From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide

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The author examines central legal and philosophical issues pertaining to the regulation of hate speech. In particular, he evaluates the competing perspectives of the "causationist" approach, which requires a direct causal link between the expression it purports to regulate and the harm it allegedly causes, and the "correlationist" approach, which would regulate hate expression based on a rational correlation between the expression and the harm. In contrast, the correlationist approach adopts a preventive logic that seeks to structure attitudes by enforcing positive norms. After examining the theoretical underpinnings of these views, and reviewing their legal and philosophical pitfalls—particularly in their extreme forms—the author ultimately favours the correlationist approach to hate speech regulation. Civil society and a democratic tradition will prevent this type of regulation from leading down a slippery slope to state censorship. To avoid undue limitations to freedom of expression, however, only extreme hate expression should be regulated, that is, abusive expression, which is distinct from offensive expression in that it targets persons rather than ideas. There is no optimal way to balance equality and freedom of expression, nor to address the challenges that the enforcement of hate speech regulation entails. Analogizing with the myth of Sisyphus, the author refers to these challenges as the dilemma of the "Sisyphus state", concluding that this dilemma becomes a duty to regulate against abusive forms of expression, because a constitutional democracy cannot tolerate radical denials of the humanity of some of its citizens.

L'auteur examine les principales questions légales et philosophiques soulevées par la réglementation de la propagande haineuse, en particulier le débat entre les partisans d'une approche qui requiert un lien causal direct entre l'expression et le dommage, et ceux d'une approche qui se contente d'une corrélation rationnelle entre l'expression haineuse et le dommage. Cette dernière approche adopte une logique préventive qui cherche à structurer les attitudes dominantes par l'application de normes positives. Après examen des fondements rationnels et des dangers qui guettent chacune de ces deux positions, surtout lorsqu'elles prennent des formes extrêmes, l'auteur prend parti en faveur de la seconde approche, basée sur la corrélation rationnelle. La société civile et la tradition démocratique suffisent à prévenir la dégénérescence de cette position en censure étatique. Toutefois, afin d'éviter d'imposer des limitations excessives à la liberté d'expression, seule l'expression haineuse abusive — qui se distingue de l'expression simplement offensante en ce qu'elle cible des personnes plutôt que des idées — devrait être réglementée. Il ne semble pas y avoir de manière idéale de concilier l'égalité et la liberté d'expression, ou de résoudre les problèmes soulevés par l'application des lois portant sur la propagande haineuse. L'État fait face à un dilemme entre son devoir de réglementer l'expression abusive et les difficultés inhérentes à un tel exercice. Tel Sisyphe, il fait alors face à une tâche potentiellement infinie — car une démocratie ne peut tolérer une négation radicale de l'humanité même de certains de ses citoyens.

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Hate speech raises fundamental issues from legal, philosophical, and epistemological standpoints. It prompts us to think about individual and collective incarnations of hatred, how we apprehend this social phenomenon, and most important, how we characterize its dissemination. This article meditates on both the limits and the promises of regulations of hate propaganda, and more generally, of law itself. But why a "meditation"? Essentially because meditating implies a certain openness to unforeseen questions that arise, *pêle-mêle*, in the course of the meditation itself. This explains why this written "meditation" is structurally and formally different from a more traditional essay, where one reaches *c* by way of *a* and *b*, and where one generally wishes to convince someone of something. As such, an essay may be seen as an attempt to tame doubt and to provide certitude, whereas a meditation raises questions more than it does anything else.

While "hate speech" may aptly describe any word or utterance intended to injure, degrade, denigrate, or ridicule people on the basis of a distinguishing feature, this expression fails to capture what often leads to hate crimes and to genocide: the systematic, rather than individual, use of hateful discourse and the systemic nature of hatred that sometimes ensures its social acceptability. In such cases, hate speech, or hate propaganda, as I prefer to call it, is ingrained in a system where the social degradation of the Other plays a central role in political discourse. In fact, hate propaganda contributes in and of itself to the creation of an imaginary Other. Dehumanized and depersonalized, depicted as threatening and as a potential enemy, this Other is indeed likely to become *the* enemy for those influenced by such propaganda. Huge consequences may follow. Depending on the circumstances, hate propaganda may create an environment where hate crimes are considered no different from other crimes. In such a case, what inspires them, that is, hatred, becomes obscured, thereby trivializing their qualitatively different nature. Worse than their being trivialized, however, hate crimes may sometimes become socially acceptable, and ultimately, desirable. From individual and isolated hate crimes committed in the private sphere, we move to more widespread incitement to hate, and finally we reach the realm of publicly-supported mass hate crimes—or genocide as public policy, to put it bluntly. This explains the nexus between hate propaganda, hate crimes, and genocide, a nexus that has too often surfaced during the twentieth century, especially, but not exclusively, in countries where democratic traditions were young and civil society weak. This nexus may be acknowledged by the socio-political realm, but not always by the legal one.

The juridical apprehension of the nexus between hate propaganda, hate crimes, and genocide stirs controversy in intellectual circles, especially in North America.[1] In

[1] I am referring more specifically to the debate that rages in the United States between some liberal and libertarian jurists, on the one hand, and critical race theorists, as well as some feminist legal

particular, the question of the relative performativity[2] of some forms of expression, including racist speech, remains at the centre of philosophical and epistemological debates about the appropriateness of regulating these forms of expression. Can speech alone be characterized as assaultive, causing harm in and of itself? If yes, should we regulate it? Assuming that we should, how do we do so?

Although these questions are important, because acknowledging the possibility that speech alone may cause harm may ultimately induce us to rethink the classic dichotomy between speech and conduct, the legal apprehension of the nexus between hate propaganda, hate crime, and genocide requires no specific reference to the theory of performative speech.[3] Indeed, we need not ask ourselves: Should we consider this form of speech as an act or conduct because of the harm it causes in its own right? Understanding this nexus requires, instead, a reflection on the degree of causation constitutionally required to legitimize restrictions to freedom of expression in view of regulating hate propaganda. Should the law necessitate a close and direct link between the expression it purports to regulate and the harm that this expression allegedly causes? A direct link imposes upon the regulator the burden of demonstrating the existence of "a clear and present danger" or an "imminent lawless action", to borrow from American legal terminology,[4] as a consequence of the expression it purports to regulate (the "causationist" approach). In other words, the message conveyed must immediately induce one to act on it. The contrasting view holds that, for a law to be constitutionally permissible, it is enough that it acknowledge a strong rational corre-

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scholars, on the other, about the constitutionality of hate speech regulation and the interplay between freedom of speech and eqnality rights.

