causes a variety of the psychic harms, including fear, humiliation, isolation, and feelings of worthlessness, self-hatred and lack of confidence, and have argued that it is only by taking cognisance of such injuries that one can properly determine the limits of freedom of expression.²²⁷ It is against this background that these and other writers have suggested a new approach to First Amendment jurisprudence, one that essentially rests upon the argument that expression which defames or insults plaintiffs

Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

For a discussion of the United States' attitude to the limitations on expression found in the Convention see Green, M. Christian "The 'Matrioshka' strategy: US evasion of the spirit of the International Covenant on Civil and Political Rights" 10 (1994) *South African Journal on Human Rights* 357 at 359-61.

²²³For a discussion of s 20(2) and the Committee's treatment of this case see Boerefijn, Ineke and Joanna Oyediran "Article 20 of the International Covenant on Civil and Political Rights" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 33. The case, which was reported in Canada as *Canada (Human Rights Commission) v Taylor* (1991) 75 DLR (4th) 577, is discussed at 2.2.6.1 below.

²²⁴Lawrence, supra n. 55 at 457-466.

²²⁵Matsuda, supra n. 217 at 2326-31, 2335-41.

²²⁶Delgado, supra n. 205 at 135-49, and Delgado "Campus Antiracism Rules: Constitutional Narratives in Collision" 85 (1991) *Northwestern University Law Review* 343 at 379-80.

²²⁷A convenient compilation of some of the writings of the authors mentioned in the preceding three paragraphs is to be found in Matsuda, Mari, Lawrence, C., Delgado, R. and Crenshaw, K. *Words that wound - Critical race theory, assaultive speech and the First Amendment* (Boulder, Westview Press, 1993).

on the basis of group membership constitutes a discriminatory act.²²⁸ Thus Matsuda states that²²⁹

Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a [sic] historical vertical relationship.

Similarly, Lawrence argues that speech which harms the reputation of racial groups constitutes an infringement of equality rights,²³⁰ and that a justification for regulating racist speech is to be found in *Brown v Board of Education*²³¹ and other cases decided under the equal protection clause of the Fourteenth Amendment, which he sees as upholding the constitutionality of the prohibition not only of discriminatory *conduct* but also the *message* of supremacy which he states is inherent in such conduct.²³² The basis of this analysis is that the reason for the conduct is to be found in the message it seeks to communicate - in other words that the conduct is a by-product of the message rather than the message being a by-product of the conduct, from which it follows that a statement disparaging a racial group is as much an act of discrimination as is a requirement that members of the group attend separate educational institutions.

However, this exposes a fundamental problem with the equality-based analysis - one which, as will be shown below, affects the argument relating to obscenity as much as it does that relating to hate speech. The essence of this problem is, as Schauer notes, that the equality-based approach ignores the fundamental distinction between discriminatory acts and discriminatory ideas.²³³ Clearly an unlawful discriminatory act may take the *form* of speech, as in the example Lawrence gives of a restaurant that has signs demarcating separate entrances for different races, but here it is the *discriminatory act of exclusion* rather than the speech itself that falls foul of anti-discrimination provisions.²³⁴ Where, on the other hand, racist statements are proscribed, it is *the expression itself* that is penalised - in other words, the speaker is punished for his or her viewpoint. As Fleischman points out²³⁵ Lawrence's argument is not only that all racist conduct is also speech, but that all racist speech is racist

²²⁸See Lawrence, *supra* n. 55 at 431 and Delgado, *supra* n. 226.

²²⁹Matsuda, *supra* n. 217 at 2358.

²³⁰Lawrence, *supra* n. 55 at 462-6.

²³¹347 U.S. 483 (1954).

²³²Lawrence, *supra* n. 55 at 438-444.

²³³Schauer, *supra* n. 15 at 183.

²³⁴Lawrence, *supra* n. 55 at 442 n. 50.

²³⁵Fleischman, Steven "Dear Professor Lawrence, You Missed the School Bus, *Brown v Board of Education* Supports Free Speech on Campus: A Reply" 72 (1992) *Boston University Law Review* 953 at 955.

conduct, and so because discriminatory *actions* are unlawful, so too would be the expression of racist ideas. Yet this of course would be to punish expression solely because of the idea it advocates, which is the very thing the First Amendment prohibits, with drastic implications for free political debate. As Fleischer states²³⁶

The articulation by an individual of the message of inherent racial inferiority does not involve a clash between two constitutional rights. Rather, the clash is between the speaker's constitutional right to free expression and the ideal or norm of equality that the speaker is challenging.

The threefold distinction between abstract idea, incitement to action and action itself is fundamental to a society predicated upon free political activity. Thus, taking racial discrimination as an example, and assuming a society where such discrimination was unlawful, a clear distinction must be drawn between (i) publishing a text advocating the *theory* of racial discrimination, (ii) inciting someone to discriminate against a third party, and (iii) the act of discrimination itself. Whereas (iii) is unlawful, and (ii) will be (provided that the requirements relating to intention and likelihood of a resultant imminent unlawful act as laid down in *Brandenburg v Ohio*²³⁷ are satisfied), (i) surely cannot be. To hold otherwise would constitute a clear example of viewpoint discrimination.

2.2.4 The equality-based approach and viewpoint censorship.

In light of the above it is clear that the theory which equates discriminatory speech with discriminatory acts would involve suppression of speech on the basis of viewpoint. However, some proponents of the equality-based approach maintain that a commitment to equality justifies denial of a hearing to particular viewpoints. Pre-eminent among these is Matsuda²³⁸ who states that

We can attack racist speech - not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong.

Furthermore, she argues, such views are known to be wrong simply because "The uniform rejection of racist ideology is evidence of moral truth."²³⁹ and because²⁴⁰

²³⁶Fleischer, *supra* n. 68 at 736.

²³⁷395 U.S. 444 (1969).

²³⁸Matsuda, *supra* n. 217 at 2380.

²³⁹*Ibid.*, 2359 n. 203.

²⁴⁰*Ibid.*, 2360.

..we accept certain principles as the shared historical legacy of the world community. Racial supremacy is one of the ideas we have collectively and internationally considered and rejected.

Similarly, Abel²⁴¹ states

the horrors of recent centuries [have] forged a consensus about the evils of slavery, colonialism, racism and anti-Semitism.

Because racist ideas are "historically untenable"²⁴² Matsuda argues that they can be "properly treated as outside the realm of protected discourse",²⁴³ and on this basis argues for the incorporation of Article 4 of CERD into the domestic law of the United States.²⁴⁴ The extent to which viewpoint discrimination would be countenanced by the equality-based approach is demonstrated by Matsuda's treatment of the question of whether factual statements that caused emotional harm - for example an academic paper in which it was argued that certain groups were genetically superior to others - would be protected. Her conclusion that such expression would be permitted if "made in a context free of hatefulness and without the endorsement of persecution"²⁴⁵ sets what is obviously an intolerably vague standard: As Browne points out,²⁴⁶ a statement that affirmative action policies ought to be abandoned could, according to Matsuda herself,²⁴⁷ well be classed as persecutory of minorities, yet clearly contributes to debate on an important public issue. The dangers of this approach become even clearer in view of the fact that Matsuda would proscribe historical works denying the holocaust²⁴⁸ and exhibitions of Nazi memorabilia²⁴⁹ because of the emotional harm they might cause.

While such sentiments are understandable, motivated as they are by a desire to find a remedy for the emotional hurt occasioned by hate speech, it is undeniable that as Post²⁵⁰ states

²⁴¹ Abel, *supra* n. 74 at 34. The same view is expressed in Lee, Simon *The Cost of Free Speech* (London, Faber and Faber, 1990) 63, and by Cockrell, Alfred "'No Platform for Racists': Some Dogmatism Regarding the Limits of Tolerance" 7 (1991) *South African Journal on Human Rights* 339.

²⁴² Matsuda, *supra* . 217 at 2357.

²⁴³ *Ibid.*, 2359.

²⁴⁴ *Ibid.*, 2341-6.

²⁴⁵ *Ibid.*, 2358.

²⁴⁶ Browne, *supra* n. 49 at 535.

²⁴⁷ As Matsuda apparently does (see *supra* n. 217 at 2334).

²⁴⁸ *Ibid.*, 2366-7.

²⁴⁹ *Ibid.*, 2367-8.

²⁵⁰ Post, *supra* n. 102 at 291.

The notion that racist ideas ought to be forbidden within public discourse because of their "elemental wrongness" is...fundamentally irreconcilable with the rationale for first amendment freedoms.

From the perspective of Millian epistemology there is an enormous danger in asserting, as Abel does, that we have "forged a consensus" about anything - to take an obvious example, there was a consensus in medieval Europe that freedom of religious belief was anathema to the functioning of society, yet today there is a consensus to the opposite effect. At all points in history, there have been ideas in the fields of both ethics and science (reproductive freedom and powered flight being two obvious examples) which were, to use Matsuda's words, "considered and rejected" on the basis either that they would undermine the moral foundations of society or that they were incompatible with the laws of nature as then understood, but which were later accepted into the mainstream of thought. As was stated by Mill²⁵¹

To refuse a hearing to an opinion because they are sure it is false is to assume their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility.

The particular danger of such assumption lies in the fact that, as Mill states,²⁵² our understanding of truth changes from age to age:

...it is as evident in itself as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.

In other words, the claim to infallibility, which lies at the heart of the argument that freedom of expression should be limited if the ideas it contains are antithetical to the values of society, denies the possibility of intellectual change and assumes that our knowledge of the issue upon which debate has been prevented is static - something that obviously does not accord with human experience. As Browne expresses it²⁵³

Certainty about the correctness of one's views should not lead to certainty about the correctness of silencing one's opponents.

²⁵¹ Mill, *supra* n. 13 at 37.

²⁵² *Ibid.*, 38.

²⁵³ Browne, *supra* n. 49 at 538.

Of course, it could be argued that from a late 20th century perspective it is reasonable to state that it is *unlikely* that racist ideas will be found to be true, even if Millian agnosticism prevents one from making such a statement with absolute certainty. Yet it is equally clear that freedom of expression would be undermined not only in circumstances where the courts were permitted to decide whether ideas were true or false but also where they decided whether they were likely to be true or false. Indeed the latter position would arguably pose more of a threat to expressive rights, because a finding of mere likelihood of falsity, rather than actual falsity, would then be sufficient to justify the suppression of the idea in question.

Even less satisfactory is the argument that an idea may be denied protection because there is social consensus as to its falsity. As Browne points out in his critique of Matsuda's article,²⁵⁴ the fact that racist speech is an issue means that it has not been "uniformly" rejected, but that even if the argument were taken to be that because the vast majority rejects such speech it is "wrong", this would be to

...advocat[e] a rule that the speech of minorities is not entitled to protection where it conflicts with the views of a substantial majority. Such reasoning turns the first amendment on its head, since if majority sentiments may be called upon to justify suppression of minority viewpoints, the first amendment fails in its essential purpose...

Free speech theory and First Amendment case law are replete with affirmations of the fundamental principle that expression which contradicts fundamental values of society is the very category of expression which the freedom is designed to protect. Freedom of expression is not called into aid in cases where the expression falls within the ambit of fundamental values of the society - it becomes useful precisely in circumstances where expression challenges those values. As Mill put it²⁵⁵

If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

Similarly, as Browne states,²⁵⁶

²⁵⁴Ibid., 537.

²⁵⁵Mill, *supra* n. 13 at 37.

²⁵⁶Browne, *supra* n. 49 at 536-7.

A mighty conviction that "women should not be sex objects" or that "bigotry is bad" is an insufficient basis for attempting to outlaw expressions of those views. In the first place, the first amendment requires an official agnosticism on questions of social policy. Government may legitimately advocate and implement one policy over another, but it may not stifle debate simply by labelling social views as "wrong".

Thus he concludes²⁵⁷

That we as a society no longer accept the truth of..statements arguing for inequality does not make them any less worthy of protection.

Similarly, Brant writes²⁵⁸

There is no greater fallacy than the belief that government can or ought to separate truth from error. Error, protected by freedom of speech, may outlive truth. But freedom dies when error is repressed by law, and error multiplies when freedom dies.

The same idea is expressed by Richards as follows²⁵⁹

Notwithstanding the detestation of and outrage felt by the majority toward certain contents of communication, the equal liberty principle absolutely forbids the prohibition of such communication on the ground of such detestation and outrage alone. Otherwise, the [sic] liberty of expression, instead of the vigorous and potent defense of individual autonomy that it is, would be a pitifully meagre permission allowing people to communicate only in ways to which no one has any serious objection.

Thus it becomes clear that free speech theory requires vigilance not only against a tyrannical government which attempts to impose an official truth upon an unwilling population, but also against majoritarian arguments that democracy means that the majority may impose its view of truth on society. As Browne states²⁶⁰

²⁵⁷Ibid., 540.

²⁵⁸Brant, Irving *The Bill of Rights* (Indianapolis, Bobbs-Merrill, 1965) 506.

²⁵⁹Richards, David "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" 123 (1974) *University of Pennsylvania Law Review* 45 at 68.

²⁶⁰Browne, supra n. 49 at 547.

The primary risk of censorship in our society today is not from a government fearful of challenge, but from majorities seeking to establish an orthodoxy for all society. When the orthodoxy is one of "equality" the risk is at its highest.

The same argument has been made in numerous First Amendment cases. In *Collin v Smith*,²⁶¹ the court held

The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

In *United States v Schwimmer*²⁶² Holmes J said

If there is any principle of the Constitution that more imperatively calls for attachment than any other is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate.

Similarly, in *United States v Eichman*²⁶³ Brennan J stated

Any suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.

Finally, this point was perhaps never better expressed than by Jackson J in *West Virginia State Board of Education v Barnett*²⁶⁴ where he held

²⁶¹ 578 F.2d (7th Cir. 1978) at 1210 (*cert. denied* 439 U.S. 916 (1978)).

²⁶² 2779 U.S. 644 (1929) at 654-5.

²⁶³ 496 U.S. 310 (1990) at 318.

²⁶⁴ 319 U.S. 624 (1943) at 642. See also the decision delivered on the same day in *Taylor v Mississippi* 319 U.S. 583 (1943) in which the court overturned a statute prohibiting speech that encouraged refusal to respect the flag. These decisions were reaffirmed in *Texas v Johnson* 491 U.S. 397 (1989). Finally, for a warning of the dangers of censorship flowing from the creation of an official orthodoxy, one can quote Justice Douglas' dissent in *Beauharnais v Illinois* 343 U.S. 250 (1952) at 286:

Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms. Farm labourers in the West who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of a dominant religious group - all of these are caught in the mesh of today's decision...The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardised thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty.

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

One final issue must be addressed before leaving the issue of viewpoint discrimination: Let us assume, contrary to First Amendment principle, the validity of the argument that racist and other objectionable viewpoints warranted suppression because of the emotional harm they cause. The problem that would then have to be faced is that "racism" (as well as "sexism" and other ideas that proponents of the suppression of hate speech claim should be suppressed) is a political concept, the meaning of which is inherently subjective. To take the example of the decision in *Brown v Board of Education*, whereas the decision in *Brown* defined segregation as constituting unlawful discrimination, some now argue that *assimilation* is inimical to the interests of ethnic groups, and that such groups are entitled to separation in order to protect their identity.²⁶⁵ Thus because the very definition of what are essentially political concepts like "racism" and "sexism" change over time,²⁶⁶ proscribing speech on the basis of these concepts means that individuals will have no way of determining when their expression has contravened the boundaries set by inherently fluid criteria. Would speaking against affirmative action in the United States²⁶⁷ or in favour of ethnic self-determination in South Africa²⁶⁸ constitute racist speech in those countries? Thus suppression of speech on the ground that the ideas contained therein are offensive is doubly objectionable - firstly because viewpoint discrimination offends against the principle of truth-seeking, and secondly because the inherent subjectivity of viewpoints means that the criterion against which expression is tested will inevitably suffer from unacceptable vagueness. As Wright states²⁶⁹

²⁶⁵For examples of this see Abel, *supra* n. 74 at 133-4.

²⁶⁶For a discussion of this problem see Johannessen, Lene "Should Censorship of Racist Publications Have a Place in the New South Africa" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 223 at 234. An excellent example of this is adduced by Strossen (*supra* n. 59 at 557) who notes that a resolution adopted by Britain's National Union of Students in 1974 to prevent members of "openly racist and fascist" organizations from speaking on campuses, originally drafted as a measure against members of the anti-semitic National Front, was used just a year later by students to bar the Israeli ambassador from speaking on the grounds that Zionism equalled racism !

²⁶⁷For a critique of Matsuda see Browne *supra* n. 49 at 535.

²⁶⁸This is adduced as an example of the dangers of limiting freedom of expression in Neisser, Eric "Hate Speech in the New South Africa: Considerations for a Land Recovering from Decades of Racial Repression and Violence" 10 (1994) *South African Journal on Human Rights* 336 at 347.

²⁶⁹Wright, R "Racist Speech and the First Amendment" 9 (1988) *Mississippi College Law Review* 1 at 23.

If a suitable definition of racist speech can be settled upon, the problems of interpreting and applying the legal standard to concrete situations begins. One possible approach, of course, is that of a continuing censorship bureaucracy. In the end, history teaches us that the 'boundaries of the forbidden' cannot reliably be drawn.

2.2.5 Formal and substantive equality.

The fact that equality and freedom are cast in antagonistic roles in contemporary free speech analysis highlights the essential duality of the concept of equality: Whereas, on the one hand, as will be shown at 3.2 below, *formal* equality in the sense of the equal entitlement of individuals to autonomy serves as a fundamental justification of liberal rights, *substantive* equality, which at its simplest means defining equality in terms of outcome rather than opportunity, has a significant limiting role on individual freedoms, including freedom of expression, because the realisation of substantive equality requires the limitation of the freedom of those members of society who are said to enjoy advantages conferred by race and gender. Those arguing for censorship on the basis of a substantive equality position assert that disparities in power between dominant and subordinate social groups means that the marketplace of ideas metaphor breaks down because some viewpoints enjoy a dominant market position as a result either of financial resources or of political imbalances between different groups.²⁷⁰ They also assert that the law ought not to be neutral between such groups, arguing that neutrality perpetuates existing substantive inequalities even as it upholds formal equality.²⁷¹ The importance of the distinction between formal and substantive equality for free speech law is expressed as follows by Post²⁷²

Of course the principle of self-rule contains its own commitment to the value of equal citizenship, to the notion that, as a formal matter, citizens must be viewed as "free and equal persons". But the meaning of this commitment is measured by the purpose of enabling the process of self-determination. The appeal to the fourteenth amendment, on the other hand, is meant to signify the commitment to a substantive value of equality that is not defined by reference to this purpose, so that the implementation of the value may adversely effect the process of self-determination.

²⁷⁰See Sunstein, Cass "Pornography and the First Amendment" 1986 *Duke Law Journal* 589 at 618-24.

²⁷¹Abel, *supra* n. 74 at 124.

²⁷²Post, *supra* n. 102 at 292-3.

Or again²⁷³

The principle of equality at issue in the paradox of public discourse is purely formal; its extension to all persons is the fundamental precondition of the possibility of self-government. To the extent that the principle is circumscribed, so also is the reach of self-determination. The norm of equality violated by racist speech, on the other hand, is substantive; it reflects a particular understanding of how we ought to live. It is the kind of norm that ought to emerge from the processes of public deliberation. Although the censorship of racist speech is consistent with this substantive norm of equality, it is inconsistent with the formal norm of equality, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality. Such persons would thus be cut off from participation in the process of collective self-determination.

Another argument derived from the concept of substantive equality is that racial insults, far from meriting protection under freedom of expression, undermine one of the fundamental values secured by that freedom - namely the free interchange of ideas - because they silence victims of such insults and deter them from contributing to public debate.²⁷⁴ Is this argument valid? The answer to this depends on which aspect of the argument one is considering. Post identifies three such aspects:²⁷⁵ exclusion of victims' point of view from "the dominant discourse", the devaluation of victims' point of view, and the fact that the emotional shock of much insulting speech pre-empts response by victims. The first two legs of the argument essentially depend on acceptance of the argument that it is the role of the law to intervene to correct imbalances caused in the marketplace of ideas. This is an argument adopted by Ely,²⁷⁶ and by Lawrence,²⁷⁷ the latter of who argues that the irrational and often unconscious nature of racial prejudice makes it unamenable to refutation by reasoned argument in the intellectual market, and so the devaluation of its victims and the ideas they hold means that the interests of free speech are in fact served by the denial of protection to racist ideas. The trouble with this argument lies in both its underlying assumption and the consequences that would ensue if it was accepted. The underlying assumption is that simply because an idea is "irrational" and thus not

²⁷³Ibid., 303-04.

²⁷⁴Ibid., 275. See also Lawrence, *supra* n. 55 at 467-8.

²⁷⁵Post, *supra* n. 102 at 306-10.

²⁷⁶Ely, J. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980) 103-104 and 135-79.

²⁷⁷Lawrence, *supra* n. 55 at 469-72.

changeable by an appeal to reason it ought to be denied protection. On that basis all religious beliefs (and any other idea, whether religious or secular, that society labels "irrational") are unworthy of protection. But the more fundamental objection to the Ely / Lawrence argument, is that the value of groups and the opinions they hold fluctuate throughout the history of any given society. There are a host of ideas and groups that society may discredit at any particular time, but it would lead to an unimaginably intrusive degree of regulation were the law to be used as an instrument to compensate for fluctuations in the popularity of those groups and ideas. The contest between them is the essence of democratic politics. It is not for the courts to influence the outcome of such contests.²⁷⁸ As McLachlin J stated in relation to the "silencing" argument in her dissenting judgment in *R v Keegstra*²⁷⁹ (discussed at length below)

There are several difficulties with this argument. The first is that it rests on the assumption that freedom of expression includes the right to be believed. I know of no historical or philosophical basis for such a proposition. The underlying assumption of the "market-place of ideas" justification for free speech as well as the justification on political grounds is that many ideas will be rejected. Even the rationale of self-actualization does not support a right to be considered or believed.

Similarly, Emerson states that²⁸⁰

There can be little doubt that, in any society, the more powerful forces will engage in a greater volume of speech, on a more pervasive scale, and with a deeper impact than the less powerful groups. A fully balanced equality of speech among all groups and individuals is probably unattainable, at least without a degree of governmental intervention that would destroy the freedom

²⁷⁸Post (supra n. 102 at 306-11) comes to the conclusion that the "silencing" argument does not justify regulation of speech on somewhat different grounds from those advanced above in relation to the first two aspects of the argument. So far as exclusion from the "dominant discourse" is concerned, Post argues that all expression is founded upon unarticulated assumptions, and that the remedy is to expose the assumptions through debate rather than to suppress the expression. Similarly, with regard to devaluation of victims' views, Post argues that the value of all expression fluctuates according to its social context, and that the remedy is to persuade audiences to change their understanding of that context. Finally, so far as the shock effect of racial insult is concerned, Post is of the opinion that the root cause of intimidation of victims of such speech is racism inherent in society, which proscription of specific insulting expression can remedy at best at a purely symbolic level, a gain which he says would be difficult to justify when weighed against the restraints on public debate it would require. While in agreement with Posts first two arguments, it will become clear below why I do not agree with the third.

²⁷⁹61 C.C.C. (3d) 1 at 99 f-g.

²⁸⁰Emerson, Thomas "Pornography and the First Amendment: A Reply to Professor MacKinnon" 3 (1984) *Yale Law & Policy Review* 130 at 140-1.

of the system. What the system does guarantee is that the unorthodox, minority, dissenting and submerged elements of the society have a constitutional right to express their views and endeavour to gain adherents. The system is not designed only for a "non-hierarchical society", assuming such a social order exists. It is designed precisely to give a subordinated group, such as women, a way out of their "powerlessness" by some method other than force.

The third leg of the "silencing" argument (the fact that emotional shock pre-empts any response by the victims of insult) has more to recommend it, as it points to the psychic hurt caused by insulting speech. As will be argued at 2.2.7.3 and 5.6.4.1 below, a remedy ought in certain circumstances to be provided for this particular harm, but for what it is rather than because its victims will not feel free to express themselves.

A further consequence of the theory of substantive equality as applied to freedom of expression is what might be called an "affirmative denial" approach to group insult, in terms of which it is argued that the law should take cognisance of power relationships involved in free speech cases, even to the extent that no action should be available in cases where plaintiffs are insulted on the basis of their membership of "dominant majority groups".²⁸¹ According to this view the law should, for example, differentiate racist expression directed by whites against blacks from that directed by blacks against whites, because the latter may be justifiable in light of preceding history of oppression of blacks by whites. Even setting aside the formal inequities of this approach,²⁸² and the likely social consequences of the law protecting some groups while effectively declaring others to be "fair game", not least of which would be the disrepute the law would thereby attract, such a doctrine would be immensely difficult to implement. How does one define "dominant"? How would social dominance be proved - are not conclusions as to whether a group is dominant or subordinate not essentially statements of political opinion? Are there dominant religious, political and economic groups, or is the concept of dominance to be restricted only to race, ethnicity and language? Is dominance relative to sectors in society - for example, should the law recognise that a group might be dominant in academia but not in society generally? (A question that has arisen in cases of anti-

²⁸¹Lawrence, *supra* n. 55 at 450 n. 82. Matsuda, *supra* n. 217 at 2358 and 2361-3. See also Hentoff's report (*supra* n. 18 at 170-1) of the debate on the Stanford speech code, where a law professor said that under the code, white students would not be protected from racial insults by blacks.

²⁸²See criticisms by Strossen, *supra* n. 59 at 506-7.

Semitic speech by some black politicians in the United States.)²⁸³ In a society consisting of two or more groups, ought the courts to define groups hierarchically, so that a member of the middle group on a scale of three could bring an action if insulted by a member of the superior group but not if insulted by a member of the inferior one? Would an individual who belonged to a dominant religious group but a dominated ethnic group be granted a remedy against insult if the insult was ethnically targeted but denied a remedy if it was religiously targeted? Can a group be dominant in relation to one political controversy, say access to tertiary education, but subordinate in relation to another, say access to officer ranks in the armed forces? What would be the status of dominant *minority* groups? Can a group become non-dominant over time? Indeed, can the unequal solicitude of the law for members of group A as compared with members of group B (justified on the basis of past oppression of A by B) *itself* eventually make members of group B *non*-dominant and, if so, after how long? Taking this one step further, will not the members of group A themselves have become dominant because of the reverse discrimination favouring them? Applying the concept of dominance and subordinacy to the realm of ideas expressed (as distinct from the groups expressing them) is even more problematic.²⁸⁴ How does one determine whether an idea is equally represented in the marketplace? Are not some ideas unrepresented simply because they are not believed and thus in one sense deserve to be unrepresented, and does not this conclusion itself depend upon a determination of the relative merits of ideas which is precisely what the courts ought not to be engaged in in a society that protects freedom of expression? Asking ones-self these questions, which even proponents of substantive equality admit pose significant problems,²⁸⁵ shows that whatever its utility may be in other fields, reverse discrimination surely has no role to play in the search for remedies for insult.

In contrast to the substantive equality school of thought, Downs²⁸⁶ states that the major concern of free speech jurisprudence ought to be to "maintain an open public process rather than to encourage certain outcomes", and notes that

²⁸³Hentoff, *supra* n. 18 at 160-1.

²⁸⁴This issue is discussed by Strauss, David "Persuasion, Autonomy and Freedom of Expression" 91 (1991) *Columbia Law Review* 334 at 349.

²⁸⁵See Abel, *supra* n. 74 at 130, where the point is made, *inter alia*, that Muslims could well say that criticism of polygamy and patriarchy constitutes an insult to them on the basis of religion, that Jews were an oppressed minority but now oppress Palestinians, and that neo-Nazis could claim to be an oppressed minority after half a century of suppression. This did indeed occur in a Georgia case where, in a decision overturning a statute that forbade the wearing of masks (subsequently reversed on appeal), the County court that first heard the case noted that the Klan was arguably a persecuted group because of the widespread unpopularity of its views - see Hentoff, *supra* n. 18 at 268.

²⁸⁶Downs, D. A. *The New Politics of Pornography* (Chicago, University of Chicago Press, 1989) 4.

...the Supreme Court has steadfastly rejected laws designed to apply affirmative action principles to the realm of speech. It has refused to sanction designs to equalize the market place of ideas by restricting speech or spending on speech by wealthy persons or corporations.

In *Buckley v Valeo*²⁸⁷ for example, it was held that

...the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...

Sunstein²⁸⁸ cites the case of *Red Lion Broadcasting Company v F.C.C.*,²⁸⁹ in which the Supreme Court held that fairness required that radio stations be compelled to provide free time if that was necessary to provide balanced coverage of public affairs, as contrary precedent to *Buckley v Valeo*. However closer examination of this case reveals that it cannot be used to support the argument based on substantive equality. In the first place, what the court ordered in *Red Lion* was the *provision of access* to competing points of view, not the suppression of the viewpoint of others. Furthermore, it is important to note that the holding related to access to radio frequencies - a limited resource - rather than to the right to express oneself in media not so limited. Thus *Red Lion* could not be used to justify *suppression* of expression in media (such as magazines and videos) access to which is not limited by technological constraints.

Two final points need to be made in respect of the argument based on substantive equality: Firstly, a major harm which proponents of the egalitarian analysis say is inherent in hate speech and obscenity is "stereotyping", which Horton define as follows²⁹⁰

Stereotyping means responding to a person on the basis of a category, thus attributing to the person traits and characteristics associated with the category, rather than evaluating the individual on her own merits.

²⁸⁷424 U.S. 1 (1976) at 48-9, see also *First National Bank of Boston v Bellotti* 435 U.S. 765 (1978) and *Citizens for Rent Control v City of Berkely* 454 U.S. 290 (1981).

²⁸⁸Sunstein, *supra* n. 270 at 620-1.

²⁸⁹395 U.S. 367 (1969).

²⁹⁰Horton, Amy "Of Supervision, Centrefolds and Censorship: Sexual Harassment, The First Amendment and the Contours of Title VII" 46 (1991) *University of Miami Law Review* 403 at 438 n. 162.

Yet does not the approach based on substantive equality do precisely this, in that it calls for a categorization of individuals as members of "dominant" or "subordinate" groups, irrespective of their personal histories?²⁹¹ The idea that the rights to which a person is entitled depends upon the history of intergroup relations between plaintiff and defendant fails to satisfy its own context-based rationale: The context of the *individuals* involved may be such that the party who is nominally a member of a subordinate group may, due to circumstances that are entirely personal to him or herself (such as wealth, upbringing or good fortune) in fact enjoy a far more advantageous position in society than does the other party, who may conversely be disadvantaged even though nominally a member of a dominant group. Thus the proponents of substantive equality, while lamenting the supposed incapacity of the law to do justice in cases involving members of unequally powerful groups, are themselves open to the charge that by focusing on inequalities between groups rather than that between individuals, their approach will lead to injustice in many cases. Only by considering the aggregate level of social power possessed by each individual involved in a particular case can true substantive justice be done, but this would mean abandoning law as a set of generally applicable rules. The approach that rests on formal equality may be acontextual, but it is at least equally acontextual for all. Thus it is incorrect to conclude, as do some theorists,²⁹² that simply because some speakers enjoy greater influence because they are able to disseminate their message more widely, true freedom of speech does not exist and that we therefore do not lose much through state regulation. The point is not that freedom of expression of the uninfluential requires the suppression of the free expression rights of others, but rather that no-one, including the uninfluential, can effect change if freedom of expression is not protected.

This leads to the second point, which is that the argument that *restriction* of freedom of expression serves the interests of the powerless is a strange one - indeed Bollinger²⁹³ identifies free speech as a vital refuge within which the powerless can take sanctuary, and cites Neier who points out that "the only alternative to freedom is power",²⁹⁴ and that the vulnerability of powerless groups can be compensated only by restrictions on power, and in particular by restrictions on the ability of the powerful to

²⁹¹This argument is also made by Richards, David "Free Speech as Toleration" in Waluchow, W. J. (ed) *Free Expression* (Oxford, Clarendon Press, 1994) 31 at 53-4.

²⁹²Abel, *supra* n. 74 at 47-58.

²⁹³Bollinger, *supra* n. 19 at 98-100.

²⁹⁴Neier, *supra* n. 74 at 4. Aryeh Neier was executive director of the American Civil Liberties Union at the time of the Skokie case. His book *Defending My Enemy* (*supra* n. 74) explains why the ACLU in general, and in particular Neier (who was Jewish), argued in favour of the right of Collin and his Nazi followers to march in Skokie.

stop the powerless using the only real defence available to them - namely that of using freedom of expression to draw attention to actual or threatened oppression. The history of the U.S. civil rights movement indicates how those who are *not* powerful can effect change precisely *because* they at least enjoyed freedom of expression.²⁹⁵ This refutes the argument of those who argue that restriction of freedom of expression benefits the disadvantaged, and indeed illustrates the validity argument made in the critique of substantive equality above, namely that reverse discrimination in favour of a group elevates that group to a position of dominance. To take a specific example, it would certainly be difficult to deny that the "Political Correctness" movement, which favours restriction on freedom of expression on the basis that this is necessary to prevent gender and race discrimination, has assumed an extremely *powerful* presence in academia in North America and elsewhere,²⁹⁶ and that it is the proponents of freedom of expression who are on the defensive.²⁹⁷ Yet it is the proponents of

²⁹⁵Hentoff, *supra* n. 18 at 183.

²⁹⁶*Ibid.*, chapters IV - VII. For a general overview of this issue see also Berman, P. (ed) *Debating P.C.* (New York, Dell, 1992).

²⁹⁷Specific attention will be paid to campus speech codes in the United States at 2.2.7.2 below. Here it is interesting to take note of one of the controversies that have affected academia in the United States in recent years, which occurred at New York University Law School in 1990, when the School submitted to pressure to withdraw a moot problem based on whether custody of a child should be granted to a parent who had entered into a lesbian relationship. The School justified the withdrawal on the ground (cited by Hentoff, *supra* n. 18 at 205) that

...the issue of whether awarding custody to a homosexual parent is presumptively contrary to the child's best interests was *not an open question* in a law school community that has a policy of condemning anti-gay biases, both in law and society...the problem was an affront to our law school's values and thus there was *no need for further debate*debate concerning the suitability of custody by an African-American parent would be inappropriate and that the [problem of custody by a lesbian] was similarly inappropriate.
(Emphasis added)

This conclusion was reached despite the fact that the issue was obviously an "open question" and a moot point of law, as indeed was the question of inter-ethnic adoption, which has become the subject of intense public debate. The danger inherent in preventing the issue being aired was of course that the question could be asked why, if the issue was so clear cut, should those who oppose anti-gay biases have any fear of the outcome? Surely one would have expected them to be *most in favour* of the moot? Indeed approval of the moot topic was aired by a Professor at another law school, who was also an office holder in an association representing gay and lesbian lawyers (*ibid.*, 213-14). As was stated by Anthony Amsterdam, a professor at N.Y.U. Law School (cited *idem*, 213)

...once you begin to exclude ideas from the discourse of a community on the ground that they are wrong or offensive, you start in motion a process that inevitably ends up justifying suppression of the unpopular ideas of unpopular minorities. It is fanciful to think that bigots cannot beat you at the game you have begun. They always have and they always will.

In other words, if who is allowed to speak is decided not a matter of principle but as a matter of power, the possibility clearly exists that those who muster sufficient support today for the suppression of ideas they find "offensive" may tomorrow themselves be faced by a group who finds *their* ideas "offensive" but because the principle of freedom of expression irrespective of content will have already been abandoned, they will have no way to prevent their own oppression. Of course this argument applies with particular force in the case of minority groups who, although they may on occasion be able to rally support against ideas they dislike are, in the long run, more likely to be on the receiving end of oppression

restrictions on free speech who identify themselves as representing the oppressed. This surely bears out Neier's view that restrictions on freedom of expression serve to benefit the powerful, and incidentally suggests that advocates of restrictions on freedom of expression are being somewhat disingenuous in asserting the altruism of their position.

2.2.6 The Canadian approach to hate speech

The equality-based approach to freedom of expression and hate speech has been adopted by the Canadian courts in a series of decisions arising under the Canadian Charter of Rights and Freedoms. This section contains a critique of these decisions in the light of the arguments relating to viewpoint discrimination made in preceding sections, and is followed in 2.2.7 by an examination of recent decisions by courts in the United States, which reached very different conclusions to the courts in Canada.

The Canadian case law involved Charter challenges to statutory provisions which were alleged to constitute an unreasonable infringement of freedom of expression, and it is therefore useful at the outset to reproduce these provisions under which the hate speech cases arose.

The Canadian Criminal Code contains three provisions relating to hate speech. Section 318, which prohibits advocacy of the specific crime of genocide, simply criminalises a specific type of incitement to unlawful conduct and is thus uncontroversial from a free speech perspective. Most case law has arisen under s 319, the essential parts of which read as follows:

- (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.
- (2) Every person who, by communicating statements other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.

- (3) No person shall be convicted of an offence under subsection (2)
 - (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

"Identifiable group" is defined in s 318 as "any section of the public distinguished by colour, race, religion or ethnic origin".

In addition, case law has also arisen under s 13(1) of the Canadian Human Rights Act, which states:

It is a discriminatory practice for a person or group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication authority...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.

"Prohibited grounds of discrimination" were listed in s 2 of the Act, and comprised race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which pardon had been granted.

Finally, prior to its being held unconstitutional, expressive rights were restricted by s 181 of the Code, which provided that

Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

The equality-based approach adopted by the Canadian Supreme Court is illustrated by a trilogy of cases decided on the same day: *R v Keegstra*²⁹⁸ and *R v Andrews*²⁹⁹ in which the constitutionality of s 319 of the Criminal Code was challenged, and *Canada (Canadian Human Rights Commission) v Taylor*,³⁰⁰ which involved a challenge to s 13(1) of the Human Rights Act. The facts in *Keegstra* and *Andrews* were very similar,³⁰¹ and the brief judgment in *Andrews* is in substance no different from that in *Keegstra*, having been arrived at for the same reasons as were given in *Keegstra*. In so far as s 319 is concerned, therefore, it suffices to focus on the judgment in *Keegstra*.

Keegstra was a high school teacher whose teachings attributed evil qualities to Jews, while Andrews and his co-accused were members of the central committee of the Nationalist Party of Canada, and published a newsheet entitled the *Nationalist Reporter* the content of which was virulently antisemitic. In essence then, both Keegstra and Andrews defamed and fomented ill-will against Jews. The accused in both cases were convicted under s 319 of the Code and challenged the constitutionality thereof. The attack on s 319 was based on two arguments - first that s 319(2) constituted an unreasonable infringement of freedom of expression guaranteed by s 2 of the Charter, and second that the reverse onus provision contained in s 319(3)(a) constituted an unreasonable infringement of s 11(d) of the Charter which guarantees accused persons the presumption of innocence.

The 4-3 majority judgment in *Keegstra* was delivered by Dickson C.J.C.³⁰² who, having reviewed the history of hate speech legislation, noted that the harm that s 319(2) was essentially aimed at was group defamation.³⁰³ This finding was of crucial importance to the case, for it clarified precisely what interest (namely the right of groups not to have their reputation diminished and to suffer opprobrium as a result) was to be weighed against freedom of expression. The court had no difficulty in finding that s 319(2) did amount to a limitation of freedom of expression³⁰⁴ and thus proceeded to the inquiry mandated by s 1 of the Charter - namely whether the

²⁹⁸(1990) 61 C.C.C. (3d) 1.

²⁹⁹(1991) 77 DLR (4th) 128.

³⁰⁰[1991] 75 DLR (4th) 577.

³⁰¹For discussions of these cases see Sumner, L. W. "Hate Propaganda and Charter Rights" in Waluchow, W. J. (ed) *Free Expression* (Oxford, Clarendon Press, 1994) 153, James Weinstein, *supra* n. 102 at 175, and Manwaring, John "Legal Regulation of Hate Propaganda in Canada" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 106 at 112-16.

³⁰²With whom Wilson, L'Heureux-Dube and Gonthier JJ concurred.

³⁰³At 18c - 19g.

³⁰⁴At 24e - 25a.

limitation was reasonable in a free and democratic society. In reaching the conclusion that the s 319(2) limitation was indeed justified, the court noted that speech that denigrates groups harms their sense of self worth, and leads to prejudice against them in the minds of others.³⁰⁵ The harm occasioned by hate speech was the possible "alteration of views" in the minds of recipients which might in turn lead to "discord between various cultural groups".³⁰⁶ The court noted that s 15 of the Charter protects the right to equality and prohibits discrimination, and that s 27 requires that the Charter be interpreted consistently with the multicultural nature of Canada. It further stated that the harms caused by the anti-egalitarian message contained in hate propaganda "run directly counter to the values central to a free and democratic society"³⁰⁷ and that such expression threatens "the enthusiasm with which the value of equality is accepted and acted upon by society".³⁰⁸ The court also justified its finding that s 319(2) was constitutional by stating that³⁰⁹

There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

Similarly, viewpoint discrimination was expressly articulated in a passage where the court held³¹⁰

The suppression of hate propaganda undoubtedly muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate - indeed, perhaps even language intended to promote hatred - is an unavoidable part of the democratic process. Moreover I recognise that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively putting it at the very heart of the principle extolling freedom of expression as vital to the democratic process. None the less, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic

³⁰⁵At 36d - 37h.

³⁰⁶At 37e.

³⁰⁷At 44d.

³⁰⁸At 45c.

³⁰⁹At 49b.

³¹⁰At 50a-d.

process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee...I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s 2(b) rationale.

The flaws in this reasoning are obvious. The fact that the statute affected the expressive activities of only "a few individuals" firstly tends to suggest that the danger posed to inter-group relations by their expression was in fact not that great, and secondly, because they constitute such a small minority, tends to heighten rather diminish the need that their expression be protected. Furthermore, the degree of limitation cannot possibly be described as "not substantial" given that those individuals were prohibited from expressing the ideology they espoused. Most flawed, however, was the court's logic that because ss 15 and 27 indicated that non-discrimination and multiculturalism were fundamental values of Canadian society, it therefore followed that speech counter to those values warranted suppression.³¹¹ Such a finding leaves the way open for a degree of censorship that is potentially as limitless as are the number of values identified as being fundamental to society. Ought communists, for example, to be prohibited from expressing their ideology because it too is inimical to the very concept of a "free and democratic society"?³¹² Or, since the provision of adequate social services is arguably a fundamental value of a democratic society, should capitalists also be silenced? These last examples are somewhat facetious, but the *Keegstra* decision raises the very serious questions of how an anti-democratic dissenter determines which political ideas may be expressed consistently with the character of a democratic society, and how far expression may diverge from democratic orthodoxy before reaching the point at which it forfeits constitutional protection. The lesson suggested by *Keegstra* is that the boundary can be fixed no more precisely than as simply being at the point where a court believes

³¹¹ This view is also supported by Cotler, Irwin "Principles and Perspectives on Hate Speech, Freedom of Expression and Non-discrimination: The Canadian Experience as a Case Study in Striking a Balance" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 123 at 126.

³¹² As indeed was the case in the United States during the 1950's when the courts upheld measures that led to the imprisonment of those advocating communism - see *Dennis v United States* 341 U.S. 494 (1951).

the expression is incompatible with the values of a free and democratic society and, furthermore, that it is a hallmark of democracy that expression challenging democracy is not entitled to constitutional protection. The *Keegstra* decision also illustrates the dangerous result of the conflation of idea and action which, as was noted at 2.2.3 above, is a fundamental characteristic of the equality-based approach to freedom of expression: By elevating the value of equality found in s 15 of the Charter to the status of one so fundamental that expression antipathetic to it was held unlawful, *Keegstra* raises the possibility that, in theory at least, a person arguing that Canada should adopt an aristocratic form of government could be silenced on the grounds that democracy is a fundamental value of Canadian society mentioned in the Charter. Similarly, as Weinstein states in his discussion of *Keegstra*³¹³

Presently in the USA. and Canada abortion is a constitutionally protected activity, but it is not inconceivable that some day a woman's choice to terminate her pregnancy will again be criminalised in both countries. If this happens, then books and films favourable to abortion rights could be banned if the government were to show that such expression was likely to lead women to have abortions. Similarly, if homosexual activity were ever again criminalised in Canada, as it is today in many parts of the USA, books and films portraying homosexual couples as having loving, healthy relationships could be banned on the theory that the 'alteration of views' caused by such depictions might lead to illegal sexual conduct. What these examples show is that a rationale permitting government to outlaw expression just because it might lead to antisocial or even illegal conduct, but without showing that the speaker has directly called for others to engage in such conduct, can easily encompass speech that attempts to persuade others peacefully and legally to change the law. As such, this rationale is at war with the very essence of free expression in a democracy.

Elsewhere he states that³¹⁴

When the government suppresses speech that denounces basic societal norms the risk is great that it is trying to control expression not because of any real

³¹³Weinstein, supra n. 102 at 212-3. The example of the banning of a non-sexually explicit film depicting homosexual relationships did in fact occur in Ontario in 1984 - see King, Lynne "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?" in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 79 at 82. The argument concerning abortion is also persuasively made by David Goldberger in "Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation" 37 (1989) *Buffalo Law Review* 337 at 365.

³¹⁴Weinstein, supra n. 102 at 216.

danger that the expression will persuade people to violate the law or breach fundamental norms, but because government fears that the expression will persuade the people to legally *change* these laws or norms. Indeed, although, he usually characterises the harm in more concrete ways, Chief Justice Dickson gives away the game when he says, 'Hate propaganda seriously threatens..the *enthusiasm* with which the value of equality is accepted and acted upon by society'. Justifying the suppression of speech because it makes people less enthusiastic about a fundamental norm of society is antithetical to a meaningful free speech principle. It is also a formula for a conservative society, for the boundaries of permissible public discourse would then be set by the values expressed in the constitution...For many years slavery was a norm that found expression and even protection in the United States Constitution, and until relatively recently racial segregation remained a deeply valued norm in many parts of the USA. Even more recently there have been serious attempts in the USA to amend the constitution to protect foetal life. It is not inconceivable that someday the Canadian Charter could be amended to protect foetuses, or that an existing provision of the Charter might be so interpreted. Such an occurrence would be a bleak day for procreative rights in Canada, but it would be an even bleaker one if expression advocating abortion rights were thereafter presumptively proscribable, or even considered of 'limited importance', because contrary to a value expressed in the Charter. (Emphasis in the original).

As Weinstein concludes,³¹⁵ the essential harm identified by the court in *Keegstra* was attitudinal change towards minority groups, yet intergroup strife is an inevitable corollary of open politics³¹⁶ (even if not along racial lines then almost certainly along

³¹⁵Ibid., 210-11.

³¹⁶The harm that censorship ostensibly designed to foster inter-group relations can do is most poignantly illustrated in the case of Sri Lanka, where s 120 of the Penal Code prohibits expression which

...raise[s] discontent or disaffection amongst the people of Sri Lanka, or..promote[s] feelings of ill will or hostility between different classes of such people..

The Sri Lankan experience reveals the inherent danger of hate speech provisions: Firstly, the legislation has been used selectively by the government, which has prosecuted members of the minority Tamil population who have spoken critically of the majority Sinhalese and what the Tamils consider to be their oppressive policies towards Tamils. By contrast, Sinhalese have been left free to criticise Tamils (Abeysekera, Sunila and Kenneth Cain "Incitement to Inter-ethnic Hatred in Sri Lanka" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 238 at 239-40). But a more serious problem, and one that is of relevance beyond Sri Lanka, is that where political divisions in a society follow ethnic, racial or religious lines, inter-group defamation is an inevitable part of politics and, whatever its evils may be, the alternative - inter-group warfare - is far worse. In other words, whereas ethnically divided societies are those in relation to which it might be thought the argument in favour of hate speech provisions is

strongest, they are also those in which the suppression of such speech, and the blocking of the safety valve such speech provides, reaps its most awful harvest. This is indeed what happened in Sri Lanka where, deprived of the opportunity of offering a political challenge to the Sinhalese, Tamils resorted to civil war (*ibid.*, 242-3). In other words, hate speech measures intended to preserve public order had precisely the opposite effect. It is therefore necessary to recognise the harsh reality that in many countries the removal of inter-ethnic verbal struggle from the realms of politics moves the struggle onto the battlefield. The Sri Lankan experience therefore suggests that the "safety-valve" justification of the tolerance of hate speech seems to have much to recommend it.

Much the same can be said with regard to hate speech provisions which, ironical as it may seem, existed in South Africa under apartheid, and which were used against black South Africans who necessarily caused inter-group tension when they protested their treatment by the minority white government. These provisions were contained in s 29 of the Black Administration Act 38 of 1927 (discussed in Marcus, Gilbert "Racial Hostility: The South African Experience" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 208 at 214-19) and in the Publications Act 42 of 1974, the provisions of which were enforced by a specialist tribunal, the Publications Appeal Board (discussed in Johannessen, *supra* n. 266). Thus s 29(1) of the Black Administration Act, which proscribed acts or words performed or uttered "with the intent to promote a feeling of hostility" between blacks and whites was used to convict speakers who delivered speeches critical of the policies adopted by whites in respect of blacks (see *R v Mote* 1928 OPD 150, *R v Rulashe* 1928 EDL 376, *R v Thaele* 1930 CPD 332, *R v Ncwangu* 1933 NPD 579). However convictions did not result where ill-will was directed against an individual rather than whites in general, the court pointed out that it would be absurd to convict in such circumstances because then any dispute between two individuals of different races would be indictable. (See *R v Dumah* 1928 OPD 152. See also *R v Ncwangu* 1933 NPD 579 at 582, where it was held that the promotion of hostility against a substantial sector of a racial group, such as the white farming community, would amount to a contravention of the section.) But of course the real defect of such provisions is that some degree of hostility between groups, be they racial, linguistic or socio-economic in origin, is the inevitable consequence of free politics in any society. This point was recognised in certain cases (*R v Bunting* 1929 EDL 326 at 331-2 and 337-8, *R v Brown* 1929 CPD 221) where the courts recognised that freedom of political debate means that the mere causation of inter-racial hostility did not suffice, and that it was necessary to show that that was the *intended* result (for example, because the words urged unlawful conduct against members of another race - see *Diamond v R* 1933 NPD 380 at 386). This suggests that by "intent" is meant actual rather than legal intent (*dolus directus* rather than *dolus eventualis*). The difficulty of establishing actual intention was addressed in *R v Nkatlo* 1950 (1) SA 26 (C) at 30-31, where the court cautioned that the distinction between the intent of the speaker and the effect (actual or potential) of his words must always be kept in mind, and that in order to guard against unsafe convictions, liability for intentional promotion of hostility could arise where such an intent was the *only* inference that could be drawn from the words, and that if there was any other possible inference, the accused should be acquitted. This decision was followed in subsequent cases (*R v Sutherland* 1950 (4) SA 66 (T) at 70D -71H, *R v Nyandoro* 1959 (1) SA 639 (SR), *R v Mawena* 1961 (3) SA 362 (SR), *R v Samkange* 1961 (3) SA 374 (SR), *R v Mawema* 1962 (1) SA 896 (FC), *S v Kubhaka* 1974 (3) SA 443 (N), *S v Singh* 1975 (1) SA 330 (N), *S v Mbiline* 1978 (3) SA 131 (E)), but one should note that even so the court in *R v Mawena* 1961 (3) SA 362 (SR) at 368F-370G convicted on the basis that the only reasonable inference that could be drawn from the accused's "deliberate distortion of historical facts" (at 370F) was an intention to promote hostility (although this was overturned on appeal (see *R v Mawena* 1962 (1) SA 896 (FC)), and that in *S v Singh* 1975 (1) SA 330 (N), a conviction resulted from a speech in which the accused had criticised the oppression of blacks by whites. These last two cases demonstrate that even accepting the necessity of actual intent, the fact still remains that it may well be legitimate within the context of robust political debate deliberately to promote hostility against one's political opponents, particularly if "hostility" is broadly interpreted as meaning "feelings of discord, enmity, estrangement, hatred, and even disaffection and unfriendliness" (as in *R v Bunting* 1929 EDL 326 at 332). Nor is this true only of circumstances such as obtained in South Africa where it was possible to identify "oppressors" and "oppressed" - in many, perhaps most, instances of political discord it will not be possible to categorise the protagonists in this way, and to try to do so would mean the courts would have to embark upon an inquiry into where justice lay in the controversy at hand, which is surely what the political process, rather than court action, should determine.

Finally, one should note the hate speech provisions found in s 18 of the United Kingdom's Public Order Act 1986, the underlying philosophy of which is very similar to the Canadian provisions. The

class lines), and the dynamics of such relationships are surely not to be regulated by the law. As Weinstein states³¹⁷

..it is precisely speech that offensively challenges the basic values of society that is most imperilled by the political process and hence most in need of constitutional protection.

In addressing the issue of the reverse onus in the defence of truth, Dickson C.J.C. recognised that many statements that might lead to prosecution under s 319(2) would be those of opinion in relation to which a finding of "truth" or "falsity" would not be possible, and that even in the case of statements of fact, s 319(2) could lead to liability for innocent mistakes as to the truth of the statement,³¹⁸ a consideration which it has already been noted at 1.4.1 led the court in *New York Times v Sullivan* to place the burden of proof on the plaintiff seeking to prove the falsity of defamatory statements, rather than on the defendant seeking to establish their truth. Yet despite this recognition, Dickson C.J.C. held that the Charter's protection of freedom of expression would not necessarily be incompatible with the imposition of liability for hate speech *even if true*,³¹⁹ from which it of course followed that allowing a defence of truth but imposing the onus on the defendant would also be found to be compatible

Public Order Act consolidates various offences relating to racial hatred. The progenitor of s 18 was s 6 of the Race Relations Act 1965. Section 18(1) provides as follows:

- (1) A person who uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting, is guilty of an offence if
 - (a) he intends thereby to stir up racial hatred, or
 - (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Racial hatred is defined in s 17 as hatred against a group of persons in the United Kingdom who are defined by reference to colour, race or nationality, including citizenship, ethnic or national origins. Various sections of the Act cover other activities whereby hatred may be stirred up, including publishing or distributing written material (s 19), publically performing a play (s 20), distributing, showing or playing a recording (s 21), broadcasting a programme, including via a cable service (s 22), and possessing racially inflammatory material (s 23). Like the Canadian provisions, the United Kingdom Act targets the inspiration of hatred, and restricts the offence to racial or ethnic groups, although special measures applying only to Northern Ireland (the Incitement to Hatred (Northern Ireland) Act 1970) penalises incitement to religious hatred as well. (This Act is discussed in Murphy, Therese "Incitement to Hatred: Lessons from Northern Ireland" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 263). A feature of the British legislation is that under s 18(1)(b) conviction does not depend on an intention to stir up hatred, merely on the objective likelihood of its being stirred up. The Act is discussed by Oyediran, Joanna "The United Kingdom's Compliance with article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 245, and Bindman, Geoffrey "Incitement to Racial Hatred in the United Kingdom: Have We Got the Law We Need?" in Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 258.

³¹⁷At 216.

³¹⁸At 62a-c.

³¹⁹At 62e-g.

with the Charter, and that therefore the reverse onus provision in s 319(3)(a) was not an unreasonable limitation on the right to be presumed innocent contained in s 11(d) of the Charter.³²⁰ In reaching this conclusion, the court was once again clearly influenced by its opinion of the viewpoint expressed in hate speech, holding that³²¹

Where the likelihood of truth or benefit from an idea diminishes to the point of vanishing, and the statement in question has harmful consequences inimical to the most central values of a free and democratic society, it is not excessively problematic to make a judgment that involves limiting expression.

In contrast to the majority, the dissenting judgment delivered by McLachlin J was based on an affirmation of the impermissibility of viewpoint censorship. McLachlin J firstly doubted whether s 15 and s 27 had any bearing on the case in hand, noting that as was the case with all the other sections of the Charter, the rights these sections conferred would become relevant to a case only where it was alleged that *state action* had impaired the individual's exercise of such rights. In this case however, s 15 and s 27 were being used to set *limits* on the exercise of a right by an *individual*.³²² Nevertheless, McLachlin J recognised that the various rights in the Charter could be used to assist in the interpretation of each other's content.

Central to McLachlin J's judgment was a re-affirmation of viewpoint neutrality, and a rejection of the argument that, in deciding whether expression was entitled to protection, a court should be influenced by the viewpoint contained in the expression. Thus, in addressing the argument that racist speech is to be denied protection because of its contradiction of the philosophy of equality underlying s 15 of the Charter, she held³²³

The cases where this court has considered the meaning of s 2(b) have expressly rejected the suggestion that certain statements should be denied the protection of the guarantee on the basis of their content. The court has repeatedly affirmed that no matter how offensive or disagreeable the content of the expression, it cannot on that account be denied protection under s 2(b) of the Charter...The argument based on s 15 is clearly opposed to this principle, as it suggests that protection be denied expression whose content conflicts with the values underlying the s 15 guarantee.

³²⁰At 70a - 72f.

³²¹At 63e.

³²²At 100h - 101e.

³²³At 101f-g.

Later she stated that it was not inconceivable that speech promoting "hatred" (the wide meaning of which is discussed below) might not legitimately be uttered in the course of political debate, stating³²⁴

To come within the ambit of potential prosecution under s 319(2) speech need only wilfully demean an identifiable group....Is it unimaginable that questions of public policy should involve speech of this kind? The Canadian Civil Liberties Association raises the example of a native leader making bitter comments about whites in frustration with governmental failure to recognize land claims.

In the same vein she said that the requirement of intent to foment hatred should not save s 319(2), stating:³²⁵

It is argued that the requirement of "wilful promotion" eliminates from the ambit of s 319(2) statements which are made for honest purposes such as telling a perceived truth or contributing to a political or social debate. The difficulty with this argument is that those purposes are compatible with the intention (or presumed intention by reason of foreseeability) of promoting hatred. A belief that what one says about a group is true and important to political and social debate is quite compatible with and indeed may inspire an intention to promote active dislike of that group. Such a belief is equally compatible with foreseeing that promotion of such dislike may stem from one's statements. The result is that people who make statements primarily for non-nefarious reasons may be convicted of wilfully promoting hatred.

Similarly, in addressing the argument that the Canadian commitment to multiculturalism in s 27 of the Charter justified limitation of expressive rights she held that³²⁶

Different people may have different ideas about what undermines multiculturalism. The issue is inherently vague and to some extent a matter of personal opinion. For example, it might be suggested that a statement that Canada should not permit immigration from a certain part of the world is inconsistent with the preservation and enhancement of multiculturalism. Is s

³²⁴At 106h - 107b.

³²⁵At 118d-f.

³²⁶At 102h - 103a.

2(b) to be cut back to eliminate protection for such a statement, given the differing opinions one might expect on such a matter?

Although agreeing that hate speech has harmful effects on minorities³²⁷ McLachlin J argued that to criminalise the inspiration of "hatred" created an offence the contours of which were impermissibly overbroad and vague - the very term "hatred" covers a wide range of emotions, and this imported the danger that convictions might arise for speech which incited "active dislike" (one of the dictionary meanings for "hatred") simply because such speech was unpopular³²⁸ and realistically speaking, would be more likely to be found to have been uttered with the intention of fomenting hatred.³²⁹ The chilling effect this would have on expression would lead to even lawful speech being deterred as speakers strove to keep within the boundaries of the law,³³⁰ to the extent that³³¹

Novelists may steer clear of controversial characterisations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in "The Merchant of Venice". Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade might be tempered. These matters go to the heart of traditional justifications for freedom of expression.

So far as the imposition of a reverse onus on the accused to prove the truth of his statements was concerned, McLachlin J pointed out this could lead to convictions even where the speaker's statement was true but he was unable to prove its truth.³³² Further, she stated that³³³

..the concepts of "truth" and "reasonable belief in truth" may not always be applicable. Statements of opinion may be incapable of being classified as true or false, communicating not facts so much as sentiments and beliefs. Polemic statements frequently do not lend themselves to proof of truth or falsity. As

³²⁷ At 111c-g.

³²⁸ At 117c - 118a.

³²⁹ At 118a.

³³⁰ At 113e-h.

³³¹ At 120h - 121a.

³³² At 117c and 119e.

³³³ At 119e-g.

for the defence of reasonable belief, how is a court to evaluate the reasonableness of diverse theories, political or otherwise? The defence of statements in the public interest poses similar problems. How is a court to determine what is in the public interest, given the wide range of views that might be held on matters potentially caught by s 319(2)?

Finally, McLachlin J also doubted the argument that measures such as s 319 were justified by the argument that they would reduce racism, arguing that³³⁴

The argument that criminal prosecutions for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, their listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it. Theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by suppressing their utterance.

This line of reasoning is supported by Strossen, who points out that psychological studies show that prohibited speech tends to become more attractive and persuasive precisely because it is forbidden,³³⁵ and by Hentoff, who argues that if no opportunity has been given to refute objectionable ideas, they may at some later time be assumed to be true simply because there is no record of their having been refuted in open debate.³³⁶ Proscribing expression of a particular attitude thus does not lead to its disappearance - rather it will go underground.³³⁷ Indeed the *only* way of changing attitudes is by open debate,³³⁸ for if views are forbidden rather than refuted, those who hold them will be provided with the argument that the truth they speak is so powerful that it has been banned.³³⁹ The irony therefore is that a paternalistic state which suppresses views contrary to those it approves of, because it mistrusts its own citizens' capacity to evaluate "dangerous" views, sows doubt as to the validity of the very "truth" it will not allow to be contradicted. As Meyerson states³⁴⁰

³³⁴At 116b-d.

³³⁵Strossen, *supra* n. 59 at 554 and 559.

³³⁶Hentoff, *supra* n. 18 at 102.

³³⁷*Ibid.*, 168.

³³⁸See the statement by Rohde cited *ibid.*, 169.

³³⁹*Ibid.*, 170.

³⁴⁰Meyerson, Denise "'No Platform for Racists': What Should the View of Those on the Left Be ?" 6 (1990) *South African Journal on Human Rights* 394 at 397.

Finally, there is Marcuse's argument for intolerance, namely that tolerance of that which is evil serves the cause of oppression..Marcuse's view...overlooks the costs of intolerance. First, to drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those on the left, who, after all, believe there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than police force as the better weapon against falsehood.

The other significant decision delivered with *Keegstra* and its sister case *Andrews* was that in *Canada (Canadian Human Rights Commissioner) v Taylor*.³⁴¹ Although in *Taylor* the court was considering s 13(1) of the Human Rights Act which differed in certain respects from s 319 of the Code, both provisions are aimed at essentially the same harm - that of group defamation.³⁴² It is therefore unsurprising that similar considerations motivated the judges (both majority and minority) as had in *Keegstra*, and that the members of the court were divided 4-3 along the same lines as they had been in that case. The appellants in *Taylor* (a Mr Taylor and the political party of which he was a member) sought to overturn an order of committal for contempt which had been issued by the Human Rights Tribunal after the appellants had failed to desist from offering a telephone service that played taped anti-semitic messages. The thrust of the messages was that Jewish people were responsible for a conspiracy that sought to undermine Canadian society. The reasoning of the majority in *Taylor* proceeded along much the same lines as it had done in *Keegstra*, except that since s 13 of the Human Rights Act explicitly stated that expression likely to bring persons into hatred or contempt constituted discrimination, the issue of discrimination did not have to be raised by the court *mero motu* as it had been in *Keegstra*. Moreover, s 13(1) was held to be constitutional despite the lack of a requirement of intent³⁴³ or the existence of a defence of truth,³⁴⁴ (both of which were contained in s 319), and despite the fact that it applied even to private conversations³⁴⁵ unlike s 319 which expressly did not. Thus from a Millian perspective, the decision in *Taylor* marks an even more egregious impairment of freedom of expression than does *Keegstra*. Particularly troubling in this regard was the majority's finding (anticipated by an

³⁴¹[1991] 75 DLR (4th) 577.

³⁴²For a discussion of *Taylor* see Manwaring, *supra* n. 301 at 117-19.

³⁴³See 602f- 603g.

³⁴⁴At 605d - 606a.

³⁴⁵See 606f - 608b.

obiter statement in *Keegstra*³⁴⁶) that even *truthful* statements were suppressible consistent with the Charter if they constituted hate propaganda, and that therefore the absence of a defence of truth in s 13(1) (as opposed to "only" placing the onus of proving truth on the defendant as in the case of s 319 of the Criminal Code) was not fatal to its constitutionality.³⁴⁷ As McLachlin J stated in her dissenting judgment in *Taylor*³⁴⁸

Section 13(1) catches speech which is neither intended nor calculated to foster discrimination. It catches speech which may be entirely accurate or truthful; speech which seeks merely to air legitimate group grievances; speech which merely exposes to ridicule; speech which merely communicates the information by telephone to a single person who has the power to hang up the telephone if he or she does not like the message; private speech between consenting participants.

Although in upholding s 13(1) notwithstanding these greater restrictions on freedom of expression the court was in part motivated by the fact that, in contrast to s 319 of the Criminal Code, the Human Rights Act aimed to combat racial discrimination through compensation of victims rather than prosecution of offenders,³⁴⁹ the fact remains that, as *Taylor's* case itself demonstrates, a citizen who stood his ground on freedom of expression and refused to comply with the findings of the Human Rights Tribunal would ultimately be visited with the rigours of the criminal law, brought into play in the form of contempt proceedings.

2.2.6.2 Other decisions.

A discussion of decisions taken under the Canadian Charter of Rights and Freedoms would not be complete without reference to three other decisions which, while not as far reaching as those already discussed, are nevertheless important.

In *R v Zundel*³⁵⁰ the Canadian Supreme Court considered the constitutionality of s 181 (the "false news" provision of the Criminal Code), which penalised the wilful publication of "a statement, tale or news" that the accused "knows is false and that causes or is likely to cause injury or mischief to a public interest". The section had been challenged by the appellant who had been convicted under its provisions after

³⁴⁶At 62e-g of *Keegstra*.

³⁴⁷At 605d - 606d.

³⁴⁸At 630e-g.

³⁴⁹See 603h - 605c, and 606b-d.

³⁵⁰(1993) 95 DLR (4th) 202.

publishing a leaflet denying that the Jewish Holocaust had occurred. Speaking for the majority, McLachlin J held that the purpose of the constitutional guarantee of freedom of expression³⁵¹

..extends to the protection of minority beliefs which the majority regard as wrong or false...Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view..Thus the guarantee of freedom of expression...serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's opinion. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.

Furthermore, she held that even leaving aside the difficulty of determining the truth or falsity of historical and social facts,³⁵² exaggerated or even deliberately false facts might serve the values protected by freedom of expression, citing Salman Rushdie's *Satanic Verses* as an example of artistic expression which Muslims condemned as perpetrating lies about Muhammed.³⁵³ To this one might of course add Mill's statement that truth is served by collision with error.³⁵⁴ Most persuasively, however, the majority judgment pointed to the chilling effect likely to arise due to the difficulty of determining whether a statement was one of fact or opinion, and thus susceptible to a determination of "truth" or "falsity",³⁵⁵ and from the danger that the issue of whether an accused knew that what he was saying was untrue would come to be tested against what is generally "known" to be true or false, and that juries would apply the logic "everyone knows this is false; therefore the defendant must have known it was false".³⁵⁶ Also problematic was the determination of whether a false statement was injurious "to a public interest",³⁵⁷ the vagueness of which meant that a potentially enormous range of expression might be caught by s 181.³⁵⁸ By contrast, the dissenting minority judgment, which would have upheld the constitutionality of s 181, was marked by an extraordinary misunderstanding of the justification of

³⁵¹See 260e - 261a.

³⁵²See 263a - 264b.

³⁵³At 262a-d, and 264c-e.

³⁵⁴Mill, *supra* n. 13 at 37.

³⁵⁵See 257h - 258c, and 272a-d.

³⁵⁶At 258d-h, and 272d-h.

³⁵⁷For a criticism (in the context of defamation law) of the use of such vague concepts in the determination of liability see Sims, *supra* n. 122 at 269.

³⁵⁸See 272h - 275b.

freedom of expression from truth: Cory and Iacobucci JJ held that "the publication of deliberate and injurious falsehoods does not contribute to the attainment of truth",³⁵⁹ which is surely to miss the point of the Millian analysis which is that we can never *know* truth with absolute certainty - or at the very least that it can never be known with sufficient certainty to warrant criminal punishment for the publication of false accounts of history. Moreover, even the fact that s 181 required proof of knowledge on the part of the accused that the statement was false³⁶⁰ could not save it if one adopts a strict Millian approach, because the possibility would still exist that whereas the accused believed the statement to be false and was therefore guilty in a *subjective* sense, the inherent unknowability of facts might mean that the statement was subsequently (that is, at some date later than the accused's trial) found to be *objectively* true, and so the accused would have been punished for making a true statement. A good hypothetical example of this might be an accused who was motivated purely by malice against Russians and who, in the years when the truth about the matter was still disputed, made a statement *which he believed to be false* that Russian forces were responsible for the Katyn forest massacre of Polish officers during World War II. If it were shown that the accused made the statement believing it to be false, he could have been convicted under s 181. Yet the Russians have recently admitted that their forces did commit the massacre. Would it have been legitimate for such an accused to have been convicted simply because of his bad motive?

The next case to be considered is that of *Ross v Moncton Board of School Trustees, District No. 15*,³⁶¹ in which the New Brunswick Court of Appeal struck down an order made by Board of Inquiry, convened under the province's Human Rights Act³⁶² against a teacher (Ross) who made anti-semitic statements outside the class-room. The order was based on a finding that the school board had discriminated against Jewish students by not disciplining the teacher, and required that Ross be moved to a non-teaching post.³⁶³ In finding the order to be an infringement of s 2 of the Charter which was not saved under s 1,³⁶⁴ the court relied upon the decision in *Zundel* and found that there was no sufficiently pressing reason to justify infringing the appellant's rights of freedom of expression. There was no evidence that he had ever

³⁵⁹At 241g.

³⁶⁰Discussed by the minority at 213g - 214h.

³⁶¹(1994) 110 DLR (4th) 241.

³⁶²R.S.N.B. 1973, c. H-11.

³⁶³A further part of the order, requiring that Ross be dismissed even from this non-teaching post if he continued to make out of school anti-semitic statements had previously been struck down as an infringement of s 2 of the Charter by a lower court - see *Ross v Moncton Board of School Trustees, District No. 15* (1992) 86 DLR (4th) 749.

³⁶⁴At 250a - 251c.

used the class-room to further his views, and to uphold the dismissal simply on the basis that as a teacher he was to some extent a role model for his pupils would, the court said, "have the effect of condoning the suppression of views that are not politically popular at any given time".³⁶⁵ Clearly the court was correct - to find otherwise would have led to the situation where the expressive rights of people would be subject to increasing limitation in proportion to their status in society.³⁶⁶

The hate speech provisions of the Code may be usefully contrasted with those that criminalise defamatory libel.³⁶⁷ In *R v Stevens*³⁶⁸ the Manitoba Provincial Court upheld the constitutionality of s 300 of the Code, which imposes liability for defamatory libel but which, it should be noted, places the onus on the prosecution of proving that the accused knew that the libel was false, which would of course first involve proving that the libel was indeed false.³⁶⁹ The court was however not called upon to decide the constitutionality of s 301 of the Code which punishes (albeit with a lesser penalty) libels made without knowledge of falsity, and in relation to which s 311 imposes the burden on the accused of proving the defence of truth and public benefit. It is however significant that it noted³⁷⁰ *obiter* that in the unreported case of *R v Finnegan*³⁷¹ an Alberta court had held s 301 to be unconstitutional precisely

³⁶⁵At 251a.

³⁶⁶An interesting parallel to *Ross* is provided by the American case of *Levin v Harleston* 966 F.2d 85 (2d Cir. 1992), where the court held unconstitutional sanctions imposed on a University professor who had published the view that blacks are less intelligent than whites.

³⁶⁷The relevant provisions of the Code read as follows:

298(1) A defamatory libel is 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.

(2)...

299. A person publishes a libel when he

(a) exhibits it in public;
(b) causes it to be read or seen; or
(c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

300. Everyone who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

301. Everyone who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

³⁶⁸(1993) 82 C.C.C. (3d) 97.

³⁶⁹At 141a, 149c - d. The court in *Stevens* held unconstitutional those parts of ss 298 and 299 which criminalised the publication of the defamatory material to the person defamed, stating that the imposition of liability for insult as distinct from defamation fell outside the ambit of the offence of criminal defamation. This aspect of the decision is discussed in more detail at 2.2.7.3 and 5.2 below.

³⁷⁰At 153c-g.

³⁷¹Unreported decision of MacKenzie J Alta. Q.B., 13 November 1992.

because it casts the onus on the accused to prove the truth of the defamatory statement.

2.2.6.3 Summation of the Canadian approach.

The decisions in *Keegstra*, *Andrews* and *Taylor* bode ill for freedom of expression in Canada. The willingness of the court to justify restrictions on freedom of expression by reference to its subject matter has implications that go far beyond the "easy" case of raving anti-semites. By upholding the constitutionality of group defamation provisions, the court has made a wide range of expression potentially vulnerable to prosecution. To take examples suggested by Strossen, would a statement by homosexuals that "Catholics are bigots" for following their church's doctrines which are condemnatory of homosexuals, or the characterisation by activist blacks of other blacks as "Uncle Tom's" amount to group defamation?³⁷² Could feminists (some of whom believe that heterosexual sex is rape)³⁷³ be accused of insulting men as a group for suggesting that they are, potentially at least, all rapists?³⁷⁴ Yet are not all these statements quintessentially political ones which make an important contribution to public debate? Or, to take another example suggested by Weinstein, what of the act of superimposing a swastika on an Israeli flag as a protest against that country's policy towards Palestinians?³⁷⁵ Should the courts state that the display of a swastika by a Nazi in a Jewish suburb is wrong, but by the Palestinian protester is permissible, justifying this finding on its impressions of where right lies in the history of Nazi-Jew and Jew-Palestinian relations? Yet is not official determination of which is the "correct" answer to political questions such as these the very antithesis of democracy? As Weinstein points out, such political questions are inherently subjective, and would give the government vast discretion to choose which expression to punish on the basis that it victimises whichever party to a political dispute the government has determined is the "victim".³⁷⁶ Furthermore, it would not be long before the government's decision on such questions began to coincide with what its own interests dictated.

Although the findings in *Zundel* and *Ross* are to be applauded, they cannot be counted as stunning victories for the principle of free speech. The very fact that the legitimacy of suppressing "false" historical accounts and the disciplining of a public school teacher for his after-hours political activities even became contestable issues

³⁷²Strossen, *supra* n. 59 at 529 n 219.

³⁷³See the authorities cited *infra*, n. 497.

³⁷⁴Strossen, *supra* n. 59 at 538.

³⁷⁵Weinstein, *supra* n. 102 at 207.

³⁷⁶*Idem*.

rather serves to illustrate the extent to which the *Keegstra* philosophy has eroded expressive rights. On the other hand, the unreported decision in *Finnegan* (noted in *Stevens*) in which an Alberta court declared invalid the reversal of onus contained in one of the criminal defamation provisions of the Criminal Code may, if it is appealed to the Supreme Court, give that body another opportunity to consider the general area of criminal defamation. *Keegstra*, *Andrews* and *Taylor* were narrowly decided by a 4-3 margin. It is therefore not impossible that were *Finnegan* to be upheld on the basis that the reverse onus in s 311 as read with s 301 of the Code constitutes an impermissible limitation on freedom of expression, this might subsequently lead the court to review its decisions on s 319 of the Code (which also imposes the burden of proving truth on the accused) and s 13 of the Human Rights Act (which provides for no defence of truth at all).

A fitting way in which to end this critique of the Canadian cases is to offer as a contrast to the viewpoint based approach in *Keegstra* the finding with that of the American court in the famed case of *Collin v Smith*,³⁷⁷ where, in upholding the right of American Nazis to march through a predominantly Jewish suburb of Skokie, it was held that

We would hopefully surprise no one by confessing personal views that the NSPA's beliefs and goals are repugnant to the *core values held generally by residents of this country*, and, indeed, to much of what we cherish in civilization. As judges sworn to defend the Constitution, however, we cannot decide this or any other case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators.

(Emphasis added).

It is to the most recent hate speech decisions in the United States that we must now turn.

2.2.7 The First Amendment and Hate Speech.

As was explained at 2.1 and 2.2.1 above, the body of First Amendment case law contains no instance in which the courts have allowed liability for group defamation or insult. The only exception to this rule is the case of *Beauharnais v Illinois* but, as has already been explained, this case is no longer thought to be good law. The following sections focus on recent American case law pertaining to hate speech and

³⁷⁷ 578 F.2d 1197 (7th Cir. 1978) at 1200 (*cert. denied* 439 U.S. 916 (1978)).

ends with a discussion of whether it is possible to fashion a remedy for emotional hurt caused by hate speech without violating the fundamental principle of viewpoint neutrality.

2.2.7 1 The decision in *R.A.V. v St. Paul*

As was shown by reference to the cases quoted at 2.2.4 above, the United States Supreme Court has long held viewpoint discrimination to be impermissible under the First Amendment. But this principle undoubtedly reached its apotheosis in the recent case of *R.A.V. v St. Paul*³⁷⁸ in which an accused had put a burning cross on the property of a black family, and was prosecuted under the city's hate speech ordinance, rather than the more obvious charges of assault by threat of bodily harm or trespass. The ordinance³⁷⁹ punished as "disorderly conduct" the placement on public or private property of any "symbol, object, appellation, characterisation or graffiti...which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender..".

The Supreme Court held that notwithstanding the fact that it was bound by the Minnesota Supreme Court's³⁸⁰ interpretation of the ordinance as proscribing only "fighting words", which was a class of expression which *Chaplinsky* had held not to be protected by the First Amendment,³⁸¹ the fact that the emotional response that the state sought to prevent was proscribed only if it related to one of a limited class of human characteristics (race, colour, creed, religion or gender) made the ordinance unconstitutional. In other words, the court held that content-based regulation is impermissible *even within an unprotected class of speech*,³⁸² and that the statute was therefore invalid on grounds of content discrimination.³⁸³ In other words, because the St Paul ordinance did not punish inspiration of anger, alarm or resentment on the basis of political affiliation, union membership or sexual orientation for example, it amounted to content-based discrimination. Furthermore, since the content-based regulation was not necessary to achieve the (admittedly compelling) interest of preventing harassment of ethnic minorities (an ordinance penalising harassment

³⁷⁸ 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). For a critical analysis of this case see Abel, *supra* n. 74 at 34-6.

³⁷⁹ St Paul Bias Motivated Crime Ordinance s 292.02 (1990).

³⁸⁰ Whose interpretation of the ordinance the United States Supreme Court was bound to follow.

³⁸¹ The *R.A.V.* case was also significant in that Scalia J took the opportunity (at 317-18) to clarify a fundamental First Amendment point, which is that limitations on expression which are permissible because they relate to one of the established categories (such as obscenity and libel) are allowed not because the court takes the artificial position that such categories do not involve "speech", but rather simply because these types of speech are constitutionally proscribable.

³⁸² This aspect of the case is discussed by Mannheimer, *supra* n. 54 at 1547-48.

³⁸³ 120 L. Ed. 305 at 323-5.

without reference to race, religion, gender *et cetera* would have achieved the same object) it was unconstitutional.

The court further argued that the ordinance potentially favoured one side in political debates on issues of race, colour, creed, religion *et cetera*, because whereas those who inspired anger, alarm or resentment in the minds of those favouring racial and religious tolerance could be prosecuted under the ordinance, if the same emotions were inspired by those *favouring* tolerance, it would be difficult to argue that the fear had been inspired "on the basis of race". On the other hand, and in contradiction to this argument, one could argue that the ordinance was correctly found invalid precisely because, to give an example provided by Hentoff,³⁸⁴ a black person putting up a sign demanding school integration in the 1950's could have been prosecuted for arousing anger on the basis of race, and the same could be said of a Jew who displayed a Star of David, seen as a symbol of Zionism by Arabs.³⁸⁵ Finally, and to re-iterate a point made elsewhere in this thesis, perhaps the most fundamental reason why the ordinance merited striking down was that put forward by the minority³⁸⁶ - namely that proscribing "anger, alarm and resentment" are emotions which are quite frequently inspired in the normal course of heated political debate. Although the court did not say it, it is clear that upholding such a prohibition would have effectively constitutionalised the heckler's veto. The situation would, of course, have been much different had the statute proscribed speech that inspires fear of *harm*, which is obviously a response that is not justified by reference to rights of expression. Thus, had the St Paul ordinance penalised inspiration of fear of harm (and had it also not specified only those threats which evidenced specific kinds of prejudice) the conduct of the appellant would clearly have supported a conviction that was consistent with First Amendment principles. Indeed, as is discussed in the next paragraph, the appellant and his accomplices were subsequently convicted when charged under a statute proscribing the making of threats. As the court in *R.A.V.* stated, it would have been permissible for the city to proscribe a particular *mode* of expression (for example expression that was threatening in manner), but what it did

³⁸⁴See Hentoff, *supra* n. 18 at 258-65.

³⁸⁵It is also interesting to refer to a letter (cited by Hentoff, *ibid.*, 259) written by Tribe at the time of the St. Paul hate speech trial in which he stated

The First Amendment is almost always tested with speech that is profoundly divisive or painful. But if you start making exceptions, and suppressing speech that is hurtful, these exceptions will swallow free speech, and the only speech that will be left protected will be abstracted, emotionally lightweight speech that doesn't pack any wallop.

³⁸⁶The majority decision was heavily criticised by the four minority concurring justices who held (at 330) that since fighting words were an unprotected category, it was of no moment that the ordinance evidenced viewpoint based discrimination between different types of fighting words.

instead was single out a particular *viewpoint*, and this is not allowed by the First Amendment.

In contrast to *R.A.V.*, the courts have upheld the convictions of accused who engaged in cross-burning and who were prosecuted under statutes prohibiting the making of threats. Thus in *United States v Lee*,³⁸⁷ *United States v McDermott*³⁸⁸ and *Singer v United States*³⁸⁹ the courts upheld the validity of 18 U.S.C. 241 which prohibits conspiracy to "injure, oppress, threaten, or intimidate any inhabitant..in the free exercise or enjoyment of any right or privilege secured to him by the Constitution", while in *United States v Hayward*³⁹⁰ convictions for cross burning were upheld by a similar provision contained in 42 U.S.C. 3631(a) which makes liable for criminal prosecution anyone who "by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with..." another in the exercise of rights protected by the Constitution, specifically under this subsection the right to occupy property. In all these cases, the reasoning of the court was essentially the same: The statutes were upheld because they prohibited threats (rather than the inspiration of "anger, alarm or resentment" as in the case of the St. Paul statute) and, furthermore, were content-neutral in that they were not limited to threats made on any particular basis. These cases also illustrate the importance of the distinction drawn in *United States v O'Brien*³⁹¹ (discussed at 1.2 above) between measures which are aimed at a message being expressed, and those which are directed towards some *other* harm and only incidentally limit freedom of expression. The courts in *Lee*, *McDermott*, *Singer* and *Hayward* concluded that the provisions under which these appellants had been convicted were of the latter type in that they punished threats of physical harm (which a line of cases affirms is not protected by the First Amendment³⁹²) rather than the message lying behind the threat. In *R.A.V.* on the other hand, the court was dealing with a statute which proscribed the *actus reus* of simply expressing certain ideas which inspired anger, alarm or resentment in others - which is precisely the ground upon which, as was discussed in 1.2 and 1.4.3 above, free speech may not be proscribed. In light of the above case law it was clear that the conduct of the appellant in *R.A.V.* did indeed amount to a threat, and thus the final

³⁸⁷935 F.2d 952 (8th Cir. 1991), rehearing en banc granted and judgment reversed in part, 6 F.3d 1297 (8th Cir. 1993) (*cert. denied*, 114 S. Ct. 1550 (1994)).

³⁸⁸29 F.3d 404 (8th Cir. 1994).

³⁸⁹38 F.3d 1216 (6th Cir. 1994).

³⁹⁰6 F.3d 1241 (7th Cir. 1993).

³⁹¹391 U.S. 367 (1968).

³⁹²See *Watts v United States* 394 U.S. 705 (1969) at 707, *United States v Mitchell* 463 F.2d 187 (8th Cir. 1972) at 191 (*cert. denied* 410 U.S. 969 (1973)), *United States v Orozco-Santillan* 903 F.2d 1262 (9th Cir. 1990) at 1265-66 and *United States v Bellrichard* 994 F.2d 1318 (8th Cir. 1993) at 1321 (*cert. denied* 114 S. Ct. 337 (1993)).

act in the *R.A.V.* saga was the upholding, in *United States v J.H.H.*,³⁹³ of convictions of J.H.H., R.A.V. and a number of co-accused who had been re-charged, this time under 18 U.S.C 241 and 42 U.S.C. 3631. By the same token, I would argue that such a viewpoint-neutral statute could, if applied to a Skokie type situation, lead to the conviction of demonstrators carrying Swastikas in a predominantly Jewish neighbourhood, *provided that* the prosecution proved that such conduct could reasonably be seen as constituting a threat of the infliction of harm, which would ultimately depend on an examination of all the factual circumstances of the case.³⁹⁴ Such a prosecution would be entirely different from one which sought to proscribe conduct which, because of the *political viewpoint it contained*, gave rise to offence (as for example if it was sought to prohibit Nazis from marching simply because their ideology gave offence, there being nothing in the circumstances of their conduct to constitute a threat). Conviction in this second type of case would obviously be unconstitutional in light of *R.A.V.*

Finally, before ending this discussion of *R.A.V.*, it is necessary to examine the compatibility of this decision with that in *Wisconsin v Mitchell*³⁹⁵ in which the Supreme Court upheld a statute that imposed heavier penalties for certain criminal acts where such crimes were racially motivated. Does the fact that the motivation of the crime led to the imposition of an increased penalty mean that defendants were being punished on the basis of viewpoint?³⁹⁶ The conclusion that the court in *Mitchell* reached was that it does not. Central to the court's reconciliation of this case with *R.A.V.* was the distinction drawn between speech and conduct - *R.A.V.* involved a statute that penalised expression, which meant that the statute had to withstand First Amendment scrutiny. By contrast the Wisconsin statute penalised conduct (and in particular, crimes against persons and property) which meant that it did not. Furthermore, although the penalty enhancement provision meant that if the perpetrator was motivated by a certain point of view (race, religion, colour, disability, sexual orientation national origin or ancestry) his penalty would be increased,³⁹⁷ this was held to be legitimate on the basis that it lies within the competence of the legislature to enact, and the courts to apply, legislation that requires motive to be taken into account at sentencing. This was indeed already evident from *Barclay v*

³⁹³22 F.3d 821 (8th Cir. 1994).

³⁹⁴This is the view taken by Feinberg, *supra* n. 68 at 86-7 in his analysis of *Collin v Smith*.

³⁹⁵1135 S. Ct. 2194 (1993).

³⁹⁶Both *R.A.V.* and *Mitchell* are analysed by Delgado, Richard and Yun, David in "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation" 82 (1994) *California Law Review* 871 at 874-5.

³⁹⁷Note that, as was held in *Dawson v Delaware* 503 U.S. 159 (1992), this is not true where the defendant's views did not motivate the crime.

Florida,³⁹⁸ in which the court had upheld a judge's taking into account the racial animus that had motivated an offender in deciding whether to sentence him to death. Most important for First Amendment purposes however, is the fact that the decision in *Mitchell* is distinguishable from that in *R.A.V.* because to be convicted under the penalty enhancement statute the accused had to have performed some independently illegal act before the issue of the idea motivating the act became relevant. In *R.A.V.* however, the court was dealing with a statute which criminalised the *expression of an idea itself, even if* that idea did *not* take the form of an illegal act. Although on the particular facts of *R.A.V.* the method chosen to express the idea did happen to take the form of the criminal offence of threat or trespass, a person could still have been convicted under the statute simply for burning a cross on their own lawn. This reveals what is probably the most crucial difference between *Mitchell* and *R.A.V.*, which is that in *Mitchell* the court was dealing with a statute that enhanced the penalty that could be imposed for a crime motivated by an idea, while in *R.A.V.* the statute penalised *the mere expression of the idea itself*.³⁹⁹ One can, therefore, conclude that the decision in *Mitchell* does not derogate from the principle that viewpoint discrimination will not be tolerated under the First Amendment.

2.2.7.2 University speech codes.

Recent years have seen attention focussed on the issue of speech clauses which some Universities have sought to include in their student disciplinary codes. As writers on both sides of the debate acknowledge,⁴⁰⁰ the clash between the competing values of freedom of expression and the right not to suffer emotional harm is particularly acute on campus. Thus one can agree with Woodward that⁴⁰¹

The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.

On the other hand it is argued that free interchange of ideas requires that students be prohibited from causing emotional harm to their fellows, and thus deterring them from participation in University life, and it was in an attempt to prevent the harm that

³⁹⁸463 U.S. 939 (1983).

³⁹⁹See the analysis of *R.A.V.* and *Mitchell* in Sunstein, Cass *Democracy and the Problem of Free Speech* (New York, Free Press, 1993) 180-197.

⁴⁰⁰There is a great deal of literature on freedom of expression in the specific context of the University campus. See for example Lawrence, *supra* n. 55, Delgado, *supra* n. 226, Fleischman, *supra* n. 235, and Fleischer, *supra* n. 68.