[2] In a nutshell, the notion of performativity designates the capacity, in some circumstances, of an utterance to *do* something simply by being uttered. For example, when an officer of justice who is legally empowered to celebrate weddings utters, during a wedding, "I declare you husband and wife," the immediate consequence of this declaration is precisely to give truth to the utterance that the man and the woman now are, indeed, husband and wife. A performative utterance, that is, an utterance that *performs* something—hence its characterization as a "speech act"—must be distinguished from a merely descriptive utterance such as "This is a cow," which does not perform anything and which does not become true simply because it was uttered, since the person who makes that utterance could wrongly take another animal for a cow. That said, relying on the notion of performativity, some argue that the utterance of hateful words alone inflicts harm on targeted listeners. On performativity, see J.L. Austin, *How to Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1962); J. Searle, "What Is a Speech Act?" in M. Black, ed., *Philosophy in America* (Ithaca, N.Y.: Cornell University Press, 1965) 221; R. Nadeau, *Vocabulaire technique et analytique de l'épistémologie* (Paris: Presses Universitaires de France, 1999) *s.v.* "performatif/constatatif".

[3] Indeed, it has been argued, quite convincingly I must say, that the "performative speech" theory alone offers a rather shaky foundation for hate propaganda regulations. See W. Sadursky, "On 'Seeing Speech through an Eqnality Lens': A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography" (1996) 16 Oxford J. Legal Stud. 713.

[4] For a legal history of the evolution of these tests, see L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 841-49.

lation between the expression and the harm that it presumably causes, and that it act upon this acknowledgement (the "correlationist" approach).

While the causationist approach is based on a curative logic of imputation, the correlationist approach is inspired by a preventive logic of risk management. In a way, the heuristic process implied by the causationist approach requires a quasi-photographic capturing of the transition between a primary expressive state, conceptualized as essentially intangible, and a secondary behavioural state, conceptualized as essentially tangible. As Bollinger puts it, "[T]he tests of the 'clear and present danger' genre appear to focus on a very narrow range of potential social harm from speech—that is, on the risk that the audience will be persuaded to turn from talk to action of a kind deemed especially harmful to the society."[5] As such, the causationist approach implies a microscopic examination of a segment of social reality that excludes from its consideration any form of harm that is not immediate and entirely tangible.[6] Because it emphasizes the demonstration of a direct and almost unmediated causal link, this approach can surely be characterized as profoundly juridical in the classical sense, in a way akin to the approach in the law of torts.

It could be argued, however, that this profoundly juridical approach has been unduly influenced by a rather dated theory concerning the logic of scientific discovery, which postulates that the pursuit of a certain scientific method may actually lead to the discovery of absolute scientific certitudes or truths. In keeping with this view, scientific knowledge comprises what has been definitely proven. For example, if a hypothesis, say that mixing element *a* with element *b* causes reaction *c*, has been duly, that is, scientifically, verified, it should be considered as proven and therefore absolutely true. That said, most scientists would now treat the notion of absolute scientific certitude as an oxymoron. Indeed, in line with Karl Popper's theory of knowledge, the scientific method is now described negatively rather than positively; instead of being depicted as implying the (positive) verification of a hypothesis, thereby giving birth to a scientific certitude, it is now presented as involving constant attempts to falsify the dominant hypothesis that will remain the dominant theory only insofar as it can resist these falsification attempts. Superficially, the difference between these two views may seem tenuous, but it is not. Quite the contrary: focussed as it is on refutation instead of verification, Popper's theory renders doubt unavoidable, thereby making its management one of the most important issues to address, if not the most important. To use anthropomorphic language, scientific theories now live with the knowledge of their own internal frailty. As a result, even in the "hard" sciences, the imperium of strict

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[5] L. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986) at 179.

[6] Hence the non-consideration of most non-physical forms of harm. Hence, also, its intrinsic inability even to acknowledge the *possible* performativity of some forms of speech.

and linear images of causation has faded away, leaving more room for other models of causation.

If this is acknowledged in the scientific realm, it should also be acknowledged in the social sciences, where the part played by "givens", assuming that such "givens" exist, is much smaller than that played by "constructs". This is a fortiori the case with law, at least positive law, which can certainly not be characterized as a science.[7] Thus, when examining issues pertaining to causation, we should never forget that legal knowledge is fundamentally different from scientific knowledge. While the idea of an entirely "pure" fact is hardly possible, in that it would exclude any human mediation in the construction of the problematics surrounding factuality itself, the level of factuality of phenomena dealt with in the legal field is quite different from that of the pure or applied sciences. As Feldman points out:

> The phenomena identified by legal concepts such as negligence, fraud, and rape are not like the phenomena identified by natural scientific concepts like proton or gravity. Negligence, fraud, and rape are not human-independent phenomena; they are constituted by our practices, goals, values, and beliefs.[8]

As such, we should never forget that from a legal standpoint there is no entirely natural or objective way to look at causation. This is why it is worthless to invoke the law's neutrality to hide that any decision taken in the legal field as to the degree of causation required in a particular case necessarily implies a policy choice. This choice is made either by the legislator or by the judiciary, both of whom reflect the normative values of the society in which the choice is made.

While causation is more than politics, in that it sometimes deals with material facts the existence of which cannot be doubted, its political dimension should not be obscured. Far from being a pure given, causation is first and foremost a construct. This is why legal reflection should never abdicate outright to "scientific" evidence, whether it comes from the hard or social sciences. The law must remain master of the processes through which it apprehends issues pertaining to evidence. It should not systematically and naively yield to other forms of "authority", even scientific, accepting these constructions as "givens" for legal purposes. This should be borne in mind when we reflect on competing logics such as the curative logic of imputation and the preventive logic of risk management.

A number of theoretical and practical consequences flow from the initial acknowledgement of the perils associated with blind adherence to "scientific data" or "scientific causation" and their use as a possible justification for the elaboration of a

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[7] Law can be characterized in many ways, but certainly not as a science when "law" describes positive law. This is not to say, however, that law cannot be scientifically studied, viz. from an external perspective.

[8] H.L. Feldman, "Objectivity in Legal Judgment" (1994) 92 Mich. L. Rev. 1187 at 1188-89.

given norm. For example, it becomes clear that the strict causal link that the curative logic of imputation requires between the expression to be regulated and the harm allegedly caused by that expression forces the potential victims of hate propaganda to bear or absorb all risks. This may be justified sometimes in the more individualistic context of tort law, but is it justified in the more societal context of constitutional law?

This causationist approach stands in contrast to the correlationist approach. By considering social reality from a macroscopic angle, the correlationist approach acknowledges less tangible forms of harm, and more important, considers as sufficient the demonstration of a strong rational correlation between a given expression and the harm it allegedly causes. The correlationist approach allows for a higher level of deference towards regulatory attempts to manage the risks of harm that presumably flow from certain forms of expression because it is based on a theory that acknowledges links that are rational and plausible from a global societal angle rather than only direct, legal-causationist links. As such, the correlationist approach is inspired by a preventive logic that can only be implemented if the traditional legal concept of causation is expanded, or more accurately, imploded. Pushed to its extreme, however, the correlationist approach sometimes refuses unduly to acknowledge the risks associated with censorship, thereby potentially threatening all speakers who try to convey unpopular messages. This is a risk that the slippery slope argument captures. But when used to condemn *any* attempt at regulating hate propaganda, the same argument fails to acknowledge that the correlationist approach may simultaneously acknowledge the risk associated with censorship while acknowledging the risk associated with the absence of any legal constraints on some forms of speech. When both forms of risks are considered, the correlationist approach may well involve a much more complex analysis than its causationist counterpart. It may also inform a different approach to the interplay between freedom of expression and equality, the two rights at stake in the regulation of hate propaganda.

The curative logic of imputation, as well as the preventive logic of risk management, are illustrated respectively by the American and Canadian positions on the constitutionality of laws prohibiting hate propaganda.[9]

While these two logics may explain differences in how countries approach the regulation of hate propaganda from a domestic constitutional standpoint, the distinction between these logics can also prove a useful tool with which to assess potential or actual obstacles to the enforcement of international norms prohibiting hate propa-

[9] In fact, it is to be noted that the American position on the unconstitutionality of hate propaganda regulation is exceptional; Canada's position, for its part, is in line with the rest of the world. See *e.g.* I. Cotler, "Hate Speech, Equality, and Harm under the Charter: Towards a Jurisprudence of Human Dignity for a 'Free and Democratic Society'" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Scarborough: Carswell, 1996) 20-1.

ganda. For example, aside from the fact that a direct prohibition of hate propaganda would contradict a basic tenet of the First Amendment creed, that is, viewpoint neutrality, the causationist approach adopted by American law in its analysis of speech-related harms precludes the United States from fully subscribing to these international norms, and as a result, from participating in their enforcement. Indeed, how can the United States subscribe to international norms that purport to outlaw hate propaganda if its own domestic law prevents its government from doing so? How can the American government accept that legal consequences be drawn from the fact that a systematic campaign of hate propaganda often, but not always, serves as a precursor to genocide, or in other words, that such a campaign only *may* serve this purpose? How can the United States then participate in the enforcement of international norms that are based on a prior acknowledgement by the international community of a rational correlation between a given form of expression and some of its consequences—the "mildest" including discrimination, hostility, and ostracism directed at the stigmatized group and the worst being genocide? In short, the United States is extremely reluctant to do so.[10] This reluctance is troublesome because the United States is the only superpower in the post-cold war era and so it often finds itself in a position to influence the outcome of events. This reluctance is especially troublesome in light of the ethnic cleansing and genocide in Bosnia and Rwanda, and the ethnic cleansing that recently took place in Kosovo. It is even more troublesome considering the well-documented role that hate propaganda played in the first two cases.[11]

At an even deeper level, any inquiry into the nexus between hate speech, hate crimes, and genocide forces us to reflect on the realization of basic human rights fifty years after they were solemnly entrenched in the *Universal Declaration of Human Rights*.[12] More specifically, it raises the following question: To what extent can the regulation of hate propaganda be linked to the realization of human rights? In the next few pages, I will modestly propose some intellectual parameters within which to approach this question. Addressing it will inevitably demonstrate how the two fundamental rights at stake in the regulation of hate propaganda, freedom of expression and equality, interact. I will use two well-known cultural icons as springboards for my ob-

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[10] See *e.g.* U.S. formal reservations on the application of the *International Convention on the Elimination of All Forms of Discrimination*, GA Res. 2106(XX), UN GAOR, 21 December 1965, 660 U.N.T.S. 195, arts. 4, 7, and of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 20, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[11] See K. Mahoney, "Hate Speech—Ethnic Cleansing—in the Balkans" (International Conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?*, Faculty of Law, McGill University, 28 January 1999) [unpublished]; W.A. Schabas, "Hate Speech in Rwanda: The Road to Genocide" (2000) 46 McGill L.J. 141.

[12] GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

servations: first, the mythical story of Sisyphus, and second, the motto of the French Revolution and now of France, "Liberty, Equality, Fraternity".

First, let me deal briefly with Sisyphus, to whom I will return at my conclusion. In Greek mythology, Sisyphus has been condemned by the gods to endlessly pushing a stone up a mountain, only to see it fall down again and again upon reaching the top. Sisyphus's role in Greek mythology strangely evokes the state's position when faced with regulating phenomena such as hate propaganda in the techno-scientific era. If Western governments choose to regulate and enforce laws against hate propaganda, they face an endless struggle uphill, which is exacerbated by recent technological developments, such as the Internet, that allow for easier and faster dissemination of information—any information—to all parts of the world. As a matter of fact, today's dynamic of "de-territorialization"[13] destabilizes the state's power and ability to regulate the flood of available information. Undoubtably, this must induce profound changes in the way norms emerge and are enforced. Whether we like it or not, states are ill-equipped to come to terms with this phenomenon of de-territorialization. In fact, numerous information providers are literally shielded from state normativity as a result of the intrinsic limitations on the latter's extraterritorial jurisdiction. Moreover, new information technologies preclude the state from effectively imposing any watertight control over anti-egalitarian expression such as hate propaganda, the regulation of which was already hard to enforce prior to the emergence of these technologies. Without a doubt, insofar as the control of information is concerned, today's regulatory state looks more and more like Sisyphus with his stone. Hence the Sisyphus state's first dilemma is "to regulate or not to regulate". Assuming a positive answer, the dilemma then becomes whether to enforce the regulation.