⁴⁰¹*The Woodward Report to the Fellows of the Yale Corporation*, quoted in Henthoff, *supra* n. 18 at 115. See also Smolla, *supra* n. 11 at 158.

has been caused by racially-motivated incidents on campus that Universities drafted speech codes which proscribed speech considered to be offensive. In so doing however, the Universities adopted the equality-based approach, the weaknesses of which, and in particular its equation of discriminatory opinions with discriminatory acts, have already been discussed in sections 2.2.3 and 2.2.4 above. The inevitable result was that such codes were declared unconstitutional on grounds of viewpoint discrimination. Thus in *Doe v University of Michigan*⁴⁰² the court invalidated a campus speech code⁴⁰³ which was challenged by a psychology graduate student *inter alia* on the ground that the breadth of the code deterred him from discussing biological differences between races and the sexes and the morality of homosexual conduct, for fear of being considered "sexist" or "racist" and thus being charged under the code.⁴⁰⁴ As Strossen notes in her discussion of the case, the plaintiff felt that a "secular orthodoxy" had been imposed by the University policy.⁴⁰⁵ The court found that terms such as "stigmatizes or victimizes" were undefined and subjective⁴⁰⁶ and that their inherent vagueness meant that they could be used to proscribe speech simply on the ground that it was found to be offensive,⁴⁰⁷ which is obviously contrary to fundamental First Amendment doctrine. The court's fears were indeed justified, as was demonstrated by the history of the application of the policy,⁴⁰⁸ which included a student facing disciplinary proceedings for arguing that homosexuality was a disease that could be psychologically treated.⁴⁰⁹ The court held⁴¹⁰ that it was impermissible for the University to enact an

⁴⁰²721 F. Supp. 852 (E.D. Mich. 1989).

⁴⁰³The relevant part of the code prohibited

Any behaviour, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status and that

(a) Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

(b) Has the purpose or reasonable foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

(c) Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

⁴⁰⁴At 858.

⁴⁰⁵Strossen, *supra* n. 59 at 530.

⁴⁰⁶At 859 and 867.

⁴⁰⁷See also Strossen, *supra* n. 59 at 529 who also notes (writing of the terminology used by campus speech codes) that terms such as "demeaning", "disparaging", "harassing", "hostile", "insulting" *et cetera* are inherently vague and subjective and leave wide leeway for selective application.

⁴⁰⁸See 865- 6.

⁴⁰⁹At 861 and 865.

⁴¹⁰At 863.

..anti-discrimination policy which had the effect of prohibiting certain speech because of the ideas or messages sought to be conveyed

and struck the code down in so far as it regulated expression. The constitutionality of a similar speech code⁴¹¹ issued by the University of Wisconsin, was tested in *UWM Post, Inc. v Board of Regents*.⁴¹² The code was narrower than that promulgated at Michigan in that it applied only to expression directed towards specific individuals and, according to guidelines⁴¹³ promulgated with it by the University, would thus not have applied where a student made derogatory remarks about a racial group to an entire class. However, its application was also potentially wider in that, on the face of it, it prohibited expressive conduct that demeaned "the..*religion*..of [an] individual". Interpreted literally, this would have proscribed the statement "Islam is a bigoted religion" made to a Muslim, which is of course very different from saying "You are a Muslim bigot". Whether this was merely the result of imprecise drafting, or whether the code was indeed intended to prohibit insults directed towards genders, religions and creeds *et cetera* as distinct from insults directed towards individuals *on the basis of* one of the categories, is not clear. However, this issue was not addressed by the court, which decided the case simply on the basis that the code did not fall within the "fighting words" doctrine. This it did firstly by re-affirming that the first leg of the *Chaplinsky* rule, which proscribed what the court in *UWM Post* described as "psychological injury, primarily in the form of emotional upset and injury to the 'sensibilities' of addressees", had become redundant, and that only a narrow class of words likely to provoke violence was proscribed by *Chaplinsky*.⁴¹⁴ Having stated this, the court then examined the Wisconsin code and held that while the type of harm it sought to remedy certainly included situations in which a violent reaction was likely to be provoked, it also included situations in which this was not the case - the words "intimidating" and "demeaning", for example, covered circumstances where the victim was made timid by threats or reduced in dignity or stature through insult and was thus *unlikely* to resort to violence. This finding of overbreadth, while correct

⁴¹¹The relevant part of the code provided that the University could discipline students

For racist or discriminatory comments, epithets or other expressive behaviour directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behaviour or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, ancestry or age of the individual or individuals, and
2. create an intimidating, hostile or demeaning environment for education, university-related work, or other university authorized activity.....

⁴¹²774 F.Supp 1163 (E.D. Wis. 1991).

⁴¹³Reproduced at 1166 of the report.

⁴¹⁴At 1169-71.

in the light of prevailing interpretations of *Chaplinsky*, starkly demonstrates the failure of that doctrine as currently interpreted to remedy emotional harm. Yet even setting aside the narrowness of *Chaplinsky*, it was clear that the breadth of the code was such as to enable it to be used to suppress on the basis of viewpoint. As the court pointed out, the code had been used where a student had not used insulting epithets but was simply conveying a discriminatory idea, as where a white student had told an Asian that he was unwelcome in America.⁴¹⁵ The University speech code cases illustrate once again the impermissibility of viewpoint based restraints on freedom of expression.

2.2.7.3 A narrowly drawn remedy for insults?

Is there then any way in which emotional harm could be remedied without engaging in impermissible viewpoint discrimination? A possible avenue for such a remedy, which has been suggested by some proponents of the egalitarian approach, is the argument that suppression of viewpoint would not occur were the law to prescribe only that expression which consisted of insulting epithets. Words as "nigger", "wop", "kike" *et cetera* convey no "meaning", and thus declaring them to be outside the bounds of protected expression would neither impede truth-seeking nor amount to viewpoint suppression. The same reasoning would arguably also apply to depictions (such as cartoons) which have no effect other than to insult a person rather than to convey a message,⁴¹⁶ although one must concede that it might be more difficult to determine when non-verbal communications were meaningless in the same way epithets are.

Smolla⁴¹⁷ calls such forms of meaningless expression "statements of emotion", which he defines as

...a statement conveying no cognitive message other than the static level of cognition required to use language. What I mean by "language of emotion" is language that requires no more thought than the ability to spell; language that states no fact, offers no opinion, proposes no transaction, attempts no persuasion...⁴¹⁸

⁴¹⁵See 1167 and 1175. The student had stated "It's people like you - that's the reason this country is screwed up..you don't belong here. ...Whites are always getting screwed by minorities and some day the Whites will take over."

⁴¹⁶For a discussion of insulting depictions see Matsuda, *supra* n. 217 at 2320 and 2365-6.

⁴¹⁷Smolla, Rodney "Rethinking First Amendment Assumptions About Racist and Sexist Speech" 47 (1990) *Washington and Lee Law Review* 171 at 183.

⁴¹⁸*Idem*.

Similarly, Greenawalt states⁴¹⁹

[The speaker] does not use words to inform, nor is he really attempting to indicate his feelings. His aim is to wound, and the congruence of what he says with his actual feelings is almost coincidental.

This argument thus differs from that which urges the prohibition of racial epithets on the ground that they communicate an implicit message of inferiority,⁴²⁰ which clearly falls foul of the principle of viewpoint neutrality. Instead it is argued that insulting epithets convey *no* meaning and their prohibition would thus not compromise the Millian values that lie at the heart of the First Amendment. Of course, by classifying such epithets as mere meaningless abuse I do not mean to make the sophistical suggestion that such words lack "meaning" in the literal sense. Quite obviously they do, if only the meaning of intense dislike. The point is, however, that such forms of expression inflict *gratuitous* emotional harm because the same meaning could be conveyed in a less hurtful way. Thus it is incorrect to argue, as Browne does,⁴²¹ that if epithets can be proscribed, then statements not containing such epithets (for example the statement "Black people should not have equal status with whites") but which, like calling someone a "nigger", are also hurtful, could also be proscribed.⁴²² Deciding free speech cases clearly requires that a balance be struck between Millian values and emotional harm. Regulating the form of the message while leaving its substantive meaning intact (which would occur if one defined epithets as meaningless and proscribed them on that basis) would preserve Millian values while penalising the infliction of emotional harm above and beyond that contained in the idea of the message.⁴²³ It is one thing to say that a commitment to Millian values requires that the law should tolerate the emotional harm caused by the statement "Black people should not have equal rights" (which is political speech which the First Amendment must obviously protect⁴²⁴), and quite another to argue that the law must therefore

⁴¹⁹Greenawalt, *supra* n. 69 at 293.

⁴²⁰Delgado, *supra* n. 205 at 135-36 and 146.

⁴²¹Browne, *supra* n. 49 at 534.

⁴²²*Idem*.

⁴²³Thus, as Feinberg (*supra* n. 68 at 86) states of the Skokie example,

Surely if they [the American Nazis] had carried banners emblazoned only with the words "Jews are scum", they could not have been described as advocating a political programme or entering an "opinion" in the "marketplace of ideas". Only some speech acts are acts of advocacy, or assertions of belief; others are pure menacing insult, no less and no more.

See also *ibid.*, at 235.

⁴²⁴Even some proponents of the regulation of discriminatory expression admit that expression may be "political" and "discriminatory" at the same time - see Strauss, *supra* n. 101 at 25.

protect someone who calls another a "nigger".⁴²⁵ The first statement must enjoy protection despite its hurtful effect, because to hold otherwise would be to accept the principle that messages may be suppressed simply because people find them offensive, which would be to sound the death knell of freedom of expression. Proscribing the use of epithets, however, would not have this effect because, as Wright states⁴²⁶

Most instances of the use of racial epithets, even if thought to at least imply some social idea, seem susceptible of reformulation so as to express pungently the speaker's contempt, animosity or resentment without the use of racial epithets.

The argument in favour of denying protection to expression consisting of gratuitous epithets thus relies on a distinction being drawn between form and content.⁴²⁷ Against this however must be set the finding in *Cohen v California*,⁴²⁸ in which the Supreme Court held that the First Amendment protected the right to wear a jacket inscribed with the words "Fuck the draft", on the ground that "one man's vulgarity is another's lyric",⁴²⁹ and that it was a "facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process".⁴³⁰ The court also made the point that the emotive force of expression may add as much to the overall message it seeks to communicate as does the cognitive element, stating⁴³¹

We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

⁴²⁵Browne, *supra* n. 49 at 534.

⁴²⁶Wright, *supra* n. 269 at 19 n. 111.

⁴²⁷This distinction is supported in Feinberg, *supra* n. 69 at 38-40, where the author argues that whereas the offensiveness of opinions, ideas and statements of fact ought never to justify legal prohibition, the offensive *manner* in which expression is couched may do so.

⁴²⁸403 U.S. 15 (1971).

⁴²⁹At 25.

⁴³⁰At 26.

⁴³¹At 25-6. This was also applied by the court in *UWM Post, Inc. v Board of Regents* 774 F.Supp 1163 (E.D. Wis. 1991) at 1175 where it rejected the argument that even if the University speech code had not regulated speech that conveyed ideas, it would still be invalid because it would prohibit speakers communicating their (negative) emotions towards plaintiffs.

This has been adduced by some commentators as a counter-argument to the one that epithets can be proscribed without compromising First Amendment values.⁴³² Thus Greenawalt notes that sometimes it is precisely the emotiveness of the means of communication chosen by the speaker that serves to emphasise his or her disregard for the victim of insulting speech, and that to this extent mere abuse is "meaningful".⁴³³ Against this however one should note that the facts of *Cohen* were that the offensive words ("Fuck the draft") were not directed against any individual or group, and so this precedent is of limited value in relation to liability for insult. Furthermore, while the use of epithets may indeed highlight the speaker's depth of feeling, it needs to be re-emphasised that making mere abuse actionable does not limit expressive rights in relation to fact or opinion - the message, including the strength with which the speaker wishes to convey it, may still be transmitted provided that clearly identified gratuitously insulting speech are avoided. A case which Smolla⁴³⁴ argues supports the form / content distinction is *F.C.C v Pacifica Foundation*,⁴³⁵ in which the U.S. Supreme Court permitted the regulation of indecent speech on the radio. In his concurring judgment, Justice Stevens held that⁴³⁶

A requirement that indecent language be avoided will have its primary effect on the form rather than the content of serious communication...[t]here are few, if any thoughts that cannot be expressed by the use of less offensive language.

Similarly, in *Cantwell v Connecticut*,⁴³⁷ the court held that

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Thus Wright argues⁴³⁸ that the denial of First Amendment protection to epithets raises no danger that any expression other than meaningless abuse will be suppressed, given that the distinction between form and content is not all that difficult to draw.

Confining restrictions on freedom of expression to meaningless abuse eliminates the problem of viewpoint discrimination which, as was argued in preceding sections,

⁴³²See for example Mannheimer, *supra* n. 54 at 1560-2 and the authorities he cites.

⁴³³Greenawalt, *supra* n. 102 at 144-5 and 147.

⁴³⁴Smolla, *supra* n. 417 at 203-04.

⁴³⁵483 U.S. 726 (1978).

⁴³⁶At 743 n. 18.

⁴³⁷310 U.S. 296 (1940).

⁴³⁸Wright, *supra* n. 75 at 16-20.

constitutes the major flaw inherent in the equality-based argument. It is, therefore, ironic that those proponents of the equality-based approach who accept that only epithets should be prohibited take a position which, I would argue, would lead to expression which should be proscribed because of the emotional hurt it causes *escaping* regulation. The reason for this is that the egalitarian approach does not focus on emotional harm in general, but rather on harm caused to certain groups (racial, gendered and ethnic) by discrimination, of which verbal insult is seen as just one manifestation. Thus although the argument that proscription of epithets would not compromise First Amendment rights has been supported by Post,⁴³⁹ Delgado,⁴⁴⁰ Sunstein⁴⁴¹ Greenawalt,⁴⁴² Smolla,⁴⁴³ Yen⁴⁴⁴ and Love,⁴⁴⁵ (either on the basis that such expression falls within the "fighting words" exception,⁴⁴⁶ or should be seen as meeting the "outrageousness" standard of a liberalised tort of intentional infliction of emotional harm⁴⁴⁷), these writers (with the exception of Love⁴⁴⁸ and of Delgado in his latest article written with Yun⁴⁴⁹) all essentially base their argument on the theory that epithets should be proscribed because such expression constitutes an infringement of the equality rights. In consequence, the remedy they advocate would

⁴³⁹Post, *supra* n. 102 at 311 and 315.

⁴⁴⁰See for example Delgado, *supra* n. 226 379-80. The contribution that Delgado has made to debate on this issue is discussed in note 449 below.

⁴⁴¹Sunstein, *supra* n. 399 at 187 and 198-204.

⁴⁴²Greenawalt, *supra* n. 102 at 292-9. See also Greenawalt, *supra* n. 69, at 294 - 300 and 306.

⁴⁴³Smolla, *supra* n. 417 at 182-6 and 198.

⁴⁴⁴Yen, *supra* n. 214 at 606-08.

⁴⁴⁵Love, *supra* n. 215 at 147-51.

⁴⁴⁶Post and Greenawalt justify proscription of epithets in cases meeting the requirements of the "fighting words" doctrine found in *Chaplinsky v New Hampshire*. The deficiencies of this doctrine have already been discussed at 1.4 above.

⁴⁴⁷Yen argues for a lowering of the standard of "outrageousness" so as to bring racial epithets within its limits. Similarly, Love argues that a rebuttable presumption of outrageousness ought to arise where words insulting the plaintiff on the basis of his membership of a class protected by anti-discrimination laws are uttered.

⁴⁴⁸Although Love (*supra* n. 215 at 145-7) points out that the action for intentional infliction of emotional distress is not limited to insults based on race, ethnicity, gender *et cetera*, and is available for any insult deemed sufficiently "outrageous" irrespective of the human characteristic it is aimed at, the thrust of her argument is for the reform of this common law action so as to enable it to be used to remedy discriminatory speech in particular, rather than insulting speech in general (see her conclusion, *ibid.*, at 158-9).

⁴⁴⁹Delgado began by suggesting the creation of a civil remedy for racial insult to remedy the "affront to dignity" such insults cause (Delgado, *supra* n. 205 at 166). However, his argument suffered from the weakness of not dealing with the difficult issue posed by racial insults taking the form of statements containing statements of fact or opinion as opposed to mere epithets. Thus although arguing (*ibid.*, at 177) that his proposed civil action for racial insults would not compromise First Amendment values because "protecting members of racial minorities from injury...is very different from prohibiting espousal of the view that racial discrimination is proper", he did not state whether this meant that his proposed action would be restricted only to insults consisting of epithets. However subsequent writings suggested that the action would indeed be restricted to epithets (see Delgado, Richard "Professor Delgado Replies" 18 (1983) *Harvard Civil Rights - Civil Liberties Law Review* 593) in which case it would not compromise Millian values. In his very latest article (with Yun, *supra* n. 396), Delgado argues that all insulting epithets should be proscribed. This article is discussed in the penultimate paragraph of this section.

apply only where the epithet causing the plaintiff "feelings of humiliation"⁴⁵⁰ and "dignitary affront"⁴⁵¹ (which one would think could arise from any type of insult) related to race, ethnicity or gender,⁴⁵² rather than to human characteristics in general. Thus a fundamental limitation afflicting the equality-based analysis is that because it categorizes the harm caused by an insulting epithet as an act of discrimination, it provides a remedy only in those cases where the insult depends upon the plaintiff and defendant belonging to social groups whose historic interchange is characterised by the existence of an asymmetric power relationship. Such an approach would depend for its application on what I have argued (at 2.2.5 above) is the invidious and unworkable distinction between "dominant" and "subordinate" groups. This also explains why some advocates of this approach would deny any relief to plaintiffs who are members of "dominant" groups and who are insulted on the basis of their group membership.⁴⁵³ Furthermore, such an approach of course offers no protection to those insulted for reasons other than those to do with association with historically oppressed groups. Granted, the evidence from the United States indicates that racially based insult is the type most frequently encountered in a society with a history of slavery,⁴⁵⁴ but that is no reason to leave unremedied harms that are relatively unimportant now but which may assume greater relative importance at other times or in other societies. Furthermore, the emotional hurt suffered where insult targets other characteristics of the plaintiff is not necessarily any less serious than in cases of racist or sexist invective. I would therefore argue that it is invidious to distinguish between different types of insult or to argue that some are more serious than others⁴⁵⁵ - if all cause emotional hurt, ought not all to be remedied? If hate speech doctrine is to have both credibility and durability, it must be developed in a non-selective way. Furthermore, by defining insult solely with reference to categories such as gender, race, ethnicity, religion, and sexual orientation one implicitly denies the harm inherent in insults which may be directed against any one of the myriad other characteristics (for example, disability, political beliefs and socio-

⁴⁵⁰Delgado, supra n. 205 at 137.

⁴⁵¹Ibid., 143.

⁴⁵²Ibid., 167 and 179-80. See also Yen, supra n. 214 at 605-16.

⁴⁵³Lawrence, supra n. 55 at 450 n. 82, Matsuda, supra n. 217 at 2358 and 2361-3.

⁴⁵⁴Yen, supra n. 214 at 604 and 611.

⁴⁵⁵Ibid., 628. Although Yen does state (ibid., at 627 n. 242) that "in theory" a tort action brought under the intentional infliction of emotional harm rubric would be available for insulting epithets other than those directed towards the plaintiff's race, she argues that in practice relief would be unlikely to be obtainable for such insults because, she says, they are not as injurious as racial insults and are thus unlikely to reach the standard of "outrageousness". Despite Yen's argument that differentiating between racial and other insults would not fall foul of the ruling in *R.A.V.*, it is submitted that any approach which labels one type of insult as being "more serious" than others would constitute impermissible content discrimination and would therefore be struck down under the *R.A.V.* rule in a way that a provision that enabled recovery for *all* types of insult would not.

economic class)⁴⁵⁶ that go to make up an individual, some of which may be peculiar to that particular individual. Founding a theory of remedies for insult upon harms to status groups is thus simply not adequate, as it supports the existence of a remedy only in certain categories of case. What is needed is a far broader theory of dignity which gives a remedy to each individual for insult directed towards him or her, a remedy to which he or she is entitled simply by virtue of being an individual, and *irrespective* of what status groups he or she might belong to - which is indeed what classical human rights theories assert. As Cranston states⁴⁵⁷

But human rights do not depend in any way on the station or situation of the individual. This is part of what is meant by saying they are 'rights that pertain to a human merely because he is a human being'.

The harm that an individual suffers in cases of insult should thus be seen as not primarily or even significantly related to considerations of treatment relative to that meted out to other individuals - the person causing the harm may indeed have discriminatory *motives* for his actions, but the harm consists primarily in injuring the self-esteem of the individual plaintiff *qua* individual, and does not depend upon whether the defendant treats the plaintiff better or worse than he does others. In other words, the harm is against an inherent right to dignity, not a relative right to be treated similarly to everyone else. Finally, it is necessary to note that it is unlikely that any measure proscribing only those insults motivated by discriminatory ideas would pass constitutional muster following the decision in *R.A.V.* which, it will be remembered, makes unconstitutional (on grounds of underinclusiveness) hate speech statutes that target only speech motivated by certain viewpoints.⁴⁵⁸

The closest that any American writers have come to suggesting an action for impairment of dignity in general is to be found in the proposal by Delgado and Yun, contained in their recent article on hate speech⁴⁵⁹ in which, addressing the specific issue of campus speech-codes, they suggest that victims should have recourse (either under the "fighting words" doctrine or a significantly reformed common law action for emotional distress) for any insults which impair their ability to function on

⁴⁵⁶A good example of such bias is provided by the speech code of the New York State University at Buffalo, which prescribes "racist, sexist, homophobic and anti-lesbian, ageist and ethnically derogatory statements [and] other remarks based on prejudice and group stereotype" (Hentoff, *supra* n. 18 at 156). Note that the code does not cover insults to individuals *qua* individuals.

⁴⁵⁷Cranston, M. "Human Rights, Real and Supposed" in Raphael, D. D. *Political Theory and the Rights of Man* (London, McMillan, 1967) 43 at 50.

⁴⁵⁸Sunstein, *supra* n. 399 at 199 and 203-4.

⁴⁵⁹Delgado and Yun, *supra* n. 396.

campus, and not just insults that are racially motivated.⁴⁶⁰ This approach would meet the objection raised above that those arguing in favour of hate speech provisions have not sought to protect dignity in its entirety, and would also satisfy the underinclusiveness rule found in *R.A.V.* The problem is, however, that the concept of an action to remedy "mere insult" is foreign to Anglo-American common law, as was shown at 2.2.1 above, and as was most recently demonstrated by the Canadian criminal defamation case of *R v Stevens*⁴⁶¹ where, despite having equated harm to reputation with impairment of dignity,⁴⁶² the court held unconstitutional those parts of s 299(c) of the Canadian Criminal Code that made it an offence to publish the defamatory matter to the person defamed, as this would not harm reputation even though it would impair dignity.⁴⁶³ Similarly, the court also declared severable and invalid that portion of s 298(1) which imposed liability for insult, again stating that while insults impair dignity, they do not harm reputation, and thus have the effect of limiting expressive rights more than is required by a law designed to punish criminal defamation.⁴⁶⁴ The absence of an actionable right to dignity in the common law tradition means that were the courts to try to develop the concept of an actionable insult which could serve as a limit on freedom of expression, they would face considerable difficulty in determining the parameters of that right. How should the law define dignity and what constitutes an impairment of dignity? Would epithets which are insulting in the social sense always also constitute insults in the legal sense of an impairment of the right to dignity, and if not, how would one distinguish between such insults? How would a court weigh freedom of expression against the right to dignity? Answers to these questions must await the discussion of dignity in general in chapter 3 and of its specific application as an actionable right in chapters 4 and 5 below.

⁴⁶⁰*Ibid.*, 886-7.

⁴⁶¹(1993) 82 C.C.C. (3d) 97.

⁴⁶²At 119g - 120a, 121b and 121h.

⁴⁶³144c - 145b.

⁴⁶⁴At 149h - 150c.

2.3 Inequality and obscenity

In light of the failure of the courts to devise a harms-based rationale justifying proscription of sexually explicit material⁴⁶⁵ (see 1.4.5 above), contemporary writers have sought to develop an approach in terms of which such material is seen as constituting an act of gender discrimination and thus an infringement of equality rights. This section explains the equality-based argument and then examines its application by the courts in Canada and its rejection by the courts in the United States. Many of the themes dealt with in the section on hate speech recur in this section because, as we shall see, the equality-based critique of sexually explicit materials relies on the same conceptual foundation as does that relating to hate speech. However, at the risk of some repetition, these themes are addressed again in order to give comprehensive treatment to the issue of sexually explicit material. One more preliminary point: the equality-based rationale that is the subject of my critique is frequently referred to as the "feminist" position. This should not however be taken to mean that all feminists necessarily support the position - as I make clear, many feminists do not, and their arguments will be given due attention. My use of the word "feminist" must therefore be always interpreted with regard to the context in which I place it.

2.3.1 Sexually explicit material as sexist expression.

Among the leading proponents of the equality-based critique are Andrea Dworkin and Catharine MacKinnon. The essential argument they advance⁴⁶⁶ is that the harm of what they term pornography lies in the fact that

It eroticises hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is the central dynamic...Pornography in this view is a form of forced sex, a practice of sexual politics, an institution of gender inequality.....pornography is neither a harmless fantasy nor a corrupt and confused representation of an otherwise natural and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female...Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. Pornography is

⁴⁶⁵The term "sexually explicit material" is used consciously instead of "pornography" which is a constitutionally undefined term which is used in practice to mean whatever category of sexually explicit material the speaker finds objectionable - see Strossen, *supra* n. 188 at 1103-4.

⁴⁶⁶MacKinnon, Catherine A. "Pornography, Civil Rights and Speech" 20 (1985) *Harvard Civil Rights - Civil Liberties Law Review* 1 at 18-20. See also MacKinnon, *supra* n. 160.

not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol either. It is a sexual reality...to defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality.

Because it promotes a particular image of gender relations that is predicated upon sexual inequality, pornography is, according to MacKinnon⁴⁶⁷

..a political practice, a practice of power and powerlessness...Pornography is integral to attitudes of violence and discrimination which define the status and treatment of half the population.

Thus, as Dworkin writes⁴⁶⁸

The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting-down of women, the suppression of women...is what sex is taken to be...Pornography, unlike obscenity, is a discrete, identifiable system of sexual exploitation that hurts women as a class by creating inequality...
(Emphasis in the original).

In similar vein, Brownmiller⁴⁶⁹ states that "Pornography is the undiluted essence of anti-female propaganda", while LaBelle⁴⁷⁰ identifies the harm created by such material as the creation of stereotypes about women in the minds of its consumers. Thus under this critique, sexually explicit material is rejected not simply because it is sexually explicit (which is the ground upon which the moralist-conservative camp and indeed the Supreme Court in *Miller* rejected it), but rather because it amounts to sexist ideology which serves to buttress male domination. In other words, pornography is about power and only incidentally about sex.⁴⁷¹ A further example of

⁴⁶⁷Ibid., 21-2. See also MacKinnon "Pornography as Defamation and Discrimination" 71 (1991) *Boston University Law Review* 793

⁴⁶⁸Andrea Dworkin "Against the Male Flood: Censorship, Pornography, and Equality" 8 (1985) *Harvard Women's Law Journal* 1 at 9.

⁴⁶⁹Brownmiller, Susan *Against Our Will: Men, Women and Rape* (New York, Simon and Schuster, 1975) 394.

⁴⁷⁰LaBelle, Beverly "The Propaganda of Misogyny" in Lederer L. (ed) *Take Back the Night: Women on Pornography* (New York, William Morrow, 1980) 174 at 174-5.

⁴⁷¹Downs, supra n. 286 at 36. See also Dworkin, Andrea *Pornography: Men Possessing Women* (London, Women's Press, 1981) Ch 1.

the thinking underlying this position is provided by the policy statement of the UK's Campaign against Pornography and Censorship (CPC) which states⁴⁷²

We believe that the portrayal of women as sex objects (in pin-ups, car and other advertisements, 'Miss World Competitions', page three) is one of the most powerful and visible expressions of the negative attitudes of sexism and is central to the sex objectification, and therefore dehumanisation and degradation, of women. We believe that pornography is the most extreme portrayal of women as less than human and less than equal. We believe that pornography reinforces women's unequal status by presenting them only as sexual and 'sexualised' objects for men's titillation and gratification and perpetuates their unequal status...

Given that the feminist objection to sexually explicit material centres on the sexist ideology that it is alleged to promote, it goes without saying that the equality-based approach is not viewpoint neutral - the "harm" that this approach points to as justifying denial of First Amendment protection to sexually explicit material is the fact that such material works an attitudinal change in its consumers in relation to how they think about women. As Delgado and Stefancic state⁴⁷³

..for many feminists, pornography is a per se harm, namely that of being derogatorily constructed as passive, hypersexual, masochistic, a sexual plaything, and so on.

Yet, just as in the case of hate speech, the same argument against viewpoint discrimination can be made in respect of sexually explicit material. Thus if, as Moorcock states,⁴⁷⁴ pornography "plays a central role in the persistent repression of women as a class", and ought therefore to be proscribed, should capitalist tracts also be banned because their persuasive effect means that they play a central role in the repression of the proletariat as a class? Surely if literary material could be proscribed on the basis of the response it *might* elicit in its readers, then the law would have to proscribe all works describing ideologies which, if they were accepted, would lead to harm to others? Thus if pornography has a negative impact on "..culture, cultural

⁴⁷²CPC policy statement quoted in Easton, Susan M. *The problem of pornography - Regulation and the right to free speech* (London, Routledge, 1994) at 72.

⁴⁷³Richard Delgado and Jean Stefancic "Pornography and harm to women: 'No empirical evidence ?'" 53 (1992) *Ohio State Law Journal* 1037 at 1048.

⁴⁷⁴Moorcock, Michael "Working in the Ministry of Truth: Pornography and Censorship in Contemporary Britain" in Itzin, C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) 536 at 551.

discourse and ideology (on ideas and the imagination), in conditioning attitudes [and] beliefs..."⁴⁷⁵ should other ideas that have such negative impacts also be proscribed, and how will it be decided (and by whom) which ideas are "bad" and which are "good"? This illustrates the dangers of what Wilson, writing from a feminist but anti-censorship perspective, refers to as the "secular fundamentalism" of the feminist anti-pornography movement.⁴⁷⁶ As Gey states,⁴⁷⁷ MacKinnon

..embrace[s] with relish the notion that the state should rigorously control the attitude-shifting effects of pornography. The MacKinnon view reduces all expression to its explicit or implied position on one issue - the subjugation of women. If the expression carries the wrong message on this issue, then the expression may be properly suppressed.

Of course, as has frequently been re-iterated by the courts, the essence of viewpoint neutrality is that ideas may not be regulated simply because it is thought they may have adverse social consequences. In *Kingsley International Pictures Corp. v Regents*,⁴⁷⁸ for example, the Supreme Court struck down a New York state decision to deny a licence for the showing of a film version of D H Lawrence's *Lady Chatterley's Lover*. The licence had been denied on the ground that the film portrayed adultery (which was then still illegal under New York law) in a favourable light, and thus arguably advocated it. The Supreme Court held⁴⁷⁹ that New York had denied the licence

..because the picture advocates an idea - that adultery under certain circumstances may be proper behaviour. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has struck at the very heart of constitutionally protected liberty. Advocacy of conduct proscribed by law is not...'a justification for denying free speech where advocacy falls short of incitement'.

Certainly the evils produced by adultery - break up of marriages, dysfunctional families, adolescent crime *et cetera* cannot be denied, but is this any reason to

⁴⁷⁵Itzin, C. "Pornography and Civil Liberties: Freedom, Harm and Human Rights" in Itzin C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) 553 at 559.

⁴⁷⁶Wilson, Elizabeth "Feminist Fundamentalism" in Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate* (London, Virago, 1992) 15 at 27.

⁴⁷⁷Gey, Steven "The Apologetics of Suppression: The Regulation of Pornography as Act and Idea" 86 (1988) *Michigan Law Review* 1564 at 1604.

⁴⁷⁸360 U.S. 684 (1959).

⁴⁷⁹At 688.

prohibit the idea? Clearly if the First Amendment protects expression advocating conduct (provided that advocacy does not become incitement) it must, as Weinstein states, surely protect the making of discriminatory or hateful statements about groups falling short even of advocacy of discrimination or harm against them.⁴⁸⁰ As King states⁴⁸¹

Do we really want a censor board...deciding what we cannot see? If the question becomes whether a film condones or normalizes an action, where does censorship stop? By the same logic *Reds* should be banned for condoning or normalizing communism and *Terms of Endearment* for condoning or normalizing extramarital sex.

Furthermore, if ideas themselves were to become proscribable then, as Magnet writes with reference to the hate provisions of the Canadian Criminal Code, this would necessarily lead to⁴⁸²

...creation of official dogmas. We could establish that in Canadian society, as official dogma, Jews are not over-represented in universities. As official dogma, we could proclaim that men and women are equal. These propositions cannot be questioned in any context on pain of jail, whether or not true. The problem with this alternative is that dogma is the antithesis of a free society.

Thus although the argument for regulation put forward by feminists claims to be harms-related and therefore to represent an advance on the moralistic approach embodied in *Miller*, in fact it turns out to be just as values-dependant as the conventional obscenity doctrine; the only difference between the approaches being that instead of elevating the idea of sexual morality to a position of pre-eminence, the feminist position chooses to privilege a political idea, namely equality. Finally in this regard, it needs to be emphasised that censorship of material simply on the basis that it promotes harmful attitudes violates what Wirenius calls the obligation of a democratic state to "presume the ability of its citizens to make rational choices".⁴⁸³ By presuming the contrary, that citizens are unable to make their own value judgments of the message inherent in sexually explicit and other materials, censorship

⁴⁸⁰Weinstein, *supra* n. 102 at 192.

⁴⁸¹King, *supra* n. 313 at 81-2.

⁴⁸²Magnet, Joseph "Hate Propaganda in Canada" in Waluchow, W. J. *Free Expression* (Oxford, Clarendon Press, 1994) 223 at 246.

⁴⁸³Wirenius, *supra* n. 199 at 60-1 and 67.

is, as Wirenius states, "extraordinarily degrading"⁴⁸⁴ because it essentially reduces the citizen to the status of an infant.

2.3.2 Other content-based objections to sexually explicit material.

Before leaving the issue of viewpoint discrimination, it is necessary to examine four other arguments advanced by those who advocate censorship of sexually explicit material on the basis of its content.

The first is that sexually explicit materials ought to be regulated on the ground that they constitute a "lie" and are "defamatory and libellous",⁴⁸⁵ because they depict women as sexual objects and, in some instances, as enjoying being dominated. Several problems arise from the equation of sexually explicit materials with defamation. As Feinberg points out, to say that pornography defames women because it depicts them in subordinate roles suggests firstly that even some soap powder commercials or romantic novels are "defamatory", and secondly that by portraying one member of a class in a subordinate role even if in a work of fiction (Feinberg adduces the example of Shylock as being representative of Jews) one defames that class.⁴⁸⁶ Furthermore, even accepting the criticism that sexually explicit materials focus exclusively on the sexual characteristics of women and thus convey a distorted image of them,⁴⁸⁷ this does not constitute sufficient grounds for proscribing such material, any more than would be the case in respect of a work of fiction that contained *no* reference to the sexuality of their characters and was therefore also "unrealistic" or "false".⁴⁸⁸ So far as the issue of depicting women in situations of dominance and subordination are concerned, Diamond argues that consensual domination is enjoyed in the context of both male and female sexuality, heterosexual and homosexual.⁴⁸⁹ Such activities may go from mock coercion - pretended force and pretended resistance to ultimately consensual intercourse⁴⁹⁰ best exemplified by rape

⁴⁸⁴Ibid., 72.

⁴⁸⁵See Longino, Helen "Pornography, Oppression and Freedom: A Closer Look" in Lederer L. (ed) *Take Back the Night: Women on Pornography* (New York, William Morrow, 1980) 40 at 45-8 and 53, and Easton, supra n. 472 at 73-4.

⁴⁸⁶Feinberg, supra n. 68 at 148-9.

⁴⁸⁷Weaver, James "The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography" in Itzin, C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) 284 at 286-7. See also Hill, Judith M. "Pornography and Degradation" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 62 at 72.

⁴⁸⁸Christensen, F. M. *Pornography - The Other Side* (New York, Praeger, 1990) 31-2 and 43.

⁴⁸⁹Duggan, Lisa, Hunter, Nan and Vance, Carole S. "False Promises: Feminist Antipornography Legislation in the U.S." in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 130 at 137, 139, and 145.

⁴⁹⁰Christensen, supra n. 488 at 65-6.

fantasies found in romance novels⁴⁹¹ on the one hand, to consensual sado-masochism on the other. Given the reality of such sexual practices, is there any reason why they should not be depicted? Indeed if one were to accept the position that they may *not* be depicted, it would be difficult to resist the argument that the *activities themselves* ought to be outlawed. In other words, it seems that the feminist critique of sexually explicit materials has implications far beyond the issue of freedom of expression and in fact raises questions of sexual autonomy. This issue is further addressed in chapter 6 below.

The second variant of the anti-discrimination argument is that presented by Forna,⁴⁹² which is that censorship of race hatred provides a model for censorship of pornography on the basis that the latter constitutes the incitement of hatred against women. Similarly, Itzin⁴⁹³ and Easton⁴⁹⁴ argue that pornography should be punishable as "incitement to sexual hatred" in the same way as incitement to racial hatred is penalised by s 18 of the United Kingdom's Public Order Act 1986.⁴⁹⁵ Yet as is stated by Rodgerson and Wilson (writing from an anti-censorship feminist perspective) it would be difficult to secure prosecutions under a hatred statute given that most men who consume pornography would claim to be attracted to women.⁴⁹⁶ Furthermore, in view of the broad definition of pornography adopted by the United Kingdom's CPC and the MacKinnon-Dworkin school in the United States, the incitement to sexual hatred argument reinforces the impression that supporters of the position see the very act of heterosexual intercourse as inherently oppressive of women.⁴⁹⁷ Even supporters of the idea are cautious, fearing that such legislation

⁴⁹¹Ibid., 66-7. See also Strossen, *supra* n. 188 at 1130, Wilson, *supra* n. 476 at 17-18, Cowie, Elizabeth "Pornography and Fantasy - Psychoanalytic perspectives" in Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate* (London, Virago, 1992) 132 at 141-3 and Segal, Lynne "Sweet sorrows, painful pleasures" in Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate* (London, Virago, 1992) 65 at 71. As is stated by Dority, Barbara "Feminist Moralism, 'Pornography' and Censorship" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 111 at 115

It is not a crime or an issue subject to moral judgment to fantasize about rape, or even for two consenting adults to choose to enact a pretend rape.

⁴⁹²Forna, Aminatta "Pornography and Racism: Sexualizing Oppression and Inciting Hatred" in Itzin, C. (ed.) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) at 106-12.

⁴⁹³Itzin, C. "Legislating Against Pornography without Censorship" in Itzin C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) 401 at 422-3.

⁴⁹⁴Easton, *supra* n. 472 at 166-74.

⁴⁹⁵Discussed *supra* n. 316.

⁴⁹⁶Rodgerson, Gillian and Wilson, Elizabeth (eds) *Pornography and Feminism - The Case Against Censorship* (London, Lawrence & Wishart, 1991) 63.

⁴⁹⁷Thus Dworkin sees the sex act as an act of male domination, in terms of which the female is possessed by the male (Dworkin, Andrea *Intercourse* (London, Secker & Warburg, 1987) 63).

might, for example, be used by men against publishers of a feminist journal that was critical of men, on the grounds that such a publication incited gender hatred.⁴⁹⁸

The third argument is that presented by Sunstein,⁴⁹⁹ who advances the theory that different types of expression merit differing degrees of constitutional protection, and that because sexually explicit materials should be classified as "low value" speech, their level of First Amendment protection ought therefore to be reduced. Whether speech is of "high" or "low" value depends, according to Sunstein, on four factors: the degree to which it is connected with public affairs (protection of engagement in which is seen as the chief objective of the First Amendment), the degree to which it is cognitive, the degree to which the speaker intends to convey a message; and finally the likelihood that, given the nature of the speech, the state is likely to be acting from impermissible motives in seeking to proscribe it.⁵⁰⁰ But can one classify sexually explicit material as being low value? Why should sexual arousal not receive high value classification? As Sunstein himself admits, the purpose of freedom of expression is not only the conveyance of ideas but also the achievement of self-realization.⁵⁰¹ Thus consumption of sexually explicit material can be justified not only on the basis of the need to uphold viewpoint neutrality where such material contains a "message", but also on the basis of a more general right to autonomy (discussed at 3.2 and 3.5.3 below), in terms of which individual moral choice should be left unfettered and conduct should be regulated only where it causes harm to others. The application of this general principle to the specific area of sexual autonomy is the basis upon which Ronald Dworkin founds his defence of the right to

Similarly, MacKinnon, Catherine A. *Toward a Feminist Theory of the State* (Cambridge, Harvard University Press, 1989) 173-4 states

The point of defining rape as "violence not sex" has been to claim an ungendered and nonsexual ground for affirming sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference....Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.

For a discussion of this point, see Meyer, Carlin "Sex, Sin, and Women's Liberation: Against Porn-Suppression" 72 (1994) *Texas Law Review* 1097 at 1127-9 and 1150-2, where the author notes that the feminist view of sexuality parallels Victorian attitudes towards sex, in terms of which women were seen as the objects rather than the agents of sexual pleasure, and the act of intercourse as something in which no woman would voluntarily choose to participate.

⁴⁹⁸Easton, *supra* n. 472 at 168.

⁴⁹⁹Sunstein, *supra* n. 270. "

⁵⁰⁰*Ibid.*, 603-04.

⁵⁰¹*Ibid.*, 605.

consume pornography.⁵⁰² This broader view of expression as simply an aspect of autonomy is also reflected in the statement by Redish that⁵⁰³

Once one recognizes that the primary value of free speech is as a means of fostering individual development and aiding the making of life-affecting decisions, the inappropriateness of distinguishing between the value of different types of speech becomes clear.

Thus if a person chooses to develop their sexuality through the consumption of material, that in itself suffices to give the material value. Indeed, the importance of sexuality to human expression, and the fact that it lies so close to the core of the individual's personality, suggests that sex-related expression should receive heightened rather than diminished protection. The "high value" - "low value" distinction is considerably weakened if one accepts that freedom of expression exists to serve human autonomy.

The discussion of autonomy in the preceding paragraph leads to the final argument that needs to be addressed, which is essentially a feminist counter-argument to the traditional view of autonomy. According to this argument, women's autonomy is *compromised* by sexually explicit material because of the perception it creates of women as sex objects, and this limiting of women's autonomy constitutes sufficient harm to justify prohibition of such material.⁵⁰⁴ In answer to this one can make the point that the scope for restriction of autonomy would be virtually limitless were "harm" to be defined as simply the inspiration by A of a "negative ideas and images"⁵⁰⁵ in the mind of B (assuming of course the truth of the feminist categorisation of sex objectification as "negative")⁵⁰⁶ towards C. The position would, of course, be different where the negative attitude takes the form of incitement to a harmful *act*⁵⁰⁷ (this is addressed in Chapter 6 below), but where A's expression simply alters B's *opinions* of C without more, it would be to strain the concepts of

⁵⁰²Dworkin, Ronald "Do We Have a Right to Pornography ?" in *A Matter of Principle* (Cambridge, Harvard University Press, 1985) 335 at 353-9 and 364.

⁵⁰³Redish, M. "The Value of Free Speech" 130 (1982) *University of Pennsylvania Law Review* 591 at 625.

⁵⁰⁴Easton, *supra* n. 472 at 42-3 and 48.

⁵⁰⁵*Idem*.

⁵⁰⁶It was precisely because the feminist position required the acceptance of an "approved view of women" that the Indianapolis ordinance, which was based on that position, was declared unconstitutional. The issue of "objectification" is addressed at 2.3.3 below, where it is argued that sexual objectification is inherent in sexual conduct by both genders and cannot itself be considered unlawful.

⁵⁰⁷Smolla, *supra* n. 11 at 31, emphasises the crucial difference between punishing speech which incites harmful action and punishing that which has no connection with action but is simply deemed offensive in itself.

both "harm" and "autonomy" to say that C's autonomy has thereby been compromised. Individuals surely have the right to hold whatever opinion of each other they choose, no matter how inaccurate such opinions may be. It surely cannot be consistent with freedom of expression for the law to penalise the cultivation of, or belief in, false opinions *per se*.

2.3.3 The equality-based approach and the conflation of speech and action.

There is more to the equality-based critique of sexually explicit materials than the allegation that such materials express the ideology of sexism. As in the case of the equality-based analysis of racist expression, the argument relating to sexually explicit materials takes the further important step of arguing that sexist expression is *itself an act of discrimination*, and that therefore its suppression is justified on Fourteenth Amendment grounds. This is well exemplified by MacKinnon who states⁵⁰⁸

...when a man looks at a pornographic picture - pornographic meaning that the woman is defined to be acted upon, a sexual object, a sexual thing - *the viewing is an act, an act of male supremacy.*

(Emphasis added).

Two aspects of this statement merit comment. Firstly, as Christensen points out in his insightful examination of human sexuality,⁵⁰⁹ "objectification", in the sense of focussing on and valuing the physical attributes of a person as depicted in a sexually explicit image, means neither that because the depiction is an object the viewer considers the person depicted therein to be an object (if that were so, then keeping a photograph of a loved one would be to "objectify" them), nor that being attracted to someone's body dehumanizes them, given that having a body is as much a part of humanity as having an intellect or personality. Furthermore, as feminist opponents of censorship point out, "objectification" in the sense of focussing primarily upon the sexual desirability of another person "occurs in the fantasies of lovers (both male and female) who treat one another as autonomous and equal".⁵¹⁰ More importantly however, MacKinnon's quotation reveals what Downs calls the "absolute conflation of speech and action"⁵¹¹ which suggests that "...images of sex are the same as real sex, and that the images themselves are responsible for women's subordination",⁵¹² so that

⁵⁰⁸MacKinnon, Catherine A. *Feminism Unmodified: Discourses on life and law* (Cambridge, Harvard University Press, 1987) 130.

⁵⁰⁹Christensen, *supra* n. 488 at 27-8.

⁵¹⁰Rodgers and Wilson, *supra* n. 496 at 54.

⁵¹¹Downs, *supra* n. 286 at 47 and 155.

⁵¹²Diamond, Sara "Pornography: Image and Reality" in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 40 at 41.

merely viewing pornography is *itself* an act of gender discrimination⁵¹³ because it inspires discriminatory attitudes in the consumer⁵¹⁴ - as MacKinnon and Dworkin state

...pornography is therefore not fantasy or simulation or catharsis but sexual reality...Pornography *participates* in it's audience's eroticism through creating an accessible sex object, the possession and consumption of which *is* male sexuality, as socially constructed; to be consumed and possessed as which *is* female sexuality, as socially constructed...It is not that life and art imitate each other, in this sexuality, they *are* each other.

(Emphasis in original).

Similarly they state "pornography *is* what pornography *does*".⁵¹⁵ One must therefore reject as inconsistent with her own expressed views MacKinnon's argument⁵¹⁶ that

The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, which is a political idea, doesn't make the pornography itself into a political idea. One can express the idea a practice embodies. That does not make the practice into an idea. Segregation expresses the idea of the inferiority of one group to another on the basis of race. That does not make segregation an idea. A sign that says "Whites Only" is only words. Is it therefore protected by the first amendment? Is it not an act, a practice, of segregation because of the inseparability of what it means from what it does?

This very analogy of sign restricting entry to a public place to whites only, first used by Lawrence, has already been addressed at 2.2.3 above, where it was noted that the harm inherent in the sign is not the fact that it reflects a negative idea towards non-whites, but rather that it denies them entry to a facility. The feminist position on sexually explicit material however is that the "harm" caused by such material resides in the fact that it embodies sexist ideas. Although, as will be shown later, many feminists claim that such ideas manifest themselves in the form of anti-social behaviour (a claim which is itself challenged at 6.2 below), it is crucial to the understanding of the feminist position and my critique thereof to recognise that its proponents see the propagation of sexist ideas as sufficient justification for the

⁵¹³Easton, supra n. 472 at 118.

⁵¹⁴Downs, supra n. 286 at 39 and 42.

⁵¹⁵Dworkin, Andrea and MacKinnon, Catharine *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis, Organizing Against Pornography, 1988) 38.

⁵¹⁶MacKinnon, supra n. 466 at 65.

suppression of sexually explicit material *even in the absence of* such ideas leading to anti-social conduct. Indeed, the MacKinnon-Dworkin doctrine is reminiscent of the medieval *versari* doctrine of criminal law, in terms of which one could be liable for unlawful acts even in the absence of *mens rea*.⁵¹⁷ The feminist position is essentially *versari* in reverse, in that it seeks to punish thoughts (one cannot even put it as high as intent) in the absence of *actus reus*. This is revealed by the fact that MacKinnon urges censorship despite admitting that⁵¹⁸

Courts and commissions and legislatures and researchers have searched largely in vain for the injury of pornography in.....'society', or in empirical correlations between variations in levels of 'anti-social' acts and liberalization in obscenity laws.

Contrary to this, I argue that whereas *acts* of discrimination are proscribable, the *idea* of discrimination (or communism, or capitalism or socialism, ideas which may or may not be pernicious in varying degree) cannot be proscribed in a society that pretends to uphold freedom of expression. What the equality-based critique tries to do is transform idea into act and, conversely, also to elevate the idea of equality to a status of privilege above other ideas, to the extent that advocating anti-egalitarian ideas (be they related either to race or gender)⁵¹⁹ is *itself* an act of discrimination.

Finally, it is interesting to examine Mill's critique of attitudinal regulation. As he stated it,⁵²⁰ punishing attitudes is to erase the distinction between moral failings which, if not manifested in actions that are harmful to others, ought not to be punished; and harmful acts, for which the individual may be punished, not because of their *internal* origin (the moral failing) but because of the *external* consequence of harm to others. Of course, all human conduct, even that which consists simply of the propagation of "immoral" ideas rather than the performance of acts that cause direct injury or loss to others, has social consequences in that it has the potential to change individual attitudes. Thus the key issue is whether the propagation of ideas which foment anti-social attitudes should be considered only to be moral failings (which should not be subject to regulation) or as acts amounting to harm (which could be regulated). Mill himself was of the former opinion, and criticised the dangers inherent in what he (Mill) referred to as "social rights" (that is, the purported right not

⁵¹⁷For a discussion of the doctrine see Burchell, E. M. and Hunt, P. M. A. *South African Criminal Law and Procedure -- Volume 1, General Principles of Criminal Law* (E. M. Burchell, J. R. L. Milton and J. M. Burchell (eds), Cape Town, Juta, 1983) 127-30.

⁵¹⁸MacKinnon, Catherine A. "Not a Moral Issue" 2 (1984) *Yale Law and Policy Review* 321 at 339.

⁵¹⁹Easton, *supra* n. 472 at 154, applies the argument to both pornography and hate speech.

⁵²⁰Mill, *supra* n. 13 at 96.

to have society influenced in anti-social ways). This is well illustrated by Mill's criticism of temperance campaigners, who argued that the social dislocation caused by alcohol constituted an impairment of these "social rights":⁵²¹

[The] theory of 'social rights' [is]...that it is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal thereof. So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify; it acknowledges no right to freedom whatever, except perhaps that of holding opinions in secret, without ever disclosing them: for, the moment an opinion which I consider obnoxious passes any one's lips, it invades all the 'social rights' attributed to me...The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard.

2.3.4 Substantive equality, silencing and censorship

As in the case of hate speech, the substantive equality approach has been adopted by those advancing the feminist position on sexually explicit materials. The importance of the distinction between formal and substantive equality to this argument is demonstrated by the following statement by Horton⁵²²

Dominance theorists, who recognise differences between the sexes and attribute those differences to women's traditionally inferior social status, have launched a powerful critique of the equality principle as the point of departure in sex discrimination analysis. These scholars point out that the equality view confuses formal with substantive equality, and ignores the social consequences of sex-linked traits and experiences.

Consistent with its endorsement of anti-discrimination provisions, including affirmative action, the feminist position advocates the suppression of the discriminatory message inherent in pornography - a policy MacKinnon terms "progressive censorship"⁵²³ following Herbert Marcuse's theory that dominant conservative or reactionary ideas ought to be censored so that "progressive" views

⁵²¹Ibid., 104.

⁵²²Horton, *supra* n. 290 at 449.

⁵²³MacKinnon, *supra* n. 466 at 4-5.

will be heard.⁵²⁴ Similarly, Sunstein argues that the disparity of access to the marketplace that the pornography industry enjoys because of its financial power merits its restriction on grounds of substantive equality,⁵²⁵ while Easton argues⁵²⁶ that

In a non-hierarchical society, it might be possible for the First Amendment to protect all forms of speech. But as society is presently constituted, it may be that a breathing space or interim period is necessary where restraints are imposed temporarily to encourage the expression of alternative views.

The problem with this approach of course is, as was explained at 2.2.5 above, that hierarchical relationships are inevitable in any society, and thus apart from the hideously complicated process of ranking of social groups that the courts would be called upon to perform, it is unlikely that restraints would be as temporary as Easton would have one believe. Furthermore, the redistributivist view of freedom of expression implies that society can hear only a certain amount of expression and that the opportunity to express must therefore be rationed by the state,⁵²⁷ an approach which not only incorrectly treats society's capacity to pay attention as if it were a limited tangible resource,⁵²⁸ but which also raises the spectre of a command economy of ideas. Finally, a perhaps unintentionally revealing insight is given into the substantive equality position by Easton when she writes⁵²⁹

But the expansion of the pornography market has paralleled the increase in feminist writings, and the latter seem to have had no dampening effect on demand. Even if women have greater access to the means of dissemination, they are unlikely to persuade those engaged in consumption.

This statement would seem to contradict her assertion that pornography prevents women's voices being heard and, more disturbingly, to suggest that failure to achieve success through persuasion is a justification for censorship.

⁵²⁴Marcuse, H. "Repressive Tolerance" in Wolff, R., Moore, B. and Marcuse, H. *A Critique of Pure Tolerance* (Boston, Beacon Press, 1965).

⁵²⁵Sunstein, supra n. 270 at 618-24.

⁵²⁶Easton, supra n. 472 at 108.

⁵²⁷Thus Easton states (ibid., 108) "The pornographers' free speech means in reality the loss of speech for others".

⁵²⁸This calls to mind the anecdote about Emperor Joseph II who, after hearing Mozart's *Abduction from the Seraglio* is alleged to have said that it had "too many notes" and could therefore not be absorbed in its entirety by the listener ! See *Amadeus* (Orion Pictures, 1984), and Braunbehrens, Volkmar *Mozart in Vienna* (Bell transl) (New York, Grove Wiedenfled, 1989). (In the latter the Emperor is reported as having said "an awful lot of notes".)

⁵²⁹Easton, supra n. 472 at 116.

The problem with the argument based on equality, in both its anti-hate speech and anti-pornography forms, is that it ultimately urges judicially created equality of outcomes between competing ideologies, which is surely the role of the political process and not of the courts in a free society. As explained by Balkin⁵³⁰ supporters of this school of thought believe that the relative distribution of power in society ought to be taken into account in deciding free speech cases. Of course, this would necessitate the state imposing a set of values on the citizenry, and abandonment of the fundamental liberal belief in⁵³¹

...an essentially non-preferential attitude of fairness towards competing groups, all of whom want to instil their values in the hearts and minds of others.

As Wirenius states, MacKinnon's theories of censorship would lead to⁵³²

...a state with the authority to regulate every component of the individual's life, from the forms of sexual intimacy they may conduct, to the attitudes they are to have. The state's role in promulgating a sexual orthodoxy and in suppressing any and all dissenting views is a stringently maternalistic one....For MacKinnon...the state acts legitimately in fostering attitudes beneficent to equality among citizens and in suppressing actions and attitudes that deny or interfere with an egalitarian sense of community...

Finally, even taking a pragmatic point of view, it is difficult to understand how the interests of those who allege that freedom of expression serves a malicious dominant ideology can be served by giving to authority the power to censor speech. This is reflected by those writing from a feminist and anti-censorship position, who argue that censorship is inimical to feminist interests.⁵³³ As Downs points out,⁵³⁴ even some anti-pornography feminists opposed the Indianapolis anti-pornography ordinance (discussed at 2.3.7 below) because of the risk that once enacted, measures that discriminated between viewpoints might be used against feminists themselves.⁵³⁵

⁵³⁰Balkin, J. M. "Some Realism about Pluralism: Legal Realist Approaches to the First Amendment" 1990 *Duke Law Journal* 375 at 379.

⁵³¹*Ibid.*, 382.

⁵³²Wirenius, *supra* n. 199 at 51-2. For a response to Wirenius see Higgins, "Giving Women the Benefit of Equality: A Response to Wirenius" 20 (1993) *Fordham Urban Law Journal* 77.

⁵³³For the latest and most comprehensive articulation of this view see Strossen, *supra* n. 188.

⁵³⁴Downs, *supra* n. 286 at 151.

⁵³⁵See also King, *supra* n. 313 at 79, and also at 83 where she states

Thus Gey⁵³⁶ predicts that censorship of the type advocated by MacKinnon and Dworkin will simply perpetuate the role of state and judiciary as father-figure, which is hardly in the interests of feminism. Other feminists oppose censorship because, having correctly distinguished between fantasy and reality,⁵³⁷ they see in censorship the possibility of female sexual fantasy, some of which depicts relationships with dominant males or females, being proscribed.⁵³⁸ This body of opinion argues that some sexually explicit materials are positive from a feminist point of view because they depict women expressing and enjoying their sexuality in contexts of autonomy not necessarily tied to domesticity or reproduction.⁵³⁹ Indeed, such materials are often useful to both men and women in the development of their sexuality.⁵⁴⁰ Supporters of this perspective frequently adopt what might be called the "more speech is a remedy for bad speech" argument, and urge the production of material which depicts sexual explicitness from a feminist perspective, rather than the banning of that which does not.⁵⁴¹ As Strossen points out, the most likely victims of censorship powers wielded by the authorities are those who produce sexually explicit material dealing with unpopular aspects of sexuality, including feminism and homosexuality,⁵⁴² which explains the enthusiasm with which anti-pornography religious groups, who otherwise share no common interest with feminists (who they perceive as being hostile to traditional family values), have allied themselves with pro-censorship feminists.⁵⁴³ Finally, as Strossen argues, presumably pro-censorship feminists who have viewed pornography have done so while managing to retain their respect for women's equality, and it is therefore patronising for them to assume that others cannot be exposed to such material without having their attitudes changed.⁵⁴⁴

2.3.5 Canadian experience before the Charter

The equality-based approach to sexually explicit material has been favourably received by the courts in Canada. This section and the next examine relevant

Once a law or regulation is on the books, it is the personnel of the state - its bureaucrats, its judiciary - who enforce it. Feminists may think a law looks good as written and may be assured repeatedly that it will be used to stamp out misogynist pornography and nothing else. But feminists do not control the censors who demand the cuts, feminists do not control the attorney-general or the police who initiate the prosecution...

See also Strossen, *supra* n. 188 at 1143-7.

⁵³⁶Gey, *supra* n. 477 at 1610-11.

⁵³⁷See also Diamond, *supra* n. 512 at 50-1.

⁵³⁸Kostach, Myrna "Second Thoughts" in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 32 at 36-7.

⁵³⁹Strossen, *supra* n. 188 at 1132-4 and 1145-7.

⁵⁴⁰*Ibid.*, 1131 and 1163-4.

⁵⁴¹See Rodgeron and Wilson, *supra* n. 496 at 14-15.

⁵⁴²Strossen, *supra* n. 188 at 1119-20.

⁵⁴³*Ibid.*, 1164-6.

⁵⁴⁴*Ibid.*, 1130.

Canadian case law arising both prior to and after the enactment of the Canadian Charter of Rights and Freedoms.

Until the mid 1980's, the approach of the Canadian courts to the issue of obscenity to a large extent paralleled that adopted in the United States, but in a line of decisions starting with *R v Wagner*,⁵⁴⁵ and culminating in *R v Butler*,⁵⁴⁶ the Supreme Court of Canada adopted a distinctive approach in terms of which pornography was seen as an act of discrimination.

As in the United States, early Canadian decisions imported the English definition of obscenity found in *R v Hicklin*.⁵⁴⁷ This test was superseded⁵⁴⁸ by a statutory definition of obscenity in 1959, when s 159 (now s 163) was added to the Criminal Code. Section 163(1)(a) provides that an offence is committed by anyone who

...makes, prints, publishes, distributes, circulates or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever.

"Obscenity" is defined in s 163(8) as follows:

For the purposes of this Act, a publication the dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

Clearly much turned on what meaning is given to the term "undue exploitation", and in *R v Dominion News and Gifts (1962) Ltd*⁵⁴⁹ the Canadian Supreme Court, like its counterpart in the United States,⁵⁵⁰ adopted a "community standards" test of "undueness". This test was less than satisfactory. Quite apart from the evidentiary problems associated with determining what the average member of the community believed, it was open to manipulation by sellers of sexually explicit material who would flood the market with such material and point to its consequent ready

⁵⁴⁵(1985) 43 C.R. (3d) 318.

⁵⁴⁶(1992) 89 DLR (4th) 449.

⁵⁴⁷(1868) LR 3 QB 360.

⁵⁴⁸In *Brodie v R* (1962) 132 C.C.C. 161 it was held that the statutory definition must be read as having been intended to supplant that found in *Hicklin*.

⁵⁴⁹[1964] SCR 251.

⁵⁵⁰See *Roth v United States* 354 U.S. 476 (1957), discussed at 1.4.5 above.

availability as evidence that it was tolerated by the community.⁵⁵¹ Furthermore, Mahoney points out that whether or not exploitation was "undue" depended solely upon the degree of explicitness of the material in question, rather than its nature.⁵⁵²

The increasing production of material which coupled sexual explicitness with violence led to a shift in emphasis in the interpretation of what constituted undue treatment. In *R v Doug Rankine Co*⁵⁵³ Borins J of the Ontario County Court held that films portraying

...violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanise people upon whom they are performed...

exceeded the level of tolerance set by the community standard. Of course, the combination of sex with cruelty and violence existed as independent categories in s 163(8), along with undue exploitation, but what was new was the finding that the depiction of indignities and dehumanisation amounted to undue exploitation. Thus the decision in *Doug Rankine* is important because it established that the treatment of sex would be undue *either* because of its level of explicitness *or* because it depicted indignities or dehumanizing activities. This reasoning was followed in *R v Wagner*,⁵⁵⁴ and *R v Ramsingh*⁵⁵⁵ in which it was held that material that degraded or dehumanised the participants would *ipso facto* contravene the community's standards even in the absence of cruelty or violence, and in *R v Pereira-Vasquez*,⁵⁵⁶ where it was held that material could be prohibited under the community standards test *either* because it was violent and degrading *or* because of its degree of explicitness. *R v Wagner* also represented the first attempt to define the harm inherent in material depicting degradation or dehumanisation, which Shannon J stated was the viewer's

...increased callousness towards women and less[er] receptiveness to their legitimate claims for equality and respect.

⁵⁵¹ Mahoney, Kathleen "Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law" in Schneiderman, D. (ed) *Freedom of Expression and the Charter* (Scarborough, Thompson Professional Publishing, 1991) 145 at 149-56.

⁵⁵² *Ibid.*, 151.

⁵⁵³ (1983) 36 CR (3d) 154.

⁵⁵⁴ (1985) 43 CR (3d) 318, 36 Alta. L R (2d) 301 (QB).

⁵⁵⁵ (1984) 14 C.C.C. (3d) 230, 29 Man. R. (2d) 110 (QB).

⁵⁵⁶ (1988) 43 C.C.C. (3d) 82.

He also said that "false representations" of female sexuality were created which reduced women to the status of mere objects of sexual access. Similarly in *R v Red Hot Video*⁵⁵⁷ the court held⁵⁵⁸ that community standards are breached by degrading and violent material for the reason that

...it makes men tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.

The court further held⁵⁵⁹ that the materials in question were obscene because they

...approve[d] [of] the domination of women by men as an acceptable social philosophy.

The increasing importance attached to the concepts such as "indignity", "degradation", "dehumanisation" and the like was endorsed by the Supreme Court in *R v Towne Cinema Theatres Ltd*⁵⁶⁰ where a majority⁵⁶¹ held that the community standards test was not the only criterion to be applied in assessing undue exploitation, and that other factors to be taken into account were the artistic or literary merit of the material and whether it involved degradation. Most importantly however, Dickson CJC held⁵⁶² that material which is degrading could be proscribed *even if* it met the community standards test:

Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus a legal definition of "undue" must also encompass publications harmful to members of society and, therefore, to society as a whole.

Sex-related publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment, may be "undue" for purposes of s 159(8). No one should be subject to the degradation and humiliation inherent in publications which link sex with violence, cruelty and other forms of dehumanizing treatment. It is not likely

⁵⁵⁷(1985) 18 C.C.C. (3d) 1.

⁵⁵⁸At 23.

⁵⁵⁹At 24.

⁵⁶⁰(1985) 18 DLR (4th) 1 (SCC).

⁵⁶¹Dickson CJC, Lamer J and Le Dain J.

⁵⁶²At 14.

that at a given moment in a society's history, such publications will be tolerated...

However, as I have noted above, there is no *necessary* coincidence between the undueness of publications which degrade people by linking violence, cruelty or other forms of dehumanizing treatment with sex, and the community standard of tolerance. Even if certain sex-related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment.

In other words, the court went beyond the point reached in judgments discussed in preceding paragraphs where courts had held that degrading material automatically infringed the community standards test, and instead separated the tests.⁵⁶³ Indeed I would argue that after *Towne Cinema*, the community standards test became subsidiary to an approach in terms of which obscenity was defined as material which inspired discriminatory attitudes in its consumers. *Towne Cinema* was, however, decided on facts arising before the coming into force of the Canadian Charter of Rights and Freedoms, and it was through a challenge to s 163 in the case of *R v Butler*⁵⁶⁴ that the "discrimination is obscenity" analysis achieved its apotheosis. Given its importance, the *Butler* case warrants separate and more detailed treatment.

2.3.6 *R v Butler* and the constitutionalization of attitudinal regulation.

In *Butler* the appellant, who operated a shop which sold pornographic material, had been convicted under s 163. On appeal to the Supreme Court of Canada he challenged the validity of the section under s 2(b) of the Charter. Speaking for the majority,⁵⁶⁵ Sopinka J examined the community standards and "degradation or dehumanisation" tests, and expanded upon the concepts of degradation and dehumanization, holding⁵⁶⁶ that

...degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the

⁵⁶³ Separating the tests would prevent s 163 being circumvented by means of the market-flooding technique discussed above.

⁵⁶⁴ (1992) 89 DLR (4th) 449. For a critique of the decision in *Butler* see Kramer "R v Butler: A New Approach to Obscenity Law or Return to the Morality Play?" (1992) 35 *Criminal Law Quarterly* 77.

⁵⁶⁵ Lamer C JC, La Forest, Cory, McLachlin, Stevenson and Iacobucci JJ concurred with Sopinka J. A separate concurring judgment was delivered by Gonthier J with L'Heureux-Dube J concurring.

⁵⁶⁶ At 466h - 467b.

appreciation of whether the material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

This type of material would, apparently, fail the community standards test not because it offends against morals but it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women, and therefore to society as a whole...

Later on in his judgment,⁵⁶⁷ Sopinka J had this to say about the harm caused by obscene material:

Essentially these objectives [sought to be achieved by s 163] are the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a "decent society".

Sopinka J further held⁵⁶⁸ that

To impose a certain standard of public or sexual morality, solely because it affects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991) 1 CR (4th) 367 at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities....On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of *some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society*....In this regard, criminalising the proliferation of materials

⁵⁶⁷ At 475h.

⁵⁶⁸ At 476d-h.

which undermine another basic Charter right may indeed be a legitimate objective.

(Emphasis added).

Sopinka J then quoted from the MacGuigan report on pornography⁵⁶⁹ where the nature of the harm caused by obscene materials was explained as follows:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It appears to make degradation, humiliation, victimisation and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling any medium of depiction, description or advocacy which violates these principles.

He also held that⁵⁷⁰

..the objective [that s 163 sought to achieve] is the avoidance of harm caused by the degradation which many women feel as "victims" of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women..

and that⁵⁷¹

While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

Relating the community standards and degradation and dehumanization tests to one another, Sopinka J held that⁵⁷²

⁵⁶⁹Report on Pornography by the Standing Committee on Justice and Legal Affairs (1978) at 18:4., cited at 477 of *Butler*.

⁵⁷⁰At 486h.

⁵⁷¹At 483a.

⁵⁷²At 470h - 471b.

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an antisocial manner as, for example, the physical or mental maltreatment of women by men, or, what is perhaps debatable, the reverse. Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of risk of harm the lesser the likelihood of tolerance.

The final test dealt with by *Sopinka J* was what had been called the "internal necessities" test or alternatively the "artistic defence", which courts had recognised⁵⁷³ as saving material that might otherwise constitute undue exploitation of sex because that material was necessary to serve the artistic purposes of the work. In relation to this *Sopinka J* held⁵⁷⁴

The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is the undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary or other similar purpose? Since the threshold determination must be made on the basis of community standards, that is, whether the sexually explicit aspect is undue, its impact when considered in context must be determined on the same basis. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

Thus the success or otherwise of the "artistic defence" depends on whether undue treatment of sex is the dominant theme of the work or is artistically necessary, a determination which will be made in the light of community standards. There is, therefore, nothing particularly different about this defence - whether it is successful is decided by applying the community standards test to the "dominant characteristic" element of s 163(8).

⁵⁷³*Sopinka J* referred to the cases of *R v Brodie* (1962) 32 DLR (2d) 507 and *R v Odeon Morton Theatres Ltd. and United Artists Corp.* (1974) 45 DLR (3d) 224.

⁵⁷⁴At 471f-h.

To illustrate the operation of the combined community standard and degrading and dehumanizing test, Sopinka J related them to three categories into which he said pornography could be classified. These categories are: (i) explicit sex with violence, (ii) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (iii) explicit sex without violence that is neither degrading nor dehumanizing.⁵⁷⁵ Material falling into the first category would almost always fall foul of the test of undueness,⁵⁷⁶ indeed it would in any event be hit by the separate s 163(8) category of sex combined with violence,⁵⁷⁷ and would therefore be prohibited as obscene. Material falling into the second category would be held to be undue if the risk of harm was substantial,⁵⁷⁸ while material in the third category would generally not be classified as undue unless it employed children in its production.⁵⁷⁹

In his concurring judgment, Gonthier J placed great emphasis on the fact that what s 163 proscribes is *representations* of a certain type, and that the definition of obscenity in s 163(8) ("sex and ...crime, horror, cruelty and violence" and "undue exploitation of sex") obviously embraced a far broader range of activities than the fairly limited number of sexual offences prohibited by the Code. Thus he stated

This difference in content [between acts which the Code prohibits one to perform and the wider range of activities which it prohibits one from representing] stems from the element of representation found in s 163 of the Code. Parliament ascribed a broader content to obscenity because it involves a representation. In this combination of a given content and its representation lies the particular essence of obscenity, as was mentioned above. The type of scenes vividly described...might perhaps be legal if done between consenting adults, but they become obscene if represented.

Amazingly, this key issue - the disjunction between what it may be lawful to do and what it may be lawful to represent - was not further elucidated upon but, as will be argued in chapter 6 below, it ought to be a crucial issue in the law governing freedom of expression.

⁵⁷⁵At 470c - 471c.

⁵⁷⁶At 471b.

⁵⁷⁷At 470d.

⁵⁷⁸At 471b.

⁵⁷⁹At 471c.

Turning to the issue of harm, Gonthier J echoed the approach adopted by Sopinka J, holding that⁵⁸⁰

Obscene materials...convey a distorted image of human sexuality, by making public and open elements of human nature which are usually hidden behind a veil of modesty and privacy...these materials do not reflect the richness of human sexuality, but rather turn it into pure animality...This distorted image of human sexuality often comprises violence, cruelty, infliction of pain, humiliation, among other elements...Attitudinal changes..because of exposure to pornographic materials, may lead to abuse and harm...[Pornography puts forward] a distorted image of human sexuality, which in turn can induce harmful behavioural changes.

Later⁵⁸¹ he again explicitly stated that the objective of the legislation was to avoid harm in the form of attitudinal changes, and finally that⁵⁸²

..the harm takes the form of violations of the principles of human equality and dignity. Obscene materials debase sexuality. They lead to the humiliation of women and sometimes to violence against them...Without entering into the examination of the rational connection, some empirical evidence even elucidates the link between these materials and actual violence. Even then, as was said by this court...and is reiterated by my colleague in his reasons, scientific proof is not required, and reason and common experience will often suffice...most would agree that these attitudinal changes [induced by obscene materials] are serious and warrant state intervention...

Finally, Gonthier J turned his attention to the legitimacy of legislating on the basis of "morality", and held⁵⁸³ that there are fundamental conceptions of morality which could legitimately be enshrined in legislation. Thus he held that as the avoidance of harm is a fundamental moral concept, it was legitimate for the state to act to prevent it. While the proposition that much of the criminal law is based on concepts of morality is unexceptionable, and indeed trite, the real issue is how to determine *whose* concepts of morality should be enshrined in law, given the diversity of

⁵⁸⁰At 490g - 491f.

⁵⁸¹At 496c.

⁵⁸²At 498g - 499a.

⁵⁸³At 496g - 499c.

opinions in society on moral questions. On this Gonthier J had the following to say⁵⁸⁴

..a consensus must exist among the population on these [moral] claims. They must attract the support of more than a simple majority of people. In a pluralistic society such as ours, many different conceptions of the good are held by various segments of the population. The guarantees of s 2 of the Charter protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s 2 of the Charter becomes less insurmountable an objection to state action...In this sense a wide consensus among holders of different conceptions of the good is necessary before the state can intervene in the name of morality.

Thus Gonthier J seemed to argue for an objective test of morality, but one based on the prevailing consensus in society. The danger inherent in supposedly "objective" tests (such as this one) which are in reality subjective in that they depend on fluctuations in public opinion, is that if the constitutionality of statutes comes ultimately to be decided according to popular opinion, one of the major purposes of a bill of rights will have been subverted - it is precisely those whose actions *defy* the moral consensus of society that are most in need of constitutional protection. This indeed has been shown in the aftermath of the *Butler* decision, which has been cited by Canadian prosecutors and customs officers as justifying the prohibition of the sale of lesbian and gay material (including books written by Andrea Dworkin) which contained themes of degradation and subordination.⁵⁸⁵

The review of Canadian case law leading up to and including the decision in *Butler* reveals that the prevailing trend since the mid-1980's has been for Canadian courts to define obscenity primarily as harm taking the form of the inspiration in its consumers of discriminatory attitudes. This mirrors⁵⁸⁶ the approach taken in respect of hate speech which, as has been shown, was also denied constitutional protection on the ground that it undermined public "enthusiasm" for the idea of equality. It was, in the words of Anderson J in *R v Red Hot Video*,⁵⁸⁷ the "social philosophy" underlying

⁵⁸⁴At 498d-f.

⁵⁸⁵Strossen, *supra* n. 188 at 143-7.

⁵⁸⁶Indeed even before the decision in *Butler*, the suggestion was made that the equality-based approach in *Keegstra*, *Andrews* and *Taylor* should be used in denying constitutional protection for sexually explicit materials - see Kathleen Mahoney "R v Keegstra: A Rationale for Regulating Pornography" 37 (1992) *McGill Law Journal* 242.

⁵⁸⁷*R v Red Hot Video* (1985) 18 C.C.C. (3d) 1 at 24.

pornography, "antisocial attitudinal changes",⁵⁸⁸ negative "perceptions and attitudes towards women"⁵⁸⁹ (Sopinka J in *Butler*) and "attitudinal changes"⁵⁹⁰ (Gonthier J in the same case) that justified censorship of sexually explicit material. In essence then, the courts passed beyond the debate relating to what *behaviour* sexually explicit material might or might not cause. For them the fact that studies linking such material with anti-social *conduct* are notoriously equivocal was irrelevant - such materials were held to be proscribable simply because of the possibility that they might foster anti-social *attitudes*. As Feinberg argues, determining what constitutes moral "harm" is clearly a far more daunting task than determining what constitutes physical or even economic harm, given competing conceptions of what is morally correct, and the difficulty of obtaining empirical data on cause and effect in the realms of moral development.⁵⁹¹ Secondly, and more fundamentally, even if it were accepted that exposure to certain types of sexually explicit materials changed attitudes for the "worse", is it not an even greater infringement of freedom for the state to attempt to control attitudes than it is for it to regulate expression? If, as Gonthier J held in *Butler*,⁵⁹² the projection of a "distorted image of human sexuality" is a harm that can legitimately be suppressed, does this not imply the existence of a socially approved image of sexuality, and if so, raise the question of how and by whom such an image will be defined? Furthermore, does not the restriction of freedom of expression inherent in legislative measures such as s 163 simply become a vehicle for what I would suggest is the far more disturbing objective of limitation of thought and opinion? The inevitable (but infrequently recognised) threat posed to freedom of thought by regulation of freedom of expression is explained with particular clarity by Smolla, who writes⁵⁹³:

The fulfilment that comes from speech is bonded to man's capacity to think, imagine, and create. Conscience and consciousness are the sacred precincts of mind and soul. The linkage of speech to thought, to man's central capacity to reason and wonder, is what places speech above other forms of fulfilment, and beyond the routine jurisdiction of the state.

It might however be maintained that even *thought* deserves no special protection from the state as a matter of right. The precincts of the mind are not sacred, merely inaccessible; men have been able to get away with free

⁵⁸⁸(1992) 89 DLR (4th) 449 at 475h.

⁵⁸⁹At 486h.

⁵⁹⁰At 490g - 491f, 496c and 498g - 499a.

⁵⁹¹Feinberg, Joel *Harmless Wrongdoing* (New York, Oxford University Press, 1988) 308-9.

⁵⁹²At 490g.

⁵⁹³Smolla, *supra* n. 11 at 10-11.

thinking in those precincts because up to now no state has devised a means of patrolling them. ...Technology, of course, might someday change that; it is possible to imagine a world in which thoughts can be monitored like radio transmissions, and thought police could presume to intercept and regulate thought...If, through such a technological "breakthrough", thought could be monitored, a case for regulating "potentially harmful thought" could be made on the same grounds that cases are made today for regulating "potentially harmful speech". Indeed, the line we now instinctively recognise between "speech" and "thought" could itself begin to dissolve.

But who would defend the prerogative of the state to censor thought? Only by accepting that man is a creature of the state and that even the intimate internal processes of mind that distinguish human existence are enjoyed at the state's sufferance could such a monstrous and awesome intrusion be justified. To accept the proposition would be to accept the extinction of thousands of years of moral evolution, in which the world has come slowly and painfully to recognise that men possess certain entitlements to dignity and autonomy by sheer virtue of their humanity...

Once the inviolable primacy of freedom of thought is accepted, the preferred position of freedom of speech follows....Thought and speech are complementary, reinforcing freedoms, freedoms that partake at once of the private and social aspects of personality. The human spirit is nourished by both thought and speech, as the body is nourished by both food and water.

Similarly, as Browne states⁵⁹⁴

To a degree perhaps unprecedented, the current attempt to stifle offensive speech can be viewed as an attempt to achieve not only an egalitarian orthodoxy of speech and action but an orthodoxy of thought itself. Consider, for example, prohibitions against employees having sexually explicit pictures on the inside of their lockers or reading *Playboy* (or worse) in the workplace. The justification for such regulation is not that women of delicate sensibilities might see the material and be shocked by it. Rather the basis for the prohibition is that some people, mostly women, are offended by what the employee is thinking while he is looking at the pictures; they are offended by the way he "views" - that is, "thinks about" - women.

⁵⁹⁴Browne, *supra* n. 49 at 548.

There is irony in the fact that whereas Smolla apprehends the development of justifications for restriction of freedom of thought were the necessary technology to be developed, the position is that the courts in Canada have developed the rationalisation in advance of the technology.⁵⁹⁵

Given the fundamental importance of attitudinal regulation to the decision in *Butler*, it is instructive to contrast that case with *American Booksellers Association, Inc. v Hudnut*⁵⁹⁶ in which a United States court dealt with the same issue, but came to a very different conclusion.

2.3.7 The decision in *American Booksellers Association, Inc. v Hudnut*

In 1984 the city of Indianapolis passed an anti discrimination ordinance.⁵⁹⁷ Included in this enactment were clauses drafted by Catharine MacKinnon and Andrea Dworkin⁵⁹⁸ which identified pornography as a discriminatory practice⁵⁹⁹ and which entitled complainants to recover damages for coercion into pornography, having pornography forced on them, for assault due to pornography or, at its broadest, for trafficking in pornography. Pornography itself was broadly defined, and included depictions of women being penetrated or of women in postures of sexual submission or servility or display,⁶⁰⁰ a definition which potentially included within its scope any

⁵⁹⁵As an example of the type of thinking supportive of thought-control see Itzin's rejection of what she terms the "fallacious Cartesian body/mind dichotomy" in her defence of censorship, *supra* n. 475 at 577.

⁵⁹⁶598 F. Supp. 1316 (S.D. Ind. 1984) (*aff'd* 771 F. 2d 323 (7th Cir. 1985), 475 U.S. 1001 (1986)).

⁵⁹⁷Indianapolis General Ordinance 24 of 1984.

⁵⁹⁸For their own explanation and analysis of the ordinance see Dworkin and MacKinnon, *supra* n. 515.

⁵⁹⁹Section 16-1 was a "findings" provision wherein the reason for the ordinance was recited. Included in this section was the statement that

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is essential in maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights...

The anti-discrimination purpose of the Ordinance is discussed in Hunter, I., Saunders, D. and Williamson, D. *On Pornography - Literature, Sexuality and Obscenity Law* (London, MacMillan, 1993) 231-6.

⁶⁰⁰Section 16-3 (5)(q) of the Ordinance defined pornography as

...the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

material depicting women as the objects of sexual desire. Thus, although supporters of the ordinance claimed that it would not have led to the prohibition of those sexually explicit materials which were "not based on subordination" but were rather "premised on equality",⁶⁰¹ the fact that mere display of the body or depictions of heterosexual intercourse met the ordinance's definition of pornography, makes it difficult to imagine what non-discriminatory sexually explicit material would consist of. Indeed, as feminist opponents of the ordinance stated⁶⁰²

At its heart, this analysis implies that heterosexual sex is itself sexist; that women do not engage in it of their own volition...

As Strossen argues, implicit in the pro-censorship view of sexually explicit materials is the Victorian stereotypical idea that sex is "bad for" women and that women need to be protected from heterosexual eroticism.⁶⁰³ This is confirmed by that portion of the ordinance dealing with defences, which listed a 13 point series of circumstances (including, for example, proof that women involved in the making of sexually explicit material had consented to the making of it, that they had signed contracts consenting to make it or that no physical threats were used in the making of it) which did *not* in themselves negate a finding that a woman had been coerced into making the material.⁶⁰⁴ Some supporters of the measure were of the view that where women do

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

⁶⁰¹ See for example the defence of the ordinance in Itzin, C. "A Legal Definition of Pornography" in Itzin C. (ed) *Pornography - Women, Violence & Civil Liberties* (New York, Oxford University Press, 1992) 435 at 446-9.

⁶⁰² Duggan, Hunter and Vance, *supra* n. 489 at 139. See also Rodgeron and Wilson, *supra* n. 496 at 58, who state:

The argument that the making of pornography itself constitutes violence against women is fuelled by a belief, common among anti-pornography campaigners, that women do not really like sex. The popular stereotype in which women, who are not really interested in sex, perform sex only under pressure from men, forms the foundation of a theory that every woman who appears in visual pornography must have been forced to perform the acts shown, as no woman would actually wish to do these things. The assumption is applied to the full range of sexual activities, including and, in some cases, especially, to common sexual intercourse. Some feminists say that, therefore, to portray women enjoying these acts constitutes a misrepresentation of women. But the facts do not support this portrayal of women; in reality many of us enjoy penetrative sex with men as well as lesbian sex or other sexual practices.

See also Segal, *supra* n. 491 at 77-8.

⁶⁰³ Strossen, *supra* n. 188 at 1147-51. See also Meyer, *supra* n. 497 at 1133.

⁶⁰⁴ Section 16-3(5).

become involved in pornography, either as actors or even as viewers of it, this must be seen as a result of their sexuality having been "moulded within a hetero-patriarchal culture"⁶⁰⁵ - in other words that they have been falsely conscientised into enjoying it, and that their consent should not be seen as real, an argument which effectively sees some women maternalistically deciding when the consent of other women is valid.⁶⁰⁶ Similarly, women who themselves engage in "pornographic" speech by acting in or producing such materials were accused of engaging in expression which could legitimately be suppressed⁶⁰⁷ because, as MacKinnon put it, it was "not speech for women".⁶⁰⁸ Indeed the intolerance underlying the pro-censorship position was illustrated by the fact that opponents of the MacKinnon-Dworkin ordinance were harassed by its supporters during legislative hearings conducted by the city.⁶⁰⁹

The ordinance sought to make pornography actionable on the basis of the harm it caused, rather than because it infringed community standards of morality (the rationale underlying the *Miller* test),⁶¹⁰ which pro-censorship feminists reject.⁶¹¹ However, whereas plaintiffs alleging harm in the form of coerced participation in the making of sexually explicit materials, involuntary exposure to them, or use of such materials in the commission of crime against themselves would at least have had to demonstrate that they had been caused direct personal harm, the type of harm which its drafters argued could sustain a claim brought by a plaintiff under the "trafficking" provision could amount simply to attitudinal change towards women in the minds of

⁶⁰⁵Easton, *supra* n. 472 at 83.

⁶⁰⁶This point is well made by Strossen, *supra* n. 188 at 1137-40 and by Gey, *supra* n. 477 at 1599 n. 164.

⁶⁰⁷For an excellent analysis of MacKinnon's intolerant attitude to dissenting women's views see Wirenius, *supra* n. 199 at 53-60.

⁶⁰⁸MacKinnon, *supra* n. 508 at 193-6.

⁶⁰⁹Downs, *supra* n. 286 at 80-83.

⁶¹⁰Thus according to Dworkin and MacKinnon, *supra* n. 515 at 40

Whatever one's moral judgments, the presentations in the definition are there because there is material evidence that they do harm, and the decision has been made that the harm they do to some people is not worth the sexual pleasure they give to other people - not because the people making the laws do not like these acts sexually or approve of them morally.

⁶¹¹See Kappeler, Susanne *The Pornography of representation* (Cambridge, Polity Press, 1986) 25 who states

Feminist critique is concerned with sexism, not with indecency or obscenity. The values of 'obscene' and 'indecent' change with changing mores...A feminist critique of pornography is not primarily concerned with censorship..but with the exposition of the pervasive presence of sexism and pornographic structures throughout our culture.

the consumers of such material⁶¹² - a feature of the ordinance that would become central to its failure to surmount First Amendment review.

Having been declared unconstitutional in Federal District Court by Barker J,⁶¹³ an appeal was lodged with the 7th Circuit Court of Appeals, where judgment was delivered by Eastbrook J. Among the most significant aspects of the judgment was the acceptance by the court of the city's argument that sexually explicit material effects attitudinal change. Thus Eastbrook J stated⁶¹⁴ that

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women as subordinate are more likely to treat them so. Pornography is an aspect of dominance"...". It does not persuade people so much as change them....There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. ...Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. "...." In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights...

Yet, having accepted the rationale of the legislation, Eastbrook J held that "this simply demonstrates the power of pornography as speech"⁶¹⁵ and that the argument

⁶¹²See Dworkin and MacKinnon, *supra* n. 515 at 45-9 for a discussion of the harms the ordinance was designed to make actionable. Complainants under the ordinance would simply have to show that the pornography did the harm of "subordinating women" which it did by "increas[ing] attitudes..of..discrimination by men against women..". See also the judgment of Easterbrook J in *American Booksellers Association Inc. v Hudnut* 771 F. 2d 323 (7th Cir. 1985) at 325 (*aff'd* 475 U.S. 1001 (1986)) where, in reviewing arguments presented by counsel seeking to uphold the ordinance, he stated:

They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness...Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination...

⁶¹³598 F. Supp. 1316 (S.D. Ind. 1984).

⁶¹⁴771 F. 2d 323 (7th Cir. 1985) at 328-9 (*aff'd* 475 U.S. 1001 (1986)).

⁶¹⁵*Idem*.

that pornography was "low value" speech, unworthy of First Amendment protection because it did not advance truth-seeking failed because⁶¹⁶

Indianapolis seeks to prohibit certain speech because it believes this speech *influences social relations and politics on a grand scale*, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value.

(Emphasis added).

In other words, it was *precisely because* pornography embodies a view about and an attitude towards the issue of gender equality revealingly stated by MacKinnon as follows⁶¹⁷

Pornography is propaganda, an expression of male ideology, a hate literature, an argument for sexual fascism

that its suppression was held inconsistent with the First Amendment. Rejecting legislation which would "put the government in control...of which thoughts are good for us", Eastbrook J cited⁶¹⁸ Jackson J's defence of freedom of opinion in *West Virginia State Board of Education v Barnette*⁶¹⁹ where it was held that

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion...

and concluded⁶²⁰ that under the Indianapolis ordinance

Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual context. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may

⁶¹⁶At 331.

⁶¹⁷MacKinnon, *supra* n. 467 at 807.

⁶¹⁸771 F. 2d 323 (7th Cir. 1985) at 327.

⁶¹⁹319 U.S. 624 (1943) at 642.