While the challenges mentioned above must certainly be considered when reflecting on the utility of state regulation as a means of preventing the harm caused by hate propaganda, they cannot be invoked alone either to dismiss any further use of such regulation or to abandon the very idea of enforcing the already existing norms against that form of speech. That a legal norm appears ineffective does not mean that it is actually ineffective. Legal norms do not operate in a social vacuum; thus, their effectivity may be assessed from microscopic as well as macroscopic standpoints. As noted by legal feminists and critical race theorists, acknowledging this multiplicity of perspectives has important consequences. For example, reflection on a legal norm's layers of effectivity may push some to rethink their adherence to a causationist approach for assessing the constitutionality of that norm. More important, it may induce them to recognize that some forms of expression have harmful effects on certain

[13] I borrow this expression from R.-J. Dupuy, "Le dédoublement du monde" (1996) 100 Rev. D.I.P. 313 at 317.

groups and that there is no watertight distinction between expression and conduct.[14] In any event, simple acknowledgement of the relevance of such questioning could change the way we frame debates about the regulation of these forms of expression. At the very least, it surely affects the way in which we conduct any serious discussion about the interplay between freedom of expression and equality.

Some epistemological obstacles, however, must be removed before such discussion can occur.[15] For example, a purely ideological portrayal of the interplay between freedom of expression and equality may impinge on a complex understanding of this relationship, thereby systematically allowing freedom of expression to prevail over equality, or vice versa. As a result, depicting this interplay as an unsolvable conflict where one value always trumps the other is of no use whatsoever. Indeed, from a legal-philosophical perspective, there is no clearly obvious or "given" solution to the appropriate balance between freedom of expression and equality, since neither of these two rights can be realized in the abstract, despite their status as normative ideals. Bearing this in mind, any answer to the problem must go beyond the realm of pure abstraction, which often obscures strictly ideological motives anyhow, to a kind of "idealistic pragmatism" that considers not only the immediate legal constraints applicable but also the whole socio-legal context in which this balance must be struck. In any event, two things are certain. First, no solution can ever pretend to be optimal, in the sense of pleasing everyone, nor can it pretend to be self-evident, in the sense, in and of itself, of "naturally" convincing all. Second, any solution is likely to be conditioned by the internal and external legal cultures,[16] as well as by the political cultures,[17]

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[14] I think it is intellectually absurd to say without any nuance, however, that "speech is act", and this even if one accepts the *possible* relative performativity of some forms of expression. The analysis must always be contextualized.

[15] Gaston Bachelard defines the concept of "epistemological obstacle" as a generic concept that designates all causes of inertia, stagnation, or setback in knowledge. See G. Bachelard, *La formation de l'esprit scientifique: contribution à une psychanalyse de la connaissance objective*, 12th ed. (Paris: Vrin, 1960) at 14. François Ost and Michel van de Kerchove are more specific, describing it as follows:

> L'"obstacle épistémologique" est une catégorie qui, placée au fondement d'une théorie, tente de la garantir contre les mises en question et infirmations dont elle pourrait faire l'objet : tantôt simple concept indûment élargi, ... tantôt véritable "*Weltanschauung*", l'obstacle survalorise la théorie, refoule les questions irrésolues qu'elle suscite par devers elle et la dote d'un pouvoir explicatif exagérément étendu (*Jalons pour une théorie critique du droit* (Brussels: Facultés universitaires Saint-Louis, 1987) at 121-22).

[16] "External legal culture" refers to the lay people's legal culture, whereas "internal legal culture" refers to the legal culture of the members of the legal community. See L.M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) at 223.

[17] See generally J.-F. Gaudreault-DesBiens, "Du droit et des talismans: mythologies, métaphores et liberté d'expression" (1998) 39 C. de D. 717 [hereinafter "Du droit et des talismans"].

at play, and by the audiences that the interpreter seeks to address.[18] This is true for the interplay between freedom of expression and equality, as it is for the specific question posed by the constitutional understanding of juridical attempts to regulate hate propaganda or other forms of anti-egalitarian expression.

One could legitimately ask, however, why there is no obvious solution to the problem posed by the regulation of hate propaganda. The answer lies first in the Manichaean and abusive use of the two previously identified logics—the curative logic of imputation and the preventive logic of risk management—in the debate surrounding regulation. Pushed to its extreme, the curative logic of imputation prevents almost any juridical acknowledgement of the harm caused by hate propaganda. This is, in essence, the position adopted by libertarian jurists who will systematically oppose the regulation of hate propaganda unless presented with direct and irrefutable evidence of its deleterious effects. Their fear of losing the smallest part of liberty pushes them to deny any legitimacy to state regulation of such propaganda, thus obscuring considerations pertaining to equality. On the other side, when pushed to its extreme, the preventive logic of risk management overstates the systemic nature of the harm caused by hate propaganda or any other form of anti-egalitarian expression, thereby rendering its own philosophy the only determining variable for the solution to the problem. From this vantage point, hate propaganda's systemic nature will be invoked to legitimize a quasi-total control of anti-egalitarian forms of expression, at the risk of obliterating all considerations pertaining to freedom of expression. Both sides, however, are wrong; social reality is too complex to be imprisoned by any "pure" logic designed to be universally applied. Indeed, the way these two logics are applied owes much to another logic, binary logic.

Given the latter's imperium, and the staunch idealism that inspires the protagonists of the debates, negotiating the competing claims of the debate is no easy task. Some share a blind faith in the so-called free market of ideas' self-regulating powers, while others entertain idealistic expectations about the effectivity of state law, or more generally, of institutional law, in correcting social inequalities. Each party to the debate demonstrates an exaggerated skepticism about the other's arguments. In the end, neither the idealist arguments nor the skeptical ones are very convincing. For example, if it is true that regulating hate propaganda *may* contribute to the goal of substantive equality, it is not accurate to state that such regulation *will* solve the problem of inequality. Conversely, if it is true to say that some state regulation of a given form of expression *may* in some circumstances lead to totalitarianism—the slippery slope argument—it is erroneous to state that it *necessarily* leads to it, especially where a civil

[18] Following Chaim Perelman, legal interpretation can be depicted as an attempt to answer the expectations of a certain number of audiences. For a work that applies Perelman's theories to Canadian constitutional adjudication and then refines it, see A. Lajoie, *Jugements de valeurs* (Paris: Presses Universitaires de France, 1997).

society and democratic tradition exist. This kind of intellectual process works by inflating a specific example, either positive or pathological, so as to transform it into a rule that is universally applicable. In the end, none of the arguments and counter-arguments invoked in the debate about anti-egalitarian expression are compelling in themselves. In fact, the argument that most effectively refutes objections in principle to any form of state control of hate propaganda is fundamentally an ethical one. It posits that hate propaganda conveys an unambiguous message of contempt and degradation that denies the humanity of those it targets.[19] Put otherwise, this form of expression denies its victims the right to participate as equals in social life. At a societal level, the question then becomes whether a democratic society is bound to tolerate some of its members actively inciting their fellow citizens to disrespect and demean other members of the very same society, and ultimately, to inflict harm on them. Conversely, is a democratic society ethically obliged to help, even in the symbolic realm, those people whose very humanity is radically denied? According to David Kretzmer,

> [T]his argument stresses the symbolic importance of restrictions on racist speech. ... it does not necessarily assume that the prevention of racist speech will result in fewer people subscribing to racist ideas. ... it does not emphasize the indignity caused by the exposure of target populations to racist speech, rather it stresses the indignity of living in a society in which such speech is protected. The thrust of this argument is that a society committed to the ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expressions and statements.[20]

More than any other, this argument convinces me that a limited regulation of hate propaganda, and of other forms of anti-egalitarian speech in general, is not inherently problematic. This is not to say, however, that such regulation is entirely unproblematic.

While regulation of hate propaganda may have a considerable symbolic impact, it can also entail long-term social consequences. As Richard Delgado points out, "The establishment of a legal norm creates a public conscience and a standard for expected behavior that check overt signs of prejudice." Legislation aims first at controlling only the acts that express undesired attitudes. But "when expression changes, thoughts too in the long run are likely to fall into line."[21] Some object to such arguments on the grounds that they legitimize the idea of governmental thought control, since the purpose of hate propaganda regulation would not be the prevention of harm, but rather

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[19] C.R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" [1990] Duke L.J. 431 at 461.

[20] D. Kretzmer, "Freedom of Speech and Racism" (1987) 8 Cardozo L. Rev. 445 at 456.

[21] R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Harv. C.R.-C.L. L. Rev. 133 at 149 [footnotes omitted].

the elimination of any anti-egalitarian thought. In other words, those who support the regulation of hate propaganda are reproached for desiring a prior control of attitudes or beliefs, rather than simply a downstream control of the expression of hateful attitudes or beliefs.[22] This line of argument is far from convincing. Without elaborating more than necessary on a question pertaining to legal ontology, is not the ultimate objective of most legal norms to influence not only immediate behaviours but also attitudes and beliefs, or put otherwise, intellectual presuppositions that condition behaviour and, as a result, effect respect for the norm? Consider the classic example of the obligation to stop at a red light. What explains that most people stop? Is it the constant fear of being caught? If so, the strict effectivity of a norm depends on the state's coercive mechanisms. Or rather is it a mix of the fear of triggering these coercive mechanisms *and* the internalization of the content of this norm because of its intrinsic value? In the same vein, most people respect legal prohibitions against fraud not only for fear of being caught, but also because they have internalized these prohibitions. In fact, the objection expressed above seems to rely on a rather reductionist vision of the law's effectivity; not only does it deny any legitimacy to positive norms purporting, even minimally, to structure attitudes; it also denies that even the most innocuous norms may have that effect or purpose. This position is premised on the belief that positive norms are intrinsically neutral, an ideal that may be legitimate but is almost never realized in fact. Indeed, since all positive norms embody public policy objectives to various degrees, the law, more than being simply procedural, necessarily produces meaning for the purpose of moulding attitudes and thoughts in one way or another. The result—the attitudes and thoughts so moulded—may certainly be subject to criticism, but it is hard to see why the process itself would be fundamentally flawed. Legal norms are signs that contribute to shape each individual's thoughts and attitudes, just as other social "signs" do.

Furthermore, simply equating the impact the law may have on people's conscience with some Orwellian form of thought control seems even more dubious considering the social context from which this argument stems. Without denying the need for vigilance, the notion that a real "thought control" system could be implemented in a society with a long-standing democratic tradition and civil society seems farfetched, since any civil society would oppose such a system. The counter-argument is that, while anti-hate legislation is a mild form of thought control, it constitutes a dangerous first step in the direction of a stronger one. This is a variation on the slippery slope argument. I need not repeat that such an argument is not conclusive in itself, since it fails to take into account the specific socio-legal fabric of the society in which such anti-hate laws are enacted. Once again, the existence of a democratic tradition and strong civil society would probably prevent slippage towards totalitarianism or

[22] See *e.g.* L. Alexander, "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 Const. Commentary 71 at 79.

authoritarianism. This is not to say that democratic societies are not vulnerable to fascist impulses. It is only to point out that, although valuable for reminding us of that vulnerability, metaphors such as the slippery slope should be used with caution, since they tend to drain complexity from any analysis. As such, they act as epistemological obstacles, and more specifically, as "verbal" ones, to use Gaston Bachelard's classification.

Bachelard characterizes "verbal" obstacles as encompassing all metaphors that pretend to explain complex phenomena while actually obscuring their complexity. These metaphors therefore act as intellectual "sponges", sucking complexity from the analysis and pre-packaging the phenomena they are supposed to describe in such a way as to give the impression that they describe them accurately and completely.[23] The intellectual process that leads to the transformation of useful metaphors into epistemological obstacles is often triggered by a search for analytical certainty. The process implies a shift from the relatively weak status of metaphor—that is, simply a figure of speech—to the stronger one of "ideal reality",[24] a concept that roughly describes the factualization of some representations in the realm of social relations. Not only do these representations reflect social relations; they also constitute them: once believed, they cease to be representations, strictly speaking, and enter the content of social relations. What may have been a normative representation of how things could or should be will ultimately be transformed into a material fact. For example, the free market of ideas, which is a legitimate ideal but certainly not an empirical reality, becomes in the minds of its believers an empirical reality that serves as the incorrigible[25] intellectual foundation upon which they base their concept of freedom of expression. Similarly, the slippery slope metaphor, which is meant to warn against a possible danger, often leads its believers to see actual danger in contexts that do not empirically warrant such fear. Without factual indication to that effect, and notwithstanding the socio-political culture of the country, they imagine that regulating hate propaganda could actually lead to totalitarianism. In other words, actual danger will be assumed whatever the circumstances,[26] preventing interpreters from pursing any thorough inquiry on the actual circumstances in which regulation may take place. In conclusion, there may be a slippery slope to the reckless use of the "slippery slope" metaphor!

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[23] See Bachelard, *supra* note 15 at 78-79.

[24] M. Godelier, *L'idéel et le matériel: pensée, économies, sociétés* (Paris: Fayard, 1984) at 172.