⁶²⁰771 F. 2d 323 (7th Cir. 1985) at 328.

relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

In a sense then, supporters of the ordinance were hoist with their own petard - having successfully argued that pornography carries a discriminatory political message,⁶²¹ it was inevitable that an enactment prohibiting pornography for that reason would fall foul of the rule against viewpoint discrimination.⁶²² Furthermore, the idea that there is an orthodox feminist view of sexuality encountered opposition not only from traditional libertarians, but also from sectors of the feminist movement itself.⁶²³ Taken to its extreme, the MacKinnon-Dworkin argument could be used to justify the proscription of *any* expression which, in the view of those with the power to define "equality", causes males to view women in a way contrary to that value.⁶²⁴ Indeed, as

⁶²¹See for example MacKinnon, Catherine A. "Not a Moral Issue" in MacKinnon, Catherine A. *Feminism Unmodified - Discourses on Life and Law* (Cambridge, Harvard University Press, 1987) 146 at 147

Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men.

See also the discussion of how sexual depictions are an integral part of debates about sexuality in Cole, *supra* n. 181 at 122-4.

⁶²²Thus as was stated by Grossman "The First Amendment and the New Anti-Pornography Statutes" *News for Teachers of Political Science* (Spring 1985) 19

Politicizing the definition of pornography is, however, the fatal constitutional flaw. By attributing meaning to pornography beyond its individual appeal to individual prurience the ordinance elevates pornography to the class of ideas which necessarily have some political and social - if not artistic or scientific - significance.

Similarly Tigue, R. "Civil Rights and Censorship - Incompatible Bedfellows" 11 (1985) *William Mitchell Law Review* 81 at 93 stated

What makes sexually explicit material pornography under the MacKinnon/Dworkin ordinance is not its degree of sexual explicitness, not its appeal to prurient interests, not even its lack of social value. Rather, it is the content of the ideas advocated by the material.

⁶²³See for example Diamond, *supra* n. 52 at 54

Some feminists have defined erotica as images about sexuality that show equal power relationships and exchanges between mutually loving and committed people. But who will define what constitutes "equality", "love" and "commitment" ? And even if we agree on the meaning of these words, one woman's dream may be another's prison.

⁶²⁴As is stated by Steele, Lisa "A Capital Idea: Gendering in the Mass Market" in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 58 at 72

So if we are going to consider pornography, we must begin to be critical not only of material that is produced for men, but also that which is produced for women - and I'm not talking about *Playgirl* magazine. There's romance fiction, which encourages women to mainline marriage fantasies and domination on a weekly basis; *Cosmopolitan* magazine, which teaches women, step-by-step, how to become sex objects; fashion magazines such as *Vogue* or

Emerson stated in his commentary on the ordinance,⁶²⁵ the measure could have been used to suppress the *Arabian Nights*, *Fanny Hill*, many tales from Greek mythology and even romance novels, all of which, from the MacKinnon-Dworkin perspective, portray the subordination of women. Thus while Moorcock ⁶²⁶ may scoff at the idea that the incorporation of the egalitarian critique of freedom of expression into the law would lead to the prohibition of lingerie advertisements or *Romeo and Juliet*, or the removal of *Uncle Tom's Cabin* or *Othello* from public libraries, the fact is that the feminist argument that the harm of pornography consists of its objectification of women means that the first example is not as far fetched as it would seem.⁶²⁷ Furthermore, as Wirenius points out,⁶²⁸ from a principled point of view even material that is *not* sexually explicit but which promotes discriminatory attitudes towards women should, under the MacKinnon-Dworkin rationale, attract censorship as much as its sexually explicit variant, and that the ordinance should therefore be seen as the first step along a road that would have lead to suppression of a far wider class of expression than "pornography". To take the argument to its extreme, one might even suggest that since conduct can shape attitudes as much as does expression, the MacKinnon - Dworkin principle would justify dress codes prohibiting women from dressing in such a way as to cause themselves to be viewed as sex objects by men.⁶²⁹ If indeed the consent of women participating in sexually explicit films could not, according to the drafters of the ordinance, justify that activity, surely the restriction of women's right to wear revealing clothing could be justified on the same basis?

2.3.8 The equality-based critique of *Hudnut*.

Supporters of the Indianapolis ordinance criticised the *Hudnut* decision for the court's rejection of the arguments that speech can constitute discriminatory conduct and that pornography silences women. MacKinnon's response to *Hudnut* was to argue⁶³⁰

Bazaar, which offer in-depth instruction in the narcissistic pastime of turning oneself into a living sculpture...

⁶²⁵Emerson, supra n. 280 at 132.

⁶²⁶Moorcock, supra n. 474 at 537-8.

⁶²⁷Furthermore, anti-hate speech campaigners have in fact succeeded in having *Huckleberry Finn* removed from libraries in the United States on the ground that some of its characters use racist expressions, notwithstanding the fact that seen in context the book does not advocate racism. Objections to *Huckleberry Finn* have been based on Twain's use of the word "nigger" throughout. However to see this work as denigrating blacks is to misunderstand it entirely - the whole thrust of the book is to expose the irrationality and immorality of the dehumanisation of blacks - see Hentoff, supra n. 18 at 18-41 and Gracyk, Theodore A. "Pornography as Representation: Aesthetic Considerations" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 117 at 126-7.

⁶²⁸Wirenius, supra n. 199 at 41-2.

⁶²⁹ See Christensen, supra n. 488 at 118, Meyer, supra n. 497 at 1126.

⁶³⁰MacKinnon, supra n. 467 at 812.

The civil rights law against pornography was held to be a form of discrimination on the basis of "viewpoint" because it was not neutral on the subject of sex-based exploitation and abuse. By this standard, every discriminatory practice and every anti-discriminatory law expresses a point of view. Acts express ideas, yet they are legally restricted and do not have to be proved expressionless first. Segregation expresses the view that Blacks are inferior to whites; rulings against segregation express the contrary view. Segregation is not therefore protected speech, nor are rulings against it considered "thought control".

However, this is completely to misrepresent the court's reasoning in *Hudnut*. The court did not declare the ordinance unlawful because it thought the ordinance constituted conduct which, because it was motivated by a discriminatory ideology, could not be prescribed, but rather because the court found it to constitute an ideology and *not* conduct, and prescription of ideas is not permitted under the First Amendment. MacKinnon's response is based upon the argument (already analysed at 2.2.3 and 2.3.3 above) that because some unlawful conduct has an expressive dimension, it follows that all expression advocating what she sees as discriminatory (and thus unlawful) ideology constitutes unlawful conduct. But, of course, this is to miss the fundamental point that under the First Amendment there *can be no such thing* as unlawful ideology. As Eastbrook J stated, all of the negative social effects of pornography depend on "mental intermediation"⁶³¹ - in other words the conscious acceptance and putting into action of the message they convey. In the absence of that process, propagation of the *mere idea* of inequality could not be proscribed without severe intrusion into freedom of expression. Similarly, as Ronald Dworkin stated in his analysis of *Hudnut* ⁶³²

Judge Easterbrook's opinion for the Seventh Circuit assumed, for the sake of argument, however, that pornography did have the consequences the defenders of the ordinance claimed. He said that the argument nevertheless failed because the point of free speech is precisely to allow ideas to have whatever consequences flow from their dissemination, including undesirable consequences for positive liberty...

⁶³¹ 771 F. 2d 323 (7th Cir. 1985) at 329 (*aff'd* 475 U.S. 1001 (1986)).

⁶³² Dworkin, Ronald "Pornography, Feminism, and Liberty" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 164 at 170-1.

That this crucial point is missed by supporters of the position embodied in the Indianapolis ordinance is revealed by Karo and McBrian who, in attempting to refute criticism of the ordinance state that⁶³³

..the argument implicitly assumes that the goal of anti-pornography ordinances is to impose morality, not redress harm. This assumption avoids asking the hard question of whose rights should prevail in a clash of rights. Several prominent jurists have made this mistake, claiming that it is improper to "legislate attitudes" - effectively ignoring countervailing civil rights violations.

Yet this statement itself begs what is in reality the *central question* of the pornography debate, which the pro-censorship camp has never been able convincingly to answer: how simply *expressing a viewpoint* on sexuality can itself constitute an *act of discrimination* and thus an infringement of civil rights. As Dority states⁶³⁴

...discrimination is not what people say or write about other people; it is what people *do* to other people. Individuals cannot be persecuted, censored or condemned for their ideas. In a free society, there are no crimes of thought - only crimes of action.

A similar answer can be made to the argument put forth by Michelman⁶³⁵ who says that the court in *Hudnut* failed to balance regulation of freedom of expression against the fact that pornography silences women. This, he argues, occurs because, through its propagation of the philosophy of inequality, pornography makes women's point of view less likely to be listened to. In response to this Ronald Dworkin states⁶³⁶

...there is no contradiction in insisting that every idea must be allowed to be heard, even those whose consequence is that other ideas will be

⁶³³Karo, Martin and Marcia McBrian "The Lessons of *Miller* and *Hudnut*: On Proposing a Pornography Ordinance that Passes Constitutional Muster" 23 (1989) *University of Michigan Journal of Law Reform* 179 at 195.

⁶³⁴Dority, *supra* n. 491 at 113. Dority is essentially correct in drawing the distinction between actions, which can attract liability, and thoughts, which in themselves do not. However, it is, of course, important to remember that liability can arise in cases where expression is criminal because it amounts to conspiracy or incitement. Nevertheless, in such cases, the conspiracy or incitement must themselves be directed towards inciting criminal *acts* - as Dority would no doubt agree, no-one should be censured for inciting *attitudes* in the minds of others.

⁶³⁵Michelman, Frank "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation" 56 1989 *Tennessee Law Review* 291.

⁶³⁶Dworkin, *supra* n. 632 at 172.

misunderstood, or given little consideration, or not even be spoken at all because those who might speak them are not in control of their own public identities and therefore cannot be understood as they wish to be...[A]cts that have these consequences do not, for that reason, deprive others of their..liberty to speak...

Given the ordinance's embodiment of the affirmative action / substantive equality approach to freedom of expression, which had consistently been rejected by the Supreme Court,⁶³⁷ its demise was inevitable. As Barker J held in the court of first instance⁶³⁸

To permit every interest group, especially those who claim to be victimised by unfair expression, their own legislative exceptions to the First Amendment so long as they succeed in obtaining a majority of legislative votes in their favour demonstrates the potentially predatory nature of what defendants seek through this ordinance.

2.3.9 Other harms.

The critique of the equality-based approach to sexually explicit material has highlighted the fact that its characterisation of the "harm" caused by such material as being the attitudinal change it causes is incompatible with Millian values. Of course, some of those favouring the censorship of such materials also argue that they cause more direct harm than just attitudinal change, and that sexually explicit materials incite unlawful *conduct*. Attention is given to this argument in chapter 6 below. Here it is simply necessary to note that by characterising various types of sexual conduct (ranging from conventional consensual heterosexual conduct to consensual sadomasochism)⁶³⁹ as objectionable on the ground that it involves dominance and subordinacy, the equality-based approach clearly has implications not only for what types of sexual activity may be depicted, but also what activity may be *engaged in*. This in turn raises issues regarding the limits of sexual autonomy. This too will be addressed in chapter 6.

2.4 Title VII discrimination

The analysis of First Amendment law presented thus far suggests that the equality-based approach cannot be used to regulate hate speech or sexually explicit material consistently with the First Amendment. However, despite the rejection of this

⁶³⁷ See the cases cited at 2.2.5 above.

⁶³⁸ 598 F. Supp. 1316 (S.D. Ind. 1984) at 1337.

⁶³⁹ See *supra* n. 497 and accompanying text.

approach in *R.A.V.* and *Hudnut*, there are instances in which such regulation does occur, seemingly without falling foul of existing First Amendment law.

Such regulation has taken place under Title VII of the Civil Rights Act 1964, which prohibits discrimination "because of [an] individual's race, colour, religion, sex or national origin".⁶⁴⁰ In the leading case on Title VII, *Meritor Savings Bank v Vinson*,⁶⁴¹ the Supreme Court held that under Title VII employees have "the right to work in an environment free from discriminatory intimidation, ridicule and insult", and that liability will arise under the Act where an employer's activity creates "an intimidating, hostile or offensive working environment". The court drew upon existing precedent where liability had been found for "hostile environment" type discrimination on the basis of race, religion and ethnic origin to find that such discrimination would exist on the basis of sex in cases where sexual harassment, defined by federal guidelines⁶⁴² as including "[u]nwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature" had taken place. The Supreme Court thus made it clear that Title VII covered expressive conduct. Consistent with this approach, there have been a large number of cases in which harassment taking the form of expression has contributed to a finding of liability for racial and sexual harassment. Although liability for harassment had until recently not been imposed where expressive conduct was unaccompanied by other forms of harassment,⁶⁴³ the fact that expressive conduct could nevertheless contribute towards liability obviously has a chilling effect on speech in the workplace as it causes employers to err on the side of caution - that is, restriction - in deciding what expression constitutes harassment. Indeed, as Browne states, it is the very open-endedness of the term "harassment" that causes Title VII to have a chilling effect on free speech.⁶⁴⁴ Furthermore, although a single utterance of a racial or sexist epithet would not suffice to found liability under Title VII (plaintiffs must show that the harassment is sufficiently severe and pervasive to create a hostile environment⁶⁴⁵) the Title VII action does not require that the harassment necessarily have been directed against the plaintiff as an individual. As was stated in *Robinson v Jacksonville Shipyards, Inc.*:⁶⁴⁶

⁶⁴⁰42 U.S.C. s 2000e-2(a)(1).

⁶⁴¹477 U.S. 57 (1986) at 63-7.

⁶⁴²The guidelines were issued by the Equal Employment Opportunities Commission (EEOC), and are referenced as 29 C.F.R. 1604.11(a)(3). Although the EEOC guidelines are not regulations, and thus lack the force of law, they have nevertheless uniformly been relied upon by the courts, as in *Vinson*.

⁶⁴³Browne, *supra* n. 49 at 483.

⁶⁴⁴*Ibid.*, 502-10.

⁶⁴⁵*Rogers v EEOC* 454 F.2d 234 (5th Cir. 1972) at 238, cited with approval in *Vinson* at 67.

⁶⁴⁶760 F.Supp. 1486 (M.D.Fla. 1991).

...the issue in this case is the nature of the work environment. This environment is shaped by more than the face-to-face encounters between Robinson and male coworkers and supervisors. The perception that the work environment is hostile can be influenced by the treatment of other persons of a plaintiff's protected class, even if that treatment is learned second-hand.

Similarly in *Waltman v Int'l Paper Co.*⁶⁴⁷ it was held that

Although not all the graffiti was directed at Waltman, it is all relevant to her claim...[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.

The expressive elements of Title VII claims have ranged from sexual⁶⁴⁸ or racial⁶⁴⁹ epithets and the display of sexually explicit pictures⁶⁵⁰ to statements of fact or opinion,⁶⁵¹ including expression that in context was racially offensive but was nevertheless clearly political.⁶⁵² Indeed, that employers are *required* to limit the expression of political ideas in the workplace was explicitly stated in *Davis v Monsanto Chemical Co.*⁶⁵³

In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their coworkers. By informing people that the expression of racist and sexist attitudes in public is unacceptable, people may eventually learn that

⁶⁴⁷875 F.2d 468 (5th Cir. 1989) at 477.

⁶⁴⁸Examples from case-law include "broad", "bitch", "cunt", "whore" and "twat" - see Browne, *supra* n. 49 at 492.

⁶⁴⁹In *Snell v Suffolk County* 611 F. Supp. 521 (E.D.N.Y. 1985) at 532, for example, the court issued an injunction prohibiting the use of the following racial epithets: "nigger", "polak", "kike", "spic", "guinea", "honky", "mick", "coon" and "black bitch". See also Browne 498.

⁶⁵⁰See the many examples cited by Browne, *supra* n. 49 at 493 n. 79.

⁶⁵¹For example see *Lipsett v University of Puerto Rico* 864 F.2d 881 (1st Cir. 1988) at 887 where liability was found following statements that women should not become surgeons "because they need too much time to bathe, to go to the bathroom, to apply makeup, and to get dressed", along with more general statements that women did not belong in surgery, *Robinson v Jacksonville Shipyards, Inc.* 760 F.Supp. 1486 (M.D.Fla. 1991) at 1488 where a co-worker stated "there is nothing worse than having to work around women", and *Rabidue v Osceola Ref. Co.* 805 F.2d 611 at 624 (6th Cir. 1986), (*cert. denied*, 481 U.S. 1041 (1987)), where a supervisor had a sign on his desk which read "Even male chauvinist pigs need love". Another example, related to race rather than gender, is "Send all blacks back to Africa" in *EEOC v Murphy Motor Freight Lines, Inc.* 488 F. Supp. 381 (D. Minn. 1980).

⁶⁵²*United States v City of Buffalo* 457 F. Supp. 612 (W.D.N.Y. 1978) in which police officers employed by the city wore "Wallace for President" buttons.

⁶⁵³858 F.2d 345 (6th Cir. 1988) at 350, (*cert. denied*, 109 S. Ct. 3166 (1989)).

such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Thus, as Browne points out, courts have imposed liability not merely because expression took the form of an offensive *manner* but precisely because of the offensiveness of the (discriminatory) *idea conveyed*.⁶⁵⁴ In other words, in finding Title VII liability, the courts have not felt restrained by the First Amendment's prohibition of viewpoint discrimination, and so⁶⁵⁵

In the harassment context, comments to the effect that women and blacks are equal and entitled to equal respect in the workplace are permitted; comments expressing the contrary view are not.

Although, as was stated above, cases in which Title VII liability had been found had always involved a *combination* of discriminatory conduct and discriminatory expression, a significant development in this area of the law took place in the recent case of *Robinson v Jacksonville Shipyards, Inc.*,⁶⁵⁶ in which *expressive activity alone* (taking the form of sexually explicit speech⁶⁵⁷ and the display of sexually explicit pictures⁶⁵⁸) was held to have created a hostile environment. The court felt no qualms about suppression of viewpoint, holding that the display of the pictures constituted harassment because they communicated the idea that women should be viewed primarily in a sexual way.⁶⁵⁹

How can these Title VII cases be reconciled with the First Amendment? The short answer is that they cannot. Title VII case-law is anomalous given the court's rejection of exactly the same "discriminatory views equal discrimination itself" rationale in *Hudnut*⁶⁶⁰ or, to look at it from the perspective of those such as MacKinnon who support viewpoint regulation, it is anomalous that offensive expression should be actionable when uttered in the employment context but protected by the First Amendment in others.⁶⁶¹ Strange as it may seem however, the interaction between Title VII and the First Amendment has not been directly adjudicated by the courts, which have dismissed the rare First Amendment arguments

⁶⁵⁴Browne, supra n. 49 at 501 and 515.

⁶⁵⁵Ibid., 519.

⁶⁵⁶760 F.Supp. 1486 (M.D.Fla. 1991).

⁶⁵⁷At 1498-1500.

⁶⁵⁸At 1495-8 and 501.

⁶⁵⁹At 1526.

⁶⁶⁰Browne, supra n. 49 at 524 n. 254.

⁶⁶¹MacKinnon, supra n. 160 at 45-68.

in such cases without comment,⁶⁶² nor has any Title VII case been appealed to the Supreme Court on First Amendment grounds, although commentators state that it is only a matter of time before one is.⁶⁶³ The only reference made by the Supreme Court to Title VII in a First Amendment context is an *obiter dictum* found in the minority judgment delivered by Justice White in *R.A.V. v St. Paul*⁶⁶⁴ where, in criticising the concept of "underinclusiveness" upon which the majority based its decision, Justice White pointed out that on that analysis, Title VII liability could not be imposed consistently with the First Amendment, because that statute seeks to proscribe expression on the basis of a specific viewpoint as did the statute involved in *R.A.V.*⁶⁶⁵ In view of this statement, one cannot but doubt that a First Amendment challenge to an harassment claim founded on racist or sexist expression would probably not survive First Amendment scrutiny.

Is there then any way in which Title VII can be reconciled with Millian theory and the prohibition against viewpoint discrimination? Clearly, in so far as the courts have interpreted this provision as outlawing expression because of the offensive ideas it conveys, Title VII is incompatible with the principle of viewpoint neutrality. However, so far as epithets are concerned, it has already been argued (at 2.2.7.3 above) that because epithets amount to meaningless abuse, they can be proscribed without compromising the value of truth-seeking. More detailed attention will be paid to this at 5.6.4.1 below. In the meanwhile it can be said that to the extent that Title VII type measures are used to remedy gratuitous epithets, they are not objectionable from a Millian perspective. Indeed, I would argue that Title VII gives *insufficient* protection to individuals who are victimised by insulting epithets: Although Title VII seeks to shield plaintiffs from the emotional harm that harassment causes, the fact that it is a measure designed to remedy discrimination means that solicitude for emotional hurt is exhibited only in respect of the "protected classes" marked out by the statute - namely racial, sexual, religious or national groups. Thus insulting speech directed towards some other characteristic would not be actionable,⁶⁶⁶ and Title VII does not protect plaintiffs against offensive speech

⁶⁶²See for example *Snell v Suffolk County* 611 F. Supp. 521 (E.D.N.Y. 1985) at 531, and *Rabidue v Osceola Refining Co.* 584 F. Supp. 419 (E.D. Mich. 1984) at 431-2.

⁶⁶³Horton, supra n. 290 at 417.

⁶⁶⁴1992 U.S. 377, 120 L. Ed. 2d 305.

⁶⁶⁵120 L. Ed. 2d 305 at 335-6. The majority rejected Justice White's argument (at 322), stating that under Title VII it is discriminatory conduct rather than discriminatory ideas that are penalised. However, with respect, this response is not convincing: As I have shown in the text above, where Title VII liability is based on expressive as opposed to other types of conduct, the harm sought to be remedied is quite clearly the offensiveness of the message conveyed by the defendant and, as has often been stated, this is precisely the type of "harm" that the First Amendment does not accept as justifying limitations on freedom of expression.

⁶⁶⁶Browne, supra n. 49 at 488-9 and 491.

generally.⁶⁶⁷ As I argued at 2.2.7.3 above, there is no reason why the law should not grant a remedy in any instance where harm of this type is experienced, and that liability for insult ought to extend to any meaningless expression causing such harm.⁶⁶⁸ The problem is that Anglo-American common law contains no test which could be used to determine when emotional harm of this type justifies the imposition of liability.

Many Title VII cases have involved unwanted sexual conversation (sometimes including solicitations to sexual intercourse) and displays of sexually explicit pictures. Are these properly subject to regulation under a Millian analysis? In answering this question it is important to view Mill's treatment of freedom of expression in the wider context of the liberal doctrine he advocated, fundamental to which was the principle that relationships between individuals should be governed by the principle of consent.⁶⁶⁹ In accordance with this principle, it would seem logical to argue that individuals have as much right to refuse involuntarily to be exposed to communications they do not wish to receive as they do to receive those they do wish to consider. But where then does this leave freedom of expression? How are those wishing to exercise expressive rights to know whether their speech is wanted or not? If there is a right "not to be spoken to", how is this to be balanced against the right to speak? Furthermore, surely a rule prohibiting involuntary exposure to sexually explicit materials as opposed, for example, to involuntary exposure to a political notice on a roadside billboard, constitutes content-based discrimination?⁶⁷⁰ But if, in order to avoid this charge, one were to accept the principle that "addressees have a

⁶⁶⁷Ibid., at 519.

⁶⁶⁸The issue of racial and gender-based jokes is an interesting one. The only case in which they have been given detailed attention was *Snell v Suffolk City* 611 F. Supp. 521 (E.D.N.Y. 1985) at 528-31, where allegedly humorous racist epithets were uttered with the intention of causing offence, and where the making of such jokes was held to amount to racial harassment under Title VII. Clearly, such jokes range widely, from the hurtful to the affectionate (see Browne, supra n. 49 at 536 and Yen, supra n. 214 at 608), and most convey an idea - indeed those arguing that they should be proscribed usually do so on the basis that such jokes convey ideas which perpetuate "stereotypes" (Matsuda, supra n. 217 at 2368). Since they do contain meaning I would argue that as in all other types of speech, the presence or absence of offence should not be the sole determinant of liability, but rather that liability should attach only where (i) the joke causes offence and (ii) epithets are used (as indeed was the position on *Snell*). I would therefore disagree with MacKinnon (supra n. 160 at 48) that offensive jokes should be actionable even in the absence of epithets. Rather jokes should be protected speech in the absence of offensive epithets.

⁶⁶⁹Thus Mill, supra n. 13 at 32, states:

But there is a sphere of action in which any society, as distinguished from the individual, has, if any, only an indirect interest, comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.

⁶⁷⁰See for example Haiman, Franklyn "Speech v Privacy: Is There a Right not to be Spoken to ?" 67 (1972) *Northwestern University Law Review* (1972) 153 at 190-2, Cole, supra n. 181 at 154-6 and Schuster, Joseph *The First Amendment in the Balance* (San Francisco, Austin and Winfield, 1992) 255.

right not to be exposed to *any* unwelcome speech", would this not bring an end to freedom of expression, particularly in public *fora* where one would expect expression (and in particular political expression) to be *least* restrained? Thankfully, these problems turn out to be more apparent than real, because as several writers argue, there *is* a way in which the principle of voluntariness can be applied to sexual expression as a distinct class.⁶⁷¹ The argument they advance is that involuntary exposure to sexually explicit materials and unwanted sexual conversation should not be seen as infringing a "right not to be spoken to", but rather as an invasion of the right to *privacy*. This is because sexual expression is qualitatively different from other types of expression in that the viewer or hearer is forced to reveal their (perhaps reflexive) response to sexual stimuli or conversation and therefore, to some extent, to reveal a side of their personality that is normally kept private. Display of sexually explicit materials and unwanted sexual conversation thus amount to what Browne refers to as "coercing intimacy"⁶⁷² and so an invasion of privacy. The advantage of this approach is that, unlike current Title VII doctrine, it does not depend upon the argument that such expression is proscribable because of its sexist viewpoint. Furthermore, existing Supreme Court case law already provides that involuntary exposure to sexually explicit material can be proscribed consistent with the First Amendment,⁶⁷³ and the courts also grant an action for intentional infliction of emotional distress where a defendant persistently⁶⁷⁴ solicits sexual intercourse.⁶⁷⁵

In conclusion then, the anti-discriminatory philosophy underlying Title VII liability means that it manifests the same flaws as does the equality-based critique of freedom of expression discussed in foregoing sections of this chapter. However, certain instances of Title VII liability - insulting epithets and unwanted exposure to sexually explicit materials or speech - are reconcilable with freedom of expression on the ground that in the former case the expression constitutes meaningless abuse and thus does not raise viewpoint concerns, and in the latter because unwanted exposure to the expression amounts to an invasion of privacy.

⁶⁷¹This approach is supported by Abrams, Kathryn "Gender Discrimination and the Transformation of Workplace Norms" 42 (1989) *Vanderbilt Law Review* 1183 at 1212 n. 118, Browne, *supra* n. 49 at 530, Feinberg, *supra* n. 68 at 18-19, 22-4 and 140-2, Strauss, *supra* n. 101 at 36-7 and by Tribe, *supra* n. 50 at 954.

⁶⁷²Browne, *supra* n. 49 at 530.

⁶⁷³*Rowan v United States Post Office Department* 397 U.S. 728 (1970). In this case the court upheld the validity of a statute which entitled individuals to compel the postal authorities to require persons sending unsolicited sexually explicit materials to them to desist from doing so.

⁶⁷⁴No liability attaches merely for asking for sexual intercourse on a single occasion. See for example *Reed v Maley* 115 Ky. 816, 74 S.W. 1079 (1903).

⁶⁷⁵*Samms v Eccles* 11 Utah 2d 289, 358 P.2d 344 (1961).

2.5 Summary

As was noted at the beginning of this chapter, the equality-based approach seeks to remedy two major defects in free speech law: the unavailability of a remedy for the emotional harm caused by "hate speech" (that is, group defamation and insult), and the fact that under *Miller*, obscenity law is morals- rather than harms-based.

Proponents of the egalitarian approach take a common approach to both hate speech and sexually explicit materials, arguing that because such expression is based on racist and sexist ideas, it may be suppressed on the ground that it constitutes discrimination and thus an infringement of equality rights. This theory is, however, incompatible with the Millian philosophy of truth-seeking and the principle of viewpoint neutrality because it equates the expression of discriminatory ideas with discriminatory conduct (thus eliminating the important distinction between speech and action) and, more importantly, because it asserts that the mere fact that expression conveys an idea that gives rise to a feeling of offensiveness constitutes sufficient "harm" to warrant suppression of the expression. Proponents of this approach reject viewpoint neutrality, arguing that racist, sexist and other anti-egalitarian ideas are inherently "wrong" and so are not entitled to constitutional protection. But determining the lawfulness of expression on the basis of viewpoint necessarily implies that the state has the right to determine which ideas are "true" and which are "false", a position which is fundamentally irreconcilable with free speech theory. Unless one wishes to give the state the power to create an official orthodoxy, it is simply not possible to justify censorship of expression solely on the ground that the ideas it contains give rise to offence.

A further viewpoint-related objection to the equality-based approach is that some of its proponents advocate censorship of expression on the ground that where expression enjoys a position of "dominance" it should be seen as "silencing" expression from other viewpoints, and that censorship of it would, therefore, be justified as an act of affirmative action. Apart from the practical difficulties of determining the "dominance" or "subordinacy" of ideas within a population or, at its most complex, within sectors thereof, this argument suggests that the law ought to ensure equality of outcomes between competing ideas and ought therefore to discriminate between ideas by offering protection to some at the expense of others. This too is clearly incompatible with viewpoint neutrality and truth-seeking.

Despite its faults, the equality-based approach to hate speech does at least highlight issues that need to be addressed. Clearly it is necessary to arrive at an approach

which, in so far as is possible, remedies the harm caused by hate speech without compromising Millian values. A possible solution to this problem is that proposed by those theorists who suggest that a measure proscribing the strictly defined class of "meaningless abuse" would be consistent with free speech doctrine because, since such expression conveys no ideas, proscribing it does not offend Millian values and viewpoint neutrality. This argument is, however, limited by its egalitarian roots in that it can be used to justify a remedy only in cases where insults are directed towards characteristics - such as race and gender - in relation to which it has been determined social inequality exists. However this not only raises the problem (referred to earlier) of determining questions of dominance and subordination as between social groups, but also raises the possibility that because such an approach would penalise only those insults motivated by discriminatory ideology, it would fall foul of the underinclusiveness doctrine contained in *R.A.V. v St. Paul*. In an attempt to avoid these problems Delgado and Yun propose that insults be made actionable irrespective of which characteristic of the plaintiff they are directed towards. The problem is however that Anglo-American common law contains no theory which sets the parameters for a general remedy covering all cases of insult. Such a theory is discussed in chapters 3 - 5 below.

So far as the specific case of sexually explicit materials is concerned, the equality-based critique fails in its endeavour to develop a harms-based approach to this area of the law, because the "harm" its proponents identify is that of attitudinal change, which is essentially the same "harm" that underpins the community morals approach in *Miller*. In other words, whereas under *Miller* sexually explicit material is censored because of the prurient interest it arouses contrary to a subjective moral code, under the equality-based approach such material is censored because the sexist philosophy underlying it offends an equally subjective political code, of which equality is the primary value. Clearly this is as incompatible with Millian values as is the egalitarian approach to hate speech.

Some of the harms identified by proponents of the equality-based approach - unwanted sexual conversation and involuntary exposure to sexually explicit material - can be regulated consistently with free speech theory. However this would be done on the basis that such expression constituted an invasion of privacy, rather than on the impermissible basis that it conveyed discriminatory ideas.

The question of whether sexually explicit material incites consumers to unlawful *conduct* is addressed in chapter 6. Here it may be noted that the egalitarian approach

is open to criticism in that by labelling some forms of sexual activity as inherently "wrong" on the ground that it involves relationships of dominance and submissiveness (even if engaged in consensually), the approach fails adequately to address the issue of sexual autonomy and the question of how to distinguish between permissible and impermissible sexual activity.

CHAPTER 3

DIGNITY AS THE FOUNDATION OF RIGHTS

3.1 Introduction

Thus far consideration has been given to two major concepts - truth and equality. In chapter 1 it was demonstrated that while the search for truth is the most often cited justification for freedom of expression, and is undoubtedly an important value served by it, it is insufficiently broad to justify the protection given to all dimensions of this freedom - artistic expression being a prime example. It was also shown that, important as the search for truth may be, it certainly cannot be seen as an "ultimate" value, because there are interests to which, even despite First Amendment suspicion of content regulation, this value must sometimes be subordinated. The focus in chapter 2 was not on an ultimate value *justifying* freedom of expression, but rather on an interest - equality - frequently advanced as the most suitable interest to be used in *limiting* this freedom. The conclusion reached was that this would be an unsatisfactory criterion to adopt, firstly because equality itself is a value that must be open to debate in a free society, and secondly because of the irreconcilable conflict between substantive equality and freedom.

Attention is now turned to a concept which, it will be argued, can play the role both of justification for and a source of limits on, freedom of expression. In other words it will be argued that dignity is a concept of sufficient breadth to embrace freedom of expression *and* the interests that must be balanced against it. The focus of this chapter is the role of dignity in general human rights theory and the extent to which it has been recognised as a source of rights in United States jurisprudence. Subsequent chapters will deal with the remedy for impairment of dignity conferred by the *actio injuriarum* of the Roman-Dutch law of South Africa.

3.2 Dignity and freedom - Renaissance and Enlightenment Origins

The concept of dignity is intimately connected with fundamental freedoms. The most recent comprehensive work on the concept of dignity is Rotenstreich's *Man and his Dignity*,⁶⁷⁶ and his historical analysis of dignity provides a useful framework for explaining the relationship between dignity and freedom.

⁶⁷⁶Rotenstreich, Nathan *Man and his Dignity* (Jerusalem, Magnes Press, 1983).

As with natural law theories, human dignity was originally seen in theistic terms,⁶⁷⁷ and was justified by reference to the Biblical statement that man was created in the image and likeness of God.⁶⁷⁸ According to this biblical view there was nothing inherently worthwhile in the human being as such - human worth derived from and was measured against a standard set by the Creator. Such unique qualities as were exhibited by human beings and separated them from the rest of creation proceeded from the fact that human beings were created by God and shared certain divine qualities. However, this view is anachronistic,⁶⁷⁹ as nowhere does the Bible refer to dignity in the sense that that term is used today - as an inherent quality of humankind.⁶⁸⁰ Nevertheless, the biblical view is worthy of mention if only to underscore the essential feature of the modern view of dignity, which originated during the Renaissance, and was given its classic exposition in Pico della Mirandola's *Oration on the Dignity of Man*.⁶⁸¹ The significance of this work was its founding of human worth in rational free will which, although ultimately derived from the Creator, serves to place human beings in a *parallel* position with God in that, enjoying the autonomy of choice that free will gives, human beings can choose to do either good or evil without reference to the will of God and, indeed, in *contravention* of the will of God.⁶⁸² This autonomy based on free will also separates humans from the rest of creation, which lacks the faculty of reason and thus free will. It is this inherent specialness⁶⁸³ that constitutes the "dignity" of humankind. In terms of this analysis⁶⁸⁴ it follows that interference with human potential to exercise and act in accordance with free will constitutes an offence against dignity.

The Renaissance concept of free will and autonomy as the foundation of human dignity formed an important part of Enlightenment philosophy⁶⁸⁵ and, most importantly, led to the development of the theory of natural rights since, having accepted that free will is the essence of human dignity, it was a logical step to argue

⁶⁷⁷ See the general discussion *ibid.*, Chapter 2.

⁶⁷⁸ Genesis 1: 26-27.

⁶⁷⁹ Rotenstreich, *supra* n. 676 at 23-5 and 49.

⁶⁸⁰ *Ibid.*, 1.

⁶⁸¹ Della Mirandola, Pico (1463-94) *On the Dignity of Man* (Wallis trans) (Indianapolis, Bobbs-Merrill, 1965).

⁶⁸² *Ibid.*, 4-5. Rotenstreich, *supra* n. 676 at 49-54.

⁶⁸³ See for example Herder, J. G. *J G Herder on Social and Political Culture* (Barnard, trans.) (Cambridge, University Press, 1969) 256 and 264-7.

⁶⁸⁴ See in general Rotenstreich, *supra* n. 676 at Chapter 3 and at 141.

⁶⁸⁵ Thus, in commenting on Kant's *What is Enlightenment*?, Rotenstreich (*ibid.*, 64) writes as follows

The Renaissance concept of man in terms of man's essence and dignity is rephrased as a concept of the man of the Enlightenment. What, if anything, is particular in this context in terms of Enlightenment? One possible answer would be the emphasis on reason or, put differently, the tendency to identify creativity with reason.

that it was necessary to guarantee rights in order to secure for individuals the autonomy to act in accordance with that will.⁶⁸⁶ Furthermore, the link between dignity and rights meant that move from a theistic to a rationalistic idea of human dignity was paralleled, in the 17th century, by a shift from a theistic to a rationalist concept of natural law and natural rights.⁶⁸⁷ One of the most important early figures in this transformation was Grotius, to whose work attention will be paid later in this chapter, while among 18th century philosophers it was Kant who most explicitly based a rationalist theory of rights upon human dignity,⁶⁸⁸ emphasising man as an end as opposed to man as a means - in other words, that the inherent dignity of each person makes it impermissible for one to be subordinated to another⁶⁸⁹ or to be prevented by that other from exercising free will.⁶⁹⁰ Kant also identified equality as a crucial link in the chain from the "is" (the individual has a quality - dignity - which derives from his uniqueness as an autonomous being endowed with free will) to the "ought" (the individual should be guaranteed rights to prevent interference with that autonomy),⁶⁹¹ arguing that once one asserts that inherent dignity as a human being

⁶⁸⁶As is stated by Polin, Raymond "The Rights of Man in Hobbes and Locke" in Raphael, D. D. *Political Theory and the Rights of Man* (London, McMillan, 1967) 16 at 18:

Natural right is thus a right peculiar to man and particularly human, because it consists in the capacity to act according to reason and to govern oneself according to one's own rationally established judgment, and this is something which is in the province of man.

⁶⁸⁷As is stated idem, it came to be accepted that natural law was "made up of rationally calculated precepts".

⁶⁸⁸In discussing the Kantian idea of human dignity Rotenstreich, supra n. 676 at 141 states

With all due consideration for Kant's own idea of human dignity, that dignity is grounded in man's freedom and freedom, in turn, can be understood as manifesting man's creativity or as identical with it.

See also his discussion on Kant and autonomy, *ibid.*, 162-7.

⁶⁸⁹As Rotenstreich expresses it (*ibid.*, 154):

Kant himself associates mankind with dignity and asserts that this is so because one human being cannot take advantage of another human being; not only can he not do so but he cannot regard even himself merely as a means since he has always been regarded as an end. His dignity lies precisely in that position which elevates him above the position of those entities which are mere things. What actually happens is that every human being recognizes on the level of practice the dignity of mankind in each human individual, and along with that recognition comes the duty to express respect and reverence for every human being.

⁶⁹⁰*Ibid.*, 161-2.

⁶⁹¹Thus, as Rotenstreich states (*ibid.*, 133):

Suppose that we adopt the view that the desire for destruction is an expression of creativity and, to that extent, accords with the notion of human dignity. That desire implies the annihilation or disregard of one's fellow man both in the singular and in the plural. However, man's awareness of his dignity is joined by his awareness that dignity is not a quality of his, or of Paul or Peter, only, but is an attribute of man *qua* man. In this sense the awareness of human dignity presupposes a step beyond one's personal scope; it further presupposes the acknowledgment of their [sic] respective dignity of human beings in their plurality. Here the

entitles one to freedom of action, one is logically bound to recognise that freedom in all other human beings as well, and from the "is" of one's own dignity proceeds the "ought" of respecting the dignity of others.⁶⁹² The onus of justifying his position thus no longer rests on him who asks why should the dignity of others be respected, but rather on him who, having laid claim to his own dignity, seeks to trench upon the dignity of others. The concept of equality thus provides the link between dignity and natural rights - since dignity is inherent in being human, all human beings must be entitled to it, and thus each human being has the right to have his or her dignity respected by all other human beings.⁶⁹³ Thus as Rotenstreich points out,⁶⁹⁴ Kant held that although man has unique dignity *qua* man, no individual is "more unique" than any other, and hence each human being's dignity must be accorded equal respect.⁶⁹⁵ Before leaving Kant, it is necessary to highlight an important qualification he placed on autonomy: As Feinberg notes, Kant's concept of autonomy differs from a purely libertarian one in that Kant saw dignity as being inalienable, and superior to the will of its possessor.⁶⁹⁶ Thus although dignity implied autonomy for Kant, it also implied *limits* on autonomy, and thus Kant held that the individual did not have the right to commit suicide. This paradox will be discussed further at 6.4.2.1 below.

Finally, assuming that dignity is to be equated with autonomy, it is useful to refer to the defence of autonomy advanced by Mill who, in his *On Liberty*, stated⁶⁹⁷

The object of this Essay is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of

very acknowledgment of the plurality of human beings implies a norm of behaviour. ...From this point of view, we can see the relationship between human dignity and human equality. The demand for or right to equality is ultimately based on the notion that the human essence is present in every human individual. In the name of that essence, in the name of human dignity as the normative expression of the human essence, equality is formulated as a principle...insofar as human beings in the empirical sense of the term are carriers of human creativity and thus of human dignity, human beings as such are valued. Their factual position is by the same token a normative position.

⁶⁹²For a general discussion of autonomy, including Kant's contribution, see Feinberg, Joel *Harm to Self* (New York, Oxford University Press, 1986) 27-51.

⁶⁹³The same rationale of shared humanity formed the basis of Locke's theory of rights - see Macpherson, C. B. "Natural Rights in Hobbes and Locke" in Raphael, D. D. *Political Theory and the Rights of Man* (London 1967) 1 at 7-8.

⁶⁹⁴Rotenstreich, *supra* n. 676 at 149.

⁶⁹⁵Similarly, Rotenstreich states (*ibid.*, 155)

..dignity allows for each human being to measure himself against every other being of his kind and to evaluate himself as equal. Participation in the idea of mankind, by being an anti-egocentric awareness, cuts the roots not only of the position of being a means and not an end, but enables positively different human beings to see themselves in their reciprocity as equals.

⁶⁹⁶Feinberg, *supra* n 692 at 94-7.

⁶⁹⁷Mill, *supra* n. 13 at 30-1.

compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant....The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Similarly, he wrote⁶⁹⁸

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

Thus it can be seen that Renaissance and Enlightenment theories of dignity and autonomy form an important foundation of modern liberalism, and that Mill's defence of the particular liberty of freedom of expression should be seen in the context of his commitment to liberty in general.

3.3 Dignity in 20th Century International Rights Documents

The increasing recognition given to rights in the twentieth century has seen dignity recognised in both international and domestic human rights documents. The United Nations Charter states that human dignity is an ideal that the members of the United Nations are determined to achieve,⁶⁹⁹ and this is reflected in the 1948 Universal Declaration of Human Rights⁷⁰⁰ which in its preamble states:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

⁶⁹⁸Ibid., 33.

⁶⁹⁹The United Nations Charter of 26 June 1945 (UNCIO xv 335) states in its preamble that signatories are "determined...to reaffirm faith in fundamental human rights" and "in the dignity and worth of the human person".

⁷⁰⁰GA Res. 217 A (III) of 10 December 1948.

Furthermore, Article 1 of the Declaration provides that

All humans are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Both these provisions clearly owe much of their intellectual heritage to the Enlightenment view of the inherent dignity of human beings, of the equal freedom that that dignity implies, and of the consequent entitlement of each human individual to fundamental rights. Dignity is also protected by the International Covenant on Civil and Political Rights,⁷⁰¹ and Article 13 of the International Covenant on Economic, Social and Cultural Rights.⁷⁰² Finally, Principle VII of the Helsinki Accords⁷⁰³ binds signatory states to promote the effective exercise of human rights and freedoms, all of which are stated to derive "from the inherent dignity of the human person". Moving from the international arena to specific jurisdictions, some jurisdictions having Bills of Rights mention dignity, either as a principle upon which other rights are based or as a justiciable right.⁷⁰⁴ Perhaps the best example of the latter is provided by Article 1, § 1 of the German Constitution which provides as follows:

The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

As commentators have noted, this section confers upon dignity the status of a fundamental right upon which all others are based.⁷⁰⁵ Further attention will be paid to

⁷⁰¹GA Res 2200A (XXI) of 16 December 1966. The Preamble states that "rights derive from the inherent dignity of the human person", while Article 10 provides:

..[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 of the Covenant is also reproduced as Article 5 of the American Convention on Human Rights.

⁷⁰²GA RES 2200A (XXI) of 16 December 1966. This article states in part that

...education shall be directed towards the full development of the human personality and the sense of its dignity..

⁷⁰³Reproduced in Joyce, J. A. (ed) *Human Rights: International Documents* (Dobbs Ferry, Oceana, 1978) 1373 at 1377.

⁷⁰⁴South African Law Commission, *supra* n. 1 at 414.

⁷⁰⁵Schneider, Peter "Social Rights and the Concept of Human Rights" in Raphael, D. D. *Political Theory and the Rights of Man* (London, McMillan, 1967) 81 at 87-8, 90-3; Reimann, Mathias "Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States" 21 (1987-88) *University of Michigan Journal of Law Reform* 201 at 210.

the interaction between the general right to dignity and the specific right of freedom of expression later in this thesis.

3.4 The McDougal - Lasswell School

Contemporaneous with increasing international recognition of the fundamental importance of human dignity to human rights during the mid-20th century was the development by Professors McDougal and Lasswell of a school of thought at the cornerstone of which was the ideal of "deference for the dignity and worth of the individual".⁷⁰⁶ In developing their jurisprudence McDougal and Lasswell stated⁷⁰⁷ that the

...supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference...

and in their search for "the primary postulate[] of public order, infusing and transcending all particular communities",⁷⁰⁸ they identified⁷⁰⁹

...The comprehensive set of goals which, because of many heritages, we recommend for clarification and implementation are, as already suggested, those which are today commonly characterised as the basic values of human dignity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being very more insistently expressed in the rising common demands and expectations of peoples everywhere. As demanded in the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenants on human rights, regional agreements and programs, national constitutions, political party platforms, and other official and unofficial pronouncements, these values are of course formulated at many different levels of abstraction and in many different cultural and institutional modalities.

Similarly McDougal wrote⁷¹⁰

⁷⁰⁶Lasswell, H. and McDougal, M. "Legal Education and Public Policy: Professional Training in the Public Interest" 52 (1943) *Yale Law Journal* 203 at 207.

⁷⁰⁷*Ibid.*, 212.

⁷⁰⁸Lasswell, H. and McDougal, M. "Criteria for a Theory About Law" 44 (1971) *Southern California Law Review* 362 at 393.

⁷⁰⁹*Idem.*

⁷¹⁰McDougal, M. "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies" 14 (1974) *Virginia Journal of International Law* 387 at 388-9.

..there is an overriding insistence, transcending all cultures and climes, upon greater production and wider distribution of all basic values, with increasing recognition that a world public order of human dignity can tolerate wide differences in the specific practices by which values are shaped and shared, so long as all demands and practices are effectively appraised and accommodated in terms of common interest. Similarly, different peoples, conditioned by different philosophical and ideological traditions, do offer different justifications or logical derivations in support of these demands. The contemporary movement for human rights upon the world scene would appear to be heir to all the great, though more partial historic movements for man's freedom (in Europe, the Americas and elsewhere) and to the enduring elements in most of the world's great religions and secular philosophies, most especially those of natural law and natural rights and those of contemporary science with its findings about the deep interrelations of simple respect for the dignity of the person and all other values. Yet, again, there is growing awareness that ...different syntactic justifications converge upon the same empirical reference to all the basic rights of men.....The important fact is that the people of the world are today increasingly demanding whatever their differences in cultural traditions, ideologies and styles of justification - that all those basic rights, commonly characterised in empirical references as those of 'human dignity,' be secured by the process of law in all those different communities of which they are members, including especially the transnational or world community.

It is clear from the above that human dignity was, for McDougal and Lasswell, the ultimate value which human rights were to serve. As Paust expresses it, dignity was the "high level abstraction" which would be given concrete expression through the satisfaction of people's expectations that rights would be protected.⁷¹¹ In subsequent writings, McDougal, Lasswell and Chen identified specific rights that respect for human dignity would guarantee.⁷¹² Although the above quotations are indicative of the recognition McDougal and Lasswell gave to growing international pressure towards the protection of fundamental rights, it would be wrong to deduce from this (as does Paust⁷¹³) that they saw such demands as constituting the *source* of such

⁷¹¹Paust, Jordan "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria And Content" 27 (1984) *Howard Law Journal* 145 at 200-201.

⁷¹²See, in general, McDougal, M., Lasswell H. and Chen, L. *Human Rights and World Public Order* (New Haven, Yale University Press, 1980).

⁷¹³Paust, *supra* n. 711 at 198 and 200.

rights - it is important rather to note that their concept of dignity was based in natural rights, an interpretation supported by Shestack in his survey of rights theories.⁷¹⁴

3.5 Dignity in United States and Canadian law

The previous sections have demonstrated the fundamental importance of dignity to the theory of human rights in general. The next issue to be investigated is more specific, namely to what extent if any a right to dignity has been recognised in the jurisprudence of the United States and Canada. Does the vast body of case law that has arisen, particularly under the long history of the Bill of Rights in the United States, acknowledge dignity as an enforceable right?

3.5.1 Dignity as an underlying value

Although the concept of human dignity played a crucial role in the development of the theory of human rights during the Enlightenment, it is surprising that dignity is nowhere mentioned in the United States Constitution and Bill of Rights, which were quintessential products of that era. Similarly, the Canadian Charter makes no mention of dignity. Despite this, however, North American jurisprudence has not remained uninfluenced by the increasing importance accorded to the concept of dignity. The most significant survey of judicial attitudes to dignity was that conducted by Paust who, in his comprehensive statistical analysis of the use by the United States Supreme Court of "human dignity" and related terms, shows that reference has been made to the concept with increasing frequency over the past fifty years or so.⁷¹⁵ Thus, to take a specific example, Paust adduces as being reflective of both natural rights theory and America's constitutional heritage⁷¹⁶ a *dictum* by Justice Stevens in *Meachum v Fano*⁷¹⁷ where, in discussing the right of prisoners not to be subject to cruel and unusual punishment, it was held that it was

...clear that even the inmate retains an unassailable interest in liberty - *at the very minimum the right to be treated with dignity - which the Constitution may never ignore.*

(Emphasis added).

Furthermore, although relatively little judicial energy has been directed towards giving content to the term "human dignity", Paust is able to identify a range of

⁷¹⁴Shestack, Jerome J. "The Jurisprudence of Human Rights" in Meron, Theodore (ed) *Human Rights in International Law* (Oxford, Clarendon Press, 1984) 69 at 96.

⁷¹⁵Paust, *supra* n. 711 at 150-62.

⁷¹⁶*Ibid.*, 162.

⁷¹⁷427 U.S. 215 (1976).

entitlements which dignity is seen to imply. Thus the courts have characterised a range of wrongs as constituting loss of dignity,⁷¹⁸ including racial discrimination,⁷¹⁹ forced disclosure of political belief,⁷²⁰ attacks on reputation,⁷²¹ invasion of privacy,⁷²² infliction of physical or mental injury,⁷²³ and compulsion of the will⁷²⁴ - a catalogue of harms which, as will be shown below, is strikingly similar to those which South African courts have identified as constituting impairments of *dignitas*. The conclusion which Paust draws from his survey of American case law is that dignity is to be seen as a broad value underpinning the collection of rights protected by the Constitution⁷²⁵ and this leads him to state that⁷²⁶

[Dignity] has been used, as perhaps it always should, as an open-ended and dynamic constitutional concept that is often inter-dependent with most of our constitutional rights and a fundamental belief in the inherent dignity and worth of every person.

In similar vein, Bloustein argues⁷²⁷ that when, in their famous *Harvard Law Review* article,⁷²⁸ Warren and Brandeis argued for judicial recognition of a common law right to privacy,⁷²⁹ the authors were motivated by a desire to protect⁷³⁰

⁷¹⁸Paust, supra n. 711 at 171-84.

⁷¹⁹*Korematsu v United States* 323 U.S. 214 (1944) at 233 and 240-2; *Duncan v Kahanamoku* 327 U.S. 304 (1946) at 334, *United States v Martinez-Fuerte* 428 U.S. 543 (1976) at 573; *Heart of Atlanta Motel v United States* 379 U.S. 241 (1964) at 291.

⁷²⁰*Ullmann v United States* 350 U.S. 422 (1956) at 452-3.

⁷²¹*Rosenblatt v Baer* 383 U.S. 75 (1966) at 92. In contrast with this however, one should note the Federal court ruling in *Johnson v Hackett* 284 F Supp. 933 (E.D. Pa 1968) at 939-40, in which the plaintiff, who had been called a "nigger" by a police officer, failed in his claim for violation of civil rights, the court holding that there was no constitutional right to dignity or reputation.

⁷²²*Traver v Smith* 402 U.S. 1000 (1971).

⁷²³*Rochin v California* 342 U.S. 165 (1952).

⁷²⁴*United States v Mara* 410 U.S. 19 (1973).

⁷²⁵Thus Paust, supra n. 711 at 181, states that

...a short, easy definition of human dignity would not only be unrealistic but ultimately incomplete. It does not require an unprecedented step in judicial reasoning then to conclude that the implicit recognition of Justice Douglas is correct - human dignity values pervade the Constitution and are interrelated.

The reference in this quote to Justice Douglas refers to his statement in dissent in *Frank v Maryland* 359 U.S. 360 (1959) at 376 that human dignity values are at stake in cases involving privacy, protection from self-incrimination, freedom of conscience and free expression.

⁷²⁶*Ibid.*, 149-150.

⁷²⁷Edward Bloustein "Privacy as an aspect of Human dignity: An answer to Dean Prosser" 39 (1964) *New York University Law Review* 962.

⁷²⁸Warren, S. D. and Brandeis, L. D. "The Right to Privacy" 4 (1890) *Harvard Law Review* 193.

⁷²⁹This ultimately matured into the torts of appropriation, intrusion, publication of private facts and placing in false light, the last two of which have already been discussed in chapter 1 above. For a succinct discussion of the development of tort law regarding privacy see McWhirter, D. and Bible, J. *Privacy as a Constitutional Right* (New York, Quorum Books, 1992) 75-87.

⁷³⁰Bloustein, supra n. 727 at 971.

...the individual's independence, dignity and integrity, [which] defines man's essence as a unique and self-determining being.

Thus, speaking of invasion of privacy through intrusion, Bloustein states⁷³¹

...intrusion is demeaning to individuality, is an affront to personal dignity...The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of our personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another...is less of a man, has less human dignity on that account.

Indeed, Bloustein went even further, arguing that torts involving interference with the person ought also be seen as offences against dignity.⁷³²

The experience of Canada has been similar. Thus in *R v Big M Drug Mart Ltd*,⁷³³ which was one of the very first Charter cases, the Supreme Court held that

Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.

Similarly, in *R v Oakes*⁷³⁴ "the inherent dignity of the human being" was held to be among the values of a free and democratic society against which limitations on rights were to be weighed, while in *R v Morgenthau*,⁷³⁵ Wilson J held⁷³⁶ that dignity "finds expression in almost every right and freedom guaranteed by the Charter", and referred to "the respect for human dignity upon which the Charter is founded".

Yet despite the above, one ought not overstate the case for dignity in North America. Certainly it has not been accorded the same status that it was in the Enlightenment or

⁷³¹Ibid., 973-74. Invasion of privacy by public disclosure (ibid., 979 and 981-3) by appropriation (ibid., 986 and 988-9) and by "false light" (ibid., 991-3) are similarly described as offences against human dignity.

⁷³²Ibid., 1003.

⁷³³(1985) 18 DLR (4th) 321 at 353.

⁷³⁴(1986) 26 DLR (4th) 200 at 225.

⁷³⁵(1988) 44 DLR (4th) 385.

⁷³⁶At 486.

in the more immediate writings of McDougal and Lasswell, and it could not be said to fulfil a role analogous to autonomy which, as has been shown earlier, was what Renaissance and Enlightenment theorists saw as being the essence of human dignity. Nor has a constitutional right to dignity or a tort of impairment of dignity (such as that suggested by Bloustein) been developed. However, this is not to say that such a concept does not exist in American constitutional thought. Rather it is simply the case that American jurisprudence has categorised such a value under the heading of privacy rather than dignity, and it is to a more fruitful inquiry into the nature of the right to privacy that it is now necessary to turn.

3.5.2 Dignity in the guise of the constitutional right to privacy

As was stated in chapter 1, truth-seeking is arguably the primary justification advanced for the protection of freedom of expression in United States jurisprudence. Yet although the arguments canvassed in that chapter sustain the position that freedom to seek the truth is necessary for purely pragmatic reasons, they suggest no principled reason as to why the individual should have a "right to seek the truth" which that argument presupposes. As has already been noted,⁷³⁷ Schauer's view is that freedom of expression is not *qualitatively* different from other human activities, and that the question "Why protect freedom of expression?" is simply part of the larger question "Why protect freedom to engage in activity in general?" Seen in this context, "expression" is simply an aspect of a general right to individual autonomy, and the classification of rights and freedoms under headings such as "freedom of expression", "freedom of religion", "freedom of movement" *et cetera* is useful only to the extent that it indicates the range of activities which that autonomy implies. This is, of course, apparent from the arguments of Mill himself, whose defence of the right to seek the truth was founded upon an argument in support of liberty in general.⁷³⁸

⁷³⁷See the articles by Schauer cited *supra* n. 12.

⁷³⁸Thus Mill, *supra* n.13 at 30-1, states

The object of this Essay is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others...The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Similarly (*ibid.*, 33) he wrote

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

Furthermore, support for the idea that individual autonomy is the fundamental value underlying freedom of expression is to be found in the writings of several commentators on the First Amendment.⁷³⁹ This characterisation of freedom of expression as an aspect of autonomy has profound implications for the inquiry into the role of dignity in American jurisprudence - as was argued above, Renaissance, Enlightenment and modern theories concerning human dignity saw liberty to act in accordance with free will as being the essence of dignity. If, therefore, American law recognises a general right to autonomy (however labelled), it will be possible to say that the classic concept of dignity is known to that legal system.

The issue of whether the United States Constitution protects a general right to autonomy has engaged the attention of the courts in several leading cases during the twentieth century. Both the Fifth Amendment and Fourteenth Amendments provide that the individual shall not be deprived of "liberty" without due process of law, while the Ninth Amendment stipulates that the fact that specific rights were enumerated (in the first eight Amendments) did not mean that other rights were denied. The roots of the argument that a right to autonomy is implied by these Amendments are usually traced to Warren and Brandeis' arguments for a tort action to vindicate privacy.⁷⁴⁰ More important for present purposes, however, was the parallel development from the Warren and Brandeis article of a separate *constitutional* "right to privacy"⁷⁴¹ in the sense of personal autonomy, in which Brandeis also had a hand when, in his dissenting opinion in *Olmstead v United States*,⁷⁴² he argued for recognition of "the most comprehensive of rights and the right most valued by civilised men...the right to be let alone".⁷⁴³ Further expansion of the right to privacy occurred through decisions in *Meyer v Nebraska*⁷⁴⁴ in which the court struck down a law prohibiting education of

and finally (ibid., 72-3)

As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.

In general on the value of autonomy see ibid., 72-5 and 78-9.

⁷³⁹See Redish, supra n. 503, Scanlon, T. "A Theory of Freedom of Expression" 1 (1972) *Philosophical and Public Affairs* 204, and Baker, C. Edwin "The Scope of the First Amendment Freedom of Speech" 25 (1978) *University of California at Los Angeles Law Review* 964 at 990-1009.

⁷⁴⁰Warren and Brandeis, supra n. 728.

⁷⁴¹Discussed by McWhirter and Bible, supra n. 729 at 91-104.

⁷⁴²277 U.S. 438 (1928).

⁷⁴³The conceptual link between the common law tort and the constitutional right was expressly noted by Murphy J in his dissenting judgment in *Goldman v United States* 316 U.S. 129 (1942) at 136-7, and by Bloustein, supra n. 727 at 994-5.

⁷⁴⁴162 U.S. 390 (1923).

school children in foreign languages, and in which McReynolds J held⁷⁴⁵ that where the due process clause of the Fourteenth Amendment protects "liberty" this

...denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free men.

Similarly in *Pierce v Society of Sisters*⁷⁴⁶ the court struck down a provision requiring that all children be educated at public schools which would have outlawed private educational institutions. Subsequently, in *Skinner v Oklahoma ex rel. Williams*,⁷⁴⁷ the court struck down a statute prescribing sterilisation of habitual criminals, finding that it infringed "one of the basic civil rights of man" (that of reproduction) implied by the Fourteenth Amendment. However, probably the most influential case in the area of privacy was that of *Griswold v Connecticut*⁷⁴⁸ in which the court struck down legislation criminalising the supply of contraceptives, holding that marital privacy was one of the rights guaranteed by the Constitution. Although justification for this position was found primarily in the Ninth Amendment, the court also held that the Fifth Amendment protected a "zone of privacy" secure from intrusion by the state. Thus Goldberg J held that

..the Ninth Amendment lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Similarly, in their concurring judgments, Justices Harlan and White stated that the legislation was unconstitutional on the ground that it infringed the Fourteenth Amendment which, according to the earlier decision in *Palko v Connecticut*,⁷⁴⁹ included within its protective ambit "basic values implicit in the concept of ordered liberty". In other words, the decision in *Griswold* laid a firm foundation for the development of a general right to what the court called "privacy" but which was in

⁷⁴⁵At 399.

⁷⁴⁶268 U.S. 510 (1925).

⁷⁴⁷316 U.S. 535 (1942).

⁷⁴⁸381 U.S. 479 (1965).

⁷⁴⁹302 U.S. 319 (1932).

reality "autonomy" - a zone of essentially private decision making in which the state is not permitted to interfere, unless it could meet the "strict" standard of constitutional scrutiny, which is that the state must show that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.⁷⁵⁰ The right to a "zone of privacy" was subsequently used by the court in cases such as *Loving v Virginia*⁷⁵¹ to strike down a state law prohibiting inter-racial marriage, and *Eisenstadt v Baird*⁷⁵² to uphold the right of unmarried persons to have access to contraceptives. This was soon followed by the landmark decision of *Roe v Wade*⁷⁵³ in which the court stated that the right to privacy found in the Fourteenth Amendment⁷⁵⁴ made unconstitutional prohibitions on abortion within the first trimester of pregnancy, a finding that has since been upheld in a line of abortion cases to reach the court.⁷⁵⁵ Finally, the court has recently addressed perhaps the most difficult aspect of individual autonomy - that relating to the right of patients to refuse medical treatment which, some assert, includes the right to elect treatment that will hasten death. Central to this position is the argument that patients should, at a stage when they still have the capacity to reason, be allowed to use that reason to exercise a measure of control over the timing and manner of their death, rather than to be the object of decisions by the medical profession. Active suicide clearly raises profound issues regarding the limits of autonomy, and these are discussed in chapter 6 below, but the patients' rights movement provides us with a clear example of a right incorporating all the elements of human dignity - reliance upon reason, autonomy, and non-objectification of the human being. In *Cruzan v Director, Missouri Department of Health*⁷⁵⁶ the court upheld the validity of a statute which made withdrawal of life support conditional upon relatives of a patient in a vegetative state being able to adduce sufficient proof that that would have been her wish, holding that such a requirement did not violate the patient's right to liberty inherent in the Fourteenth Amendment. However, the court noted that it *was* willing to accept for the purposes of the case that the Constitution would grant to a competent patient (which, of course,

⁷⁵⁰*Griswold v Connecticut* 381 U.S. 479 (1965) at 496-8, citing *Bates v Little Rock* 361 U.S. 516 (1960) at 524. For a concise discussion of the development of the right to privacy see Feinberg, *supra* n. 692 at 87-94.

⁷⁵¹338 U.S. 1 (1967).

⁷⁵²405 U.S. 438 (1972).

⁷⁵³410 U.S. 113 (1973).

⁷⁵⁴Interestingly, the court held that the alternative foundation of the Ninth Amendment would also support this aspect of the right to privacy.

⁷⁵⁵The *Roe* decision that choice in the matter of abortion is an aspect of the right to privacy was upheld in several cases, including *Akron v Akron Center for Reproductive Health Inc.* 462 U.S. 416 (1983), *Thornburgh v American College of Obstetricians and Gynaecologists* 476 U.S. 747 (1986) and *Planned Parenthood of Southeastern Pennsylvania v Casey* 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

⁷⁵⁶497 U.S. 261 (1990).

the patient in this case was not) the right to refuse medical treatment, even if this hastened death.

In light of the increasingly broad interpretation given to the right to privacy in the cases discussed above, the decisions in *Paul v Davis*⁷⁵⁷ and *Bowers v Hardwick*⁷⁵⁸ seem aberrant.⁷⁵⁹ In *Paul* the Supreme Court refused to find that the respondent's rights to liberty or privacy guaranteed by the Fourteenth and Ninth Amendments respectively had been infringed when defamatory notices suggesting he was a shoplifter were distributed by the police. Clearly the court was unwilling to extend the concept of liberty to include the right not to be subject to the emotional harm resulting from defamation. In *Bowers* the Court upheld the validity of a Georgia statute prohibiting consensual homosexual acts, refusing to consider whether homosexual conduct was protected by the Fifth, Fourteenth and Ninth Amendments, and stating that the privacy precedents (discussed above) related to "family, marriage [and] procreation",⁷⁶⁰ which homosexual activity did not. The court further cited precedent⁷⁶¹ to the effect that such freedoms as might be implied by these Amendments were restricted to those that were "implicit in the concept of ordered liberty" in the sense that "neither liberty or justice would exist if they were sacrificed" and to abolish them would be to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Palko v Connecticut*,⁷⁶² reaffirmed in *Paris Adult Theatre I v Slaton*⁷⁶³) or were "deeply rooted in this Nation's history and traditions" (*Moore v East Cleveland*⁷⁶⁴), and that far from being an indispensable aspect of liberty, homosexual conduct had traditionally been widely proscribed. Leaving aside for the moment the broader issue of the methodology used in discovering what rights are implicit in the Constitution (which is dealt with in the paragraphs below), the court's reading of the precedents in *Griswold* and subsequent cases was surely wrong - restrictions on intimate activity had been struck down in these earlier cases not because there was anything special about these activities *per se*, but because they were simply aspects of a fundamental right of privacy, in the sense of autonomy, which was (successfully) argued for in them all. The reasoning in *Hardwick* was nevertheless adopted in *Barnes v Glen*

⁷⁵⁷424 U.S. 693 (1976).

⁷⁵⁸478 U.S. 186 (1986).

⁷⁵⁹For a critical analysis of the decision in *Bowers* see McWhirter and Bible, *supra* n. 729 at 116-23 and Samar, Vincent *The Right to Privacy - Gays, Lesbians and the Constitution* (Philadelphia, Temple University Press, 1991) 36-7 and 82.

⁷⁶⁰*Bowers v Hardwick* 478 U.S. 186 (1986) at 190.

⁷⁶¹At 191-2.

⁷⁶²302 U.S. 319 (1937) at 325.

⁷⁶³413 U.S. 49 (1973) at 65.

⁷⁶⁴431 U.S. 494 (1977) at 503.

Theatre, Inc.,⁷⁶⁵ where in his concurring judgment, Scalia J rejected the idea that the Constitution embodied a general protection for all conduct that was not harmful or which was engaged in consensually. Consequently he also rejected the idea that a prohibition on conduct was unconstitutional simply because the prohibition was based on morality, citing sadomasochism, bestiality, suicide, drug use and prostitution as examples of activities that were proscribed on the basis that they offended public morality, rather than that they caused harm to a victim.⁷⁶⁶

By contrast, however, some comfort is to be obtained from the more recent case of *Planned Parenthood of Southeastern Pennsylvania v Casey*,⁷⁶⁷ in which the court re-affirmed *Roe v Wade*, explicitly reiterated that the Fourteenth Amendment right not to be deprived of liberty without due process embraced more than just the rights protected in the other Amendments, and stated that "it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter".⁷⁶⁸ Later the court held⁷⁶⁹ that its previous refusals to countenance governmental intervention in areas such as marriage, procreation contraception *et cetera* were based upon the principle that these were matters

...involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which are] essential to the liberty protected by the Fourteenth Amendment.

Similarly, in upholding the view that the Constitution protected a degree of freedom of choice as regards abortion, Stevens J linked autonomy and dignity, holding that⁷⁷⁰

The authority to make such traumatic and yet empowering decisions is an element of basic human dignity

and that⁷⁷¹

Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled.

⁷⁶⁵ 501 U.S. 560 (1991).

⁷⁶⁶ At 575.

⁷⁶⁷ 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

⁷⁶⁸ At 695.

⁷⁶⁹ At 698.

⁷⁷⁰ At 740.

⁷⁷¹ At 743.

Casey thus represents a swing back towards a more generous understanding of autonomy, more in keeping with cases like *Griswold v Connecticut* and *Roe v Wade*, an outcome which, it is submitted, relates to the difference in methodology used in this decision as compared with that used in *Bowers* to determine the extent of the right to "autonomy": In *Bowers v Hardwick*, and subsequently in *Michael H v Gerald D*,⁷⁷² the court adopted an approach based squarely on "tradition", essentially holding that new rights would be found to be implicit in the Constitution only if the traditions of American society indicated that they were worthy of protection. The incompatibility of this approach with the concept of individual liberty is obvious. As Justice Brennan pointed out in his dissenting opinion in *Michael H v Gerald D*, the adoption of that approach in many of the early cases on privacy would probably have led to different results, in that the rights claimed in those cases (for example, the right of access to contraceptives vindicated in *Griswold v Connecticut*) were certainly *not* traditionally protected by society at the time the cases were heard by the court. Further he stated that⁷⁷³

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse [p]rotects our own idiosyncrasies...In a community such as ours, "liberty" must include the freedom not to conform.

In contrast to the majority approach in *Michael H.*, the court in *Casey* stated firstly that in determining the scope of liberty conferred by the due process clause the court was called to "exercise that same capacity which by tradition courts have always exercised: reasoned judgment".⁷⁷⁴ Furthermore, the court held that in making its decisions it had to⁷⁷⁵

...speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded in principle, *not as compromises with*

⁷⁷²491 U.S. 110 (1989) at 122-9.

⁷⁷³At 141.

⁷⁷⁴*Planned Parenthood of Southeastern Pennsylvania v Casey* 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) at 697.

⁷⁷⁵At 707.

social and political pressures having, as such, no bearing on the principled choices the Court is obliged to make.
(Emphasis added).

In other words, the court in *Casey* adopted an approach through which the ambit of individual autonomy would be determined objectively and, therefore, I would argue, in a manner more in keeping with the natural rights doctrine upon which the Bill of Rights is based, which sees objective values as existing independently of, and yet being discoverable by, human will, rather than as the product of societal pressures.⁷⁷⁶ This is not to say, however, that social values and expectations are irrelevant to the understanding of human rights⁷⁷⁷ - to use an analogy from Roman law, *ius gentium* is often good evidence of *ius naturale* - but clearly the idea of human rights as providing protection for individuals is stripped of much of its usefulness once the ambit of rights is limited by what is acceptable to society, because it is, of course, in protecting what is *unacceptable* to society that the concept of human rights frequently comes into its own. Further attention will be devoted to the issue of subjective *versus* objective tests for limits autonomy / dignity in section 5.5 below.

3.5.3 Dignity, autonomy and expression

The previous section identified privacy as the right in American law analogous to the overarching concept of autonomy which, at the beginning of this chapter, was stated to be the essential characteristic of dignity. This section explores the extent to which American law has identified the specific right of freedom of expression as an aspect of autonomy - in other words the extent to which American jurisprudence recognises autonomy / dignity as the source of the specific freedom that is the subject of this thesis.

Although freedom of expression received specific textual recognition through the First Amendment and thus did not need to be developed under the heading of "privacy" in the same way as was necessary in the case of freedoms (such as reproductive freedom) which were not specifically mentioned in the Bill of Rights, there are many instances in both academic writing and case law in which this freedom

⁷⁷⁶See for example Paust, *supra* n. 711 at 220-2, where he argues that since the United States Constitution was drafted in order to give expression to unwritten natural rights, it is appropriate to adopt an objective approach in interpreting that document, and in particular the Ninth Amendment's reservation of rights to the people.

⁷⁷⁷*Ibid.*, 204-10.

has been described as being an aspect of dignity or autonomy.⁷⁷⁸ Perhaps the clearest example of the link between dignity, autonomy and freedom of expression is provided by Emerson's statement that⁷⁷⁹

The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being...every man - in the development of his own personality - has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions..The power to realize his potentiality begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. Hence, suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.

Thus according to the argument based on autonomy and self-fulfilment, restrictions on freedom of expression compromise not only the value of truth-seeking, but also the dignity and autonomy of both speaker and hearer,⁷⁸⁰ and is thus in some sense an insult to them.⁷⁸¹ Similarly, Smolla⁷⁸² notes that "...free speech is also an end in itself, and end intimately intertwined with human autonomy and dignity..", and later that⁷⁸³

...man's capacity to think, imagine and create..[and the] linkage of speech to thought, to man's central capacity to reason and wonder, is what places speech above other forms of fulfilment, and beyond the routine jurisdiction of the state.

In the same vein Richards states⁷⁸⁴

⁷⁷⁸For a general discussion of the way in which freedom of expression serves the underlying value of autonomy and self-expression see Tribe, *supra* n. 50 at 787-9. See also Strossen, *supra* n. 59 at 535, and Redish, *supra* n. 503.

⁷⁷⁹Emerson, *supra* n. 11 at 879.

⁷⁸⁰See Cockrell, *supra* n. 241. .

⁷⁸¹The idea of "censorship as insult" is advanced by Raz, Joseph "Free Expression and Personal Identification" in Waluchow, W. J. (ed) *Free Expression* (Oxford, Clarendon Press, 1994) 1 at 14-18.

⁷⁸²Smolla, *supra* n. 11 at 9 and 119.

⁷⁸³*Ibid.*, 10.

⁷⁸⁴Richards, David "The Moral Theory of Free Speech and Obscenity Law" in Berger, Fred (ed) *Freedom of Expression* (Belmont, Wadsworth Publishing, 1980) 99 at 120.

Rather, the First Amendment rests more fundamentally on the moral liberties of expression, conscience and thought; these liberties are fundamental conditions of the integrity and competence of a person in mastering his or her life and expressing this mastery to others. The freedom to determine the contents of one's communications is fundamental to this mastery. Without this freedom, one lacks a basic ingredient of self-determination.

The same view is echoed by McCloskey who points to the link between rational thought, on the one hand, and individuality and self-development, on the other, and concludes that because freedom of expression is necessary for rational thought it is, therefore, necessary for self-development.⁷⁸⁵ Here one sees the link explicitly being made between freedom of expression and the original Renaissance idea of dignity as the capacity of the human being to use reason. Finally, the identification of freedom of expression as an aspect of autonomy is stated with particular eloquence by Hartman as follows:⁷⁸⁶

Freedom of expression encourages the exercise of...human capacities by supporting an individual's sovereign autonomy in deciding how to communicate with others and by disfavoring restrictions on communication imposed for the sake of the distorted rigidities of the orthodox and the established. In so doing, free expression nurtures and sustains the self-respect of each person. Moreover, freedom of expression protects the interests of the individual who possesses developed capacities of rational choice. This protection permits the individual to decide whether to be an audience to a communication and to weigh the communication according to his or her own rational vision of life. This idea was expressed by Immanuel Kant, who noted that each rational being is a sovereign legislator in the realm of ends. For any other putative sovereign, democratic or otherwise, to decide to what communications people can be exposed is a contempt of human rationality. In this regard, freedom of expression rests on its deep relation to respect arising from autonomous self-determination, without which the life of the spirit is meager [sic] and slavish.

⁷⁸⁵McCloskey, *supra* n. 39 at 234. See also *Monro*, *supra* n. 41 at 247-9. A more general discussion of the relationship between autonomy and freedom of expression is to be found in *Strauss*, *supra* n. 284.

⁷⁸⁶Hartman, Rhonda "Revitalizing Group Defamation as a Remedy for Hate Speech on Campus" 71 (1992) *Oregon Law Review* 855 at 870.

So far as case law is concerned, the courts have been ambivalent on the issue of whether freedom of expression derives from dignity / autonomy. Certainly there are instances in which this view has been adopted. In *Cohen v California*,⁷⁸⁷ Harlan J stated that

The constitutional right of free expression...is designed and intended to remove governmental restraints from the arena of public discussion, putting decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Similarly, in *Joseph Burstyn, Inc. v Wilson*⁷⁸⁸ it was held that freedom of expression enjoyed constitutional protection not only by virtue of the First Amendment, but also by virtue of the general protection afforded to liberty by the Fourteenth Amendment. Furthermore, in *Herbert v Lando*⁷⁸⁹ Justice Brennan held that "freedom of speech is...intrinsic to individual dignity", while freedom of expression was also cited as an aspect of dignity in *Procunier v Martinez*,⁷⁹⁰ *Rosenfeld v New Jersey*,⁷⁹¹ and *Bose Corporation v Consumers Union of the United States, Inc.*⁷⁹² In First Amendment cases involving children and obscenity, the court seems to have based its reasoning on the concept of autonomy, linking consumption of (*Ginsberg v New York*⁷⁹³) and appearance in (*New York v Ferber*⁷⁹⁴ and *Osborne v Ohio*⁷⁹⁵) sexually explicit material with capacity to form adult judgement - as the court in *Ginsberg* phrased it, "a child....is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees".⁷⁹⁶ The court further stated that the legislature was entitled to protect parental rights to determine the moral upbringing of their children⁷⁹⁷ and itself had a legitimate interest in promoting the welfare of

⁷⁸⁷403 U.S. 15 (1971) at 24.

⁷⁸⁸343 U.S. 495 (1952) at 500.

⁷⁸⁹441 U.S. 153 (1979) at 186 n. 1

⁷⁹⁰416 U.S. 396 (1974).

⁷⁹¹408 U.S. 901 (1972).

⁷⁹²466 U.S. 485 (1984).

⁷⁹³390 U.S. 629 (1968).

⁷⁹⁴458 U.S. 747 (1982).

⁷⁹⁵495 U.S. 103 (1990).

⁷⁹⁶390 U. S. 629 (1968) at 649-50.

⁷⁹⁷Similarly, Feinberg, *supra* n. 68 at 276-7, argues that a distinction should be drawn between access to sexually explicit material by adults and by children on the basis that exposure of children to such materials would undermine parental rights to guide the sexual *mores* of their children.

children.⁷⁹⁸ This accords fully with Millian doctrine, which discusses freedom against the background of an assumption that one is dealing with persons of full autonomy and rationality.⁷⁹⁹ On the other hand, however, the reverse - that the presumed possession by adults of sufficient maturity to exercise autonomous judgement means that they should be at liberty both to view obscenity - has not been accepted by the courts. As was noted in chapter 1, the court's decision in *Stanley v Georgia*⁸⁰⁰ (in which it relied on Brandeis' "right to be let alone" to strike down a statute prohibiting mere private possession of obscene materials on the ground that the state had no right to intrude upon an individual's privacy), was over-ruled in *Miller v California*⁸⁰¹ and *Paris Adult Theatre I v Slaton*.⁸⁰²

The most that can therefore be said is that while the courts have in certain instances been prepared to acknowledge that freedom of expression is an aspect of autonomy, they have not gone so far as to use autonomy as a general criterion for deciding freedom of expression cases, even though this could be done consistently with the other Millian justification of freedom of expression on the basis of truth-seeking. As is indicated by the academic opinion quoted above, the right to seek truth is obviously an aspect of autonomy, and thus of dignity, and so all the arguments based on truth-seeking would stand if freedom of expression was seen as being justified by an entitlement to dignity. Furthermore, as was stated in chapter 1, basing freedom of expression on dignity would confer the advantage of giving that freedom a broader base than does that of truth-seeking, which sees the value of expression solely in terms of the communication of ideas and which, for example, is therefore unable to accommodate artistic freedom within its ambit. On the other hand, whereas an infinite range of human activities are justifiable under the broad concept of dignity / autonomy, some test is necessary in order to distinguish activity that relates to freedom of expression from that which does not (see the discussion on expressive and non-expressive conduct at 1.2 and 1.4.5 above). Here the Canadian decision of *Irwin Toy Ltd v Quebec*⁸⁰³ is useful, for there the court held that "activity is expressive if it attempts to convey meaning". Conceiving expression in this way covers a wider range of activities than does the Millian concept of expression as simply being required for the discovery of truth, and recognises that expression frequently involves

⁷⁹⁸390 U.S. 629 (1968) at 639-41.

⁷⁹⁹Scanlon, *supra* n. 739 at 215.

⁸⁰⁰394 U.S. 557 (1969).

⁸⁰¹413 U.S. 15 (1973).

⁸⁰²413 U.S. 49 (1973).

⁸⁰³(1989) 58 DLR (4th) 577 at 606.

not the communication of ideas in the sense of statements of fact or value, but also the transmission of experiences, sentiments and emotions.

Finally, since dignity is the source of *all* rights, including those *against which* freedom of expression must be balanced, an important advantage of basing freedom of expression theory on dignity would be that a single theory could be used to decide not only what activities could be justified as an exercise of freedom of expression, but also what activities exceeded the bounds of that freedom because they invaded some other freedom which is also an aspect of human dignity. Although some theorists have described what they term the "ethereal torts" (that is, torts such as defamation, infliction of emotional distress and invasion of privacy which cause emotional harm) as being offences against dignity,⁸⁰⁴ Anglo-American law has yet to reach the point where the concept of dignity / autonomy has been developed in such a way as to be used to balance competing rights (that is, competing aspects of autonomy) against one another. It is to the *actio injuriarum* of Roman Dutch law that one must turn for such a concept.

3.6 Summary

This chapter began with an examination of the concept of dignity, and a survey of its Renaissance and Enlightenment origins led to the conclusion that since the power to exercise rational free will is the essential characteristic of human beings, respect for human dignity requires at a minimum the enjoyment of autonomy to exercise that will. Equating dignity with autonomy led in turn to the conclusion that dignity implied the necessity of respecting the various human rights which are components of the overall right to autonomy.

Although the importance of dignity has been recognised in international human rights documents and by the McDougal - Lasswell school of jurisprudence, it was found that dignity is not accorded specific textual protection as a right that can be vindicated under the United States Constitution, although the courts have on occasion referred to infringements of such rights as are protected as invasions of dignity.

Despite the relative neglect of dignity in American jurisprudence, the courts have held that the Ninth and Fourteenth Amendments protect a right to privacy which has been interpreted as conferring a right to autonomy covering freedoms additional to those specifically enumerated in the Bill of Rights. In light of the earlier conclusion that autonomy is the essence of human dignity, it can be said that American law does

⁸⁰⁴See for example Levit, *supra* n. 17 at 140 and 189, and the authorities discussed at 5.2 below.

recognise a concept analogous to that of dignity, albeit under the name of "privacy". The extent to which autonomy is protected under the right to privacy remains contested, as is indicated by the differences in approach adopted in *Bowers v Hardwick*, on the one hand, and *Casey*, on the other: The court in *Bowers* held that autonomy was protected by the Constitution only to the extent that a particular freedom claimed under it had traditionally been seen as worthy of protection by society. By contrast, the court in *Casey* adopted a more objective approach, holding that in determining such issues a court should be guided by "reasoned judgment" rather than by tradition - an approach which is in keeping with the universalist natural rights theory upon which the concept of human dignity is founded. The distinction between subjective and objective tests in determining the content of broad concepts such as autonomy and dignity will be addressed in subsequent chapters.

Freedom of expression is an important aspect of autonomy. However, the courts in the United States have not based First Amendment rights on autonomy, but have rather adhered to the Millian justification discussed in chapter 1. It has nevertheless been argued that while the theory which sees freedom of expression as an aspect of autonomy is not incompatible with the Millian theory, it does have the advantage of embracing a wider range of expressive activities. Furthermore, the breadth of the autonomy / dignity concept means that it could be used not only as a justification for a right such as freedom of expression, but also as a means of discovering *limits* on such a freedom by balancing it with the other freedoms implied by dignity.

CHAPTER 4

DIGNITY AS A SOURCE OF RIGHTS UNDER THE *ACTIO INJURIARUM*

4.1 The law of delict in South Africa

The right to dignity is protected in terms of South African law of civil wrongs, or delict. Unlike tort law in Anglo-American jurisdictions which identifies certain distinct types of wrong each remedied by its own particular action, the law of delict is one of general principle, traceable back to the Roman *lex Aquilia* of 287 BC which gave an action for patrimonial loss (that is, loss measurable in pecuniary terms); and the *actio injuriarum*, which had its origin in the Twelve Tables (*circa* 450 BC) which provided a penalty for *injuriae* (that is, infringements of non-pecuniary personality rights).⁸⁰⁵

The reception of Roman law into the Netherlands in the period spanning the fifteenth to seventeenth centuries saw the amplification and extension of Roman law principles and their incorporation into local Germanic customary law, leading to the development of what came to be known as Roman-Dutch common law. The institutional writers such as Voet, De Groot (Grotius) and others broadened basic Roman principles of delict to extend liability beyond what was originally contemplated by that system.⁸⁰⁶

Roman-Dutch law was taken to the Dutch colony at the Cape of Good Hope, settled in 1652, and remains the foundation of the common law of South Africa, although the importation of English common law principles from the time the Cape became a British possession in 1806 has made South Africa's common law a hybrid system.⁸⁰⁷

Modern case-law has identified five⁸⁰⁸ basic elements which must be satisfied in order for a remedy to be granted under the law of delict. These are conduct (which may be either positive or represented by an omission), wrongfulness (in the sense of a

⁸⁰⁵For the history of these actions in Roman law see Van der Walt, J. C. *Delict: Principles and Cases* (Durban, Butterworths, 1979) 11-16; Neethling, J., Potgieter, J. M. and Visser, P. J. *Deliktereg* (2nd ed) (Durban, Butterworths, 1991) 8-10 and 13-15.

⁸⁰⁶The development of delictual principles by Roman Dutch writers is discussed by Van der Wal, *supra* n. 805 at 17-20; Neethling, Potgieter and Visser, *supra* n. 805 at 10-11 and 15-16.

⁸⁰⁷Hahlo, H. R. and Kahn, E. *The South African Legal System and its Background* (Cape Town, Juta, 1968) 585-6, Ranchod, Bhadra *Foundations of the South African Law of Defamation* (Leiden, 1972) xiii.

⁸⁰⁸The requirement that the conduct be that of someone with the requisite capacity for legal liability is sometimes added, making the total number of requirements six. See Burchell, Jonathan *Principles of Delict* (Cape Town, Juta, 1993) 23.

violation of an interest protected by law), fault (which may take the form either of intention or negligence), causation (which links the act or omission of the defendant with the harm suffered by the plaintiff) and harm (in the form of damage to a pecuniary or personality interest).⁸⁰⁹ The fundamental distinction between the *actio legis Aquiliae* and the *actio injuriarum* relates to the nature of the right protected and the degree of fault which must be proved. Whereas the Aquilian action serves to provide a remedy for pecuniary loss and will remedy both negligent and intentional conduct, the *actio injuriarum* remedies infringements of rights of personality and, in general, requires that intention, or *animus iniurandi*, be proved.⁸¹⁰ Thus damages are claimed under the *actio injuriarum* not to restore any quantifiable economic loss suffered by the plaintiff but rather as a *solatium*, that is money to assuage hurt feelings. Differing opinions exist on the question of whether a claim for physical pain and suffering brought in conjunction with the Aquilian action in the context of a physical injury to the plaintiff⁸¹¹ is part of that action or constitutes an action *sui generis*.⁸¹² A single event can, of course, lead to the bringing of both the Aquilian action and the *actio injuriarum* - a physical assault, for example, could lead to a claim for medical expenses (Aquilian action), for pain and suffering, and for the infringement of the right to physical integrity (*actio injuriarum*).⁸¹³

The *actio injuriarum* will be examined in detail in this Chapter, but it is useful at the outset to mention that doctrine established in Roman and Roman-Dutch law and

⁸⁰⁹Boberg, supra n. 127 at 24-25.

⁸¹⁰Ibid., 18. An exception to the rule that intention must be proved applies where the *actio injuriarum* is brought in cases of defamation involving the mass media: The liability of distributors of such material (for example, news vendors and libraries) is based on negligence, while mass media publishers (such as newspapers and television stations) are subject to strict liability for defamatory material. See Burchell, Jonathan *The Law of Defamation in South Africa* (Cape Town, Juta, 1985) 181-202.

⁸¹¹Note that the action can only be brought for pain and suffering flowing from physical injury *to the plaintiff himself*, see Boberg, supra n. 127 at 516. It is therefore distinguishable from, and ought not to be confused with, the action for compensation for nervous shock, which is founded upon the injury occasioned to the plaintiff's nervous system, for example by his witnessing harm coming to someone else or to property - see *Masiba and another v Constantia Insurance Co Ltd and another* 1982 (4) SA 333 (C).