[25] I use the word "incorrigible" in its epistemological sense, meaning "immune from refutation". See W.P. Alston, *Epistemic Justification: Essays in the Theory of Knowledge* (Ithaca, N.Y.: Cornell University Press, 1989) at 286. On the free market of ideas metaphor as a potential epistemological obstacle, see "Du droit et des talismans", *supra* note 17 at 733-43.

[26] It is ironic to note that the "slippery slope" metaphor being founded on an assumed danger, that of totalitarianism, denies another potential danger, *i.e.* that hate propaganda may indeed cause harm to some groups and individuals. Would the causationist approach operate selectively?

That being said, it should be clear to my readers that I do not subscribe to these "all or nothing" approaches that play such a huge role in debates about hate propaganda, and more generally, anti-egalitarian expression. Nevertheless, once we have concluded that the regulation of hate propaganda is not inherently problematic, at least in principle, the potential scope of such regulation remains to be determined. Leaving aside the indirect effect positive norms may have through their symbolic and mind-structuring impact, we must decide which forms of anti-egalitarian expression should be subject to a norm intended to be *directly* effective. Some parameters may lead us to a relatively satisfying answer.

First, we should not forget the limits of state, or institutional, law in preventing social phenomena that are systemic in nature such as racism, or in eradicating related epiphenomena such as racist expression. Although we must remember the role that anti-egalitarian expression plays in the reproduction of discriminatory social systems, we should not forget that it would be inappropriate—and unrealistic—to view the problem from the standpoint of an absolutist logic purporting to prevent or eliminate all risk of harm.

Second, while it is not only legitimate, but also necessary, to look at the harm anti-egalitarian expression causes from the victims' perspective, we should not fall prey to complacency or intellectual abdication. The multiple forms of anti-egalitarian expression that exist are neither equally harmful nor performative; we must not, therefore, lose sight of the link between the norm that the state is drafting and the broader public policies involved when identifying the specific forms of anti-egalitarian expressions to discourage. As much as the victims' perspective must be actively listened to rather than passively heard, this listening process should enhance, not trump, the values underlying a free and democratic society, including freedom of expression.

Third, one must bear in mind that legal control of anti-egalitarian forms of expression may entail unwanted consequences, both at the enactment stage and during implementation. The worst of these is probably the elevation of those who convey anti-egalitarian views to martyr status. As Richard Abel correctly points out, "The greatest perversion ... is that law, far from silencing harmful speech, rather encourages, valorises, and publicises it, transforming offender into victim and offense into romantic defiance."[27] Rhetorically, this is illustrated by what I call the "Galileo syndrome", which is the propensity to systematically invoke the example of Galileo before the Inquisition, or some equivalent, in order to delegitimize any attempt at regulating anti-egalitarian expression and, a fortiori, enforcing such regulation.[28] Aside

[27] R. Abel, *Speech and Respect* (London: Stevens & Sons, 1994) at 107.

[28] See J.-F. Gaudreault-DesBiens, *La liberté d'expression entre l'art et le droit* (Québec: Presses de l'Université Laval, 1996) at 258.

from being paradoxical, if not absurd,[29] the problem with this kind of comparison is that it trivializes freedom of expression itself. Indeed, by relying on quantitative rather than qualitative logic, it basically considers any non-violent eructation an "expression", even if it is entirely irrational. Indeed, irrationality is a hallmark of anti-egalitarian expression.[30] While the rationality of an expression should not be in and of itself a determining factor in deciding whether it deserves constitutional protection,[31] and while it may be pragmatically defensible to reject any a priori distinction between less performative forms of expression at the stage of circumscribing the scope of freedom of expression for constitutional purposes,[32] it is nonetheless important to acknowledge this trivializing effect.

Last, it should never be forgotten that there is no entirely optimal way to reconcile equality and freedom of expression; only a complex apprehension of the problems raised by anti-egalitarian expression may lead to a relatively satisfying compromise where one right will not trump the other. The preceding comments thus induce me to say that any regulation of anti-egalitarian expression, even the most abhorrent, can only pursue limited and well-defined ends. It follows that a legal norm purporting to be directly, as opposed to symbolically, effective, could and should only target extreme forms of anti-egalitarian expression. The confinement of positive law to the realm of extremes seems, in any case, inevitable considering the limited effectivity of state regulation of expression, the possible unwanted consequences of such regulation, and more important, the difficulty of drawing a clear line between the forms of anti-egalitarian expression that should be proscribed and those that should not.

We inevitably come back to the problems raised by state regulation of forms of expression that may bear multiple, and even contradictory, meanings. How can the border between what should and should not be proscribed be established? The ethical

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[29] Indeed, it is quite strange to hear hate-mongers tried for the dissemination of hate comparing their "plight" to that of Galileo before the Inquisition when their own views of what a society should be have much more in common with the Inquisition's than with Galileo's.

[30] Jean-Paul Sartre argued, rightly as far as I am concerned, that anti-Semitism implies a devaluation of both words and rationality. See J.-P. Sartre, *Réflexions sur la question juive* (Paris: Gallimard, 1954) at 22. Obviously, this is not to say that anti-Semitic expression, however irrational, is not *rationalized* by its proponents. Evidence of this can be found in their use of pseudo-scientific theories, *i.e.* of superficially rational discourse, to legitimize their views.

[31] *E.g.* art is not always rational, but it is commonly accepted in Western democracies that it deserves constitutional protection. On art and expression, see N. Carroll, *Philosophy of Art: A Contemporary Introduction* (London: Routledge, 1999) at 59-106.

[32] This is precisely what the Supreme Court of Canada did in its jurisprudence on s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], when it refused to accept arguments that purported to exclude hate propaganda from the ambit of this subsection. See *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 117 N.R. 1.

argument that I found to be compelling enough earlier to justify, at least in principle, regulation of some anti-egalitarian expression leads us down an interesting path. I argued that it is not conceivable for a democratic society to remain mute when confronted with discourse that denies the very humanity of entire groups based on some defining feature of their identity, or incites their exclusion or, worse, their elimination. Not only is such discourse offensive; in many respects it is abusive as well. Indeed, in addition to advocating abusive behaviour towards the targeted individuals or groups, it abuses democratic societies' tolerance by denying the intrinsic value of the social and cultural pluralism that these societies cherish. Paradoxically, such discourse demands the right to deny the plurality of individuals and groups within society in the name of the pluralism of ideas. It is this *abusive* expression, conceptually distinct from *offensive* expression, that the state may legitimately try to regulate. The distinction between one form of expression and the other is admittedly not always clear, but absence of intrinsic clarity is the lot of many other distinctions in the legal field. Nothing therefore justifies treating this distinction differently from other ones of the same nature.

When manipulating this distinction, however, one must tune out the sirens of dominant discourses that, for ideological reasons, obscure the complexity of the problems raised by state regulation of anti-egalitarian expression. Opponents of regulating hate propaganda, for example, systematically depict those supporting such regulation as asking for the censorship of merely offensive expression, thus trivializing the harm that abusive anti-egalitarian expression may cause.[33] Conversely, proponents of such regulations often confuse offence and abuse in their desire to dismantle the tools that (re)produce inequality. Hence the importance, as noted earlier, of refraining from an uncritical acceptance of the victims' perspective.[34] In fact, if I had to find a formula to capture the essence of the distinction between offensive expression and abusive expression, I would propose this one: offensive expression targets ideas, while abusive expression targets human beings. In this light, an offence implies, at worst, that the values of a group are confronted. For example, the depiction of Jesus Christ in Martin Scorcese's *Last Temptation of Christ* or that of Mahomet in Salman Rushdie's *Satanic Verses* certainly clashes with some Christians' or Muslims' beliefs. But these works, as offensive as they may be for some, do not advocate that Christians or Muslims are inferior beings who not only can, but must, be excluded and degraded as individuals and as a group. Racist hate propaganda, in contrast, advocates the need

[33] F. Schauer, "The Sociology of the Hate Speech Debate" (1992) 37 Vill. L. Rev. 805 at 814.

[34] *E.g.* in its interpretation of the equality right guaranteed by s. 15 of the *Charter*, *supra* note 32, the Supreme Court of Canada relativizes, without in any way obscuring it, this perspective by assessing the harm allegedly suffered from the subjective-objective perspective of the "reasonable victim". See *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 59-61, 170 D.L.R. (4th) 1.

and the right to perform such exclusion and degradation, as do some forms of hard-core pornography.[35]

Some would fault the distinction between offensive expression and abusive expression for being unduly Eurocentric in that it relies on a rationalist philosophy. Persons whose beliefs are offended, it could be argued, may be said to be victimized in their humanity, since these beliefs are partly constitutive of who they are. This may be so, but it does not change my answer: it would be antithetical to the idea of democracy to uphold the right not to be offended. Indeed, the emphasis that democracy places on freedom, in both its liberal and republican forms, fosters an atmosphere of tempered relativism which, in addition to inducing tolerance, encourages the questioning of orthodoxies and the raising of doubt. In this light, as was pointed out by Homi Bhabha, Salman Rushdie's greatest sin is having proposed an alternative reading of the Koran that went against Iranian mullahs' orthodox interpretation.[36]

That said, the reference I make to democracy clearly indicates the intellectual framework in which my reflection takes place—that of a democratic society embodying the Enlightenment's ideals, with their defects but also with their positive qualities. Such philosophical "ethnocentrism" is inevitable, and it may well be that some values are irreconcilable. Without any imperialist vocation, this ethnocentrism denies neither diversity nor Otherness; it simply acknowledges that it is only from our own standpoint that we can participate in a true and authentic dialogue with the Other. It also posits reciprocity in openness and compromise as an essential condition for such a dialogue to take place. Last, it acknowledges that in any interpretive community, the act of judging is, for historical reasons, constrained within a certain intellectual framework that is futile to hide. This philosophical ethnocentrism, which in a way relates to Richard Rorty's epistemological relativism,[37] is therefore entirely opposed to radically relativist schools of thought which, to use Claude Lefort's words, would see in democracy a "simple preference".[38]

Ultimately, socio-legal reflection on the appropriateness of regulating hate propaganda, and on the potential scope of that regulation, leads me to believe that regula-

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[35] If I use here the word "some" in relation to hard-core pornography, it is because pornography raises more complex issues than racist hate propaganda. Indeed, since it participates in the polysemic phenomenon of sexual representation, the meaning of pornography, hard-core or not, is not always as clear or obvious as racist hate propaganda. For sure, it may be exclusion or degradation, but it may also be something else.

[36] See H. Bhabha, *The Location of Culture* (London: Routledge, 1994) at 226.

[37] R. Rorty, *Objectivity, Relativism, and Truth: Philosophical Papers*, vol. 1 (Cambridge: Cambridge University Press, 1991) at 30.

[38] C. Lefort, "La liberté à l'heure du relativisme" in *Les usages de la liberté: textes des conférences et entretiens organisés par les trente-deuxièmes Rencontres Internationales de Genève 1989* (Neuchâtel: Éditions de la Baconnière, 1999) 237 at 241.

tion must be confined to anti-egalitarian expression that is both extreme and harmful. In other words, the scope of such regulation must be restricted to expression which, to borrow the language of the Quebec *Charter of Human Rights and Freedoms*, has "the effect of nullifying or impairing [the right to full and equal recognition and exercise of [one's] human rights and freedoms],"[39] or worse, which may be characterized as direct attempts at inducing people to act so as to nullify or impair those rights.[40] Although this solution is unsatisfactory in many respects, it is the only one that permits a certain reconciliation of equality and freedom of expression, rather than allowing one to trump the other. One could argue that proscribing only the worst epiphenomena of a systemic problem of hate propaganda risks lulling us into the belief that the entire problem has been definitively solved. In the same vein, one could also argue that, under the proposed solution, more pervasive and discrete anti-egalitarian expression remain untouched—for example, the "mild" stereotypes that permeate mass culture. Even worse, to target only the most obvious and extreme anti-egalitarian expression could lead some to believe that everything not expressly condemned by the law is socially acceptable and thus legitimate.

While not unfounded, these observations do not take into account three important factors that reduce the potentially negative effects of a confinement of the regulation of anti-egalitarian expression to its most extreme and harmful forms. First, other rules participate in the fight against "ordinary" anti-egalitarian expression, such as the anti-discrimination norms proscribing sexual or racial harassment, or the norms acknowledging the right to dignity. Second, the symbolic-normative impact of the regulation of anti-egalitarian expression, even if restricted to the most extreme cases, may largely exceed the cases so targeted. Last, debates on the regulation of anti-egalitarian expression may themselves shape the legal-normative consciousness of individuals and groups, to the point of triggering the emergence of new "social" or informal norms,[41] or of modifying older ones.[42] Viewed this way, the enactment of positive norms purporting to regulate anti-egalitarian expression could simply amount to an institutionalization of already effective informal ones.