⁸¹²Boberg, supra n. 127 at 516-522; Neethling, Potgieter and Visser, supra n. 805 at 17-18, 201 and 250-1; Burchell, supra n. 808 at 135 and Van der Walt, supra n. 805 at 19. In *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A), Joubert JA supported the view that the action for pain and suffering is separate from the Aquilian action, and derives from the acceptance by Dutch jurists of an actionable right found in the customary law of various parts of the Netherlands and in the writings of Spanish jurists of the 16th century. This accords with the fact that whereas the Aquilian action seeks to provide compensation for patrimonial loss, the action for pain and suffering provides compensation for *physical and psychiatric harm* in the form of pain, loss of amenities, shortened life expectancy *et cetera*. This again is different from the *actio injuriarum*, the object of which is not compensatory but is rather to give the plaintiff monetary satisfaction for *emotional* harm.

⁸¹³See for example *Bennett v Minister of Police* 1980 (3) SA 24 (C), where the plaintiff was awarded compensation for medical expenses under the *actio injuriarum* and a *solatium* for infringement of his right to physical integrity.

which has been accepted into modern South African law, asserts that three basic interests are protected by the *actio*. These are *corpus*, *fama* and *dignitas*. While the meanings of *corpus* and *fama* are certain, being the rights to bodily integrity and reputation respectively, *dignitas* denotes a concept that is less well defined. Although it certainly includes the concept of dignity in the narrow sense of the right not to be insulted, it is equally certain that the interests falling under *dignitas* go far beyond this. This Chapter seeks to discover exactly what the ambit of *dignitas* is, and in particular whether it can be equated with dignity in the sense that that word is used in Chapter 3 - that is as the fundamental autonomy of each individual human being that forms the basis of modern human rights doctrine.

4.2 An historical analysis of the rights protected by the *actio injuriarum*

In order to appreciate the potential of the modern *actio injuriarum*, it is necessary to trace the history of the action during the Roman and Roman-Dutch periods before examining modern South African law. In view of the fact that the focus of this thesis is the right to dignity, particular attention will be paid to the meaning given to the term *dignitas* as used by legal writers to indicate an interest protected by the *actio*.

4.2.1 Roman law

4.2.1.1 Traditional interpretations of the *actio injuriarum*

The roots of the *actio injuriarum* are to be found in a provision of the original Twelve Tables of Roman law imposing punishment for purely physical harm caused to a plaintiff.⁸¹⁴ From these limited beginnings the scope of the remedy was extended during the Republican period by praetorian edict⁸¹⁵ so as to protect non-physical personality rights by making actionable *injuriae* taking the form of public verbal abuse, affronts to chastity and defamation.⁸¹⁶ Further extension occurred in terms of the *Lex Cornelia de injuriis* (dated at approximately 81BC) which reaffirmed liability for physical assault and which also imposed liability for invasion of another's home.⁸¹⁷ The final authoritative statement of Roman law was the great codification by the emperor Justinian (527-565 AD). The harm remedied by the *actio injuriarum* is described in the Digest in a quotation from Ulpian as follows⁸¹⁸:

⁸¹⁴Table VIII 1-4 punished incantations intended to produce physical harm, disablement of a limb, fracture of a bone and lesser physical injuries. See De Villiers, Melius *The Roman and Roman-Dutch Law of Injuries* (Cape Town, Juta, 1899) 1-2 and Van der Walt, *supra* n. 805 at 15.

⁸¹⁵De Villiers, *supra* n. 814 at 4-9, Van der Walt, *supra* n. 805 at 15, Neethling, J. *Persoonlikheidsreg* (3rd ed) (Durban, Butterworths, 1991) 42-5.

⁸¹⁶Ranchod, *supra* n. 807 at 7-9.

⁸¹⁷McQuoid-Mason, David *The Law of Privacy in South Africa* (Cape Town, Juta, 1978) at 20-22.

⁸¹⁸*Digest of Justinian* (Mommsen, T., Kreuger, P and Watson, A. trans.) (Philadelphia, University of Pennsylvania, 1985). D 47.10.1.2.

..omnemque iniuriam aut corpus inferri aut ad dignitatem aut ad infamiam pertinere..

This is translated as⁸¹⁹

Every contumely [which] is inflicted upon the person or relates to one's dignity or involves disgrace..

It is on the basis of this text that the action has generally come to be accepted⁸²⁰ as having protected *corpus* (bodily integrity), *fama* (reputation) and *dignitas* (dignity). However the question that must be addressed is precisely what the term *dignitas* embraced. For although the meaning of *corpus* and *fama* are obvious from the terms themselves, as well as from the historical context of protection of physical integrity and of reputation provided by the Twelve Tables, the praetorian edicts and the lex Cornelia, the word *dignitas* is more difficult to translate, particularly in view of the fact that it does not appear in texts prior to that of Ulpian quoted in the Digest.

In his discussion of *dignitas*, De Wet⁸²¹ argues that in terms of Roman law *dignitas* was not a discrete, legally protected personality interest, but rather referred to a person's overall status in society, which would be diminished as an inevitable corollary of an infringement of the rights of *corpus* or *fama*. Similarly, Joubert states that every infringement of *corpus* or *fama* involved a diminution in *dignitas*.⁸²² De Wet's approach has the advantage of emphasising the all-embracing nature of *dignitas*. Furthermore, Joubert's assertion that infringement of *corpus* or *fama* amounted to an infringement of *dignitas* provides support for the argument (to be developed below) that *dignitas* was a comprehensive term, embracing all types of infringements of personality rights, including those of *corpus* and *fama*.

Neethling adopts a different approach. Emphasising the role played by the praetor after the reforms of the Republican period, he states that *dignitas* was a generic term covering all personality rights, *other than* those of *corpus* and *fama*, which had not

⁸¹⁹Note the use of the word "contumely" in the translation the general sense of an *injuria* - that is, an infringement of rights. This accords with modern thinking on the *actio injuriarum* in terms of which the requirement that a plaintiff have suffered *contumelia* is interpreted as meaning simply that the plaintiff show that his rights were treated with contempt rather than that he felt insulted. (In this regard see 4.3.1 below).]

⁸²⁰Lee, R. W. *Introduction to Roman-Dutch Law* (5th ed) (Oxford, 1953) 322, Neethling, Potgieter and Visser, *supra* n. 805 at 14.

⁸²¹De Wet, J. C. and Swanepoel, H. L. *Strafreg* (4th ed) (Durban, Butterworths, 1985) 245-6.

⁸²²Joubert, W. A. *Grondslae van die Persoonlikheidsreg* (Cape Town, Balkema, 1953) 110.

yet received definition in Roman law, and that this left open the opportunity for case by case development of the *actio injuriarum* as the praetor identified different aspects of the overall right to protection of personality.⁸²³ Such development depended on the praetor's appreciation of what interests the *boni mores* of the community indicated as requiring protection⁸²⁴ - an approach which, it is interesting to note, parallels the test for wrongfulness in the modern law of delict.⁸²⁵ The casuistic manner in which liability developed is confirmed by passages in the Digest, which indicate that the action could be used to remedy a number of *injuriae* that cannot be classified under either *corpus* or *fama*.⁸²⁶ The flexibility given to the action through the exercise of praetorian discretion has led commentators to say that the *actio injuriarum* could be used to remedy any "violation deliberately designed to injure the personality of another"⁸²⁷ or "any affront to the dignity of a person",⁸²⁸ while Neethling, Potgieter and Visser state⁸²⁹ that

These extensions eventually led to the development of the concept of *injuria* to a *general delict* in the classical period.

Given that what constituted an infringement of *dignitas* was limited only by the willingness of the praetor to grant an action, Neethling warns against limiting its meaning to "honour" or "pride", and thus of limiting the harm that it remedies to "insult".⁸³⁰ As Neethling, Potgieter and Visser⁸³¹ state

..although one may identify the *corpus* and the *fama* as independent personality rights with a more or less fixed meaning, the same cannot be said of *dignitas*. The [sic] *dignitas* was in any case not regarded as synonymous with *honour* or *dignity* in the context of a personality interest, but rather as a collective term for all personality interests, excluding *corpus* and *fama*, which in Roman law had not yet been clearly distinguished and independently delimited.

⁸²³Neethling supra n. 815 at 46-8.

⁸²⁴Idem, and Ranchod, supra n. 807 at 7.

⁸²⁵See 5.5.1 below.

⁸²⁶For example, the making public of a testator's will during his lifetime (D 9.2.41.pr) and wrongfully subjecting one's wife to the evidentiary process of *inspectio ventris* (D.25.4.1.8).

⁸²⁷Sohm, Rudolf *Institutes of Roman Law* (Ledlie, trans.) (3rd ed) (Oxford, 1907, reprinted New York, A. M. Kelley, 1970) 423.

⁸²⁸Ranchod, supra n. 807 at 9.

⁸²⁹Neethling, Potgieter and Visser, supra n. 805 at 14.

⁸³⁰Although one hastens to add that insult is certainly one of the ways in which the right to *dignitas* can be infringed.

⁸³¹Neethling, Potgieter and Visser, supra n. 805 at 14.

Furthermore, the idea that the right to *dignitas* includes more than the right not to be insulted is reinforced by the general consensus regarding the meaning to be given to the word *contumelia*, which the Digest defines as the harm arising out of an *injuria*.⁸³² It is now recognised that the use of the term *contumelia* did not imply that the action was available only where the plaintiff felt insulted by the conduct of the defendant, but simply that the plaintiff had an action where the defendant had shown *contempt for his rights*.⁸³³ This emerges clearly from the opening words of the discussion of *injuriae* in the Institutes,⁸³⁴ which are translated as follows:

Injuria generally constitutes anything which is done without right (*non iure*); in particular, it signifies now contumely, which stems linguistically from disparaging (*contemnere*), what the Greeks call *hubris*....then again it signifies inequity and injustice..

Similarly, De Villiers, in discussing the process whereby the Roman law of *injuriae* was systemised into the form it was written in the Digest, states that⁸³⁵

..the writings of the jurists had greatly contributed towards a systematic development of the then existing law on the subject of injuries. They regarded *injuria* as equivalently represented by *contumelia*; that is to say, every injury, even if it were an assault on the person, was looked upon as bringing upon the individual who sustained the injury a certain amount of ignominy, or at least, a distressful condition of mind of which he was undeserving...

He further states that⁸³⁶

The word *contumelia* (arrogant action, ignominious treatment, ignominy) is used in the Digest as an equivalent of *injuria* but the distinction should be noted between this sense of the word used as a legal term and its ordinary non legal significance. A person to whom the social precedence to which he deems himself to be entitled is not accorded may possibly regard the treatment

⁸³²D 47 10 1 pr.

⁸³³See Neethling, supra n. 815 at 47-8, 51, and 53-4, Burchell, supra n. 808 at 190, and Kaser, M. *Roman Private Law* (4th ed) (Pretoria, University of South Africa, 1984) 215, where "contumelious conduct" is equated with "any intentional disregard of another's personality". See also *Brenner v Botha* 1956 (3) SA 257 (T) at 260B.

⁸³⁴*Institutes of Justinian* (Moyle, J. B. ed.) (5th ed) (Oxford, Oxford University Press, 1912). Inst. 4.4.pr.

⁸³⁵De Villiers, supra n. 814 at 9.

⁸³⁶*Ibid.*, 22.

which he has thus received as ignominious (*contumelia* in its non legal sense), but he cannot complain in such a case of an *injuria*, nor is the treatment he has thus received actionable. Ignominious treatment is an injury only when it is an infringement of one of the absolute rights of personality; a right that *is recognised by the law of the State* as included among the rights of every free man.

(Emphasis added).

The importance of this second passage is twofold: First, it shows that when used in a legal sense, the word *contumelia* does not simply mean "to insult", but rather has the much broader meaning of "to infringe a personality right". Secondly, the reference it contains to recognition of rights by the state shows that in so far as the specific class of *injuriae* which do involve insults are concerned, what is insulting from a "social" point of view will not necessarily be insulting from a legal point of view - that is, will not necessarily constitute the infringement of a legally protected right of personality. This second issue will be further addressed in the section on wrongfulness in chapter 5.

Thus in summarising the generally held view of the Roman law concept of *dignitas*, it would be accurate to say that this term is thought to refer to the bundle of all personality rights that an individual might have, other than *corpus* and *fama*. Modern writers justify this conclusion on the basis that the Digest mentions a number of *injuriae* that were not remediable as separate wrongs under the Twelve Tables, the praetorian edict or the lex Cornelia, and that the only way to explain this is to say that praetorian extension of the action stemmed from a recognition by Roman jurists that the law protected a third personality interest known as *dignitas*, which was a generic term embracing all rights other than *corpus* and *fama*.

4.2.1.2 *Dignitas* as an inclusive interest.

Yet given the uncertainty surrounding the meaning of the word *dignitas*, is it not equally arguable that this term was an *inclusive* one, which embraced *corpus* and *fama* along with all the other rights that were gradually recognised by the praetor? Two arguments can be advanced in support of this view:

Firstly, to hold that on the one hand the term *dignitas* referred to an open-ended category of rights, but on the other that it excluded *corpus* and *fama*, would seem to impose a rather arbitrary limit on the concept of *dignitas*. Acceptance by Roman jurists of the principle that all personality rights were worthy of protection (subject to

the discretion of the praetor and his application of the *boni mores* criterion) raises the question of *why* this principle came to be accepted or, expressing it differently, what underlying *value* led to the acceptance of the principle. If that value was *dignitas* - and there seems to be no other concept which could have constituted this underlying value - then *dignitas* must have included *corpus* and *fama*, because an underlying value is, of its nature, all-inclusive, and it would be absurd to think of a "qualified" underlying value expressed as: "all personality rights, other than those to physical integrity and reputation, should be protected". The approach which I propose gives the concept of *dignitas* a coherence that is absent under the traditional formulation, because by viewing *dignitas* as an over-arching right, the *actio injuriarum* is given a jurisprudential *raison d'être* - namely the protection of all the rights that might be inherent in human personality - which is lacking under the traditional theory that sees *dignitas* as protecting a set of apparently unconnected interests. In this regard it is interesting to note that in his commentary on the Institutes, Moyle identifies the interests protected by the *actio injuriarum* as "personal freedom, safety and reputation".⁸³⁷ Safety and reputation obviously correspond with *corpus* and *fama*, and it is submitted that by equating *dignitas* with personal freedom the commentator had in mind the all-inclusive definition of the term argued for above.

The second argument supporting an all-inclusive definition of *dignitas* relates to the concept of *contumelia*. Although De Villiers holds the orthodox view that *dignitas* does not include *corpus* and *fama*,⁸³⁸ does not the excerpt from his work quoted above wherein he states that assault on the person brought *contumelia* in the sense of "a certain amount of ignominy" on the victim support the contrary view that *all* types of *injuria* constituted an impairment of *dignitas*, for surely it is of the essence of an impairment of *dignitas* that the victim suffers ignominious treatment? This is also echoed by De Wet who, as was noted above, sees an infringement of *dignitas* inherent in violations of the rights to *corpus* and *fama*. In other words, if one accepts that every incidence of *contumelia* constituted an infringement of *dignitas*, then one must also accept that infringements of *corpus* and *fama* constituted infringements of *dignitas*, given that they were undoubtedly instances of *contumelia*.

In light of the above, I would argue that notwithstanding the orthodox view that sees *corpus*, *fama* and *dignitas* as a trilogy of interests that do not overlap, it is at least possible to see the extension of delictual liability under Roman law from injuries to the person to injuries to reputation, and then finally to any injury for which the

⁸³⁷Moyle, *supra* n. 334 at 534.

⁸³⁸Discussed at 4.5.2.2.

praetor might grant an action, as evidencing a progressive widening of protection of a single interest, namely *dignitas*. Thus it is argued that the *corpus, fama, dignitas* formula found at D 47.10.1 was simply a convenient formulation of a group of rights, some of which (such as the rights to physical integrity and reputation) had become well established, whereas others were subject to praetorian development, but of which all served to protect the individual from *contumelia* - that is, infringement of dignity.

Finally it should be noted that the above argument is not meant to suggest that the Romans had developed a concept of "natural rights" of which *dignitas* formed the foundation. It is true that the Romans distinguished between *ius civile* (the laws of their particular society), *ius gentium* (laws agreed upon by mankind as a whole and from which individual societies varied to a greater or lesser extent) and *ius naturale* (the law prescribed by natural reason),⁸³⁹ and recognised that slavery was not permitted by *ius naturale* even though it was part of *ius civile* and *ius gentium*.⁸⁴⁰ However, to equate *ius naturale* with natural rights would be anachronistic in that it would ascribe to Roman law a meaning of the word "right" that simply unknown to it, and which developed only from the 17th century,⁸⁴¹ and an advance in political philosophy - that individuals had natural rights that they could maintain against the state - that occurred only in the 18th. Thus the idea of the *actio injuriarum* as a vehicle for the protection of natural rights was not part of Roman law, although that development did begin to occur during the Roman-Dutch period, as will be shown below.

4.2.2 Roman-Dutch law

4.2.2.1 Voet's analysis of the *actio injuriarum*

The tripartite classification of *injuriae* into infringements of *corpus, fama* and *dignitas* found in the Digest, was adopted by Voet,⁸⁴² one of the chief institutional writers of Roman-Dutch law, who defined the concept of *injuria* as follows:

..*Injuria*, or injury, is used as equivalent to ignominious treatment (*contumelia*)..."a wrongful act committed in contempt of a free man by

⁸³⁹Inst. 1.2.pr.-2.

⁸⁴⁰Inst. 1.3.2. Buckland, W. W. *A Text-Book of Roman Law* (3rd ed By Stein) (Cambridge, University Press, 1963) 53, Lee, R. W. *Elements of Roman Law* (4th ed) (London, Sweet & Maxwell, 1956) 35-9, Jolowicz, H. F. and Nicholas, B. *Historical Introduction to the Study of Roman Law* (3rd ed) (Cambridge, University Press, 1972) 106-7.

⁸⁴¹Sohm, supra n. 827 at 70-1.

⁸⁴²Voet, Johannes (1647-1713) *Comentarius ad Pandectas* (Leiden and the Hague, 1698-1704) (De Villiers' trans.) (Cape Town, Juta, 1899) 47 10 1.

another who thereby with evil intention impairs either his person, his dignity or his reputation."

Voet 47.10.1. is accepted by modern writers as representing the correct formulation of interests protected by the *actio injuriarum* in Roman-Dutch law. Thus De Villiers states⁸⁴³

The general principles relating to the Roman-Dutch Law of injury may be summed up in the following manner: - (1) Every intentional and unlawful act of one person that aggrieves another and constitutes an impairment of the person, dignity or reputation of the other is an injury;...

In giving meaning to the word "dignity" in his commentary on Voet, De Villiers states⁸⁴⁴

..by dignity [is meant] that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt. The rights referred to are absolute or primordial rights...Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against...degrading or humiliating treatment;...

and, in a footnote to the above excerpt⁸⁴⁵

It is clear from the Digest that the word *dignitas* must be understood in a wide sense, not as merely equivalent to the elevated public position of the Roman citizen. Injuries against dignity evidently comprise all those injuries which are not aggressions upon either the person or the reputation; in fact all such *indignities* as are violations of the respect due to a free man, as such...

The mention of a "free human being" by Voet is, I submit, significant, in that it serves to emphasise that the entitlement to rights proceeds from human liberty, a theme that will be developed in coming paragraphs. Also of note are De Villiers' references to

⁸⁴³De Villiers supra n. 814 at 15.

⁸⁴⁴Ibid., 24-25.

⁸⁴⁵Ibid., 24 fn 19.

natural law as the origin of rights protected by the *actio* in Roman-Dutch law,⁸⁴⁶ the importance of which will emerge in the analysis of Grotius' writings below.

The classification of *injuriae* in Voet 47.10.1 is also accepted by modern writers such as Neethling,⁸⁴⁷ who comes to the conclusion that, as in Roman law *dignitas* was not a clearly defined personality right, but rather denoted an open ended category which was broad enough to include such personality interests as might be thought worthy of protection. Voet 47.10.1 has also been accepted into modern South African law by the courts.⁸⁴⁸ Nevertheless it is submitted that an alternative interpretation of *dignitas* is to be found in the Roman-Dutch authorities - one which accords with the theory advanced in the section on Roman law, namely that all *injuriae*, including violations of the rights to *corpus* and *fama*, involved violations of *dignitas*, which is therefore to be equated with dignity in the broad sense of the value from which human rights are derived.

4.2.2.2 Grotius and the broad view of *dignitas*.

The clearest example of this suggested alternative approach is to be found in the writings of Grotius who gave the *actio injuriarum* its most expansive interpretation. In formulating his classification of rights protected by the law of delict, Grotius stated that this branch of the law served to remedy infringements of "life, body, freedom, honour and property".⁸⁴⁹ Infringements of property interests corresponded to compensation for pecuniary loss protected by the *lex Aquilia*.⁸⁵⁰ The remaining (non pecuniary) interests corresponded to rights protected by the *actio injuriarum*. These Grotius dealt with under separate headings of harm to life,⁸⁵¹ harm to the person (embracing all physical harm other than that resulting in death),⁸⁵² and harm to *eer* or honour⁸⁵³ (that is harm to reputation).⁸⁵⁴ Most significant for present purposes was Grotius' treatment of infringements of *vryheid*, or freedom, and his statement that⁸⁵⁵

⁸⁴⁶See for example *ibid.*, 22 and 24

⁸⁴⁷Neethling, *supra* n. 815 at 48-51, Neethling, Potgieter and Visser, *supra* n. 805 at 15.

⁸⁴⁸*R v Umfaan* 1908 TS 62 at 66, *O'Keeffe v Argus Printing and Publishing Co. Ltd.* 1953 (4) SA 244 (C), *Brenner v Botha* 1956 (3) SA 257 (T) at 260 B, *Moaki v Reckitt and Coleman (Africa) Ltd.* 1968 (3) SA 98 (A).

⁸⁴⁹Grotius, *Hugo Introduction to the Jurisprudence of Holland* (The Hague, 1631) (Maasdorp trans.) (3rd ed) (Cape Town, 1899) 3.33.1.

⁸⁵⁰3.37 and 3.38.

⁸⁵¹3.33.

⁸⁵²3.34.

⁸⁵³3.36.

⁸⁵⁴3.36.1.

⁸⁵⁵3.35.1.

Crimes⁸⁵⁶ against freedom are termed injury. We say that this is in conflict with freedom, because persons who are not subject to one another, although they may be in other respects equal, are equal in the matter of freedom, by virtue of which freedom every one is entitled to expect that others shall do him no injury.

It is this substitution of *vryheid* for *dignitas* that distinguishes Grotius' treatment of the *actio injuriarum* from that of Voet, and indeed from the Digest. Furthermore, Grotius' explicit linkage of the delictual remedy with the equality of all human beings and the right of each person not to be harmed by others amounted to an important conceptual advance in terms of which the *actio* was to be seen as being rooted not only in the received wisdom of the Digest, but in the natural rights of man. This is evident from Grotius' discussion of unlawfulness in his introductory section on delict where, in explaining what type of conduct was unlawful, he included a general category of "whatever is contrary to reason as indicated and confirmed by natural law",⁸⁵⁷ and from his frequent assertion that the obligation to compensate a plaintiff for a wrong (or "inequality") derives from natural law.⁸⁵⁸ What then was the content of the right to freedom? The answer to this question can most easily be discovered by examining the types of wrong Grotius adduced as examples of *infringements* of this right. The word used by Grotius to denote an infringement of freedom was *hoon*, and as examples of *hoon* he cited delicts such as rape, seduction and adultery⁸⁵⁹ as well as attacks on reputation.⁸⁶⁰ The crucial point to note here is that Grotius' choice of these examples of infringements of *vryheid* provides convincing evidence that for Grotius *vryheid* was an *overarching* right which *embraced* physical integrity and reputation: Rape and seduction were offences against the body, while attacks on reputation offended against honour, and were therefore already included under two other interests (of body and of honour) that Grotius had separately identified as being protected by the law of delict. Adultery on the other hand is recognised as not falling under *corpus* or *fama*, but is rather usually considered to be an infringement of *dignitas*.⁸⁶¹ Grotius' mention of these wrongs as being infringements of either *corpus*

⁸⁵⁶The use of the word "crimes" does not indicate confusion between criminal and civil wrongs. The word *misdaed* used by Grotius referred to wrongs in general, but it was clearly acknowledged by him (see 3.32.7 and 3.32.8) that separate liability to the state and to a plaintiff could arise out of the same wrongful act.

⁸⁵⁷3.32.5.

⁸⁵⁸See for example 3.32.9 ("A person is by natural law bound to the removal of inequality"), 3.32.11 ("...let us see how liability to remove inequality arises under natural law.."), and 3.32.15 ("All such persons are by natural law bound to make reparation.."). See also Wessels, W. J. *History of the Roman-Dutch Law* (Grahamstown, 1908) 289-90.

⁸⁵⁹3.35.7-9.

⁸⁶⁰3.36.1.

⁸⁶¹Neethling, *supra* n. 815 at 212.

or *fama* (depending on the nature of the harm) *as well as* of *vryheid* clearly indicates an intention to treat this third aspect of the *actio injuriarum* as embracing the other two. Thus in discussing reputation, Grotius stated that⁸⁶²

Wrongs against honour are called defamation. Honour is here understood in a narrow sense to imply the good esteem in which others hold us. In a wider sense of the word 'honour' injury [*hoon*] also is said to be directed against a man's honour.

In other words, it was necessary to distinguish between honour in the narrow sense (meaning the esteem with which a person is held by others) and honour in the wide sense (meaning the right not to be subjected to *hoon* - in other words the right not to have one's freedom interfered with) because an offence against honour constituted an infringement of both the right to freedom *and* the right to reputation.⁸⁶³ In light of the above there would appear to be strong grounds for arguing that, according to Grotius, the law of delict protected a general right to freedom, and that he saw freedom as a general right embracing all others.

Although acknowledging this argument, Neethling believes that it goes too far, and argues that in using the term "freedom" Grotius meant simply to indicate the same set of rights as did Voet in using the term *dignitas* - that is an open category of rights *apart from* physical integrity and reputation.⁸⁶⁴ Yet although Neethling's approach accords with the traditional understanding of the *actio injuriarum*, I would argue that considered from the perspective of its own internal logic, and a correct interpretation of the old authorities, it is flawed.

The first ground upon which established views of the *actio* are open to challenge has already been discussed in the analysis of Roman law above. Whereas Neethling (along with others⁸⁶⁵) is willing to accept that the term *dignitas* denotes an open-ended set of interests, capable of expansion so as to protect new rights, no explanation is offered as to what difference exists between this approach and that which would see *dignitas* as an over-arching right. If *dignitas* is an open-ended concept of the same type that it is argued that "freedom" was to Grotius, what determines the ambit of *dignitas* in the sense that that term is used by Neethling and, more specifically, why should its ambit necessarily be restricted so as to exclude the

⁸⁶²3.36.1.

⁸⁶³This would also seem to be confirmed by Ranchod, *supra* n. 807 at 68.

⁸⁶⁴Neethling, *supra* n. 815 at 50-1.

⁸⁶⁵See for example Burchell, *supra* n. 808 at 14 and 189.

rights to *corpus* and *fama* from its scope? Is there a qualitative difference between these two interests and any of those that one might include under the heading of freedom? If not, is there any reason to resist the argument that *dignitas* is an all-embracing term denoting a general right not to be interfered with in the enjoyment of the natural right to freedom, and that among the many rights included in this general right to *dignitas* or freedom are those of *corpus* and *fama*? In short, it would seem that once one has accepted the broad interpretation of *dignitas* argued for by Neethling, there is no reason not to accept that *dignitas* means freedom and embraces all rights, including *corpus* and *fama*. It is necessary to emphasise that an acceptance of this theory would not entail a rejection of existing law of remedies under the *actio injuriarum* - the case-law that has developed around *corpus*, *fama* and *dignitas* would remain valid, all that would be required is the adoption of a new understanding of the term *dignitas* as denoting the ultimate right of personality from which all other personality rights are derived.

Next, taking the point regarding textual interpretation, is there any reason why one should reject what would seem to be the obvious implication of what Grotius meant by *vryheid*? Neethling supports his own position by referring to Pauw,⁸⁶⁶ who states that while *hoon* embraced all wrongs against *vryheid*, Grotius mentioned *lastering* (defamation) as a separate wrong, and that this means that *hoon*, and thus *vryheid*, were not all-embracing. However, as has already been noted, Grotius included offences against *eer* (honour) in his concept of *hoon*,⁸⁶⁷ and Neethling himself accepts that by this Grotius meant harm to reputation - in other words, defamation.⁸⁶⁸ This reference to Pauw aside, Neethling offers no argument justifying his disregard of what I have argued is the fundamental difference in approach between Voet and Grotius that emerges from an ordinary reading of both texts. Furthermore, Grotius was not alone in adopting this more expansive approach to the *actio injuriarum* - as Neethling himself acknowledges, support for Grotius is to be found in the writings of other Roman Dutch authorities. Thus, in commenting on Grotius 3.35, Van Leeuwen⁸⁶⁹ stated that

By reason of natural liberty every one has a right that another shall not cause him any injury or wrong.

⁸⁶⁶Pauw *Persoonlikheidskrenking en skuld in die Suid-Afrikaanse Privaatreg - 'n Regshistoriese en Regsvergeleykende Ondersoek* (Pijnacker, 1976) 69.

⁸⁶⁷3.36.1.

⁸⁶⁸Neethling, *supra* n. 815 at 50.

⁸⁶⁹Van Leeuwen, Simon (1626-82) *Commentaries on Roman-Dutch Law* (Leiden, 1664) (1780 ed) (Decker introd., Kotze trans.) (London, 1882-6) 4.35.1.

Van Leewuen mentioned offences of violence (including assault, rape and abduction) as examples of actionable infringements of the right to natural liberty.⁸⁷⁰ Similarly, in accordance with Grotius, Van Leeuwen stated that⁸⁷¹

An offence against honour and reputation, caused by deeds and acts (otherwise termed *Hoon*) is every deed whereby another is injured in his honour and reputation. This happens in a variety of ways, the most important of which are where the body and members are dishonoured, as for instance, the rape of women, seduction, adultery...

Here, as in Grotius' writings, one finds a departure from the compartmentalisation of *corpus*, *fama* and *dignitas* in favour of a general natural right to liberty, and a conflation of wrongs under the heading of *hoon*, a term which clearly embraced offences against both the body and reputation. It is also of interest to note that in Decker's commentary on Van Leeuwen 4.36.1,⁸⁷² the point is made that

Injury (*Hoon*) is properly *all manner* of insult, contempt, or hurt, levelled intentionally at another personally...whereas defamation (*laster*), on the other hand, embraces an improper imputation made openly in the presence of others.

(Emphasis added).

It is arguable that here the commentator sought to emphasis that defamation is but a specific aspect of *hoon* which, as has been seen from the analysis of Grotius, was the term used to cover wrongs to all personality interests.

Van der Linden also followed Grotius' classification of wrongs to some extent, and mentioned crimes against life, against the person, against reputation and against property, although not against freedom.⁸⁷³ It is, however, noteworthy that Van der Linden included under the heading of reputation wrongs such as defamation, insult and seduction, which is a further example of the parcelling of impairments of *corpus*, *fama* and *dignitas* under one heading.⁸⁷⁴

⁸⁷⁰4.36.1, 2, 4.

⁸⁷¹4.37.4.

⁸⁷²Supra, n. 869 at 299 n. (a).

⁸⁷³Van der Linden, Johannes *Institutes of Holland* (Amsterdam, 1806) (Juta trans.) (Cape Town, 1904) 1 16 1- 5.

⁸⁷⁴1.16.4.

Finally, mention should be made of several Roman-Dutch writers whose analysis of *injuriae* was similar to that of Voet either because, as in the case of Huber⁸⁷⁵ no mention was made of freedom at all, or because although mentioning freedom as a right protected by the *actio injuriarum*, they did not use it in the all-embracing sense that Grotius did, and otherwise treated *injuriae* in much the same way as did Voet: Thus in his exposition of the law, Van der Keessel adopted a classification which differed both from Voet and from Grotius, but included freedom as one of the rights protected by the *actio*,⁸⁷⁶ while Vinnius mentioned freedom, but clearly did not accord it the same broad meaning as did Grotius, and otherwise used the same tripartite formula as is found in the Digest.⁸⁷⁷

4.2.3 *Dignitas* and natural law dignity

The soundness of the above analysis obviously depends on a particular interpretation of Grotius' conception of personality rights in general and of the term *vryheid* in particular. If *vryheid* or freedom was indeed an all-embracing right that included within its ambit the entire body of personality rights that a person might claim, then surely much could be learned about the meaning of that concept by examining what Grotius and his contemporaries would have understood by the idea of a "right to freedom". What did they consider to be the source of *vryheid* and the other personality rights? Could it be said that the jurists of this period used *dignitas* or, in the case of Grotius, its analogue *vryheid*, in the sense similar to that which was argued for in Chapter 3 - that is to denote the ultimate natural right to autonomy from which all other rights are derived?

Mention has already been made in chapter 3 of the natural law theorists of the Renaissance and Enlightenment. Grotius' contribution to this movement was his monumental *De Jure Belli ac Pacis*⁸⁷⁸ which is important not only for its treatment of international law, but also for the general inquiry into the nature of law that is found in the *Prolegomena* and the first chapter of Book I. The first point to note from this work is the evidence it contains of a crucial contribution that seventeenth century jurists made to Roman law, a contribution that can best be identified by noting a feature Roman law *lacked* but which became the foundation of modern rights theory:

⁸⁷⁵Huber, Ulrich (1636-94) *Heedensdaegse Rechtsgeleertheit* (Leeuwarden, 1686) (Gane, trans.) (Durban, Butterworths, 1939) 6.8.

⁸⁷⁶Van der Keessel, Dionysius Godefridus (1738-1816) *Dictata* (Leiden, 1793-1806) (Beinart and van Warmelo trans.) (Cape Town, 1969) 47 10.

⁸⁷⁷Van der Berg *Personality in Criminal Law* (Unpublished LLM thesis, University of Natal, Pietermaritzburg, 1987) 23. The texts referred to are Vinnius (1588-1657) *Commentarius ad Institutiones* (Amsterdam, 1642) 4.4 and Vinnius *Peritoneum juris civilis* (Amsterdam, 1644) 2.45.

⁸⁷⁸Grotius, Hugo *De Jure Belli ac Pacis* (Kelsey trans. and Scott introd.) (New York, Bobbs-Merrill, 1925). The work was first published in Paris in 1625.

In his work on the development of natural rights theories, Tuck makes the point that in using the term *ius* the Romans did not mean a right in the sense of a legal interest possessed by a person.⁸⁷⁹ To them *ius* meant what *was right* objectively speaking. Indeed it would seem that there was no term in Roman law⁸⁸⁰ corresponding to the concept of a right in the sense that Grotius and others used it, that is to denote a legal entitlement held by an individual,⁸⁸¹ which is the sense in which that term continues to be used in modern South African law.⁸⁸² The second important feature to note from *De Jure Belli ac Pacis* is the extent to which Grotius' ideas on natural law correspond with those of other 17th century rights theorists: According to Grotius natural law was a secular code revealed by the application of reason,⁸⁸³ which would be valid even in the absence of divine revelation.⁸⁸⁴ Furthermore, natural law was immutable and could not be changed, even by God Himself.⁸⁸⁵ Questions of what was just (that is, what was in accordance with natural law) would be determined by reference to what was generally agreed upon as being correct, that is the *ius gentium*,⁸⁸⁶ although given that natural law is immutable and general sentiment might be erroneous, *ius gentium* did not inevitably coincide with natural law despite the fact that it resembled it closely.⁸⁸⁷ Thus "the testimony of those who are skilled" in law would also be referred to.⁸⁸⁸ But most significant for our purposes was Grotius' statement that according to natural law all men were equal⁸⁸⁹ and that among the rights protected by natural law is⁸⁹⁰

...power, now over oneself, which is called freedom...

This, it is submitted, provides evidence of Grotius' belief that a general right to freedom is conferred upon the individual by natural law. Furthermore, although Grotius differed from natural rights philosophers of the 18th century in his insistence that, although the unjust edicts of a ruler that were contrary to natural law ought not to be obeyed,⁸⁹¹ it was nevertheless not permissible to assert one's right to justice by

⁸⁷⁹Tuck, R. *Natural rights theories - Their origin and development* (Cambridge, University Press, 1979) 7-9.

⁸⁸⁰*Ibid.*, 12-13.

⁸⁸¹Grotius, *supra* n. 878 at 1.1.4. See also Scott's introduction at xxxii.

⁸⁸²See the discussion at 5.5.2 below.

⁸⁸³Grotius, *supra* n. 878, *Prolegomena* 9 and 1.1.10.1. See also Scott's introduction at xxxiii., and Grotius, *supra* n. 849, 1.2.5.

⁸⁸⁴Grotius, *supra* n. 878, *Prolegomena* and 11.

⁸⁸⁵1.1.10.5-6. See also Scott's introduction at xxxii-iii.

⁸⁸⁶1.1.12.2. See also Scott's introduction at xxxiv.

⁸⁸⁷*Inleiding* 1.2.12.

⁸⁸⁸1.1.14.2.

⁸⁸⁹1.3.8. See also Scott's introduction to *De Jure Belli ac Pacis* at xxxi.

⁸⁹⁰1.1.5.

⁸⁹¹1.4.1.3.

rising in rebellion against such a ruler,⁸⁹² it is notable that he did concede that resistance might be offered *inter alia* to a ruler who had agreed to be answerable to his people⁸⁹³ or who sought entirely to destroy the people over whom he ruled.⁸⁹⁴ As Wessels⁸⁹⁵ states

The theory of Natural Law had not reached with him the revolutionary character it attained in the following century....During the next century, however, it was boldly asserted that Positive Law which did not conform to the principles of Natural Law was no law at all, and could be disobeyed with impunity...We find, however, in Grotius the germs of this view, for he tells us, "What is forbidden by Natural Law cannot, circumstances remaining the same, be commanded, nor can that which is commanded be forbidden; and in this sense this species of law is called immutable" (*Intro.* 1,2,6).

It is submitted that a correct understanding of the term *vryheid* ("freedom") used in the *Inleiding* in place of *dignitas* to denote the over-arching right protected by the *actio injuriarum* can only be achieved by referring to Grotius' earlier discussion of "freedom" in *De Jure Belli ac Pacis*. Since *De Jure Belli ac Pacis* discloses a concept of freedom that coincides with that which formed the basis of modern natural rights theory, one is led to the conclusion that by substituting *vryheid* for *dignitas* in his *Inleiding*, Grotius sought to emphasise the capacity of the *actio injuriarum* to protect freedom in the broadest sense. This then forms the foundation for the argument that by the Roman-Dutch period, Grotius and those of the Roman-Dutch jurists who adopted his analysis had moved beyond the traditional classification of rights protected by the *actio injuriarum* under the headings of *corpus*, *fama* and *dignitas*, and had instead adopted a far broader approach, in terms of which the action was seen as protecting a general right to freedom. Thus one should distinguish between *dignitas* in the broad sense, meaning the general right to freedom, and *dignitas* in the narrow sense that it has generally been understood until now, meaning all personality rights other than *corpus* and *fama*. Under the new formulation one would have always to bear in mind that *dignitas* in the broad sense *embraces* all the rights recognised as being included under *dignitas* in the narrow sense. Although this led to what seems a degree of confusion with regard to the headings under which specific rights, such as those to physical integrity and to reputation, should be placed (as is evidenced by the differing methods of classification found in the excerpts

⁸⁹² 1.4.1.3 and 1.4.2.1-3.

⁸⁹³ 1.4.8.

⁸⁹⁴ 1.4.11.

⁸⁹⁵ Wessels, *supra* n. 858 at 290-1.

quoted above), this departure from the simplicity of the approach in the Digest was compensated for by the breadth of protection potentially offered by an action that could be used to vindicate any right that might be included under the heading of freedom. For this reason it is submitted that on grounds of textual interpretation alone Neethling is incorrect in his rejection of this expansive view of Grotius' treatment of the *actio injuriarum*. Furthermore, The adoption of this view would remove the anomaly inherent in the existing interpretation of the old authorities which considers *dignitas* to be an apparently limitless concept but which nevertheless excludes *corpus* and *fama* from its ambit.

If one accepts that Roman-Dutch law concept of *dignitas* meant respect for individual autonomy, a concept which lies at the foundation of modern human rights doctrine, the following conclusions must surely follow: Since the doctrine of natural rights was incorporated into Roman-Dutch law under the label of *dignitas*, one must interpret *dignitas* as protecting the specific freedoms which are components of that autonomy - in other words one must accept that the *actio injuriarum* can be used to vindicate human rights. Secondly, one must also conclude that the interests that Roman-Dutch scholars identified as being protected by the *actio injuriarum* also form part of the human rights heritage which was subsequently given concrete form in modern human rights documents. In other words, the fertilisation worked both ways: Just as the Enlightenment's nascent human rights jurisprudence became part of Roman-Dutch law, so too the personality rights which could be vindicated by the *actio injuriarum* became part of that jurisprudence. This being the case, one can argue that even if these rights have not yet been availed of in interpreting instruments such as the Bill of Rights of the United States of America, they nevertheless form part of the natural rights heritage upon which such documents are based, and ought to be used in interpreting such documents in order to give them full effect. This issue will be further examined in chapter 7 below.

4.3 The *actio injuriarum* in South African law

4.3.1 Introduction

Does modern South African case-law provide support for the theory advanced in previous paragraphs that the *actio injuriarum* should be interpreted as protecting 'dignity' in the broadest sense of that word, and that one ought therefore to read *dignitas* as covering *all* personality rights of which *corpus* and *fama* are the best-defined examples? In other words, is there any support in modern South African law

for the argument that *dignitas* should be read in the broad as well as in the narrow sense and has it been seen as an action which protects human rights?

The principles of the *actio injuriarum* as formulated by Voet were accepted into South African law,⁸⁹⁶ and thus the action has been held by the courts to protect *corpus*, *fama*, and *dignitas*.⁸⁹⁷ Although some cases⁸⁹⁸ sought to establish that *contumelia* in the sense of a feeling of having been insulted was a requirement of the *actio injuriarum*, more recent case authority has firmly established that *contumelia* in that sense was never a requirement of the action,⁸⁹⁹ that by *contumelia* is simply meant acting in contempt of someone's rights, and that consequently the meaning of *dignitas* ought not to be restricted to dignity in the sense of "honour" nor the wrong occasioned by an infringement of *dignitas* to "insult". This broad meaning of *contumelia* is exemplified by the definition of *injuria* contained in *Brenner v Botha*⁹⁰⁰ where the court held that an *injuria* is

a wrongful act designedly done *in contempt of another*, which infringes his dignity, his person or his reputation.

(Emphasis added).

Another case which illustrates in an interesting fashion the wide meaning ascribed to *contumelia* is *Financial Mail (Pty) Ltd v Sage Holdings Ltd*,⁹⁰¹ where it was held that a juristic person, which was obviously incapable of feeling emotional hurt, was entitled to protection of its privacy which is one of the rights that *dignitas* is held to protect. This clearly implies that *contumelia* in the sense of a feeling of insult, is not a requirement of the *actio injuriarum*.

What types of wrong have the courts held to be remediable in terms of the *actio injuriarum*? Infringement of the right to *corpus*, or physical integrity, has been

⁸⁹⁶Neethling, Potgieter and Visser, *supra* n. 805 at 16.

⁸⁹⁷*Matthews and others v Young* 1922 AD 492 at 503, *R v Holliday* 1927 CPD 395, *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (1) SA 622 (C), *O'Keeffe v Argus Printing and Publishing Co. Ltd.* 1953 (4) SA 244 (C), *Brenner v Botha* 1956 (3) SA 257 (T) at 260 B, *Moaki v Reckitt and Coleman (Africa) Ltd.* 1968 (3) SA 98 (A), *Delange v Costa* 1989 (2) SA 857 (A) at 861A.

⁸⁹⁸*R v Umfaan* 1908 TS 62 at 68, *Matthews v Young* 1922 AD 492 at 503, *Walker v Van Wezel* 1940 WLD 66 at 67, *Kidson v S A Associated Newspapers Ltd* 1957 (3) SA 461 (W), *Mhlongo v Bailey* 1958 (1) SA 370 (W) at 371-2, *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 37C-G.

⁸⁹⁹*Foulds v Smith* 1950 (1) SA 1 (A) at 11, *O'Keeffe v Argus Printing and Publishing Co Ltd* 1953 (4) SA 244 (C) at 248. See also Burchell, *supra* n. 808 at 190 and Neethling, Potgieter and Visser, *supra* n. 805 at 17.

⁹⁰⁰1956 (3) SA 257 (T) at 260B.

⁹⁰¹1993 (2) SA 451 (A).

held⁹⁰² to include assaults upon the body,⁹⁰³ the senses⁹⁰⁴ or the mind (the last in the form of engendering fear or emotional shock⁹⁰⁵ or isolating a detainee and depriving him of exercise and intellectual stimulation.⁹⁰⁶), as well as seduction.⁹⁰⁷ Deprivation of liberty also falls under this heading,⁹⁰⁸ and can take the form of wrongs such as wrongful⁹⁰⁹ or malicious⁹¹⁰ arrest or detention, the maltreatment of awaiting trial prisoners (by confining them to punishment cells and subjecting them to the harsh regime usually reserved for recalcitrant prisoners),⁹¹¹ and the subjection of detainees to extreme and prolonged interrogation.⁹¹² Infringement of the right to *fama*⁹¹³ can take the form of defamation,⁹¹⁴ malicious prosecution⁹¹⁵ or wrongful or malicious

⁹⁰²In general see Neethling, Potgieter and Visser, *supra* n. 805 at 313-19,

⁹⁰³*Senkge v Bredenkamp* 1948 (1) SA 1145 (O), *Magqabi v Mafundityala* 1979 (4) SA 106 (E), *Bennett v Minister of Police* 1980 (3) SA 24 (C), *M v N* 1981 (1) SA 136 (Tk), *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE), *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (VSC).

⁹⁰⁴For example, filling someone's hut with smoke: *R v Khumalo* 1952 (1) SA 381 (A) at 388.

⁹⁰⁵For example *Boswell v Minister of Police* 1978 (3) SA 268 (E), where the plaintiff had falsely been told that her cousin had been shot and killed by the police and that she should go to identify his body.

⁹⁰⁶*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A). The "trespass upon and violation of the plaintiff's right to mental and intellectual well-being" (see 145I - 146D of the report) clearly amounted to an assault on the mind.

⁹⁰⁷*Carelse v Estate De Vries* (1906) 23 SC 532 at 538, *Bensimon v Barton* 1919 AD 13 at 19, *Bull v Taylor* 1965 (4) SA 29 (A), *Sager v Bezuidenhout* 1980 (3) SA 1005 (O) 1007, *Card v Sparg* 1984 (4) SA 667 (E) 670, and *Arendse v Roode* 1989 (1) SA 763 (C) 765 (although one should note the statement at 765H that the action for seduction is *sui generis* and not brought under the *actio injuriarum* - this is however contrary to the views expressed in the other cases). The question of whether seduction should remain actionable is discussed *infra* n. 1452. below.

⁹⁰⁸Neethling, Potgieter and Visser, *supra* n. 805 at 277-9.

⁹⁰⁹*Birch v Johannesburg City Council* 1949 (1) SA 231 (T), *Tsose v Minister of Justice* 1951 (3) SA 10 (A), *Ingram v Minister of Justice* 1962 (3) SA 225 (W), *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T), *Donono v Minister of Prisons* 1973 (4) SA 259 (C), *Areff v Minister van Polisie* 1977 (2) SA 900 (A), *Botha v Lues* 1981 (1) 687 (O) and 1983 (4) 496 (A), *Boland Bank Bpk v Bellville Municipality* 1981 (2) SA 437 (C), *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A), *Shoba v Minister van Justisie* 1982 (2) SA 554 (C), *Minister van Wet en Orde v Van den Heever* 1982 (4) SA 16 (C), *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A), *Minister of Law and Order v Hurley* 1986 (3) 568 (A), *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE), *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C), *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (VSC), *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E), *De Welzim v Regering van KwaZulu* 1990 (2) SA 915 (N), *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E), *Masawi v Chabata* 1991 (4) SA 764 (ZHC), *Minister of Law and Order v Thandani* 1991 (4) SA 862 (A), *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E), *Todt v Ipser* 1993 (3) SA 577 (A).

⁹¹⁰*Thompson v Minister of Police* 1971 (1) SA 371 (E), *Newman v Prinsloo* 1973 (1) SA 125 (W).

⁹¹¹*Whittaker v Roos and Bateman* 1912 AD 92.

⁹¹²*Van Heerden v Cronwright* 1985 (2) SA 342 (T).

⁹¹³For a useful summary see Neethling, Potgieter and Visser, *supra* n. 805 at 319-32.

⁹¹⁴The most recent general exposition of the law of defamation is to be found in Burchell, *supra* n. 810.

⁹¹⁵For case authority see *Moaki v Reckitt and Coleman (Africa) Ltd* 1968 (3) SA 98 (A), *Prinsloo v Newman* 1975 (1) SA 481 (A), *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (VSC), *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E), *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E).

attachment of property.⁹¹⁶ Finally, there is academic authority⁹¹⁷ which has been accepted by the courts⁹¹⁸ that interference with a plaintiff's exercise of any public or private right constitutes an *injuria*.

But the area in which there is most uncertainty or, to put the issue in a more positive light, most scope for development, is that relating to *dignitas*, the central concern of this chapter. It is to an examination of this concept to which attention must now be turned.

4.3.2 The meaning of *dignitas* in modern South African law

Earlier in this section the question was posed as to whether the concept of *dignitas* was able to be equated with "dignity" in the sense of the value underlying human rights. The review of Roman and Roman-Dutch law showed that there was some evidence in support of this theory, particularly in the writings of Grotius. Can the same be said of modern South African case law concerning *dignitas*?

In *R v Umfaan*⁹¹⁹ Innes CJ defined *dignitas* as

those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy.

In *R v Holliday*⁹²⁰ Greenberg JP (as he then was) stated that

Now "*dignitas*," it seems to me, is not fully translated by the English word "dignity."...*Dignitas* is not simply the esteem in which a person is held by others..but it includes, it seems to me, his self-respect...It is the violation of a man's rights of personality, his primordial rights of "son etat civile," which gives rise to an action of injury.

In *R v Terblanche*⁹²¹ De Villiers JP defined *dignitas* as

...the complainant's own sense of her dignity; in other words, her self-respect..

⁹¹⁶*Els v Messenger of the Court*, Durban 1955 (4) SA 406 (N).

⁹¹⁷McKerron, R. G. *The Law of Delict* (7th ed) (Cape Town, Juta, 1971) 53, citing Voet 47.10.7.

⁹¹⁸*Masawi v Chabata* 1991 (4) SA 764 (ZHC) at 771G.

⁹¹⁹1908 TS 62 at 68.

⁹²⁰1927 CPD 395 at 400-1.

⁹²¹1933 OPD 65 at 68.

In *Minister of Police v Mbilini*⁹²² and *Delange v Costa*⁹²³ the Appellate Division accepted De Villier's definition of *dignitas* as

...that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt. The rights referred to are absolute or primordial rights...Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against...degrading or humiliating treatment;..

Two significant observations can be made with regard to the above. The first is that *dignitas* is seen as deriving from natural rights to which every human being is entitled - in other words, it is a universal value. The second is that terms such as "self-esteem", "mental tranquillity", "offensive" "degrading" or "humiliating" treatment, "ill-will, ridicule, disesteem or contempt" indicate that the range of interests that can be protected in terms of this value is very broad indeed. How then do the courts determine what type of conduct is of such a nature as to found liability under the *actio injuriarum*?

The question of what a plaintiff had to prove in order to establish an impairment of his *dignitas* was for a time somewhat vexed - did such a plaintiff have to satisfy a subjective test (by showing that he himself felt that his dignity had been impaired), an objective test (by showing that a reasonable observer would consider that the plaintiff's dignity had been impaired), or had he to satisfy both a subjective and an objective test? This issue, left undecided by the Appellate Division in *Jackson v N.I.C.R.O.*,⁹²⁴ was finally settled in *Delange v Costa*.⁹²⁵ The court firstly endorsed⁹²⁶ De Villier's definition of *dignitas* and went on to hold that for an action for impairment of *dignitas* to lie it must be shown not only that the plaintiff *subjectively* experienced a loss of dignity,⁹²⁷ but also that the conduct complained of was of a kind that would offend a person of ordinary sensibilities - in other words, the conduct must have been offensive to dignity from an *objective* point of view.⁹²⁸ What are the practical implications of this dual test? Firstly, so far as the first requirement (that of a subjective feeling of insult) is concerned, it is clear that this does *not* mean that the

⁹²²1983 (3) SA 705 (A) at 715H.

⁹²³1989 (2) SA 857 (A) at 861A.

⁹²⁴1976 (3) SA 1 (A).

⁹²⁵1989 (2) SA 857 (A).

⁹²⁶At 861A.

⁹²⁷At 861E.

⁹²⁸At 861C and 862B-H.

plaintiff must undergo some type of emotional trauma or "feel insulted".⁹²⁹ The plaintiff may in fact undergo the impairment of *dignitas* with great stoicism, yet this provides no reason why he or she should be denied compensation for infringement of a right of personality. Indeed the courts have been willing to hold that an impairment of *dignitas* has occurred in "peeping Tom" cases where the complainant is *unaware* of the impairment of dignity at the moment it occurred, and was informed of it only subsequently.⁹³⁰ Furthermore, as was noted above, the courts have rejected the proposition that *contumelia* in the sense of a feeling of "insult" is a requirement of the *actio injuriarum*, and on this basis have been willing to accord personality rights to juristic persons, which by their very nature are *incapable* of feeling "insult".⁹³¹ The subjective requirement in *Delange v Costa* should, therefore, be understood as simply requiring that a plaintiff show *locus standi* - that he or she was the object of the behaviour which is alleged to have constituted an infringement of a right of personality. The real determinant of liability is therefore provided by the objective test, in respect of which the court held that

In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness...This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*.

Clearly this objective standard is required to prevent claims by hyper-sensitive plaintiffs, while the subjective requirement must be fulfilled simply to show that the plaintiff did actually experience an impairment of the right to *dignitas*. The objective test for wrongfulness and the importance of *Delange v Costa* in relation to freedom of expression will be discussed in the section on unlawfulness below. For the moment, attention will be concentrated on the types of wrong that the courts have held to constitute infringements of *dignitas*, for it is by examining these (in the light of the

⁹²⁹This is one of features of the *actio injuriarum* which distinguishes it from the American tort of intentional infliction of emotional distress, the very name of which (and the requirement that the conduct complained of be "outrageous") serves to indicate the type of emotional hurt that the defendant must be proved to have caused.

⁹³⁰See the cases mentioned *infra* n. 981. This issue is discussed in Hunt. P. M. A. *South African Criminal Law and Procedure - Volume II - Common-Law Crimes* (2nd ed by Milton, revised reprint) (Cape Town, Juta, 1990) at 538-9.

⁹³¹*Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A).

definitions of *dignitas* and the tests for its infringement that have been discussed in this section) that the content of the right to *dignitas* in modern South African law can most easily be determined.

Before proceeding to an examination of cases illustrating what constitutes an infringement of *dignitas*, mention should be made of the fact that in South African law infringements of *dignitas* give rise not only to a civil action, but also to a common-law criminal charge of *crimen injuria*.⁹³² It is for this reason that some of the examples given of infringements of *dignitas* are criminal cases. The elements of the crime mirror precisely those of the civil action - the State must prove an unlawful and intentional act on the part of the accused that impaired the dignity of the complainant. It should be noted that according to the decision in *S v Bugwande*,⁹³³ "seriousness" is no longer an element of *crimen injuria*, and so liability under both civil and criminal law is likely to be coincident given that both are now simply subject to the usual *de minimis* rule.

4.4 Impairment of *dignitas*.

Having discussed what is meant by *dignitas* in modern South African law, it is now necessary to identify what types of action have been held to constitute impairments of *dignitas*. In general it has been held⁹³⁴ that

...acts which are insulting in the sense that they amount to degrading, humiliating or ignominious treatment of a person, fall under the head of injury to the dignity of a person.

Although, as has been noted above, it would be mistaken to view impairment of *dignitas* as taking the form only of verbal insult, there have been a large number of cases of this type. Thus impairment of *dignitas* has been held to have resulted from the conduct of defendant's who used terms such as "bloody whore",⁹³⁵ "bitch",⁹³⁶ "bloody bitch",⁹³⁷ "fok-off",⁹³⁸ "fuck off you white bitch",⁹³⁹ "Black bastard"⁹⁴⁰, "big

⁹³²For a detailed discussion of this common law crime see Hunt, *supra* n. 930 at 519-48, and *South African Criminal Law and Procedure - Volume II - Common-Law Crimes* (2 ed, revised reprint, Cape Town, 1990) 519-48 and Snyman, C. R. *Criminal Law* (2nd ed) (Durban, Butterworths, 1989) 450-9.

⁹³³1987 (1) SA 787 (N).

⁹³⁴*Walker v van Wezel* 1940 WLD 66 at 68-9, *Brenner v Botha* 1956 (3) SA 257 (T) at 260F.

⁹³⁵*Whittington v Bowles* 1934 EDL 142.

⁹³⁶*S v S* 1964 (3) SA 319 (T)

⁹³⁷*Brenner v Botha* 1956 (3) SA 257 (T), *R v Dibden* 1967 (1) PH H137 (RAD).

⁹³⁸*S v Momberg* 1970 (2) SA 68 (C), *S v Rasenyalo* 1988 (2) SA 208 (O)

⁹³⁹*S v M* 1979 (2) SA 25 (A).

⁹⁴⁰1987 (1) SA 787 (N).

prick",⁹⁴¹ "steker",⁹⁴² "blackmailer, inveterate liar, bloody crook, swindler and immoral woman",⁹⁴³ and who called a black person by the racist epithet of "kaffir".⁹⁴⁴ Liability for impairment of *dignitas* has been found in circumstances where the defendant addressed the complainant in a language she did not understand, the meaning of which was subsequently revealed to her by a translator.⁹⁴⁵ The high water mark of liability for impairment of *dignitas* by verbal insult is undoubtedly represented by *Matiwane v Cecil Nathan, Beattie & Co.*⁹⁴⁶ In this case a law firm was found to have impaired the *dignitas* of the plaintiff as a result of its senior partner writing him a letter in which he used peremptory language telling him to desist from writing "stupid" letters to a bank that was one of the law firm's clients, and to drop the "vexatious" proceedings he had brought against it. The term "stupid" can hardly be considered a severe form of abuse, and academic comment questioned whether liability ought to have been found in this case.⁹⁴⁷ However, if this case is to be considered an impairment of *dignitas*, it is submitted that it ought to be considered not as one involving insult but should rather be put in the class of cases involving an abuse of power, which are discussed below. Examples of statements that have been held not to constitute impairments of *dignitas* include an imputation that someone was not acting in the best interests of the country's industry,⁹⁴⁸ and the words "Go to hell",⁹⁴⁹ and "You are a pig".⁹⁵⁰ Liability for the last of these was, however, avoided only because the court applied the (now redundant) principle that impairments of *dignitas* must be "serious" to support a conviction for *crimen injuria*, and it seems that the words would have been actionable at civil law.⁹⁵¹

⁹⁴¹ *R v Dibden* 1967 (1) PH H137 (RAD).

⁹⁴² *S v Lewis* 1968 (2) PH H367 (T). The term "steker" literally means "pricker". The court interpreted it when addressed to a pregnant woman as carrying the implied meaning that she was pregnant as a result of promiscuity.

⁹⁴³ *Fayd'herbe v Zammit* 1977 (3) SA 711 (D).

⁹⁴⁴ *S v Tanteli* 1975 (2) SA 772 (T), *Ciliza v Minister of Police* 1976 (4) SA 234 (N), *Mbatha v Van Staden* 1982 (2) SA 260 (N), *S v Paluza* 1983 (2) PH H 150 (E), *S v Pretorius* 1991 (1) PH H29 (B). This term is particularly offensive in South Africa. Originally derived from the Arabic word *kfir*, meaning infidel or unbeliever, it assumed similar connotations in South Africa as the word "nigger" has in the United States. Its use is regarded as highly insulting.

⁹⁴⁵ *Pillay v R* 1958 (1) PH H28 (N).

⁹⁴⁶ 1972 (1) 222 (N).

⁹⁴⁷ Boberg, P. Q. R. 1971 *Annual Survey of South African Law* 175.

⁹⁴⁸ *Delange v Costa* 1989 (2) SA 857 (A).

⁹⁴⁹ *R v Robinson* 1937 TPD 117.

⁹⁵⁰ *S v Jana* 1981 (1) SA 671 (T).

⁹⁵¹ At 677B - E.

Separate consideration should be given to a line of cases in which it has been held that it constitutes an insult to utter words⁹⁵² or write letters⁹⁵³ suggesting sexual intercourse to the recipient. Are these cases correctly categorised? Of the ten cases reported, a careful reading of four of them reveals that the courts found impropriety where none in fact existed, being influenced it would seem by the fact that the complainant and the accused were of different races.⁹⁵⁴ Of the remaining six, all involved solicitation either of strangers⁹⁵⁵ or of fellow employees,⁹⁵⁶ and it is submitted that in line with the discussion at 2.4 above, these ought rather to be put in a new class of instances of impairment of *dignitas* taking the form of infringement of privacy by intrusion, following the analogy of cases involving persistent following discussed below. The act of asking someone to engage in intercourse is surely not in itself *insulting*, and therefore it is submitted that these cases ought not to be classed as impairments of *dignitas* by insult but rather, as has been suggested, as invasion of privacy. Here of course the relation between the parties and the persistence with which the conduct has been engaged in will be important in determining liability.⁹⁵⁷ Of course, there will be cases in which insulting language *is* used (as it was in two of the six reported cases⁹⁵⁸), and these specific instances may also be classified as insult, but as a general rule this will not be the case.

Finally, it should be noted that insult can take the form not only of words, but of offensive representations or gestures.⁹⁵⁹

Instances of insult aside, impairment of *dignitas* has also been held to have taken place in a number of cases which can conveniently be grouped together because they evidence the common theme of a misuse of power or authority. Thus liability has

⁹⁵²*R v Kaye* 1928 TPD 463, *R v Shaw* 1942 GWLD 41, *R v E* 1954 (4) SA 501 (SR), *R v Roelofse* 1955 (2) PH H126 (E), *Pillay v R* 1958 (1) PH H28 (N), *R v Walton* 1958 (3) SA 693 (SR).

⁹⁵³*R v Mavundhla* 1932 TPD 194, *R v Olakawu* 1958 (2) SA 357 (C), *R v M* 1961 (1) SA 30 (N), *S v K* 1975 (3) SA 446 (N). Note that in *S v K* the court held (at 448H - 449A) that a mere declaration of love, even if unwelcome, is not in itself wrongful (in this regard see also *R v Terblanche* 1933 OPD 65 and *R v Marimuthoo* 1956 (3) SA 231 (N)), but (at 452F) also held that *even the absence of obscene terminology* does not change the unlawful character of an invitation to sexual intercourse. However in such cases whether or not the words are actionable will depend entirely on the circumstances in which they were uttered and whether sexual solicitation can be inferred from them. Mere impertinence or over-familiarity is also not actionable (see for example *R v Ismail Nera* 1922 NPD 153, *R v Morrison* 1929 EDL 163, *R v Du Toit* 1930 TPD 204, *R v P* 1938 CPD 408, *R v Van Wyk* 1940 GWLD 53, *R v Ferreira* 1943 NPD 19, *R v Xabanisa* 1946 EDL 167, *S v Ngwenya* 1962 (1) SA 367 (N)).

⁹⁵⁴*R v Kaye* 1928 TPD 463, *R v Mavundhla* 1932 TPD 194, *R v Olakawu* 1958 (2) 537 (T), *R v M* 1961 (1) SA 30 (N).

⁹⁵⁵*R v Shaw* 1942 GWLD 41, *R v E* 1954 (4) SA 501 (SR), *R v Roelofse* 1955 (2) PH H126 (E), *R v Walton* 1958 (3) SA 693 (SR).

⁹⁵⁶*Pillay v R* 1958 (1) PH H28 (N), *S v K* 1975 (3) SA 446 (N).

⁹⁵⁷Hunt, *supra* n. 930 at 533.

⁹⁵⁸*R v Shaw* 1942 GWLD 41, *Pillay v R* 1958 (1) PH H28 (N).

⁹⁵⁹De Villiers, *supra* n. 814 at 84-5. See for example *Innes v Visser* 1936 WLD 44.

been found where a defendant removed property belonging to a plaintiff and destroyed huts belonging to him,⁹⁶⁰ restricted the movement of a plaintiff by ordering him off a public bus,⁹⁶¹ coerced a plaintiff into signing a document admitting her adultery and unfitness as a mother,⁹⁶² harassed a plaintiff with repeated suggestions that she be hospitalised for mental illness,⁹⁶³ and interfered with parental authority.⁹⁶⁴ There is also authority for the view that to obstruct a plaintiff on a public road would impair his *dignitas*.⁹⁶⁵ Finally, mention should be made of cases in which impairment of *dignitas* has been held to have arisen from a failure to adhere to procedural rights. Examples of such *injuria*e include the expulsion of members of a club contrary to the club's constitution,⁹⁶⁶ unlawful expulsion from an educational institution,⁹⁶⁷ summary ejection from a meeting of a local government body contrary to that body's by-laws,⁹⁶⁸ and failure by a subordinate legislature to adhere to correct procedure in establishing a committee to investigate a breach of privilege by an outsider.⁹⁶⁹ Finally, racial discrimination resulting from by-laws passed *ultra vires* by a local government body has also been held to constitute an impairment of *dignitas*.⁹⁷⁰

A number of cases involve offences against chastity. Apart from the cases involving verbal solicitation to intercourse mentioned above, impairment of *dignitas* was held to have occurred as a result of indecent exposure,⁹⁷¹ when a woman was deceived into entering a bigamous marriage,⁹⁷² when a woman was deceived into engagement

⁹⁶⁰*Smith, N.O. and Lardner-Burke, N.O. v Wonesayi* 1972 (3) SA 289 (RAD).

⁹⁶¹*Purshotam Dagee v Durban Corporation* 1908 NLR 391.

⁹⁶²*Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (1) SA 622 (C).

⁹⁶³*Rutland v Jordan* 1953 (3) SA 806 (C).

⁹⁶⁴*Meyer v Van Niekerk* 1976 (1) SA 252 (T), *Coetzee v Meintjies* 1976 (1) SA 257 (T), *Gordon v Barnard* 1977 (1) SA 887 (C), *H v I* 1985 (3) SA 237 (C).

⁹⁶⁵See for example *Sievers v Bonthuys* 1911 EDL 525, where the plaintiff who was driving a flock of ostriches along a public road was turned back by the defendant who threatened him with a claim for damages (the defendant's crops bordered the road). The plaintiff was not *physically* prevented from proceeding, and it is clear that the defendant was within his rights to warn the plaintiff of a possible claim for damages but, as is stated by Burchell, Jonathan "Beyond the Glass Bead Game" 4 (1988) *South African Journal on Human Rights* 1 at 2-3, an obstruction, even if not physical in nature, would surely constitute an infringement of the plaintiff's *dignitas* by virtue of D 47.10.13.7. See also *Stern v Podbrey* 1947 (1) SA 350 (C) at 362 where the principle that obstruction is an *injuria* was affirmed.

⁹⁶⁶*Boswell v Union Club of South Africa (Durban)* 1985 (2) SA 162 (N).

⁹⁶⁷*Tiffin v Cilliers* 1925 OPD 23, *Schoeman v Fourie* 1941 AD 125. See also McKerron, *supra* n. 917 at 53.

⁹⁶⁸*Course v Household* (1909) 30 NLR 188.

⁹⁶⁹*Engelbrecht v Voorsitter, Wetgewende Vergadering van Suidwes-Afrika* 1973 (1) SA 52 (SWA).

⁹⁷⁰*Jacobs v Waks* 1992 (1) SA 521 (A). Of course, where impairments of dignity occur as a result of legislation that has been validly passed, the plaintiff's claim could be met with the defence of justification. However, as Burchell, *supra* n. 965 at 8-15 argues, the fact that dignity has been impaired through operation of a statute warrants a restrictive interpretation of the legislation apparently authorising the impairment.

⁹⁷¹See Hunt, *supra* n. 930 at 540-1, and the cases cited at 540 n. 220.

⁹⁷²*Snyman v Snyman* 1984 (4) SA 262 (W).

and intercourse by a married man,⁹⁷³ and as a consequence of breach of promise of marriage⁹⁷⁴ and adultery.⁹⁷⁵ There is also *obiter* authority to the effect that to display pornographic pictures to an unwilling viewer impairs *dignitas*.⁹⁷⁶ "Peeping Tom" cases could also be included under the heading of offences against chastity, but are mentioned in the discussion on privacy in the next paragraph.

Invasion of privacy constitutes an impairment of *dignitas*,⁹⁷⁷ and several types of conduct have been identified by the courts as amounting to an invasion of this particular personality interest. Invasion of privacy by intrusion⁹⁷⁸ has been held to have taken place in cases of eavesdropping,⁹⁷⁹ the reading of private documents,⁹⁸⁰ spying on a person (which mostly take the form of "peeping Tom" cases),⁹⁸¹ and persistently following a person.⁹⁸² Invasion of privacy by publication of private facts⁹⁸³ has been held unlawful in cases involving newspaper reports of people's private lives⁹⁸⁴ and the taking of photographs of a person against their wishes.⁹⁸⁵ Invasion of privacy by appropriation⁹⁸⁶ was held to have taken place when the plaintiff's photograph was used in an advertisement against her will,⁹⁸⁷ while invasion of privacy through depiction in false light⁹⁸⁸ was constituted by publication of an article alleging that a married nurse wanted a boyfriend.⁹⁸⁹

An assault may also constitute an impairment of *dignitas*. Cases of this nature are discussed at 4.5.2.1 below.

⁹⁷³ *Viljoen v Viljoen* 1944 CPD 137, *R v Youngelson II* 1948 (1) SA 822 (W).

⁹⁷⁴ *McCalman v Thorne* 1934 NPD 86, *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W), *M N.O. v M* 1991 (4) SA 587 (D).

⁹⁷⁵ *Foulds v Smith* 1950 (1) SA 1 (A).

⁹⁷⁶ *R v Robinson* 1911 CPD 319, *R v James* 1960 R&N 159.

⁹⁷⁷ For the most comprehensive discussion of privacy see McQuoid-Mason, *supra* n. 817.

⁹⁷⁸ *Ibid.*, 37-8, 86-7 and 135-68.

⁹⁷⁹ *S v A* 1971 (2) SA 293 (T), *Reid-Daly v Hickman* 1981 (2) SA 315 (ZAD), *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W), *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1992 (3) SA 451 (A). See also *Motor Industry Fund Administrators (Pty) Ltd and or. v Janit and or.* 1994 (3) SA 56 (WLD).

⁹⁸⁰ *Reid Daly v Hickman* 1981 (2) SA 315 (ZAD), *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W), *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1992 (3) SA 451 (A)

⁹⁸¹ See for example *R v Holliday* 1927 CPD 395, *S v P* 1973 (2) SA 737 (RAD), *S v I* 1976 (1) SA 781 (RAD) and other cases noted at Hunt, *supra* n. 930 at 541 n. 233.

⁹⁸² *Epstein v Epstein* 1906 TH 87, *R v Van Meer* 1923 OPD 77, *R v Ellis* 1944 SR 195.

⁹⁸³ *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A). In general see McQuoid-Mason, *supra* n. 817 at 38-9, 87-8, and 169-200.

⁹⁸⁴ *Mhlongo v Bailey* 1958 (1) SA 370 (W), *Mr and Mrs "X" v Rhodesia Printing and Publishing Co. Ltd.* 1974 (4) SA 508 (R), *Jooste v National Media Ltd* 1994 (2) SA 634 (C).

⁹⁸⁵ *La Grange v Schoeman* 1980 (1) SA 885 (E).

⁹⁸⁶ McQuoid-Mason, *supra* n. 817 at 40-3, 89-90 and 208-16.

⁹⁸⁷ *O'Keeffe v Argus Printing and Publishing Co. Ltd.* 1954 (3) SA 244 (C).

⁹⁸⁸ McQuoid-Mason, *supra* n. 817 at 40, 89 and 201-07.

⁹⁸⁹ *Kidson v SA Associated Newspapers Ltd.* 1957 (3) SA 461 (W).

Finally, however, it must be emphasised that although the case law allows one to group impairments of *dignitas* into these useful categories of insulting words and gestures, abuse of power, offences against chastity, invasion of privacy and assault, there is no closed list of *injuriae* constituting an impairment of *dignitas*. The very utility of the action stems from the fact that the courts have shown themselves willing to vindicate impairments of *dignitas* in a wide variety of circumstances, and one can thus identify what might be termed an innominate class of impairments of *dignitas* which do not fit the categories identified above. Thus in *Whittaker v Roos and Bateman*⁹⁹⁰ the "pain of mind" (sic) occasioned by the detention of awaiting trial prisoners in punishment cells was held to constitute an impairment of *dignitas*, while in *Ramsay v Minister van Polisie*.⁹⁹¹ the Appellate Division expressly *declined* to classify the precise form of *injuria* that the conduct of the respondent's servants amounted to.⁹⁹² In this case police officers had disrupted and terminated an interview the plaintiff was conducting with a client, had accused him of tampering with a state witness, had confiscated his notes, had demanded his name and address and had threatened to take him into custody. While the disruption of the interview and the accusation of tampering could be classified as invasion of privacy and defamation respectively, the other actions cannot be placed in any of the existing categories of liability. They clearly do not amount to infringements of *corpus* or *fama* and must therefore have constituted impairments of *dignitas*.

4.5 *Dignitas* as a source of fundamental rights

Although the preceding section illustrates the diversity of interests embraced by *dignitas*, the question still remains open as to whether *dignitas* as that term is understood in relation to the *actio injuriarum* can be equated with dignity in the sense of the ultimate value from which human rights are derived. If *dignitas* can be so equated, one would expect some evidence from the case law to this effect. The first two parts of this section examine the extent to which case law supports the view that *dignitas* should be seen as a source of inalienable rights analogous to autonomy and, therefore, as an interest that embraces *corpus* and *fama*. The third section discusses academic arguments which support this view.

4.5.1 *Dignitas* as an inalienable right.

If *dignitas* can be equated with "dignity", one would expect some evidence of its having been used in the sense of an overarching value which could embrace human

⁹⁹⁰1912 AD 92 at 134-5.

⁹⁹¹1981 (4) SA 802 (A).

⁹⁹²At 817 F.

rights in general. As it is, there are several cases in which *dignitas* is described in terms indicating that it is equated with "natural" or "inalienable" rights. Thus in *Whittaker v Roos and Bateman*,⁹⁹³ *Brenner v Botha*⁹⁹⁴ and *Boswell v Union Club of South Africa (Durban)*,⁹⁹⁵ the courts stated that impairment of *dignitas* constitutes an infringement of the "natural rights" of a person, while in *Fayd'herbe v Zammit*⁹⁹⁶ Hoexter J (as he then was) described these rights as "primordial personality rights", and later stated that "a person's *dignitas* is absolute and his rights thereto inalienable". As has already been stated, a broad definition of *dignitas* also appears in *R v Umfaan*⁹⁹⁷ where Innes CJ held that it referred to

...those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy.

Similarly, in *R v Holliday*⁹⁹⁸ it was stated that

It is the violation of a man's rights of personality, his primordial rights of "son etat civile," which gives rise to an action of injury.

In *Gosschalk v Rossouw*⁹⁹⁹ the rights of personality protected by the common law in South Africa were explicitly equated with "civil liberties" protected by Bills of Rights in countries that have such documents, a point that is emphasised by Burchell¹⁰⁰⁰ in relation to the *actio injuriarum* in general and the right to *dignitas* in particular.¹⁰⁰¹

On the other hand, in *Clarke v Hurst NO*¹⁰⁰² the Natal Provincial Division rejected an argument by the applicant (who sought a declaration that it would not be unlawful to terminate life support for her husband, who was in a vegetative state) that the

⁹⁹³1912 AD 92 at 122.

⁹⁹⁴1956 (3) SA 257 (T) at 261B.

⁹⁹⁵1985 (2) 162 (N).

⁹⁹⁶1977 (3) SA 711 (D) at 719D and 719G.

⁹⁹⁷1908 TS 62 at 68.

⁹⁹⁸1927 CPD 395 at 401.

⁹⁹⁹1966 (2) SA 476 (C) at 490G - 491A.

¹⁰⁰⁰Burchell, supra n. 965.

¹⁰⁰¹Ibid., 1-5. Thus impairment of *corpus* has been held to have taken place in cases of unlawful arrest and detention, restriction of movement, and the subjection of a detainee to extreme and prolonged interrogation, infringement *fama* to have been occasioned by malicious prosecution, while police harassment of the spouse of a detainee has been held to constitute insult and thus an infringement of *dignitas*. Examples of cases illustrating these principles are to be found supra n. 913 - n. 916. Burchell also argues that failure to apply the rules of natural justice ought also to be considered an infringement of a personality right (ibid. 15-18), this is supported by *Course v Household* (1909) 30 NLR 188, *Engelbrecht v Voorsitter, Wetgewende Vergadering van Suidwes-Afrika* 1973 (1) SA 52 (SWA), and *Boswell v Union Club of South Africa (Durban)* 1985 (2) SA 162 (N), discussed above.

¹⁰⁰²1992 (4) SA 630 (N) at 637E - 640B.

individual's rights of personality included the right to self-determination, a right that had been held in certain American cases to be implied by the right to privacy and which would of course have to be included in a broad definition of *dignitas*. However, it is important to note the context of the court's rejection of self-determination: First, the case concerned the legal position of the patient's wife to terminate his treatment, rather than the rights of a conscious patient himself to exercise self-determination by refusing treatment, and secondly, the rejection of the American authority seems to have derived as much from the fact that the legal regime of the U.S.A., with its justiciable bill of rights, differed from that which then pertained in South Africa. Furthermore, as was noted in chapter 3, in *Cruzan v Director, Missouri Department of Health*¹⁰⁰³ the United States Supreme Court itself distinguished between the rights of patients and of their relatives, holding that the patient's right to self determination was not unconstitutionally limited by procedural requirements binding relatives who wished to have the patient's life support removed.

Finally, one should note the contrasting attitude adopted by the South African courts in *GA Fichardt Ltd v The Friend Newspapers Ltd*,¹⁰⁰⁴ where the Appellate Division held that

Freedom duly and lawfully to exercise one's energies and to engage in one's own activities is an absolute right.

and in *Denys Reitz v SA Commercial, Catering & Allied Workers Union*¹⁰⁰⁵ where it was held that

South African law recognises a general right or liberty to do as you please except where the law proscribes or the interests of others are unduly harmed.

This surely constitutes recognition of a general right to autonomy, or at the very least a recognition that the individual is free to do as he pleases unless the onus of proving that his acts are unlawful is discharged.

4.5.2 Impairments of *corpus* and *fama* as impairment of *dignitas*.

The second factor supporting the "broad" theory of *dignitas* is the existence of case authority that suggests that impairments of *corpus* or *fama* might *also* constitute impairments of *dignitas*. This issue has been one of some controversy in so far as the

¹⁰⁰³497 U.S. 261 (1990).

¹⁰⁰⁴1916 AD 1 at 6-7.

¹⁰⁰⁵1991 (2) SA 685 (W) at 692G.

law regarding *crimen injuria* is concerned - on the one hand there are cases in which the courts have held that impairments of *corpus* and *fama* could be prosecuted *either* as assault or criminal defamation *or* as *crimen injuria*, while in other cases it has been held that where the facts of a case support a charge of criminal defamation or of assault then that is the appropriate charge to make and that the charge of *crimen injuria* should be used only where there has been an impairment of *dignitas*.¹⁰⁰⁶ A debate on the ambit of the offence of *crimen injuria* is beyond the scope of this thesis - in any event the real question is not whether *crimen injuria* encompasses impairments of *corpus* and *fama* as well as of *dignitas*, but rather whether there is case law to support the proposition that impairments of *corpus* and *fama*, be they redressed criminally or civilly, are *in themselves* impairments of *dignitas*.

4.5.2.1 Impairment of *corpus*.

According to De Villiers¹⁰⁰⁷ an assault *per se* does not constitute an impairment of *dignitas* in the absence of evidence that the assault was committed in such a way as to insult the plaintiff. Thus he draws a distinction between spitting in someone's face and stabbing someone - impairment of *dignitas* being inferred from the first case but not from the second. This reasoning might, at first blush, seem to have been accepted by the Appellate Division in *Bennett v Minister of Police*,¹⁰⁰⁸ where Baker J held

The fact is that *not* all assaults necessarily involve *contumelia*. It depends on the circumstances. A policeman who unlawfully shoots a person does not normally impair that person's dignity; a robber who stabs a victim does not normally insult the victim by so doing. But an assault by a policeman with a baton is probably on a different footing. I would think that this does involve a measure of *contumelia* objectively regarded.

However it may with respect be noted that the court seems here to have been sidetracked into a discussion as to whether *contumelia* (in the sense of a feeling of insult) is a requirement for impairments of *corpus* and, as has already been stated, *contumelia* in this sense is not a requirement for the impairment of *any* personality interest. *Bennett* does not, therefore, preclude one from arguing that an impairment of physical integrity constitutes an impairment of *dignitas*.

Turning first to criminal cases, it seems that an assault will be prosecuted as *crimen injuria* only if the element of humiliation or affront to self-esteem predominates over

¹⁰⁰⁶Hunt, supra n. 930 at 524-6, especially at n. 82.

¹⁰⁰⁷De Villiers, supra n. 814 at 78.

¹⁰⁰⁸1980 (3) SA 24 (A) at 37F. See also *S v Brereton* 1971 (1) SA 489 (RAD) at 491E-G.

the impairment of physical integrity.¹⁰⁰⁹ Thus in cases where the accused kissed a girl against her will,¹⁰¹⁰ took hold of a girl's leg,¹⁰¹¹ took hold of a girl's arm and blew kisses at her,¹⁰¹² stripped a complainant,¹⁰¹³ or spat at a complainant¹⁰¹⁴ the offence has been charged as *crimen injuria*. Yet although the courts have not gone so far as to say that assault *per se* constitutes an impairment of *dignitas*, is there any reason why this should not be asserted? In this regard it is interesting to note that according to contemporary writers *all* instances of indecent assault constitute impairments of *dignitas*,¹⁰¹⁵ and there are cases in which they have been charged as such.¹⁰¹⁶ Bearing in mind that the right to *dignitas* embraces an individual's "self-respect and mental tranquillity" and that an action for impairment of *dignitas* seeks to protect him or her from "offensive or degrading treatment...disesteem or contempt", is there any reason to suppose that one's self respect and tranquillity are any less upset by a simple assault than by one which includes elements of indecency? Granted, the harm to self respect occasioned by an indecent assault will in most cases be greater than in instances of simple assault, but can it be denied that such harm does nevertheless occur in all cases where physical integrity is impaired?

Turning now to civil cases, there are a number of instances in which the courts have departed from the more usual compartmentalisation of *corpus*, *fama* and *dignitas* to suggest that impairments of *corpus* might *in themselves* constitute impairments of *dignitas*: Assault was stated to amount to an infringement of *dignitas* in *Jooste N.O. v Minister of Police*,¹⁰¹⁷ to an infringement of "rights of dignity" in *Magqabi v Mafundityala*,¹⁰¹⁸ to an "indignity" in *Dladla v Minister of Police*¹⁰¹⁹ and *Ramakulukusha v Commander, Venda National Force*,¹⁰²⁰ and to "indignity and insult" in *Mabona v Minister of Law and Order*.¹⁰²¹ Unlawful arrest and detention was also described as an "indignity" in *Mabona* and in *Ochse v King William's Town Municipality*.¹⁰²² Similarly, in *Whittaker v Roos and Bateman*¹⁰²³ unlawful

¹⁰⁰⁹Hunt, *supra* n. 930 at 543, Snyman, *supra* n. 932 at 454.

¹⁰¹⁰*R v Ismail* 1933 (1) PH H88 (T), *R v S* 1955 (3) SA 313 (SWA).

¹⁰¹¹*R v Cousins* 1942 GWLD 104.

¹⁰¹²*R v Gosain and Damian* 1928 TPD 516.

¹⁰¹³*S v Brereton* 1971 (1) SA 489 (RAD).

¹⁰¹⁴*S v Ndlangisa* 1969 (4) SA 324 (E).

¹⁰¹⁵Hunt 525, 542, Snyman 451.

¹⁰¹⁶See for example *R v X and Y* 1938 EDL 30, *R v S* 1948 (4) SA 419 (G).

¹⁰¹⁷1975 (1) SA 349 (E) at 355B-D.

¹⁰¹⁸1979 (4) SA 106 (E) at 110E.

¹⁰¹⁹1973 (2) SA 714 (W) at 720C.

¹⁰²⁰1989 (2) SA 813 (VSC).

¹⁰²¹1988 (2) SA 645 (SE) at 664H.

¹⁰²²1990 (2) SA 855 (E).

¹⁰²³1912 AD 92 at 125

confinement of awaiting trial prisoners in punishment cells was similarly held to amount to an "indignity".

4.5.2.2 Impairment of *fama*.

So far as cases of criminal defamation are concerned, the question again is whether, by impairing the reputation of a complainant, an accused *ipso facto* impairs his *dignitas* as well. As in cases involving impairments of *corpus*, modern writers agree that an act that involves both impairment of *fama* and of *dignitas* may be prosecuted as either, but assert that there may be instances where defamatory words or conduct does not impair *dignitas*.¹⁰²⁴ No direct case authority exists on this point, but it is difficult to imagine circumstances in which defamatory conduct would not also impair the complainant's *dignitas*. After all, does not the fact that a complainant lays a charge of criminal defamation indicate the subjective feeling of harm that is required in cases of impairment of *dignitas*? As was stated in *S v Dziva*¹⁰²⁵

In the case of defamation the defamation is published to the world and *not only the man's dignity suffers* but also his reputation with his fellow men.

(Emphasis added).

Thus it is submitted that the very reason why a defamation action (be it criminal or civil) is brought is to punish the offence caused to the complainant's feelings by the publication of the defamatory matter. This being the case, it would surely not be contrary to principle to say that every charge of criminal defamation could sustain a charge of *crimen injuria* (although the reverse is, of course, not true).

When one turns to the civil action, there is case authority which supports the proposition that a harm to reputation constitutes an impairment of dignity. : *Ramakulukusha v Commander, Venda National Force*,¹⁰²⁶ *Ochse v King William's Town Municipality*¹⁰²⁷ and *Mthimkhulu v Minister of Law and Order*¹⁰²⁸ are all cases in which the court, in describing the harm caused to the plaintiff as a result of malicious prosecution, held that the plaintiff's dignity had been impaired, even though the action for malicious prosecution is normally classified as one for impairment of the right to *fama*.

¹⁰²⁴Hunt, *supra* n. 930 at 556, Snyman, *supra* n. 932 at 450.

¹⁰²⁵1971 (4) SA 185 (R) at 187D.

¹⁰²⁶1989 (2) SA 813 (VSC), at 846F, 850G and 851F.

¹⁰²⁷1990 (2) SA 855 (E), at 860E-H.

¹⁰²⁸1993 (3) SA 432 (E) at 441C.

The enactment of the interim Constitution,¹⁰²⁹ which in Chapter 3 includes a bill of fundamental rights, and which in s 10 provides that

Every person shall have the right to respect for and protection of his or her dignity.

has led to renewed examination of the common law concept of *dignitas* and its relationship with the constitutional right to dignity. In *Mandela v Falati*¹⁰³⁰ the court held that the constitutional right to dignity *included* the right to reputation, although did not express itself one way or the other on the question of whether the constitutional right was co-terminus with the common law concept of *dignitas*. Similarly, in *De Klerk and Another v Du Plessis and Another*¹⁰³¹ the court used words which suggested that reputation was an aspect of dignity. However, while the court in *Gardener v Whitaker*¹⁰³² similarly held that reputation was an aspect of human dignity (as protected in the Constitution), it also expressed the view that the constitutional right was broader than the common law concept of *dignitas*¹⁰³³ (a view which has found some academic support)¹⁰³⁴ and therefore, one must imply, that *dignitas* might not necessarily include reputation. Clearly, the relationship between the constitutional right to dignity and the common law concept of *dignitas* awaits conclusive adjudication by the Constitutional Court. That court may then also take the opportunity to pronounce upon the scope of *dignitas*.

4.5.3 Academic comment in favour of a broad conception of *dignitas*.

Finally, attention should be paid to academic writings in support of a broad definition of *dignitas*. Particularly important in this respect is Burchell who, in discussing the usefulness of the *actio injuriarum* as a means of vindicating fundamental rights states¹⁰³⁵

The role of the law of delict in the protection of human rights and fundamental freedoms is usually regarded as peripheral. However, there is a

¹⁰²⁹Constitution of the Republic of South Africa Act 200 of 1993.

¹⁰³⁰1995 (1) SA 251 (W) at 258F.

¹⁰³¹1995 (2) SA 40 (T) at 51G.

¹⁰³²1995 (2) SA 672 (E) at 686 D and 691F.

¹⁰³³1995(2) SA 672 (E) at 686 D and 690G - I.

¹⁰³⁴Van Aswegen, A "The Implications of a Bill of Rights for the Law of Contract and Delict" 10 (1995) *South African Journal on Human Rights* 50 at 63-4. See also Cachalia, A., Cheadle, H., Davis D., Haysom, N., Maduna, P. and Marcus, G. *Fundamental Rights in the New Constitution* (Cape Town, Juta, 1994) 33-4. With respect, however, these authors' view that dignity is broader than "the more technical Roman-Dutch definition" begs the question. For if, as I have argued, the Roman-Dutch concept is itself broad and not "technical", then it and the constitutional right may in fact coincide.

¹⁰³⁵Burchell, *supra* n. 965 at 1-2.

vast, as yet virtually unexploited, potential within the law of delict for the protection of these rights and freedoms. The catalyst found to release this potential is found in one of the most impressive legacies of the Roman mind. The Roman law, unlike Anglo-American common law, built the protection of human dignity on one of the foundation stones of delictual liability, the *actio injuriarum*, which safeguards person, dignity and reputation. Legal systems rooted in the English tradition protect physical integrity and individual reputation in terms of the law of delict or tort but provide little or no specific common-law protection for individual dignity....There is some support in the Roman and Roman-Dutch law for the view that dignity should be seen in a broad perspective, analogous to the sense in which the concept is used in the Universal Declaration of Human Rights.

Later in the same work he concludes that¹⁰³⁶

I hope I have succeeded in demonstrating the immense potential for the furthering of human rights and fundamental freedoms that lies hidden within the *actio injuriarum*. A liberal interpretation of dignity, analogous to the meaning given to the concept in the Universal Declaration of Human Rights and the European Convention on Human Rights, and reflected in many aspects of the Freedom Charter, would provide a key to these hidden riches. As Joseph Raz says '...respecting people's dignity includes respecting their autonomy, their right to control their future'. An insult, according to Raz, offends a person's dignity when it 'consists of or implies a denial that he is an autonomous person or that he deserves to be treated as one'. The seeds of a liberal approach to the concept of dignity are already in Roman-Dutch soil and they only need the hand of an innovative judge to flourish.

4.6 Summary

The purpose of this chapter has been to analyse the *actio injuriarum* from its Roman law roots through the period of the institutional writers of Roman-Dutch law and thence to the present day. In so doing, I have suggested that whereas the traditional understanding of Roman and Roman-Dutch law texts is that the *actio injuriarum* protects three distinct interests of *corpus* (physical integrity), *fama* (reputation) and *dignitas* (dignity), it is arguable that *dignitas* was an inclusive term denoting a general interest in one's personality that *included* specific rights such as *corpus* and *fama*. Support for this view is to be found in the writings of Grotius, whose substitution of

¹⁰³⁶*Ibid.*, 18.

the word *vryheid* (or freedom) for *dignitas* evinced the view that by protecting *dignitas*, the *actio injuriarum* protected a general right to liberty, encompassing the entire range of personality interests.

Grotius' analysis of the *actio injuriarum* was then related to his *De Jure Belli ac Pacis*. The conclusion was drawn that the important role Grotius played in the development of natural rights theory during the early Enlightenment indicates that by his use of the term *vryheid* he meant a general right to autonomy which, as was explained in chapter 3, was seen by Enlightenment theorists as the basic natural right from which others were derived. From this it was argued that Grotius' substitution of *vryheid* for *dignitas* in his analysis of the *actio injuriarum* is indicative of a belief that that action protected a general right to autonomy.

Although the courts generally continue to follow the traditional tripartite classification of the interests protected by the *actio injuriarum*,¹⁰³⁷ the relatively fixed content of *corpus* and *fama* may be contrasted with the expanding range of interests which have been identified as constituting impairments of *dignitas*. The open ended and flexible nature of *dignitas* has enabled the courts to use it to remedy types of harm that were previously not actionable. Furthermore, long-standing precedents define *dignitas* as referring to the inalienable rights of which a person is possessed, and some recent cases support the argument that the infringement of *any* right of personality (including *corpus* and *fama*) amounts to an impairment of dignity. These factors support the conclusion that the courts are moving towards a recognition that the wellspring of *all* personality interests, including the rights to physical integrity, reputation and self-respect, is the over-arching right to dignity to which each person is entitled by virtue of their humanity. Furthermore, although the decisions in *Clarke v Hurst NO* and *Denys Reitz v SA Commercial, Catering & Allied Workers Union* indicate that provincial divisions are divided on the question of whether *dignitas* protects a general right to autonomy, it would be in accordance with growing trends were the courts to take the step of finding that it does and thus adopt the interpretation that I have argued is inherent in Grotius' analysis.

It is worthwhile re-emphasising that acceptance of the proposition that "*dignitas* equals freedom" would not mean a rejection of existing case-law on the *actio injuriarum* - special rules governing liability for specific harms to personality could continue to exist - for example with regard to defamation - without at all conflicting with this general principle. However, equating *dignitas* as understood in Roman-

¹⁰³⁷Neethling, Potgieter and Visser, supra n. 805 at 16.

Dutch law with dignity in the broad sense would, so far as South African law is concerned, leave the way open for judicial development of rights in the realm of private law in the same way that the Bill of Rights serves to protect freedoms in the field of public law. Furthermore, elucidation by the courts of the meaning of the concept of dignity in the field of private law would be of great assistance in applying the Bill of Rights provisions of the recently enacted interim Constitution. As Burchell stated¹⁰³⁸ prior to its enactment:

If South Africa eventually acquires a bill of rights, some of the rights protected in the bill may coincide with certain of the rights protected by the law of delict. The courts' interpretation of such a bill of rights will be greatly facilitated by a careful analysis of the delictual rights and a strong body of precedent will hopefully be amassed in this interim period pending the introduction of a bill of rights.

The significance of equating *dignitas* with dignity in the broad sense would be that it would demonstrate that a heretofore unappreciated link exists between a long standing remedy found in Roman-Dutch law and the natural rights theory that lies at the foundation of human rights law in other jurisdictions. This in turn would mean that the rights included under the heading of *dignitas* would be recognised as being part of the international human rights heritage. Courts in other jurisdictions could draw upon the case law that has built up in the South African legal system, where the concept of dignity has been given a legal and not merely social meaning, and where legal tests have been developed to determine when an infringement of dignity has occurred. The fact that *dignitas* includes the right not to be insulted would obviously have implications for freedom of expression, and it is to this issue that attention is now directed.

¹⁰³⁸Burchell, *supra* n. 865 at 6.

CHAPTER 5

HATE SPEECH, IMPAIRMENT OF *DIGNITAS* AND FREEDOM OF EXPRESSION

5.1 Introduction

The two major areas in which controversy has arisen in relation to freedom of expression are those of "hate speech" and obscenity. In chapter 4 it was argued that the *actio injuriarum* protects dignity in the widest sense of the word - that is in the sense of the individual's right to autonomy. Given that freedom of expression is an important element of autonomy and that its value has been emphasised by the courts in South Africa,¹⁰³⁹ denial of this right would clearly constitute an impairment of *dignitas*, falling into the rapidly expanding class of impairments of *dignitas* generally grouped under the heading of abuse of authority.¹⁰⁴⁰ On the other hand, we have also seen that the *actio injuriarum* can also be used to limit freedom of expression in so far as it gives a remedy to plaintiffs who have either suffered harm to *fama* through defamation or who have had their *dignitas* impaired through insult. How then would the *actio injuriarum* strike a balance between these competing interests?

As was stated at 4.1, a delictual action in South African law requires five essential elements which can be summarised as (i) unlawful (ii) conduct (iii) performed with requisite fault (intention or negligence)¹⁰⁴¹ on the part of the defendant which (iv) causes (v) harm to the plaintiff. The primary tool used to decide the limits of liability is the criterion of unlawfulness (alternatively referred to as wrongfulness) which requires the court to make a policy-based judgement as to whether the defendant has breached a legally recognised duty of care or, alternatively, whether or not a legally

¹⁰³⁹See, for example, *Spoorbond v South African Railways* 1946 AD 999 at 1012-3, *Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) at 160E-F, *S v Turrell* 1973 (1) SA 248 (C) at 256G, *Argus Printing and Publishing Co. Ltd. v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 587F - 591E. In *Zillie v Johnson* 1984 (2) SA 186 (W) at 195D - 197A the court recognised a new defence (perhaps classifiable as a species of qualified privilege or as an example of the defence of necessity - see Burchell, *supra* n. 810 at 248 and 278) which the court said was available to the press where it was reporting on important matters of public interest. Under such a defence, it would not be necessary for a defendant to prove the truth of defamatory material, provided that it could be said that there was a duty on the press to publicise the matter concerned. This line of reasoning was accepted by the trial court in *Neethling v Du Preez* (which is unreported, but discussed in detail by Burchell, *supra* n. 808 at 172-5), but subsequently rejected by the Appellate Division in *Neethling v Du Preez* 1994 (1) SA 708 (A) at 775I and 777D-H. The latter decision is, however, itself now in doubt following the enactment of a bill of rights - see *Gardener v Whitaker* 1995(2) SA 672 (E) at 690E - G and 690H - 692A.

¹⁰⁴⁰See 4.4 above.

¹⁰⁴¹The only exception to the fault requirement being in cases of defamation by the media, where strict liability applies to mass media publishers - see Burchell, *supra* n. 810 at 181-97.

recognised right of the plaintiff has been infringed. Before dealing with unlawfulness, it is necessary firstly to address the following preliminary matters: the advantages of characterising the harm caused by hate speech as insult and thus the remedy for it as impairment of dignity, the issue of fault, and the position where an individual plaintiff seeks to recover for unlawful conduct directed towards a group of which he or she is a member.

5.2 Characterising hate speech as insult

As was shown in chapter 2, hate speech has essentially been defined as speech which incites hatred against groups or which libels them, and thus the harm inherent in hate speech as the inspiration of the negative emotion of hatred towards the targeted group among the rest of the community. At 2.2.7.3 I criticised this definition of this approach on the grounds that it limits the remedy for hate speech to cases where only recognised groups are subject to vilification, that by characterising hate speech as the infringement of a "right not to be hated", the focus of the harm becomes the reaction of the community rather than that of the victim, which suggests that where no negative emotion is aroused among other members of the community, no harm has been suffered by the plaintiff. Some recognition has, however, been given to what I would argue is the more fundamental question of what is the nature of the injury caused to victims as *a result of* the hatred generated against them. For example, as was held by the Canadian Supreme Court in *R v Keegstra*¹⁰⁴²

Essentially, there are two sorts of injury caused by hate propaganda. First, there is the harm done to members of the target group. It is indisputable that the *emotional damage* caused by words may be of grave psychological and social consequence....The derision, hostility and abuse encouraged by hate propaganda have a severely negative impact on the *individual's sense of self-worth* and acceptance....A second harmful effect of hate propaganda...is its influence on society at large.....[T]he threat to the *self dignity of target group members* is thus matched by the possibility that prejudicial messages will gain some credence....

(Emphasis added).

Although the equality-based justification for restriction of freedom of expression was rejected in chapter 2, this passage is useful in that it highlights that it is essentially *injury to the plaintiff's feelings* caused by the diminution of worth in the eyes of the community that is remedied by group defamation provisions. This view is consistent

¹⁰⁴²[1991] 2 W.W.R. 1 (S.C.C.) 42.

with a body of academic opinion which, while recognising that defamation has its own particular rules, nevertheless argues that the harm sought to be remedied by the defamation action is essentially injury to the plaintiff's feelings which, as was shown in chapter 4, forms the basis of the action for impairment of dignity. Thus Lebel¹⁰⁴³ argues that the *primary* harm caused by defamatory material is emotional, caused by the plaintiff's distress at loss of reputation. Similarly Post,¹⁰⁴⁴ who sees reputation as a dignitary interest,¹⁰⁴⁵ draws upon concepts developed by sociologist Erving Goffman,¹⁰⁴⁶ to link defamation law with dignity by saying

Dignity can only be confirmed by the respect that is its due....our own sense of intrinsic self-worth, stored in the deepest recesses of our "private personality", is perpetually dependant upon the ceremonial observance by those around us of rules of deference and demeanour. The law of defamation can be conceived as a method by which society polices breaches of its rules of deference and demeanour, thereby protecting the dignity of its members.

¹⁰⁴³Lebel, Paul A. "Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework" 66 (1987) *Nebraska Law Review* 249 at 298-9 Taking the example of a defamatory article published in a newspaper Lebel argues that

..one ought nevertheless to recognise that the predominant initial response to that article is going to be *personal* reaction by the person about whom the statements are made, rather than a *reputation-injuring* reaction by other people who read the article or are subsequently told about its contents. The personal reaction may run a gamut of emotions, including anger, embarrassment and helplessness...the plaintiff's reaction is not dependent on actual reputational injury. The personal reaction can occur before the victim is aware what sort of response by others the defamatory publication has produced. Even if people whom the victim knows have a generally supportive response to the victim after they become aware of the publication, the initial personal reaction of the victim can be quite intense and may be aggravated by a concern about future responses to the publication. ...there is no logical necessity that reputational harm occur in order for there to be a legitimate claim for the kind of personal reaction that can be characterised as emotional distress...The publication of statements that have the potential of causing injury to the reputation of the victim is simply another, highly foreseeable, way in which a defendant can be expected to cause harm of the emotional distress type.....The most likely outcome ..[of the defamation law reform Lebel proposes]..is a more forthright recognition of the type of harm that the defendant's publication actually caused.

¹⁰⁴⁴Post, Robert C. "The Social Foundations of Defamation Law: Reputation and The Constitution" 74 (1986) *California Law Review* 691.

¹⁰⁴⁵In support Post cites Justice Stewart J in *Rosenblatt v Baer* 383 U.S. 75 (1966) 92:

The right of a man to the protection of his reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this court as a basic of our constitutional system.

See also Logan, David "Tort Law and the Central Meaning of the First Amendment" 51 (1990) *University of Pittsburg Law Review* 493 at 497 who argues that the tort of defamation affects the plaintiff's "interest in personality and human dignity".

¹⁰⁴⁶Goffman, Erving *Interaction Ritual* (Chicago, Aldine Publishing, 1967).

Thus, in terms of this analysis, the basic harm constituted by defamation is not harm to reputation *per se*, but rather the harm to one's sense of self-worth *caused by* the diminution in one's reputation. After all, "reputation" is not a disembodied ghost, capable of suffering injury independent of its owner - the true harm caused by defamation is injury to the feelings of the plaintiff *consequent upon* a diminution in reputation. Support for this view has also been expressed by writers on South African law - Neethling, Potgieter and Visser¹⁰⁴⁷ who state that although the fundamental distinction between claims for defamation and for insult (both of which are of course brought under the *actio injuriarum*) is that injury to feelings is an element of the latter but not of the former, the *basis* for the award of damages in both cases is the same - a sense of emotional harm felt subjectively by the plaintiff. The difference between the two types of claim is that sentimental damage is *presumed* to exist as a consequence of having one's reputation harmed in cases of defamation, whereas (as was held in *Delange v Costa*¹⁰⁴⁸) the plaintiff bringing an action for impairment of *dignitas* must aver that he felt offended.¹⁰⁴⁹ This approach is consistent with the argument advanced above that the *actio injuriarum* ought to be seen as remedying a general right to freedom, the infringement of any of the aspects of which (be it *corpus*, *fama* or any other right) constitutes an affront to the plaintiff's self-esteem. In terms of this analysis it would indeed be true to say that the harm caused by defamation and by insult is essentially the same - a feeling that one's self regard has been diminished either because one's reputation has been impaired by defamatory words or because one has been insulted. Finally, it is interesting to refer to the Canadian decision of *R v Stevens*,¹⁰⁵⁰ a criminal defamation case, in which the court justified the limitation on freedom of expression inherent in s 300 of the Criminal Code which created the offence. In holding that protection of reputation is a sufficiently important interest to warrant limitation of freedom of expression, the court expressly identified reputation as an aspect of dignity, holding that¹⁰⁵¹

..reputation is a significant facet of the inherent dignity and worth of the human person

¹⁰⁴⁷Neethling, J., Potgieter, J. M. and Visser, P. J. *The Law of Delict* (Durban, Butterworths, 1990) 196-8. See also Rabie JA in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 454.

¹⁰⁴⁸1989 (2) SA 857 (A).

¹⁰⁴⁹The change in emphasis from defamation as an impairment of dignity of a special type involving publication, to defamation as a wrong the essence of which is publication is described by Schreiner JA in *Die Spoorbond v South African Railways* 1946 AD 999 at 1010.

¹⁰⁵⁰(1993) 82 C.C.C. (3d) 97.

¹⁰⁵¹At 119g - 120a.

and that¹⁰⁵²

A defamatory attack on a person's reputation involves a violation of that person's integrity and human dignity in much the same way as a physical assault does...

Characterising the harm caused to a victim of hate speech in terms of insult rather than defamation has the important consequence of broadening the number of cases that can be classified as constituting hate speech. Clearly, in terms of the above analysis, all cases of defamation will *ipso facto* also constitute cases of impairment of dignity in this sense. But there are also cases of impairment of dignity taking the form of insult which would not fulfil all the requirements of defamation: First, whereas publication is an element of defamation, the same is not true in the case of actions for impairment of dignity in the form of insult, and so an oral or written insult directed against an individual in private will be actionable as insult but would not be actionable as defamation. The same would apply in the case of an insult directed against a particular group that was not heard by members of any other group. Secondly, no remedy is provided by the law of defamation for "meaningless abuse" (South Africa¹⁰⁵³) or "mere words of abuse" (United States¹⁰⁵⁴), whereas such language will very often be insulting and thus remediable by an action for impairment of *dignitas*.¹⁰⁵⁵

In addition, not only is the action for impairment of dignity through insult wider than the defamation action but, I would submit, is also wider than the American tort of intentional infliction of emotional harm. For although this tort would cover some of the cases that fall under the Roman-Dutch concept of insult, the requirement of "extreme outrage" means that only where plaintiffs are able to prove severe mental trauma will they be able to recover damages,¹⁰⁵⁶ whereas it is clear that a plaintiff bringing the *actio injuriarum* does not have to prove that they experienced *contumelia*.¹⁰⁵⁷

¹⁰⁵²At 121b. See also 121h and 152g.

¹⁰⁵³*Wood N.O. v Branson* 1952 (3) 369 (T). See also Burchell, *supra* n. 810 at 126.

¹⁰⁵⁴Prosser and Keeton, *supra* n. 77 at 776.

¹⁰⁵⁵See *R v Walton* 1958 (3) SA 693 (SR) at 696E-H.

¹⁰⁵⁶Prosser and Keeton, *supra* n. 77 at 60-4.

¹⁰⁵⁷See 4.3.2 above. Interestingly, this distinction is acknowledged by Bloustein who, in arguing that the common law action for invasion of privacy remedies not the infliction of emotional harm *per se* but rather impairment of dignity states (*supra* n. 727 at 973-4)

When the right [to privacy] is violated she [the plaintiff] suffers outrage or affront, not necessarily mental trauma or distress. And, even where she does undergo anxiety or other symptoms of mental illness as a result, these consequences themselves flow from the

In summary then, it can be said that categorising the harm inherent in hate speech as impairment of dignity in the form of insult more accurately identifies the harm inherent in such speech, and also brings within its scope the widest range of instances of expression that impair the self-worth of plaintiffs including, but going beyond, statements meeting the particular requirements of defamation law.

5.3 *Animus injuriandi*

As is stated at 4.1 above, the Roman-Dutch law action for vindication of personality rights (the *actio injuriarum*) is distinguishable from the action for recovery of pecuniary loss (the *Actio Legis Aquiliae*) in that whereas either negligence or intent will found liability for the latter, only intent (or *animus injuriandi*) will lead to liability under the *actio injuriarum*. There can therefore generally¹⁰⁵⁸ be no liability for "negligent" impairments of reputation or dignity.

5.3.1 Establishing fault

The requirement that the defendant's act must have been done intentionally is normally unproblematic: Once the plaintiff has discharged the onus of proving that the defendant performed an act that infringed the plaintiff's rights, an inference that the defendant acted with that intention is raised.¹⁰⁵⁹ The defendant must then rebut this presumption.¹⁰⁶⁰ In doing so, however, the general rule, established in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*,¹⁰⁶¹ is that the defendant bears only an evidentiary burden, rather than a full onus of proof on a balance of probabilities.¹⁰⁶²

indignity which has been done to her...I contend that the gist of the wrong in the intrusion cases is not the intentional infliction of emotional distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are so whether or not they cause emotional trauma.

¹⁰⁵⁸The only exception to this rule arises in cases involving the mass media or distributors of defamatory material. The former are strictly liable (see Burchell, *supra* n. 810 at 181 *et seq*), while negligence suffices to found liability in the latter case (*ibid.*, 175-7). It is not suggested that these exceptions should apply in an action for insult. In any event, it is highly unlikely that these rules will survive, given the interpretation some courts have begun giving the freedom of expression provisions contained in South Africa's new bill of rights (for a discussion of these cases, see 5.6.4.4.2).

¹⁰⁵⁹Thus in *Bennett v Minister of Police* 1980 (3) SA 24 (C), a case involving impairment of dignity in the form of an assault, it was held that once proof of unlawful aggression had been adduced, a rebuttable presumption of *animus injuriandi* was raised. Similarly, in *Jackson v N.I.C.R.O.* 1976 (3) SA 1 (A) at 13A-G it was held that where an impairment of dignity takes the form of words which are injurious *per se*, the presumption of intent is raised. See also *Boswell v Union Club of South Africa* 1985 (2) SA 162 (D) at 166I - 167J; Neethling, Potgieter and Visser, *supra* n. 805 at 327 and 333, Burchell, *supra* n. 810 at 166-7.

¹⁰⁶⁰*Whittaker v Roos and Bateman* 1912 AD 92.

¹⁰⁶¹1977 (3) SA 394 (A) at 403B.

¹⁰⁶²The exception to this rule, established in *Neethling v Du Preez* 1994 (1) SA 708 (A) at 745C - F, 769B, 769H - 770J and 802D - F, is that where a defendant in a defamation action seeks to rebut

While the issue of *animus injuriandi* has most often attracted the attention of the courts in cases involving *injuriae* in the form of defamation, the presumption applies equally to *injuriae* involving impairment of dignity.¹⁰⁶³ In cases where *injuriae* are directed against groups, issues of intent would be governed by the body of rules which are equally applicable to both criminal law and delict in South Africa.¹⁰⁶⁴ Thus, where for example a defendant makes a public statement containing defamatory matter about a particular group, one will be able to conclude that the defendant must at least have foreseen the likelihood that any member of the public whom hearers of the defamatory matter knew to belong to that group would suffer a diminution of reputation. The nature of intent in this case would be *dolus eventualis* (because the defendant proceeded to publish the defamatory material despite the likelihood of it diminishing the reputation of members of the group) and *dolus indeterminatus* (because although the defendant might not have intended harm to the specific individual who brought the action, he nevertheless was aware of the likelihood that *some* member of the group would suffer diminution of reputation). The same reasoning would apply to *injuriae* that took the form of impairments of *dignitas*. Thus, taking the example of insult, a defendant who made a public derogatory statement about a particular group could be said to have *dolus eventualis* given that the insult was uttered notwithstanding the likelihood that it would be heard by a member of the group, while the absence of intent with regard to a specific individual would again provide no impediment to liability given the *dolus indeterminatus* doctrine.

5.3.2 Defences rebutting fault

Under the law of delict, *animus injuriandi* will be rebutted if the defendant raises one of the recognised defences, such as mistake, intoxication, insanity, provocation (sometimes referred to as *rixa* or anger) or jest.¹⁰⁶⁵ Of these, only provocation and jest require specific mention. Mistake is discussed in the context of lack of knowledge of unlawfulness at 5.3.3 below.

In so far as provocation is concerned, dispute exists in South African law on the question of whether the defence should exist at all, and if it does, whether it serves to

unlawfulness by raising the defences of truth for the public benefit or privilege, the full burden of proof must be discharged. However, it should be noted that there is nothing in *Neethling* to suggest that it is precedent for other *injuriae* or for defences rebutting *animus injuriandi*. Furthermore, as is indicated by *Gardener v Whitaker* 1995(2) SA 672 (E) at 690E - G and 690H - 692A, it is doubtful whether the *Neethling* decision will itself survive, given its incompatibility with South Africa's new bill of rights.

¹⁰⁶³Burchell, supra n. 808 at 192.

¹⁰⁶⁴Ibid., 30 and 183-4; Neethling, Potgieter and Visser, supra n. 805 at 117-9.

¹⁰⁶⁵Burchell, supra n. 808 at 182-4.

rebut fault or unlawfulness, or both.¹⁰⁶⁶ The situation in which the defence would operate would be where defamatory or insulting words are uttered as a result of provocation by the plaintiff and this led to retaliation by the defendant.¹⁰⁶⁷ Thus where A insults B, and in anger B makes a similarly insulting response, B can meet a claim for damages by A with the defence of provocation. In the absence of Appellate Division authority on this issue, it is submitted that in so far as the defence exists at all, it should be available only to rebut intent (the position adopted in *Geldenhuys v Van der Linde*¹⁰⁶⁸ and *Jeftha v Williams*¹⁰⁶⁹) rather than wrongfulness (the position adopted in *Bester v Calitz*¹⁰⁷⁰). To do otherwise would effectively legitimate verbal slanging matches. The defence will therefore be available only in those rare situations where the defendant can show that he was so affronted by the plaintiff's provocation that he lost the capacity to control his will. This defence may at first blush seem to be analogous to the "fighting words" doctrine adopted by the United States Supreme Court in *Chaplinsky v New Hampshire*¹⁰⁷¹ which permitted restrictions on speech that was likely to incite the average hearer to fight but which, as was argued at 1.4 above, is contrary to free speech principles. However there is an important distinction between *Chaplinsky* and the South African law - whereas *Chaplinsky* outlawed speech which was likely to provoke *physical* retaliation, an approach which it has been argued gave moral albeit not legal endorsement to those who would silence argument by violence, *Bester v Calitz* makes it clear that the defence excuses only *verbal* reactions to provocatory speech - *physical* reactions to harmful speech having always been held to be unlawful under Roman Dutch law.¹⁰⁷²

So far as jest is concerned, there is authority in South African law¹⁰⁷³ that, as was held in *Masch v Leask*,¹⁰⁷⁴ the defendant's lack of intent does not suffice to relieve him of liability, and that the words must, objectively speaking, have been such as a reasonable bystander would have understood them as being a joke. However it is submitted that this mixing of subjective and objective elements is contrary to general principle governing intent, and that sufficient protection against spurious claims of jest by defendants is provided by the fact that the defendant bears an evidentiary

¹⁰⁶⁶Burchell, supra n. 810 at 266-74, Neethling, J. "The Basis of Provocation as a Defence Against the Actio Injuriarum" (1989) 106 *South African Law Journal* 694.

¹⁰⁶⁷*Strydom v Fenner-Solomon* 1953 (1) SA 519 (E). See also Neethling, Potgieter and Visser, supra n. 805 at 89-90.

¹⁰⁶⁸1980 (1) PH J1 (O).

¹⁰⁶⁹1981 (3) SA 678 (C).

¹⁰⁷⁰1982 (3) SA 864 (O).

¹⁰⁷¹315 U.S. 568 (1942).

¹⁰⁷²See Neethling, Potgieter and Visser, supra n. 805 at 87, Boberg, supra n. 127 at 827-37 *Bennett v Minister of Police* 1980 (3) SA 24 (A) at 31H.

¹⁰⁷³Burchell, supra n. 810 at 285-6.

¹⁰⁷⁴1916 TPD 114.

burden of rebutting the *prima facie* presumption of intent (including knowledge of unlawfulness, discussed in the next section), which it will be difficult to do in cases where the defendant alleges that he believed that words that are widely known to be insulting were a mere joke. However in legitimate cases, the *animus injuriandi* requirement will enable defendants to rebut intention, and would thus cover cases of the type referred to by Abel¹⁰⁷⁵ where *prima facie* insulting language is not harmful because it was uttered in jest.

5.3.3 Knowledge of unlawfulness

In the previous section the general requirement of intention was discussed. However, before leaving this issue, special mention must be made of the role played by "knowledge of unlawfulness" (sometimes called "consciousness of wrongfulness") in defining the limits of liability in terms of the *actio injuriarum*.

Although controversy has surrounded the issue for some time, case authority¹⁰⁷⁶ and academic opinion¹⁰⁷⁷ now agree upon the point that, in general,¹⁰⁷⁸ intent cannot be said to exist on the part of a defendant unless he had subjective knowledge of the unlawfulness of his conduct. A mistake as to any relevant fact or the law therefore excludes liability.¹⁰⁷⁹ Thus, to take the example of defamation, it is clear that where a defendant genuinely, albeit mistakenly, believes that the defamatory statement is covered by one of the defences excluding unlawfulness, he will escape liability.¹⁰⁸⁰ Although Burchell has argued that such mistake should have to be reasonable,¹⁰⁸¹ he does recognise that existing case law requires only that the mistake be *bona fide*.¹⁰⁸² Thus, to take the example of defamation, a defendant who publishes a false defamatory statement genuinely believing it to be true and that it is in the public interest¹⁰⁸³ to publish it, will escape liability. Taking cases of insult as examples, one

¹⁰⁷⁵At 139-41.

¹⁰⁷⁶*Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) at 396D-G, *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at F-H.

¹⁰⁷⁷Neethling, Potgieter and Visser, *supra* n. 805 at 120, Boberg, *supra* n. 127 at 271-2, Burchell, *supra* n. 810 at 166 and Burchell, *supra* n. 808 at 183-4.

¹⁰⁷⁸The courts have explicitly left open the possibility that policy may indicate the necessity of exceptions to this rule (see for example *Ramsey v Minister van Polisie* 1981 (4) SA 802 (A) at 818E - 819C), but as matters stand, knowledge of unlawfulness is required for all *injuria*e for which fault is a requirement except unlawful arrest and detention and the wrongful attachment of goods (*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154I - 157F).

¹⁰⁷⁹Neethling, Potgieter and Visser, *supra* n. 805 at 119-20.

¹⁰⁸⁰*Maisel v Van Naeren* 1960 (4) SA 836 (C).

¹⁰⁸¹Burchell, *supra* n. 810 at 171-4.

¹⁰⁸²Burchell, *supra* n. 808 at 184.

¹⁰⁸³Note that under Roman-Dutch law, and in contrast with Anglo-American common law, truth is itself not a defence to a defamation action. The defendant must in addition show that it was in the public interest to publish the material. The most often stated reason for this rule is that it serves to prevent the "raking up of the past" of plaintiffs who may once have performed discreditable acts but

might think of the position of a defendant X, who utters words which he knows would be insulting if spoken to a member of racial group Y, but which are completely inoffensive to members of racial group Z. Should X speak the words to a member of group Y in the erroneous belief that the person is a member of group Z, then his error of fact would make him not liable. The same would of course apply if, desiring to insult a person whom he thinks to be a member of group Z, he (X) utters the words to a member of group Y. The second type of case in which knowledge of wrongfulness would be relevant would be where X utters words that are insulting to members of group Z to a person whom he knows to be a member of that group, but where he (X) is unaware that the words are insulting. Here too X will not be liable, but in this case his non-liability would stem from the fact that he was ignorant as to the unlawfulness of his utterance, believing as he did that, objectively speaking, it was not insulting to utter the words to a member of group Z.

The requirement that a defendant have knowledge of unlawfulness as a component of *animus injuriandi* serves to ensure that only in circumstances where a defendant both intends to perform an injurious act *and* knows that it was unlawful will he be burdened with liability. There can therefore be no question of a defendant "mistakenly" insulting a plaintiff. This does not however mean that a defendant can escape liability by making the bald assertion that he was unaware of a vital fact or of the unlawfulness of his conduct.¹⁰⁸⁴ As was stated above, once a harmful act is proved by the plaintiff, a presumption of *animus injuriandi* is raised. In order to rebut the presumption the defendant must adduce evidence of lack of knowledge of unlawfulness. However, it should be noted that in such circumstances the defendant bears only an *evidentiary burden* of adducing facts indicating the basis of his mistake of law or of fact - he is not obliged to prove the defence on a balance of probabilities.¹⁰⁸⁵ The requirement of knowledge of unlawfulness thus performs an important role in limiting liability.

who have now reformed themselves. The existence of the public benefit requirement means that the South African defamation action bears some similarity to that for invasion of privacy by publication of private facts because, as was noted at 1.4.2 above, this action is one where the plaintiff has suffered emotional harm *precisely because* the facts that have been revealed are true. See Burchell, *supra* n. 810 at 212-14.

¹⁰⁸⁴*Ibid.*, 167.

¹⁰⁸⁵*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403B, *Borgin v De Villiers* 1980 (3) SA 556 (A) at 571E-G. Burchell, *supra* n. 810 at 167, Burchell, *supra* n.808 at 171. Note that in *Neethling v Du Preez* 1994 (1) SA 708 (A) at 745C-F, 769B, 768H - 770J and 802D-F, the Appellate Division held that a party to a defamation action seeking to exclude unlawfulness by raising the defence of justification must prove the defence on a balance of probabilities. There is however no reason to think that this rule extends to other *injuria*e or to defences excluding *animus injuriandi*. It is, however, unlikely that this rule will survive in light of the enactment of South Africa's interim Constitution. Thus, the court in *Gardener v Whitaker* 1995(2) SA 672 (E), while acknowledging (at 686J - 687B and 692C-D) that *Neethling* had wrought this change, nevertheless found (at 690E - G and 690H - 692A) that the common law was at odds with the Constitution and had been over-ridden by it.

5.4 Conduct relative to plaintiff

A crucial question that needs to be addressed in assessing the usefulness of the *actio injuriarum* in demarcating limits on freedom of expression is the degree of specificity with which a person must be referred to before it can be held that his or her dignity has been infringed. To take an obvious example, would a derogatory statement about a particular group heard by an individual member of that group constitute an insult to *that individual*? What protection does the *actio injuriarum* offer to members of groups that are insulted?

In order for liability under the *actio injuriarum* to attach to a defendant, not only must he have had subjective intent with regard to the particular plaintiff who alleges an infringement of personality rights, but the wrongful conduct must, from an objective perspective, have referred to the plaintiff. Thus, as was held by the Appellate Division in *Young v Kemsley*¹⁰⁸⁶ (a case involving defamation) what must be shown is that

...the ordinary, reasonable man hearing the speech would have understood the words complained of to apply to [the plaintiff].

It is submitted that the requirement of reference to the plaintiff is equally applicable in cases involving insult as in those involving defamation. This means that in a case where the *actio injuriarum* is brought to claim damages for allegedly insulting words or conduct, the plaintiff will have to show that the reasonable person would have understood the insult to refer to the plaintiff. No difficulty is presented in satisfying the objective test when the words or conduct are obviously directed towards the plaintiff, as when X addresses an insult to Y. But what is the position when the insult is directed towards a group rather than an individual? The usefulness of an action for impairment of dignity would depend on whether it was able to afford protection to plaintiffs who allege that their dignity has been impaired because of words or conduct directed against a group to which they belong.

Although there are no reported cases on the impairment of the *dignitas* of groups, it is submitted that guidance can be obtained by examining cases on group defamation.

Gardener and other cases arising under the new Constitution are discussed at 5.6.4.2.2 and 7.2.3 below.

¹⁰⁸⁶1940 AD 258 at 281.

The response of South African law to the issue of group defamation is illustrated by the case of *SA Associated Newspapers Ltd v Estate Pelser*,¹⁰⁸⁷ where it was held that

..in a case of so-called class or group libel, the plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof of and concerning him personally.

Burchell¹⁰⁸⁸ adduces the following examples of bodies whose individual members have been held by the courts to be entitled to sue for defamation where the defamatory words related to the body concerned: a medical council,¹⁰⁸⁹ a jury,¹⁰⁹⁰ a board of directors,¹⁰⁹¹ an executive committee of a trade union¹⁰⁹² and a member of the Executive Council of the government.¹⁰⁹³ Furthermore, as Burchell states¹⁰⁹⁴

..a person does not need to be referred to by name to be identifiable: reference to the office occupied by the plaintiff or some identifiable characteristic or feature would be sufficient.

Everything will obviously depend on how the defamatory words are phrased and, as was held in *Bane v Colvin*,¹⁰⁹⁵ on the size of the class or group, the generality of the charge and the extravagance of the accusation. In the most recent Appellate Division case of *Sauls v Hendrikse*¹⁰⁹⁶ it was held that an individual member of a group suing on the basis of defamation of that group must show that a reasonable reader would understand the defamatory material to refer to the plaintiff or that there must be facts or circumstances which would lead an acquaintance of the plaintiff to understand that the material referred to him. In this case, the defamatory material referred to "office bearers" of a trade union. The fact that it referred only to "some office bearers" rather than "the" or "all" office bearers made it uncertain that the plaintiff was included within the reference, and hence the action was dismissed. The court specifically distinguished those cases in which liability *has* arisen as a result of defamation of a group by noting that in these cases, the defamatory words were capable of being

¹⁰⁸⁷1975 (4) SA 797 (A) at 810.

¹⁰⁸⁸Burchell, *supra* n. 808 at 168.

¹⁰⁸⁹*Hertzog v Ward* 1912 AD 62.

¹⁰⁹⁰*Le Roux v Cape Times Ltd* 1931 CPD 316.

¹⁰⁹¹*Bane v Colvin* 1959 (1) SA 863 (C).

¹⁰⁹²*De Klerk v Union Government* 1958 (4) SA 496 (T).

¹⁰⁹³*SA Associated Newspaper v Estate Pelser* 1975 (4) SA 797 (A).

¹⁰⁹⁴Burchell, *supra* n. 808 at 168.

¹⁰⁹⁵1959 (1) SA 863 (C) at 867B.

¹⁰⁹⁶1992 (3) SA 912 (A) at 918G - 920A.

understood as referring to *every* member of the group. *Sauls v Hendrickse* clearly illustrates the deficiency of the common law action for defamation and for impairment of *dignitas* where groups are concerned: Although an action might conceivably lie where the defendant has stated: "All members of ethnic group X are drunkards" and the plaintiff is identifiable as a member of group X, no relief would be available if the defendant had said "Most of the members of ethnic group X are drunkards", or probably even if the statement was "All but a handful of the members of ethnic group X are drunkards", yet in either of these instances the dignity of the group and its individual members would have been equally harmed. In view of this problem pertaining to the common law defamation action in both Roman-Dutch and Anglo-American legal systems, any remedy to protect the dignity of groups would have to be statutorily based and would have not only to make unlawful expression which insulted either individuals or groups, but would also have specifically to give *locus standi* to individuals where a group to which they had belonged had been insulted. This procedural issue is given detailed consideration at 7.4 below.

5.5 Wrongfulness

5.5.1 The general criterion of wrongfulness

Thus far we have seen that the *actio injuriarum*, and in particular the protection it accords to *dignitas*, provides the individual with a wide range of rights that can be vindicated by means of a civil action. It has also been noted that infringements of *dignitas* frequently take the form of expression, and that protection of *dignitas* necessarily implies restriction of freedom of expression in certain cases. But how do the courts determine when the right to *dignitas* has been infringed or, to use a Dworkinian term, determine when the right not to be insulted "trumped" another's right to freedom of expression?

The fact that a defendant may have performed an intentional act that causes harm to a plaintiff is not in itself determinative of liability - the court must also be satisfied that the defendant's action was such as to merit condemnation by the law. The criterion of wrongfulness thus involves the application of legal policy.¹⁰⁹⁷ In determining whether or not the requirement of wrongfulness has been satisfied, the courts refer to the *boni mores* or, as was stated in *Minister van Polisie v Ewels*,¹⁰⁹⁸ "die regsอร์ตuigings van die gemeenskap" - the "legal convictions of the community".¹⁰⁹⁹

¹⁰⁹⁷Burchell, *supra* n. 808 at 24-5.

¹⁰⁹⁸1975 (3) SA 590 (A) at 597.

¹⁰⁹⁹The *boni mores* test has been referred to as the criterion against which unlawfulness is measured in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597, *S v I* 1976 (1) SA 781 (RAD), *Universiteit*

Thus in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*¹¹⁰⁰ it was held that

in any given situation the question is asked whether the defendant's conduct was *reasonable* according to the legal convictions of the community.

The court went on to state that¹¹⁰¹

In determining whether conduct is of such a nature as to be determined unlawful, the Court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation.

The application of the policy-based test of wrongfulness has long been present in the law, even if not specifically given the recognition it now enjoys. Thus in *Walker v Van Wezel*¹¹⁰² it was held that

Conduct which may wound the self esteem but which is not insulting is not an *injuria*, and similarly to address words to another which might wound his self esteem but which are not insulting is not an *injuria*.

The court went on to cite De Villiers' statement that¹¹⁰³

The word *contumelia* (arrogant action, ignominious treatment, ignominy) is used in the Digest as an equivalent of *injuria* but the distinction should be noted between this sense of the word used as a legal term and its ordinary non legal significance. A person to whom the social precedence to which he deems himself to be entitled is not accorded may possibly regard the treatment which he has thus received as ignominious (*contumelia* in its non legal sense), but he cannot complain in such a case of an *injuria*, nor is the treatment he has

Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T) at 387, *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833-4, *Marais v Richard* 1981 (1) SA 1157 (A) at 1168, *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Guano (Pty) Ltd* 1981 (2) SA 173 (T) at 188-9, *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) 371 (D) at 380, *Schultz v Butt* 1986 (3) SA 667 (A) at 679, *Hawker v Life Offices Association of South Africa* 1987 (3) SA 777 (C) at 781, *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (1)* 1988 (2) SA 350 (W) at 356-7, *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W), *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 462E - 464 F.

¹¹⁰⁰1982 (4) SA 371 (D) at 380.

¹¹⁰¹At 384.

¹¹⁰²1940 WLD 66 at 68.

¹¹⁰³De Villiers, *supra* n. 814 at 22.

thus received actionable. Ignominious treatment is an injury only when it is an infringement of one of the absolute rights of personality; a right that *is recognised by the law of the state* as included among the rights of every free man.

(Emphasis added).

What clearly emerges from these passages is an acknowledgment of the fact that delictual liability (in this instance liability for an impairment of *dignitas*) does not follow upon a mere assertion of a (subjective) feeling of insult by the plaintiff - the (objective) criterion of unlawfulness must also be satisfied, and it is for this reason that what might from a "social" perspective seem insulting, might not amount to an insult from the legal perspective of wrongfulness. The importance of this requirement in shielding defendants from the claims of hyper-sensitive plaintiffs has already been mentioned in the discussion of *Delange v Costa* at 4.3.2 above, but it is important to remind ones-self of it when considering cases involving freedom of expression, because the wrongfulness requirement is undoubtedly the most important tool used by the courts to determine whether expression is insulting or not. Furthermore, the policy-based test for wrongfulness is particularly useful in that (as modern authorities emphasise) it clearly delimits what is wrongful in the *legal* sense from what is wrongful in a social, moral, ethical or religious sense.¹¹⁰⁴

The roots of the *boni mores* test are also discernible in the following statement by De Villiers in which he defines the criterion to be applied in determining whether an infringement of *dignitas* has occurred ¹¹⁰⁵ and which has also been approved of by the courts:¹¹⁰⁶

Whether an act is to be placed among those that involve an insult, indignity, humiliation or vexation depends to a great extent on the modes of thought prevalent amongst any particular community or at any particular time...

Of like tenor is the statement in *S v Bugwande*¹¹⁰⁷ that

In deciding whether the *injuria* in the circumstances of a particular case merits a conviction of *crimen injuria*, the Court has to some extent to pass a value

¹¹⁰⁴Neethling, Potgieter and Visser, supra n. 805 at 35-6.

¹¹⁰⁵De Villiers, supra n. 814 at 83-4.

¹¹⁰⁶*O'Keeffe v Argus Printing and Publishing Co. Ltd.* 1953 (4) SA 244 (C), *S v I* 1976 (1) SA 781 (RAD).

¹¹⁰⁷1987 (1) SA 787 (N) at 796 C.

judgment in regard to the reprehensibility of the offending conduct, viewed in the light of the principles of morality and conduct *generally accepted as the norm in society*.

(Emphasis added).

Although the *boni mores* test involves the application of a standard of "reasonableness", it is important not to confuse the objective test of reasonableness relating to *unlawfulness* with the objective test of reasonableness (usually referred to as the "reasonable person" test) which relates to *fault*. When reasonableness is used to determine wrongfulness, the court is operating *ex post facto* and with the benefit of hindsight, determining whether the legal convictions of society indicate that the defendant's conduct was unlawful. But when using reasonableness to determine fault, the court considers the conduct of the defendant at the time the allegedly wrongful conduct was engaged in, and determines without the benefit of hindsight, whether the defendant's behaviour in the circumstances in which he found himself accorded with that of the hypothetical reasonable person.¹¹⁰⁸

5.5.2 Wrongfulness as the infringement of a right or breach of a duty

Although the legal convictions of the community test forms the foundation for assessing wrongfulness, in most situations the courts do not need to make explicit reference to it. Instead delictual wrongfulness is usually ascertained by enquiring whether the defendant infringed a right of the plaintiff or, alternatively, whether the defendant breached a legal duty owed to the plaintiff. Of course, the existence of rights and duties is ultimately dependent on the legal convictions of the community, and so the *boni mores* test thus coexists with the infringement of a legal right and breach of a legal duty tests, but it is generally only in novel or borderline situations that the courts need to refer ("below the surface" as it were) to the *boni mores* test, making it explicit that it is because of their sense of the legal convictions of the community that they find a right or duty to exist in the case at hand.¹¹⁰⁹

The first of these approaches - that which sees wrongfulness as being the result of an infringement of rights - has obvious parallels with human rights law. It is therefore useful to enquire what is meant by a "right" in the sense that that term is used in the law of delict. The doctrine of legal rights as a basis for assessing unlawfulness was

¹¹⁰⁸The difference between reasonableness as a test for wrongfulness and for fault is noted by Rumpff CJ in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597. See also Boberg, *supra* n. 127 at 33 and 38-40 (and the authorities cited there), Burchell, *supra* n. 808 at 38 and 86 and Neethling, Potgieter and Visser, *supra* n. 805 at 32 and 143-5.

¹¹⁰⁹Neethling, Potgieter and Visser, *supra* n. 805 at 39-43.

first accepted by the court in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*¹¹¹⁰ where it was held

Die onregmatigheid by persoonlikheidskrenking en vermoensbenadeling is, by wyse van basiese uitgangspunt gestel, gelee in die aantasting van 'n subjektiewe reg.

The unlawfulness concerned in the infringement of the personality and patrimonial injury lies, as stated by way of a basic point of departure, in the infringement of a right.

(In translation.)

The doctrine from which this concept of rights derives is known as the doctrine of "subjective rights".¹¹¹¹ The link between this doctrine and the Kantian view of dignity discussed at 3.2 above, an essential aspect of which was the concept of the human being as subject (or actor) rather than as object (or the tool of others), is obvious. Care must be taken not to be misled by the use of the word "subjective" in the phrase "subjective rights" - by this proponents of the theory do not mean that the existence of the rights is tested subjectively, but simply that the right is held by a legal subject (that is, a legal person, either natural or artificial)¹¹¹². The existence and content of the right is tested according to the *boni mores* test which, as has already been explained is characterised by modern Roman-Dutch theorists as an objective test.

The breach of a duty of care test stands as an alternative to the infringement of a legal right test as a means of assessing wrongfulness.¹¹¹³ Its usefulness derives from the fact that in certain circumstances, cases involving pure economic loss and omissions being prime examples,¹¹¹⁴ it may be easier to determine wrongfulness by asking the question "Was a legal duty breached?" rather than "Was a legal right infringed?" However, it is emphasised that this test, like the one involving infringement of a right, ultimately depends on the *boni mores* criterion, and so an answer to the

¹¹¹⁰1977 (4) SA 376 (T) at 381F - 383C, and 387A.

¹¹¹¹See also the discussions of the doctrine in Neethling, Potgieter and Visser, supra n. 805 at 43-8 and Neethling, supra n. 815 at 5-15.

¹¹¹²The use of the word "subjective" in this context is in fact superfluous, and derives from the lack in Afrikaans and German of distinct words for "law" and "right" - in these languages the same word ("reg" and "recht" respectively) means both "law" and "right", hence the necessity of distinguishing between the two by using the term "subjektiewe reg" in Afrikaans to denote "right" as distinct from "law". See Burchell, supra n. 810 at 63-4.

¹¹¹³For a general discussion of this test see Neethling, Potgieter and Visser, supra n. 805 at 48-66.

¹¹¹⁴*Ibid.*, 49.

question "Has a legal duty been breached" could be rephrased as "Do the legal convictions of the community indicate that a duty has been breached?"¹¹¹⁵

5.5.3 Fundamental rights and the test for wrongfulness

Before passing from this general discussion of wrongfulness to its use in the specific instance of impairment of dignity through insult, it is necessary to pay attention to the role judges perform in determining wrongfulness. The policy-based "legal convictions of the community" test for wrongfulness is fundamental to the assessment of liability in the law of delict. In the case of the *actio injuriarum* it is used to determine whether words that a plaintiff alleges to be subjectively insulting are recognised as such by law - section 5.6 below contains a detailed examination of how the test is applied in cases involving this particular type of delictual harm. Is this private law standard one which other legal systems would find suitable for the adjudication of the limits of public law rights? Would this test mark with sufficient precision the boundary between expression which was actionable and that which was not?

5.5.3.1 Judicial policy

As is apparent from the discussion above, contemporary writers state that the *boni mores* or legal convictions of the community test provides an *objective* standard against which delictual liability may be assessed.¹¹¹⁶ But although the standard may be objective in the sense that it provides a criterion external to the particular defendant against which his conduct is measured, the standard is not objective in the sense of being universal, given its dependence on the court's appreciation of current social norms. Indeed, this is admitted by Neethling, Potgieter and Visser, who state¹¹¹⁷

The *boni mores* or general reasonableness criterion is therefore a juridical yardstick which gives expression to the *prevailing* convictions of the community regarding right and wrong. It is a criterion which enables the court to *continuously adapt the law to reflect the changing values and needs of the community*.

(Emphasis added).

Similarly, Boberg states¹¹¹⁸ that

¹¹¹⁵Ibid., 50 and Boberg, supra n. 127 at 32-3.

¹¹¹⁶Neethling, Potgieter and Visser, supra n. 805 at 31-2 and 36-8.

¹¹¹⁷Ibid., at 35.

¹¹¹⁸Boberg, supra n. 127 at 33.

At the root of each of these crystallised categories of wrongfulness lies a value judgement based on considerations of morality and policy - a balancing of interests followed by the law's decision to protect one kind of interest against one kind of invasion and not another. The decision reflects our society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not - the *boni mores*, or, as Rumpff CJ put it in *Minister van Polisie v Ewels*the legal convictions of the community.

Does the dependence of the *boni mores* test on social norm mean that it has an in-built majoritarian bias, which is inimical to human rights jurisprudence, and that this type of test would not be suited to determining the limits of fundamental rights? I would suggest that this is not the case, and that the "legal convictions of the community" test can be reconciled with the needs of human rights law.

Firstly, human rights law is not static. Although it is true that the *existence* of rights cannot, at least in terms of natural law philosophy, be dependant on social factors, there is nothing contrary to natural rights theory in asserting that even if human rights are objectively extant and are external to humankind, humankind's *understanding* of the content and scope of human rights changes in accordance with society's changing appreciation of the implications of human dignity. Thus to the extent that human society progresses in its appreciation of human rights, the legal convictions of the community, which can at least provide evidence of that progress in understanding, have a crucial role to play in determining the existence of rights or, to put it in Roman law terms, *ius gentium* is often good evidence of *ius naturale*.

Secondly, one must distinguish between questions involving the *existence* of rights and those involving *what constitutes an unlawful impairment of a right*. While the former type of question is, in terms of natural law theory, dependant only on humankind's understanding of a universal code of rights, the latter is usually determined by *balancing competing rights*, and the balance to be struck between rights will certainly depend upon changing social conditions. To take an obvious example, the rights of newspapers to report industrial production figures, normally something that would fall well within the ambit of freedom of the press, will be curtailed in times of warfare, and it is this type of balancing of social interests for which the *boni mores* test is particularly suited.

Furthermore, it would be incorrect to say that in applying the *boni mores* test judges see themselves as engaged in what might be called a process of decision making by opinion poll. A useful example of this is provided by the case of *Edouard v Administrator, Natal*¹¹¹⁹ in which the court had to determine whether the *boni mores* test would categorise as wrongful the birth of a child resulting from the negligent failure of a surgeon to perform a sterilisation operation. Two passages from the judgment of Thirion J are worthy of note. In the first he stated¹¹²⁰

Community values and concepts of morality differ from period to period and from one country to another. Consequently public policy is not immutable. At the same time it would be correct to say that *some fundamental values are more enduring than society itself*.
(Emphasis added)

In the second, and in answer to the question of how the courts are to determine the content of public policy on any matter, he held¹¹²¹

Certain moral values and policy considerations have become generally accepted in the community and some of these have in their turn hardened into rules of law. By reasoning from settled principles in related fields and by striking a balance between competing consideration[s] the Court tries to arrive at a result which will be fair to the individual and the community. In the process the Court must enquire what interests legitimately require to be protected for the sake of the collective welfare and it must evaluate the probable consequences of adopting a public policy rule. The Court will only apply community attitudes and values in deciding cases if such attitudes and values have gained general acceptance in the community and are clear *and if their application is necessary in the interests of sound social policy* and the welfare of the community. Any other approach would put legal principle at the mercy of the idiosyncrasies of individual Judges.
(Emphasis added).

Although ostensibly eschewing the suggestion that the values inherent in public policy are determined by judges, I would suggest that here Thirion J was being modest. For his dictum indicates that it would be erroneous to characterise the *boni mores* test as one in which the court simply determines and applies "what most people

¹¹¹⁹1989 (2) SA 368 (D).

¹¹²⁰At 376E.

¹¹²¹At 379D-F.

in society think is legally correct". The phrases emphasised in the quotations above clearly indicate firstly that there are certain values that are "more enduring than society itself", and secondly that community values will be applied only if they are in accordance with "sound social policy". The key question is, of course, who determines what is sound social policy, and the answer is that this is done by the court itself. As Nicholas AJA held in *Schultz v Butt*¹¹²²

'die regsgevoel van die gemeenskap' opgevat moet word as die regsgevoel van die gemeenskap se regbeleidmakers, *soos Wetgewer en Regter* (Emphasis added).

'the legal convictions of the community' must be understood as the legal convictions of the community's legal policy makers, *such as the Legislator and Judge* (In translation).

The adoption of this attitude by the Appellate Division is refreshing, candidly recognising as it does the primary role judges play in the formulation of legal policy, support for which is now frequently being voiced in academic writing.¹¹²³ But if the crude "public opinion poll" image of the public policy test is discarded in favour of one that sees the formulation of such policy resting primarily in the hands of the judiciary, is there not a danger that, as Thirion J states, cases will come to be determined by the "idiosyncrasies of individual Judges"? The answer to this is that judges do not operate in a normative vacuum, and have in recent years come publicly to acknowledge that they are guided by values, prominent among which are those of "justice", "fairness", "equity", "reasonableness" and, most importantly for human rights jurisprudence, natural law.¹¹²⁴ Thus, speaking extra-judicially, Mr Justice Corbett stated¹¹²⁵

In this process [of determining the content of public policy] the judge would no doubt be influenced by concepts of natural law, by international law norms

¹¹²²1986 (3) SA 667 (A) at 679D, quoting with approval Van der Merwe, N. J. and Olivier, P. J. J. *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (5th ed) (Pretoria, Van der Walt, 1985) 58 n. 95.

¹¹²³See in general Hoexter, Cora "Judicial Policy in South Africa" 103 (1986) *South African Law Journal* 436 and, for a discussion on judicial policy in the law of delict, Van Aswegen, A. "Policy considerations in the law of delict" 56 (1993) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 171.

¹¹²⁴See Van Zyl, D. H. "The Significance of the Concepts "Justice" and "Equity" in Law and Legal Thought" 105 (1988) *South African Law Journal* 272 at 284-90, Corbett, M. M. "Aspects of the Role of Policy in the Evolution of our Common Law" 104 (1987) *South African Law Journal* 52.

¹¹²⁵Corbett, *supra* n. 1124 at 67-8.

and by the way in which the particular problem is handled in other comparable systems of jurisprudence.

Furthermore he stated that¹¹²⁶

At the same time the judge must bear in mind that community norms and values are not universally the same; and that they may vary from age to age...[this] is well illustrated by the law relating to newspaper defamation. In South Africa, as I have shown, the courts have adopted the principle of strict liability. This may be contrasted with the situation in the United States of America where by reason of the First Amendment, which guarantees freedom of speech and of the press, defamation takes on a constitutional dimension...

In the last resort the judge will often be required to perform a balancing act between two competing values, each in itself a worthy and desirable one...And the balance which is eventually struck must accord with society's notions of what justice demands. It is a fascinating but daunting task; and one which the courts are often called upon to perform. And it is a process to which our Roman-Dutch common law, based as it is on broad principle, lends itself particularly well.

What is significant from these passages (to which approval was given in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*¹¹²⁷) is their implicit recognition that such variation in community values as may from time to time occur will diminish once a society codifies those values in a bill of rights - clearly the South African courts would not have reached the same conclusions on cases involving press freedom had judges been *bound* to take this into account (because of a provision in a bill of rights) as distinct from being *able* to take it into account if they chose to refer to natural rights. In other words, the very fact that judges were not obliged to take natural rights into account in discovering the content of public policy (even though, as I have argued, they were fully entitled to do so) accounts for the fact that results given by the legal convictions of the community test do not *necessarily* accord with human rights. But, as academic commentators have realised,¹¹²⁸ the enactment of a bill of rights is bound to have a significant effect on what judges determine are the legal convictions of the community. Thus Burchell states¹¹²⁹

¹¹²⁶Ibid., 68-9.

¹¹²⁷1990 (2) SA 520 (W) at 527D - 529B.

¹¹²⁸Van Aswegen, *supra* n. 1034 at 60, Burchell, *supra* n. 808 at 28. See also Neethling, Potgieter and Visser, *supra* n. 805 at 34 n. 22.

¹¹²⁹Burchell, *supra* n. 808 at 28.

Introduction of a Bill of Rights in South Africa will crystallize community views on fundamental rights and will provide inspiration to a court faced with determining the legal convictions on a particular or related issue.

Section 35(3) of the recently enacted interim Constitution of South Africa in fact requires that in developing common and customary law the courts have due regard to the "spirit, purport and objects" of the Constitution (including, obviously, the bill of rights in Chapter 3 thereof), and helpfully guides the courts in this process by providing¹¹³⁰ that in interpreting the bill of rights, courts shall

...promote the values which underlie an open and democratic society based on freedom and equality..

Thus one can safely say that the policy-based test for wrongfulness in the law of delict is not incompatible with the type of test judges apply in determining the ambit of constitutional freedoms. Indeed, in *Gardener v Whitaker*¹¹³¹ the court expressly stated that in balancing competing rights protected by the bill of rights in South Africa's new Constitution, the courts are

...called upon to decide the matter by balancing competing interests in much the same way as unlawfulness is established in a delictual action according to the standard of the *boni mores* of the community..

In society that lacks a bill of rights a judge ought to formulate policy in accordance with universal values - the *boni mores* test is thus not an invitation to the judge either to take an opinion poll or to embark upon a legislative frolic of his or her own. In a society that does have a bill of rights, the judge's task is made the more easier because those universal values are easily ascertainable in their codified form.

5.5.3.2 North American approaches to judicial policy-making

Although the courts in South Africa are likely to find that the wrongfulness test in the law of delict provides a good model for constitutional adjudication, to what extent is this approach compatible with the role judges in the United States and Canada adopt in deciding legal policy?

¹¹³⁰Section 35(1).

¹¹³¹1995 (2) SA 672 (E) at 691B - D.

5.5.3.2.1 The United States

First, it is necessary to note that policy based assessments of liability, such as that embodied in the legal convictions of the community test, are not alien to tort law - as is noted at 6.3.3 below,¹¹³² whether a duty of care exists in tort depends upon "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection".¹¹³³ Similarly, as was stated in *Weirum v RKO Gen. Inc.*,¹¹³⁴

Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.

But how does the balancing of what Chafee termed "individual interests and social interests"¹¹³⁵ take place where the courts decide constitutional issues? What did Harlan J mean when he said in *Barenblatt v United States*¹¹³⁶

Where First Amendment Rights are asserted...resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

Do the courts, when weighing constitutional questions, adopt a standard defined by their perception of social *mores*, or do they adopt a more objective standard ? This issue has already been touched upon, in that at 3.5.2 above in the discussion of the Supreme Court's attitude to the scope of the right to privacy, where it was noted that these cases reveal a struggle between two opposing schools of thought: On the one hand, in reaching its decision in *Bowers v Hardwick*¹¹³⁷ that the right to privacy did not prevent a state from criminalising homosexual conduct, the court adopted an approach which, it claimed, reflected the "history and traditions" of society. By contrast, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,¹¹³⁸ the court adopted what might be called a natural rights approach, explicitly stating that

¹¹³²Infra n. 1332.

¹¹³³Prosser and Keeton, supra n. 77 at 358.

¹¹³⁴15 Cal. 3d 40 at 46, 539 P.2d 36 at 39, 123 Cal. Rptr. 468 at 470.

¹¹³⁵Chafee, *Zechariah Free Speech in the United States* (Cambridge, Harvard University Press, 1941, reprinted 1967) 32.

¹¹³⁶360 U.S. 109 (1959) at 126. For similar statements that it is the role of the judiciary to balance rights see Vinson J in *American Communications Association v Douds* 339 U.S. 382 (1950), and Frankfurter J in *Dennis v United States* 341 U.S. 494 (1951).

¹¹³⁷478 U.S. 186 (1986) at 192 and 194.

¹¹³⁸112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) at 707.

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them , as grounded truly in principle, not as compromises with social and political pressures...

Even more emphatic was the statement by Scalia J in which he said¹¹³⁹

How upsetting it is , that so many of our citizens...think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus..

The latter approach clearly reflects the judicial role in so far as First Amendment cases are concerned, as the case authority cited at 2.2.4 demonstrates. As Douglas J held in his dissenting judgment in *Roth v United States*,¹¹⁴⁰

The standard of what offends 'the common consensus of the community' conflicts, in my judgment, with the command of the First Amendment that 'Congress shall pass no law abridging freedom of speech, press, assembly or petition'.

I would therefore conclude that were the courts in the United States to be presented with a case in which they were required to balance dignitary interests against freedom of expression they, like the South African courts, would not be uncomfortable applying a policy-based test, but in so doing would balance the rights in accordance with their determination of where, given the values served by freedom of expression on the one hand and human dignity on the other, the balance ought to be struck, rather than in accordance with a determination of what reflected the majority view of society.

5.5.3.2.2 Canada

The policy-making role of judges is acknowledged in Canada.¹¹⁴¹ However, the decisions in *R v Keegstra*¹¹⁴² and *R v Butler*¹¹⁴³ leave no doubt that the Canadian courts certainly are prepared to do adopt an approach which defers to prevailing

¹¹³⁹At 795.

¹¹⁴⁰354 U.S. 476 (1957) at 511-12.

¹¹⁴¹See for example Hogg, Peter W. *Constitutional Law of Canada* (3rd ed) (Scarborough, Carswell, 1992) 119-23, 306-7, 388-9, 797-801 and 811-14.

¹¹⁴²(1990) 61 C.C.C. (3d) 1.

¹¹⁴³(1992) 89 DLR (4th) 1.

social values in determining what limits on freedoms are acceptable in a "free and democratic society" - an approach which I argued is inimical to freedom of expression (see 2.2.6.1 and 2.3.6 above).

Given that the Canadian courts have gone far further in restricting freedom of expression than I would argue is permitted by the dignity standard (as will become clear at 5.6 and 6.4 below), asking the question of whether a test such as the "legal convictions of the community test" would be found too restrictive if applied to constitutional cases is academic. The Canadian cases do however illustrate the danger inherent in any policy-based balancing approach - that it can lead to a devaluation of freedom of expression through deference to majoritarianism.

5.6. Determining wrongfulness in cases of impairment of *dignitas*

5.6.1 Introduction

Attention has been focussed in the foregoing sections on the general test for wrongfulness. This section deals with the criteria to be used in determining wrongfulness in the specific instance of impairments of *dignitas*. As has already been noted, in *Delange v Costa*¹¹⁴⁴ the Appellate Division affirmed the objective test of wrongfulness, stating that a plaintiff bringing an action for the impairment of *dignitas* must show not only that he (subjectively) was insulted but also that the defendant's conduct contravened the prevailing (objective) norms of society.

The policy-based test for wrongfulness will, therefore, be used by the courts to determine first whether the words or conduct which allegedly impair *dignitas* are, seen by themselves, reprehensible according to the legal convictions of the community; and secondly, whether such conduct as *has* been found to impair *dignitas* is wrongful when weighed against *other* rights, and in particular the defendant's right to freedom of expression. The nature and degree of the impairment of dignity is then weighed against the costs of limiting freedom of expression. Thus any inquiry into wrongfulness, and particularly one involving fundamental rights, requires the courts to balance competing interests and freedoms.

Obviously whether particular words are insulting from a legal point of view will be determined primarily with reference to the meaning ascribed to them in the particular society, the context in which they were used and the extent to which the norms of that society would characterise them as sufficiently emotionally hurtful to be

¹¹⁴⁴1989 (2) 857 (A).

characterised as an impairment of dignity (see the discussion in 5.5.1 above). As was noted at 5.2 above, there will often be a close correlation between expression that is defamatory and that which is insulting.¹¹⁴⁵ But in general the determination of whether words are insulting will simply be a matter of evidence as to the objective meaning of the words complained of in the society concerned. However, apart from matters of evidence relating to meaning, the court will have to consider a variety of other factors in determining wrongfulness. The rest of section 5.6 focuses on the criteria a court should use in determining whether expression should be held to be unlawful. Some of these factors relate to the first aspect of the inquiry (the nature of the insult and the circumstances in which it was delivered) while others relate to the second (the interests that need to be balanced against the complainant's mental tranquillity).

5.6.2 The size of the group insulted

Although, the objective test for wrongfulness is usually easy to apply, it does give rise to a procedural problem in relation to impairments of *dignitas*. The problem derives from the fact that although one might easily say that the "legal convictions of the community" determine wrongfulness in general, the question then arises as to *which* community's convictions the court ought to apply when dealing with the specific question of the lawfulness of *particular words or conduct*. As is pointed out by Taitz, in a heterogenous society it is impossible to discover an objective standard that can be used to determine wrongfulness.¹¹⁴⁶ The difficulties that arise in applying objective tests in multi-cultural societies has been noted by many writers commenting on both civil¹¹⁴⁷ and criminal¹¹⁴⁸ law. Most important for present purposes is the question of how an objective standard can operate in cases involving insult. Ought one to adopt the standard of the "reasonable person" in determining whether speech is insulting or not? Unfortunately the difficulty of defining the characteristics and attitudes of this notional character increases in proportion to the diversity of the society one is dealing with. A dictum which explains this difficulty with particular eloquence is to be found in the Rhodesian case of *R v Nkomo (1)*,¹¹⁴⁹ where Beadle CJ stated

¹¹⁴⁵In this regard see also Burchell, *supra* n. 808 at 199.

¹¹⁴⁶Taitz, J "Euthanasia and the 'Legal Convictions of Society' in a South African Context" 110 (1993) *South African Law Journal* 440 at 443-4.

¹¹⁴⁷See Burchell, *supra* n. 810 at 97-102, Burchell, *supra* n. 808 at 91-2.

¹¹⁴⁸See Burchell and Hunt, *supra* n. 517 at 195-6, Snyman, *supra* n. 932 at 229.

¹¹⁴⁹1964 (3) SA 128 (SR) at 131. See also Hefer JA in *S v Melk* 1988 (4) SA 561 (A) at 578F who, in discussing the difficulties inherent in the objective test, stated that in terms of the test "the unsophisticated and uneducated shepherd will be treated no differently from the professor".

In England, with its relatively homogenous population, the test of "the reasonable man"...has caused enough difficulty in attempting to define the standard. In a country such as this, with its diverse, multi-racial community, whose social and educational standards vary over almost the widest possible range, the task is wellnigh impossible. To strike a mean between the Batonka fisherman living his primitive life in some remote spot on the Zambesi, and the professor at the University College of Rhodesia, is to set a task which even an arch-exponent of the "reasonable man test" would shrink from attempting.

One could imagine situations in which a defendant had uttered words which were subjectively insulting to a plaintiff who belonged to a small minority in society, but which would not be considered as such if directed towards the vast majority. Would the element of objective wrongfulness be satisfied in this case?¹¹⁵⁰ How is the individual speaker to know what language he or she should avoid using?

One solution would be provided by the sectional approach taken by American courts to defamation cases, in terms of which words are defamatory if they lower the plaintiff's reputation in the eyes of a "substantial and respectable group, even though it might be quite a small minority".¹¹⁵¹ If adopted in cases of insult, words or conduct would be held to be insulting only if they impaired the dignity of a "substantial group". The shortcoming of this approach is that it denies protection to groups not deemed "substantial".

The alternative would be to say that conduct found insulting by an individual on the basis of his or her membership of *any* group, no matter how small, was unlawful. But then surely principle would require that liability should arise from conduct which was deemed insulting by the individual *qua* individual, and not only for the more common cases of insulting conduct directed towards an individual on the basis of a group to which he or she belonged? Or, to state the issue differently, if the size of the group towards which the insult is directed is to have no effect on liability, then is there any reason not to extend protection to the smallest "group", namely the individual? If this rather radical alternative was adopted, it would no doubt sometimes occur that defendants were sued after having insulted a member of a small group of whose

¹¹⁵⁰The issue of sexually suggestive comments provides a particularly good example of the problems associated with the objective test - the line of South African cases where liability was imposed when strangers suggested sexual intercourse to plaintiffs stands in contrast to the general principle in American law that "there is no harm in asking" - see *supra* n. 647 and accompanying text.

¹¹⁵¹This approach has received some support in South Africa - see Burchell, *supra* n. 810 at 101-2.

sensibilities they were unaware. Such actions could however be met by the defence of lack of knowledge of unlawfulness which, as was shown at 5.3.3 above, relieves a defendant of liability where he is able to discharge the evidentiary burden required to rebut the presumption of *animus injuriandi*. In practice, whether or not the court accepts the defendant's assertion that he was unaware that his conduct was insulting (that is, whether the court accepts that he has discharged the evidentiary burden required to rebut unlawfulness), will come down to a question of evidence, and the strongest (and perhaps only) evidence the defendant will be able to adduce to support his defence will be the smallness of the group. This then raises the likelihood that only larger groups would be protected from insult, because it would be less easy to persuade the court one did not know the speech was insulting¹¹⁵² than in the case of small groups which, because people could argue they were unaware they were offending them, would find it difficult to obtain a remedy for insult. Thus irrespective of whether one adopts the sectional approach or its alternative, smaller groups are likely to find it difficult to vindicate their right not to be insulted - on the sectional approach because an insult directed towards them will not be *prima facie* wrongful, on the alternative approach because knowledge of unlawfulness will in all likelihood be rebutted. But the alternative approach does have the advantage of extending at least *prima facie* protection to *all* groups and individuals, and is therefore to be preferred. In conclusion then it is submitted that the size of the group to which the insult is directed should be relevant only to the issue of knowledge of unlawfulness rather than to unlawfulness itself. This avoids the problem inherent in the objective test.

5.6.3 The human characteristic insulted

Ought the particular characteristic of the plaintiff that is insulted to have a bearing on the determination of wrongfulness? In this regard it is useful to refer to the writings of Horowitz who, in discussing the role of groups in constitution-building in divided societies, refers to "ascriptive" characteristics - that is, characteristics such as race and ethnicity which are an integral part of an individual's identity as a human being and which are immutable.¹¹⁵³ Clearly an insult relating to any of these characteristics hits at an essential aspect of the complainant's humanity and thus impairs his or her *dignitas*. Moreover, the very immutability of such characteristics provides strong

¹¹⁵²See for example *Mbatha v Van Staden* 1982 (2) SA 260 (N) at 262H - 263A where the court had no difficulty in finding that the accused must have known that the word "kaffer" was insulting when addressed to a black person.

¹¹⁵³Horowitz, D. *A Democratic South Africa ?* (Berkeley, University of California Press, 1991) 1-2, 25 and 38-9.

foundation for the argument that an insult based on such a characteristic is particularly injurious to the victim's sense of self-worth.¹¹⁵⁴

But what then of insults directed against a person on the basis of their religious, ethical or political affiliations, or indeed any of those aspects of personality that are distinguishable from the ascriptive aspects only because they are chosen by the individual rather than being innate? Those recognising a qualitative difference between innate and chosen characteristics point to the fact that because the latter are the result of choice, insults directed against them are to some extent answerable by rational argument - one can answer an insult which targets one on the basis of the religion or political party one chooses to belong to in a way that is impossible in the case of an insult directed against one's race.¹¹⁵⁵ Some also argue that insults directed towards immutable characteristics are more harmful in that they are arguably more hurtful than those directed towards one's weight, athletic prowess or intellectual accomplishments *et cetera*, and because ethnic and racial slurs often awaken historically based fears of persecution.¹¹⁵⁶ On the other hand it can be argued that since chosen characteristics are a manifestation of human will, the exercise of which is an aspect of dignity, insults directed against such characteristics merit some censure by the law. Moreover, as Bollinger points out, using an analogy from antidiscrimination law,¹¹⁵⁷ the distinction between discrimination on ascriptive grounds and volitional ones is of doubtful validity in that racial discrimination, for example, is only incidentally a manifestation of prejudice against persons with a different skin colour, and is in fact indicative of a more fundamental intolerance of their *difference*. It is also clear that restricting a remedy for insult to particular grounds arguably amounts to content discrimination. This essentially was the defect in the statute declared unconstitutional in *R.A.V. v St. Paul, Minnesota*,¹¹⁵⁸ (discussed at 2.2.7.1 above), which was deemed underinclusive because it criminalised only expression motivated by racial hatred. On the basis of these arguments, there is no good reason to distinguish between insults directed towards political or religious difference as opposed to racial or ethnic difference, as each is a manifestation of disregard for human dignity. Of course, this does not mean that

¹¹⁵⁴For a discussion of this argument see Weinstein, *supra* n. 102 at 209.

¹¹⁵⁵The distinction between insults directed against characteristics that are "volitional" and those that are not is recognised by Abel, *supra* n. 74 at 139.

¹¹⁵⁶Neisser, *supra* n. 268 at 338-40.

¹¹⁵⁷Bollinger, *supra* n. 19 at 111-2.

¹¹⁵⁸505 U.S. 377 (1992).

courts need be blind to differences in the degree of harm that insults cause, and this is a matter that can be reflected in the amount of damages awarded.¹¹⁵⁹

Two other points remain regarding the characteristic that is insulted:

First, it is important to distinguish between the precise *form* that a particular harm takes and the *essential human characteristic* it is directed against. Thus, to take an example already referred to, the use of the word "kaffir" or "nigger" are *different, society-specific forms* (from South Africa and the United States respectively) of the *same type of harm*, namely an insult directed towards the hearer's race. Moreover, it should be noted that the insulting effect of words in such cases will often depend upon the context in which they are uttered - thus while the words "White" and "Black" are not *per se* insulting when used to refer to members of different race groups, the courts have justly found phrases such as "White bitch"¹¹⁶⁰ and "Black bastard"¹¹⁶¹ to be so - the words "White" and "Black" here gave an additional racial sting to "bitch" and "bastard" which are insulting in themselves.

Secondly, one must distinguish between insults directed towards *persons* on the basis of their membership of a chosen group, and insults directed against the *idea* underlying that membership. Whereas the former may, as has been said, support an action for insult, it is submitted that the latter, being directed against a concept rather than a person, ought never do so. This is well illustrated by the case of *S v Tanteli*¹¹⁶² in which the White appellant (who was serving in a shop) had been approached by a White customer who addressed her in Afrikaans. The appellant, who did not understand Afrikaans, angrily said to the White complainant "If it's Afrikaans you are speaking, you must speak to the kaffir", referring to another shop assistant, who was Black. The complainant alleged impairment of his dignity on the basis that his language had been insulted. A striking feature of this case is, of course, that the Black shop assistant laid no complaint against his employer, which is perhaps indicative of the fact that social pressures may reduce the efficacy of legal remedies even when they are available. But more important for present purposes was the court's approach to infringements of dignity taking the form of disparaging remarks about a person's *language* rather than about the *person himself*. In overturning the appellant's conviction for *crimen injuria* the court stated¹¹⁶³ that while the words

¹¹⁵⁹Clearly a greater amount would be awarded where the defendant had called the plaintiff a "black bastard" than if he had called him a "fat fool".

¹¹⁶⁰*S v M* 1979 (2) SA 25 (A).

¹¹⁶¹*S v Bugwande* 1987 (1) SA 787 (N).

¹¹⁶²1975 (2) SA 772 (T).

¹¹⁶³At 775C-H.

might have been offensive to the shop assistant to whom they referred (but who did not lodge the criminal complaint)

..there was in the present case no basis for finding that the complainant's *dignitas* (his proper pride in himself) was impaired at all. The attack was not, and was not understood as being, an attack against the complainant personally. It was an attack upon his language. Undoubtedly, the complainant found that to be hurtful and offensive in a general sense; but it did not, in relation to the person of the complainant, have that degrading, insulting or ignominious character which is a requisite of an *injuria*.

In the same vein, the court in *Church of Scientology in SA (Incorporated Association Not For Gain) v Reader's Digest Association (Pty) Ltd*,¹¹⁶⁴ held that a magazine article critical of a philosophy (as distinct from the members believing in it) could not be the subject of a defamation action.

Both these cases illustrate the important distinction that must be made between disparaging statements made about religions, languages and political ideologies, and those referring to people who belong to particular religious, linguistic or political groups. The courts were surely correct in holding that no action for insult or defamation can lie in cases where the offending words are directed against ideas or beliefs.

5.6.4 The truth or falsity of the insult

Undoubtedly the most difficult issue to consider in setting boundaries between expression and insult is to what extent the truth or falsity of the insult should affect the determination of wrongfulness, for it is this issue which most starkly highlights the contrast between the values of truth-seeking on the one hand and dignity on the other. This section therefore concentrates on the balance to be struck between the Millian value of truth-seeking, identified as the primary justification for freedom of expression in chapter 1, and the right not to have one's dignity impaired through insult. Of course, many statements that are insulting contain no statement of fact at all, but consist only of meaningless abuse, most often taking the form of ethnic, racial or gender-related epithets. Thus before dealing with insults that do contain meaning it is necessary to deal separately with those that do not.

¹¹⁶⁴1980 (4) SA 313 (C).

5.6.4.1 Meaningless abuse

Insulting words that are meaningless in the sense that they contain no statement of fact or opinion constitute a category of expression that is comparatively easy to distinguish, for whereas truth-seeking will *prima facie* be compromised if meaningful statements are prevented from reaching the public, the proscription of expression that contains no meaning does not deprive the public of the right to test the validity of ideas. Insulting epithets¹¹⁶⁵ relating to the type of inherent characteristics (such as race, ethnicity, gender, sexual orientation *et cetera*) are the commonest although not the only¹¹⁶⁶ examples of this category. Such expression contains no "truth" or "falsity", and thus adds nothing of substance to the message being conveyed. Of course, it may be argued that the distinction between meaningless abuse and other types of insult places excessive importance on the distinction between form and content, and that an insult couched in sophisticated language and containing statements of fact may be as hurtful as one taking the form of mere crudities, but whereas any affront inherent in statements of fact is of a type in relation to which issues of truth and falsity may be contested and which can be countered by further debate, the harm caused by derogatory epithets cannot be thus remedied, and so not even intellectual satisfaction is available to the victim to erase the psychic harm he or she has suffered. This, I would submit, marks meaningless abuse as a clear category of expression which can be proscribed without compromising the value of truth-seeking.

The coincidence between meaningless abuse and unlawfulness is best illustrated by the fact that out of the eighteen¹¹⁶⁷ reported cases, both criminal and civil, where the courts have found that an impairment of *dignitas* by verbal¹¹⁶⁸ insult¹¹⁶⁹ has

¹¹⁶⁵The ingenuity of people to devise terms of opprobrium for each other seems, unfortunately, to be limitless. Nevertheless a few well-known examples will suffice to indicate what types of expression fall into this category - words such "nigger", "kaffir", "wog", "kike" and "wop" are clear examples of insults relating to race and ethnicity, "cunt" and "bitch" to gender, and "homo" and "faggot" to sexual orientation.

¹¹⁶⁶Although it is emphasised that the conclusion reached at 6.3 was that any insult, whether relating to a group characteristic or one specific to the plaintiff, should be actionable.

¹¹⁶⁷*Whittington v Bowles* 1934 EDL 142, *S v S* 1964 (3) SA 319 (T), *Brenner v Botha* 1956 (3) SA 257 (T), *R v Dibden* 1967 (1) PH H 137 (RAD), *S v Momberg* 1970 (2) SA 68 (C), *S v Rasenyalo* 1988 (2) SA 208 (O), *S v M* 1979 (2) SA 25 (A), *S v Bagwandeen* 1987 (1) SA 787 (N), *S v Lewis* 1968 (2) PH H367 (T), *Fayd'herbe v Zammit* 1977 (3) SA 711 (D), *S v Tanteli* 1975 (2) SA 772 (T), *Ciliza v Minister of Police* 1976 (4) SA 234 (N), *Mbatha v Staden* 1982 (2) SA 260 (N), *S v Paluza* 1983 (2) PH H150 (E), *S v Pretorius* 1991 (1) PH H29 (B), *Pillay v R* 1958 (1) PH H28 (N), *Matiwane v Cecil, Nathan, Beattie & Co* 1972 (1) 222 (N), and *R v Shaw* 1942 GWLD 41. The words used in these cases are discussed at 4.4 above.

¹¹⁶⁸Insult may of course take the form of a gesture, but *Innes v Visser* 1936 WLD 44 is the only reported case of this type.

¹¹⁶⁹Included in this figure are two cases (*R v Shaw* 1942 GWLD 41 and *Pillay v R* 1958 (1) PH H28 (N)) of invitation to sexual intercourse in which abusive language was used. As was argued at 4.4 above, it is doubtful whether it is in general correct to classify this type conduct as an impairment of

occurred, only two¹¹⁷⁰ (discussed at 5.6.4.2.1 below) - did not involve the use of meaningless abuse. In other words, in the overwhelming majority of cases decided in a legal system with a long common law history of a remedy for insult, the courts have had no hesitation in imposing liability for meaningless abuse and, conversely, have been far more reluctant to do so when dealing with insults containing statements of fact or opinion. The fact that *even in the absence of* constitutional protection of freedom of expression the courts in South Africa have, in the overwhelming majority of cases, imposed liability for insult only where such insult took the form of meaningless abuse, suggests that it would be highly likely that in countries which *do* accord explicit constitutional protection to freedom of expression, the courts would be cautious in imposing liability for speech that goes beyond meaningless abuse.

One final matter needs to be dealt with in respect of meaningless abuse, which is that insulting epithets are of course often used in the context of statements of fact or opinion.¹¹⁷¹ What is the position where meaningless abuse and meaningful statements of fact or opinion are intertwined? The answer here must surely be that such parts of a statement that consist of meaningless abuse - even if it take the form of a single epithet *in the context of* an otherwise meaningful statement - will be unlawful. Thus insults in the form of abuse will not be shielded simply because they occur in the context of otherwise lawful expression.

5.6.4.2 Insults containing meaningful statements

As was noted in 5.6.4.1 above, case law on impairment of dignity gives a clear answer to the issue of unlawfulness in so far as meaningless abuse is concerned. What then is the position where dignity is impaired by statements of fact or opinion that do not contain abusive epithets?

dignitas in the form of insult. Rather it is suggested that it be classified as a separate instance of impairment of *dignitas* taking the form of harassment or invasion of privacy, and that only where abusive language is used should they also be classified as insult.

¹¹⁷⁰*Matiwane v Cecil Nathan, Beattie & Co* 1972 (1) SA 222 (N) and *Fayd'herbe v Zammit* 1977 (3) SA 711 (D).

¹¹⁷¹Greenawalt, *supra* n. 102 at 297.

5.6.4.2.1 The decision in *Fayd'herbe v Zammit*

There are only two reported cases in which liability has been found in cases not involving meaningless abuse. The first, *Matiwane v Cecil Nathan, Beattie & Co*¹¹⁷² has already been discussed at 4.4 above, and the conclusion reached that this case did not involve impairment by insult at all, but is rather classifiable as abuse of power in that it involved an intimidating letter written (in otherwise unexceptionable language) by a firm of attorneys to the plaintiff. More problematic is *Fayd'herbe v Zammit*¹¹⁷³ in which liability for impairment of dignity through insult was found where the defendant sent a letter to the plaintiff stating that she was a "blackmailer, inveterate liar, bloody crook, swindler and immoral woman". The court rejected the defendant's argument that the statement in the letter was true, holding that truth is not a defence in actions for impairment of dignity. This decision has received academic support¹¹⁷⁴ on the basis that even someone who has engaged in reprehensible conduct that forms the basis of an insult containing a true statement does not thereby forfeit their right to dignity. Yet the fact that the words complained of were factual accusations, albeit cast in harsh language, and contained in correspondence between estranged lovers, indicates just how widely the net of liability could reach if one accepts the court's arguments that truth is no defence.

It is clearly this aspect of the law relating to insult that most directly affects freedom of expression, because it requires a balancing of the right of the plaintiff not to be insulted on the one hand, against the right of the defendant to express a fact or opinion and that of the public to consider what the defendant has said, on the other. Given the abhorrence Millian theory exhibits for the resolution of issues of the truth or falsity of expression by the courts, the idea that expression which is *true* should attract liability is, of course intolerable. Thus although Boberg states that it is difficult to imagine circumstances in which it was in the public interest to impair *dignitas*,¹¹⁷⁵ this is surely to beg the question, which is to what extent the law should permit solicitude for the wounded feelings of plaintiffs to over-ride the value of truth-seeking upon which freedom of expression is founded. Clearly then the decision in *Fayd'herbe v Zammit* is open to question, for not only does it constitute the only true instance where liability for impairment of dignity was imposed for a statement of fact or opinion, but it was also a case in which it is respectfully submitted the court failed to balance dignity against truth-seeking.

¹¹⁷²1972 (1) 222 (N).

¹¹⁷³1977 (3) 711 (D).

¹¹⁷⁴Burchell, *supra* n. 808 at 193 (where it is noted that the truth of the insulting statement will however be relevant to the assessment of damages) and Burchell, J. M. 1977 *Annual Survey of South African Law* 205.

¹¹⁷⁵Boberg, *supra* n. 947 at 176.

5.6.4.2.2 Truth in defamation law

A further argument against the proposition in *Fayd'herbe* that truth is no defence is to be found in cases where the *actio injuriarum* is brought to vindicate *fama* (that is, reputation) rather than *dignitas*. As was argued at 5.2 above, the actions for defamation and for impairment of dignity are essentially similar in that both remedy emotional harm. Furthermore it is clear that in most cases, the distinction between an action for impairment of dignity taking the form of an insulting statement of fact on the one hand, and a defamation action on the other, will rest only in the fact that publication has not occurred in the former case but has in the latter. In other words, it is difficult to think of insulting statements of fact which would not be actionable as defamation if they were published. To put it differently, in cases where an insult *is* published, my analysis suggests that it could be remedied either by an action for impairment of dignity or by means of a defamation action. This being the case, in addressing the question of what the attitude of the law should be to insulting statements of fact, it is instructive to examine the approach adopted to truth in defamation actions. In South African law the position is that defamatory statements are presumed to be false, but that the defence of justification is available where the defendant is able to prove that the statement was true and that its publication was for the public benefit.¹¹⁷⁶ Of course, truth alone is a defence in Anglo-American defamation law.¹¹⁷⁷

Clearly, to allow truth as a defence avoids the most flagrant violation of Millian doctrine, and thus the position in defamation law is far preferable to that taken in *Fayd'herbe*. Nevertheless, so far as the question of onus is concerned, the defamation law requirement that the defendant prove truth is itself a substantial abrogation of expressive rights in that it places the burden of avoiding liability on the party seeking to initiate debate rather than on the party seeking to restrict it. As Brennan J stated in *New York Times v Sullivan*¹¹⁷⁸

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognise an exception for any test of truth - whether administered by judges, juries or administrative officials - and especially not one that puts the burden of proving truth on the speaker.

¹¹⁷⁶Burchell, *supra* n. 810 at 207. It is the additional requirement of showing that publication was for the public benefit that serves to distinguish the South African law of defamation from that of the United Kingdom and the United States, where truth alone suffices to rebut the unlawfulness of the defamation.

¹¹⁷⁷*Ibid.*, 208.

¹¹⁷⁸376 U.S. 254 (1964) at 271.

The court further held¹¹⁷⁹ that placing the burden of proving truth on the speaker would cause them to be

..deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. [Speakers will] tend to make only statements which "steer far wider of the unlawful zone."

From a purely epistemological point of view then, placing the onus on the defendant to prove the truth of his or her statement is objectionable. Furthermore, although defamation is taken to have occurred when the defamatory material is published, could it not be argued that since the defence of truth exists because no harm to good reputation is possible where such reputation is undeserved,¹¹⁸⁰ the onus really requires the defendant to negative what could be considered an element of the action, namely the falsity of the material?

Recently, substantial academic support has been expressed in the United States for the placing of the onus on the plaintiff to prove falsity, by writers such as Franklin and Bussel (who point out that the plaintiff is better placed to prove the falsity of a fact relating to himself than the defendant is to prove its truth),¹¹⁸¹ Dienes¹¹⁸² and with particular force by Smolla (who emphasises that the marketplace of ideas theory requires that in cases of doubt, that is where truth or falsity cannot be established, it is better that the law err on the side of freedom of expression).¹¹⁸³ The same position has been taken in South Africa, although only in regard to public figure plaintiffs, by Spitz,¹¹⁸⁴ who argues that the Roman-Dutch common-law rule will not survive review under the freedom of expression provisions of the new South African interim

¹¹⁷⁹At 279 of the report.