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[39] This proposition is inspired by the wording of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10. One could argue that this section embodies what Hannah Arendt called the "right to have rights".

[40] See P. Bosset, "Les mouvements racistes et la *Charte des droits et libertés de la personne*" (1994) 35 C. de D. 583 at 611-13.

[41] I do not use here the expression "social norm" to distinguish positive legal norms from extra-legal ones, as this expression has a very low heuristic value. See V. Olgiati, "Le pluralisme juridique comme lutte pour le droit: la folie théorique et méthodologique d'une récente proposition" (1997) 12 Can. J. L. & Soc. 47 at 53, n. 16.

[42] This is precisely the hypothesis advanced by Professor Schauer in light of the actual success of Catharine MacKinnon's anti-pornography campaign, in spite of the striking down of the ordinance she had inspired. See Schauer, *supra* note 33 at 818-19.

If we accept that hate propaganda is likely to nullify or impair the right to full and equal exercise of human rights and freedoms, any inquiry into the nexus between hate propaganda, hate crimes, and genocide ultimately forces us to reflect on the realization of human rights. Indeed, how can one truly exercise one's rights and freedoms if one lives in a society that tolerates expression that denies one's equal dignity as a human being? In the end, this individual will probably feel alienated in his or her own society, no longer comfortable exercising his or her supposedly inalienable rights and freedoms.[43] While such situations undermine the legitimacy of these rights as useful tools to fight discrimination and exclusion, they also demonstrate, albeit negatively, that human rights find their real strength in their concrete and practical nature.

How can we contribute to the realization of both freedom of expression and equality without systematically trumping one or the other, bearing in mind the limits of law and legal discourse? The answer to this is far from obvious, as illustrated by this discussion. At both domestic and international levels, however, inspiration can be drawn from the ideals underlying the first three generations of human rights. These are embodied in the French Revolution's normative ideals, that is, "liberty" for first generation rights, "equality" for second generation rights, and "fraternity" for third generation rights. Notwithstanding questions associated with the justifiability of second and third generation rights, the fact that a whole normative structure centred around "basic rights" was built after World War II shows a concern for the realization of such rights. It was not enough to entrench "core" civil and political rights; something more was needed to make these rights effective. Acknowledgement of this gap eventually led to the recognition of social, economic, and cultural rights—the second generation rights—and later, of third generation collective rights such as the right to development, identity, and environment. Third generation rights, by emphasizing the idea of "fraternity", serve together with second generation rights as a reminder that solidarity is not foreign to human rights discourse. Not only is it not foreign, but it could be argued that the interpretation of any human right, as well as the resolution of any conflict between various human rights, should be inspired not only by the ideal of liberty and equality, but also by this too-often-forgotten ideal of fraternity, or if one prefers, solidarity.[44]

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[43] G. Haarsher, *Philosophie des droits de l'homme*, 4th ed. (Brussels: Université de Bruxelles, 1993) at 42.

[44] Fraternity already finds expression in the public law, as well as the private law, of some countries. This is obviously the case with France (see M. Borgetto, *La notion de fraternité en droit public français : le passé, le présent et l'avenir de la solidarité* (Paris: L.G.D.J., 1993)), but also, to some extent, with Canada. It could even be argued that fraternity is one of the implicit principles of the Constitution of Canada. On these questions, see C.D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill L.J. 567.

With respect to the case of hate propaganda, the reconciliation of freedom of expression and equality may, perhaps, be made through reference to this normative ideal, thereby forcing us to recognize the relational dimension of even the most individualistic rights such as freedom of expression. As noted, acknowledging the concrete importance of that ideal may lead us to recognize, both in the domestic and international realm, the legitimacy of some forms of hate propaganda regulation, and of the enforcement of such regulation when needed. Particularly in the international realm, acknowledging the legitimacy of such enforcement may also result in the establishment of a nexus between what is perceived to belong to traditional human rights law and what is now characterized as humanitarian law. From it may ultimately flow a much-needed reconsideration of the imperium of state sovereignty, as well as a relaunching of the debate around the duty and the right of the international community to interfere in a state's internal affairs under certain circumstances.

I will conclude these remarks by returning, first, to Sisyphus himself, and then to the notion of the Sisyphus state. Albert Camus once described Sisyphus's fate as follows: "The Gods had condemned Sisyphus to ceaselessly rolling a rock to the top of a mountain, whence the stone would fall back of its own weight. They had thought with some reason that there is no more dreadful punishment than futile and hopeless labor."[45] This last sentence raises a fundamental question about the attitude the Sisyphus state should adopt towards the regulation of hate propaganda: Is it not a futile and hopeless labour to regulate that propaganda while knowing very well the obstacles that arise in enforcing that regulation? In metaphorical terms, is it worthwhile trying to contradict the fate the Gods reserved Sisyphus? I believe that the answer should be positive. Indeed, emphasizing the importance of solidarity as a normative ideal leads us to assess the regulation of hate propaganda from a different angle. While there is no doubt that the decision to regulate or not that kind of expression places the Sisyphus state in a dilemma because of the difficulties it is likely to experience in enforcing such regulation and of the perverse effects that are associated with it, the state that accepts solidarity as a legitimate inspiration for such regulation, however, conveys the message that, notwithstanding these problems, it is ready to make a commitment to a certain kind of society; one in which, for ethical reasons, the idea of constitutional democracy cannot be reconciled with the radical denials of the humanity of some of its citizens. This entails that indifference to these citizens' victimization is itself intolerable. Hence the need to convey this message through formal legal means, the effect of which is significant, despite being largely symbolic. Moreover, although I initially suggested that, unlike Sisyphus, the state has a choice whether to engage itself in this labour that some could indeed characterize as "futile and hopeless", the principles of democracy compel the state to do something in order to shake up its citizens' indiffer-

[45] A. Camus, *The Myth of Sisyphus and Other Essays*, trans. J. O'Brien (New York: Alfred A. Knopf, 1969) at 119.

ence and to make them feel collectively and individually responsible for the fate of their fellow citizens. It should try to make sure that, when confronted with the phenomenon of hate propaganda, each citizen, for a moment, thinks of himself as another, to paraphrase Paul Ricœur.[45] As Camus wrote, "The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."[47] As such, viewed under the light of solidarity, the Sisyphus state's—or the international community's—initial dilemma may very well become its duty.

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[45] See P. Ricœur, *Oneself as Another*, trans. K. Blamey (Chicago: University of Chicago Press, 1992).

[47] Camus, *supra* note 45 at 123.