¹¹⁸⁰Burchell, *supra* n. 810 at 209, citing the old English case of *M'Pherson v Daniels* (1829) 10 B&C 263 at 272, 109 ER 448 at 451 where Littledale J held

...the law will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not, to possess.

¹¹⁸¹Franklin and Bussel, *supra* n. 80 at 859-65.

¹¹⁸²Dienes Dienes, C. Thomas "Libel Reform: An Appraisal" 23 (1989) *University of Michigan Journal of Law Reform* 1 at 5 and 14-15.

¹¹⁸³Smolla, Rodney "Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation" 75 (1987) *Georgetown Law Journal* 1519 at 1529-31.

¹¹⁸⁴Spitz, Derek "Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of Freedom of Expression" 10 (1994) *South African Journal on Human Rights* 301 at 323-4.

Constitution,¹¹⁸⁵ in cases where public figures sue for defamation. Although he further states that the same would not apply in the case of private figure plaintiffs (even to the extent that the strict liability Roman-Dutch law imposes on media defendants might survive) this must, I submit, be seen in the context of the fact that the South African Constitution accords a higher level of protection to freedom of expression relating to political matters than it does to other types of expression.¹¹⁸⁶

Although this issue has yet to be adjudicated by the Constitutional Court, existing principles of the common law of defamation as applied to public figures were found to be incompatible with the rights provisions of the Constitution in recent local and provincial division decisions. In *Mandela v Falati*,¹¹⁸⁷ the Witwatersrand Local Division justified its refusal to extend an interim injunction restraining the defendant from publishing allegedly defamatory matter concerning the plaintiff by saying that while such an injunction was available under the common law, the protection accorded to freedom of expression by the Constitution made prior restraints impermissible. In *Gardener v Whitaker*¹¹⁸⁸ the court held that the bill of rights created no hierarchy of rights, and that each case in which rights came into conflict should, therefore, be judged on its own facts. The onus of proving that one right should take precedence over another in any given case should rest with the party making that assertion - that is, with the plaintiff. In view of this, and in view of the fact that democratic processes required openness and accountability - values which were served by freedom of expression - the court held that the onus of proving truth (and other defences) that the common law of defamation places on the defendant conflicted with the constitutional guarantee of freedom of expression. It should however be noted that in both *Mandela* and *Gardener* the plaintiffs were holders of public office, and so the decisions leave open the question of private figure plaintiffs. No doubt the Constitutional Court will ultimately be called upon to determine the impact of the bill of rights on the common law of defamation in general,¹¹⁸⁹ and on the question of onus, as regards both types of plaintiff in particular.

¹¹⁸⁵Constitution of the Republic of South Africa Act 200 of 1993, s 15(1), as read with the limitations section (s 33(1)).

¹¹⁸⁶The limitations section of the constitution (s 33(1)) provides that in general, freedoms may be limited to the extent that the limitation is reasonable and justifiable in a free and democratic society and provided that the essence of the freedoms is not negated. However, the section goes on to provide that in so far as certain rights (including freedom of expression) relate to "free and fair political activity", such limitations must also be "necessary".

¹¹⁸⁷1995 (1) SA 251 (W).

¹¹⁸⁸1995 (2) SA 672 (E). The court discussed the role freedom of expression had to play as a guarantee of openness and accountability at 685C - E and 687I - 688C. The issue of onus was discussed at 690F and 691C - I. As the court in *Gardener* itself noted, its finding on onus contradicts that in *Neethling v Du Preez* 1994 (1) SA 708 (A) (discussed supra, n. 1062 and 1085) which was decided before the bill of rights came into effect.

¹¹⁸⁹For an academic discussion on this see van Aswegen, supra n. 1034 at 60-2.

Further support for the imposition of the onus on the plaintiff is to be found in the Australian High Court decision in *Theophanous v Herald & Weekly Times Ltd*¹¹⁹⁰ in which the court effectively imported the *New York Times* doctrine into Australian law, holding that where public figures are defamed, they should bear the onus of proving intentional publication of false material.¹¹⁹¹ One should also note the importance attached to the issue of onus in the narrowly decided (4-3) *Keegstra* decision on statutory group defamation (discussed at 2.2.6.1 above), where the minority felt that the imposition of the burden of proving the defence of truth upon the accused constituted an unjustifiable reversal of the presumption of innocence, especially given that it might often be as difficult to prove the truth of a statement as to prove that it is false.¹¹⁹²

The application of the *New York Times* rule to all plaintiffs (and not just public figure plaintiffs as in that case) would constitute a significant innovation in the law. It would also attract the criticism that it ignores the arguments used to justify the public / private figure plaintiff distinction - namely that private plaintiffs are entitled to greater protection both because they have not taken upon themselves the peril of involvement in public affairs, and because they generally have less opportunity to refute defamatory allegations than do public figure plaintiffs, who usually enjoy significant access to the media.¹¹⁹³ Furthermore, it has been pointed out that where truth is a defence in group defamation claims, defendants might welcome the publicity given by the opportunity to adduce evidence proving the truth of derogatory statements made about plaintiffs.¹¹⁹⁴ Notwithstanding this however, I would argue firstly that those who support the private figure / public figure distinction have yet to explain why a person should be entitled to a lesser degree of dignity simply because they have entered public life. Secondly, the argument in favour of the distinction ignores the centrality of the Millian concept of truth to free speech theory - indeed it would be true to say that a presumption of falsity (and thus of liability) strikes at the very core of Millian theory of the nature of truth, and that to have this presumption operate in all cases where expression relates to private plaintiffs (about whom most individuals going about their daily lives speak more than they do about public

¹¹⁹⁰(1994) 124 ALR 1.

¹¹⁹¹On the other hand however, the Canadian Supreme Court expressly *declined* to import the *New York Times v Sullivan* standard into the common law in *Hill v Church of Scientology* (1994) 114 DLR (4th) 1 at 22-37, holding that so radical a change to the law of defamation should be effected by Parliament rather than by the courts.

¹¹⁹²(1990) 61 C.C.C. (3d) 1 at 117c - 119e.

¹¹⁹³See the discussion at 1.4.1 of this principle as enunciated in *Gertz v Robert Welch, Inc.*, 418 U.S. 323 (1974) at 345.

¹¹⁹⁴Greenawalt, *supra* n. 69 at 305-06.

figures) imposes an unacceptably broad limit on freedom of expression. Furthermore, the argument that the private / public figure distinction is justified on the basis that the former is more likely to encompass "political" speech than the latter, and ought therefore to receive a heightened degree of protection, can be met by pointing out that since what is commonly referred to as "hate speech" is in reality group defamation, which I have argued (at 5.4 above) should be actionable as a species of impairment of dignity, the likelihood that "private" defamation (that is, defamation not involving public figures) will contain "political" statements is surely increased, given that much of what is defined as group defamation consists of unpalatable statements of fact about groups which may, of course, be made in the course of an exchange of words between private individuals. This being the case, the rationale for applying the *Sullivan* rule even to private plaintiffs is strengthened. I would therefore conclude that not only should truth be a defence to actions for impairment of dignity where the insult consists of statements of fact or opinion based on fact, but that it should take the form of a requirement that irrespective of status, the plaintiff should prove falsity as an element of the action rather than that the defendant prove truth.

5.6.4.2.3 False insulting statements honestly made

Assuming that a plaintiff has established falsity, what of false statements that were made *bona fide* ? As was noted in the discussion of Millian values at 1.2 above, even false statements have value in that they serve to highlight the truth. But perhaps a more persuasive reason for affording at least some protection to statements which are false is to be found by once more referring to the opinion of Brennan J in the *New York Times* case where¹¹⁹⁵ he stated that

Erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive".....The state rule of law is not saved by its allowance of a defence of truth. A defence of erroneous statements honestly made is no less essential...

Brennan J went on to note that linking liability with falsity raised the danger that defendants might engage in self censorship by not publishing what they *thought* was true (and what might indeed *have* been true) because they could not take the risk that it was *possibly* false. For this reason, the court required that plaintiffs prove not simply that the material was false, but that the defendant published it *knowing* that it was false, or at least with reckless disregard as to falsity. Some recognition of this

¹¹⁹⁵376 U.S. 254 (1964) at 271-2.

argument can be found in South African case law. Thus in *S v Gibson*¹¹⁹⁶ the court said that it should be recognised that newspapers cannot sift facts with the thoroughness of a commission of inquiry, and indeed that their readers are aware of this and thus read newspapers in the knowledge that what has been reported may possibly be inaccurate.¹¹⁹⁷ However, this reasoning was firmly rejected by the Appellate Division in *Neethling v Du Preez*,¹¹⁹⁸ where the court held that the media enjoys no special licence to publish material without ensuring its veracity, and that where they do so, they must accept the risk of facing a defamation suit.

While the recognition in the *New York Times* decision of the necessity of affording some protection to false speech is sound from a Millian point of view, the imposition of the onus on the plaintiff to prove that the defendant's mistake was *not* honest has made it virtually impossible for public officials to recover damages for defamation, and on that basis the decision has attracted judicial criticism.¹¹⁹⁹ Clearly the real issue here is that of *bona fides*, the existence of which is obviously within the ken of the defendant rather than of the plaintiff. Therefore it is submitted that the way to accommodate the Millian concern that falsity be tolerated if it is genuinely held, is to impose a burden on the defendant to show *bona fide* belief in the false statement. Thus once the plaintiff has proved falsity, the defendant should have to prove the defence of *bona fide* belief.

The issue of *bona fides* was addressed, albeit indirectly, in *Delange v Costa*,¹²⁰⁰ the most recent Appellate Division case on impairment of *dignitas* by insult. In this case the plaintiff had been sent a letter by the defendant in which the defendant said that his company would not negotiate further business transactions with the plaintiff "until we are satisfied that your motives are in the interest of your country's industry." (The reference to "the industry" was the olive industry, in which both plaintiff and defendant were engaged). The court re-affirmed the long-standing principle that

¹¹⁹⁶1979 (4) SA 115 (D) at 135C-E.

¹¹⁹⁷Similar sentiments were expressed in the (unreported) trial court decision in *Neethling v Du Preez*, discussed in Burchell, *supra* n. 808 at 172-5.

¹¹⁹⁸1994 (1) SA 708 (A) at 770G.

¹¹⁹⁹Thus as White J stated in his concurring judgment in *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* 472 U.S. 749 (1985) at 767

[I]n *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favour, even if the publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation...

¹²⁰⁰1989 (2) SA 857 (A).

verbal communication of "an offensive or insulting nature" would be wrongful under the *actio injuriarum*, but cautioned that¹²⁰¹

There is no such thing as an absolute right not to be criticised. A person must be prepared to tolerate legitimate criticism, ie criticism which is fair and honest. Put differently, an act done in the exercise of a right is not a wrongful act, and can therefore not constitute an *injuria*. Honest criticism is such an act.

In applying the test for wrongfulness, the court had no difficulty in concluding that the plaintiff's *dignitas* had not, objectively speaking, been impaired. It held that the statement that the plaintiff was motivated by interests contrary to those of the national industry was the same as saying that the plaintiff was motivated by his own interests, and that to impose liability in this case would be to impose unjustified limitations on the right to criticise. Although the court offered no definition of what constituted "honest" or "fair" criticism, it is clear that one is expected to tolerate a degree of criticism in everyday life.¹²⁰² What then do the terms "honesty" and "fairness" mean?

Some guidance on this issue can be obtained from the law regarding the defamation law defence of fair comment, which is common to both South African and Anglo-American common law. This area of the law was long plagued by uncertainty, over the issue of whether, in order to be fair, criticism had also to be reasonable.¹²⁰³ In the early case of *Crawford v Albu*¹²⁰⁴ the Appellate Division distinguished between general comment and a special class of comment that imputed bad motives to the plaintiff. In meeting the requirement of fairness in the first type of case, all that needed to be shown was that the comment was honest, was relevant and was not malicious. Clearly the first and third requirements were complementary: one can safely assume that criticism is honest if it is made by someone who genuinely believes in what he says - thus if it could be shown that a defendant had levelled criticism maliciously, for the sake of causing offence and without genuinely holding the views he was expressing, the criticism would not be honest.¹²⁰⁵ So far as comment which imputed bad motive was concerned, the court added a further requirement, which was that the comment must be such as could be reasonably

¹²⁰¹At 862G.

¹²⁰²See for example *Walker v Van Wezel* 1940 WLD 66, where it was held not to be injurious for a supervisor to write to an employee that there had been "an apparent lack of control" in his department.

¹²⁰³Burchell, supra n. 810 at 225-9, Burchell, supra n. 808 at 177-8.

¹²⁰⁴1917 AD 102.

¹²⁰⁵Abel, supra n. 74 at 138-9 reaches a similar conclusion in that he holds that motive should be one of the criteria used to determine whether speech is harmful or not.

inferred from the facts. This requirement of reasonableness is clearly far more restrictive of free expression, because it means that unreasonable expression is not protected, and it is clearly the views of the extremist that will most often need such protection. The issue of fairness was again addressed by the Appellate Division in *Marais v Richard*,¹²⁰⁶ but this case did little to remove the uncertainty, because in affirming the use of the criterion of reasonableness to determine fairness, the court did not make it clear whether it was referring to *all* instances of fair comment or only those involving imputation of improper motive. If the court meant to state the former, it would have the consequence that *any* comment not meeting the standard of reasonableness would be proscribed, a position that would involve an even greater intrusion on free expression than is justified by *Crawford v Albu*. Happily, there is an indication that the Appellate Division is now tending towards the view that reasonableness is *not* an element of fairness: In *Johnson v Beckett*¹²⁰⁷ a majority of the court¹²⁰⁸ indicated that comment is fair provided that it is honest or genuine, and that

The word 'fair' is used in a specialised sense and means that the opinion must be an opinion which a fair man, *however extreme his views may be*, might honestly have, *even if his views are prejudiced*.
(Emphasis added).

Returning to the statement in *Delange v Costa* that insulting criticism will not be wrongful if it is honest and fair, one can, on the basis of the reasoning adopted in *Johnson v Beckett*, state that the requirement is simply that the criticism must have been genuine in the sense that the speaker held it *bona fide* and was not motivated by malice. This must clearly be the correct approach, firstly because it accords with the doctrine discussed at 5.3.3 above in terms of which a defendant will not be liable where he lacked intention in the form of knowledge of wrongfulness (for example, where he believed that his statement was true and that therefore the defence of truth would apply); and secondly because the alternative would lead to the proscription of extremist speech simply because it is "unreasonable" or irrational, and would cast upon the courts the requirement of making findings as to the "reasonableness" of ideas, an approach which would clearly involve viewpoint discrimination. The danger of applying a standard such as "reasonableness" in free speech cases is well stated by Douglas J's dissent in *Beauharnais*¹²⁰⁹ where he held

¹²⁰⁶1981 (1) SA 1157 (A).

¹²⁰⁷1992 (1) SA 762 (A).

¹²⁰⁸At 780J - 781A. See also 783B.

¹²⁰⁹343 U.S. 250 (1952) at 285.

..recently the Court in this and other cases has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate "within reasonable limits" the right of free speech. To me this is an ominous and alarming trend. The free trade in ideas which the framers of the Constitution visualised disappears. In its place there is substituted a new orthodoxy - an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality or health of society. Free speech in the constitutional sense disappears. Limits are drawn - limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action.

This indeed was the position adopted by the minority in *R v Keegstra*,¹²¹⁰ who argued that although s 319(3)(c) of the Canadian Criminal Code allowed defendants to escape liability if they showed that they reasonably believed the hatred inspiring statements they had been made to be true and in the public interest, the section offered no guidance to a court on how to determine whether it was "reasonable" to believe something or not. This, it is interesting to note, was in marked contrast to s 300 of the Code (the criminal defamation section) which affixes guilt only where the accused publishes a false libel which he *knows* to be false, and which therefore does not impose liability where an accused genuinely believes the truth of the defamatory statement.¹²¹¹ The conclusion I would therefore draw is that a defendant who has been shown to have made an insulting statement which is false need only prove subjective *bona fides*.

5.6.4.2.4 Opinions

The distinction between opinion and fact is notoriously difficult to make,¹²¹² yet is clearly crucial to hate speech, given that some of what is colloquially termed hate speech consists of statements of opinion. It is useful at the beginning of this section to examine the statements of American writers on the issue of fact *versus* opinion.

¹²¹⁰1990 61 C. C. C (3d) 1 at 119e-g.

¹²¹¹*R v Stevens* (1993) 82 C.C.C. (3d) 97 at 149e - g.

¹²¹²Dienes, *supra* n. 1182 at 14-15. The author adduces (*ibid.*, n. 54) words such as "scab", "sleazebag", "insane" and "Mafia kingpin" as examples of alleged defamatory matter which it is difficult to categorise as fact or opinion. See also the discussion by Franklin and Bussel, *supra* n. 80 at 871-80.

According to Post¹²¹³ the distinction between fact and opinion is to be explained as follows

...statements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we therefore have a right to expect ultimate convergence or consensus. Statements of opinion, on the other hand, make statements about an independent world the validity of which depends upon the standards or conventions of a particular community, and about which we cannot therefore expect convergence under conditions of cultural heterogeneity.

He further states that¹²¹⁴

Statements of opinion seem to be inherently debatable and uncertain in a way that statements of fact do not....There is no theory, no reproducible method, no "reconstructible rules" by which we can determine whether any given application, any given opinion, is correct or incorrect, because every such application will carry within it a contestable understanding of the underlying standard to be applied. Opinions might be viewed as an invitation to join in a process of interpreting standards. The protection extended to opinion by the common law privilege of fair comment trades on exactly this understanding. It does not follow that opinions do not claim to be true or do not solicit agreement on the basis of their truth, but it does follow that opinions are in their nature debatable. To impose sanctions for "false" opinions is to use the force of law to end this potential debate by imposing legally definitive interpretations of the cultural standards at issue.

The niceties of the fact / opinion distinction are well illustrated by Smolla¹²¹⁵ who makes the important point that it is necessary to examine the allegedly defamatory words in context in order to determine whether they are statements of fact or opinion. Thus, taking the examples he uses, the statement "John Smith is an Uncle Tom" has the appearance of a statement of fact but is in reality a statement of political opinion that John does not serve the interests of his race. On the other hand, the statement "In

¹²¹³Post, Robert C. "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*" 103 (1990) *Harvard Law Review* 601 at 660.

¹²¹⁴*Ibid.*, 664.

¹²¹⁵Smolla, *supra* n. 417 at 179-82.

my opinion. John Smith is a murderer" is simply a statement of fact dressed as opinion. Sometimes statements *combine* fact and opinion. Thus the statement "Dr John Smith is a murderer" on a placard held by an anti-abortion demonstrator who believes that abortions constitute murder combines an opinion (that abortion is murder), with a fact (that Dr Smith performs abortions). Smolla notes¹²¹⁶ that whereas the common law used to exempt statements of opinion from defamatory liability only if they were "fair" in the sense of being "reasonable", the finding in *Gertz v Robert Welch, Inc.*¹²¹⁷ that "under the First Amendment there is no such thing as a false idea" has ended this common law requirement, at least in so far as it relates to matters of public concern, and prevents juries' conceptions of what constitutes "reasonable" opinions being used to stifle opinions that are simply unpopular. Thus where a statement is one of evaluative opinion only, tortious liability cannot be imposed.¹²¹⁸ (The same does not hold true in cases involving statements of opinion based on fact. As was made clear in *Milkovich v Lorrain Journal Co.*,¹²¹⁹ a statement of opinion is not, simply because it is a statement of opinion, immune from liability under the law of defamation, although the court did caution that for liability to ensue the opinion must at least impliedly assert some statement of fact. In such cases, liability will arise either where the fact is not true or where the opinion is not genuinely held.¹²²⁰)

As Post points out, most expression defaming or insulting groups are likely to amount not to statements of fact but rather to statements of "evaluative opinion" in relation to which no finding of "truth" or "falsity" may be made. Post illustrates the importance of the fact / opinion distinction by referring to the group libel case of *Beauharnais v Illinois*,¹²²¹ in which the accused had distributed pamphlets which petitioned the mayor¹²²²

...to halt the further encroachment, harassment and invasion of white people, their property, neighbourhoods and persons by the Negro...

¹²¹⁶Idem.

¹²¹⁷418 U.S. 323 (1974) at 340. The full quotation is as follows:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.

¹²¹⁸This issue is discussed by Weinstein, *supra* n. 102 at 184-85, and by Smolla, *supra* n. 417 at 178-82. See also Prosser and Keeton, *supra* n. 77 at 814-15, and Franklin and Bussel, *supra* n. 80 at 868-9.

¹²¹⁹497 U.S. 1 (1990) at 18-20 and 25.

¹²²⁰497 U.S. 1 (1990) at 20 n. 7.

¹²²¹243 U.S. 250 (1952).

¹²²²The text of the pamphlet is quoted at 252.

and which warned that if

...the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the..rapes, robberies, knives, guns and marijuana of the Negro, surely will.

In analysing the case, Post states that¹²²³

To accuse an individual of using marijuana is to assert that he or she has committed certain specific acts, but to accuse the group "blacks" of using marijuana is not to make an analogous assertion. Some blacks will have used marijuana, and most will not have. The question is thus not the existence of certain specific acts, but rather whether those acts can appropriately be used to characterise the group. The fundamental issue is the nature of the group's identity, an issue which almost certainly ought to be characterised as one of evaluative opinion. Because the social meaning of race is inherently controversial, most statements likely to give rise to actions for group harm will be negative assessments of the identity of racial groups, and hence statements of evaluative opinion. No serious commentator would advocate a trial to determine the truth or falsity of such statements...in a context in which group identity is a matter of determination through political struggle and disagreement, the hypostatized injury of a group cannot, consistent with the processes that instantiate the principle of self-determination, be grounds to legally silence characterizations of group identity within public discourse.

Similarly, Hartman offers as examples of opinion which, although offensive, would not be proscribable consistent with the First Amendment statements such as that members of certain racial groups lack the intellectual acumen to study science, or a student T-shirt listing 15 reasons why "beer is better than women".¹²²⁴ It is for this reason that a statute such as that upon which conviction was based in *Beauharnais* would not be upheld today,¹²²⁵ given the changes to defamation law (particularly with regard to the level of intent required and the onus of proving falsity) effected by *New York Times v Sullivan* and cases which followed it, and the striking down of a very similar statute in *Collin v Smith*.¹²²⁶

¹²²³Post, supra n. 102 at 298.

¹²²⁴Hartman, supra n. 786 at 897.

¹²²⁵See the discussion of *Beauharnais* at 1.4.1 above.

¹²²⁶578 F.2d 1197 (7th Cir. 1978) (*cert. denied* 439 U.S. 916 (1978)).

Fact-based opinion is of course recognised in Roman-Dutch law, which provides that a defendant will successfully raise the defence of fair comment only where he or she is able to show that the facts upon which the opinion is based are true, that the comment is fair, and that the comment relates to a matter of legitimate public interest.¹²²⁷ Clearly the arguments made above which criticise the placing of a burden on the defendant to prove truth where the defamatory material consists of a statement of fact would apply in instances of comment based on fact. Furthermore, as was stated by McLachlin J in her dissenting judgment in *R v Keegstra*,¹²²⁸ making expressive rights dependant upon what it is in the "public interest" to discuss begs the very question that is so often at issue in political debate. Such a requirement clearly gives wide scope for viewpoint-based censorship. For these reasons, and consistent with what has already been stated with regard to the defence of truth, I would argue that where an insult consists of an opinion based on fact, the plaintiff should bear the onus of proving falsity, whereafter the defendant should bear the onus of proving his or her *bona fides*,¹²²⁹ without having in addition to show that expressing the opinion satisfied the nebulous requirement of being "in the public interest".

Fact-based opinions aside, however, the distinction made in America between "pure" or "evaluative" opinions, on the one hand, and opinions based on fact, on the other, is not known to Roman-Dutch law, and one can therefore only presume that an opinion not based on fact would not be covered by the defence of fair comment, simply because there are no facts which the defendant can prove as being true. Thus evaluative opinions would enjoy less (in fact no) protection in comparison with fact-based opinion. In the United States however, the position is the reverse in that, as was held in *Gertz v Robert Welch, Inc.*, liability cannot be imposed merely for "false ideas", and thus evaluative opinions enjoy *greater* (in fact absolute) protection than do those based on fact.¹²³⁰ In light of the position taken in this thesis that the Millian doctrine of truth-seeking permits liability to be imposed only where the plaintiff can prove a false statement of fact, it follows that liability ought not to be applied for statements of "pure" or "evaluative" opinion.

¹²²⁷Burchell, supra n. 810 at 224-30, Burchell, supra n. 808 at 177-8.

¹²²⁸1990 61 C. C. C (3d) 1 at 119g.

¹²²⁹It being remembered that it is not necessary to prove that a belief was reasonable in order to prove that it was *bona fide*.

¹²³⁰Prosser and Keeton, supra n. 77 at 814-15.

5.7 The constitutionalisation of private-law doctrines

The argument advanced in this chapter has been that the *actio injuriarum* of South African common law contains useful principles which could be used to resolve free speech issues. Yet I have also suggested that these common-law principles would require modification if they were to be used in this way - the requirement that plaintiffs should have to prove the falsity of insulting statements of fact being a prime example of this. Thus, the idea of using common-law doctrines to solve constitutional law problems has implications not only for constitutional law but also for the common-law doctrines themselves. In particular, it implies that what would traditionally be classified as "private" speech, and thus beyond the realms of constitutional adjudication, ought in fact to be subject to public law. This issue is further discussed at 7.2.3 below.

5.8 Summary

The purpose of this chapter has been to assess the utility of the principles underlying the *actio injuriarum*, and in particular the action for impairment of dignity, as a remedy for hate speech. Characterisation of hate speech as insult not only identifies the true nature of the harm inherent in such speech (namely the infliction of emotional distress on the plaintiff), but also brings within the scope of the remedy derogatory statements that are not published and which consist of meaningless abuse, neither of which would be actionable were the harm to be characterised as a form of defamation.

An important determinant of liability is the presence of fault, termed *animus injuriandi*, in Roman-Dutch law. In this regard particular emphasis was placed on the requirement that in order for subjective intent to be present, a defendant must have realised the wrongfulness of his or her actions, and that therefore a genuine belief in the lawfulness of the conduct will serve to rebut fault.

Procedural difficulties relating to the *locus standi* of individual plaintiffs where an insult refers to a group in general would need to be overcome by giving individuals a right of action where a group to which such an individual belonged had been insulted.

The criterion of unlawfulness is used in the law of delict to determine whether a defendant's conduct gives rise to liability. This requires a court to apply the policy-based *boni mores* or "legal convictions of the community" test to determine whether a legally recognised right has been infringed or a legally recognised duty neglected. By

applying this test, the courts are able to balance the dignitary rights of the plaintiff against the expressive rights of the defendant. The *boni mores* test can be used to decide whether particular words are objectively insulting from a legal point of view, based on evidence of the context in which the words were used and how they are understood in the society concerned. In addition it is suggested that the following rules be followed in determining the balance between dignitary and expressive rights:

The size of the group insulted does not affect the issue of wrongfulness, but may be relevant to the issue of knowledge of unlawfulness, and thus fault. Words found insulting by any group, no matter how small, or even by an individual, will therefore be wrongful, but a defendant should escape liability if he or she discharges an evidentiary burden to indicate lack of awareness that the words were insulting to the particular group or individual.

The human characteristic that is insulted ought also not to affect wrongfulness: the element of wrongfulness will be satisfied whether the insult is directed against an innate characteristic of the plaintiff (such as race, ethnicity, national origin, gender, sexual orientation or physical condition), or against a characteristic that the plaintiff has assumed by choice. Such considerations may, however, affect the seriousness of the insult and thus the amount of damages awarded. Wrongfulness ought never to be found where the insult is directed against an idea or belief, as distinct from persons holding that idea or belief.

Insults consisting of meaningless abuse will always be wrongful, as the harm they cause is not counterbalanced by considerations of truth-seeking. This approach is supported by the strong correlation in case law between meaningless abuse and liability for insult. Furthermore, where words of abuse are used within the context of otherwise meaningful statements, liability should still arise in respect of the meaningless abuse. South African case law indicates that this is a clear category of expression that may be subjected to liability without compromising truth-seeking.

Where insult takes the form of a meaningful statement, however, it is suggested that the sole precedent of *Fayd'herbe v Zammit*, in which liability was affixed in such circumstances and truth not allowed as a defence, is incompatible with Millian values and ought not to be followed, and that the correct balance between dignitary and expressive rights requires that it should

rather be the plaintiff who bears the onus of proving that the insulting statement was false, as in the case of *New York Times v Sullivan*.

Once falsity has been proved however, the defendant to an action for impairment of dignity should escape liability if able to show a *bona fide* belief that the statement was true. This rule is necessary in order to avoid the chilling effect on freedom of expression that would result were plaintiffs to be liable for inadvertent untruths, and is in any event implied by the subjective nature of intent (which includes the requirement of knowledge of wrongfulness). Furthermore it is argued that defendants ought not to be required to prove the reasonableness of their belief, as this would involve the courts having to determine the reasonableness of political theories and thus engage in viewpoint discrimination.

In cases where the defendant's statement is one of opinion based on fact, liability should be imposed where the plaintiff is able to prove the falsity of the fact. Thereafter, the defendant should be required to prove *bona fide* belief in the truth of the fact. Where however the opinion is purely evaluative (that is, not based on fact) no liability should ensue.

CHAPTER 6

INCITEMENT

6.1 Introduction

In chapter 2 I rejected the argument that the creation of discriminatory attitudes amounts to a legally cognizable harm, arguing that that theory entails viewpoint discrimination and is thus fundamentally at odds with the principle of viewpoint neutrality upon which freedom of expression is founded. In this chapter I discuss what is perhaps the more obvious question of whether material can be regulated on the basis that it causes consumers not just to hold discriminatory *attitudes* but rather causes the more direct harm of inciting them to commit unlawful *acts*. If it can be established that expressive material does, in certain instances, cause such harm, the question then arises as to whether incitement could be characterised as a civil wrong founding an action for impairment of dignity.

6.2 Sexually explicit material as a direct cause of harm - the empirical evidence

Can exposure to sexually explicit or other types of material cause consumers to commit harmful acts? The obvious importance of this question both to those seeking to prove and to refute the proposition that expressive material causes harm has led to copious academic writing on this issue. However, empirical research has produced answers which are at best equivocal.¹²³¹

¹²³¹Thus Segal, Lynne "Does Pornography Cause Violence ?" in Gibson, Pamela and Gibson, Roma (eds) *Dirty Looks: Women, Pornography, Power* (London, British Film Institute, 1993) 5 at 15 cites the most recent study of the relationship between pornography and violence (published by the United Kingdom Home Office in 1990) and concludes (at 15) that

...inconsistency is the *only* consistency to emerge from empirical research...as the most recent Home Office report on pornography commissioned in the UK concluded: 'Inconsistencies emerge between very similar studies and many interpretations of these have reached almost opposite conclusions'

Similarly, Wesson, Marianne "Sex, Lies and Videotape: The Pornographer as Censor" 66 (1991) *Washington Law Review* 913 at 927 states

Rivers of ink have been spilled in the debate about what empirical evidence indicates. Different commentators make diametrically opposing claims based on the same evidence.

See also Easton, *supra* n. 472 at 11-12.

The most frequently cited research on this issue by Donnerstein, Linz and Penrod¹²³² measured the response of laboratory subjects to films containing sex, violence or combinations of the two. Before discussing the data, it is crucially important to define precisely what is meant by "sex" and "violence". Starting first with violence, this is given its ordinary meaning of assault, battery, sexual assault and rape. It does *not* include degradation in the absence of violence, in relation to which there is no convincing data showing an increase in aggressive attitudes by consumers.¹²³³ So far as sex is concerned, it is crucial, in discussing the research results, to appreciate that material containing sex includes *but is not limited to* the sexually explicit. In other words, although material "containing sex" most often depicts sexual activity in a manner which would fall within the *Miller* definition of obscenity because of its sexual explicitness, much depicts sex in a non-explicit manner.¹²³⁴ The important implications of this rather broad definition of sex will become apparent later in this chapter. What then does the research show? The results can be summarised as follows: Where subjects were exposed to different types of film,¹²³⁵ an increase in aggression¹²³⁶ was measured after exposure to films containing a combination of sex and violence, a lesser degree of aggression after exposure to films containing violence alone but no sex,¹²³⁷ and *equal* lowest levels in aggression after exposure *either* to films containing sex but no violence *or* to films containing neither sex nor violence.¹²³⁸ Indeed the evidence in respect of films containing sex but no aggression is not wholly reliable, as some studies show that exposure to non violent sexually oriented material actually *lowers* levels of aggression,¹²³⁹ while others indicate that exposure to *any* stimulus (ranging from comic films to physical exercise) increases *all* responses by the subject, both aggressive and non-aggressive.¹²⁴⁰ The conclusion that has therefore been drawn from these studies is that it is not sex but rather

¹²³²The most recent work summarising their own research and those of others is Donnerstein, E., Linz, D. and Penrod, S. *The Question of Pornography - Research Findings and Policy Implications* (New York, Free Press, 1987).

¹²³³*Ibid.*, 171, Downs, *supra* n. 286 at 23 and Segal 12.

¹²³⁴This point is emphasised in Donnerstein, Linz and Penrod, *supra* n. 1232 at 175, *The Question of Pornography* 160, 175 and in Schauer, Frederick "Causation Theory and the Causes of Sexual Violence" 1987 *American Bar Foundation Research Journal* 737 at 741 and 766.

¹²³⁵For a convenient summary of the results of exposure to different types of film see Linz, D., Penrod, S. and Donnerstein, E. "The Attorney General's Commission on Pornography: The Gaps Between the "Findings" and the Facts" 1987 *American Bar Foundation Research Journal* 713 at 720.

¹²³⁶Tested either by provoking the male subjects subsequent to their exposure to the material and measuring their willingness to act aggressively to a female participant in the research, or by questioning the subjects as to their attitudes about rape.

¹²³⁷Downs, *supra* n. 286 at 168 and 191 citing Donnerstein *et al.* See also Russell, Diana "The Experts Cop Out" in Russell, Diana (ed) *Making Violence Sexy - Feminist Views on Pornography* (Buckingham, Open University Press, 1993) 151 at 154-55.

¹²³⁸Donnerstein, Linz, Penrod, *supra* n. 1232 at 79.

¹²³⁹Segal, *supra* n. 1231 at 12.

¹²⁴⁰Christensen, *supra* n. 488 at 136-7.

violence that is responsible for increased levels of aggression in subjects, and that it is material which combines both violence and sex which ought to give rise to greatest concern. As Donnerstein *et al* state¹²⁴¹

[V]iolent pornography influences attitudes and behaviours...Viewers come to cognitively associate sexuality with violence, to endorse the idea that women want to be raped, and to trivialize the injuries suffered by a rape victim. As a result of the attitudinal changes, men may be more willing to abuse women physically (indeed, the laboratory aggression measures suggest such an outcome).

This having been stated, however, one must also note the argument that shortcomings inherent in laboratory experiments have led some commentators to question whether the data so derived can justify censoring even material combining sex and violence: While the experimental data does show an *immediate* increase in aggressiveness after exposure to films containing a combination of sex and violence, the studies have not shown whether exposure to such material has any *long term* effects.¹²⁴² Furthermore, it cannot be overemphasised that such increases in aggression as have been demonstrated are valid *for the laboratory*, and must therefore be interpreted as being derived from that artificial background. In particular researchers have cautioned that increased aggressive *attitudes* stimulated in a laboratory does not necessarily mean that one can therefore predict increased aggressive *behaviour* in real life settings.¹²⁴³ As Donnerstein *et al* themselves emphasise,¹²⁴⁴ their findings that material leads to short term attitudinal changes does not necessarily prove the different assertion that there is an increased probability that the viewer will commit harmful acts, although the fact that it produces aggressive responses in the laboratory does at least indicate a *possibility* that such aggression may affect subsequent behaviour. Of course there is no means of devising an experiment in which the real life behaviour of subjects towards women could be tested after exposure to such materials, short of putting them into situations where they were allowed to commit unlawful acts.¹²⁴⁵

In light of the above findings, the Meese Commission's conclusion that¹²⁴⁶

¹²⁴¹Donnerstein, Linz and Penrod, *supra* n. 1232 at 20.

¹²⁴²Downs, *supra* n. 286 at 168.

¹²⁴³Donnerstein, Linz and Penrod, *supra* n. 1232 at 174. See also Layman, *supra* n. 189 at 1491.

¹²⁴⁴Donnerstein, Linz and Penrod, *supra* n. 1232 at 180-5.

¹²⁴⁵*Ibid.*, 20.

¹²⁴⁶Attorney General's Commission on Pornography (1986) 326.

[S]ubstantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence, and for some subgroups, possibly to unlawful acts of sexual violence"

must be qualified. As Downs emphasises, the very most that can be said on the basis of existing data is that there is what the 1986 Attorney General's Commission¹²⁴⁷ termed "probabilistic" causality¹²⁴⁸ between material combining sex and violence and violence itself - in other words, that on the basis of laboratory responses to materials that combine sex with violence, and an assumption that such responses are a likely pointer to behaviour, all one can say is that violence is *more likely* to occur if there has been exposure to such material, but that this could be true of many other factors, none of which can be demonstrated as having a direct, deterministic causal relationship with violence, as indeed the Commission itself admitted.¹²⁴⁹ Thus even supporters of censorship¹²⁵⁰ concede that only a correlation and not causation¹²⁵¹ has been demonstrated between violent pornography and harmful social conduct. D'Amato is therefore highly critical of the use of the word "causation" (whether in conjunction with the word "probabilistic or not"¹²⁵²) rather than "correlation"¹²⁵³ by

¹²⁴⁷The findings of this Commission, as well as the earlier reports the United States President's Commission on Obscenity and Pornography (1970) and the United Kingdom's Williams Committee Report on Obscenity, Cmnd. 7772 (1979), are discussed in detail in Hawkings, Gordon and Zimring, Frank E. *Pornography in a Free Society* (Cambridge, University Press, 1988).

¹²⁴⁸Attorney General's Commission on Pornography (1986) 306-20.

¹²⁴⁹These passages are helpfully collected by Linsley, William A. "The Case Against Censorship of Pornography" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 138 at 150-51. The Commission's conclusions were entirely predictable, given that its composition was heavily weighted in favour of people who had expressed pro-censorship views even before they undertook their investigation - see Vance, Carole "Negotiating Sex and Gender in the Attorney General's Commission on Pornography" in Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate*" (London, Virago, 1992) 29 at 31-2.

¹²⁵⁰Easton, *supra* n. 472 at 36.

¹²⁵¹Downs, *supra* n. 286 at 169. The difference between correlation and causation can be illustrated as follows: Assume research showed that the United States has a high incidence of violent crime, and that most people in the United States professed Christian belief. While this demonstrates a correlation between violence and Christianity, it would clearly be nonsensical to conclude that Christianity begets violence. An interesting example of correlation, cited by Feinberg, *supra* n. 68 at 155, is one derived from a study in a feminist journal indicating a correlation between increasing emancipation of women and increasing levels of criminal activity by women. Two points can be made here: First, it would be ridiculous to claim that increasing liberation *causes* crime, and secondly, that even if it was shown that the opportunities liberation provides to women *did* in fact lead some of them to engage in crime, that would surely not constitute sufficient reason to halt women's liberation, any more than the fact that sexually explicit materials leads a minority of men exposed to it to commit crime justifies suppression of such material.

¹²⁵²D'Amato, Anthony "A new Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence" 31 (1990) *William and Mary Law Review* 575 at 597-601 and 604 shows that there is no meaningful distinction between "causation" and "probabilistic causation" - the existence of a cause and the probability that a cause exists both depend upon proof of causation rather than mere correlation, which the Commission did not have.

¹²⁵³*Ibid.*, 575-6 and 581-5.

the Commission and by Schauer in his analysis of the Commission's findings,¹²⁵⁴ and argues that the fact that millions of events correlate without bearing a causative relationship with one another makes the Commission's leap from correlation to causation all the more questionable.¹²⁵⁵ Indeed, he points out that given that the vast majority of consumers of sexually explicit materials do *not* commit crime, there could even be said to be a *negative* correlation between exposure to such material and criminal acts - in other words that the argument that exposure to sexually explicit material is cathartic is possibly correct.¹²⁵⁶

But, even *accepting* the Meese Commission's conclusion regarding "probabilistic causation", one could state that since there are many other attitude altering practices which arguably cause more harm (including more harm done by men to women) than does pornography - alcohol consumption being a prime example - the question arises as to why pornography should be singled out for proscription given that prohibition of alcohol is no longer seriously entertained.¹²⁵⁷ And since the majority of consumers of sexually explicit materials do *not* commit crime as a result of their exposure to it, is prohibition justified by the acts of a small minority, thus effectively creating what Dority labels a "pervert's veto"?¹²⁵⁸ This latter fact is also consistent with research findings that whereas exposure to material combining sex and violence does increase arousal in some men, most find such material unappealing.¹²⁵⁹ This in turn supports the conclusion that material combining sex and violence assists in arousing those who are *already* predisposed to violence rather than itself being the cause of violence,¹²⁶⁰ a finding which is supported by Donnerstein *et al.*¹²⁶¹ Indeed, laboratory evidence shows that subjects who are exposed to material combining sex and violence, and are then "debriefed" by exposure to materials dispelling the myth that women welcome rape, emerge from the process with a greater appreciation of that message than those who receive the message without prior exposure to the material.¹²⁶²

¹²⁵⁴Schauer, *supra* n. 1234.

¹²⁵⁵D'Amato, *supra* n. 1252 at 590-2.

¹²⁵⁶*Ibid.*, 602-03.

¹²⁵⁷Downs, *supra* n. 286 at 165, 171 and 192.

¹²⁵⁸Dority, *supra* n. 481 at 114.

¹²⁵⁹Segal, *supra* n. 1231 at 12.

¹²⁶⁰*Ibid.*, 13, Easton, *supra* n. 472 at 38-9, Segal 13, Rodgerson and Wilson, *supra* n. 496 at 51. Thus, as is stated by Feinberg, *supra* n. 68 at 150:

It is not likely that non-rapists are converted into rapists *simply* by reading and viewing pornography. If pornography has a serious causal bearing on the occurrence of rape, as opposed to the trivial copy-cat effect, it must be in virtue of its role (still to be established) in implanting the appropriate cruel dispositions in the first place.

¹²⁶¹Donnerstein. Linz and Penrod, *supra* n. 1232 at 103.

¹²⁶²Strossen, *supra* n. 188 at 1167-8.

In the absence of a demonstrable cause and effect relationship between exposure of laboratory subjects to material combining sex and violence and their subsequent real life behaviour, attempts have been made to draw conclusions from broader social data. Here too the findings do not provide conclusive evidence supporting the claim that pornography causes crime. Research indicates that in some countries,¹²⁶³ including the U.S.A.,¹²⁶⁴ an increase in the availability of sexually explicit material¹²⁶⁵ has coincided with a decrease in crimes of sexual violence, that most of those who commit sexual crimes were raised with repressed anti-sexual attitudes,¹²⁶⁶ and that sex offenders have been exposed to such material later in their lives and in lesser amounts than non-offenders.¹²⁶⁷ Even studies which show a correlation between rape rates and consumption of sexually explicit material in different states of the U.S.A. might equally be explicable on the basis that such states also tend to be those with a high ratio of males to females - in other words the correct conclusion might be that both consumption of sexually explicit materials and rape rates could well be a function of the gender ratio, rather than that rape is correlated to the consumption of sexually explicit material.¹²⁶⁸ There are also studies comparing regulation of sexually explicit material in different states of the U.S.A. which indicate a correlation between equal opportunities for women and circulation of pornography, from which the conclusion has been drawn that those states which are socially tolerant in respect of one issue are likely to be tolerant in others.¹²⁶⁹ Finally, whatever the effects of violent sexually explicit material on some men, it is true that violence appears in a lower proportion of sexually explicit films than it does in "mainstream" productions,¹²⁷⁰ that the proportion of sexually explicit material containing violence relative to all sexually explicit material has decreased (although in absolute terms both types of material have increased in volume),¹²⁷¹ that the vast

¹²⁶³Segal, *supra* n. 1231 at 10.

¹²⁶⁴See Thomas, George "A Critique of the Anti-pornography Syllogism" 52 (1993) *Maryland Law Review* 122 who analyses statistical evidence as to the occurrence of rape and consumption of sexually explicit materials and concludes (*ibid.*, 141-2 and 161) that the rate of increase in rape has slowed since the early 1970's despite a substantial increase in consumption of such materials. This tends to support the argument that sexually explicit materials provide a cathartic function, thus *reducing* the incidence of rape (*ibid.*, 146).

¹²⁶⁵Note that the studies were confined to sexually *explicit* material, not material with any sexual content.

¹²⁶⁶Strossen, *supra* n. 188 at 1185.

¹²⁶⁷Segal, *supra* n. 1231 at 10. See also Rodgereson and Wilson, *supra* n. 496 at 49-50.

¹²⁶⁸Thomas, *supra* n. 1264 at 151-2 and 161.

¹²⁶⁹Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate*" (London, Virago, 1992) 7. The studies cited by Segal also indicate the reverse: that those states with strict anti-obsenity laws are ones in which women have made least progress in seeking equality. See also Strossen, *supra* n. 188 at 1185.

¹²⁷⁰Christensen, *supra* n. 488 at 59-60.

¹²⁷¹*Ibid.*, 60.

majority of consumers of pornography do not engage in violence,¹²⁷² and that some who do engage in violence can be aroused to it by stimuli as innocuous as church services,¹²⁷³ passages from the Bible,¹²⁷⁴ and the novel *Catcher in the Rye*.¹²⁷⁵ In short, there is no convincing evidence that sexually explicit materials causes criminal *behaviour* on the part of its consumers.¹²⁷⁶ As was stated in the United Kingdom's *Inquiry into Obscenity and Film Censorship* (the Williams Committee)¹²⁷⁷

We unhesitatingly reject the suggestion that the available statistical information for England and Wales lends any support at all to the argument that pornography acts as a stimulus to the commission of sexual violence.

What conclusion ought then to be drawn from the laboratory findings and the social evidence? Firstly, given the fact that the laboratory results indicate that material containing violence alone (without any sex) increases aggressive attitudes (although to a lesser extent than material combining the two), and that some studies indicate that depictions of sex without violence lower aggressiveness, it seems clear that it is violent imagery that is the true culprit in such materials, and that it is therefore violence rather than sex that should be the focus of attention.¹²⁷⁸ Indeed, it could be argued that if violence is the true harm, that censorship should then address *all* violence, and not just sexual violence. However, as will be argued at 6.3.3 below, apart from the fact that the category of sex and violence combined produced the highest levels of aggression in subjects, the particular nature of materials depicting sex is such as to make materials combining sex with violence different from those depicting violence alone, and that it will therefore be argued that images which are both sexually arousing and violent are likely to incite harm in a way that depictions of violence alone are not.¹²⁷⁹ In other words it will be argued that the difference between materials combining sex and violence and those depicting violence alone is qualitative rather than just one of degree, and that regulation of the former is

¹²⁷²Rodgerson and Wilson, *supra* n. 496 at 50. Of course, as Dority argues (*supra* n. 491 at 114) if exposure to sexually explicit materials *did* have this effect, then it would be apparent in the behaviour of sociologists who study it and those campaigners in favour of censorship who have seen it. For a libertarian argument against restricting pornography even if it causes a small minority to harm others see Narveson, Jan *The Libertarian Idea* (Philadelphia, Temple University Press, 1988) 293-4.

¹²⁷³Christensen, *supra* n. 488 at 127.

¹²⁷⁴Rodgerson and Wilson, *supra* n. 496 at 50.

¹²⁷⁵Dority, *supra* n. 491 at 114.

¹²⁷⁶Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace* ? (Buffalo, Prometheus Books, 1991) 14.

¹²⁷⁷The Report was published in 1979. This quotation is found in Palley, Marcia "Misalliance against pornography" *Sacramento Bee* 21 February 1993 F 01.

¹²⁷⁸Donnerstein, Linz and Penrod, *supra* n. 1232 at 112, 171 and 175. Linz, Penrod and Donnerstein, n. 1235 at 721. See also Layman, *supra* n. 189 at 1492.

¹²⁷⁹Rodgerson and Wilson, *supra* n. 496 at 28.

justifiable in a way that it is not in respect of the latter. Secondly, although the empirical research has failed to demonstrate a causal connection between exposure to such material and criminal conduct, this does not mean that regulation of such material is not justified under a harms-based approach. As is pointed out by Wesson¹²⁸⁰ the Supreme Court in *United States v O'Brien*¹²⁸¹ accepted that evil social consequences can justify regulation of expression, provided that the expression is regulated not because of its message but rather because of those other consequences. Thus in *Barnes v Glen Theatre, Inc.*,¹²⁸² the court held that it was permissible to regulate nude dancing because of the links between it and other criminal activity, even though such links are of course not the inevitable consequence of every nude dancing establishment. The same rationale surely applies in respect of materials which combine sex and violence. Even if it is not certain that the effect of such material measured in the laboratory will manifest itself in real life, the fact that such material incites aggression in consumers surely creates a significant risk of social evil. Thirdly, and perhaps most importantly, if a theory of liability for the production of such material can be developed on the basis of incitement to harm, then the equivocal empirical research relating to "real life" behaviour is to some extent *irrelevant*, because, as I shall emphasise at several points in this chapter, liability for incitement arises *whether or not* harm results from the inciter's efforts. It is of course necessary to show that the communication upon which liability for incitement is based encourages harm, and the aggressive response of laboratory subjects in Donnerstein's experiments suggests that it does, but it is not necessary for purposes of incitement-based liability to show that the encouragement actually causes harmful conduct, and so the failure of the evidence to link laboratory attitudes with criminal acts is not fatal to the imposition of liability.

6.3 Incitement-based liability

Is there any basis upon which it can be said that the producer of material that incites those exposed to it to cause harm to third parties becomes liable to such third parties? Two situations can be envisaged where such liability might arise: The first of these covers cases in which actual harm was caused to the plaintiff by a third party and the plaintiff alleges that the third party acted having been incited to do so by a communication published by the defendant. Thus A produces material that is seen by B and which incites B to commit a harmful act against C. The question there is whether C has an action against A. Also included within the category of cases where actual harm has occurred are those situations in which the person who was exposed to

¹²⁸⁰Wesson, *supra* n. 1231 at 929.

¹²⁸¹391 U.S. 367 (1968).

¹²⁸²501 U.S. 560 (1991).

the material caused harm to him or her self, and an action is brought either by that person or by a relative claiming for wrongful death. The second type of situation, which is more important to my thesis than the first, is where A publishes the material but no-one has yet acted in such a way as to harm C. Does C have an action against A in these circumstances? Although I have distinguished between these two situations (simply because all but one¹²⁸³ of the First Amendment cases discussed at 6.5 below arises from the first of them) it is crucial to emphasise that both in the United States¹²⁸⁴ and other jurisdictions¹²⁸⁵ incitement (or solicitation as it is

¹²⁸³The exception is *S & W Seafoods v Jacor Broadcasting* 390 S.E. 2d 228 (Ga. 1990).

¹²⁸⁴For a statement of this and the other principles governing incitement / solicitation in United States law see La Fave and Scott, *supra* n. 149 at 486-95. Where the incitee *does* act upon the incitement, then the inciter will be liable with the incitee as a co-perpetrator. The authors note that the inciter must have some degree of intent that the incitee should act upon the incitement. Where the inciter tries but fails to communicate the incitement to the incitee, the inciter may be charged with attempted incitement.

¹²⁸⁵As Greenawalt notes (*supra* n. 102 at 120) the South African Appellate Division gave a comprehensive definition of incitement in *S v Nkosiya* 1966 (4) SA 655 (A) at 658-9) where Holmes JA held that an inciter

...is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime...I reiterate that the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes. Hence, depending on the circumstances, there may be an incitement irrespective of the responsiveness, real or feigned, or the unresponsiveness of the person sought to be influenced.

In general, the rules regarding incitement in South Africa are very similar to those in America. In South Africa incitement is an offence under the common law (for a discussion of the elements of the offence see Burchell and Hunt, *supra* n. 517 at 472-84, Snyman, *supra* n. 932 at 297-300, Burchell, Jonathan and Milton, John *Principles of Criminal Law* (Cape Town, Juta, 1991) 383-90) and under statute (s 18(2)(b) of the Riotous Assemblies Act 17 of 1956). As was held by the Appellate Division in *R v Nlhovo* (1921 AD 485) it is irrelevant whether the incitee actually commits the offence - the crime is committed when the inciter unlawfully communicates to another with the intention of influencing him to commit a crime (see also Burchell and Hunt, *supra* n. 517 at 473). If the incitee *does* in fact act upon the inciter's suggestions, then the latter should be charged as a co-perpetrator or accomplice (Burchell and Hunt, *supra* n. 517 at 473, Burchell, Jonathan and Milton, John *Principles of Criminal Law* (Cape Town, Juta, 1991) 383, Snyman, *supra* n. 932 at 298). See for example *R v Barry* 1932 TPD 312 where an accused who had incited two others to steal car parts was convicted along with them of theft of two vehicles on the grounds that he must have foreseen that they would have to steal the cars in order to remove the parts. Furthermore, the incitement does not have to be directed towards a particular person or persons - an incitement urging the public in general to unlawful action would also be a crime (Snyman, *supra* n. 932 at 298, citing Williams, Glanville *Textbook of Criminal Law* (London, Stevens, 1978) 440). If the inciter tries but fails to reach the mind of the potential incitee, the former can be convicted of attempted incitement (*S v Nkosiya* 1966 (4) SA 655 (A) at 659. See also Burchell and Hunt, *supra* n. 517 at 473, Snyman, *supra* n. 932 at 298, Burchell, Jonathan and Milton, John *Principles of Criminal Law* (Cape Town, Juta, 1991) 389, Williams, Glanville *Textbook of Criminal Law* (London, Stevens, 1978) 388). The normal rules regarding *mens rea* apply in cases of incitement. Thus *dolus eventualis* suffices to create liability, and an accused will be guilty if he must have foreseen the possibility that his communication would influence the incitee's mind towards crime and yet recklessly proceeded to make the communication (Burchell and Hunt, *supra* n. 517 at 475). However one should note that the inciter can be convicted of incitement only to those

sometimes referred to) occurs *whether or not* B actually acts upon A's urgings - the *actus reus* of A in such situations is his "urging of B to unlawful conduct", not the "urging of B to unlawful conduct which actually occurs". Thus, although the review of cases shows that where plaintiffs have sued a publisher on the basis of incitement they have done so under a personal injury suit in which they have sought to hold the defendant publisher liable *for the injuries inflicted* as a result of mimicry of the materials that were published, my argument is that recognition ought to be accorded a different cause of action (as indeed it was in one case) in which damages are recovered for harm taking the form of *the act of incitement*, which action would be available *whether or not* the incitement has been acted upon. Of course, in situations where the incitement had been acted upon, the plaintiff would be able to bring a personal injury suit *in addition* to the action for the "tort of incitement" that I am arguing for; but the prime usefulness of the latter action would be in those cases where the incitement had not yet been acted upon. Thus as Soble states¹²⁸⁶

..if encouraging others to commit crimes is itself a crime even when the encouragement fails, then there is some reason to say that the endorsement of acts harmful to women is criminal, even if those actions are known to be unsuccessful in causing the actions endorsed or cannot be proved to be successful. This argument against pornography..might be subsumed under the law of attempts, encouragement and conspiracy. This is the hidden beauty of the endorsement argument, apparently overlooked by its sponsors: it does not necessarily depend on contentious claims about the causal effects of pornography.

Thus one can circumvent the vexed question of whether and to what extent obscene materials cause unlawful acts. If materials are held to be capable of inciting people to harm, they could be made actionable for that reason alone. Also irrelevant is the size of the class *to* whom the incitement is addressed¹²⁸⁷ or *against* whom it is directed. As has already been argued in relation to hate speech (at 5.6.2 above), there is no reason why the availability of a civil remedy should be limited simply because of the size of the group against which harm is directed. Thus suing under the rubric of incitement would provide a useful vehicle for the suppression of speech which incites unlawful action, no matter how broadly defined the "target" group (that is, the group

crimes towards which he must have foreseen his communication influencing the incitee (Burchell and Hunt, *supra* n. 517 at 476).

¹²⁸⁶Soble, Alan "Defamation and the Endorsement of Degradation" in Baird, Robert M. and Rosenbaum, Stuart E. (eds) *Pornography - Private Right or Public Menace ?* (Buffalo, Prometheus Books, 1991) 96 at 102.

¹²⁸⁷La Fave and Scott, *supra* n. 149 at 491.

against whom the unlawful action is incited) may be. A member of a group alleging infringement of dignity arising out of a publication would have a claim simply by virtue of membership of the group. The procedural implications of such an action are discussed at 7.2 below.

6.3.1 Incitement as an impairment of dignity.

As was shown in chapters 4 and 5 above, the *actio injuriarum* provides a conceptual foundation upon which one can base a remedy for insult. Could the principles of this action accommodate a civil action for incitement of the type argued for above? In other words, does it constitute an impairment of a person's dignity to incite harm against him or her?

Although, as was stated at 4.5.2.1, there is case authority which supports the argument that an interference with *corpus* in the form of a physical assault constitutes an impairment of *dignitas*, the question of whether or not incitement of harm against another is civilly actionable has never been addressed. However, the question of liability for assault in the form of a *threat* did come before the courts in the old case of *R v Umfaan*,¹²⁸⁸ and it is useful to examine this case dealing with a threat of harm before addressing the question of incitement to harm. In *Umfaan* the accused had uttered the threat "I will shoot you." to the complainant. Innes CJ held that the question of whether a purely verbal threat, unaccompanied by any physical action¹²⁸⁹ amounted to an *injuria*

...is not free from doubt. It appears to me to be very much on the border-line, because a verbal threat may possibly put a man in as much bodily fear as a threatening gesture.

In the event, however, the court held that such a threat did not constitute an *injuria*. This it did on the basis that no Roman-Dutch authority mentioned liability in such circumstances, and because a threat to kill did not, in Innes CJ's opinion, necessarily involve "degradation, insult or *contumelia*". This issue was examined in *Brenner v Botha*,¹²⁹⁰ where the court distinguished between different types of threat, holding that while a threat taking the form of a physical action (such as raising one's hand) constituted an *injuria*, the same was not true of threats that were merely verbal. In

¹²⁸⁸1908 TS 62 at 67-8.

¹²⁸⁹There was no doubt that a threat accompanied by an action such as the raising of a hand would constitute an *injuria*, see D 47.10.15.1.

¹²⁹⁰1956 (3) SA 257 (T) at 260E.

*Minister of Police v Mbilini*¹²⁹¹ the Appellate Division accepted the principle in *R v Umfaan*, but noted that it could apply only if the threat was not couched in insulting language¹²⁹² - in other words that threats that were insulting would, like other insulting language, attract liability.

A point that must firstly be noted is that *Umfaan* is strictly *obiter* in so far as impairment of *dignitas* is concerned - the crime charged was that of using threatening language calculated to provoke a breach of the peace, not *crimen injuria* in the form of impairment of *dignitas*. Secondly, given that assault in the form of threats that go beyond mere words do clearly constitute an impairment of dignity in that they disturb the threatened party's "tranquillity of mind", affront his sense of self-worth and make him less likely to exercise his autonomy, is there any reason to deny that a threat that takes a purely verbal form but which has the same effect on the offended party also amounts to an *injuria*? I would argue that they do, and ought to be actionable as such. Support for this approach can indeed be found in *Ramsay v Minister van Polisie*¹²⁹³ where, despite the precedent of *R v Umfaan*, the Appellate Division included a threat against *corpus* (in this case a threat to place an attorney under arrest) among the list of actions for which it awarded damages as compensation for impairment of *dignitas*. It is also interesting to note that in *United States v Lee*¹²⁹⁴ (discussed at 2.2.7.1 above) it was held that where cross-burning constituted an act of intimidation (that is, a threat) it also amounted to an invasion of privacy. Since, as was shown at 3.5.2 above, American legal terminology equates privacy with autonomy in the sense of dignity, this too adds strength to the argument that a threat constitutes an impairment of dignity.

What, however, of the different situation where the defendant does not threaten the plaintiff directly, but rather incites another to harm the plaintiff? If one accepts that a purely verbal threat directed by X against Y constitutes an impairment of Y's *dignitas*, is there any reason not to go one step further and to hold that if X incites Z to cause harm to Y, then X has impaired Y's *dignitas* in this instance as well? Is inciting others to unlawful conduct towards Y any less of an impairment of Y's personality rights than is threatening Y? It is submitted that both types of conduct evince disregard for Y's rights, and that as a general principle it ought to be accepted that threatening another with harm *or* inciting third parties to harm another, amount to impairments of *dignitas*. I would therefore conclude by saying that although the issue

¹²⁹¹1983 (3) SA 705 (A).

¹²⁹²At 716 A.

¹²⁹³1981 (4) SA 802 (A).

¹²⁹⁴935 F.2d 952 (8th Cir. 1991).

is obviously moot, a civil action for incitement is compatible with the principles underlying the *actio injuriarum*, and that incitement of harm against a person should be seen as an infringement of their right to dignity.

6.3.2 The requirements of liability for incitement

How does one determine liability in cases where the plaintiff alleges that published material has caused harm in the form of incitement? Here it is important to distinguish between the personal injury action and the action based purely on incitement, and also between the issues of causation and foreseeability. As Wesson states, in cases in which a third party consumer of material published by the defendant has injured the plaintiff, causation of injury will be relatively easy to prove by showing that the person¹²⁹⁵ who harmed the plaintiff was exposed to the material produced by the defendant and the harmful acts mimic those depicted in the material.¹²⁹⁶ This involves the application of the "but for" test. Thus where A depicts a certain harm and B copies it, harming C, and there is strong circumstantial evidence that but for having seen the depiction, B would not have committed that precise act, causation will be established.¹²⁹⁷ Feinberg argues that in these circumstances, even though C was harmed because of B's act, this fact should not be considered to have broken the chain of causation - in other words, A's influence over B makes A in some degree responsible for the harm suffered by C. Similarly, Wesson argues that tort law imposes liability upon a defendant where that defendant created a foreseeable risk of harm, even though the harm was caused to the plaintiff through the intervening actions of a third party.¹²⁹⁸ Thus a third party's act will not break the chain of causation where the defendant foresaw or ought reasonably to have foreseen that act.¹²⁹⁹ Furthermore, it is also very important to note that in these circumstances the fact that B was influenced by A does not relieve B of responsibility for his act either. In other words, Feinberg's argument is that *both A and B* bear some responsibility for the harm to C. In cases where the plaintiff's action is for incitement *per se*, causation is much simpler, and will be satisfied by showing that the defendant's actions led to the material reaching the mind of a third party.

¹²⁹⁵Who may be the plaintiff him or her self, as for example in cases where the plaintiff claims that material published by the defendant incited him (the plaintiff) to attempt suicide.

¹²⁹⁶Wesson, *supra* n. 1231 at 866-9.

¹²⁹⁷Imitative harms are addressed at length by Feinberg, Joel *Harm to Others* New York, Oxford University Press, 1984) 232- 45.

¹²⁹⁸Prosser & Keeton, *supra* n. 77 at 301-306.

¹²⁹⁹*Idem*.

More difficult to satisfy however will be the requirement of foreseeability.¹³⁰⁰ In cases where the plaintiff is seeking to recover damages for harm caused to him or her as a result of incitement by the defendant, it will be necessary to show that the defendant ought reasonably to have foreseen that the material would incite the third party or the victim him or herself, and that if such incitement did occur, that it would cause harm in the form of injury. In cases where physical injury has not occurred, one will have to prove only the first of these requirements. Is it reasonably foreseeable that material produced by a defendant will have such an effect upon the mind of those exposed to it? In seeking to answer this question, Whittaker argues that it is generally foreseeable that human behaviour will be influenced by the media, and cites in support those cases in which criminals have copied specific acts of violence they have seen depicted or where women have reported that men have acted out scenarios found in sexually explicit material.¹³⁰¹ However, the fact that one can point to specific cases as evidence of the fact that some members of an audience will emulate what they have seen is not a particularly significant finding given (i) that a majority of those exposed to violent material do *not* perform harmful acts as a result, and (ii) that there are also cases in which perfectly innocuous material has triggered criminal acts. As Feinberg points out, even factual newspaper reports and mainstream novels can trigger "copy-cat" crimes, hence mere depiction of an activity cannot, without more, be held to constitute incitement.¹³⁰² In other words, since *any* book, picture or film is evidently capable of inspiring consumers to harmful acts, it could be said that harm is foreseeable in relation to *all* external stimuli to which a consumer is exposed, a conclusion which would make every depiction actionable.

Clearly something more must be required for the satisfaction of the foreseeability element of a tort action, and here I would argue that the empirical findings regarding the effects on aggression levels of subjects exposed to various types of material (discussed at 6.2 above) are relevant. As we have seen, research findings show that material combining sex and violence produces the most aggression, followed by that containing violence only and then, last of all, material containing sex only, which produces levels of aggression no greater than does material containing neither sex nor violence. From this evidence one could reasonably draw the conclusion that harm is

¹³⁰⁰The term "foreseeability" is used here because the discussion concerns tort actions in which it was sought to hold producers liable on the basis of negligence for the harms caused by those exposed to the materials published by such producers. It will however be seen (in 6.5.4 below) that I ultimately reach the conclusion that a degree of intention, rather than negligence, is required to hold producers liable, whereafter I refer to "foresight" (that is, subjective appreciation of risk) rather than "foreseeability" (that is risk which ought objectively to have been foreseen).

¹³⁰¹Whittaker, Elise "Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis" 27 (1993) *Georgia Law Review* 849 at 880-1.

¹³⁰²Feinberg, *supra* n. 68 at 149-50.

most foreseeable where consumers are exposed to material combining sex and violence, less foreseeable in respect of material depicting violence only, and least foreseeable in relation to material depicting sex only or neither sex nor violence. The important question is where along this continuum of foreseeability is the point at which, for purposes of tort law, it should be said that harm is sufficiently foreseeable to affix producers with liability? Clearly, it must be at some point above the category of material depicting sex only or neither sex nor violence - if it were not then the position would effectively be that *all* depictions would lead to liability. So far as the next two categories are concerned, Pollard states that the fact that materials depicting sex alone cause levels of aggression no greater than materials depicting neither sex nor violence, whereas higher levels of aggression are produced by materials depicting violence alone or sex in combination with violence, indicates that it is violence rather than the sexual element that should be actionable.¹³⁰³ But does the common factor of violence mean that harm should be foreseeable in respect of *all* material depicting violence? Pollard herself concedes that depictions of violence are so pervasive that it would be impractical to regulate these,¹³⁰⁴ and that because it is materials which combine sex and violence that clearly produce the *greatest* levels of aggression, it is these that should be targeted.¹³⁰⁵ However, as was noted at 6.2 above, I will argue that there is a principled reason why materials that combine violence with sex warrant regulation in a way that materials depicting violence only do not, and that is the qualitative difference between sexually oriented and other types of material. It is to this issue that I now turn.

6.3.3 The non-cognitive nature of sexually oriented material

Thus far in this thesis I have considered and rejected two approaches which seek to justify regulation of sexually explicit material - the morals-based approach adopted in *Miller v California*, and the equality-based approach addressed by the court in *American Booksellers Association v Hudnut*. Here however it is necessary to consider a different argument which some First Amendment theorists have used in seeking to justify regulation of such material and which, although no more compatible with the First Amendment than the two approaches already rejected, does nevertheless point to an important characteristic of sexually oriented¹³⁰⁶ material which has important implications for the issue of incitement.

¹³⁰³Pollard, *supra* n. 189 at 128-9.

¹³⁰⁴*Ibid.*, 155 and 157.

¹³⁰⁵*Ibid.*, 129.

¹³⁰⁶At 6.2 above I was at pains to emphasise that the important category to bear in mind is material with a sexual element, rather than the obviously far narrower category of *sexually explicit* material. Although this section begins with a discussion of sexually explicit material, it will be seen that the

The chief exponent of this approach is Schauer who, echoing to some extent the work of Finnis,¹³⁰⁷ argues that some sexually explicit material (what he refers to as "hard core pornography") has the sole purpose of arousing the physical senses rather than of communicating an idea, and that this "non-cognitive" characteristic means that such material is not properly termed "speech" or "expression", at least for legal purposes, and is therefore not covered by the First Amendment.¹³⁰⁸ Even though it be true that all art appeals to both the physical and mental senses, Schauer argues¹³⁰⁹ that the former is so predominant in the case of pornography that such material

...has none of the characteristics of the intellectual process constituting the core of the constitutional definition of speech.

He gives the example of¹³¹⁰

...what is commonly referred to as 'hard core pornography'. Imagine a motion picture of ten minutes' duration whose entire content consists of a close-up color depiction of the sexual organs of a male and a female who are engaged in sexual intercourse. The film contains no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants...I wish to argue that any definition of 'speech' (or any definition of the coverage of the concept of freedom of speech) that included this film in this setting is being bizarrely literal or formalistic...Here the vendor is selling a product for the purpose of inducing immediate sexual stimulation. There are virtually no differences in intent and effect from the sale of a plastic or vibrating sex aid, the sale of a body through prostitution, or the sex act itself.

conclusions it draws about sexually explicit material apply to *sexually oriented* material (that is, material that produces sexual arousal) in general.

¹³⁰⁷Finnis, John "'Reason and Passion': The Constitutional Dialectic of Free Speech and Obscenity" 116 (1967) *University of Pennsylvania Law Review* 222. Note however that whereas Finnis distinguished between works appealing to the "intellect" and those appealing to "passion" (wherein he included works that appealed to the emotions), Schauer's categorisation is more sophisticated in that, as will be shown in the text *infra*, his distinction is between material appealing to the intellect and the emotions on the one hand, and those which are physically arousing on the other.

¹³⁰⁸Schauer, Frederick "Speech and 'Speech' - Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language" 67 (1979) *Georgetown Law Journal* 899. See the critique of this approach in Gey, *supra* n. 477, where the author rejects the cognitive / non-cognitive distinction on the basis that even stimulation of the physical senses by sexually explicit material requires translation of the stimuli by intellectual processes, and also argues that the reason why reading or viewing sexually explicit material falls within the First Amendment (in a way that engaging in sexual activity does not) is that freedom of expression protects reading about an act as opposed to actually performing an act.

¹³⁰⁹Schauer, *supra* n. 1308 at 923.

¹³¹⁰Schauer, *supra* n. 15 at 181-2.

At its most extreme, hard core pornography is a sex aid, no more and no less, and the fact that there is no physical contact is only fortuitous. Thus a refusal to treat hard core pornography as speech in the technical sense at issue is grounded in the belief that the prototypical pornographic film shares more of the characteristics of sexual activity than of communication. The pornographic item is a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification in that way....pornography is more accurately treated as a physical rather than a mental experience. This is of course an oversimplification. Physical sensations, including sexual arousal, have mental elements...But the presence of a mental element in what is primarily a physical act does not create a communicative act. That I adore escargots, while others find them disgusting, is not caused by any physiological differences in taste buds. It is primarily a mental distinction. But that does not make the sale or ingestion of escargots an activity covered by the principles of freedom of speech. It has been argued, however, that serious literature as well as hard core pornography may evoke this same type of physical or quasi-physical arousal...I do not dispute this, but it misconceives the issue. It is not the presence of a physical effect that triggers the exclusion from coverage of that which would otherwise be covered by the principle of free speech. Rather, it is that some pornographic items contain *none* of the elements that would cause them to be covered in the first instance. The basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, *but that it has nothing else*...It is possible to argue that the purpose of pornography is to present the activities depicted as desirable, or to present a vision of sexual openness. But if that is the purpose, we are no longer dealing with hard core pornography. What defines pornography is its lack of intellectual appeal...Whatever may be the problems of line-drawing...it is apparent that at one extreme there exists material with neither propositional, emotive, nor artistic content.

(Emphasis in the original).

This analysis is supported by Sunstein¹³¹¹ and Easton,¹³¹² and also by MacKinnon, who states¹³¹³

¹³¹¹Sunstein, *supra* n. 270 at 606 and 617.

¹³¹²Easton, *supra* n. 472 at 91-2.

¹³¹³MacKinnon, *supra* n. 467 at 803.

On a deeper level, pornography provides direct sexual stimulation, the experience of which is one of sex, not just the idea of sex.

The first issue to deal with is the validity of Schauer's thesis for general First Amendment theory. As the quotation reproduced above shows, the essence of his theory is that there is a sub-set of the general class of sexually explicit materials which, because it is unembellished with any artistic pretensions, should be classified as an act of sexual stimulation rather than as expression. There are two problems with this approach. Firstly, it would, from a purely practical point of view, be extremely difficult to distinguish between those sexually explicit materials which do contain some cognitive element and those that do not. Even Schauer's example of the depiction of the sexual organs of a couple having intercourse could arguably be construed as bearing a message, such as the beauty of the physical form. Secondly, there is perhaps a more fundamental reason why Schauer's approach is unsatisfactory, and that is that it is founded upon a restrictive approach to freedom of expression, which is essentially that the value served by the freedom is protection of the communication of ideas from governmental tyranny.¹³¹⁴ Schauer explicitly rejects the notion that freedom of expression exists in order to serve a more general interest in self-fulfilment,¹³¹⁵ and concedes that because of this, art which is not "communicative" is not covered by the First Amendment.¹³¹⁶ Conversely, he also concedes that a broader justification of freedom of expression (one which included within its ambit autonomy and self-fulfilment, as discussed at 3.5.3 above) *would* cover sexually explicit material of the type he refers to.¹³¹⁷ Finally on this issue, Schauer's approach is no more harms-based than that in *Miller* - his technique is simply one of categorising sexually explicit material out of the zone of First Amendment protection but, since this argument depends upon the theory that the First Amendment serves only the value of truth-seeking, it falls down when confronted with the counter-argument that the First Amendment also serves the value of self-fulfilment. Of course, racial epithets could also conceivably be justified on the basis of self-fulfilment of the speaker, even though not justifiable on the basis of truth-seeking. Yet the difference between insulting epithets and Schauer's "hard core" pornography is that the former cause harm, whereas Schauer is unable to point to a countervailing interest which would answer the question of *why*, even if one accepts his argument that such materials do not assist in the search for truth, they should not

¹³¹⁴Schauer, *supra* n. 15 at 86 and 94-5

¹³¹⁵*Ibid.*, 56-8

¹³¹⁶*Ibid.*, 110-111.

¹³¹⁷*Ibid.*, 184. This point is also made by Feinberg (*supra* n. 1297 at 156-7, 169-70), who notes that even if sexually explicit materials were not classified as "expression", they would still arguably be protected by the right to autonomy or, as it is termed in American law, privacy.

nevertheless be granted protection on the basis that they serve the self-fulfilment interests of producer, actors or viewers.

Although Schauer's theory of the non-cognitive nature of sexually explicit materials does not support a general analysis of freedom of expression, it is nevertheless important because of the attention it focuses on the central feature of such expression, which is its capacity to cause physical arousal - that is, to act as a sexual stimulus. It is in the light of this important fact that one must analyse academic criticisms of the cognitive / non-cognitive distinction. The first counter-argument to Schauer's approach, advanced by Cole¹³¹⁸ and Pollard,¹³¹⁹ is that the First Amendment protects both "intellectual" and "emotive", "rational" and "irrational" expression, in support of which they cite *Cohen v California*¹³²⁰ where it was held that

..words are often chosen as much for their emotive as their cognitive force...which, practically speaking, may often be the more important element of the overall message sought to be communicated..

However, this is to misconceive Schauer's argument, and to confuse intellectual, emotional and physical responses. As is clear from the final sentence of the quotation from Schauer reproduced above, material with an "emotive" content would be accorded protection under his theory of the First Amendment. His distinction was between expression that appeals to the intellect or to the emotions on the one hand and that which is physically arousing on the other. Thus the distinction is not between "rational and irrational" communications, but rather between intellectual and emotional content on the one hand (emotional communications incorporating what Cole and Pollard referred to as the "irrational"), and purely physical stimuli on the other.

The second, and more substantial argument made against Schauer by Gey¹³²¹ and by Cole¹³²² is that¹³²³

..even if sex could be treated as purely physical, Schauer's argument that pornography is no more than a sex aid implies that pornographic images somehow work directly on the sexual organs without any cognitive

¹³¹⁸Cole, supra n. 181 at 127.

¹³¹⁹Pollard, supra n. 189 at 135-6.

¹³²⁰403 U.S. 15 (1971) at 25-26

¹³²¹Gey, supra n. 477 1587-96.

¹³²²Cole, supra n. 181.

¹³²³Ibid., 124-7

processing. If this were the case, any depiction of nudity or sexual organs would be pornographic; there would be no difference between an anatomy textbook and *Penthouse*. In fact, pornography "works" only because (and to the extent that) it plays upon fantasies and narratives which the reader, viewer, or listener finds arousing. Sexual expression, like human sexuality itself, cannot be "purely physical". Rather it is deeply and inextricably interwoven with our identities, our emotions, our upbringing, our relationships to other human beings, and the ever-changing narratives and images that our community finds stimulating.

Similarly, Loewy¹³²⁴ argues that many other types of expression elicit physical reactions (such as laughter or tears), and these cannot be considered not to be expression merely because of that. In the same vein Chevigny¹³²⁵ argues that the cognitive / non-cognitive distinction is psychologically flawed because even the sexually arousing imagery in pornography is filtered through the imagination before having its stimulatory effect.¹³²⁶ It must be conceded that Schauer did to some extent leave himself open to this criticism by trying to distinguish between that sexually explicit material which has the effect of physical arousal *as well as* other intellectual or emotional effects, on the one hand, and material which produces *only* physical arousal on the other (what he referred to as "hard core pornography"). As I state above, such a distinction may not in fact be possible, and so Schauer's critics are correct in saying that there is no such thing as material which is "purely physical" in its effect, and that the viewer of such material will always interpret it against a backdrop of narrative and fantasy. But what Schauer's critics have not been able to deny is that common to all sexually explicit depictions (even those in an anatomy text book or those which are combined with intellectual or artistic features)¹³²⁷ is the capacity to cause physical arousal, a phenomenon which is not shared by other types of material, such as material which depicts violence unaccompanied by sex.¹³²⁸ Furthermore, as Schauer stated in subsequent writing,¹³²⁹ this characteristic is a

¹³²⁴Loewy, Arnold "Obscenity, Pornography, and First Amendment Theory" 2 (1993) *William & Mary Bill of Rights Journal* 471 at 475.

¹³²⁵Chevigny, Paul "Pornography and Cognition: A Reply to Cass Sunstein" 1989 *Duke Law Journal* 420.

¹³²⁶*Ibid.*, 429-32.

¹³²⁷Furthermore, this category would not be confined only to graphic depictions - as is clear from Schauer's definition of pornography (see Schauer, *supra* n. 1234 at 740) there is no reason why, if written materials cause the same harm as do graphic ones, that they too should not be subject to regulation. Furthermore, the empirical studies show that written materials combining sex and violence produce an aggressive response in consumers just as do graphic materials - see Donnerstein, Linz and Penrod, *supra* n. 1232 at 101-103.

¹³²⁸Pathological cases where individuals experience abnormal arousal from non sexually explicit stimuli aside.

¹³²⁹Schauer, *supra* n. 1234 at 741-2, and 765-6.

feature *not only* of material which is *sexually explicit*, but any material which is sexually arousing. This also accords with the empirical research discussed at 6.2 above which, whatever ambiguities it might suffer from, was unambiguous in its conclusion that peculiar to material containing sexual themes is the capacity to arouse.

This, I submit, is the crucial factor which distinguishes material combining sex and violence from other types of publication. The fact that material containing sex stimulates the powerful urge of sexual desire gives no cause for concern in and of itself,¹³³⁰ as is shown by the fact that material depicting sex on its own has no greater effect on levels of aggression than does material containing neither sex nor violence. However, the fact that when combined with violent material, sex related imagery (whether sexually explicit or not) produces levels of aggression in excess of those produced by violent material alone, shows why material that combines sex with violence needs to be singled out, and why it merits regulation in a way that materials such as war films, detective shows *et cetera*, which depict violence alone, do not: The response produced by sexual material is peculiar to that type of material simply because the very concept of "arousal" implies a consequent wish for gratification, a wish that is not (in normal individuals at least) the consequence of viewing imagery that contains violence alone. It is the fact that material combining sex and violence *links* the urge to gratification with violence, and thus, as Donnerstein *et al* state, to "cognitively associate sexuality with violence", that defines such material as harmful in the legal sense. In short, it is the element of arousal which enables one to equate depiction of sexual activities with exhortation to engage in them, and which enables one to say that such materials incite those exposed to them.¹³³¹ This qualitative difference in responses explains why the empirical data indicates greater levels in aggressiveness in subjects exposed to material combining sex and violence as compared to those exposed to violence alone, and also answers the question regarding the appropriate level of foreseeability posed in section 6.3.2 above: Under the law of torts, whether or not a duty of care is owed is a question of policy, determined by weighing the various interests involved.¹³³² In *McCollum v CBS, Inc.*, a case in which

¹³³⁰Although it is, incidentally, the arousing effect of sexually explicit materials that justifies restrictions on their display. As was discussed at 2.4 above, the right to privacy implies a right to regulate the circumstances in which one wishes sexual arousal to take place, whereas involuntary exposure to sexually explicit materials arouse the viewer whether he or she wishes this or not.

¹³³¹The importance of the distinction between mere depiction and exhortation is discussed by Crump, David "Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the *Brandenburg* Test" 29 (1994) *Georgia Law Review* 1 at 135 n. 216 and 73, where he emphasises that while liability should not be imposed in the former instance it should in the latter.

¹³³²Thus as Prosser and Keeton state, *supra* n. 77 at 358, the existence of a duty of care "is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection". Similarly, in *Kelly v Gwinnell* 476 A.2d 1219 (N.J. 1984) at 1222, it was

a plaintiff sued on the basis of harm arising from incitement, the court held that because of the importance of freedom of expression, public policy would require a very high degree of foreseeability of harm before liability would be imposed.¹³³³ I would argue that the arousing nature of materials coupling sex and violence makes the likelihood that they will incite harm far greater than is the case with materials depicting violence alone. Furthermore, as Pollard points out, the existence of empirical evidence as to the effects of material combining sex and violence would make it very difficult for defendants to argue that they did not foresee the risk that such material might incite consumers.¹³³⁴ For this reason, I would conclude not only that harm is an objectively reasonably foreseeable consequence of exposure to such materials in a way that exposure to violent materials alone is not, but also that the likelihood of harm is such that it is possible to say that distributors of such material have *subjective* foresight of the risk of harm - in other words, fault amounting to intent and not mere negligence. This issue is further discussed at 6.5.4 below.

Defining "pornography" as material which combines sex with violence has received academic support of late. Thus Wesson argues¹³³⁵ that the important characteristic of what she calls the "new hard core" of pornography is the fact that it equates

...sexual pleasure with the infliction of violence or pain and impl[ies] approval of conduct that generates the actor's sexual arousal or satisfaction through this infliction..

This leads her to define pornography as follows:¹³³⁶

I define "pornography" as material that links the viewer's or reader's sexual gratification with the infliction of violence. Pornography is a depiction, in any medium, of violence directed against, or pain inflicted upon, an unconsenting person or child, for the purpose of anyone's real or apparent sexual arousal or gratification, in a context suggesting endorsement or

held that the question a court must answer is whether, based on an "analysis of public policy...the actor owed the injured party a duty of reasonable care". In determining this question the courts will, as was held in *Rowland v Christian* 443 P2d 561 (Cal. 1968) at 564 take into account factors such as "the moral blame attaching to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach..."

¹³³³*McCullum v CBS Inc.* 202 Cal. App. 3d. 989, 249 Cal.Rptr. 187 (1988) at 195-6.

¹³³⁴Pollard, *supra* n. 189 at 140 n. 71.

¹³³⁵Wesson, *supra* n. 1231 at 915.

¹³³⁶*Idem* and Wesson, Marianne "Girls Should Bring Lawsuits Everywhere...Nothing Will Be Corrupted: Pornography as Speech and Product" 60 (1993) *University of Chicago Law Review* 845 at 851-2.

approval of such behaviour, and that is likely to promote or encourage similar behaviour in those exposed to the depiction.

Similar to Wesson's approach is that of Sunstein, who defines pornography as material which is sexually explicit, which depicts women as enjoying or deserving physical abuse, and which has the purpose and effect of producing sexual arousal.¹³³⁷ The harms-based approaches of both Wesson and Sunstein are clearly very different from both the morals-based approach in *Miller* (although of course everything that Wesson identifies as pornography would probably fall into the *Miller* definition simply because the latter is so wide),¹³³⁸ and that found in the Minneapolis ordinance. As Sunstein states¹³³⁹

Only pornography - not sexist material in general or material that reinforces notions of female subordination - is regulated. Because of its focus on harm, antipornography legislation would not pose the dangers associated with viewpoint-based restrictions.

In section 6.4 I give detailed consideration to how one should define "material that combines sex with violence". For the moment it is important to realise that the non-cognitive nature of such material provides a satisfactory rationale for regulating it.

6.4 Incitement and the definition of violence

As has already been noted in this thesis (see 1.4.4 above), prohibitions of expression that amount to incitement to unlawful acts (as distinct from "unlawful attitudes") raises no problem from a Millian point of view. What must now be determined is how to identify material which constitutes incitement. In the preceding section I advanced the argument that liability for incitement should arise where material links the urge to sexual gratification with violence. However, what I have not yet addressed is precisely what type of material would be covered by such a definition. Failure to devise a clear definition would lead to such a restriction on expression being invalidated on grounds of vagueness, as is well illustrated by the case of *Video Software Dealers Association v Webster*¹³⁴⁰ in which the court struck down a

¹³³⁷Sunstein, *supra* n. 270 at 592. This definition is however deficient, in that it assumes that only sexually explicit materials produce arousal, whereas the empirical research indicates that any sexually oriented material, whether explicit or not, has harmful effects when combined with depictions of violence.

¹³³⁸Wesson, *supra* n. 1231 at 915 n. 9 and 919.

¹³³⁹Sunstein, *supra* n. 270 at 612.

¹³⁴⁰814 F.2d 1017 (5th Cir. 1987) at 1025-30, (*cert. denied*, 485 U.S. 459 (1988)).

Missouri statute¹³⁴¹ that would have penalised the distribution of violent videos to minors. The statute contained a definition that used a verbal formula covering violence which essentially copied that used in relation to obscenity by the Supreme Court in *Miller*. However, the court in *Webster* declared the statute invalid on the ground that it lacked a sufficiently precise definition of "violence".¹³⁴² The following sections address problems which might arise in identifying materials which are held to incite harm.

6.4.1 The role of context

What characteristics must material display for it to be said that it is of a type combining sex with violence? As a preliminary and obvious point, one may say that by material "combining sex and violence" is not meant material that has sexually explicit and violent elements which, although both found in the work, are represented separately in it - for example a film in which a bank robbery and a scene of sexual intercourse appear in different scenes. Rather the term refers to material which *sexualizes violence* or, to use the definition by Donnerstein *et al*,¹³⁴³ to material which "depicts sexual coercion in a sexually explicit context". On the other hand, as has frequently been emphasised in this chapter, the class of material combining sex and violence is wider than the class of materials combining sexual *explicitness* with violence. This is well illustrated by the definition proposed by Schauer who states¹³⁴⁴

Thus sexual violence is here defined to include rape, attempted rape, sexual acts that are not rape but involve actual or threatened physical coercion, and actual or attempted acts of *nonsexual physical violence inspired by a search for sexual fulfilment*.

(Emphasis added).

Similarly, Donnerstein *et al* emphasise that films that depict violence in a sexual but not sexually explicit context (the example they frequently cite "slasher" films which frequently have as their theme the pursuit and murder of a sexually attractive woman) produce the same aggressive effect as do films which depict violence in conjunction with sexual explicitness (for example, a sexually explicit rape).¹³⁴⁵ Clearly then, the

¹³⁴¹Missouri Revised Statutes 573.090 (Supp. 1992).

¹³⁴²This case is discussed in Hershinger, Jessalyn "State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis" 46 (1993) *Vanderbilt Law Review* 473 at 475-8 and 497-8.

¹³⁴³Donnerstein, Linz and Penrod, *supra* n. 1232 at 4.

¹³⁴⁴Schauer, *supra* n. 1234 at 742.

¹³⁴⁵Donnerstein, Linz and Penrod, *supra* n. 1232 at 4, 113, 125-35 and 175.

context in which violence is shown will be crucial in identifying which materials are harmful because they "sexualise violence", and this will in some cases make it more difficult to make a decision in respect of specific material than would be the case if the presence of sexual *explicitness* and violence was sufficient to identify objectionable material. Yet this must be attempted, simply because the research is so certain in indicating that, irrespective of explicitness, material combining sex and violence causes aggression in those exposed to it.

But is it satisfactory to condemn material simply on the basis of what it depicts? Could it not be argued that it is crucial in cases of incitement to discover what *message*, if any, is conveyed by the depiction? As Soble argues¹³⁴⁶

The issue, then, is whether depictions...can endorse what they depict, and if so, what conditions must be satisfied for a depiction to be an endorsement...

Taking a specific example, one might think of a film (such as *The Accused*¹³⁴⁷) containing a depiction of a rape which is sympathetic to the victim. Would such a depiction fall into the category of material combining sex and violence, or would it be "saved" by the message it contains disapproving of rape? Here it is useful to refer back to the definitions of pornography proposed by Wesson and Sunstein (discussed at 6.3.3 above), both of which stipulate that material would be proscribable only if it depicted sexual violence "in a context suggesting endorsement or approval" of the violence (a requirement which Wesson includes precisely to exempt from liability works containing sympathetic portrayals of victims¹³⁴⁸), or which depicts women as "enjoying or deserving physical abuse" (Sunstein). Similarly, Donnerstein *et al* cite research which indicates that while material depicting sex and violence which concludes with a "positive" outcome for the victim (suggesting that women want to be raped and ultimately find the act pleasurable) causes aggression in those exposed to it, aggression does not increase where the outcome is shown as being "negative".¹³⁴⁹ For this reason they emphasise that the most harmful material is that which depicts sexual violence "where the victim(s) are shown enjoying or somehow benefiting from this treatment"¹³⁵⁰ or "that portrays the myth that women enjoy or in

¹³⁴⁶Soble, *supra* n. 1286 at 103.

¹³⁴⁷Paramount Pictures, 1988.

¹³⁴⁸Wesson, *supra* n. 1336 at 864 n. 84.

¹³⁴⁹Donnerstein, Linz and Penrod, *supra* n. 1232 at 93-9 and 102.

¹³⁵⁰*Ibid.*, 160.

some way benefit from rape, torture, or other forms of sexual violence".¹³⁵¹ Similarly Schauer condemns¹³⁵²

...sexual violence directed against women which is portrayed as desirable, acceptable or appropriate; male sexual violence directed against women which is portrayed as consistent with the real if unexpressed desires of the women involved (the view that "no" means "yes"); and male violence against women...in which the violence is seen as spurred by sexual desires or as a source of male sexual satisfaction [by which Schauer is clearly seeking to incorporate the "slasher" films already referred to].

This then suggests that context will have a further role in determining whether material is actionable, because not only will it determine whether the material depicts violence in a sexual (rather than a sexually explicit) way, but it will also be used to determine whether the material depicts the sex and violence in an approving way, and that only in that circumstance will it be objectionable.

But this raises another problem. Gracyk argues that one should distinguish the subject matter of a representation and the attitudes of the *people represented in it*, on the one hand, from the attitude expressed towards their activity *by the work itself*, on the other.¹³⁵³ He points to the example of the Roman Polanski film *Repulsion*,¹³⁵⁴ which depicts a mentally ill woman repeatedly imagining that she is being raped, and on one occasion imagining herself taking pleasure from the rape, but which, taken as a whole, elicits pity for her mental suffering. From this he concludes that "showing a woman enjoying a rape does not mean that the work endorses rape as pleasurable to women."¹³⁵⁵ Furthermore, the point has also been made that if, as was argued in the preceding paragraph, a depiction which would otherwise be proscribable should escape liability because of the manner (such as a message of disapproval for the crime and sympathy for the victim) in which it was presented, should one not also exempt from regulation those materials which are simply accompanied by an express disclaimer from their producers warning consumers that the activities depicted are harmful or criminal?¹³⁵⁶ Would this simple expedient not negate whatever inciting effect the material might have? The other side of this argument is presented by

¹³⁵¹Ibid., 171.

¹³⁵²Schauer, *supra* n. 1234 at 740.

¹³⁵³Gracyk, *supra* n. 627 at 122-31.

¹³⁵⁴Compton-Tekli, 1965.

¹³⁵⁵Gracyk, *supra* n. 627 at 131.

¹³⁵⁶Soble, *supra* n. 1286 at 104-5.

Gilbert who, in her analysis of Andrea Dworkin's novel *Mercy*, notes firstly that its depiction of sexual violence means that it would clearly fall foul of Dworkin's own definition of pornography, and then argues that while Dworkin depicts rape from a point of view sympathetic to its victim, some readers will find the descriptions of sexual violence arousing whatever the intention of the author.¹³⁵⁷ In other words, Gilbert argues that some consumers will read past the message and concentrate on the depiction. Indeed, one could also imagine the situation where consumers do not even bother to view the whole of a work, and select only those parts they find arousing. How then is one to solve the tension between the contextual approach discussed in the preceding paragraph, which suggests that material is harmful only if sexual violence is presented in a favourable light, and practical considerations which indicate that even if the *overall* message of a production is condemnatory of violence, harm might still be done by discrete parts of the work which, seen on their own, do not bring that message home?

In the final analysis, I would argue that the answer to this question is dictated by the fundamental characteristic of sexually explicit material - namely that it is non-cognitive. The very fact that arousal is non-cognitive means that sexual depictions are to a large extent *beyond* the moderating appeal of any separately delivered message based on reason or emotion.¹³⁵⁸ I would therefore argue that in practice, depiction is everything, and that unless a depiction of sexualised violence is *itself* presented in a manner that condemns the activities shown, it should not be saved by a message (such as one of sympathy for rape victims) appearing elsewhere in the material. In other words, in saying that the "context" of a depiction may save it, one can only mean the *immediate* context of the specific depiction, rather than the context of the work as a whole. Similarly, as far as disclaimers are concerned, I would agree with Crump's observation that if the effect of material is to incite harm, liability could be imposed notwithstanding any disclaimer. As he argues¹³⁵⁹

...the varieties of camouflaged incitement can include descriptions or depictions that are (or purport to be) straightforward depictions of violent scenes, without words of express incitement. They also may include incitement by attractive presentation that glamourises the activity. They may even include incitement accompanied by disclaimers, like those in Mark Antony's exhortation.

¹³⁵⁷Gilbert, Harriet "So long as it's not sex and violence" Segal, Lynne and McIntosh, Mary (eds) *Sex Exposed: Sexuality and the Pornography Debate* (London, Virago, 1992) 216 at 223-4.

¹³⁵⁸Higgins, *supra* n. 532 at 86.

¹³⁵⁹Crump, *supra* n. 1331 at 22.

Thus, as Crump emphasises, disclaimers themselves may *heighten* the effect of incitement, just as lurid "warnings" on the packaging of sexually explicit materials are designed to attract custom.¹³⁶⁰ My argument clearly has implications for the issue of intent, in that it suggests that liability would not be avoided simply because it was not the defendant's aim and object to incite consumers. This issue is discussed in detail at 6.5.4 below. It suffices here to say that I will indeed argue for a lesser level of fault than actual intent, and that one of the reasons for this is that given the results of empirical research, and the non-cognitive nature of sexually explicit materials, it would not be unduly onerous to impose liability in cases where a defendant produces material which, because it combines sex with violence, creates a risk of incitement of which, one can assert, the defendant must have been aware *despite* the context provided by the rest of the work or any disclaimer by him. Or, to view it from another perspective, allowing the overall context of a work or disclaimers to negative intent would allow producers of material combining sex and violence to escape liability simply by "tacking on" a formulaic disavowal of the message *prima facie* carried by their product. I am, of course, aware that by arguing this way I have resurrected an aspect of the old test in *R v Hicklin*,¹³⁶¹ in terms of which a work could be condemned as obscene on the basis of an isolated part thereof, a factor which, as was shown at 1.4.5 above, contributed to the demise of that test. However, I would argue that since liability for incitement would arise only in respect of a very narrow class of material which has demonstrably been shown to cause harm - namely material that combines sex with violence and depicts that violence in an approving manner - there is no reason why such liability should be evaded simply because material which sexualizes violence is found in the context of other, innocuous, material.

The same considerations apply when one comes to address the question of whether a so-called "artistic" defence, such as that provided for by the third leg of the *Miller* test should be available in respect of material depicting sex and violence in an approving manner. For example, Downs argues that even material combining sex and violence should be saved if it has redeeming artistic or social features, citing the works of Sade, Pauline Reage's *The Story of O* and films such as *Last Tango in Paris* as examples.¹³⁶² This he justifies essentially on the basis that such material assists humankind understand its own duality - animal and human, reason and passion, personalisation and objectification - and the struggle to keep a balance between these

¹³⁶⁰*Ibid.*, 66-7.

¹³⁶¹(1868) LR 3 QB 360.

¹³⁶²Downs, *supra* n. 286 at 172-5.

competing impulses.¹³⁶³ Thus he rejects a blanket prohibition of material combining sex and violence stating¹³⁶⁴

There is no light without darkness, as St Augustine's teaching and personal experience reveal. The difficulty lies in acknowledging the dialectic without falling prey to dissolution. In dealing with sexuality and human experience, art must avoid sliding into artless pornography and obscenity. Yet the dangers of pornographic art are worth risking because this form engages this fundamental dialectic of our natures. From this philosophical perspective, the task of censorship is to distinguish art from sheer pornography or obscenity while still accommodating the potentially productive aspects of the dark side of human nature....

The furthest he is prepared to go in restricting sexually explicit material is to argue for a refinement of the *Miller* test, which would see only material combining sexual explicitness and violence (not sex and violence) categorised as obscenity,¹³⁶⁵ and which would mean that material which had redeeming social and artistic value would escape regulation. Clearly it would be extremely difficult to avoid subjectivity when seeking to distinguish artistic from non-artistic examples of material combining sex and violence. Yet even setting that difficulty aside, Downs' argument that the law should adopt a more liberal attitude to depictions of unlawful forms of sexual activity than it does to the activities themselves,¹³⁶⁶ is open to the criticism that it ignores the fact that the arousing effect of such materials means that they have the effect of inciting consumers to emulate what they depict. Down's argument is thus well answered by Itzin, who states that if material causes harm¹³⁶⁷ it ought not to be exempt from censorship simply because it has attained the status of "art",¹³⁶⁸ and by

¹³⁶³Ibid., 175. This argument is also advanced from a feminist perspective in Gronau, Anna "Women and Images: Toward a Feminist Analysis of Censorship" in Burstyn, Varda (ed) *Women Against Censorship* (Vancouver, Douglas & McIntyre, 1985) 91 at 95-8, where she states that pornography constitutes evidence of sexism and therefore contributes towards an understanding of it and that

Artists of both sexes and women in general are particularly vulnerable if their search for ways of expressing new ideas includes such taboo subjects as sex and violence....If we should want to explore the deep psychological and social links between violence and sex as part of the process of gaining knowledge and understanding of them (and, by extension, about our own sexual repression and potential), our own productions may well be both disturbing and explicit.

¹³⁶⁴Downs, *supra* n. 286 at 182.

¹³⁶⁵Ibid., 188 and 195-6.

¹³⁶⁶Ibid., at 188.

¹³⁶⁷Note however that while I agree with Itzin's point, I have already expressed disagreement (at 2.3.1 and 2.3.2 above) with her equation of sexist expression with harm.

¹³⁶⁸Itzin, *supra* n. 601 at 451-2.

Crump who argues that incitement ought not to receive constitutional protection simply because it is found in the context of artistically valuable material.¹³⁶⁹ In support of this Crump points to the precedent of *Hamling v United States*,¹³⁷⁰ in which it was held that obscene depictions were not protected simply because they were juxtaposed with a description of the Presidential Commission on Obscenity and Pornography. Finally, one can again draw a parallel with the discussion on hate speech at 5.6.4.1 above, where I argued that liability for insulting epithets should not be negated simply by the fact that the insulting speech was found in the context of that which is innocuous. For this reason I would conclude that "artistic" portrayal of harmful material ought not to be a defence to liability.

6.4.2 Incitement and consensual violence.

Inherent in the concept of liability based on incitement is, of course, the assumption that the incitement is to an activity that is *unlawful*.¹³⁷¹ Conversely, where the activity urged by the inciter is lawful, the "inciter" cannot be held liable.¹³⁷² As was stated by Mill¹³⁷³

Whatever it is permitted to do, it must be permitted to advise to do.

Thus far the discussion of what type of material can be said to incite harm has led to my arguing that material is actionable if it incites harm by depicting sex combined with violence in an approving manner. Here my assumption is that sex combined with violence is unlawful. But is this always the case? What of the situation where a person *consents* to have violence inflicted on themselves, as in a sadomasochistic relationship? Is that conduct lawful, and is it thus lawful to urge others to engage in it by depicting it in an approving manner? Although the question of what limits the law imposes on the individual's capacity to consent to harm may seem somewhat remote from the subject of this thesis, attention must be paid to this issue in order to determine the limits of incitement.

¹³⁶⁹Crump, *supra* n. 1331 at 67-9.

¹³⁷⁰418 U.S. 87 (1974).

¹³⁷¹La Fave and Scott, *supra* n. 149 at 489.

¹³⁷²*City of Columbia v Scott* 47 Ohio App. 2d 287, 353 N.E. 2d 858. Note however that in some circumstances solicitation of lawful acts might be proscribed consistent with the First Amendment, as for example in cases involving solicitation for prostitution. As was held in *Wood v United States* 498 A.2d 1140 (D.C. App. 1985) the First Amendment does permit regulation of commercial speech even if lawful in order to serve such legitimate objectives, and protecting the public from solicitation is such an objective. Such cases are in fact perhaps best classified as involving the suppression of the nuisance that is caused by solicitation.

¹³⁷³Mill, *supra* n. 13 at 112.

6.4.2.1 Consent, autonomy and harm.

The factor which generally determines the lawfulness of sexual activity is consent. The most obvious example where consent is put in issue is in cases of rape. Lack of consent is an essential element of this crime, and the prosecution bears the burden of proving lack of consent on the part of the victim. The requirement that lack of consent be proved means that the act of sexual intercourse is *prima facie* lawful. An obvious exception to this rule is cases involving intercourse with persons who are under the legal age of consent. In these cases consent is not an issue in that the law regards the victim as incapable of giving consent, and so once the act is proved, criminal liability ensues in the absence of any other recognised defence. By contrast, however, whereas the law regards sexual intercourse as consensual unless proved otherwise, the same is not true of assault, battery and variants thereof which, once proved, are generally presumed to be unlawful and to have taken place without the consent of the complainant. The onus then rests on the defendant to prove consent on the part of the complainant, although clearly consent to certain assaults - for example, being bumped into in the street - is implied from engagement in day to day activities. These apparently simple rules are however complicated by the fact that the law does not always recognise the validity of consent. As will be demonstrated by the overview of cases on this question, legal policy generally limits the individual's capacity to consent to what are otherwise actionable interferences with the person. How should these limits be determined?

The most important point to realise in relation to this question is that consent to physical interaction involves a fundamental aspect of autonomy, for if autonomy means anything it must at the very least encompass autonomy in relation to one's own body. This is particularly so in relation to sexual activity, which involves decisions in respect of the most intimate aspects of one's physical existence.¹³⁷⁴ As Downs states¹³⁷⁵

Sex is (among other things) an exploration of the dynamic tensions of human experience. Recognition of this fact counsels tolerance towards consensual adult sexual activity as well as society's right to draw a normative line somewhere.

The connection between autonomy, privacy and dignity was explored in Chapter 3, where it was argued that autonomy was the essence of human dignity, and that this

¹³⁷⁴Wirenus, *supra* n. 199 at 74-5 argues that imposition of sexual orthodoxy is fundamentally incompatible with autonomy.

¹³⁷⁵Downs, *supra* n. 286 at xxi.

value had been accorded some recognition in United States law under the rubric of "privacy". Furthermore, in chapter 4 it was noted that infringement of an individual's bodily integrity constitutes an impairment of his or her dignity. Yet just as autonomy / dignity is compromised by an infringement of physical integrity (for example through battery in the form of physical touching not consented to) it is also true to say that autonomy is compromised when the law imposes limits on what physical interaction an individual may consent to. In other words, legally imposed restrictions on what the individual may do with his or her body is a limitation of autonomy just as is another's unwelcome interference with the individual. This is most eloquently brought out by Feinberg who, in his discussion of a play entitled *Whose Life Is It Anyway?*, which centres on a quadriplegic's legal struggle to refuse treatment and be allowed to die, comments as follows¹³⁷⁶

In his final exchange with the judge, Harrison cites the chief reason for his choice (and of course in his view the ground of its reasonableness or correctness) his desire for *dignity*. He is eloquent about the indignity of being forced to live in total dependence on others for even the basic primitive functions. In response to the judge, he then concedes that "many people with appalling physical handicaps have overcome them and have lived essentially creative, dignified lives"...but the point, he insists, is that "the dignity begins with their choice." It would be an indignity to force others to die against their will, but an equal indignity to force him to remain alive. as a kind of "medical achievement", against his will. Human dignity is not possible without the acknowledgment of personal sovereignty.
(Emphasis in the original).

In light of the above it can be stated that where individuals consent to an interference with their own person, they are consenting to an invasion of their autonomy, but the fact that they have exercised their autonomy in so consenting negates the harm that would otherwise have been constituted by that interference. In other words, inherent in the concept of autonomy, is the capacity to *limit one's autonomy by consent*. Conversely, where the law refuses to recognise the validity of consent, it protects the individual's autonomy in that consent no longer legitimates the interference, but in so doing the law also limits autonomy by denying one of its inherent capacities (that of consenting to limitations on one's autonomy). The issue of consent and limits on it thus highlights a logical problem in the concept of autonomy which arises because limitations on the capacity to consent are said to be necessary in order to preserve

¹³⁷⁶Feinberg, *supra* n. 692 at 354.

autonomy. Harkening back to the discussion of human dignity in Chapter 3, one notes that in discussing Kant's theory of human dignity, Rotenstreich states¹³⁷⁷

Kant himself associates mankind with dignity and asserts that this is so because one human being cannot take advantage of another human being; not only can he not do so but he cannot regard *even himself* merely as a means since he has always been regarded as an end.

(Emphasis added).

The inalienability of freedom thus involves a paradox - the absence of restraint on action that freedom implies would, it might be thought, entitle the individual to do anything he or she pleases, including voluntarily surrendering that freedom. Does this mean that the individual would be able to alienate his or her autonomy to the point where it no longer existed? Here an analogy can usefully be drawn between individual autonomy and the doctrine of parliamentary supremacy: Whereas the doctrine of parliamentary supremacy states that parliament is the supreme and omnicompetent source of law in society, that supremacy is limited in that parliament cannot declare itself incompetent to legislate contrary to its will as already expressed, because if it could so legislate, it would no longer be supreme. In other words, in order for parliament to be supreme there must be something it cannot do - namely negate its own future supremacy. So too in respect of human autonomy it has been argued that if an individual is to remain autonomous, he or she must lack the capacity to alienate that autonomy. This issue was addressed by Mill who, in discussing the question of whether the individual should be free to alienate his or her freedom by voluntarily selling him or herself into permanent slavery, conceded that the irrevocability of the transaction meant that it was ultimately incompatible with freedom, and thus the individual's freedom had to be limited in order to prevent such an alienation.¹³⁷⁸ In more recent times this same question has been acutely debated in the context of suicide and, of course, euthanasia, as illustrated by the case of *Cruzan v Director, Missouri Department of Health*,¹³⁷⁹ discussed at 3.5.2 above. The essential issue is, of course, at what point can it be said that the individual's consent to harm is incompatible with their human autonomy or, as I prefer to call it, their human dignity? In particular, are there any forms of sexual conduct which it can be said are so incompatible with individual dignity as not to be able to be consented to?

¹³⁷⁷Rotenstreich, *supra* n. 676 at 154.

¹³⁷⁸Mill, *supra* n. 13 at 116-17. This argument is also to be found in Locke, John *Second Treatise of Civil Government* (Carpenter (ed)) (London, Dent, 1924) Book II, Chapter IV.

¹³⁷⁹497 U.S. 261 (1990).

The question of alienation of dignity has been addressed by the German Constitutional Court in cases arising out of Art 1, § 1, which provides that human dignity is inviolable, and that it is the duty of the state to respect and defend human dignity.¹³⁸⁰ Furthermore, cases have arisen on the specific question of what implications Art 1, § 1 has for the publication of sexually oriented materials covered by Article 5 of the Constitution which, subject to broad qualifications,¹³⁸¹ protects freedom of expression.¹³⁸² Article 184 of the Penal Code, which governs distribution of "indecent" material was substantially liberalised in 1974, so that even hard-core pornography may be legally distributed, and the only real restrictions relate to distribution to minors, restrictions on public display (to prevent involuntary exposure), and restrictions on materials combining sex and violence, or depicting sexual activity involving children or animals.¹³⁸³ On the other hand, despite the liberality of the present law, the competence of the legislature to regulate sexually oriented materials is uncontroversial in Germany, and the courts have never invalidated legislation restricting such materials, even when the legislation was far more restrictive.¹³⁸⁴ The courts have thus only twice had occasion to balance freedom of expression and human dignity. The first case,¹³⁸⁵ in which a group of female plaintiffs sought to prevent depictions of nude women on magazine covers on the basis that such depictions were insulting to them as a class, was decided on the purely procedural point that the law did not permit an action for insult to be brought on

¹³⁸⁰The German Constitution provides as follows:

Art. 1 (Protection of human dignity)

- (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3)...

¹³⁸¹It must however be noted that notwithstanding any qualifications Art. 19(2) prohibits infringements of the "basic core" of any right.

¹³⁸²Article 5 provides as follows:

Art. 5

- (1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
- (2) These rights are limited by the provisions of the general laws, the provision of the law for the protection of youth, and the right to inviolability of personal honour.
- (3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the Constitution.

¹³⁸³Reimann, *supra* n. 705 at 212-16.

¹³⁸⁴*Ibid.*, 209-11.

¹³⁸⁵Decision of 26/7/78 LG Hamburg, 33 NJW 56 (1980).

behalf of so large a group.¹³⁸⁶ On the other hand, in a case in which the legality of peep shows was challenged,¹³⁸⁷ the court held that the anonymity provided by private booths from which the customer could see the stripper but could not himself be seen reduced the performer to the status of a sex object and thus contravened Art. 1(1).¹³⁸⁸ The court rejected the argument that there could be no impairment of dignity because the models were participating voluntarily, holding that dignity was inalienable even at the will of the holder.¹³⁸⁹ However, this aspect of the decision has attracted criticism on the basis that the court did not adequately weigh autonomy, which is an integral part of dignity, against inalienability.¹³⁹⁰ As Reimann states¹³⁹¹

...the "peep show" decision illustrates a problem not only in the present case but inherent in the human dignity approach itself. The simple answer that courts should always protect human dignity, even against the bearer's will, begs a much more complex and very fundamental question....Human dignity, as modern Western culture understands the concept, has little value if it does not comprise the right to self-determination. Only on the basis of self-determination can the individual truly experience her dignity and enjoy "the right to the free development of her personality" that Article 2, section 1 of the Basic Law guarantees...The human dignity concept thus needs to strike a delicate balance..To strike the balance in an acceptable manner requires more effort than the Federal Supreme Administrative Court was willing to make.

This, of course, is the core issue in determining what types of sexual action and representation may be restricted in the name of human dignity, and it is unfortunate that the court shied away from addressing the paradox inherent in the concept of dignity.

How then is the question of the validity of consent to be answered? This is a profound philosophical question, meriting a thesis of its own, but some guidance can be obtained from the following: Assuming that one starts from the point that personal autonomy entitles an individual to consent to harm to him or herself, Feinberg argues¹³⁹² that while *in principle* consent ought to be available as a defence even to

¹³⁸⁶The case is discussed by Reimann, *supra* n. 705 at 232-5.

¹³⁸⁷Decision of 15/12/81, 64 Entscheidungen des Bundesverwaltungsgerichts [BVerwG] 274.

¹³⁸⁸This case is discussed by Reimann, *supra* n. 705 at 235-41.

¹³⁸⁹Decision of 15/12/81, 64 Entscheidungen des Bundesverwaltungsgerichts [BVerwG] 274 at 279-80.

¹³⁹⁰Reimann, *supra* n. 705 at 239-41.

¹³⁹¹Idem.

¹³⁹²Feinberg, *supra* n. 591 at 166-7 and 328-31.

slavery, gladiatorial contests and murder, *in practice* the defence might never be accepted either because it might well not be sufficiently verifiable for one ever to be sure that the "victim's" agreement was indeed a truly voluntary exercise of autonomy,¹³⁹³ or because the risk of abuse of the defence (by murderers who manipulate or counterfeit the consent in advance) would undermine the deterrent effect of the law.¹³⁹⁴ But while this argument might hold true for truly grievous harm, such as murder, it does not therefore hold true for the lesser harm resulting, for example, from consensual sadomasochistic relationships. Thus, so far as consent to physical harm short of death is concerned, Feinberg himself argues that provided sufficiently strong standards for determining voluntariness were met,¹³⁹⁵ consent on the part of the victim should serve to excuse even physical harm amounting to maiming,¹³⁹⁶ as denial of such a right could be justified only on paternalistic grounds, and would thus clearly be incompatible with personal autonomy. In other words, Feinberg is unable to offer any principled reason justifying why the individual should be prevented from harming him or herself, which of course takes us no further in solving the autonomy paradox.

On the other hand, even if a satisfactory rationale for limiting autonomy on grounds of harm to *the actor* seems difficult to arrive at without resorting to paternalism, Feinberg argues that there may be a rationale justified on the basis of avoiding harm *to others*. Clearly persons who consent to the infliction of injuries on themselves run the risk of harm requiring medical treatment. The question then arises as to who is to bear the resultant costs. Although it might be argued that having consented to injury, the participants should bear the costs themselves, the fact remains that those who need but, for example cannot afford, treatment required for injuries which they voluntarily risked do impose a "cost" on others - the psychic costs borne by society as a whole which faces the moral dilemma of either treating the victims at public expense or leaving them untreated, and the more direct psychic costs to those (such as

¹³⁹³Feinberg, *supra* n. 692 at 71-81. The argument here is that there will always be some risk that, no matter how many procedural safeguards one puts in place, a mistake might be made and someone who was not truly consenting might be put to death. In such circumstances, the great harm (namely involuntary death) arising in even isolated cases would outweigh the denial to the majority of genuine would-be victims of their right to consent to harm.

¹³⁹⁴Feinberg *Harmless Wrongdoing* 168-69.

¹³⁹⁵Feinberg (*Harm to Self* 126) states that it would be legitimate to presume that actions which are not normally done are not being done voluntarily, and could be restrained until it was confirmed that the individual wanting to engage in them was doing so truly voluntarily. However Feinberg cautions against the danger of using this precaution as a means of enforcing majoritarian concepts of morality - homosexuality, for example, constitutes a departure from the norm of human sexual conduct, yet this would clearly not justify questioning the voluntariness of such conduct. Feinberg thus makes it clear that only rare actions - such as serious self-mutilation - could be restrained pending an inquiry into voluntariness.

¹³⁹⁶Feinberg, *supra* n. 591 at 170-1.

persons who discover the injured parties or who treat them in casualty departments) who suffer emotional shock through seeing the injuries.¹³⁹⁷ Although these harms may seem somewhat abstract, Feinberg's reasoning does at least supply a test - namely the likelihood of injury serious enough to require medical attention - for determining limits on consent.

Note that in this section I embarked upon the search for a justification for limits on consent working on the assumption that the protection of human dignity required that the actor should be prohibited from harming *him or herself*. That avenue had, however, to be abandoned because restrictions founded on that supposition are inescapably paternalistic. Rescue ultimately came in the form of Feinberg's non-paternalistic rationale, in terms of which limits on one's capacity to consent are justified on the basis that limitless capacity to consent to injury to ones-self leads to psychic harm to *others*. This, I would suggest, is an entirely satisfactory outcome: The very reason I rejected the *Miller* approach to obscenity is that the only "harm" it is able to identify is damage to the consumer's morals. Basing the justification for limits on consent on the avoidance of harm to others rather than on the paternalistic principle that one may not harm ones-self is consistent with my overall approach.

6.4.2.2 Case authority

It is now necessary to examine the rather sparse case authority derived from the United States, England and South Africa. At the outset it should be stated that the most conspicuous feature of the case law is, unfortunately, the failure of the courts to address in any detail the jurisprudential issues canvassed above.

6.4.2.2.1 The United States

Turning first to the United States, in *People v Samuels*¹³⁹⁸ the California Court of Appeals rejected the argument that consent was a defence to a charge of aggravated assault taking the form of a sadomasochistic beating administered with a riding crop, holding that¹³⁹⁹

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury.

¹³⁹⁷Feinberg, *supra* n. 692 at 134-42.

¹³⁹⁸250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967).

¹³⁹⁹At 447.

The court adduced no policy considerations in support of this proposition. Similarly, in *Commonwealth v Appleby*,¹⁴⁰⁰ a case involving the use of whips in a sadomasochistic relationship, a Massachusetts court held that consent did not constitute a valid defence to a charge of assault with a dangerous weapon, stating that assault likely to cause bodily harm cannot be consented to. The court in *Appleby* addressed the right to privacy in an *obiter* statement to the effect that, assuming that such a right existed, it would not legitimise assaults of this type.¹⁴⁰¹ Finally, in *State v Collier*,¹⁴⁰² the Court of Appeals of Iowa refused to interpret s 708.1 of the Iowa Code, which provided for a defence of consent to assaults committed in the course of "sport, social or other activity", as including sadomasochistic conduct. The court did not give detailed consideration to privacy, and simply decided the case on the basis that the argument had been rejected in *Samuels* and *Appleby*, stating that¹⁴⁰³

Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare.

These few cases are notable only for the courts' dismissive approach to the argument that the right to privacy encompasses the right to consent to assault. Yet this is surely not surprising - as was shown by the decision in *Bowers v Hardwick* (discussed at 3.5.2 above), the Supreme Court has not even been willing to accept that the right to privacy extends to homosexual conduct, and so one could hardly expect a more adventurous approach from the lower courts in relation to the more controversial issue of sadomasochism.

6.4.2.2.2 England

The most recent authority on the limits of consent is the case of *R v Brown*.¹⁴⁰⁴ The appellants had been charged with assault occasioning actual bodily harm under s 47 of the Offences Against the Person Act 1861, and unlawful wounding under s 20 of the same Act. Following the trial court's ruling that consent was no defence to such charges, the accused had pleaded guilty, but had appealed the ruling of law to the Court of Appeal. Having dismissed that appeal, that court certified the question of consent as a point of law of general public importance to be decided by the House of

¹⁴⁰⁰380 Mass. 296, 402 N.E.2d 1051 (1980) at 1060.

¹⁴⁰¹*Idem*.

¹⁴⁰²372 N.W.2d 303 (1985) at 307.

¹⁴⁰³*Idem*.

¹⁴⁰⁴[1993] 2 All ER 75.

Lords. The Lords held by a 3-2 majority (Templeman, Jauncy and Lowry LJJ concurring, Mustill and Slynn LJJ dissenting) that participants in sadomasochistic sexual activities could not raise consent on the part of other participants as a defence to the statutory charges. In analysing this decision, it is important to appreciate that since the appellants had been charged under assault-related provisions, the case turned upon two issues: firstly, whether the activities in which the appellants had engaged constituted one of the types of assault to which the law did not *prima facie* recognise consent; and secondly, if the assaults were of such a type, whether sadomasochism might nevertheless be recognised as one of a category of activities which stood as exceptions to the law in that consent to them was allowed (examples of these range from boxing and ear-piercing to circumcision and other kinds of surgery).¹⁴⁰⁵

In its statement of the law regarding different categories of assault,¹⁴⁰⁶ the majority held that whereas consent could be raised as a defence to common assault, such was not the case once assault was sufficiently serious to cause "actual bodily harm", defined in *R v Donovan*¹⁴⁰⁷ as

..any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transitory and trifling.

In such cases, the court held, as well as those in which the assault causes either "grievous bodily harm" (which the law defines no more precisely than "bodily harm that is really serious"¹⁴⁰⁸) or wounding (essentially defined as a puncturing of the skin¹⁴⁰⁹), consent could *prima facie* not be offered as a defence.¹⁴¹⁰ Following this classification of assaults almost made it almost inevitable that the court should hold that sadomasochistic acts could not be consented to. As both Hughes¹⁴¹¹ and Stuart¹⁴¹² have noted, in view of the fact that participants in sadomasochistic activity sometimes consent to pain which is "transient" but which will be more than "trifling", the definition of actual bodily harm adopted in *Donovan* is clearly unsuited for use as a determinant of the boundary between permissible and impermissible consent. By

¹⁴⁰⁵For a comprehensive and highly critical analysis of the *Brown* decision see Thompson, W. *Sadomasochism* (London, Cassell, 1994) 180 - 241.

¹⁴⁰⁶[1993] 2 All ER 75 at 77j - 79a,

¹⁴⁰⁷[1934] 2 KB 498 at 509.

¹⁴⁰⁸*DPP v Smith* [1961] AC 290.

¹⁴⁰⁹*JJC (a minor) v Eisenhower* [1983] 3 All ER 230.

¹⁴¹⁰[1993] 2 All ER 75 at 90e - 91b, 94e and 99b - d,

¹⁴¹¹Hughes, Graham "Consent in Sexual Offences" 25 (1962) *Modern Law Review* 672 at 684-5.

¹⁴¹²Stuart, Don *Canadian Criminal Law* (2nd ed) (Toronto, Carswell, 1987) 472.

contrast, in his dissenting judgment, Slynn LJ came to a different conclusion on the law, and rejected the idea that consent was not a defence to a charge of assault causing actual bodily harm, stating¹⁴¹³

It is, however, possible to draw the line, and the line should be drawn, between really serious injury on the one hand and less serious injuries on the other. I do not accept that it is right to take common assault as the sole category of assaults to which consent can be a defence and to deny that defence in respect of all other injuries. In the first place the range of injuries which can fall within 'actual bodily harm' is wide - the description of two beatings in the present case show that one is much more substantial than the other. Further, the same is true of wounding, where the test is whether the skin is broken and where it can be more or less serious. I can see no significant reason for refusing consent as a defence for the lesser of these cases of actual bodily harm and wounding. If a line has to be drawn, as I think it must, to be workable it cannot be allowed to fluctuate within particular charges and in the interests of legal certainty it has to be accepted that consent can be given to acts which are said to constitute actual bodily harm and wounding. Grievous bodily harm I accept to be different by analogy with and as an extension of the old cases on maiming. Accordingly, I accept that, other than for cases of grievous bodily harm or death, consent can be a defence...None of the convictions in the present cases have been on the basis that grievous bodily harm was caused. Whether some of the acts done in these cases might have fallen within that category does not seem to me to be relevant for present purposes.

Clearly the vagueness of such terms as "interference with health or comfort" and "really serious" makes it difficult to distinguish either between common assault and assault causing actual bodily harm, or between assault causing actual bodily harm and that causing grievous bodily harm.¹⁴¹⁴ However, although Slynn LJ did not express any opinion on whether grievous bodily harm should be defined any more precisely than as being "harm that is really serious", it is interesting to note his comment that

The acts did not result in any permanent or serious injury or disability or any infection *and no medical assistance was required....*
(Emphasis added).

¹⁴¹³[1993] 2 All ER 75 at 121j - 122d.

¹⁴¹⁴See 82d.

This, I would argue, suggests that a common sense test for what constitutes grievous bodily harm and thus where the limit of consent should be drawn - namely whether the harm inflicted is such as to require medical treatment. Be that as it may, the majority chose to adhere to the *Donovan* rule.

The second issue upon which the *Brown* case turned was whether, even if they caused actual bodily harm, sadomasochistic activities should be recognised as an exception in the same way as are boxing, ear-piercing, tattooing, religious flagellation, and surgery (some of which is therapeutic and some, such as circumcision, which is not).¹⁴¹⁵ Once again the court relied upon *Donovan*, and in particular the statement that¹⁴¹⁶

If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime so far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer.

Here the court in *Donovan* sought to draw a distinction between offences which were in themselves criminal acts (*malum in se*) and which could therefore not be consented to, and other acts in respect of which consent was valid.¹⁴¹⁷ However, as commentators have pointed out,¹⁴¹⁸ this test is circular because it essentially states that that consent is invalid in respect of that which is unlawful, whereas the essence of the inquiry is to discover which acts are unlawful *because* they are of such a nature that the law does not recognise consent to them. Although the court in *Donovan* had held that an assault which took the form of a beating for the purposes of sexual gratification ought not to be recognised as one of the exceptional categories of assault which consent could legitimate, the House of Lords was not bound by this decision. Nevertheless, the majority chose not to depart from it for reasons which, it will be argued, were far from satisfactory. As a preliminary point it is necessary to note the *ad hoc* approach adopted by the law in identifying those types of conduct which, although they cause actual bodily harm, may be consented to.¹⁴¹⁹ Several tests have

¹⁴¹⁵These categories of lawful assault are discussed at 79a - b, 88g, 108j - 110j, and 119e.

¹⁴¹⁶[1934] 2 KB 498 at 507.

¹⁴¹⁷At 508.

¹⁴¹⁸Burchell and Hunt, *supra* n. 517 at 371, Hunt, *supra* n. 930 at 495.

¹⁴¹⁹This was explicitly recognised in the minority judgment of Lord Mustill in *R v Brown* [1993] 2 All ER 75 at 103c - f.

been suggested, yet none has provided a criterion which covers all the established categories. Consent to harm is certainly not limited to therapeutic procedures, given that the law permits boxing, ear-piercing and circumcision. Leigh suggests that consent be valid except in cases involving conduct which causes mutilation, disfigurement or serious impairment of mental or physical powers either permanently or for a protracted period.¹⁴²⁰ Mutilation is defined as "permanent destruction or deprivation of a part of the body", yet if this is the case, might not the lawfulness of organ donation be thrown into doubt? Similarly, disfigurement, which Leigh defines as an injury which detracts from a person's personal appearance¹⁴²¹ occurs whenever individuals submit to ear and nose piercing and ritual facial scarring. The same issues are addressed by Williams, who criticises the decision in *Donovan* for its failure to offer a principled argument in support of the proposition that consent does not justify infliction of bodily harm.¹⁴²² Williams' conclusion is that in practice the issue of lawfulness has depend upon the application of moral judgments by the courts, which are prepared to condone physical harm for religious, cosmetic and family planning reasons but not, it would seem, for reasons of sexual gratification.¹⁴²³ In light of this he suggests that consent should be recognised as a defence to conduct provided that it does not cause "permanent damage...which curtails the individual's activities".¹⁴²⁴ But even the test of irrevocability would not cover all recognised categories - ear-piercing, tattooing and surgery are all examples of irrevocable procedures, and boxers certainly at least run a risk of irrevocable harm which could drastically curtail their activities.

The inescapable conclusion thus seems to be that such cases are decided by the courts on the basis of their conception of public policy, and so the outcome of *Brown* depended on whether public interest considerations indicated that consensual sadomasochistic activity stood as another exception to the general rule that consent was not a defence.¹⁴²⁵ It is in this regard to their approach to this question that the *Brown* court's decision is most open to criticism. In deciding this question in the negative, the majority pointed to the risk of disease (and in particular AIDS) when blood is spilled,¹⁴²⁶ the risk that youths will be introduced to sadomasochism,¹⁴²⁷

¹⁴²⁰Leigh, L. H. "Sado-masochism, consent, and the reform of the criminal law" 39 (1976) *Modern Law Review* 130 at 139.

¹⁴²¹*Ibid.*, 140.

¹⁴²²Williams, Glanville "Consent and Public Policy" (part II) [1962] *Criminal Law Review* 154, at 155-6.

¹⁴²³*Ibid.*, 157-9.

¹⁴²⁴*Idem* 159.

¹⁴²⁵[1993] 2 All ER 75 at 82b-c, 85e and 124b-d.

¹⁴²⁶At 83e-g and 91h.

¹⁴²⁷See 82j - 83b and 91a - b.

and the risk that such conduct might lead to the infliction of pain beyond which the participants had originally consented.¹⁴²⁸ In answer to this however it could be pointed out that sexual activity with minors is already a separate offence, that nowadays any form of sexual contact carries with it the risk of exposure to AIDS,¹⁴²⁹ and that the members of the group charged in *Brown* had agreed that participants could call an end to proceedings by speaking a code-word if they found the pain unbearable.¹⁴³⁰ Indeed, in his minority judgment, Mustill LJ examined these same factors and concluded that the risk of disease was not such as to lead to that conclusion, and that corruption of youths and conduct in excess of what had been consented to could be prosecuted under other criminal-law provisions where necessary.¹⁴³¹ In the end, one is left with the conclusion that the majority's decision was influenced by a paternalistic view that the infliction of violence for sexual pleasure is morally wrong,¹⁴³² and is not "conducive to the welfare of society"¹⁴³³ and, perhaps most significantly, that this view was the product of prejudice born of a misunderstanding of sadomasochism.¹⁴³⁴

As Thompson stresses in his detailed discussion of sadomasochism and the law, the majority of sadomasochistic activities do *not* involve the infliction of pain or injury even to the *Donovan* standard.¹⁴³⁵ Furthermore, whatever "pain" as is experienced from activity such as spanking (with or without instruments), restraints and the use of hot and cold unguents, is in reality nothing more sinister than a manifestation of the well-known physiological phenomenon that one form of physical stimulation may induce another (through a process called "excitation transfer"), and that the overall purpose of sadomasochism is thus *not* the infliction of pain, but rather the heightening of arousal and thereby the pleasure of intercourse.¹⁴³⁶ Indeed, the whole purpose of the activity would be frustrated were the dominant participant to inflict pain to such a level that it over-rode the erotic sensations it was supposed to heighten. As Thompson forcefully argues, it seems anomalous that the law should put sports such as boxing, where the *object* of the activity is to inflict pain and, if possible, injure one's opponent, into the category of assaults which may be consented to, while denying the same protection to sadomasochistic activities where pain operates merely

¹⁴²⁸See 91h.

¹⁴²⁹As was conceded by the majority at 100f.

¹⁴³⁰See 83d and 85c.

¹⁴³¹At 116h - 117j.

¹⁴³²See 82e- j, 83h, 84f-g and 100d-e.

¹⁴³³At 100d.

¹⁴³⁴See for example the comments made at 82j - 84g and 100c-f.

¹⁴³⁵Thompson, *supra* n. 1405 at 4-5, 134-42 and 239

¹⁴³⁶*Ibid.*, 34-5, 104-07 and 263.

as a stimulus to heighten pleasure, and only in the rarest cases results in injury.¹⁴³⁷ One is left with the impression that the reason why the majority in *Brown* refused to recognise sadomasochism as an exception to the rules of consent was simply because of the sexual nature of the activity.¹⁴³⁸ Obviously there are some activities - such as piercing, branding and the infliction of burns - which *do* cause far more serious pain, and some of these were practised by some of the participants in *Brown*, but even in this case such practises were the exception rather than the rule. What the majority in *Brown* ought to have done (but failed to do) was to devise a test which could be used to determine which of the vast range of sadomasochistic activities were sufficiently harmful as not to be legalised by consent - an issue which, I have suggested, should depend upon whether the activity necessitated medical treatment. Finally, the majority paid scant attention to concerns of privacy or autonomy - indeed, Lowry LJ dismissed counsels' privacy arguments by saying that these were irrelevant where unlawful activity is involved.¹⁴³⁹ Yet this is surely to beg the very question the court was called upon to consider - namely whether, after weighing privacy against other public policy concerns, consent should be recognised in cases involving sadomasochistic activity. By contrast Mustill LJ's minority judgment recognised that the case involved issues of individual moral autonomy,¹⁴⁴⁰ while Slynn LJ similarly noted that non-recognition of consent as a defence would be invasive of individual privacy.¹⁴⁴¹

As commentators on the case have pointed out¹⁴⁴² both the majority and minority approached the case simply on the basis of whether sadomasochism constituted an exception to the respective general principles from which each started - in the case of the majority that consent was *prima facie* not a defence to a charge of assault causing actual bodily harm, and in the case of the minority that it was.¹⁴⁴³ Neither side claimed to be making new law, and both stated that that was a matter of policy which should be left to Parliament.¹⁴⁴⁴ The case is now on appeal to the European Court of

¹⁴³⁷Ibid., 243-5 and 264.

¹⁴³⁸Ibid., 226-30, 239-40, 246-8 and 264-5.

¹⁴³⁹[1993] 2 ALL ER 75 at 100g - 101c.

¹⁴⁴⁰At 115j - 116c.

¹⁴⁴¹At 123f-g.

¹⁴⁴²See Giles, Marianne "R v Brown: Consensual Harm in the Public Interest" 57 (1994) *Modern Law Review* 101 at 110-11 and Bix, B "Assault, sado-masochism and consent" 109 (1993) *Law Quarterly Review* 540 at 543-4.

¹⁴⁴³[1993] 2 ALL ER at 113b-f, 116c-h and 123f.

¹⁴⁴⁴Thus Templeman LJ, delivering a judgment for the majority, stated (at 83h) that he was "not prepared to invent a defence of consent", while both Mustill LJ and Slynn LJ (at 116e and 124b-f respectively) stated that it is up to Parliament to decide whether liability should be imposed for consensual sadomasochistic activity.

Human Rights,¹⁴⁴⁵ and so final resolution of the law on this issue must await that court's decision. Meanwhile the Law Commission has suggested that the level of harm to which individual's could consent could be raised to that of serious injury¹⁴⁴⁶ (which is essentially the position adopted in the minority judgment of Slynn LJ), which gives hope that the *Brown* decision may be short lived.

6.4.2.2.3 South Africa

The limits of consent in relation to criminal¹⁴⁴⁷ liability in South African law is determined by the dictates of public policy.¹⁴⁴⁸ Public policy is in turn influenced by the *boni mores* of society.¹⁴⁴⁹ The point has however been made that public policy (the court's perception of what is in the best interests of society) does not necessarily coincide with prevailing social *mores*.¹⁴⁵⁰ Thus it is important to distinguish the specialised terms *contra bonos mores* (or "*boni mores* of society") as used in criminal law, and which refers to the *legal* values of society, from the concept of general social morality. This is emphasised by Strauss, who states¹⁴⁵¹

But *boni mores* in this context should not be understood as the customs of society or a particular social group, or of all ethical rules prevailing in society. It should rather be understood to mean the prevailing views of society on what conduct is lawful and what unlawful. In this sense the concept of good morals constitutes a *legal* criterion.

Once the test is understood in this way, it becomes apparent that the *bonos mores* test for criminal wrongfulness is really of the same type as the "legal convictions of the community" test which, as was explained at 5.5.1 above, is generally accepted in the law of delict.¹⁴⁵² How then have the courts weighed autonomy and public policy?

¹⁴⁴⁵The Law Commission *Consent and Offences Against the Person* (Consultation paper No. 134) (London, H.M.S.O., 1994) 32.5.

¹⁴⁴⁶*Ibid.*, 17.2 - 18.3 and 22.1.

¹⁴⁴⁷Hunt, *supra* n. 930 at 471 and Snyman, *supra* n. 932 at 121.

¹⁴⁴⁸Burchell and Milton, *supra* n. 1285 at 176.

¹⁴⁴⁹Strauss, S. A. "Bodily Injury and the Defence of Consent" 81 (1964) *South African Law Journal* 179 at 183.

¹⁴⁵⁰Burchell and Hunt, *supra* n. 517 at 371, Hunt, *supra* n. 930 at 471 n. 116.

¹⁴⁵¹Strauss, *supra* n. 1449 at 183.

¹⁴⁵²Of course, criminal and civil liability do not necessarily coincide - seduction and adultery are examples of delicts which are not wrongful from the point of view of criminal law. Such cases can be explained either by saying that there are different *boni mores* for delict and criminal law or, more neatly, by saying that the *boni mores* or legal convictions of the community indicate that adultery and seduction should be visited with delictual but not criminal liability. In terms of this formulation there is just one common law criterion of wrongfulness which may be conveniently referred to as "the legal convictions of the community". But does this not raise a further question? For if the test for whether a particular publication incites the reader or viewer to impair the dignity of others depends upon whether the harm it incites is of a kind to which the law does not recognise consent, is it not possible

As was shown at 4.5.1 above, there are conflicting authorities on the extent to which South African common law protects a general right to autonomy - on the one hand the existence of such a right was denied in *Clarke v Hurst N.O.*¹⁴⁵³, but on the other in *Denys Reitz v SA Commercial, Catering & Allied Workers Union*¹⁴⁵⁴ it was held that

South African law recognises a general right or liberty to do as you please except where the law proscribes or the interests of others are unduly harmed.

In seeking to determine the limits of the individual's right to consent to harm, the courts have in many of the cases¹⁴⁵⁵ referred to the *Donovan*¹⁴⁵⁶ test and, as in English law, have recognised certain categories of harm to which consent may be given,¹⁴⁵⁷ achieving no more success than have the English courts in finding an underlying principle able to govern all of them. Thus despite the risk of harm involved, the law permits consent to medical treatment, whether therapeutic or not (as for example in cases of participation in experimentation for purposes of medical research, donation of tissue and sterilisation).¹⁴⁵⁸ Consent to injuries inflicted during

that the law may give a different answer to the question of the lawfulness of consent depending on whether the conduct is being viewed from a delictual or criminal perspective? In theory this is indeed true, but in practice there is only one instance in which criminal law and the law of delict differ on the question of consent to physical harm, and that is in respect of seduction, as the seduced woman may bring a delictual action *despite* her consent to intercourse - in other words, consent does not excuse delictual liability for seduction, whereas there is no criminal liability at all for that act (Neethling, Potgieter and Visser, *supra* n. 805 at 316). It is submitted that this single instance of differing criminal and delictual concepts of wrongfulness ought to be treated as an anomaly. Indeed authorities are divided on the question of whether seduction should be actionable in modern law. According to Van der Merwe and Olivier (*supra* n. 1122 at 97-100) and Boberg (*supra* n. 127 at 743) liability for seduction is now outmoded, but Neethling, Potgieter and Visser (*supra* n. 805 at 316) say that liability for this delict remains part of the law. It is submitted that the better view is that liability for seduction is now outdated, particularly as the grounds advanced in the common law for the invalidity of the woman's consent is "feminine weakness" and the man's seductive wiles (Grotius, *supra* n. 849 at 3.35.8), neither of which give due regard to the woman's capacity to exercise autonomous judgment. Seduction aside however, it can be safely asserted that, in testing the validity of consent to physical harm according to the criterion of the legal convictions of the community, what is wrongful for purposes of criminal law will also be wrongful in terms of the law of delict, and that this general criterion of wrongfulness can therefore be used without qualification.

¹⁴⁵³1992 (4) SA 630 (D).

¹⁴⁵⁴1991 (2) SA 685 (W) at 692G.

¹⁴⁵⁵*R v McCoy* 1953 (2) SA 4 (SR), *S v Sikunyana* 1961 (3) SA 549 (E), *S v D* 1963 (3) SA 263 (E) and *S v Collett* 1978 (3) SA 206 (RAD).

¹⁴⁵⁶[1934] 2 KB 498.

¹⁴⁵⁷For useful summaries see Burchell and Hunt, *supra* n. 517 at 372-5, Snyman, *supra* n. 932 at 122-4, Hunt, *supra* n. 930 at 472-3 and Burchell and Milton, *supra* n. 1285 at 177-82.

¹⁴⁵⁸Note, however, the very strict controls placed on such activities, and in particular on medical experimentation (see for example Burchell, Jonathan "Non-therapeutic medical research on children" 95 (1978) *South African Law Journal* 193). In general see Burchell and Hunt, *supra* n. 517 at 372, Hunt, *supra* n. 930 at 473 and Burchell and Milton, *supra* n. 1285 at 178. See also *Stoffberg v Elliot* 1923 CPD 148.

participation in sport is valid where the injuries are not serious and result from the sport being conducted in accordance with its rules. Consent even embraces fouls which, although contrary to the rules, are normally expected during the game, but consent does not cover aggressions that are not normally expected.¹⁴⁵⁹ However perhaps the most interesting South African cases are two dealing with assaults taking place during customary or religious rituals: In *R v Njikelana*¹⁴⁶⁰ consent was recognised where the injury amounted to painful but temporary irritation of the bladder after application of a powder that supposedly had aphrodisiac properties, but in *S v Sikunyana*¹⁴⁶¹ consent was held to be invalid where the ritual involved putting hot coals on the complainant's head and body. These two cases are useful in that they indicate that it is possible for the law to respect autonomy by remaining neutral in so far as the *purpose* of an assault is concerned (which is clearly what the court in *Brown*, swayed by prejudice against sadomasochism, failed to do) but nevertheless to impose limitations on the *degree of harm* which may be consented to, which was the approach adopted by Slynn LJ.

6.4.2.3 The limits of consent.

It may seem that by addressing the issue of the limits of consent I have strayed quite far from the theme of this chapter, which is what type of depictions warrant regulation on the basis of incitement. However, given the fact that incitement to unlawfulness is an essential element of incitement, it was necessary to probe the limits of consent in the realm of sexuality, because it is precisely the issue of consent which determines whether an activity is unlawful. In light of the above, I would argue that there is no good reason why sadomasochistic activity should stand as an exception to the general principle of autonomy, and that consent to such activity ought therefore to be recognised by the law. This having been said, I would support Feinberg's argument that the law should intervene to protect society from the costs it has to bear when sadomasochists injure themselves to the extent that they require medical treatment¹⁴⁶² - a test which was indeed suggested by counsel for one of the appellants in *Brown*.¹⁴⁶³ The results of each case would obviously depend upon an application of this test to the facts, and it might well transpire that heretofore

¹⁴⁵⁹*Boshoff v Boshoff* 1987 (2) 694 (O). In general on consent to assault in the course of sports contests see Burchell and Hunt, *supra* n. 315 at 373-4, Hunt, *supra* n. 930 at 142 and Snyman, *supra* n. 932 at 123.

¹⁴⁶⁰1925 EDL 204.

¹⁴⁶¹1961 (3) SA 549 (E).

¹⁴⁶²Indeed, even if they killed themselves they would still impose financial costs upon society and might also cause emotional harm to those who discovered them.

¹⁴⁶³[1993] 2 ALL ER 75 at 85f.

permitted activities - such as boxing - might be found to be unlawful.¹⁴⁶⁴ Such issues lie outside the scope of this thesis. What I have sought to argue is that the limits of consent ought to depend upon the degree of injury inflicted, rather than the nature of the activity. The implications of such a test for the law of incitement are obvious - since incitement applies only to conduct which is unlawful, recognition of the individual's capacity to consent to sadomasochistic activity (subject to the limit I have suggested) means that it is not satisfactory to state that material may be proscribed where it incites consumers to "violence" *per se*. Rather the rule should be that material may not incite consumers to acts of *non-consensual* violence. What implications does this have for the civil action I propose?

6.4.2.4 Further defining harmful material

The most conspicuous feature of the debate on the legal status of sadomasochistic materials has been a general disregard of their most important feature - namely the consensual nature of the practices they depict. In her analysis of the Attorney General's report, West criticises its inclusion of consensual sadomasochistic depictions in its definition of "violent pornography", arguing firstly that on the Commission's own view of causation ("what you see is what you'll do"), the most that exposure to materials could incite is consensual sadomasochism, and secondly that none of the empirical evidence suggests that exposure to materials depicting consensual sadomasochism incites true (that is, non-consensual) violence.¹⁴⁶⁵ Indeed, as Vance points out, the condemnatory attitude towards sadomasochistic materials manifested in the report raises doubts as to whether the commissioners appreciated the difference between violence which is real and coerced on the one hand and that which is simulated and consensual on the other, as Vance explains¹⁴⁶⁶

When we see science-fiction movies, for example, we do not leave the theatre believing that the special effects were real or that the performers were injured making the films. But the commissioners assumed that images of domination and submission were both real and coerced.

¹⁴⁶⁴England's Law Commission admitted that it was unable to bring boxing within the scope of any test that could be used to justify consent to any of the other existing categories of assaults causing actual bodily harm, and that the lawfulness of boxing was therefore anomalous - *supra*, n. 1445 at 2.9, 10.18-10.22.

¹⁴⁶⁵West, Robin "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" 1987 *American Bar Foundation Research Journal* 681 at 702-03 and 705.

¹⁴⁶⁶Vance, *supra* n. 1249 at 43. See also Thompson, *supra* n. 1405 at 129-30 and Cowie, *supra* n. 491

Another interesting feature of the debate surrounding sadomasochistic material is the coincidence between the findings of the Commission and the views of those members of the feminist movement who favour censorship of sadomasochistic materials but whose ideology is otherwise at odds with the Commission's conservative rationale for censorship.¹⁴⁶⁷ Thus West notes that¹⁴⁶⁸

...like the commissioners, anti-pornography feminists define sado-masochistic pornography as "violent" in spite of the fact that the practices depicted are consensual, not violent, and in spite of the lack of evidence linking sado-masochistic practice or pornography with acts of violence against women...Sado-masochistic pornography is harmful, according to anti-pornography feminists, and even "violent", *whether or not it actually causes particular acts of violence*, because it encourages women to accept and even enjoy sexual inequality. The fact that some women enjoy sado-masochistic sexual practices proves rather than disproves the point; female "enjoyment", like female "consent", is so problematic in this violent and patriarchal culture that the consensual enjoyment of pain or bondage can never be evidence of an authentic female sexual response. Rather, sado-masochism, its depiction, and its enjoyment all evidence the extent of women's "false consciousness". (Emphasis in the original).

Similarly she states that¹⁴⁶⁹

Anti-pornography feminists also, of course, condemn sado-masochism, degrading sex, and their pornographic representations, and if those practices are conducive to pleasure, they are opposed to the pleasure as well. I am skeptical of the feminist condemnation of sado-masochism and of sado-masochistic pornography, and I am even more skeptical of the anti-pornography feminist's broader condemnation of "degrading sex", of female sexual submission, of virtually all consensual heterosexuality, of butch / femme lesbianism, and of their depictions.

¹⁴⁶⁷See the excerpts from the report collated by West, *supra* n. 1465 at 698, which justify the need for censorship by referring to values such as the need for decency, the discouragement of promiscuity, disapproval of sex for pleasure rather than procreation, and the need to support marriage and family values. For a discussion of the important link between moralist attempts to regulate pornography and underlying social attitudes to sexual conduct see Gey, *supra* n. 477 at 1626-30. For an interesting argument *urging* a feminist alliance with moral conservatives see Jacobs, Andrew M. "Rhetoric and the creation of rights: MacKinnon and the civil right to freedom from pornography" 42 (1994) *Kansas Law Review* 785.

¹⁴⁶⁸West, *supra* n. 1465 at 703-04.

¹⁴⁶⁹*Ibid.*, 707.

The denial by some feminists of women's capacity to consent to types of intercourse defined as "unequal" (which some would say includes even conventional heterosexual intercourse), has already been discussed at 2.3.2, 2.3.7 and 2.3.9 above, where it was noted that this view of sexuality is also reflected in feminist approaches to pornography. Thus MacKinnon¹⁴⁷⁰ denies that women are capable of consenting to appear in sexually explicit materials, or at least that lack of consent should be presumed,¹⁴⁷¹ arguing that the case of *New York v Ferber*¹⁴⁷² constitutes a precedent supporting their position. Yet of course this effectively reduces women to the status of children in the eyes of the law.¹⁴⁷³ It is therefore unsurprising that the Indianapolis ordinance was cast in such terms that all sado-masochistic material would be assumed to depict real rather than consensual violence,¹⁴⁷⁴ but it seems that on the feminist view of consent discussed in this paragraph, even material depicting sadomasochistic which was undoubtedly consensual would also be proscribed. This is illustrated by the fact that one of the consequences of the adoption by the Canadian Supreme Court of the feminist argument against pornography in the *R v Butler* decision, was the confiscation by Canadian customs officers of homosexual and lesbian sadomasochistic materials which, because they contained depictions of dominant / submissive relationships fell clearly within the *Butler* court's definition of obscenity.¹⁴⁷⁵

On the other hand, some feminists argue that sadomasochism should be permitted so long as it is founded on true consent,¹⁴⁷⁶ and that where activities such as consensual bondage (which, as they point out, can occur in the context of either heterosexuality or lesbianism,¹⁴⁷⁷ and with women as either submissive or dominant¹⁴⁷⁸) are

¹⁴⁷⁰MacKinnon, *supra* n. 466 at 37.

¹⁴⁷¹See for example s 16(3)(5)(a) of the Indianapolis ordinance, which, because of the evidentiary presumptions it contained, effectively prevented defendants charged with trafficking in pornography from disproving that the material subordinated women by showing that those appearing in it did so consensually.

¹⁴⁷²458 U.S. 747 (1982).

¹⁴⁷³Downs, *supra* n. 286 at 166.

¹⁴⁷⁴Duggan, Hunter and Vance, *supra* n. 489 at 140.

¹⁴⁷⁵Magnet, *supra* n. 482 at 247. See also the editorial opinion in *The Nation* (Vol 255, 13 July 1992, 39).

¹⁴⁷⁶Downs, *supra* n. 286 at 186-7, Scruton, Roger *Sexual Desire: A Moral Philosophy of the Erotic* (New York, Free Press 1986) 298 and 301.

¹⁴⁷⁷Duggan, Hunter and Vance, *supra* n. 489 at 137, 139 and 145.

¹⁴⁷⁸Indeed, the evidence is that by far the greater proportion of men who resort to prostitutes for a sadomasochistic experience do so in order to be dominated rather than to dominate. See McClintock, Anne "Maid to Order - Commercial S/M and Gender Power" in Gibson, Pamela and Gibson, Roma (eds) *Dirty Looks - Women, Pornography, Power* (London, British Film Institute, 1993) 207 at 211-12.

depicted, the consent of the participants means that the depictions cannot be classified as "violent" pornography. As Rodgeron and Wilson state¹⁴⁷⁹

There is the added complication that images such as those of women being tied up or spanked appeal to both male and female sadomasochists, who enjoy this kind of theatrical play in their sexual fantasies. These sorts of images have also been called 'violence' but these fantasies and practices are entered into consensually and are enjoyed by both partners; a far cry from real sexual assault...Sexual fantasies and sexual behaviour do not necessarily mirror attitudes and behaviour outside the context of sexual activity.

Similarly Segal criticises the failure of psychological research on the effects of pornography to distinguish between fantasy and reality, and notes that women, like men, are often aroused by sado-masochistic or other violent fantasy, but that this neither means that women desire to be raped in reality or that people engaging in such fantasies are likely to carry them through to real violence.¹⁴⁸⁰ Similarly, as West states¹⁴⁸¹

...the categorization of sado-masochism as "sexual violence" is troubling...there are obvious important differences between rape and consensual bondage, just as there are important differences between battery and the consensual enjoyment of physical pain in order to heighten sexual pleasure. There are also, therefore, important differences between the *depiction* of violent rape or battery for sexual pleasure and the depiction of perhaps shocking but nevertheless fully consensual sado-masochistic practices for sexual pleasure.

(Emphasis in the original).

Further she states that¹⁴⁸²

In content, effect, and meaning, pornographic depictions of sado-masochistic sexuality are as different from depictions of non-consensual violence, battery, assault, and rape as sado-masochistic sexuality *itself* is different from rape and battery. Women's response to rape and battery is unequivocal: rape and battery are violent and deathly frightening experiences; no woman finds them

¹⁴⁷⁹Rodgeron and Wilson, *supra* n. 496 at 59.

¹⁴⁸⁰Segal, *supra* n. 1231 at 13-14.

¹⁴⁸¹West, *supra* n. 1465 at 705.

¹⁴⁸²*Ibid.*, 708.

pleasurable. The existence of pornography that suggests that women enjoy or deserve rape or battery is obviously a very serious problem. Women's response to consensual bondage, however, or the consensual tolerance of pain in order to heighten sexual pleasure varies widely (as does men's). The existence of pornography that depicts the enjoyment of consensual bondage or pain and that clearly meets the needs of people who take pleasure in these practices may also be a serious problem. But if it is, it is a very different problem from that posed by pornography that suggests that women enjoy or deserve rape or battery. It is a stunning testimony to the confusion that surrounds conservative and feminist treatments of pornography alike that both groups insist upon merging these two types of pornography. (Emphasis in the original).

The contrast between differing feminist approaches to sadomasochism is well illustrated by comparing Pollard's definition of "violent pornography" as being material¹⁴⁸³

...that concurrently depicts both sexual explicitness and physically violent acts between or among those engaged in the sexual activity

with that suggested by Wesson, who defines pornography as¹⁴⁸⁴

...material that links the viewer's or reader's sexual gratification with the infliction of violence. Pornography is a depiction, in any medium, of violence directed against, or pain inflicted upon, *an unconsenting person* or child, for the purpose of anyone's real or apparent sexual arousal or gratification, in a context suggesting endorsement or approval of such behaviour, and that is likely to promote or encourage similar behaviour in those exposed to the depiction.

(Emphasis added).

Pollard's definition imposes a blanket prohibition on depictions of sexual violence, whereas Wesson's inclusion of the requirement that the depiction be of violence towards an *unconsenting* person would exempt depictions of consensual sadomasochism from liability.¹⁴⁸⁵

¹⁴⁸³Pollard, *supra* n. 189 at 155.

¹⁴⁸⁴Wesson, *supra* n. 1231 at 915 and Wesson, *supra* n. 1336 at 851-2.

¹⁴⁸⁵Wesson, *supra* n. 1336 at 872.

Assuming then that consensual sadomasochism may be both engaged in and depicted (subject to the limit that harm necessitating medical attention may not be consented to), how is one to distinguish between material which depicts truly consensual sadomasochistic conduct, and that which depicts violence which the protagonist(s) do not consent to but which is depicted in a manner suggesting that it is pleasurable? This is a vitally important point because, as was noted above, materials depicting nonconsensual sex as being desired by the victim are a prime example of the type that incites harm. On the other hand, sadomasochistic material will, given its very nature, often depict feigned resistance to intercourse, in much the same way as themes of apparent resistance to sexual intercourse are common in romantic fiction. Obviously then, whether liability should ensue from exposing consumers to material will depend on whether that material depicts violence that is *genuinely* consented to, or violence which is not consented to but which is depicted as pleasurable *despite* the lack of consent. This is a fine but nevertheless fundamental distinction which, in the final analysis, will simply depend upon all the specifics of the depiction in question. As a starting point however, the major focus should be upon what the depiction *prima facie* shows. Thus if a depiction shows sex coupled with violence, that depiction should be taken at face value and will therefore be actionable. Where however a depiction shows violence that the participants appear to consent to, everything will turn upon whether the consent *as depicted* is genuine or not, taking into account the context of the depiction. If the depiction is of activity which is *in fact unconsented to* but which is presented in an approving manner, liability will arise, but where the consent *is depicted as real* the material cannot, in accordance with the discussion of consensual sadomasochism above, be held to incite harm. Finally, I would repeat the caveat relating to context discussed at 6.4.1 above - namely that here context should be given a restricted interpretation, one that is confined to the *immediate* context of the activity depicted, in order to prevent those who publish material showing nonconsensual violence escaping liability by the simple recourse of including in some other part of the work elements suggesting that the violence was consensual. Concrete examples can be advanced to illustrate the operation of these principles: A film containing scenes in which people are shown engaging in activities combining sex and violence with no indication that consent has been given would clearly be actionable. A film containing scenes of the same activity but with indications either in the scene itself or in a scene immediately connected with it that the violence was consented to would be saved by the presence of consent. However, a film containing scenes of sexualised violence with no indication in that scene or in those related to it that consent had been given would *not* be saved by an indication in *an unrelated* scene that the violence was consensual. These decisions may on occasion be

difficult, but it should be remembered firstly that under the test I have proposed liability will arise in what is after all a very narrow category of materials, and secondly that since in many jurisdictions there are administrative tribunals responsible for publications classification which make contextual judgments of this type, there is no reason why courts would also not be able to do so.

6.5 Incitement liability and the First Amendment

Assuming that a plaintiff succeeds in establishing liability on the part of a defendant who has published material of a type that incites consumers to unlawful conduct, that is not the end of the inquiry because in cases in which the plaintiffs have sought to hold publishers liable on the basis of incitement, the courts in the United States have usually held that in order to recover damages the plaintiffs must satisfy the requirements laid down in *Brandenburg v Ohio*¹⁴⁸⁶ (discussed at 1.4.4 above) in which the court held that¹⁴⁸⁷

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is likely to incite or produce such action.

or unless

...such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Thus, just as First Amendment concerns led to the "constitutionalisation" of the tort of defamation in *New York Times v Sullivan*,¹⁴⁸⁸ so too the courts have imposed an additional constitutional requirement in torts cases arising out of the suggestive power of the media, which means that in addition to the usual duty of care, foreseeability and causation requirements of a tort action, plaintiffs must also prove the elements of intent, imminence and likelihood laid down in *Brandenburg*.¹⁴⁸⁹ This approach has been taken in cases where plaintiffs have alleged that they were harmed by *others* who acted upon the suggestion of the defendant and also where victims harmed *themselves* and they or their families filed suit alleging that the harm was

¹⁴⁸⁶395 U.S. 444 (1969). *Brandenburg* was subsequently applied in *Hess v Indiana* 414 U.S. 105 (1973) and *N.A.A.C.P v Claiborne Hardware Co.* 458 U.S. 886 (1982).

¹⁴⁸⁷395 U.S. 444 (1969) at 447.

¹⁴⁸⁸376 U.S. 254 (1964) at 268-9.

¹⁴⁸⁹Brill, Laura "The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm" 94 (1994) *Columbia Law Review* 984 at 987.

inspired by the defendant. In the vast majority of cases, tort actions were denied on the ground that the requirements set by *Brandenburg* had not been met.

6.5.1 Applying the *Brandenburg* standard

Dealing first with cases in which harm was caused to the victim by others, in *Olivia N. v National Broadcasting Co.*¹⁴⁹⁰ the court refused to hold a television network liable for the rape of a child with a bottle by a group of teenagers a few days after the portrayal of object-rape on television, holding that as the network had not intended to incite unlawful conduct, the intent requirement in *Brandenburg* had not been met.¹⁴⁹¹ Similarly, in *Yakubowicz v Paramount Pictures Corp.*¹⁴⁹² the court denied recovery to parents whose son was killed by a boy who had seen *The Warriors*, a gang warfare film, holding that the film could not be taken to have urge violence on the part of viewers and was thus protected by the First Amendment.¹⁴⁹³ So far as cases in which the victims caused harm to themselves are concerned, in *Waller v Osbourne*¹⁴⁹⁴ and *McCollum v CBS Inc.*¹⁴⁹⁵ the courts rejected claims by parents whose sons attempted or committed suicide after listening to heavy metal rock recordings. In *McCollum* the court held that the songs, while arguably advocating suicide, were not intended to bring about the imminent suicide of listeners, and were therefore protected under the *Brandenburg* rule.¹⁴⁹⁶ The courts also rejected a suit brought in *Herceg v Hustler Magazine Inc*¹⁴⁹⁷ by parents whose son died of autoerotic asphyxiation after reading a magazine article describing the practice. The majority rejected the argument that because the speech was obscene, the test in *Brandenburg* did not need to be met, and held that because the article did not constitute incitement (as the magazine publishers had not wanted their readers to die and had indeed warned against the practice described in the article), the claim must fail no matter what the degree of negligence, foreseeability or causation.¹⁴⁹⁸ Similarly, the courts held that the intent requirement of *Brandenburg* had not been met in *Watters v TSR, Inc.*,¹⁴⁹⁹ a claim brought by parents whose son committed suicide after playing the fantasy game *Dungeons and Dragons*, and in *DeFilippo v NBC*¹⁵⁰⁰ where parents brought an action after their son hanged himself while copying a stunt performed on television.¹⁵⁰¹ Finally, although

¹⁴⁹⁰126 Cal.App. 3d 488, 178 Cal.Rptr. 888 (1981) (*cert. denied*, 458 US 1108 (1982)).

¹⁴⁹¹At 892-3.

¹⁴⁹²404 Mass. 624, 536 N.E. 2d 1067 (1989).

¹⁴⁹³At 1071.

¹⁴⁹⁴763 F. Supp. 1144 (M.D. Ga. 1191).

¹⁴⁹⁵202 Cal. App. 3d. 989, 249 Cal.Rptr. 187 (1988).

¹⁴⁹⁶At 193.

¹⁴⁹⁷814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1989).

¹⁴⁹⁸At 1021-5.

¹⁴⁹⁹715 F.Supp 819 (W.D. Ky. 1989) (*aff'd*, 904 F.2d 378 (6th Cir. 1990)).

¹⁵⁰⁰446 A.2d 1036 (R.I. 1982).

¹⁵⁰¹At 1040-2.

not involving incitement to any specific act, one might also include within this class the case of *Zamora v CBS*,¹⁵⁰² in which the court denied a claim brought by a 15 year old who sued several television networks, claiming that their violent programming had caused him to develop a psychopathic personality and commit murder. In all these cases it is clear that the courts interpreted the intent requirement in the strictest possible way - that is, as requiring proof of *actual* intent, in the sense of it being the defendant's aim and object to incite harm, before being willing to impose liability.

Although the intent requirement in *Brandenburg* has proved to be an obstacle to plaintiffs seeking to impose liability for incitement, the imminence requirement (that for liability to arise for incitement, the incitement must be to "imminent" unlawfulness) has generally not shielded plaintiffs.¹⁵⁰³ As Crump points out, the "imminence" requirement cannot mean "immediately", because this would mean, for example, that a person who incited another to commit a murder after an elapse of time would escape liability. Rather, he states, imminence should be interpreted as meaning that the harm was a predictable result of the incitement.¹⁵⁰⁴ The validity of this interpretation is indeed borne out by court decisions such as *People v Rubin*¹⁵⁰⁵ where the court held that the imminence requirement was satisfied where the accused had offered \$ 5000 to anyone who killed a member of the American Nazi party at a march to be held in five weeks' time.

Before leaving this survey of cases, it is necessary to mention a rare case in which the requirements of *Brandenburg* were in fact satisfied, the circumstances of which are of particular relevance to this thesis. The case is *S & W Seafoods v Jacor Broadcasting*¹⁵⁰⁶ in which the court held that the speech of a radio station talk show host, who had urged listeners to seek out the plaintiff and to make rude gestures to him and to spit on him, was not constitutionally protected. As Sims notes,¹⁵⁰⁷ the court had no difficulty in finding that the intent requirement of *Brandenburg* was satisfied, as the talk show host had obviously intended harm to the plaintiff.¹⁵⁰⁸ What is particularly significant about the case however, and what distinguishes it from all other cases involving incitement based liability, is the fact that liability arose not from any physical harm done to the plaintiff (because none of the listeners took the talk-

¹⁵⁰²480 F. Supp. 199 (S.D. Fla. 1979).

¹⁵⁰³Although in the *Zamora* case the court held that the imminence requirement meant that liability could not arise on the basis of cumulative, long-term exposure to material.

¹⁵⁰⁴Crump, *supra* n. 1331 at 59-61.

¹⁵⁰⁵96 Cal. App. 3d 968 at 978; 158 Cal.Rptr. 488 at 492-3 (1979), (*cert. denied* 449 U.S. 821 (1980)).

¹⁵⁰⁶390 S.E.2d 228 (Ga. 1990).

¹⁵⁰⁷Sims, *supra* n. 122 at 240-1.

¹⁵⁰⁸*Ibid.*, 230-1.

show host's advice) but simply from his *act of incitement*. In other words, *S & W Seafoods* establishes that where A urges B to harm C, C has a right of action against A, and such liability exists *irrespective* of whether B acts upon A's urgings. This is precisely the type of liability I argued for at 6.3 above, and I would therefore argue that *S & W Seafoods* constitutes an important development in tort liability which could be used to impose liability on publishers of material which combine sex and violence.

The above cases clearly indicate that where a plaintiff seeks to impose liability on a publisher on the basis of incitement, the requirements contained in *Brandenburg*, and in particular that of intent, generally serve to relieve the defendant of liability. However, this is not to say that *Brandenburg* will always do so. There are two distinct types of case in which plaintiffs have succeeded in affixing publishers with liability even though the *Brandenburg* requirements were *not* satisfied, and these are dealt with in the next two sections.

6.5.2 Offers to commit crime

The first type of case in which liability has attached to a publisher are those involving offers to commit crime. In *Soldier of Fortune v Braun*¹⁵⁰⁹ the 11th circuit upheld a suit brought against *Soldier of Fortune* magazine by the family of a victim murdered by a contract killer who had been hired through an advertisement in the magazine. The court held that as phrased, the advertisement contained an unambiguous offer of unlawful services¹⁵¹⁰ and that although, as was held in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*¹⁵¹¹ and *Central Hudson Gas & Electric Corp. v Public Service Commission*,¹⁵¹² "commercial speech" is entitled to First Amendment protection, it loses such protection when, as was stated in *Pittsburgh Press Co. v Pittsburgh Commission on Human Relations*,¹⁵¹³ it involves advertisements for unlawful goods or services. Similarly, the court in *Norwood v Soldier of Fortune Magazine, Inc.*¹⁵¹⁴ rejected a First Amendment defence in a case involving the same advert as that in *Braun* plus another that was similarly worded. Furthermore, although in *Eiman v Soldier of Fortune Magazine, Inc.*¹⁵¹⁵ the 5th circuit denied a claim by the survivors of a victim who had been murdered by an

¹⁵⁰⁹968 F.2d 1110 (11th Cir. 1992) (*cert. denied*, 113 S. Ct. 1028 (1993)).

¹⁵¹⁰At 1118.

¹⁵¹¹425 U.S. 748 (1976) at 763.

¹⁵¹²447 U.S. 557 (1980) at 566.

¹⁵¹³413 U.S. 376 (1973). This principle was re-affirmed in *Central Hudson Gas & Electric Corp. v Public Service Commission* 447 U.S. 557 (1980) at 564.

¹⁵¹⁴651 F. Supp. 1397 (W.D. Ark. 1987).

¹⁵¹⁵880 F.2d 830 (5th Cir. 1989) (*cert. denied* 493 US 1024 (1990)).

assassin who had responded to an advert in the same publication, it is significant that, as Wesson notes,¹⁵¹⁶ the court did not decide the case on free speech grounds, but rather on the basis that the wording of that particular advertisement did not constitute a clear offer to commit a crime and that therefore it was not reasonably foreseeable to the publisher that harm would arise from it. Indeed in none of the cases involving offers to commit crime did the courts suggest that the plaintiffs were required to satisfy the requirements of *Brandenburg*.

Yet why did the courts draw so clear a distinction offers to commit crime and incitement? The concepts do of course differ in that an offer is a statement indicating a willingness to commit unlawful acts whereas incitement consists of an exhortation to others to act unlawfully, and it could perhaps be argued that the threat of unlawful action is greater in relation to offers, in that the person who will commit the unlawful act has already made their mind up to do so, whereas in the case of incitement the incitee might never decide to act upon the exhortation. However, against this it can be argued that both offer and incitement evince defiance of the law and a desire to harm others.¹⁵¹⁷ I would therefore support Wesson's suggestion that the cases involving offers to commit crime provide support for the argument that material which incites violence should be proscribable,¹⁵¹⁸ and on this basis would argue that although the precedent of these cases is of limited usefulness in that the *Brandenburg* doctrine was not considered in them, they are useful as examples of a distinct class of tort cases in which it was not thought necessary to require that the *Brandenburg* rules be satisfied.

6.5.3 Incitement liability despite *Brandenburg*

More to the point than the cases involving offers to commit crime is one in which the court *did* reach its decision on the basis of incitement and imposed liability in circumstances where, based on the precedent of the cases discussed at 6.5.1 above, one would have thought that *Brandenburg* would have precluded liability. The case concerned is *Weirum v RKO Gen. Inc.*,¹⁵¹⁹ in which the court held a radio station liable after it organised a road race in which contestants would try to find a broadcaster travelling around the city in a car, and during which two teenage drivers killed another road user. The court held that the radio station had "stimulated" the listeners to imminent lawless action in the form of reckless driving,¹⁵²⁰ despite the

¹⁵¹⁶Wesson, *supra* n. 1336 at 865.

¹⁵¹⁷The policy considerations in favour of imposing liability for incitement are discussed in La Fave and Scott, *supra* n. 149 at 487-9.

¹⁵¹⁸Wesson, *supra* n. 1336 at 861.

¹⁵¹⁹15 Cal.3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).

¹⁵²⁰At 40 and 48.

fact that the broadcaster certainly had not intended the harm.¹⁵²¹ The court rejected the argument that the First Amendment barred recovery, holding that "[T]he First Amendment does not sanction the infliction of physical injury merely because it is achieved by word, rather than act".¹⁵²² Although the court engaged in no further First Amendment analysis, this case clearly stands as an exception to the general trend in that the intent requirement of *Brandenburg* did not serve to defeat liability. The academic response to *Weirum* has been varied: Brill¹⁵²³ concedes that the decision is incompatible with *Brandenburg*, but argues that *Brandenburg* was in any even inapplicable because, she says, *Weirum* should, like *Braun*, be classified as a case involving a legitimate restriction on "commercial speech".¹⁵²⁴ However this argument fails in view of the fact that nowhere in the *Weirum* judgment is the issue of commercial speech mentioned. On the other hand, Wesson endorses *Weirum* as an example of the imposition of liability notwithstanding existing First Amendment authority.¹⁵²⁵ Most significant however is the analysis offered by Crump, who argues that *Weirum* is compatible with *Brandenburg*, but on the basis that where the intent requirement in *Brandenburg* states that the inciter's conduct must be "directed to" inciting imminent lawless action, this must mean something less than actual intent, since the radio station's *object* was clearly not to cause road accidents.¹⁵²⁶ This argument is also advanced by Sims, who also notes lack of actual intent on the part of the radio station,¹⁵²⁷ and states that if it was held that under *Brandenburg* liability for incitement could arise only if there was intentional advocacy of unlawful conduct, then in virtually no case, *Weirum* included, could liability be imposed.¹⁵²⁸ This suggestion by Crump and Sims that the intent requirement in *Brandenburg* should be read as requiring something less than actual intent raises a crucial issue to which attention is now turned.

¹⁵²¹Wesson, *supra* n. 1336 at 864 n. 83.

¹⁵²²15 Cal. 3d 40 at 47, 539 P.2d 36 at 40, 123 Cal. Rptr. 468 at 472.

¹⁵²³Brill, *supra* n. 1489 at 999-1000.

¹⁵²⁴The Supreme Court has held that commercial speech (such as advertising) may be regulated if required to serve a substantial and pressing governmental interest, provided that the regulation is no more than is required to serve that interest. Examples of permissible regulation mentioned by the court include prohibition of fraudulent or misleading advertising or advertisements for illegal products or services - see *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 U.S. 748 (1976), *Ohrlik v Ohio State Bar Association* 436 U.S. 447 (1978) at 455-6, *Central Hudson Gas & Electricity Corporation v Public Service Commission* 447 U.S. 557 (1980) at 562-6 and *Bates v State Bar of Arizona* 433 U.S. 350 (1989).

¹⁵²⁵Wesson, *supra* n. 1336 at 862.

¹⁵²⁶Crump, *supra* n. 1331 at 42-3.

¹⁵²⁷Sims, *supra* n. 122 at 240-1.

¹⁵²⁸*Ibid.*, 256-7.

6.5.4 The intent requirement in *Brandenburg*

As was seen in section 6.5.1 above, the *Brandenburg* principles, and in particular the intent requirement, constitute a major impediment to plaintiffs seeking to hold publishers liable on the basis of incitement. This is because the prevailing approach is to treat the requirement as one of actual intent - that is, as meaning that liability arises only if it was the speaker's objective to incite harm - the effect of which, as the case law illustrates, is that it is virtually impossible to hold publishers liable.¹⁵²⁹

Two arguments have been proposed as a means of circumventing this problem. The first points to the fact that *Brandenburg* and the cases in which the Supreme Court endorsed its rule (*Hess v Indiana* and *N.A.A.C.P v Claiborne Hardware*) all involved "political speech" to crowds, in relation to which governmental prosecution will be viewed with the utmost suspicion, and where a certain amount of hyperbole is to be tolerated.¹⁵³⁰ By contrast, the same considerations do not apply in other cases, and for this reason Greenawalt highlights the distinction between "political" or "ideological" speech on the one hand and "non-ideological" speech on the other, and argues¹⁵³¹ that although this distinction was not addressed by the court in *Brandenburg*, it must necessarily be implied in the decision in order to avoid absurd results of which he gives examples (such as the First Amendment being held to protect a letter from one nephew to another urging the killing of a rich uncle so as to get his property under inheritance¹⁵³²). He thus states that to hold (as do some theorists) that the *Brandenburg* requirements must be met in all instances of incitement would contradict¹⁵³³

...the long-standing assumption that agreements to commit ordinary crimes does [sic] not raise any constitutional difficulties.

A similar conclusion is reached by La Fave and Scott¹⁵³⁴, who state that the First Amendment does not prevent the criminalisation of deeds such as solicitation (incitement), conspiracy or the obtaining of property by false words, citing the following from *Stromberg v California*¹⁵³⁵ in support:

¹⁵²⁹Crump, *supra* n. 1331 at 64.

¹⁵³⁰Pollard, *supra* n. 189 at 142.

¹⁵³¹Greenawalt, *supra* n. 147 at 748-67 and 784.

¹⁵³²*Ibid.*, 652.

¹⁵³³*Ibid.*, 784. For one of those holding the opposite opinion see Wirenius, *supra* n. 199 at 43-4, 70-1.

¹⁵³⁴La Fave and Scott, *supra* n. 149 at 170-1.

¹⁵³⁵283 U.S. 359 (1931).

There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime....

These authors too would confine the import of *Brandenburg* to "...advocacy of the necessity or propriety of violence to accomplish political reform..".¹⁵³⁶ Similarly, speaking in the specific context of civil actions brought on the basis of incitement, Sims argues that given its origins, the application of *Brandenburg* in such cases is inappropriate.¹⁵³⁷ For this reason he argues¹⁵³⁸ that liability for physical injury caused by expression might be determined by using the "clear and present danger" test found in *Dennis v United States*¹⁵³⁹ which, in so far as incitement is concerned, was over-ruled by *Brandenburg*, and in terms of which the validity of a restriction on freedom of expression was weighed by determining

..whether the gravity of the 'evil' [that might be caused by the expression], discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

Although it would avoid the difficulties associated with the *Brandenburg* test, the argument that *Brandenburg* should not apply because cases in which civil damages are sought on the basis of incitement do not amount to "political speech" is not entirely satisfactory, first because it would require the courts to depart from a long line of such cases in which, as we have seen, it has been held that *Brandenburg* must be adhered to, and secondly because the distinction between ideological and non-ideological speech which the argument rests upon might not always be easy to draw.

Far more useful is the argument (touched upon at the end of section 6.5.3 above) which is presented as an alternative by Sims and also advanced by Crump and others. This argument is that *Brandenburg* does apply, but that the intent requirement be interpreted as requiring something less than actual intent. As Pollard argues, while *Brandenburg* certainly imposed some fault requirement in that the court held that speech must be "directed to" producing an unlawful act, the case gives no indication of precisely what type of fault is required. On this basis, she argues that the courts should interpret the case not as requiring fault in the sense of a desired outcome, but rather fault in the sense that the outcome was reasonably foreseeable¹⁵⁴⁰ - in other

¹⁵³⁶La Fave and Scott, *supra* n. 149 at 170 n. 17.

¹⁵³⁷Sims, *supra* n. 122 at 256-9.

¹⁵³⁸*Ibid.*, 256-62, 278-9.

¹⁵³⁹183 F.2d 201 (2d Cir. 1950) 212.

¹⁵⁴⁰Pollard, *supra* n. 189 at 139-40 and 155.

words fault based on negligence. A similar argument is advanced by Schauer¹⁵⁴¹ who suggest that First Amendment rules - such as those contained in *Brandenburg* standard of incitement - ought not to bar civil actions where negligence can be shown. This is of course the situation in cases of libel involving private figure plaintiffs who, in terms of the rule in *Gertz v Robert Welch, Inc.* are able to obtain a remedy for defamation without discharging the heavier onus of showing intent as is required of public figure plaintiffs by *New York Times v Sullivan*. Similarly, Wesson¹⁵⁴² and Feinberg¹⁵⁴³ both argue that where a plaintiff seeks damages for personal injury caused by incitement, the normal rules governing personal liability actions should apply, and so negligence should suffice to found liability.

This argument is, however, rejected by Brill, who states that a retreat from the strict *Brandenburg* test would ¹⁵⁴⁴

...undermine First Amendment jurisprudence by creating new opportunities for the suppression of unpopular ideas...

She argues that negligence based liability would be unpredictable, and that this unpredictability would have a chilling effect on speech as producers of entertainment strive to steer well clear of a line they cannot distinctly see.¹⁵⁴⁵ Brill's contention is not without substance, as the standard of reasonableness arguably lacks the degree of precision necessary in determining the boundaries of freedom of expression. In response to Brill however, it can be argued that whereas the negligence standard may be insufficiently protective of freedom of expression, this is not the only possible standard of fault short of intent in the sense of conscious desire to achieve a particular result. As LaFave and Scott state,¹⁵⁴⁶ the Model Penal Code¹⁵⁴⁷ recognises four broad types of fault: (i) intent in the sense of wanting to achieve a particular

¹⁵⁴¹Schauer, Frederick "Mrs. Palsgraf and the First Amendment" 47 (1990) *Washington & Lee Law Review* 161 at 163-7.

¹⁵⁴²Wesson, *supra* n. 1336 at 852.

¹⁵⁴³Feinberg (*supra* n. 692 at 238-42) does not however advocate the imposition of criminal liability, firstly because those who imitate harms rarely if ever are motivated by depictions to commit harm in general (as opposed to the *specific* harm depicted by the material), rather the material suggests to those predisposed to harm others a new way of doing so. Such defendants would probably have harmed someone-else in a different way, and it is therefore unfair to blame A for the harm to society (which is what criminal law remedies) since that harm is likely to have occurred anyway. So far as the victim (C) is concerned however, that person should be allowed to bring a suit against A because he or she was the specific party harmed in the specific way suggested by the depiction. The second reason for making A civilly rather than criminally liable is the heightened chilling effect criminal liability has on freedom of expression (an issue which is dealt with at 7.2.1 below).

¹⁵⁴⁴Brill, *supra* n. 1489 at 991.

¹⁵⁴⁵*Ibid.*, 1039.

¹⁵⁴⁶La Fave and Scott, *supra* n. 149 at 214.

¹⁵⁴⁷Model Penal Code § 2.02(2).

consequence, (ii) intent in the sense that the accused subjectively knew that it was practically certain that his act would have a particular consequence, (iii) intent in the sense that the accused was subjectively aware of the risk that the consequence would possibly occur and yet acted reckless as to that possibility,¹⁵⁴⁸ and (iv) negligence in the sense that the accused ought reasonably to have avoided the risk (even though subjectively not appreciating that risk). The strict interpretation of *Brandenburg* requires type (i) fault which, as we have seen, renders it virtually impossible to affix publishers with liability, as it involves showing that they distributed material in order to incite unlawful acts. Type (ii) fault would also make it difficult to establish liability, as it would require the plaintiff to show that the defendant was subjectively aware that consumers would be incited, an argument which defendants could in many cases forestall by simply including disclaimers in their material of the type discussed at 6.4.1 above. Type (iii) fault is however more promising: While it requires a higher level of culpability than mere negligence (type (iv) fault), it does not require proof of subjective knowledge on the part of the defendant that harm would occur but rather proof that the defendant distributed material reckless as to the possibility that it might cause harm. In such circumstances fault would not be negated by a disclaimer, as a disclaimer would not entirely remove the possibility that a consumer, such as one who had not bothered to read the disclaimer, might nevertheless be incited by the material. Furthermore, as Pollard points out, the wealth of empirical evidence as to the effects of material combining sex and violence would make it very difficult for producers and distributors of such material to argue that they were unaware of the risks caused by their product.¹⁵⁴⁹ A standard of fault based on recklessness is also supported by Crump, who proposes intent should depend upon¹⁵⁵⁰

..the extent of the speaker's reckless indifference to the likelihood that some listeners might act in conformity with his encouragement..

Case authority for a recklessness standard can also be found in *American Booksellers Association v Hudnut*¹⁵⁵¹ where, in discussion that part of the Indianapolis ordinance which would have given plaintiffs harmed by pornography an action for damages, Easterbrook J stated

The law of libel has the potential to muzzle the press, which led to *New York Times v Sullivan*. A law awarding damages for assaults caused by speech also

¹⁵⁴⁸This coincides with what Roman-Dutch law calls *dolus eventualis*.

¹⁵⁴⁹Pollard, *supra* n. 189 at 140 n. 71.

¹⁵⁵⁰Crump, *supra* n. 1331 at 64.

¹⁵⁵¹771 F.2d 323 (7th Cir. 1985) at 333.

has the power to muzzle the press, and again courts would place careful limits on the scope of the right. Certainly no damages could be awarded unless the harm flowed directly from the speech and there was *an element of intent* on the part of the speaker, as in *Sullivan* and *Brandenburg*.
(Emphasis added).

What is interesting about this dictum is firstly the fact that Easterbrook J used the unspecific term "an element of intent", rather than "actual intent" or "specific intent" in stating that fault would be a requirement, which suggests that a degree of flexibility might be expected from the courts in this regard. Secondly, it is significant that whereas, on a strict reading at least, *Brandenburg* has been held to require actual intent, the standard imposed by *New York Times v Sullivan* is one of recklessness. In other words, the court in *Hudnut* referred to two *different* possible types of intent that might be required in a civil action, and left open the possibility that the lower standard (that of recklessness) might suffice in that type of case.

In light of the above, I would argue that the difficulty posed by the intent requirement in *Brandenburg* is not the insurmountable obstacle that it appears to be, and that there is room to interpret it as requiring a plaintiff to show that the defendant published the material concerned, reckless as to the possibility that it would incite consumers. Furthermore, such a standard is compatible with the characteristics of material combining sex and violence: As was stated in the discussion on context at 6.4.1 above, a standard of actual intent in cases where an action is brought on the basis of incitement would be unrealistic given the non-cognitive nature of sexually oriented materials and their ability to elicit an automatic reaction of arousal in consumers. Actual intent could be negated by the simple expedient of showing that the defendant's aim and object was not to incite harm. By contrast, the recklessness standard affixes defendants with liability wherever it can be shown that given the *prima facie* content of the materials they produced, they knew of the possibility that those materials created a risk of harm and yet proceeded nevertheless.¹⁵⁵²

6.5.5 Responsibility and incitement

An argument that has been raised against the concept of incitement based liability is that made by Brill, who says that imposing liability for imitative harms suggests a denial of the autonomy and dignity of the audience as rational individuals capable of

¹⁵⁵²Russell, Diana (ed) *Making Violence Sexy - Feminist Views on Pornography* (Buckingham, Open University Press, 1993) 4. The breadth of Russell's definition of pornography means that it would unquestionably fall foul of the First Amendment, but her point on intent (that liability will ensue where the defendant must have known that the materials he produced appeared to incite harm) is valid.

making their own choices.¹⁵⁵³ She also argues that such liability may be used as an excuse by persons who are convicted of such imitative crimes.¹⁵⁵⁴ In other words it is argued that if one accepts that the non-cognitive nature of sexually oriented materials elicits an automatic and irresistible reaction in consumers, one then has to address the possibility that defendants in sexual assault and rape cases will raise a "blame the book defence" and claim diminished responsibility on the ground that the arousing effects of the materials diminished intent in the same way as mental illness might do.¹⁵⁵⁵ Thus Brill states that it would be anomalous to allow a civil law action founded on the theory that the will of those exposed to such material was overborne through incitement, while the criminal law convicts such incitees as if they were still responsible for their actions.

The problem with this argument is that it misconstrues the nature of incitement based liability. In the first place, it bears repeating that incitement liability arises whether the harm eventuates or not - in other words, the *actus reus* of incitement is completed once the inciter makes the suggestion to the incitee and whether or not the incitee acts upon the suggestion. Secondly, so far as the "book made me do it" defence is concerned, it should firstly be noted that this defence has been explicitly rejected by the courts wherever it has been raised. Thus in *Schiro v Clark*¹⁵⁵⁶ the court rejected the accused's defence that pornography had caused him to lose the ability to appreciate the unlawfulness of the rape and murder he had committed. Similarly in *Zamora v CBS*¹⁵⁵⁷ the court rejected a civil case brought by a youth who claimed that exposure to violent television programmes caused him to develop a psychopathic personality. Thirdly, the argument that accused persons will try to evade criminal liability because they had been incited to crime confuses two separate issues: the liability of the inciter, and *mens rea* on the part of the incitee. In other words, the justification for imposing liability on A for incitement is not, as Wirenius suggests,¹⁵⁵⁸ based upon the supposition that B's mind is overborne by A. Rather liability is imposed on A because A has committed the offence of challenging the fundamental social compact that the law is to be respected, and that is why A is liable whether B commits the act or not. Thus the imposition of liability for incitement does not, as Wirenius fears it will, compromise the democratic supposition of autonomous free will. As Wesson points out, the inciter's liability is completely

¹⁵⁵³Brill, *supra* n. 1489 at 1042-3. Similarly she states (*ibid.*, 991) that accepting such liability would "disregard[] the dignity and autonomy of speakers and audience members alike".

¹⁵⁵⁴*Ibid.*, 1043.

¹⁵⁵⁵*Idem* and Strossen, *supra* n. 188 at 1156-9.

¹⁵⁵⁶963 F.2d 962 (7th Cir. 1992) at 965-7 and 972-3.

¹⁵⁵⁷480 F. Supp. 199 (1979).

¹⁵⁵⁸Wirenius, *supra* n. 199 at 73-7.

independent of the incitee's.¹⁵⁵⁹ Moreover, as we have seen, even where B *does* commit the act having been incited to it by A, there is no case authority supporting the proposition that B's responsibility is in any way diminished simply because he or she acted upon the urging of A. As Feinberg (see 6.3.2 above) and Crump¹⁵⁶⁰ point out, the essence of liability for incitement is that the liability of inciter and incitee is independent and yet not mutually exclusive.

6.5.6 Incitement liability and the *Miller* test

In this chapter I have argued that those responsible for the production of material combining sex and violence can be held civilly liable by those against whom the incitement is directed, and that such liability is compatible with the First Amendment. This section examines to what extent the liability I am proposing either coincides with or differs from the existing standard found in *Miller* (discussed at 1.4.5 above). As will be recalled, the *Miller* test was to the effect that in order for material to be found legally obscene, it would have to be such that "the average person applying contemporary community standards" would find that, taken as a whole, it appealed to prurient interest in that it depicted or described sexual conduct in a patently offensive way, and lacked serious literary, artistic, political or scientific value.

As a starting point it should be noted that since I have argued that material combining sex and violence¹⁵⁶¹ should be actionable and that this category is unaffected by the presence or absence of sexual explicitness, the scope of the liability that I am arguing for is to some extent wider than that provided by *Miller*, since the *Miller* test applies only to material which is sexually explicit. Furthermore, since I have argued that materials combining sex and violence would not be saved by an "artistic" defence, the "serious value" exception to *Miller* would not apply, and so here again liability would be wider than that provided for under *Miller*. On the other hand, there would be a large class of material which fell foul of the *Miller* test because it was sexually explicit but which, because it did not portray sex coupled with nonconsensual violence in an approving manner, would not be actionable under my proposal. In this respect my proposal would clearly be far less restrictive than *Miller*. As Cole points out¹⁵⁶² whereas the law generally imposes lesser restrictions on depictions of acts than on the acts themselves, and thus a novelist or film-maker may depict a bank robbery, the reverse seems to be true in relation to sexual expression, since depictions of acts that may lawfully be performed will not necessarily pass the *Miller* test of

¹⁵⁵⁹Wesson, *supra* n. 1336 at 870.

¹⁵⁶⁰Crump, *supra* n. 1331 at 65.

¹⁵⁶¹Always remembering that "violence" should be read as meaning "non consensual violence".

¹⁵⁶²Cole, *supra* n. 181 at 113-14.

obscenity. By contrast, under the approach I am advocating only material that incites conduct which is *unlawful* may be proscribed, hence much that would be proscribed under *Miller* (such as material depicting consensual sadomasochism) would escape liability.¹⁵⁶³ There will, of course, be many instances in which material would fall foul of both approaches - in particular, material that combines explicit sex with violence and which is not saved by the "artistic value" exception to *Miller*. It would, however, be wrong to compare the approaches simply on the basis of the scope of materials that could be prohibited under them. Far more important is the difference in purpose underlying each approach: Whereas *Miller* is morals-based and is directed towards preventing "prurient" sexual arousal, the approach I am arguing for is harms-based and targets only those materials which, because of their combination of sex and violence, create the empirically verifiable risk that those exposed to them will be incited to harm others.¹⁵⁶⁴

Even supporters of *Miller* are dissatisfied with the inherent subjectivity of the "community standards" test, the variable results produced by juries in different areas of the United States, and the vagueness of terms such as "patent offensiveness" and "serious value". As Loewy states, a "complete overhaul"¹⁵⁶⁵ of obscenity law is long overdue, and Taylor¹⁵⁶⁶ argues that the Supreme Court should clarify precisely what material falls within *Miller*. Although Taylor's expansive definition remains rooted in the subjective moralism of *Miller* and would cover virtually all categories of sexually explicit material,¹⁵⁶⁷ his basic argument in favour of a precise definition of what constitutes "obscenity" is attractive. Furthermore, as Pollard points out, the same factors that led the court in *Miller* to deny constitutional protection to obscenity, apply equally, indeed with greater force, in the case of material that combines sex and violence.¹⁵⁶⁸ What I would therefore argue is that the courts should either build upon the foundations of *Miller* but redefine "obscenity" as meaning material combining sex and violence, or else address the issue of obscenity anew and create an entirely new exception to the First Amendment covering material that combines sex with

¹⁵⁶³For a particularly well-expressed critique of the *Miller* test, see West, *supra* n. 1465 at 702-03, where she notes that material which causes no harm but which is sexually explicit will fall foul of *Miller*, whereas that which causes harm against women will not be proscribed under *Miller* if it does not meet the definition of "obscenity" (for example, if it is not sexually explicit).

¹⁵⁶⁴For arguments in support of a harms-based approach see Pollard, *supra* n. 189 at 143-5. See also Reimann, *supra* n. 705 at 243-4, where he notes that under *Miller* material which depicts explicit consensual intercourse will be found to be "prurient" and thus offensive to community standards, even though it has no harmful impact on those exposed to it.

¹⁵⁶⁵Loewy, *supra* n. 1324 at 493.

¹⁵⁶⁶Taylor, *supra* n. 184 at 271 - 82.

¹⁵⁶⁷Taylor's proposed rule (cited *ibid.*, 272) would cover "any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, anilingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible".

¹⁵⁶⁸Pollard, *supra* n. 189 at 143-5.

violence,¹⁵⁶⁹ just as it did in relation to child pornography.¹⁵⁷⁰ In either event, the law would become harms rather than morals-based.

6.5.7 The scope of the action

The final issue to be dealt with is the scope of the incitement-based action I am proposing. As was argued in the discussion on liability for insult at 5.6.2 and in the general discussion of incitement based liability at 6.3.1, the size of the group whose dignity is impaired should not determine whether or not a remedy is available, as a matter of principle. However, it will affect the type of remedy that will be available, and this is addressed at 7.2.2 below. Brill¹⁵⁷¹ argues that a significant threat would be posed to freedom of expression if a broad class of plaintiffs could sue a defendant not only on the basis of personal injury where a third party has been incited by the defendant to harm the plaintiff, but also on the grounds I am arguing for - that is, on the basis that the mere act of publishing the inciting material constitutes a wrong even if it has not been acted upon by a third party. In response to this however I would state firstly that, as Smolla points out, the case for regulating expression is strongest where that expression threatens harm,¹⁵⁷² and that this principle should apply even where the harm takes the form of incitement, and secondly that the type of liability I propose is deep but narrow, in that although it exposes defendants to actions brought on behalf of potentially very large classes of plaintiffs,¹⁵⁷³ it applies to a very limited class of material which combines sex and violence.

The idea of using a civil action as a vehicle for controlling pornography has gained increasing support over the past few years.¹⁵⁷⁴ The Indianapolis ordinance contained a provision which would have given plaintiffs directly harmed by pornography a right of action. Unfortunately however, litigants were denied the opportunity to use the remedy provisions of the ordinance by its being found unconstitutional. Yet, as is evident from the quotation from *Hudnut* reproduced at 6.5.4 above, the court did not

¹⁵⁶⁹Ibid., 145-48.

¹⁵⁷⁰See the discussion of *New York v Ferber* 458 U.S. 747 (1982) and other cases at 1.4.5 and 3.5.3 above.

¹⁵⁷¹Brill, supra n. 1489 at 1041-2.

¹⁵⁷²Smolla, supra n. 11 at 49-50.

¹⁵⁷³Brill, supra n. 11 at 1027-8.

¹⁵⁷⁴See for example Pacillo, Edith "Getting a feminist foot in the courtroom door: Media liability for personal injury caused by pornography" 28 (1994) *Suffolk University Law Review* 123. This author's proposal differs from mine in that she argues for a remedy only in cases where personal injury has occurred and can be linked to the defendant's use of pornography. She also suggests that liability should be based on negligence, arguing that the *Brandenburg* standard ought not to apply. My approach however permits an action to be brought even before harm has occurred and works within the parameters of *Brandenburg* on the understanding that that case permits liability to be imposed for recklessness rather than only for conduct in relation to which actual intent can be proved.

object to the concept of civil liability *per se*. Indeed, in the much earlier obscenity decision case of *Pope v Illinois*¹⁵⁷⁵ Stevens J and Marshall J rejected the use of the *Miller* obscenity test as the basis for criminal liability but held that they would not necessarily exclude "civil regulation" of sexually explicit material.¹⁵⁷⁶ Most recently, a bill entitled the Pornography Victims Compensation Act,¹⁵⁷⁷ introduced into the United States Senate in 1991, would enable any victim of a sex crime to sue "producers, exhibitors, distributors, renters and sellers"¹⁵⁷⁸ of obscene material and child pornography where they could show that the pornography was a "substantial cause" of the crime and that the defendant "reasonably should have foreseen that exposure of a person to the obscene material.....would be a substantial cause of a sex offense".¹⁵⁷⁹ The bill differs significantly from the action I propose, in that takes as its starting point the existing definition of obscenity, and provides a remedy only in cases where material has incited the consumer to commit a crime, and not in the *S & W Seafoods* situation where the incitement has not been acted upon. Nevertheless the bill does at least evince increasing interest in harms-based theories in terms of which the production of pornography is seen as a tort.

6.6 Summary

Empirical studies on the effects of sexually explicit material indicate no increase in aggressive attitudes on the part of those exposed to it. However, material depicting violence does cause an increase in aggression, while that combining sexual (and not just sexually explicit) content with violent content causes the greatest increase in aggression among laboratory subjects. No study has, however, been able to demonstrate a causal connection between exposure to such materials and harmful behaviour.

Liability based on incitement means that where A produces material that incites B to harm C, then C will have an action against A. Such liability has been recognised in the United States in the case of *S & W Seafoods v Jacor Broadcasting*. It is important to note that A's liability arises *irrespective* of whether B acts upon the incitement. For this reason, if the increase in aggression produced by sexually oriented materials can be said to amount to incitement, it is irrelevant for purposes of incitement-based liability that empirical studies have failed to link the aggressiveness with harmful conduct.

¹⁵⁷⁵481 U.S. 497 (1987).

¹⁵⁷⁶At 517 n. 11.

¹⁵⁷⁷Senate Bill 1521, 102d Congress, 2d Session (1991). At the time of writing, the Bill had been passed by the Senate Justice Committee but had been passed by neither House as a whole.

¹⁵⁷⁸Section 2(b).

¹⁵⁷⁹Section 4(c).

Although the issue of whether inciting harm against a plaintiff constitutes an impairment of *dignitas* has not been decided by the courts in South Africa, I would argue that the case of *Ramsay v Minister van Polisie* provides authority for the principle that a threat of harm constitutes an *injuria*, and that by analogy it could be argued that inciting a third party to cause harm to someone also amounts to an *injuria*.

Whereas it is not generally foreseeable that the mere depiction of an activity constitutes incitement to engage in it, sexually oriented material is distinguishable from other types in that its non-cognitive nature, and the arousal it elicits, leads to an urge for gratification in a way that other material does not. Although sexual arousal is in itself unobjectionable, when linked with violence, the urge to gratification it produces is one of causing harm to others, and for this reason incitement to harm can be said to be a foreseeable consequence of the exposure of consumers to material linking sex with violence. This reasoning accords with the empirical findings which indicate greatest levels of aggression in those subjects exposed to materials combining sex with violence.

In determining whether material is such as to be categorised as "combining sex with violence" it is important to note that sexual explicitness is not a necessary condition for such categorisation - the empirical research indicates that aggression may be caused either by sexually explicit material combined with violence or by material depicting violence in a sexual, but not sexually explicit, context. Although material combining sex and violence may be saved if it contains a message disapproving of the violence, this will be so only where the violence itself is depicted in such a manner as to indicate disapproval. Simply adding elements to the work lying *outside* the immediate context of the depiction of violence will not be sufficient to relieve disseminators of liability. Similarly, liability will not be evaded where the depiction inciting harm is claimed to have artistic merit.

Liability for incitement arises only where the conduct incited is unlawful. It is therefore insufficient to state as a general rule that all material depicting sex combined with violence incites consumers to unlawful activity, without first investigating the question of whether consensual violence is lawful or not. This question raises fundamental issues about the nature of human dignity. Dignity is founded upon autonomy, which suggests that the individual should have unlimited capacity to consent to harm to themselves. On the other hand, if autonomy could be

completely alienated, it would no longer exist. A way out of this paradox is, however, offered by Feinberg, who argues that a non-paternalistic justification for limiting the individual's capacity to consent to harm to him or herself is provided by the fact that incidental harms (to society that may have to bear the cost of treating victims and to those who suffer emotional harm through having to treat them) arise where the individual consents to the infliction of harm upon him or herself. This suggests that the boundary of consent should be drawn at the point where the harm consented to will necessitate medical treatment. Case law on this question, and in particular the latest decision (that of *R v Brown*) has however generally not been supportive of a right to consent to actual bodily harm. Nevertheless, there is case authority from South Africa to the effect that bodily harm may be consented to up to a certain degree, and the United Kingdom Law Commission has suggested that actual harm falling short of injury should be able to be consented to.

In view of the above, I have argued that material depicting consensual violence should not be defined as inciting harm. The key issue in classifying material depicting consensual violence would be whether the immediate context of the depiction is such as to indicate that the activities depicted are genuinely consensual. A depiction of violence which is not genuinely consensual will not be saved by indications to the contrary in unrelated parts of the work.

In the vast majority of cases dealing with incitement in the United States, the courts have held that liability will arise only where the requirements of *Brandenburg v Ohio* have been met. Because *Brandenburg* has been interpreted as requiring actual intent on the part of defendants, this has generally led to publishers escaping liability on the basis that they did not intend to urge consumers to commit harmful acts. However, this level of intent has not been required in cases involving *offers* to commit crime, or in one case involving incitement, that of *Weirum v RKO Gen. Inc.* Moreover, I would argue that the impediment to liability for incitement presented by *Brandenburg* could be removed either by distinguishing *Brandenburg* on the basis of the political nature of the speech involved in that case, or by reinterpreting its fault element as requiring intent based upon subjective foresight of the risk of harm rather than actual intent. Such a standard would prevent defendants from arguing that it was not their aim and object to incite harm despite the fact that that was the effect of the materials they published.

Basing liability on incitement would be to move from the morals-based approach found in *Miller* to a harms-based approach, which would also have the advantage of

making the law coincide with what empirical studies indicate should be the target of regulation. Whereas much material that falls foul of the *Miller* test simply because it is sexually explicit would escape regulation under the incitement approach, it is also true that material that combines sex and violence, but which is not sexually explicit, or which was said to be of "artistic value", would be actionable under the approach I advocate, but would not be actionable under *Miller*. There would of course be a body of material which is both sexually explicit and violent and which would therefore be captured by either approach.

CHAPTER 7

CONCLUSIONS

7.1 Introduction

In preceding chapters I have sought to show how the concept of human dignity provides both a justification for protection of freedom of expression and a rationale for its limitation. In this chapter I address certain procedural issues and comment on important themes that arise from the thesis as a whole.

7.2 Procedural issues

Up until now my focus has been on the substantive issue of the interaction between dignity and freedom of expression. It is now necessary to address several issues which, broadly speaking, are procedural in nature in that they relate to the appropriate remedy for impairments of dignity, and to the mechanisms by which such a remedy could be made available to plaintiffs suing on behalf of groups. This section also discusses how the law regarding freedom of speech highlights the artificiality of the division between "public" and "private" law. Finally, the section examines arguments that could be used to support recognition of dignity as a constitutional right in United States and Canadian law.

7.2.1 Civil versus criminal liability

The principal argument of this thesis has been that insults and the publication of sexually oriented material that incites unlawful activity, constitute impairments of the dignity of individuals or groups to which such insults or material refer, and that such impairments of dignity can be regulated without compromising the fundamental values served by freedom of expression. Although, as we have seen, the usual remedy for impairment of dignity under South African law is a civil action for damages, there is no reason why a legal system should not provide criminal prosecution for impairment of dignity, either in substitution for, or in addition to, the civil remedy. Indeed, South African law itself contains a common law criminal offence of *crimen injuria* which, as was shown at 4.3.2 and 4.5.2 above, provides for criminal prosecution quite separate from the (admittedly more commonly brought) civil action. Furthermore, the argument advanced in chapter 6 that material combining sex and violence should be actionable was founded upon the theory of incitement, which of course originates from criminal law.

The choice between criminal or civil liability must be made having regard to the differing impact each would have on the expressive rights of the defendant on the one hand and the dignitary rights of the plaintiff on the other. Although academic opinion is divided on the question of whether civil¹⁵⁸⁰ or criminal¹⁵⁸¹ regulation is to be preferred, it is clear that given the importance of freedom of expression to the political process in democratic society, the courts are understandably likely to look with less favour on criminal sanctions against expressive activity than they would on a civil remedy. I would therefore support the argument advanced by Greenawalt¹⁵⁸² and also by McLachlin J in her dissenting judgment in *R v Keegstra*,¹⁵⁸³ that the less invasive the remedy the better, and that both as a matter of principle and as a strategy for increasing the chances that an action for impairment of dignity would survive constitutional review, such an action should take the form of a civil suit rather than a criminal prosecution. In the most recent comprehensive discussion of the respective merits of civil and criminal remedies, Brill points to the fact that the threat of criminal prosecution carries far greater risks for freedom of expression than does the threat of civil litigation. As she states, the bringing of a criminal prosecution depends upon the exercise of prosecutorial discretion by the state, which raises the obvious risk that the government's own political interests might lead to that power being wielded selectively.¹⁵⁸⁴ Furthermore, the consequences of a conviction - a criminal record accompanied by punishment, possibly including imprisonment - has a greater chilling effect on speech than does the prospect of an award of damages (onerous as these may of course be in jurisdictions where unlimited jury awards are permitted). By contrast, a civil remedy carries with it the advantage that the initiative lies with the person whose dignity has been impaired rather than with the state, which means that the former is not reliant upon the latter for vindication of his or her rights.¹⁵⁸⁵ This indeed was the motivation behind the inclusion in the ordinance drafted for Minneapolis of a right of action which plaintiffs could bring to recover damages for harm caused by pornography.¹⁵⁸⁶ Furthermore, the lesser standard of proof required in a civil action means that satisfaction is more easily achievable by the plaintiff.¹⁵⁸⁷

¹⁵⁸⁰Delgado, *supra* n. 205 at 179-80.

¹⁵⁸¹Matsuda, *supra* n. 217 at 2321.

¹⁵⁸²Greenawalt, *supra* n. 102 at 293 and 320.

¹⁵⁸³[1990] 61 C.C.C. (3d) 1 at 121b - 122e.

¹⁵⁸⁴Brill, *supra* n. 1489 at 1018-20.

¹⁵⁸⁵Itzin, *supra* n. 493 at 425 and Easton, *supra* n. 472 at 118-19.

¹⁵⁸⁶Proposed sec. 141.60(a) of the Minneapolis Code of Ordinances in Dworkin and MacKinnon, *supra* n. 515 at 104.

¹⁵⁸⁷Easton, *supra* n. 472 at 120. Incidentally, the more easily satisfied civil onus of proof provides another reason (apart from the epistemological ones discussed at 5.6.4.2.2 above) why plaintiffs ought to bear the onus of proving falsity, and why this onus should exist irrespective of whether the plaintiff is a public or private figure.

Mention must be made of two arguments made against reliance on a civil action: As was noted by the court in *R v Stevens*,¹⁵⁸⁸ some plaintiffs may be denied a remedy because they are unable to afford the costs of a civil action or of such investigation as may be required in cases where the identity of the party who uttered the insult or published offending material is uncertain. The force of this argument is however reduced when one realises that it is not one that applies with any particularity to cases of impairments of dignity - rather it could be used to justify the wholesale absorption of tort law by criminal law - and that it is in any event inapplicable in jurisdictions that permit legal practitioners to act on a contingency basis. Most importantly however, it gives no weight to the policy issues discussed in the preceding paragraph, and in particular to the central argument that the use of criminal sanctions to deter harmful expression has a far greater potential for chilling legitimate speech than does the imposition of civil liability. The second argument advanced against opting for a civil remedy is the possibility that a multiplicity of actions might arise from a single instance of insult. The devices that can be used to circumvent this procedural problem are discussed in the next paragraph.

7.2.2 Bringing actions on behalf of groups

Assuming that a civil action was accepted as the most suitable vehicle for remedying impairments of dignity, it is clear that since impairments of dignity are frequently directed against groups rather than individuals, the remedy would be of limited scope unless it was available in such circumstances - for example, where an insulting racial epithet was directed to a large group through the mass media. To allow a remedy only in cases of harm to individuals would be to adopt the perverse position that the larger the scale of the harm, the less the likelihood that a remedy would be available.¹⁵⁸⁹ Although, as we have seen, the *actio injuriarum* has long provided a remedy in cases where individual plaintiffs assert that their dignity has been impaired, neither Roman-Dutch nor Anglo-American common law give a right of action in cases of group defamation¹⁵⁹⁰ and, by implication, would therefore also not do so in cases of group insult. For this reason, a right of action could be conferred on groups only by statute. The same would apply in respect of the right of action for impairment of dignity taking the form of incitement of harm, advocated in chapter 6 -

¹⁵⁸⁸(1993) 82 C.C.C. (3d) 97 at 147d.

¹⁵⁸⁹For the use of this argument as justification for the recognition of group libel see Parekh, Bhikhu "Group Libel and Freedom of Expression: Thoughts on the Rushdie Affair" Coliver, Susan (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London, Article XIX, 1992) 358 at 359.

¹⁵⁹⁰For a discussion of South African law, see the authorities cited at 5.4 above. The position in American tort law is discussed in Prosser and Keeton, *supra* n. 77 at 783-5.

indeed, whereas impairment of dignity taking the form of insult is often directed against individuals, it is difficult to imagine circumstances in which incitement of harm taking the form of publication of materials combining sex and violence would be directed against identifiable individuals, and so it is likely that all actions seeking to remedy that type of harm would be brought on behalf of groups. Clearly, the class of potential plaintiffs would, in many cases, be very large. For example, material containing sexually oriented depictions of violence against women could lead to an action being brought by any woman on the basis that the material incited harm against her as a member of the class of "women". What procedural avenues are available to remedy harm suffered by groups? Each jurisdiction has its own procedural rules, which could not possibly be covered in this work, so for sake of convenience I have analysed the position under the Federal Rules of Civil Procedure in the United States.

7.2.2.1 Class actions

One possible device which, it might be thought, could provide a mechanism for bringing such suits is the class action, which is designed specifically for the purpose of allowing a large number of plaintiffs with essentially similar claims to bring a single action against a defendant.¹⁵⁹¹ However, while seemingly offering a solution to the procedural difficulties associated with mass torts, not all variants of the class action are suited to the type of case discussed in this thesis. Taking the United States as an example, the provisions of Rule 23(c)(2) of the Federal Rules of Civil Procedure require that where plaintiffs seek to bring a class action for *damages* under Rule 23(b)(3), members of the class must be given

...the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort...

This requirement is designed to ensure that members of the class have an opportunity to "opt out" of the class action (either because they do not wish to sue the defendant or because they wish to maintain their own individual suit), or to remain part of it but through representation by their own counsel.¹⁵⁹² This requirement was strictly interpreted by the Supreme Court in *Eisen v Carlisle & Jacquelin*¹⁵⁹³ where it was

¹⁵⁹¹Class actions are explained in Friedenthal, J., Kane, M. and Miller, A. *Civil Procedure* (2nd ed) (St. Paul, West Publishing, 1993) 721-59. See also Chesley, Richard and Kathleen Woods Kolodgy "Mass exposure torts: An efficient solution to a complex problem" 54 (1985) *University of Cincinnati Law Review* 467 at 473-98.

¹⁵⁹²For a discussion of notice requirements see Friedenthal, Kane and Miller, *supra* n. 1591 at 737 and 749-54.

¹⁵⁹³417 U.S. 156 (1974).

held that where 2 million individuals of a plaintiff class of 6 million could be identified and notified through the use of computer records, notice by publication did *not* suffice in so far as the remainder of the class was concerned. Furthermore it was held that the costs of notification had to be borne by the plaintiffs. Clearly, adherence to such procedural requirements would be virtually impossible in cases where, for example, the class of potential plaintiffs was "all black people who heard a radio broadcast in which a racist epithet was used to refer to them", or "all women living within the area of distribution of a publication containing depictions of sexualised violence", and thus a class action for damages is precluded in cases of this type.¹⁵⁹⁴ It is for this reason that the class action has proved less useful in tort litigation than it is in litigation involving civil rights, electoral apportionment, environmental, anti-trust and consumer matters.¹⁵⁹⁵ An important qualification relating to notice requirements is, however, that they apply only to class actions for damages - an action for mandatory or injunctive relief under Rule 23(b)(2) (which is often used to pursue civil rights claims¹⁵⁹⁶) can proceed without notice being given.¹⁵⁹⁷ Obviously, in this type of case no issues arise as to the allocation of damages and, given that the nature of the relief is an order which will affect all members of the class equally, nothing is to be gained by pursuing an individual action.¹⁵⁹⁸ The conclusion I would therefore draw is that the class action as it exists in the United States does provide a mechanism whereby a remedy could be pursued on behalf of a large group, but only in cases where relief other than damages is sought.

7.2.2.2 *Locus standi*

A further difficulty that needs to be considered is that posed by the issue of *locus standi*. The particular character of mass torts - namely that they involve harms to large groups, sometimes extending to the public as a whole - means that they are often similar to crimes. Yet the rigid public / private law dichotomy that is characteristic of most legal systems places an obstacle in the path of potential plaintiffs, because private actions may be brought only where there is an identifiable

¹⁵⁹⁴The consequence of these rules is that the more widespread the harm, the less likely it is that plaintiffs will be able to comply with the procedural requirements of the class action. Indeed, one might cynically advise defendants that if they are going to cause harm, the wider the scale upon which they do so the better it will be for them.

¹⁵⁹⁵Chayes, Abram "Public law litigation and the Burger Court" 96 (1982) *Harvard Law Review* 4 at 27.

¹⁵⁹⁶Friedenthal, Kane and Miller, *supra* n. 1591 at 733-4.

¹⁵⁹⁷*Ibid.*, 752.

¹⁵⁹⁸Indeed, as is Friedenthal *et al* point out (*ibid.*, 745) some courts have held that class actions are not even necessary in cases where injunctive relief is sought, although in other cases such actions have been permitted.

plaintiff or at least well-defined class of plaintiffs.¹⁵⁹⁹ This problem exposes the absence in most modern legal systems of a right of action in respect of harms done to large groups or to society as a whole¹⁶⁰⁰ - a right which, it is interesting to note, was available in Roman law in the form of the *actiones populares* which entitled any citizen to bring a suit in the name of the people.¹⁶⁰¹ Of course the Roman law actions existed in a time before the hardening of the division between criminal and civil liability and, since they were penal in nature, were more analogous to modern private criminal prosecutions than to actions in tort.¹⁶⁰² Nevertheless these actions provide a useful concept for redress in cases where harm has been done to a wide class of plaintiffs, and accords with the argument some writers make that the law should recognise the existence of "social torts", remediable by the groups which are harmed thereby, however large they may be.¹⁶⁰³

Happily, recent years have seen increasing recognition of this type of action, both through common law developments by the courts and through statute. So far as the common law is concerned, the courts in the United States have significantly loosened the constraints imposed by the requirement of standing.¹⁶⁰⁴ Thus although, as was emphasised in *Sierra Club v Morton*,¹⁶⁰⁵ a plaintiff must be able to demonstrate some "injury in fact" which relates to a "cognizable interest" and must also show that he is "himself among the injured",¹⁶⁰⁶ the court was prepared to hold that a threat to aesthetic enjoyment of natural resources by a person who used them¹⁶⁰⁷ would satisfy

¹⁵⁹⁹This argument is advanced by Bender, Leslie "Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities" 1990 *Duke Law Journal* 848 at 864-8.

¹⁶⁰⁰For a discussion of the *actio popularis* and its non-reception from Roman law into Roman-Dutch law see *Wood and Ors v Ondangwa Tribal Authority and Or* 1975 (2) SA 295 (A) 305E - 310G. It is interesting to note that s 7(4)(b)(iv) and (v) of the new South African Constitution resurrect the *actio* by expressly conferring a right of action for breach of the Constitution on "a person acting as a member of or in the interest of a group or class of persons" and on any "person acting in the public interest" respectively. See Loots, Cheryl "Standing to Enforce Fundamental Rights" 10 (1994) *South African Journal on Human Rights* 49.

¹⁶⁰¹Thomas, J. A. C. *Textbook of Roman Law* (Amsterdam, North-Holland Publishing, 1976) 88-9.

¹⁶⁰²Although it should be noted that whereas the *actio sepulchri violati* (for despoliation of a grave) and the *actio de rebus deiectis* (for the death of a free man resulting from something being thrown from a building) were both penal, damages could be recovered in favour of the deceased's relatives in the case of the latter action (*ibid.*, 378).

¹⁶⁰³See for example Howe, Adrian "The Problem of Privatized Injuries: Feminist Strategies for Litigation" in Fineman, M. and Thomadsen, N. *At the Boundaries of Law - Feminism and Legal Theory* (New York, Routledge, 1991) 148 at 158-66.

¹⁶⁰⁴See Tribe, *supra* n. 50 at 107-29, Doernberg, Donald "'We the People': John Locke, collective constitutional rights, and standing to challenge government action" 73 (1985) *California Law Review* 52, Chayes, *supra* n. 1595 at 10-22, and Westbrook, David "Liberal Environmental Jurisprudence" (1994) 27 *U.C. Davis Law Review* 619 at 635-9.

¹⁶⁰⁵405 U.S. 727 (1972).

¹⁶⁰⁶At 734-5.

¹⁶⁰⁷The plaintiffs in this case failed only because the suit was brought by the Sierra Club as a juristic person (which was incapable of aesthetic appreciation) rather than by individual members of the club who used the threatened area of country in question - see Chayes, *supra* n. 1595 at 11-12.

these requirements even though such enjoyment was shared by the many rather than the few.¹⁶⁰⁸ The tenuousness of the cognizable interest that the courts are prepared to accept was subsequently illustrated in *United States v Students Challenging Regulatory Agency Procedures (SCRAP)*,¹⁶⁰⁹ in which the court held that users of nature reserves in a particular area had sufficient standing to challenge a rate increase on the conveyance of scrap metal by rail because the increase would lead to a decline in the recycling of such materials, which would in turn cause an adverse environmental impact of the nature reserves.¹⁶¹⁰ The court held that to deny the plaintiffs standing on the ground that the harm was too disparate would be tantamount to saying that the more widespread the injury, the less likely it was that it could be remedied.¹⁶¹¹ Finally, in *Havens Realty Corp. v Coleman*¹⁶¹² the court held that allegations of the likelihood of future injuries suffice to confer standing, stating that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief".

Statutory rights of action on behalf of large groups, colloquially known as "private attorney general" actions or as "citizen suits" in the United States, appear not infrequently in statutes governing matters such as securities exchange, freedom of information and, in particular, environmental law.¹⁶¹³ The hallmark of such actions is that under them, standing is conferred on anyone who can show that a statutory obligation has been infringed - in other words, the person bringing the action need not show that they as individuals have suffered harm as a result of the defendant's actions.¹⁶¹⁴ The criticism has been made that such actions provide a fertile hunting ground for practitioners who can make a living simply out of the costs that will be awarded where defendants are found liable, but the counter-argument has been made that private attorney general actions often provide a more cost effective means of

¹⁶⁰⁸405 U.S. 727 (1972) at 734.

¹⁶⁰⁹412 U.S. 669 (1973).

¹⁶¹⁰For a discussion of this case see Chayes, *supra* n. 1595 at 14.

¹⁶¹¹412 U.S. 669 (1973). at 688. A similar point is made by Doernberg, *supra* n. 1604 at 96, where he states that a narrow interpretation of the procedural requirement that an individual have a personal interest in a controversy would, if argued to its logical conclusion, mean that

..if government broadly and nonspecifically violates the Constitution, no individual has a sufficient stake in the outcome to pursue a judicial remedy. In short, the Court tells us that, for purposes of standing, no one has a sufficient stake to keep government behaviour within constitutional limits.

¹⁶¹²409 U.S. 205 (1972) at 209-10.

¹⁶¹³For a general overview of this type of action see Coffee, John "Rescuing the Private Attorney General: Why the model of the lawyer as bounty hunter is not working" 42 (1983) *Maryland Law Review* 215. Statutes in which provision is made for such actions are listed *ibid.* n.3. For a detailed discussion of environmental statutes see Rodgers, William *Environmental Law* (St. Paul, West Publishing, 1977) 75-89.

¹⁶¹⁴Tribe, *supra* n. 50 at 140-1.

enforcing statutory obligations than does prosecution by bureaucratically constrained public prosecutors' offices.¹⁶¹⁵ Undoubtedly the field in which such actions have assumed the greatest importance is that of environmental law. To take just two examples from among many,¹⁶¹⁶ provisions in the Clean Air Act¹⁶¹⁷ and Federal Water Pollution Control Act¹⁶¹⁸ give standing to "any person" to bring a civil action to enforce the provisions of the legislation against those who infringe it.¹⁶¹⁹ The most common relief against violators afforded by such statutes is that of a mandatory injunction and costs of the action, but some statutes provide for the imposition of a civil penalty which is usually payable to the Treasury rather than to the plaintiff, but which the court may instead direct be paid as a contribution to an environmental project.¹⁶²⁰

The liberalisation of standing both under the common law and through statutory intervention has led to a situation in which citizens frequently sue in order to vindicate diffuse interests and, as Chayes states¹⁶²¹

When standing is based on such interests, the plaintiff inevitably is in the position of a public law litigant, tendering broad issues of public policy for judicial resolution rather than seeking redress of personal harm. Such a plaintiff, whether an individual or an organization, necessarily sues as a representative of others similarly interested, or even of the interest itself...the cases...are class or representative actions.

Seen against this background, arguments in favour of a right of action being recognised in cases where plaintiffs sue as members of large classes that have been insulted or that are the objects of incitement can hardly be seen as radical. For in such cases the plaintiff and others of his or her class *can* point to personal harm, albeit harm that is very diffuse. Taking the environmental citizen suit provisions as an analogy, there is no reason why a statute should not confer a right of action on such plaintiffs. This indeed was a feature of the Indianapolis ordinance which, whatever the defects contained in its definition of pornography, was based on the correct premise that, as MacKinnon states, the type of harm caused by pornography is

¹⁶¹⁵Coffee, *supra* n. 1613 at 218-21.

¹⁶¹⁶For a full list see Westbrook, *supra* n. 1613 at 640 n. 50.

¹⁶¹⁷42 U.S.C. 7604.

¹⁶¹⁸33 U.S.C. 1365.

¹⁶¹⁹See McGregor, Gregor I. *Environmental Law and Enforcement* (Boca Raton, 1994) 102-03 and 122-3, and Stoloff, Neil *Regulating the Environment: An Overview of Federal Environmental Laws* (Dobbs Ferry, Oceana, 1991) 10-11 and 24.

¹⁶²⁰McGregor, *supra* n. 1619 at 123.

¹⁶²¹Chayes, *supra* n. 1595 at 24.

one that injures women "...as members of the group 'women'...",¹⁶²² and for this reason provided that

In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to gain relief under this chapter.

Furthermore, it is interesting to note that this procedural aspect of the ordinance was in itself not found to be objectionable when its constitutionality was tested in *Hudnut*.¹⁶²³

An action brought on behalf of a large class of plaintiffs alleging impairment of dignity through insult or through incitement of harm against them would best be brought as a class action.¹⁶²⁴ In the event that numerous individuals had filed separate claims the courts could consolidate the actions into a single hearing, using the discretion conferred on them by Federal Rule of Civil Procedure 42(a),¹⁶²⁵ which may be exercised upon application by one of the parties or on the initiative of the court itself.¹⁶²⁶ Assuming however that the plaintiffs had decided to bring a class action and the class was of such a size as to make it impossible to comply with the notice requirements (discussed at 7.2.2.1 above),¹⁶²⁷ the action would have to be for an injunction rather than for damages. Nevertheless, even in the absence of the possibility of a damages award, the threat of such litigation would still act as a deterrent against potential defendants: Defendants who had insulted large groups

¹⁶²²MacKinnon, *supra* n. 518 at 337-8. Similar provisions are found in the model ordinance drafted by MacKinnon and Dworkin (reproduced in Dworkin and MacKinnon, *supra* n. 515 at 138-42), s 5(1) of which confers a right to bring a civil suit for harms resulting from pornography, and s 3(5)(c) of which confers standing *inter alia* on "any woman acting against the subordination of women".

¹⁶²³*American Booksellers Association Inc v Hudnut* 771 F. 2d 323 (7th Cir. 1985) at 333-4 (*aff'd*. 475 U.S. 1001 (1986)).

¹⁶²⁴Use of the class action to sue producers of pornography for the harm caused by their product is advocated in Wesson, *supra* n. 1336 at 852.

¹⁶²⁵For a discussion of consolidation see Friedenthal, Kane and Miller, *supra* n. 1591 at 315-16 and Chesley and Woods Kolodgy, *supra* n. 1591 at 498-508.

¹⁶²⁶Chesley and Woods Kolodgy, *supra* n. 1591 at 501.

¹⁶²⁷It should perhaps be mentioned that notice requirements are not an inevitable part of a class action scheme, rather they are so if one believes that members of the plaintiff class have an over-riding right to opt out of such actions. The Ontario Law Reform Commission Report on Class Actions (1982) recommended the adoption of a scheme that did not give paramountcy to such a right and was therefore not burdened by complex notice procedures - see Bogart, W. A. "Questioning litigation's role - courts and class actions in Canada" 62 (1987) *Indiana Law Journal* 665 at 693-4. Some American opinion has also suggested that it should be *compulsory* for mass torts to be brought as class actions and that there should be no possibility of opting out - see Rosenberg, David "The causal connection in mass exposure cases: A "public law" vision of the tort system" 97 (1984) *Harvard Law Review* 849 at 913.

through the mass media, for example, might be ordered to bear the cost of publishing an apology, while those who had published material that incited harm against the plaintiffs could in addition be ordered to bear the expense of recalling the materials. Apology is particularly appropriate in such cases, because by apologising the defendant would be publicly affirming the dignity he had impaired.¹⁶²⁸ In all cases the defendants could have costs of the action awarded against them. Furthermore, again using environmental law remedies as an analogy, even where the difficulty of adhering to notice requirements precludes conventional (that is, compensatory) claims in which damages are distributed to individuals, a statutory right of action for impairment of dignity might provide for the imposition of a civil penalty which the court could, for example, order be paid to welfare organisations protecting the interests of ethnic groups (in cases where the impairment of dignity had taken the form of insult) or to battered women's shelters, rape crisis centres or sexual abuse hotlines (in cases involving the publication of material inciting harm through linkage of sex and violence). I would therefore conclude by saying that sufficient flexibility exists within adjectival law to enable remedies to be provided in cases where even very large groups have had their dignity impaired.

7.2.3 Public law, private law and freedom of expression

Although bill of rights law is conventionally conceived as "public" and thus confined to the "vertical" relationship between citizen and state, as distinct from "private" law governing "horizontal" relations between individuals, the realities of free speech law soon demonstrate the limited usefulness - and indeed sometimes the sheer inaccuracy - of this rigid analysis. For, while not denying the importance of freedom of expression as a tool for challenging state power, particularly in jurisdictions in which the authorities seek to limit political activity, control the press and impose artistic censorship *et cetera*, it is important to recognise that "private law" rules are equally effective in limiting freedom of expression as are those derived from statute,¹⁶²⁹ and that freedom of expression is thus involved whenever one individual seeks to regulate the speech of another, for example by means of a civil action for defamation.

The central argument of this thesis has been that protection of human dignity requires that individuals should be able to bring a civil action in cases where their dignity has been impaired. Since Anglo-American common law does not recognise dignity as an interest protected by the law of tort, such a remedy would have to be created by statute, a method which, as I have argued at 7.2.2 above, would in any event be

¹⁶²⁸Bender, *supra* n. 1599 at 873.

¹⁶²⁹Hartman, *supra* n. 786 at 874-6.

necessary in order for it to be possible to bring an action on behalf of groups. A statute is, of course, a form of state action, and thus the issue of whether public law rights are applicable in private litigation would not arise, and the statute would certainly face constitutional review. However, I found it necessary in section 5.6.4.2.2 to examine the way in which defamation law addresses the issue of truth, and although some argue that constitutional standards ought not necessarily apply in cases involving purely private actions,¹⁶³⁰ I came to the conclusion that if the Millian idea of truth is accepted, there is no reason to distinguish between defamation and other areas of law, between private suits and public prosecutions or between restrictions on freedom of expression derived from common law and those derived from statute, and that common law defamation principles - in particular the onus on the defendant to prove truth - are incompatible with Millian epistemology. Having embarked upon this excursus into defamation law, I indicated (at 5.7) that, for sake of completeness, I would devote some attention to the issue of the applicability of public law rights to private litigation, hence the brief discussion that follows.

In Canada the Supreme Court held in *R.W.D.S.U. v Dolphin Delivery Ltd*¹⁶³¹ that the Charter applies only in cases involving governmental action, and this principle has been applied in cases involving defamation law with the effect that defamation actions proceed without regard to the protection afforded to freedom of expression by the Charter.¹⁶³²

In the United States, by contrast, notwithstanding the existence of the "state action" doctrine which limits the application of the Bill of Rights to cases in which public authorities are involved, the Supreme Court has on occasion held this rule to be satisfied in cases apparently involving private interests only. The prime example of this is *Shelley v Kraemer*,¹⁶³³ in which the court declared a private contract embodying a restrictive covenant based on race to be invalid, holding that the "state action" requirement was satisfied because, like any contract, the covenant would have to be enforced by the courts. Of course, if applied generally, *Shelley v Kraemer* would erase the distinction between private and public law. The fact that this has not in fact happened, and that the state action doctrine continues to be applied, has led commentators to conclude that such exceptions as have been made to the doctrine

¹⁶³⁰See for example the arguments canvassed (but then rejected) by Brill, *supra* n. 1489 at 1007-1010 and 1015-24.

¹⁶³¹(1987) 33 DLR (4th) 174.

¹⁶³²See *Pangilinan v Chaves* (1988) 47 CRR 371 (Man. CA) and *Coates v The Citizen* (1988) 44 C.C.L.T. 286 (NSSC).

¹⁶³³334 U.S. 1 (1948).

cannot be explained by any general theory.¹⁶³⁴ The decision in *New York Times v Sullivan* is of course clear evidence that freedom of expression is an area where such relaxation has taken place and where the common law has effectively been constitutionalised.¹⁶³⁵ Further discussion of the state action doctrine and the exceptions to it lies outside the scope of this thesis. It may however be noted that as tort law has become increasingly codified in the United States over past decades, the state action doctrine has become progressively less troublesome.

In South Africa, provincial divisions have differed on the issue as to whether the protection afforded to freedom of expression by s 15 of the Constitution is of relevance to common law defamation actions. In *Mandela v Falati*,¹⁶³⁶ and (at least implicitly) in *Jurgens v Editor, Sunday Times Newspaper, and Another*¹⁶³⁷ it was held that the Constitution operated "horizontally" between private individuals, and that therefore principles of the common law of defamation could not survive if incompatible with the bill of rights. Similarly, the court in *Gardener v Whitaker*,¹⁶³⁸ while declining to make a general ruling relating to all rights protected by the Constitution, held that the common law of defamation was subject to s 15. On the other hand, in *De Klerk and Another v Du Plessis and Others*,¹⁶³⁹ the court held that the bill of rights operated only vertically, and thus did not affect principles of private law - a finding it justified both with reference to the text of the Constitution and to the fact that since rights violations had historically derived from legislation rather than from the common law (which was indeed protective of rights), the bill of rights did not need to operate horizontally in order to achieve its objectives. Academic opinion on the issue has been divided. Some argue that the bill of rights does operate horizontally.¹⁶⁴⁰ Others are of the opinion that the Constitution is *prima facie* of only vertical application, but that the mandate contained in s 35(3) that common and customary law be developed with due regard to the "spirit, purport and objects" of the Constitution, means that the bill of rights operates with "indirect" horizontality¹⁶⁴¹

¹⁶³⁴Tribe, *supra* n. 50 at 1688-91.

¹⁶³⁵See the discussion by Tribe, *ibid.*, at 1711-20.

¹⁶³⁶1995 (1) SA 251 (W) at 257I - 258E.

¹⁶³⁷1995 (2) SA 52 (W) at 58C - D.

¹⁶³⁸1995 (2) SA 672 (E) at 680E - 686B.

¹⁶³⁹1995 (2) SA 40 (T) at 45D- 51F.

¹⁶⁴⁰See Basson, Dion *South Africa's Interim Constitution - Text and Notes* (Cape Town, Juta, 1994) 15-16, Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus, *supra* n. 1034 at 19-21, Spitz, *supra* n. 1184 at 315-17, Marcus, Gilbert "Freedom of expression under the Constitution" 10 (1994) *South African Journal on Human Rights* 140 at 143-4.

¹⁶⁴¹See De Waal, Johan "A comparative analysis of the provisions of German origin in the interim bill of rights" 11 (1995) *South African Journal on Human Rights* 1 at 9-15, and Du Plessis, Lourens "A background to drafting the chapter on fundamental rights" in De Villiers, B. (ed) *Birth of a Constitution* (Cape Town, Juta, 1994) at 93. Du Plessis states that the bill of rights operates vertically and that this was the reason for the inclusion of a provision (s 33(4)) prohibiting discrimination by

(what in German constitutional law is referred to as "Drittwirkung").¹⁶⁴² Thus, where common law rules contain a *discretionary element* - for example, where a court is required to decide whether something is "reasonable" or accords with "the *boni mores* of society" - the courts will apply such concepts in conformity with the values enshrined in the bill of rights. This is likely to lead to ever increasing convergence between such values and concepts such as the "legal convictions of the community" test for wrongfulness in the law of delict,¹⁶⁴³ as I argued at 5.5.3.1 above. Of course, even if the bill of rights was not even of indirect horizontal application, there would be nothing, as was noted by the court in *De Klerk*,¹⁶⁴⁴ to prevent the courts developing the common law on their own initiative in such a way that it conformed to the values underlying freedom of expression.¹⁶⁴⁵ Clearly, final determination of this issue will occur only once a suitable case comes before the Constitutional Court.

Whether a bill of rights is applied horizontally is a major structural issue in a country's constitutional law, full treatment of which lies outside the scope of this thesis. The purpose of this subsection has simply been to show that freedom of expression is a field in which the artificiality of the private law / public law dichotomy is exposed with particular clarity.

7.2.4 Integrating the right to dignity into bill of rights law

I have advocated the creation of a statutory right of action which would enable individuals and groups whose dignity has been impaired to pursue a civil remedy. The dignity standard could also be used in those jurisdictions which have statutory administrative tribunals charged with censorship classification. The chance of such legislation surviving constitutional review in jurisdictions that have bills of rights would obviously be enhanced if dignity was itself a constitutionally protected right, enjoying equal status with freedom of expression, as compared with the circumstance where the court was balancing the clearly established right to freedom of expression against a value that had only a legislative enactment as its parent. Although, as was noted in the South African Law Commission's survey of bills of rights, dignity is

private persons and bodies who would not be bound by the chapter. As the court in *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T) pointed out (at 49C) this provision would be unnecessary were the Constitution of horizontal application.

¹⁶⁴²For a discussion of "Drittwirkung" see the articles mentioned supra, n. 1641 and also *Gardener v Whitaker* 1995 (2) SA 672 (E) at 682H - 683C.

¹⁶⁴³See Van Aswegen, supra n. 1034 at 56 and 59-65.

¹⁶⁴⁴*De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T) at 51F-I.

¹⁶⁴⁵The same point was noted by the Canadian Supreme Court in *R.W.D.S.U. v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174 at 198.

expressly mentioned in some countries' bills of rights,¹⁶⁴⁶ it appears neither in the amendments to the United States Constitution nor in the Canadian Charter of Rights and Freedoms.

As was shown at 3.5.1 above, Paust's analysis of Supreme Court references to human dignity evidences at least indirect incorporation of this value into the law through its recognition by the judiciary as a value underpinning many of the rights that are guaranteed by the Constitution.¹⁶⁴⁷ Although the courts have not explicitly recognised dignity itself as a right that can be vindicated, their acknowledgment that the infringement of some textually protected rights constitutes an impairment of dignity, does at least make it arguable that the courts would not consider it too radical a step to characterise dignity itself as a right with corresponding duties, rather than just as a value served by other rights. This then would leave the way open for impairment of dignity in the form of insult to be recognised as a legal harm requiring a remedy, and for the circumstances in which that remedy was available to be decided by balancing the right to dignity against freedom of expression in the way I have argued. How then could dignity be integrated into the jurisprudence of the United States, Canada and other jurisdictions that do not give express recognition to such a right? Leaving aside the obvious but time-consuming¹⁶⁴⁸ route of constitutional amendment, there are avenues through which a right to dignity could be incorporated into American and Canadian rights law.

7.2.4.1 Dignity as an implied right.

One way of affording recognition to a constitutional right to dignity would be to read it as implied by existing provisions. Paust argues¹⁶⁴⁹ that where the Ninth Amendment to the United States Constitution disavows that the Constitution's enumeration of rights is exhaustive and proclaims that other rights are retained by the

¹⁶⁴⁶*Group and Human Rights* (Working Paper 25, Project 58) (Pretoria,: South African Law Commission, 1989) 414.

¹⁶⁴⁷Paust, *supra* n. 711 at 218-20.

¹⁶⁴⁸Article V of the United States Constitution stipulates that the Constitution can be amended only by a two-thirds majority of each house of Congress or by a Constitutional Convention requested by the legislatures of two-thirds of the states and which, in either case, has been ratified by the legislatures of three-fourths of the states. The failure of the Equal Rights Amendment to gain ratification by the required thirty eight states even after consideration by state legislatures for ten years indicates the difficulty of constitutional amendment.

The position in Canada is that s 52(3) of the constitution, as read with s 38, requires that amendments be passed by both houses of Parliament and be approved by the legislatures of two-thirds of the (nine) provinces having at least 50% of the population of all the provinces. In other words, approval must be by at least 7 provinces, and these must contain at least 50% of the country's population. Recent controversies on Canadian constitutional development, and in particular the failure of the Meech Lake Accord to settle the issue of federal - provincial relations, makes it unlikely that there would be a general willingness to open new constitutional issues for debate.

¹⁶⁴⁹Paust, *supra* n. 711 at 220-2.

people,¹⁶⁵⁰ this amounts to implied incorporation of all the natural rights of humankind. As Paust states¹⁶⁵¹

..our society arose under Natural Law expectancies that the existence of universal Rights of Man - rights that could exist even though they were not printed somewhere with black and white particularity.

This approach clearly affords the courts extensive opportunity to extend protection to rights not specifically enumerated in the Constitution, the prime example of which is of course the constitutionalisation of the right to privacy (see 3.5.2 above), which has variously been said to be implied not only by the Ninth but also by the First, and Fourteenth Amendments, and which, as we have seen, has been broadened far beyond protection of the individual's right to keep his or her personal life out of the public eye, to the extent that it effectively amounts to a limited recognition of autonomy¹⁶⁵² in relation to issues such as access to contraception¹⁶⁵³ and to abortion.¹⁶⁵⁴ There is therefore no reason why the courts could not demonstrate the same creativity and hold that inherent in the right to privacy is the right to dignity and self-respect. Indeed, in identifying the harm the action for invasion of privacy¹⁶⁵⁵ is meant to protect, Ingber states¹⁶⁵⁶

To some extent the injury caused by privacy invasion, much like defamation, is a specific type of emotional distress...However, the main impetus for an action for invasion of privacy is not the emotional distress the invasion causes. The focus is more on *the protection of human dignity* than on compensation for loss. Once an intimate fact has been publicly disclosed, others will know of it and the resulting injury - indignity and humiliation - cannot be rectified.

The history of the courts' development of the right to privacy shows that it would not be difficult to build upon the recognition already accorded dignity on a rhetorical

¹⁶⁵⁰Amendment IX states

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

¹⁶⁵¹Paust, *supra* n. 711 at 220-2.

¹⁶⁵²Smolla, *supra* n. 11 at 120.

¹⁶⁵³*Griswold v Connecticut* 381 U.S. 479 (1965).

¹⁶⁵⁴*Roe v Wade* 410 U.S. 113 (1973).

¹⁶⁵⁵Clearly Ingber is talking of privacy in the tort sense rather than in the constitutional sense. However, it is submitted that the argument applies equally well to privacy in the sense of autonomy / dignity.

¹⁶⁵⁶Ingber "Rethinking Intangible Injuries: A Focus on Remedy" 73 (1985) *California Law Review* 772 at 841.

level (discussed at 3.5.1 above) and to find that dignity is a substantive right implied by the Constitution, meriting the same protection that is enjoyed by other rights.

A similar approach is also offered in Canada by s 26 of the Charter, which states that

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Thus the Charter ought not to be seen as a purely positivist document, but rather as implicitly recognising its own limitations and the fact that there may be natural rights others than those it mentions. Although Hogg is of the opinion that s 26 does not "constitutionalise" rights not mentioned in the text, and points to the fact that the remedies section of the Charter (s 24) applies only to expressly mentioned,¹⁶⁵⁷ I would argue that s 26 would at least leave it open to a proactive court to recognise dignity as a right and, having done so, to balance it against freedom of expression when applying the limitations provision in s 1.

7.2.4.2 Incorporation through international law

The other avenue by which it could be argued that dignity has already incorporated into United States law is by international treaty. Although under Article II Clause 2 of the Constitution the treaties signed by the President bind the United States only if ratified by a two-thirds majority of the Senate, once that has occurred the treaty becomes part of domestic law by virtue of Article IV Clause 2 without any need for Congressional enactment. Thus in *Asakura v City of Seattle*¹⁶⁵⁸ it was held that international treaty law

...stands on the same footing of supremacy as do the provisions of the Constitution and the laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

For this reason Paust argues that the United Nations Charter, which was incorporated into the treaty law of the United States,¹⁶⁵⁹ and which signatories affirm their faith in

¹⁶⁵⁷Hogg, *supra* n. 1141 at 826-7.

¹⁶⁵⁸265 U.S. 332 (1924) at 341.

¹⁶⁵⁹Paust, *supra* n. 711 at 213 n. 259.

"fundamental human rights" and "the dignity and worth of the human person",¹⁶⁶⁰ has incorporated dignity into domestic law.¹⁶⁶¹

Furthermore, even apart from incorporation via international treaty, it could be argued that the right to human dignity has become part of customary international law, and must therefore be applied by the courts in accordance with the principle expressed in *The Paquete Habana*¹⁶⁶² that

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

As Paust states¹⁶⁶³

First, international norms become legal norms when they are supported by generally shared expectations in the community at large. Second, international norms supported by generally shared expectations create legally binding obligations on nation states. Third, international norms backed by generally shared expectations are judicially enforceable in domestic courts.

A specific example of the application of this principle is provided by the case of *Filartiga v Pena-Irala*¹⁶⁶⁴ in which a federal court held that the right not to be subject to torture was part of customary international law (referring *inter alia* to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in support of this) and, as such, was part of American law which the courts were bound to apply in terms of Article VI Clause 2 of the Constitution, which mandates the courts to give effect to all laws of the United States. Similarly, in *Fernandez v Wilkinson*¹⁶⁶⁵ the court referred to the same documents to find that the

¹⁶⁶⁰The United Nations Charter of 26 June 1945 (UNCIO xv 335), Preamble.

¹⁶⁶¹Paust, *supra* n. 711 at 213-218.

¹⁶⁶²175 U.S. 677 (1900) at 700.

¹⁶⁶³Paust, Jordan "Book Review: From jurisprudential inquiry to effective litigation" 56 (1981) *New York University Law Review* 227 at 229.

¹⁶⁶⁴630 F. 2d 876 (2d Cir. 1980).

¹⁶⁶⁵505 F. Supp. 787 (D. Kan 1980) (*aff'd*. 654 F. 2d 1382 (10th Cir. 1981)).

internationally protected right not to be subject to arbitrary detention was part of federal common law. Given that, as was noted at 3.3 above, dignity is explicitly protected by both the Universal Declaration and the International Covenant, the application of these rules clearly supports the argument that dignity is a right which the courts should recognise as being part of domestic law.

In Canada, international treaties are not part of domestic law unless expressly enacted into law by Parliament, and so international human rights documents to which Canada is a signatory do not incorporate any new rights into Canadian law.¹⁶⁶⁶ However, Hogg argues that in accordance with the principle that domestic law should be interpreted in conformity with international law obligations in so far as this is possible, where a Charter case admits of more than one decision, the court ought to favour whatever result accords with international human rights documents to which Canada has agreed to be subject.¹⁶⁶⁷

To reiterate what was stated at the beginning of section 7.2.4, where a jurisdiction has incorporated international human rights instruments into domestic law in accordance with its rules for so doing, the fact that dignity would thereby have been incorporated *as a right* would mean that whatever the balance finally struck between dignity and expression, when determining that balance the courts would treat dignity as enjoying the same status (that is, the status of a fundamental right) as it does freedom of expression, a position which obviously makes it more likely that dignity would be recognised as imposing substantive limits on expression than would be the case if dignity was seen simply as an interest embodied in a statute.

7.3 The dignity standard - a comparative evaluation

It would be naive to think that the remedies I advocate in this thesis would be sufficient to eliminate the social evil of inter group hatred or of discriminatory attitudes. Yet it would be equally naive to think that more rigorous restrictions on freedom of restriction - those which permit expression to be proscribed on the basis of viewpoint in an attempt to protect a "right not to be hated"¹⁶⁶⁸ - would not be similarly deficient. As Magnet concludes in his analysis of hate speech provisions in various jurisdictions, prohibitions such as that found in s 319 of the Canadian Criminal Code may drive hate speech underground, will convert no-one from believing in it, and will disable those opposed to it from challenging its propagandists

¹⁶⁶⁶Hogg, *supra* n. 1141 at 285-7.

¹⁶⁶⁷*Ibid.*, 822-4.

¹⁶⁶⁸See the criticism of this concept in Narveson, Jan "Freedom of speech and expression: A libertarian view" in Waluchow, W. J. (ed) *Free Expression* (Oxford, Clarendon Press, 1994) 59 at 84.

in open debate.¹⁶⁶⁹ Similarly with regard to pornography, Meyer argues that proscription of pornography should not be seen as a "quick fix" solution to gender inequality, as though prohibiting the expression of a way of thinking will lead to its disappearance.¹⁶⁷⁰ Of course, proscribing racist and misogynist ideology may have symbolic value, but the question is whether the inroad into freedom of expression resulting from authoritative designation of certain viewpoints as unacceptable is a reasonable cost to pay, given the evidence of its doubtful utility.¹⁶⁷¹

Perhaps one of the most important lessons which should then be learned from research into free speech theory relates to the limitations of law: Given that social harm is caused by expression that foments hostility or discriminatory attitudes, but that viewpoint based restrictions are incompatible with freedom of expression, one is ultimately forced to recognise that the price of a free society is individual self-regulation in the expressive arena of human activity, as in so many others. In other words, one must accept the risk inherent in the principle that democracy, if it is true to its own values, must permit the airing of views that are inimical to such values and even to the concept of democracy itself. This in turn requires that lawyers to do what they are understandably loath to - that is, to accept the limits of the law, and to recognise that attitudinal regulation does not, in fact, change attitudes, and that attempting to do so exacts an unacceptable price on free speech values.

In the final analysis then, there comes a point at which legal regulation can achieve only so much, beyond which reliance must instead be placed upon the calibre of the citizens inhabiting a particular society, for it is they who ultimately shape value systems and change minds through open debate. To take one example of this line of thought, confronted by what he considers to be the deficiencies of both civil libertarianism and state regulation, Abel advocates informal social pressures as a remedy to curb harmful speech, and suggests that formal apology by the defendant is the appropriate remedy to seek in cases where harm has been caused by expressive conduct.¹⁶⁷² While rights of reply and requirements to apologise clearly have a role to play in remedying harmful speech, it is difficult to see how these can be achieved in an extra-legal way as Abel seems to argue - some authoritative imposition of the required act of contrition will always be necessary, even if only to deal with recalcitrants. Yet, this does not mean that Abel's argument is without merit - as Mill

¹⁶⁶⁹Magnet, *supra* n. 482 at 247-50.

¹⁶⁷⁰Meyer, *supra* n. 497 at 1134 and 1158-72.

¹⁶⁷¹For a pragmatic discussion of the worthwhileness of legislation meant to have a symbolic effect see Neisser, *supra* n. 268 at 350-1 and 365.

¹⁶⁷²Abel, *supra* n. 74 at 144-9.

made clear in his discussion of liberty, while the individual must be accorded freedom of opinion and action, he or she must accept the risk of unpopularity and counter-speech and action that that freedom entails.¹⁶⁷³ There are, in short, a multitude of informal strategies, from counter-argument, to demonstration to boycott that can be used by society to signal its disapproval of opinions.¹⁶⁷⁴ Of course, counter-speech may not always be possible, hence the need for some legal remedy to be available. This final section of my thesis adopts a comparative analysis to show what advantages the dignity standard that I have advocated has over existing approaches.

This thesis addresses a fundamental issue in free speech law - how to balance the values of truth-seeking and self-fulfilment served by freedom of expression against the need to remedy harms - in particular those caused by hate speech and pornography - that the exercise of that freedom may produce. In so doing I have examined whether the concept of *dignitas* could provide a suitable criterion for this balancing process. Much has been written about the useful contribution North American jurisprudence will undoubtedly make to human rights law in South Africa as the courts interpret that country's new bill of rights.¹⁶⁷⁵ My thesis has however

¹⁶⁷³Mill, *supra* n. 13 at 92-3.

¹⁶⁷⁴Two examples of this in university campus settings are adduced by Hentoff, *supra* n. 18 at 184-8. In one instance, public denunciation of a student who directed homophobic remarks towards a staff member at Stanford University achieved the same degree of censure by the community as the campus speech code would have, but without the infringement of First Amendment rights. Similarly, at Arizona State University, students who were offended by a racist notice attached to a residence door confronted those who had posted it and started a campus-wide debate on inter-ethnic relations, again without invoking the coercive power of speech codes. The point was made that this approach prevented those who put up the notice from becoming martyrs to a constitutional principle and at the same time empowered those who had been offended in that they had challenged and shamed the offenders. As has already been stated in this work, the principal defect of anti-hatred legislation is that it effectively create a "right to be liked", and thus undermines freedom of opinion as much as freedom of expression. But what is sauce for the goose is sauce for the gander - the inciter of hatred similarly has no right to be liked, and lays him or herself open to the slings and arrows of public displeasure.

¹⁶⁷⁵See for example Licht, Robert and De Villiers, Bertus *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help ?* (Cape Town, Juta, 1994). See also Albertyn, Catherine and Kentridge, Janet "Introducing the right to equality in the new Constitution" 10 (1994) *South African Journal on Human Rights* 149, Chaskalson, Matthew "The problem with property: Thoughts on the constitutional protection of property in the United States and Commonwealth" 9 (1993) *South African Journal on Human Rights* 388, Johannessen, Lene "Freedom of expression and information in the new South African Constitution and its compatibility with international standards" 10 (1994) *South African Journal on Human Rights* 216, Smith, Nicholas "Affirmative action under the new Constitution" 11 (1995) 11 *South African Journal on Human Rights* 84, Spitz, *supra* n. 1184 at 318-35, Neisser, *supra* n. 268, Woolman, Stuart "Riding the push-me pull-you: Constructing a test that reconciles the conflicting interests which animate the limitation clause" 10 (1994) *South African Journal on Human Rights* 60, Marcus, Gilbert "Interpreting the chapter on fundamental rights" 10 (1994) *South African Journal on Human Rights* 92, Marcus, *supra* n. 1640, Wendland, Wend "Tightroping freedom of expression and broadcasting regulation: The new bill of rights and the Independent Broadcasting Authority Act, 1993" 10 (1994) *South African Journal on Human Rights* 280. These are however but a selection of writings which devote particular attention to Canadian and American authority. Virtually every commentator on South Africa's interim Constitution makes

sought to demonstrate how a Roman-Dutch concept might provide solutions to some of the free speech problems with which the courts in the United States and Canada have long grappled. The malevolent effect of apartheid on South Africa's legal system ought not to obscure the fact that Roman-Dutch common law is highly protective of liberties.¹⁶⁷⁶ As Dugard describes it, Roman-Dutch law is "a rational, enlightened system of law, motivated by considerations of fairness".¹⁶⁷⁷ Indeed much of the legislative edifice necessary to support apartheid was enacted precisely in order to displace common-law principles. Thus, as Burchell points out, were it not for legislative over-ride, detention without trial and other invasions of personality rights would clearly have given rise to a delictual action against the relevant state functionary for impairment of *dignitas*.¹⁶⁷⁸ Roman-Dutch law in general, and the broad concept of *dignitas* in particular, were the legacy of an enlightened intellectual tradition, and one which, as was argued at 4.2.3 above, played an important role in the historical movement that led to the promulgation of liberal human rights documents from the 18th century onwards. For this reason I argue that although the non-reception of Roman law into English common law meant that dignity has never been recognised as an actionable right in jurisdictions tracing their legal heritage to England, the development of such a right would certainly not be inimical to established principles of public law, at least in countries which accept the idea of legally protected fundamental rights, as that idea is rooted in an intellectual tradition of which Roman-Dutch law - particularly in the person of Grotius - was a part.¹⁶⁷⁹

Dignity is a broad concept. Its identification with autonomy in Anglo-American jurisprudence means that it can be used to justify the right to engage in any form of human activity, and can therefore easily accommodate both the truth-seeking and the self-fulfilment rationales of freedom of expression. But although dignity (in the broad sense of autonomy) may have nothing new to offer as a value *justifying*

reference to North American authority. Others refer to authority from sources as diverse as Zimbabwe, Namibia, India and various jurisdictions in Europe.

¹⁶⁷⁶See the *dicta* by Van Dijkhorst J in *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T). In some respects Roman-Dutch law is more protective of basic rights than is English common law. For example, in developing the Roman-Dutch interdict *de libero homine exhibendo*, which is very similar to *habeas corpus* in that the applicant seeks to have an arrested person brought before the courts for determination of the legality of their detention, the court in *Wood and Others v Ondangwa Tribal Authority and Or* 1975 (2) SA 294 (A) held that the interdict could be granted not only (as under *habeas corpus*) where the applicant acted on behalf of a person already in detention, but also in order to prevent *future* unlawful deprivations of liberty. For a comment on this case see Carey-Millar, David "A judicial extension of the interdict *de libero homine exhibendo*" 92 (1975) *South African Law Journal* 242.

¹⁶⁷⁷Dugard, John "No jurisdiction over abducted persons in Roman-Dutch law; *Male captus, male detentus*" 7 (1991) *South African Journal on Human Rights* 199 at 203.

¹⁶⁷⁸Burchell, *supra* n. 965 at 5-9.

¹⁶⁷⁹Thus Burchell (*ibid.*, 2) argues that dignity should be seen "in a broad perspective, analogous to the sense in which the concept is used in the Universal Declaration of Human Rights".

freedom of expression, the Roman-Dutch concept of *dignitas* as a right that can be vindicated through a civil action provides an additional dimension not known to Anglo-American law, one which sees dignity not only as a justification for human conduct, but also as a source of *limitations* thereon. It is this duality that I have been at pains to emphasise, because it is the essential characteristic of dignity that makes it useful in solving free speech problems. Thus, on the one hand I gave prominence to the writings of Grotius and those Roman-Dutch scholars, both old and new, who give a broad interpretation to *dignitas*, showing that it is to Roman-Dutch law what liberty, autonomy or, in the United States, privacy, is to Anglo-American law. On the other hand, the analysis of the diverse ways in which dignity can be impaired - ranging from assault, to defamation and to what modern law classifies as harassment - shows how the variety of personality interests embraced by this concept means that the rights protected by dignity will inevitably conflict, and will therefore have to be balanced against each other. Most important of these for purposes of freedom of expression are firstly, the right not to be insulted, in regard to which a large body of case law has been built up in South Africa, and secondly, the right not to have harm incited against oneself - which I argued should be recognised as an impairment of dignity, consistent with the objectives served by the *actio injuriarum*. How do these aspects of dignity assist in solving problems presented by the exercise of freedom of expression?

The United States Constitution contains no express limitations section used to determine the limits of constitutionally protected rights, and the Supreme Court has essentially been left a free hand in determining their scope. In the case of the First Amendment the court has endorsed the Millian truth-seeking justification of freedom of expression, and has demarcated categories of expression that are denied constitutional protection. However, in so doing it has failed to develop a set of principles applicable to the entire body of First Amendment law. While it clearly is necessary to balance the value truth-seeking (and the other major justification of expression accepted by the Court, that of self-fulfilment) against the emotional harm expression can cause, First Amendment case law reveals that the courts have adopted a haphazard and inconsistent approach in their attempts to achieve this. Thus whereas, in cases involving "public figure" plaintiffs and expression concerning matters of "public concern", the Supreme Court has stood firm in defence of the principle that defendants should not incur civil liability for erroneous statements unless plaintiffs can prove knowledge of falsity, this fundamental principle is inapplicable where purely private litigation is concerned, despite the fact that, as I argued (at 5.6.4.2.2 and 7.2.3 above), it is precisely at the level of inter-personal

relations that individuals most often exercise their free speech rights. Furthermore, while departures from Millian theory are countenanced in order to remedy the emotional harm caused by defamation, invasion of privacy and infliction of emotional distress, the law offers no remedy for insult and group defamation, which are equally capable of causing such harm. Finally, whatever inconsistencies and narrowness there be in the application of the harm principle to defamation, privacy and emotional distress, when it comes to obscenity one finds that the principle is not applied at all, and that restrictions on sexually explicit material are based on subjective, majoritarian concepts, a position which is obviously incompatible with individual autonomy.

The manifest shortcomings of existing doctrine has led to the formulation of a new approach to freedom of expression based on the right to equality, in terms of which hate speech and pornography are characterised as acts of discrimination. Its proponents correctly focus attention on the emotional injury caused by hate speech, and highlight the indifference of current First Amendment doctrine to this type of harm. However, the approach is flawed in that by equating the expression of discriminatory ideology with the performance of discriminatory acts, it violates the fundamental principle of viewpoint neutrality, and makes the scope of freedom of expression ultimately dependant upon the social acceptability of the ideas underlying the expression, as is well illustrated by the decisions of the Canadian Supreme Court in *Keegstra*, *Andrews* and *Taylor*. Furthermore, although most objectionable because of the potential breadth of restriction on expression it could justify, the equality-based approach can also be criticised on the ground that it would, paradoxically, be *underprotective* of personality rights, because it would remedy only that harm that was found to derive from discrimination on specific grounds such as race or gender, and not insults directed against other personal attributes of the plaintiff.

So far as pornography is concerned, while the equality-based approach as represented by the MacKinnon-Dworkin school recognised the need to develop a harms-based rationale for regulation in substitution for the moralism of *Miller*, the project failed on its own terms in that it ultimately delivered a critique which simply replaced the *Miller* philosophy of moral subjectivism (that arousing prurience in the minds of consumers was a "harm") with one of political subjectivism in terms of which the inspiration of sexist attitudes among consumers is a "harm". For this reason the approach was found incompatible with the First Amendment in *Hudnut* although, consistent with its earlier abandonment of viewpoint neutrality in the hate speech cases, the Canadian Supreme Court adopted the MacKinnon-Dworkin doctrine in *Butler*. More promising has been the research by feminist legal scholars such as

Wesson and Pollard who identified the link between sex and violence as the crucial factor determining whether material is harmful, and who recognised the potential of tort law as the source of a remedy for such harms. Nevertheless, their analysis has been confined to arguing for a remedy for personal injury caused by those who actually commit harmful acts through exposure to pornography.

In contrast to both the prevailing First Amendment law in the United States and the equality-based approach adopted by the courts in Canada, the approach adopted in this thesis, in terms of which freedom of expression is balanced against the right to dignity, remedies the harms caused by freedom of expression without compromising the values that freedom serves. So far as hate speech is concerned, it was shown at 5.6.4.1 that where the *actio injuriarum* has been brought to remedy impairments of dignity taking the form of insult, the courts have in virtually all cases imposed liability only where the insulting speech consisted of meaningless abuse. Distinguishing between expression that is necessary to convey ideas and that which is not provides an avenue for remedying emotional harm caused by insulting epithets without compromising the value of truth-seeking. Furthermore, since the *actio injuriarum* provides a remedy for insults directed against any aspect of the plaintiff's personality, it offers a remedy which will vindicate a wider range of harms than does the equality approach discussed above.

The key to determining liability for insult under the *actio injuriarum* is the policy-based "legal convictions of the community" test. As was reiterated in *Delange v Costa*, the most recent Appellate Division case on impairment of *dignitas* through insult, not every statement which is of "an offensive or insulting nature" and which causes a plaintiff emotional hurt is actionable, and a plaintiff's right to dignity will be held to have been invaded only where found to be insulting in the light of the "prevailing norms of society".¹⁶⁸⁰ Doubtless some will take the position that such a standard is insufficiently protective of freedom of expression in that it is vague and vests the court with wide discretion. However I would argue that in any given society the lexicon of insulting epithets is usually notorious, and that since, as was explained at 5.5.3 above, the policy-based test ought not to be applied in a majoritarian manner, the scope of liability would be neither uncertain nor too extensive.

Insults taking the form of meaningless abuse constitute a clear category of expression that may be made subject to an action for impairment of dignity without compromising truth-seeking. More problematic than hate speech taking the form of

¹⁶⁸⁰1989 (2) SA 857 (A) 861C - 862H.

meaningless abuse, however, is that which does communicate an idea in the form of a statement of fact or opinion, and which would most frequently manifest itself in the form of group defamation. In such cases I argued (at 5.6.4.2.2) that the defamation remedy offered by the *actio injuriarum*, like that found in Anglo-American common law, is unsuitable in that it infringes expressive rights to an unacceptable extent by placing upon the defendant the onus of proving the truth of allegedly defamatory material. For this reason I suggested that the rule in *New York Times v Sullivan* be adopted whatever the status of the plaintiff or the subject matter of the defamatory material, and that the plaintiff therefore be required to prove that the defendant published false material with at least reckless disregard as to its falsity. This approach would allow plaintiffs to recover damages while least compromising Millian values. Here then I have advocated an approach which uses a modern rule of law to strike what I would argue is the correct balance between dignity and the values served by freedom of expression. In South Africa there are strong indications that the freedom of expression provisions of the new bill of rights will directly impact upon the common law of defamation (thus further illustrating the artificiality of the public law / private law dichotomy in this field). Furthermore, the courts have already indicated that they are aware of the need to strike a suitable balance between the right to dignity (which in *Mandela v Falati*¹⁶⁸¹ and *Gardener v Whittaker*¹⁶⁸² was defined as including reputation) against freedom of expression.

So far as sexually related material is concerned, I have argued that the concept of dignity is sufficiently broad to permit recognition of a new form of impairment - that of inciting harm against the plaintiff. Consistent with the empirical evidence, which shows that it is material which combines sex (whether explicit or not) and violence that increases aggression in those exposed to it, I argued that the non-cognitive nature of sexually oriented material incites consumers to emulate what is depicted, and that where the material incites the consumer to harmful acts, publication of such material constitutes an impairment of the dignity of those against whom the harm is incited. The advantage of this approach is that since liability for incitement attaches to the inciter irrespective of whether the incitee acts upon his (the inciter's) suggestions, there is no need to prove a causal link between exposure to the material and subsequent harmful conduct. Thus liability would be imposed upon producers and publishers of such material for the mere act of exposing consumers to it. The dignity based approach is similar to the MacKinnon-Dworkin approach in that being harms-based, both are distinguishable from the moralism of *Miller*. The crucial difference

¹⁶⁸¹1995 (1) SA 251 (W).

¹⁶⁸²1995 (2) SA 627 (E).

between them however is that whereas the MacKinnon-Dworkin approach sees the inspiration of discriminatory *attitudes* as constituting harm, the approach based on dignity requires that the material must depict and suggest unlawful *conduct* to the consumer. Furthermore, since what constitutes unlawful conduct depends, in cases involving sexual activity, upon the limits to capacity to consent, the approach I advocate, unlike the tests in either *Miller* or *Butler*, has the advantage of ensuring congruence between what activities may be engaged in and what activities may be urged upon others through depiction. Finally in this regard, defining pornography in terms of incitement not only provides groups whose dignity has been impaired by pornography with an avenue by which to take legal action against producers and distributors, but also provides a standard which could be used by classification tribunals which in most jurisdictions administer censorship legislation.

How likely is it that dignity might be developed as an actionable right in Anglo-American legal systems? Some of the methods by which this could be done - including the creation of an *actio popularis* of the type found in the new South African interim Constitution¹⁶⁸³ - were discussed in earlier sections of this chapter. But equally as important as the technicalities relating to incorporation of new rights in various jurisdictions, is the assimilation of dignity into their jurisprudence. There are trends that give ground for optimism in this regard. It has already been seen how, several decades ago, the McDougal-Lasswell school accorded primacy to dignity. Thirty years ago Bloustein argued that the tort actions for invasion of privacy,¹⁶⁸⁴ as well as torts involving interference with the person,¹⁶⁸⁵ ought to be seen as vindicating human dignity. Similarly Raz argued that insults offend dignity in that they imply a denial of the worth of the people subject to them.¹⁶⁸⁶ Recent American scholarship has begun to recognise that just as dignity confers upon the individual the right to express him or her self, so to does it confer upon others the right not to suffer emotional hurt,¹⁶⁸⁷ and that therefore these two aspects of dignity must be weighed against one another when determining the limits of freedom of expression.¹⁶⁸⁸ As noted in preceding paragraphs, some writers (cited at 2.2.7.3) have come to recognise the advantages to be gained from developing tort law in such a way to affix liability upon defendants who inflict emotional harm upon others through hate speech. Similarly, the recognition recently given by the *S & W Seafoods v Jacor*

¹⁶⁸³See s 7(4)(b)(iv) and (v) discussed *supra*, n. 1600.

¹⁶⁸⁴Bloustein, *supra* n. 727 at 971, 973-74, 1000-1002 and 1005-07.

¹⁶⁸⁵*Ibid.*, 1003.

¹⁶⁸⁶Raz, Joseph *The Authority of Law - essays on law and morality* (Oxford, Clarendon Press, 1979) 221.

¹⁶⁸⁷This view is also expressed with lucidity by Hartman, *supra* n. 786 at 869-76.

¹⁶⁸⁸*Ibid.*, 883.

*Broadcasting*¹⁶⁸⁹ case to the concept that incitement constitutes a source of tort liability would, if coupled with the strategy of creating a right of action against purveyors of pornography, as qualified by an analysis which limits the scope of the action to material combining sex and violence, essentially lead to the adoption of the approach proposed in this thesis. So far as acceptance of dignity as a constitutional right is concerned, potential clearly exists in the United States for dignity to be recognised as an aspect of the constitutional right to privacy under the Ninth Amendment which, in distinction to the narrower tort concept of privacy, has evolved into a broad right to autonomy very much akin to the broad meaning of *dignitas* in Roman-Dutch law.¹⁶⁹⁰ Whether these developments will ultimately lead to recognition of dignity as an actionable right cannot be predicted, but there are clearly grounds for optimism that this may occur.

7.4 Summary

A civil action provides the most suitable remedy for impairment of dignity, as it vests the initiative with the victim and would be more likely to survive constitutional review than would a measure limiting freedom of expression by means of a criminal sanction.

Because the common law does not confer upon groups a right of action for defamation and related harms, such a remedy would necessarily be embodied in statute that conferred wide *locus standi* on plaintiffs acting on behalf of groups alleging impairment of dignity. A range of orders ought also to be available, including injunction, apology, damages, civil penalties and awards of costs.

The division between private and public law is of little relevance in cases involving freedom of expression and human dignity, as both ought to be protected as constitutional rights and both frequently come into conflict in private litigation.

¹⁶⁸⁹390 S.E.2d 228 (Ga. 1990).

¹⁶⁹⁰One of the most interesting facets of comparative research is the different meaning that a term may acquire in different legal systems, or indeed within the same legal system. Thus the term "privacy" bears two distinct meanings in United States law: that of autonomy (the constitutional right to privacy), and the narrower, tort law, meaning of the right not to be subject to intrusion, appropriation of likeness *et cetera*. So far as Roman-Dutch law is concerned, I have argued that on the basis of Grotius' interpretation of *dignitas* and the apparently limitless range of interests the case law indicates are protected by it, it ought to be given a broader meaning than simply the right not to be insulted and should rather be equated with autonomy (or privacy in the wide, constitutional sense, using American terminology). Roman-Dutch law has for some time acknowledged a right to privacy (in the narrow sense) as an aspect of *dignitas*, and this makes all the more interesting Bloustein's analysis of the tort action for privacy as needed in order to protect human dignity.

Where a jurisdiction has a bill of rights but that bill of rights does not give explicit protection to the right to dignity, it may nevertheless be possible to read such a right into the bill of rights. The feasibility of this will of course depend on the provisions of the particular document. In the case of the United States, dignity could be held to be implied by privacy under the Ninth Amendment, while the open-ended nature of s 26 of the Canadian Charter of Rights and Freedoms offers an avenue for recognition in that country. Where a country has signed international human rights documents that protect dignity, and those documents have been incorporated into domestic law, dignity will thereby be received into municipal law. But even where international instruments do not form part of domestic law, the courts may still find a right to have become part of domestic law by virtue of its being recognised under customary international law. Furthermore, courts may indirectly import dignity into domestic law by applying the principle that where possible, domestic law should be interpreted in conformity with international law. Incorporating dignity into a country's jurisprudence in any of these ways would make it more likely that restrictions on freedom of expression designed to protect human dignity would survive constitutional review.

Balancing freedom of expression against dignitary rights offers an approach which enables the law to protect individuals from emotional harm without compromising the values served by freedom of expression.

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